CRIMINALS COMMIT CRIMES: FEDERAL RULE OF EVIDENCE 609 AND ITS PROBATIVE-PREJUDICIAL BALANCING TEST

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INTRODUCTION

Before taking the stand to testify in court, all witnesses take an oath swearing to tell the truth, the whole truth, and nothing but the truth. The reason for that oath is simple: the purpose of any trial is to determine the truth.[1] Because it is vitally important for all trial testimony to be true and complete, the question of whether a witness tends to lie is highly relevant to the judge or jury.[2] Thus, either party may challenge a testifying witness's reputation for truthfulness.[3]

1. *See* FED. R. EVID. 102.

2. Emily Horjus, *Are All Felons Liars? Reexamining Federal Rule of Evidence 609 Under the Lens of Equal Protection*, 55 NEW ENG. L. REV. 117, 119 (2021).

3. FED. R. EVID. 607.

Though witnesses are usually immune from attacks on their character, questions about their character for truthfulness are typically allowed.[4] Nonetheless, even when the witness's character for truthfulness is being challenged, the challenging attorney generally may not introduce extrinsic evidence to prove or disprove the witness's answers regarding their own truthfulness.[5] There is, however, one notable exception—Federal Rule of Evidence 609 ("Rule 609").[6]

Part I of this Comment begins by providing a brief overview of Rule 609 and highlights some of its most salient provisions. I will explain the scope of Rule 609 and describe the different crimes to which it applies. This section will also delve into the purpose of impeachment evidence and the common law and case law interpretations and developments that led to the eventual promulgation of Rule 609.

Part II of this Comment will describe the majority approach to Rule 609's probative-prejudicial balancing test, which includes a multi-factor analysis known as the *Mahone* test. Relying primarily on Ninth Circuit case law, I will outline and explain each of the five *Mahone* factors.

Part III will provide an overview of the minority view, which is followed by only two federal circuits. I will focus specifically on the Fourth Circuit and the evolution of its approach to impeachment by evidence of prior conviction.

Next, in Part IV, I will argue that while both the majority and minority approaches are flawed, the latter is particularly inadequate. The Fourth Circuit's interpretation of the probative-prejudicial balance test allows for excessive judicial deference, which yields inconsistent and unpredictable results within the circuit.

In the fifth and final Part, I will conclude by proposing two possible avenues for change: adopting a factor-less approach or requiring that judges consider all the *Mahone* factors on the record. Ultimately, I will argue that the latter is a more realistic short-term solution.

I. BACKGROUND

A. Federal Rule of Evidence 609: Understanding the Language of the Rule

Rule 609 permits the introduction of certain evidence of a testifying witness's prior criminal convictions for impeachment purposes.[7] Rule 609 allows for the admission of two types of

4. Horjus, *supra* note 2, at 119.
5. *Id.* at 119–20.
6. *Id.* at 120.
7. FED. R. EVID. 609.

convictions.[8] First, Rule 609(a)(1) considers the admissibility of felonies—crimes that are "punishable by death or imprisonment for more than one year."[9] In a civil case or a criminal case in which the testifying witness is not a defendant, evidence of a prior felony conviction must be admitted, subject to Federal Rule of Evidence 403 ("Rule 403").[10] Rule 403's balancing test allows for the exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[11] However, in a criminal case where the testifying witness is a defendant, the evidence of a prior felony conviction *must* be admitted "if the probative value of the evidence outweighs its prejudicial effect."[12]

Second, under Rule 609(a)(2), crimes involving "a dishonest act or false statement" may be used against any testifying witness regardless of whether it is a felony or misdemeanor.[13] The Advisory Committee on the Federal Rules of Evidence explained:

> By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subordination 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.[14]

These so-called "dishonest crimes" are sometimes deemed to be automatically admissible since they are not subject to the balancing test under Rule 403.[15] Accordingly, it is highly likely that a judge will admit evidence of *crimen falsi*.[16] The liberal admission of this type of evidence creates the risk that even the most prejudicial type of conviction, such as a prior conviction for the same offense as the one charged, will still be deemed mandatorily admissible.[17]

Nonetheless, Rule 609(b) still limits the admissibility of all evidence of prior crimes when "more than 10 years have passed since the witness's conviction or release from confinement for it, whichever

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8. Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 567 (2014).

9. FED. R. EVID. 609(a)(1).

10. FED. R. EVID. 609(a)(1)(A).

11. FED. R. EVID. 403.

12. FED. R. EVID. 609(a)(1)(B).

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

14. FED. R. EVID. 609 advisory committee's notes on proposed rules (interpreting H.R. Rep. No. 1597, 93d Cong., 2d Sess. 9-10 (1974)).

15. ROBERT P. MOSTELLER ET AL., MCCORMICK ON EVIDENCE § 42, 313–14 (8th ed. 2020).

16. *Id.* at 314.

17. Roberts, *supra* note 8, at 567–68.

is later."[18] However, evidence of such a crime may still be deemed admissible if "its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect."[19]

B. Historical Development: From Common Law to the Federal Rules of Evidence

The area of evidentiary law regarding the admissibility of prior convictions is continuously in flux. At common law, criminal defendants and parties to civil lawsuits were barred from testifying in their own defense.[20] This rule arose from the belief that if a testifying witness had a substantial interest in the matter on which he was testifying, the credibility of the testimony would be so unreliable that its probative value would be marginal at best.[21] However, this attitude began to shift as courts and legislatures acknowledged the importance of allowing criminal defendants to testify in their own defense.[22] Over time, it became clear that defendants with criminal records often chose not to testify, fearing that once jurors became aware of the defendant's prior convictions, they would conclude that the defendant was the kind of person who committed crimes or even "that he ought to be put away without too much concern with present guilt."[23]

Prior to 1965, the governing rule was that evidence of prior convictions was admissible to impeach criminal defendants.[24] Notwithstanding this general rule, circuit courts used different approaches to determine the admissibility of prior conviction impeachment evidence.[25] The United States Court of Appeals for the D.C. Circuit's 1965 decision in *Luck v. United States*,[26] however, created a novel and widely adopted approach that would ultimately influence the drafters of the Federal Rules of Evidence.[27]

In *Luck*, the court interpreted a statute allowing the admission of prior convictions and concluded that while the statute permitted the trial court to admit the evidence for impeachment purposes, it was

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18. FED. R. EVID. 609(b).

19. FED. R. EVID. 609(b)(1).

20. Alan D. Hornstein, *Between Rock and A Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 17–18 (1997).

21. *Id.*

22. Horjus, *supra* note 2, at 122.

23. Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 291 (2008) (internal quotations omitted).

24. Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 4 (1999).

25. *Id.*

26. 348 F.2d 763 (D.C. Cir. 1965).

27. Dodson, *supra* note 24, at 4.

not *required* to do so.[28] Rather, such evidentiary rulings allowed for "the operation of a sound judicial discretion" depending on the circumstances of each case.[29] The court explained that it was within the trial judge's purview to determine whether "the prejudicial effect of impeachment far outweigh[ed] the probative relevance of the prior conviction to the issue of credibility."[30] This approach, which served as a precursor to Rule 609's probative-prejudicial balancing test, still furnished judges with excessive discretion.[31] Thus, conflicting approaches within the same courts and inconsistent applications across different circuits were not uncommon.[32]

Two years later, in *Gordon v. United States*,[33] then-Judge Warren Burger further clarified the court's approach to admitting evidence of a prior conviction for impeachment purposes.[34] There, the court reiterated one of the main points made in *Luck*—that a defendant "may ask the court to consider whether it is more important for the jury to hear his story than to know about prior convictions in relation to credibility."[35] Further, the court explained that, in making a decision, the trial judge should consider "what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions."[36] Importantly, both the *Luck* and *Gordon* courts noted the risk that evidence of a prior conviction might have the effect of chilling important testimony by the defendant.[37]

As case law on the subject continued to develop, it became clear that courts' inconsistent approaches were yielding unpredictable results. The need for some degree of uniformity eventually catalyzed the promulgation of the Federal Rules of Evidence.[38] Prior to its enactment in 1975, Rule 609 was drafted by the Supreme Court and went through the U.S. House of Representatives, the Senate, and the Advisory Committee on the Federal Rules of Evidence.[39] At every stage, these bodies disagreed as to whether Rule 609 should be included in the rules.[40] Central to this debate was the drafters' concern that admission of past convictions as impeachment evidence

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28. *Luck*, 348 F.2d at 768.
29. *Id.*
30. *Id.*
31. Carl McGowan, *Impeachment of Criminal Defendants by Prior Convictions*, 1970 L. & SOC. ORD. 1, 3–4 (1970).
32. *Id.*
33. 383 F.2d 936 (D.C. Cir. 1967).
34. *See* Bellin, *supra* note 23, at 313.
35. *Gordon*, 383 F.2d at 939.
36. *Id.* at 940.
37. Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 845 (2016).
38. Horjus, *supra* note 2, at 122–23.
39. *Id.* at 123.
40. *Id.*

would create prejudice against testifying witnesses, especially criminal defendants.[41]

Ultimately, Rule 609 resulted from political compromise.[42] The House of Representatives advocated for the admission of only crimes involving dishonesty or false statements, while the Senate proposed that felony convictions be admissible as well.[43] The new rule permitted the use of two kinds of convictions for impeachment purposes: felony convictions that survive a balancing test under Rule 403 and crimes involving "a dishonest act or false statement."[44] For the former category, trial judges must admit evidence of the defendant's prior felony conviction if the probative value of said evidence outweighs its prejudicial effect.[45] In making this determination, most federal circuits apply a multi-factor test.[46]

II. THE NINTH CIRCUIT APPROACH: WEIGHING THE *MAHONE* FACTORS TO CONDUCT RULE 609'S PROBATIVE-PREJUDICIAL BALANCING TEST

In 1976, the Seventh Circuit interpreted Rule 609 in *United States v. Mahone*.[47] There, the court articulated five factors—originally discussed in *Gordon*—that trial courts should consider when balancing the probative value and prejudicial effects of evidence of a prior conviction.[48] These factors are: "(1) The impeachment value of the prior crime. (2) The point in time of the conviction and the witness' 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 defendant's credibility."[49]

The Ninth Circuit's current approach to the probative-prejudicial test is representative of the majority interpretation. Although the Ninth Circuit initially declined to follow *Luck* and its progeny,[50] it ultimately integrated the *Mahone* factors into its own approach.[51] In *United States v. Villegas*,[52] the Ninth Circuit acknowledged that "some version of the *Luck* rule" may be considered depending on the circumstances of each case,[53] but that it had no intention "to abandon its long-standing rule that proof of any prior felony conviction may be

41. *Id.*
42. Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1982 (2016).
43. *Id.* at 1982–83.
44. *Id.* at 1983.
45. FED. R. EVID. 609(a)(1)(B).
46. Roberts, *supra* note 42, at 1983.
47. Roberts, *supra* note 37, at 845.
48. United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976).
49. *Id.*
50. United States v. Villegas, 487 F.2d 882, 883 (9th Cir. 1973).
51. United States v. Cook, 608 F.2d 1175, 1197 n.8 (9th Cir. 1979).
52. 487 F.2d 882, 883 (9th Cir. 1973).
53. *Id.*

given by the adversary to impeach any witness."[54] In rejecting *Luck*, the Ninth Circuit remained silent as to the need for any probative-prejudicial balancing test.

For years, the rule articulated in *Villegas* governed the Ninth Circuit.[55] After the promulgation of Rule 609, though, the Ninth Circuit reconsidered its approach in *United States v. Cook*.[56] There, the court acknowledged that the adoption of the new federal rules required the trial court to balance the probative value and prejudicial effect of impeachment evidence and cited the *Mahone* factors for the first time.[57]

A. The Impeachment Value of the Prior Crime

An analysis of the first *Mahone* factor—the impeachment value of the prior crime—presupposes the understanding that the purpose of impeachment is to challenge a witness's credibility, not to provide evidence of a witness's guilt or innocence.[58] Accordingly, prior felony convictions that do not bear on a witness's truthfulness or veracity have little, if any, impeachment value.[59] Generally, courts have found that convictions resting on dishonesty relate to a witness's credibility, whereas violent or assaultive crimes do not.[60] However, prior crimes that typically do not implicate a witness's truthfulness may have some impeachment value if issues of credibility are otherwise directly involved with the crime.[61] For example, even though crimes of violence or theft do not necessarily involve "dishonesty or false statement," convictions of such crimes may nevertheless be admissible if they were committed by "fraudulent or deceitful means."[62]

In considering the impeachment value of the prior conviction, the Ninth Circuit has analyzed whether evidence of the conviction would "give the jury a more comprehensive view of the trustworthiness of the defendant as a witness."[63] In *Cook*, the Ninth Circuit upheld a ruling admitting evidence of a defendant's prior robbery convictions.[64]

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54. *Id.*

55. *See, e.g.*, United States v. Brashier, 548 F.2d 1315, 1326 (9th Cir. 1976); United States v. Wilson, 536 F.2d 883, 885 n.1 (9th Cir. 1976); United States. v. Marshall, 532 F.2d 1279, 1283 (9th Cir. 1976); United States v. Hatcher, 496 F.2d 529, 530 (9th Cir. 1974).

56. *See generally Cook*, 608 F.2d 1175.

57. *Id.* at 1185 (Goodwin, J., concurring).

58. United States v. Bagley, 772 F.2d 482, 487 (9th Cir. 1985).

59. *Id.*

60. Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).

61. *Bagley*, 772 F.2d at 487.

62. United States v. Glenn, 667 F.2d 1269, 1273 (9th Cir. 1982).

63. United States v. Cook, 608 F.2d 1175, 1187 (9th Cir. 1979) (Goodwin, J., concurring).

64. *Id.*

The court explained that, because the district court had a good faith belief that the defendant planned to lie on the stand and misrepresent his character to the jury, the evidence of the defendant's prior convictions would "give the jury a more comprehensive view of the trustworthiness of the defendant as a witness."[65]

In a distinguishable case, *United States v. Bagley*,[66] the Ninth Circuit determined that the first *Mahone* factor weighed against the admissibility of the defendant's prior robbery convictions.[67] There, the court noted that there was no evidence in the record that the defendant intended to misrepresent his character or deny that he had a criminal record during his testimony.[68] Consequently, the Ninth Circuit held that the impeachment value of the defendant's past robbery conviction weighed against the admissibility of the evidence.[69] The approach taken by the *Bagley* court falls directly in line with the purpose and spirit of Rule 609. Since the defendant's credibility was never at issue, there was no reason for the court to admit evidence of a past robbery conviction to attack said credibility.

B. The Timing of the Prior Conviction

The second factor—the timing of the prior conviction—is addressed in the language of Rule 609 itself, which imposes limitations on using evidence of past felony convictions "if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later."[70] The Advisory Committee explained that even though "few statutes recognize a time limit" on such impeachment evidence, "practical considerations of fairness and relevancy demand that some boundary be recognized."[71]

Despite recognizing the need for time limits, though, this rule does not apply to crimes of dishonesty. Rule 609(a)(2) provides that "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 providing—or the witness's admitting—a dishonest act or false statement."[72]

In weighing the second factor, the Ninth Circuit has followed the language explicitly stated in Rule 609.[73] In *United States v. Browne*,[74] the court concluded that the second factor weighed in favor of

65. *Id.*
66. 772 F.2d 482 (9th Cir. 1985).
67. *Id.* at 488.
68. *Id.*
69. *Id.*
70. FED. R. EVID. 609.
71. FED. R. EVID. 609 advisory committee's notes on proposed rules.
72. FED. R. EVID. 609(a)(2).
73. United States v. Browne, 829 F.2d 760, 763 (9th Cir. 1987).
74. 829 F.2d 760 (9th Cir. 1987).

admissibility.[75] There, the Ninth Circuit allowed evidence of the defendant's prior robbery because he had been out of jail for less than one year at the time of the crime for which he was on trial.[76] In that case, the court's sole consideration appeared to be the literal language of the rule, as the only justification it provided was that, "[b]y its terms, Rule 609 allows for admissibility of such a prior conviction even where the defendant has been released for up to ten years."[77]

C. The Similarity Between the Past Crime and the Charged Crime

The third factor—which relates to the type of crime the defendant was previously convicted of—was specifically addressed in *Gordon*.[78] The D.C. Circuit stated that a "special" and "difficult" problem arises "when the prior conviction is for the same or substantially the same conduct for which the accused is on trial."[79] The court acknowledged the dangers of admitting such evidence:

> Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity.[80]

Similarly, the Ninth Circuit has held that "evidence of a prior conviction of the very crime for which a defendant is on trial may be devastating in its potential impact on a jury."[81] The court reasoned that when the nature of the prior conviction is "sufficiently similar to the crime charged, there is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's fixation on the human tendency to draw a conclusion which is impermissible in law: because he did it before, he must have done it again."[82] Thus, the greater the similarity between the prior conviction and the charged crime, the likelier it is to be deemed inadmissible impeachment evidence. However, evidence of a prior conviction is "not inadmissible per se,

75. *Id.* at 763.
76. *Id.*
77. *Id.*
78. Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).
79. *Id.*
80. *Id.*
81. United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985).
82. *Id.*

merely because the offense involved was identical to that for which [a defendant is] on trial."[83]

It is well established that the more similar the offenses, the greater the prejudicial effect.[84] However, the degree of similarity required for this factor to weigh against the admissibility of the prior conviction remains unclear. For example, at a defendant's trial for intent to distribute cocaine, one judge might admit evidence of the defendant's prior conviction for marijuana possession because the offenses involve different controlled substances. Faced with the same facts, however, another judge might exclude the evidence on the grounds that the offenses are similar because they both involve drug crimes. The peril of these inconsistencies is a flaw that is inherent in any subjective factor-based test, and the probative-prejudicial balancing inquiry is no exception.

D. The Importance of the Defendant's Testimony and the Centrality of the Defendant's Credibility

The fourth and fifth *Mahone* factors—the importance of the defendant's testimony and the centrality of the defendant's credibility—are closely related and often considered in tandem.[85] In weighing the importance of the defendant's testimony, a judge must consider the effect of the defendant's failure to testify out of fear of prejudice because of the prior conviction.[86] In *Gordon*, the court concluded that though evidence of a prior conviction might otherwise be admissible, a judge "may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment."[87]

The fifth *Mahone* factor—the centrality of the credibility issue—invites an inquiry into whether the testifying witness's credibility is "central" to the case. The D.C. Circuit illustrated the application of this factor in *Gordon* when an issue at trial hinged on "the credibility of two persons, the accused and his accuser."[88] The court explained that, under those circumstances, there was a "compelling" need to introduce evidence of the defendant's prior convictions because doing so would allow the finder of fact to "explore all avenues which would shed light on which of the two witnesses was to be believed."[89]

The Ninth Circuit considered the fourth and fifth *Mahone* factors in *United States v. Givens*.[90] There, the court explained that even

83. United States v. Oaxaca, 569 F.2d 518, 527 (9th Cir. 1978).
84. *See, e.g.*, Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).
85. United States v. Alexander, 48 F.3d 1477, 1489 (9th Cir. 1995).
86. *Gordon*, 383 F.2d at 940.
87. *Id.* at 940–41.
88. *Id.* at 941; *see also* Bellin, *supra* note 23, at 315.
89. *Gordon*, 383 F.2d at 941; *see also* Bellin, *supra* note 23, at 315.
90. 767 F.2d 574 (9th Cir. 1985).

though evidence of a prior conviction might have a prejudicial effect, credibility was an "extremely . . . important part of [the] case . . . [including] credibility as to the . . . defendant's testimony and his explanation for knowing certain things."[91] Thus, when a defendant's credibility is central to the case, the defendant's testimony is more likely to be considered "important" within the meaning of the *Mahone* factors. Further, in *United States v. Alexander*,[92] the court stated that "[w]hen a defendant takes the stand and denies having committed the charged offense, he places his credibility directly at issue."[93]

In addition, the Ninth Circuit has held that a defendant's credibility is central to a case when a defendant testifies to an alibi.[94] This is particularly true when there are no other corroborating witnesses.[95] In *Browne*, for example, the defendant testified in detail about his alibi for the day when the charged crime occurred.[96] The court explained that since no other witness could confirm or disprove the defendant's alleged alibi, the defendant's testimony "hinged almost entirely on his credibility."[97] The Ninth Circuit further noted that, because the prosecution had no other way to impeach the defendant's credibility other than by introducing evidence of a prior conviction, the fourth and fifth *Mahone* factors weighed in favor of admissibility.[98]

Collectively, the *Mahone* factors provide a framework for courts to consider when determining the admissibility of evidence of prior convictions. Some scholars have argued that the first three factors "simply reflect the probative-prejudice dichotomy set forth in Rule 609[,]" whereas the fourth and fifth factors "are not explicitly anticipated by the text of Rule 609."[99] Further, commentators have noted that the fourth and fifth *Mahone* factors cancel each other out because if a witness's testimony is "important," then his credibility becomes "central" in equal degree.[100] While the Seventh Circuit's *Mahone* factors provided courts with guidance as to how the probative-prejudicial balancing test should be conducted, these factors left room for some judicial discretion. Still, this approach has garnered widespread support, with all but two federal circuits—the

91. *Id.* at 579.
92. 48 F.3d 1477 (9th Cir. 1995).
93. *Id.* at 1489.
94. United States v. Browne, 829 F.2d 760, 764 (9th Cir. 1987).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. Bellin, *supra* note 23, at 315.
100. *Id.* at 318.

Fourth and Eighth—having adopted some variation of this framework.[101]

III. THE FOURTH CIRCUIT APPROACH: UNCLEAR GUIDELINES AND INCONSISTENT APPLICATION

The Fourth Circuit rejected the five-factor test articulated in *Mahone* in favor of its own approach.[102] Before the promulgation of the Federal Rules of Evidence, the Fourth Circuit considered the admissibility of evidence of prior crimes in *Lovely v. United States*.[103] There, the court stated that evidence of a prior crime may be admissible to establish, *inter alia*, the defendant's identity, motive, intent, or common plan.[104] However, the Fourth Circuit cautioned against admitting evidence of a prior crime "where it has no relevance or probative value except in so far as it may show a tendency or likelihood on the part of the accused to commit a crime."[105] The court also acknowledged "the general rule that evidence of the commission by [a defendant] of other crimes is not admissible upon the trial of a defendant charged with crime."[106] Evidence of prior crimes "is ordinarily irrelevant, while at the same time its admission would necessarily operate to so prejudice a jury against a defendant" and potentially even "control the verdict."[107]

In *Benton v. United States*,[108] however, the Fourth Circuit concluded that evidence of prior convictions was possibly *too* relevant, as it could "weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[109] There, evidence of a "defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors" was deemed inadmissible "even though such facts might logically be persuasive that he by propensity a probable perpetrator of the crime."[110] Ultimately, the Fourth Circuit acknowledged the evidence's probative value, but stated that "its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."[111]

The debate surrounding the "relevance" of the prior conviction indirectly sheds light on the Fourth Circuit's approach to impeachment evidence. Though the *Lovely* and *Benton* courts

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101. Roberts, *supra* note 37, at 890 n.62.
102. *Id.*
103. Lovely v. United States, 169 F.2d 386, 388 (4th Cir. 1948).
104. *Id.*
105. *Id.* at 388–89.
106. *Id.* at 389 (quoting People v. Molineaux, 168 N.Y. 264, 340 (1901)).
107. *Id.*
108. 233 F.2d 491 (4th Cir. 1956).
109. *Id.* at 492.
110. *Id.*
111. *Id.*

disagreed as to what constituted relevant evidence, both concluded that evidence offered to prove the likelihood that the defendant committed the charged crime was not admissible to prove guilt.[112] Given that evidence used for impeachment goes to the witness's credibility rather than culpability, the *Lovely* and *Benson* courts did not explicitly state that such evidence was inadmissible.

The Fourth Circuit articulated its general rule for impeachment by evidence of prior conviction in *Walker v. United States*.[113] There, the defendant testified on the stand and was subject to cross-examination about a prior conviction.[114] In response to the defendant's argument on appeal that this evidence was inadmissible, the court stated that "it is settled that when a defendant tenders himself as a witness, his credibility, like that of any other witness, may be questioned by asking him as to previous convictions."[115] The Fourth Circuit elaborated on its rule in *United States v. Pennix*,[116] explaining: "In criminal cases a witness may be asked, for purposes of impeachment, whether he has been convicted of a felony, infamous crime, petit larceny, or a crime involving moral turpitude."[117] This remained the law of the Fourth Circuit for decades, even after the promulgation of Rule 609.[118] For example, in *United States v. Duncan*,[119] the court reiterated that evidence of a criminal defendant's prior conviction is admissible when "the defendant puts his character in issue or takes the stand."[120]

Three years later, the Fourth Circuit discussed Rule 609 and its implication for the circuit at length in *United States v. Cavender*.[121] The defendant in that case was indicted for possession of an unregistered firearm and moved for a protective order preventing any mention of his past criminal convictions that were more than ten years old at his trial.[122] The motion was denied, and the defendant was found guilty.[123]

The Fourth Circuit began by addressing the Senate Report's comments on Rule 609(b), stating that the report "made it crystalline that the District Court was only to depart from the prohibition against the use for impeachment purposes of convictions more than

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112. *See id.* at 493; *Lovely*, 169 F.2d at 390–91.
113. Walker v. United States, 104 F.2d 465, 469 (4th Cir 1939).
114. *Id.* at 470.
115. *Id.*
116. 313 F.2d 524 (4th Cir. 1963).
117. *Id.* at 531.
118. *See, e.g.*, Simon v. United States, 123 F.2d 80 (4th Cir. 1941); Beaty v. United States, 203 F.2d 652 (4th Cir. 1953).
119. 598 F.2d 839 (4th Cir. 1979).
120. *Id.* at 864.
121. United States v. Cavender, 578 F.2d 528, 530–34 (4th Cir. 1978).
122. *Id.* at 529.
123. *Id.*

ten years old 'very rarely and only in exceptional circumstances.'"[124] Such evidence was only admissible if the judge determined that there were "specific facts and evidence" to support a finding that the probative value of the conviction substantially outweighed its prejudicial impact."[125] In *Cavender*, the Fourth Circuit explained that the trial judge made no express findings on the record that the probative value of the defendant's prior convictions "substantially" outweighed their prejudicial impact, nor did the judge support his findings with any "specific facts and circumstances."[126] Further, the lower court failed to provide "any real argument on the impeachment value of the several crimes held admissible or of the facts involved in the crimes."[127]

The Fourth Circuit then highlighted the differences between Rules 609(a) and 609(b), explaining that while the former did not require the district court to provide reasons supporting the admission of prior crimes, the latter "unequivocally" required the trial court to support the admissibility of convictions older than ten years with "specific facts and circumstances" on the record.[128] Notwithstanding these differences, "admissibility under Rule 609(b) is forever tied to admissibility under Rule 609(a)" because "[i]n order to be admissible, a previous criminal conviction must pass the test of both."[129]

Importantly, the Fourth Circuit stated that "the pivotal issue of the probative value of a conviction turns largely on considerations of the nature of the conviction itself."[130] The court concluded by explaining that the purpose of impeachment is not "to show that the accused who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him."[131] The court interpreted convictions "which bear directly on whether jurors ought to believe them" as crimes that create an inference of a witness's "propensity to lie" because they "rest on dishonest conduct."[132] The *Cavender* court's interpretation of Rule 609 governed the Fourth Circuit for decades.[133] Essentially, a judge could admit evidence of a prior conviction under Rule 609(a) without explaining the "supporting reasons" for its determination.[134]

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124. *Id.* at 530.
125. *Id.*
126. *Id.* at 531.
127. *Id.*
128. *Id.* at 532.
129. *Id.* at 536 (Widener, J., concurring).
130. *Id.* at 534 (majority opinion).
131. *Id.* (quoting Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967)).
132. *Id.*
133. *See, e.g.*, United States v. Beahm, 664 F.2d 414, 417 (4th Cir. 1981); United States v. Sanders, 964 F.2d 295, 297–98 (4th Cir. 1992).
134. *Cavender*, 578 F.2d at 531.

In *United States v. Ledingham*,[135] however, the Fourth Circuit considered two factors to ultimately conclude that evidence of a prior conviction was admissible.[136] First, the court noted that the differences between the prior convictions (drug offenses and possession of stolen property) and the charged crime (possession of a firearm and ammunition) were enough to justify the admissibility of the former.[137] Second, the court explained that the trial court's "cautionary [jury] instruction regarding the use of prior convictions" was sufficient to "mitigate the possibility of prejudice from improperly admitted evidence."[138] The court's reasoning in this case was a substantial departure from its ruling in *Cavender*.[139]

Unlike in *Cavender*, where the Fourth Circuit conducted an extensive analysis of the probative-prejudicial balancing test required by Rule 609, the court's reasoning in *Ledingham* appeared more superficial.[140] There, the only explanation for admitting the evidence was that the prior crime and charged crime were not similar and that the district court gave the jury curative limiting instructions.[141] In a subsequent case, *United States v. Jefferson*,[142] the Fourth Circuit's analysis was even more cursory, as the only reason it provided in favor of admitting the evidence was "that the district court did not abuse its discretion when it excluded evidence of the witness's prior convictions."[143]

When the Fourth Circuit rejected the *Mahone* test, it failed to adopt an alternate approach. Even though the court has since considered some of the *Mahone* factors in its evidentiary rulings, it has yet to articulate a uniform standard governing Rule 609's balancing test. This lack of guidance has led to inconsistent results and unpredictable outcomes within the circuit.

IV. A DISCUSSION OF THE MAJORITY AND MINORITY APPROACHES

Though the Fourth and Ninth Circuits have articulated their rules regarding Rule 609's probative-prejudicial balancing test to varying degrees of specificity, both approaches allow for an inordinate amount of judicial discretion. It is well established that even though the Ninth Circuit does not require trial judges to analyze each of the

135. 340 F. App'x 150 (4th Cir. 2009).
136. *Id.* at 152.
137. *Id.*
138. *Id.*
139. *Id.* at 152–53.
140. *Id.*
141. *Id.*
142. 379 F. App'x 292 (4th Cir. 2010).
143. *Id.* at 294.

five *Mahone* factors, the record should reflect "at a minimum, that the trial judge 'was aware of the requirements of Rule 609(a)(1).'"[144]

This requirement is critical to ensure that fair and accurate rulings are made, as it limits the otherwise boundless judicial discretion afforded to trial judges' decisions on the admissibility of evidence. The dangers of this unchecked discretion are illustrated in *United States v. Wallace*,[145] where the trial judge only expressly considered two of the five *Mahone* factors.[146] Because there is no record of whether the judge in that case was aware of the existence of the three other factors, it is impossible to determine whether the judge abused his or her discretion in ruling in favor of admitting the evidence of a prior conviction for the purpose of impeachment.

Judges' failure to state their analysis of the *Mahone* factors presents an even graver problem: the possibility that judges might misinterpret the law and that the silent record will prevent effective appellate review. This exact issue was exemplified by the trial judge in *Wallace*, who erroneously interpreted one of the *only* two factors considered at all.[147] The trial judge stated: "[T]he activities are really quite similar, and so similar, in fact, that I think that the probative value of the prior conviction clearly outweighs the prejudicial effect of that testimony as far as the jury is concerned."[148] This interpretation was contrary to circuit precedent[149] and patently incorrect.

On appeal, the Ninth Circuit held that the trial judge "incorrectly assumed that the similarity of the prior conviction and the present charges weighed in favor of admissibility."[150] Accordingly, allowing evidence of a prior heroin conviction at the defendant's present trial, where she was charged with conspiracy and possession with intent to distribute heroin, constituted an abuse of discretion.[151] The court reiterated its interpretation of this *Mahone* factor—the similarity between the past crime and the charged crime—by citing its decision in *Bagley*.[152] In essence, "allow[ing] evidence of a prior conviction of the very crime for which a defendant is on trial may be devastating in its potential impact on a jury."[153]

In allowing the evidence of the defendant's past crime, the district court abandoned the rule from *Bagley* entirely. In fact, the trial judge's ruling directly contradicted it. Nonetheless, the judge's

144. United States v. Wallace, 848 F.2d 1464, 1473 (9th Cir. 1988) (quoting United States v. Givens, 767 F.2d 574, 579–80 (9th Cir. 1985)).
145. 848 F.2d 1464 (9th Cir. 1988).
146. *Id.* at 1473.
147. *Id.*
148. *Id.* n.13.
149. *See Bagley*, 772 F.2d at 488.
150. *Wallace*, 848 F.2d at 1473.
151. *Id.* at 1466, 1473.
152. *Id.* at 1473.
153. *Id.*

flawed reasoning was reflected in the trial transcript, which allowed for a thorough review on appeal. Had the trial judge's analysis not been properly documented for the record, the repercussions would have been twofold. First, there would have been a higher likelihood that the appellate court would have had insufficient information to reverse the improper evidentiary ruling, which would in turn lead to an unfair trial with an unjust outcome. Second, the impossibility of appellate review might have permitted the trial judge to inadvertently repeat the same mistakes, placing future litigants at risk of undue prejudice based on an erroneous ruling.

While the Ninth Circuit's application of the *Mahone* factors has ample room for improvement, the Fourth Circuit's approach presents even more concerns. Unlike the circuits that adopted the *Mahone* factors, the Fourth Circuit has yet to articulate a governing rule addressing the probative-prejudicial balancing test required by Rule 609. This lack of uniformity has led to unpredictable outcomes within the circuit.[154]

Although the Fourth Circuit declined to follow the *Mahone* test, it has still considered some of its factors when making evidentiary rulings.[155] This approach allows for excessive judicial deference by providing judges with the power to handpick which factors—if any—they will consider in each case. Depending on which factor(s) any given judge chooses to weigh, the same case could yield vastly different analyses and outcomes within the circuit. For example, in *Sanders*, the court considered the remoteness in time of the prior crime, the similarity between the past crime and the charged crime, and prior crime's bearing "on the likelihood that defendant would testify truthfully."[156] In *Ledingham*, however, the only factor the court considered to determine the probative value of a prior conviction was the similarity between the prior conviction and the charged crime.[157] Should those courts have considered different factors instead, it is possible that those cases would have had different outcomes.

The danger of this inconsistent approach is further illustrated in *United States v. Williams*,[158] where the Fourth Circuit allowed evidence of the defendant's prior drug conviction at his trial for possession of a firearm "based solely on [the defendant's] decision to take the stand."[159] Though the *Williams* court cited the language of Rule 609—acknowledging its requisite probative-prejudicial balancing test—it did not explain the analysis it used to determine

154. *See* sources cited *supra* Part III.

155. *See, e.g.*, United States v. Sanders, 964 F.2d 295, 297–98 (4th Cir. 1981); United States v. Ledingham, 340 F. App'x 150, 152 (4th Cir. 2009).

156. *Sanders*, 964 F.2d at 297–98.

157. *Ledingham*, 340 F. App'x at 152.

158. 461 F.3d 441 (4th Cir. 2006).

159. *Id.* at 442, 450.

that the evidence of the prior conviction satisfied this test.[160] Since there is no record of how the court went about making this decision, it is impossible to know what factors—if any—went into its consideration. Thus, it is plausible that another judge within the Fourth Circuit could have analyzed the same case through a different lens, which could in turn yield a vastly different outcome even though the judge considered the same underlying facts.

To be sure, inconsistent interpretations will arise even when different courts consider the same factor(s); that is the nature of subjective, factor-based tests. For example, the Fourth Circuit has varied its interpretation of how similar the prior crime and charged crime can be for the former to be deemed admissible. In *Beahm*, the court excluded evidence of the defendant's prior conviction for "unnatural and perverted sexual practices" in his trial for "taking indecent liberties with children."[161] There, even though the two offenses were not identical, the court explained that they were similar enough to bar admission of the prior conviction, noting that "similar offenses for impeachment purposes under Rule 609 should be admitted sparingly if at all."[162] It is well established that the prior conviction need only be "similar" to the charged crime in order to weigh against admissibility.[163]

However, the Fourth Circuit took a far more stringent approach in *United States v. Carmichael*,[164] admitting evidence of the defendant's prior drug charge (possession of cocaine with intent to distribute) at his trial for a separate drug offense (possession of marijuana with intent to distribute).[165] Though the court was using the evidence of a former conviction to impeach a specific statement made by the defendant, a probative-prejudicial test under Rule 609(a) was still deemed appropriate.[166] The court explained that the "similarity" factor weighed in favor of admissibility because the charges were "not identical" and "sufficiently dissimilar so as to lessen the risk of undue prejudice."[167]

This interpretation contradicts both the accepted Fourth Circuit rule[168] and the spirit of Rule 609. The purpose of impeachment is to attack the witness's credibility, not culpability. Evidence of a

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160. *Id.* at 450.

161. United States v. Beahm, 664 F.2d 414, 415–17, 419 (4th Cir. 1981).

162. *Id.* at 419.

163. *See, e.g.*, United States v. Sanders, 964 F.2d 295, 297–98 (4th Cir. 1992); *Beahm*, 664 F.2d at 418–19; United States v. Cavender, 578 F.2d 528, 541 (4th Cir. 1978) (Widener, J., concurring).

164. No. 96-4839, 1998 WL 390973 (4th Cir. July 14, 1998).

165. *Id.* at *1–2.

166. *Id.* at *2.

167. *Id.*

168. *See, e.g.*, *Sanders*, 964 F.2d at 297–98; *Beahm*, 664 F.2d at 418–19; *Cavender*, 578 F.2d at 541 (Widener, J., concurring).

conviction that is the same or similar to the charged crime is inextricably linked with culpability, as it "would certainly be the most persuasive conviction to a trier of fact in ascertaining guilt or innocence."[169] Though the prior conviction and charged crimes are not identical in that they involved different drugs, they are "clearly related offense[s]."[170] Thus, it is highly likely that a reasonable trier of fact would conflate the two offenses and think of them both as "possession of an illegal drug with intent to distribute." Not only is this conflation inapposite, but it also stands to unduly prejudice the defendant by inviting jurors to think the very thought that the "similarity" factor was designed to prevent: "Because he did it before, he must have done it again."

Further, the Fourth Circuit has also taken different approaches to determine whether another *Mahone* factor—the point in time of the prior conviction—weighs in favor or against admissibility. In *Carmichael*, for example, the court admitted evidence of a defendant's prior conviction because the four- to eight-year-old convictions were "remote in time from those charged . . . to reduce the likelihood that the jury would automatically convict the [defendant] simply because of his prior convictions.[171] In *Beahm*, however, the Fourth Circuit excluded a nine-and-one-half-year-old conviction on the grounds that "it was remote in time, almost falling within the presumptive bar of Rule 609(b)."[172]

The language of Rule 609 allows for the admission of evidence of prior convictions if more than ten years have passed, provided that its probative value substantially outweighs its prejudicial effect.[173] However, the rationale for this limitation suggests that, in general, the probative value of a prior conviction decreases with the passage of time. As the Advisory Committee Notes to Rule 609 explain, time limits on the use of evidence of prior conviction rest on "practical considerations of fairness and relevancy [which] demand that some boundary be recognized."[174] In light of that explanation, the *Carmichael* court's reasoning for allowing the evidence of the defendant's prior conviction hinged on an incorrect understanding of Rule 609(b)'s purpose. The remoteness in time of a prior conviction weighs *against* its admissibility, not in favor of it.

Rule 609's probative-prejudicial balancing test is inherently subjective. Most circuits have attempted to create uniformity by adopting the *Mahone* multi-factor approach. Though some inconsistency is inevitable, the majority approach has allowed for

169. *Cavender*, 578 F.2d at 541 (Widener, J., concurring).

170. *Id.*

171. United States v. Carmichael, No. 96-4839, 1998 WL 390973, at *2 (4th Cir. July 14, 1998).

172. *Beahm*, 664 F.2d at 419.

173. FED. R. EVID. 609.

174. FED. R. EVID. 609 advisory committee's notes on proposed rules.

more predictability than the Fourth Circuit's, where the lack of clear standards has continuously led to discrepant results.

V. THE FUTURE OF RULE 609: A PROPOSED CHANGE

Though one of the main reasons for the promulgation of the Federal Rules of Evidence was to reduce the inconsistencies brought forth by judges exercising their unfettered discretion,[175] the subjectivity of the *Mahone* framework has largely negated the drafters' initial purpose. To some extent, courts' failure to apply a uniform standard stems from the unavoidable flaws that are inherent in all multi-factored analytical approaches.[176] One potential solution is to completely set aside the *Mahone* factors in favor of a new approach. However, changes can be made to the current framework to alleviate some of the consequences of its main shortcomings.

A. A Factor-less Approach

Setting aside the *Mahone* framework in favor of an entirely factor-less approach could solve some of the issues presented by the multi-factor test.[177] While this idea might be promising in theory, it presents the practical difficulty of identifying a concrete new approach to replace the *Mahone* test. Regardless of whether a new framework is adopted, it is crucial that judges place the language of Rule 609 and the drafters' intent at the center of their rulings about evidence of prior crimes. Under Rule 609(a)(1), "Congress placed the burden of demonstrating the admissibility of a defendant's convictions on the prosecution."[178] This "indicates an intent on the part of [Congress] that 'close cases' should be decided in favor of the defendant."[179] Though courts should be guided by a presumption against the admission of prior convictions, judges will still be required to balance probative value against prejudicial effect. Thus, any new approach that replaces the *Mahone* test will still need to tackle Rule 609's balancing test.

First, the balancing test requires that courts ascertain the probative value of the prior conviction.[180] This inquiry "must rest on the specific facts of the case or the conviction itself."[181] For example, in considering the specific facts of a case, the probative value of a prior crime might increase if a defendant's testimony is inconsistent with

175. Horjus, *supra* note 2, at 122–23.
176. Bellin, *supra* note 23, at 336.
177. *Id.*
178. *Id.* at 309.
179. *Id.* at 310 (quoting Roderick Surratt, *Prior-Conviction Impeachment Under the Federal Rules of Evidence: A Suggested Approach to Applying the "Balancing" Provision of Rule 609(a)*, 31 SYRACUSE L. REV. 907, 924 (1980)).
180. *See* FED. R. EVID. 609.
181. Bellin, *supra* note 23, at 337.

the existence of a prior conviction, or if the testimony otherwise attempts to persuade the jury that the defendant had always led a law-abiding life.[182] Probative value also depends on the specific facts of the conviction itself, meaning that *crimen falsi* and other crimes that bear directly on the witness's truthfulness are more probative than other types of crimes. Keeping in mind that the purpose of impeachment is to attack a defendant's credibility, these examples illustrate possible scenarios in which courts might find that evidence of a prior conviction has at least some probative value.

With respect to the question of prejudicial effect, courts will once again be tasked with engaging in a case-specific analysis.[183] However, it is difficult to envision such an analysis that is completely devoid of any consideration of the *Mahone* factors. For example, virtually every inquiry into the prejudicial effect of a prior crime will require analyzing at least one *Mahone* factor—the similarity of the prior conviction and the charged crime. This is because, as the Ninth Circuit correctly noted, the higher the degree of similarity between the two crimes, the more "devastating" the potential impact of the jury.[184] Thus, it is unlikely that any new approach that purports to be "factor-less" will ever truly be free from *all* the *Mahone* factors.

Though it might be tempting to advocate for the complete overhaul of the *Mahone* framework in favor of a new approach, this is not the most practical solution. Even if courts decide to conduct Rule 609's balancing test without considering the *Mahone* framework, some of its factors are too intrinsic to the probative-prejudicial analysis to ever truly be replaced. Accordingly, it is more practical to improve the *Mahone* test than it is to completely replace it.

B. Analyzing Each Mahone *Factor on the Record*

Perhaps a more manageable short-term solution would be requiring that all findings resulting from the *Mahone* balancing test be clearly stated on the record. Unlike Rule 609(b), the language of Rule 609(a)(1) does not require courts to support their findings with "specific facts and circumstances."[185] However, even in the days of *Luck*, trial judges were advised to specifically state their findings on the record.[186] Turning this suggestion into a requirement will hold trial judges accountable by ensuring that any of their discretionary findings can be thoroughly reviewed by appellate courts.[187] Further, requiring judges to analyze their findings explicitly will provide

182. *Id.*
183. *Id.*
184. United States v. Bagley, 772 F.2d 482, 488 (9th Cir. 1985).
185. Bruce P. Garren, *Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence* 609, 64 CORNELL L. REV. 416, 428 (1979).
186. *Id.*
187. *Id.* at 431.

guidance for future trials, reduce the uncertainty inherent in any balancing test, and promote consistency.[188]

To render this approach even more effective, judges should explicitly state their analyses—or lack thereof—for *all* the *Mahone* factors, including the ones they are declining to consider. This should occur even if some factors are inapplicable in a particular case or if they seemingly weigh so strongly for or against admissibility that a thorough analysis appears unnecessary. Though it might seem futile to explicitly mention that a factor will not be analyzed, noting as much will protect a judge's findings from potential appellate scrutiny inquiring into whether the judge considered said factor at all. While the Ninth Circuit mandated that at the very least the record should reflect that the trial judge "was aware of the requirements of Rule 609(a)(1)," it was also clear that it "d[id] not require the trial judge to state his or her analysis of each of the five factors with special precision."[189] Enacting this change would take the Ninth Circuit's interpretation of the *Mahone* test one step further in the direction of creating a more consistent and effective approach.

CONCLUSION

The majority approach to Rule 609's probative-prejudicial balancing test—followed by all but two federal circuits—consists of analyzing the five *Mahone* factors. As illustrated by the Ninth Circuit's case law interpretations, this approach is not immune from inconsistent application brought forth by excessive judicial deference. Despite its flaws, though, the *Mahone* framework is still far superior to the vague and ambiguous method—or lack thereof—followed by the Fourth Circuit. By failing to articulate a governing standard, the Fourth Circuit has allowed, and effectively encouraged, unfettered judicial discretion that has left defendants vulnerable to undue prejudice brought forth by arbitrary, and sometimes even flawed, interpretations of the law.

Changing the well-established *Mahone* factor framework would be no small feat. For decades, it has been intertwined with the Rule 609 analysis, with the two becoming almost synonymous in most jurisdictions. Attempting to separate one from the other risks creating a vacuum that could easily be filled by a worse alternative. One possible solution is to keep the *Mahone* framework but add safeguarding mechanisms to improve consistency and fairness. Requiring judges to address all five factors on the record is one step toward eradicating arbitrary interpretations and ensuring judicial accountability.

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188. *Id.*

189. United States v. Wallace, 848 F.2d 1464, 1473 (9th Cir. 1988) (quoting United States v. Givens, 767 F.2d 574, 579–80 (9th Cir. 1985)).

Regardless of the changes that might be in Rule 609's near or distant future, judicial analyses should always be guided by the purpose and spirit of the rule: ascertaining the truth. Though it is unlikely that any one modification will cure all the aforementioned deficiencies, some type of meaningful reform is well overdue. Rule 609 was born from compromise. A compromise might be the solution here, too.

Luul Y. Lampkins[*]

* Juris Doctor Candidate, May 2024, Wake Forest University School of Law; Master of Education, 2020, National University; Bachelor of Arts, 2018, Duke University. Thank you to Professor Ronald F. Wright and my editors, Maxwell Anthony and Lane Wilson.