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Rule 609 and the Frustratingly Unkillable Five-Factor Mahone Framework

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Thanks Colin for inviting me to be a guest blogger! I wanted to start my stint with a somewhat technical critique of the courts' application of Evidence Rule 609 – I see this as one of the lowest hanging fruits in terms of things I would love to change in modern evidence jurisprudence, and a fairly important one for criminal trial practice.

Every few weeks, an American court publishes an opinion that explains why a defendant's criminal conviction was admissible to impeach his credibility under Federal Rule of Evidence 609, or a state analogue. *See* Federal Rule Evidence of 609 (permitting prosecution to impeach a defendant with prior convictions "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused"). The opinion inevitably contains an argument along these lines: the defendant's testimony, in which he claimed to be innocent, was "important" and his credibility "central" to the case and therefore impeachment was necessary to allow the jury to render a proper verdict.

Here is a recent example:

> "The court agrees with the government that the . . . Defendant's testimony will conflict with that of the government's witnesses, making Defendant's credibility

> central to the case. As Defendant's testimony and credibility will be of great importance, the court believes 99–CF–491 may be used as impeachment evidence should Defendant elect to testify."
>
> U.S. v. Sutton, No. 10–CR–20048, 2011 WL 2671355, 5 (C.D.Ill. July 8, 2011)

This reasoning reflects a misunderstanding of the applicable legal standard – a misunderstanding that is now so common that it seems almost futile to try to correct it.

At the same time, the flaw in the reasoning described above is so obvious it is difficult to understand its persistence. *Every time* a defendant testifies, his testimony will be "important" (if believed) and therefore his credibility will be "central to the case." How can these factors – which will always be present in this form – be determinants of*whether* to allow impeachment under Rule 609?

The surprising answer is that this analysis flows directly from a flawed, five-factor balancing test – a test that was distilled from a pre-Rules case (Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967)) by United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976). The*Mahone* factors, explicitly intended to govern Rule 609 decisions, have spread like a plague through state and federal courts. They 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 credibility issue." *Mahone*, at 929.

I declared war (academically speaking, of course) upon this framework in an article entitled*Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior*

Convictions, 42 U.C. Davis Law Rev. 289 (2008). So far the framework is winning. But today, thanks to EvidenceProf Blog, I open up a new front:

The fourth and fifth factors are the obvious culprits in the reasoning described above. Interestingly, though, if you trace these factors back to *Gordon* from whence they came, it is clear that the fourth factor was actually intended to protect defendants from impeachment. The idea was that if the impeachment is allowed, a defendant will decline to testify, and as a result the jury will be deprived of his testimony. *Gordon* at 940. If that testimony is "important," then, the trial court should be reluctant to allow impeachment. *Id.*

It is less clear what the *Mahone* court intended by the fifth factor; the court likely was thinking of the portion of*Gordon* where the D.C. Circuit emphasized that the case "had narrowed to the credibility of two persons, the accused and his accuser" creating a critical need for additional information that might shed light on which witness to believe. *Gordon* at 941. (In *Gordon*, the defendant had also impeached the accuser with a prior conviction. *Id.*at 938-39.)

In their original incarnation, the fourth and fifth*Mahone* factors were always in tension. When the defendant had something important to tell the jury – e.g., "I am not guilty because . . . " – the fourth factor suggested that impeachment should be prohibited, while the fifth factor arguably suggested that impeachment should be allowed. If faithfully interpreted, these factors would, for the most part, cancel each other out. This is not how things have played out.

Over the past decades and continuing to the present, the courts have steadily lost sight of the meaning of the fourth factor and, without explanation, gradually transformed it. In modern application, as illustrated in the excerpt above, the fourth factor is reversed and generally combined with the fifth factor to create a mega, pro-impeachment factor ("the importance of the defendant's credibility").

Make no mistake, the federal District Court quoted above is just following the lead of its appellate court. Here is the Seventh Circuit recently making the same mistake:

> "Here, [the defendant-] Toliver's testimony and credibility were central to the case: either he was lying or [the govt. witness] was lying. Thus, although the similarity of [Toliver's] two crimes increased the risk of prejudice, *the importance of Toliver's credibility* weighed in favor of admissibility."
>
> U.S. v. Toliver, 374 Fed.Appx. 655, 658, 2010 WL 882840, 3 (7th Cir. 2010) (italics added).

The Minnesota appellate courts make no effort to obscure their conflation of the two factors, explaining in an oft-quoted passage:

> "If credibility is a central issue in the case, the fourth and fifth. . . factors weigh in favor of admission of the prior convictions."
>
> State v. Odeneal, 2011 WL 1833018, 4 (Minn.App. 2011) (quoting *Swanson,* 707 N.W.2d at 655) (itals added).

Here is a recent decision from Maryland:

> "One of the critical considerations the jury had to contemplate was the question of whom to believe—[the defendant-]Cure or the identifying detective. Cure's testimony, which amounted to the bulk of his defense, made 'credibility ... the central issue' in the case, and, therefore, factors four and five weigh heavily in favor of admissibility."
>
> Cure v. State, --- A.3d ----, 2011 WL 3568839, 15 (Md. Aug. 16 2011)

At its core, this frustratingly common interpretive error is just a misunderstanding of the meaning of the fourth *Mahone* factor. Courts are simply applying it backwards. This is clear in a recent Texas case where the court erroneously says that the fact that the defendant's testimony was not important (because others testified to the same effect) "militate[s] against admissibility." Phelps v. State, No. 07–10–00443–CR, 2011 WL 2582810, 3 (Tex.App. 2011) The Texas court nevertheless ruled that impeachment was still proper because "the credibility of appellant's testimony was critical" – although how that could be true if his testimony was

not important is left unexplained. *Id.*

What to do? It would be best if courts would simply stop applying the hopelessly flawed five-factor framework (and particularly the 4th and 5th factors) and focus instead on the familiar concepts of unfair "prejudice" and "probative value" invoked by Rule 609. At a minimum, however, if the courts are going to continue to apply this multi-factor framework, they must apply it correctly, recognizing that the fourth factor is not the same as the fifth factor – but is, more accurately, its opposite. If an opinion emphasizes that the defendant's testimony is important, then that is a factor that supports *exclusion*, not *admission*, of the defendant's criminal record. *See Gordon* at 941 n.11 (explaining that the trial judge should "consider whether the defendant's testimony is so important that he should not be forced to elect between staying silent-risking prejudice due to the jury's going without one version of the facts- and testifying- risking prejudice through exposure of his criminal past").

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