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11-9-2021

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Cardozo Journal of Equal Rights and Social Justice

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Recommended Citation

Morrison, Niara, "The Prejudicial Impact of Federal Rule of Evidence 609 on Black Defendants" (2021).
ERSJ Blog. 8.

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The Prejudicial Impact of Federal Rule of Evidence 609 on Black Defendants

Federal Rule of Evidence 609, Impeachment by Evidence of a Criminal Conviction, allows the litigating parties to attack a witness's "character for truthfulness" [1] by evidence of a criminal conviction at trial.[2] The rule allows a witness's prior felony conviction[3] or any conviction that involved a dishonest act or false statement[4] to be admitted by a trial judge for impeachment purposes. Often defendant-witnesses are the most affected by this rule because it allows jurors to make a propensity inference about the defendant's (un)truthful character, although it may not actually be representative of their character or probative of the crime at hand. There is a high prejudicial effect of allowing previous convictions to be admitted into evidence because the jury is allowed to make inferences that witnesses testimony is untrue because they were once convicted of a crime, and therefore they must not be telling the truth now. There is a double-edged sword here: the defendant can choose not to testify, which may make him appear guilty in the eyes of the jury, or he can testify, but he runs the risk of being impeached for his prior convictions. The admission of prior conviction evidence contributes to a system that disfavors criminal defendants and disproportionately impacts people of color.[5]

The implications that FRE 609 has on witnesses is prejudicial, but when considering the witness's race, the impact becomes greater. Race is significant in criminal law because the rates in which Black people are arrested, convicted, and sentenced[6] are disproportionately higher. Race plays a large role in which groups of people are convicted for crimes and longer sentencing terms.[7] Mass incarceration, over-policing, and prosecutorial biases are just a few reasons why Black people receive harsher sentences compared to those of white people.[8] There is a tumultuous history of Black peoples' experiences with law enforcement in America that has ultimately affected their experiences within the legal system. Black criminal defendants frequently deal with "inadequate provision of defense counsel" and an "overwhelming pressure to plead guilty,"[9] which contributes to higher convictions as well. If one group of people has more run-ins with the law, it is more likely that if a subset of those people become witnesses in a trial (as a character witness or defendant-witness), their prior conviction can be used to taint their credibility. This is an exceptionally prejudicial flaw with this rule, because although the ostensible purpose of the rule is to allow parties to use established social norms of truthfulness, i.e. prior criminal convictions, to attack the witness's character for truthfulness, there are other factors that are implicitly considered by the jury. The impact this rule has on witnesses of differing races is not uniform and often has very little, if any, probative value.[10]

Once a person is convicted for a crime punishable for over a year, FRE 609 inherently deems them as an untruthful person from that day forward, opening the door for attacks on their propensity for truthfulness. Since

juries have the final say, many defendants with prior convictions may not testify to avoid impeachment altogether. [11] The fear of juror misuse allows courts to provide limiting instructions[12] to distill the jury's fact-finding and decision-making process if it has been tainted, but juries will ultimately decide whether a witness or criminal defendant is credible or not. Usually this results in convictions once a jury understands that a defendant waived his right to testify although they may not know it was "strategically" decided to prevent impeachment because they understand not testifying indicative of guilt.[13] This further perpetuates an unfortunate and all too common cycle of conviction, recidivism, and impeachment of prior conviction for Black criminal defendants. A possible solution to the harmful effects of this rule would be to eliminate FRE 609 as a rule because its prejudicial effect outweighs its probative value, or to limit the admission of prior convictions for specific crimes. People have the ability to change, rehabilitate, and grow from their previous past crimes. Leaving the fate of a trial based on a Black criminal defendant's prior conviction in the hands of the jury is dangerous because race will play a major role, whether implicitly or not. The prior crime is not always indicative of someone's ability to tell the truth, and should not be used to impair Black defendants' present or future conviction.

[1] Fed. R. Evid. 609(a)

[2] Fed. R. Evid. 609

[3] Fed. R. Evid. 609 (a)(1)

[4] Fed. R. Evid. 609(a)(2)

[5] Anna Roberts, *Defense Counsel's Cross Purposes: Prior Conviction Impeachment of Prosecution Witnesses* at 9 (2021).

[6] *Id.*

[7] *Id.*

[8] Montré D. Carodine, "*The Mis-Characterization of the Negro*": A Race Critique of the Prior Conviction Impeachment Rule, *Indiana L.J.* 521, 525-526 (2009).

[9] Roberts, *supra* note 5 at 7.

[10] Ric Simmons, An Empirical Study of Rule 609 and Suggestions for Practical Reform, 59 *Boston College L. Rev.* 993, 1003 (2018).

[11] Carodine, *supra* note 8 at 527.

[12] Fed. R. Evid. 105

[13] Carodine, *supra* note 8 at 541.