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# Criminal Law - Whether a Defendant's Claim of Victim Agressiveness Is an Essential Element of the Defense of Self-Defense: State v. Baca I & (and) II

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# CRIMINAL LAW—Whether a Defendant's Claim of Victim Aggressiveness Is an "Essential Element" of the Defense of Self-Defense: *State v. Baca I & II*

## I. INTRODUCTION

A defendant charged with a violent crime and raising self-defense may wish to present evidence of the victim's conduct prior to the crime to show that the defendant acted out of fear of the victim, or to show that the victim was the original aggressor. Admissibility under current New Mexico law is ambiguous, however, where the defendant presents past-conduct evidence primarily to show that the victim was the first aggressor. The ambiguity arises because two recent decisions in New Mexico's appellate courts have reached contradictory conclusions on the issue.

In *State v. Baca* (*Baca I*),[1] the supreme court, in what may have been dictum, stated that a defendant may offer evidence of specific instances of the victim's past conduct in order to show that victim was the aggressor.[2] Moreover, the court also stated that if such evidence is offered, "the defendant's [prior] knowledge of the victim's violent conduct is irrelevant and does not need to be shown."[3] However, in an unrelated case also captioned *State v. Baca* (*Baca II*),[4] the New Mexico Court of Appeals the following year held that when evidence of a victim's "violent disposition . . . is used circumstantially . . . to help prove that the victim acted in a particular manner at the time of the incident in question," the evidence is inadmissible.[5] The court of appeals reasoned that a victim's aggressiveness is *not* an "essential element" of the defense of self-defense within the meaning of Evidence Rule 405(b).[6] The court of appeals could not, of course, overrule any holding of the supreme court.[7] Thus, *Baca II* carefully framed its holding as a clarification of the "dictum" in *Baca I*.[8]

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1. 114 N.M. 668, 845 P.2d 762 (1992) [hereinafter *Baca I*].
2. *Id.* at 671, 845 P.2d at 765.
3. *Id.* (citations omitted).
4. 115 N.M. 536, 854 P.2d 363 (Ct. App.) [hereinafter *Baca II*], *cert. denied*, 115 N.M. 545, 854 P.2d 872 (1993).
5. *Id.* at 540, 854 P.2d at 367.
6. *Id.* (*citing* N.M. R. EVID. 11-405(B)). For ease of comparison with other jurisdictions that have adopted the Federal Rules (*see infra* Section IV), this note will refer to the Federal Rules numbering system and the language quoted will be that used in the Federal Rules. The only difference in wording between Federal and New Mexico rules is the Federal Rules' use of entirely gender-neutral language.
7. *See* Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973) (holding that court of appeals may not overrule the supreme court, even where the latter would have overruled its own decision).
8. *Baca II*, 115 N.M. at 540, 854 P.2d at 367 ("[W]e are not persuaded that the Supreme Court meant to modify SCRA 11-405(B). Had the Supreme Court intended that result, we believe *Baca* would have been explicit.").

It is far from certain, however, that the court of appeals correctly divined the supreme court's intended exposition of Rule 405(b) or that the supreme court viewed its own exposition as mere dictum.[9] Nor is it certain that the court of appeals' interpretation will prevail as the rule in New Mexico. This Casenote addresses whether the application of Rule 405(b) in New Mexico should conform to the dictum of the supreme court in *Baca I* that specific instances of a victim's conduct prior to the crime are admissible to show both that the defendant feared the victim and that the victim was the probable aggressor, or to the holding of the court of appeals in *Baca II* that such evidence is admissible only to show that the defendant acted out of fear of the victim.

## II. STATEMENT OF THE CASES

### A. *Baca I*

On June 22, 1989, Defendants Baca and Gutierrez waited for the victim, Valasquez, in a hallway at the state penitentiary in Santa Fe.[10] When Valasquez appeared, Baca stabbed him with a "shank" (a crude knife) and Gutierrez kicked him. Valasquez later died of the stab wounds.

Baca and Gutierrez pled not guilty on a defense of self-defense. Baca, the principal defendant, sought to introduce testimony at trial of prior specific instances of Valasquez's conduct to support his contention that Valasquez was the first aggressor. The evidence Baca sought to introduce, however, was first proffered by his co-defendant, Gutierrez, and pertained to acts of which only Gutierrez was aware at the time of the homicide. The trial court excluded Baca's evidence, and convicted him of murder. Gutierrez was acquitted.

### B. *Baca II*

Defendants Baca and Chavez were in the sleeping area with the victim at the New Mexico Boy's School in Springer.[11] During the night, after

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9. The Rule 405(b) issue was not necessarily decided (although it was litigated) in *Baca I*. The trial court's decision was reviewable only on an abuse of discretion standard. *Baca I*, 114 N.M. at 672, 845 P.2d at 766. The New Mexico Supreme Court held that the trial court had not abused its discretion to exclude such evidence. *Id.* at 673, 845 P.2d at 767. The evidence was properly excluded under Rule 403, according to the supreme court, because it "would have been cumulative and as such would not have affected the verdict." *Id.* Because the verdict was sustained on Rule 403 grounds, the supreme court's statement on Rule 405(b) was technically only dictum. However, immediately following its discussion of Rule 405(b) which cited other authorities extensively, the court's next statement began with the phrase, "[h]aving so ruled . . . ." *Id.* at 672, 845 P.2d at 766. Thus, whether the supreme court itself regards its views on Rule 405(b) as mere dictum may be disputed. Shortly after *Baca I* was decided, court of appeals Judge Hartz remarked in another case that a "straightforward reading of Rule 405 may not be the law in New Mexico." State v. Lamure, 115 N.M. 61, 72, 846 P.2d 1070, 1081 (Ct. App. 1992) (citing *Baca I*, 114 N.M. 668, 845 P.2d 762), *cert. denied*, 114 N.M. 720, 845 P.2d 814 (1993). Apparently, Judge Hartz also was not convinced that the discussion in *Baca I* was obiter dicta, without future effect on New Mexico's application of Rule 405(b). *Id.*

10. The facts of *Baca I* are fully recited at 114 N.M. at 670, 845 P.2d at 764.

11. The facts of *Baca II* are fully recited at 115 N.M. at 537-38, 854 P.2d at 364-65.

the lights had been turned off, Baca and Chavez attacked the victim in his bed. Chavez beat the victim with his fists, and both Baca and Chavez stabbed the victim with shanks. When the lights were turned on, both defendants were found with blood-covered shanks. The victim recovered from his wounds, and testified at trial that he heard Chavez say to him as he was being stabbed, "That's what they do to rats." After the attack, Chavez also said to the victim, "You fink, you'll never snitch again." Apparently, the victim told someone that Baca and Chavez had stolen some keys. The defendants claimed that Chavez only went to talk to the victim at his bedside, "'man to man' about the keys." The victim then tried to stab Chavez, when Baca rose to Chavez's defense.

The defendants pled not guilty to the charges of aggravated battery, conspiracy to commit aggravated battery, and possession of a deadly weapon by a prisoner. To support their contention that the victim was the first aggressor, the defendants tried to discover records in the victim's detention facility master file of the victim's prior violent behavior, without reference to any particular incident. The defense counsel's discovery request included "any psychiatrics done, all previous arrests, any forensics that may have been done, any adjudications, any problems he's had at the Boy's School, any problems elsewhere, family's history . . . . a complete background" of the victim. The trial judge allowed the defendants access to all the requested documents except those which detailed instances of the victim's conduct "in which the defendants were not implicated." The jury convicted both boys of assault.

## III. THE NEW MEXICO RULES OF EVIDENCE AND CASELAW BEFORE THE BACA DECISIONS

The New Mexico Rules of Evidence, like those of most states, are modeled on the Federal Rules, and are virtually identical. New Mexico Rule 405(b), like its federal counterpart, provides an exception to the general rule that only reputation or opinion testimony is permitted on direct examination for the purpose of showing that a person acted in a particular way on a particular occasion.[12] Rule 405(b) allows a party to

12. The general rule is stated in FED. R. EVID. 404(a) and 405(a):

404(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

405(a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry

proffer on direct, in addition to reputation and opinion testimony, testimony of specific instances of a person's conduct if such testimony is "an essential element of a charge, claim, or defense."[13] The question of admissibility, then, depends on whether the matter to be proven is viewed as an "essential element" of self-defense.

A fair number of New Mexico cases prior to the *Baca* decisions, but after adoption of the Federal Rules, have dealt with a victim's past violence as evidence tending to show a defendant's fear of the victim.[14] In general, past-conduct evidence is permitted where a defendant alleges that he or she acted out of fear of the victim, because the defendant has "knowledge" which "would have some bearing on the reasonableness of defendant's apprehension for his life."[15] In such a case, the defendant must also show that he or she was aware of the evidence before committing violence against the victim.[16]

However, *Baca I* was the first case since New Mexico's adoption of the Federal Rules to deal with the admissibility of a victim's prior acts of violence as tending to show that the victim was the aggressor. *Baca I* cited the 1923 case of *State v. Ardoin*[17] with approval as allowing "specific instances of the victim's conduct [to] be admitted when the defendant claims self-defense and when those instances would reflect on either whether the defendant was reasonable in his apprehension of the victim or on who was the first aggressor."[18]

The *Ardoin* rule contains the seed of the disagreement between *Baca I* and *Baca II*. On the one hand, *Ardoin* admits evidence of a victim's acts of violence to prove that the victim was the aggressor or to show the defendant's state of mind.[19] On the other hand, *Ardoin* also limits admissibility to acts of which the defendant was informed, regardless of why the evidence is offered.[20] Such a restriction is illogical, of course, where the evidence is used only to show a victim's aggression, but the

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is allowable into relevant specific instances of conduct.

*See also* N.M. R. EVID. 11-404(A) and 405(A). The current New Mexico rule expands the prior rule which allowed only reputation testimony, and not opinion testimony. *See* State v. McCarter, 93 N.M. 708, 711-12, 604 P.2d 1242, 1245-46 (1980).

13. "*Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of charge, claim, or defense, proof may also be made of specific instances of that person's conduct." FED. R. EVID. 405(b); *see also* N.M. R. EVID. 11-405(B).

14. *See, e.g.*, State v. Gonzales, 110 N.M. 166, 167, 793 P.2d 848, 849 (1990) (murder); State v. Lopez, 105 N.M. 538, 547, 734 P.2d 778, 787 (Ct. App. 1986) (aggravated assault), *cert. denied*, Lopez v. New Mexico, 479 U.S. 1092, *cert. quashed*, State v. Lopez, 105 N.M. 521, 734 P.2d 761 (1987); State v. Melendez, 97 N.M. 738, 742, 643 P.2d 607, 611 (1982) (murder); State v. Ewing, 97 N.M. 235, 237, 638 P.2d 1080, 1082 (1982) (murder), *appeal on remand*, 97 N.M. 484, 641 P.2d 515 (Ct. App. 1982); State v. Montoya, 95 N.M. 433, 436, 622 P.2d 1053, 1056 (Ct. App. 1980) (manslaughter), *writ quashed*, 95 N.M. 426, 622 P.2d 1046 (1981); State v. McCarter, 93 N.M. 708, 711-12, 604 P.2d 1242, 1245-46 (1980) (murder).

15. *Ewing*, 97 N.M. at 237, 638 P.2d at 1082.

16. *See McCarter*, 93 N.M. at 712, 604 P.2d at 1246.

17. 28 N.M. 641, 216 P. 1048 (1923) (murder).

18. *Baca I*, 114 N.M. at 671, 845 P.2d at 765.

19. *See Ardoin*, 28 N.M. at 646, 216 P. at 1050.

20. *Id.* at 649, 216 P. at 1051.

*Ardoin* court declined to overturn prior rulings of the territorial courts.[21] *Baca I* sought to solve the illogic in *Ardoin* by removing the requirement of the defendant's prior knowledge of the evidence to show the victim was the aggressor.[22] *Baca II*'s objection to this solution was that evidence of the victim's past behavior should not be admissible at all to show that the victim was the aggressor.[23]

After New Mexico adopted the Federal Rules, the supreme court in *State v. McCarter* reiterated the *Ardoin* rule without overruling the requirement of the defendant's prior knowledge.[24] The court explained that in light of Rule 405(b) "evidence of specific acts of violence on the part of the deceased could be introduced by a defendant if there was evidence that the defendant had been informed of, or had knowledge of, those acts at the time of the homicide. Such evidence would have some bearing on the reasonableness of defendant's apprehension for his life."[25] The thrust of the 1980 *McCarter* holding suggested that the supreme court had already adopted an understanding of Rule 405(b) consonant with that later stated by the court of appeals in *Baca II*.[26]

Thus, the dictum in *Baca I* that specific instances of a victim's conduct prior to the crime are admissible to show both that the defendant feared the victim and that the victim was the probable aggressor was a departure from New Mexico law after the state's adoption of the Federal Rules. The holding in *McCarter*, and the language of Rule 405(b) itself, should have resolved the illogicality in *Ardoin* in favor of the rule adopted by the court of appeals in *Baca II* that specific instances of a victim's conduct are admissible to show the defendant's fear of the victim at the time of the crime (and only if the defendant was aware of such conduct), but not to show circumstantially that the victim was the probable aggressor.

## IV. DISCUSSION OF THE CASES

In *Baca I*, defendant Baca appealed on grounds that the trial court abused its discretion in excluding his use of the evidence offered by his co-defendant, Gutierrez.[27] The supreme court upheld Baca's conviction on the Rule 403 grounds that his proffered evidence was more cumulative than probative.[28] However, the supreme court strongly signalled that if Baca had not had additional evidence at his disposal, the decision would have gone the other way:

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21. *Id.*
22. *See Baca I*, 114 N.M. at 671-72, 845 P.2d at 765-66.
23. *Baca II*, 115 N.M. at 540, 854 P.2d at 367.
24. State v. McCarter, 93 N.M. 708, 604 P.2d 1242 (1980).
25. *Id.* at 712, 604 P.2d at 1246.
26. *See also* State v. Lopez, 105 N.M. 538, 547, 734 P.2d 778, 787 (Ct. App. 1986), *cert. denied*, 479 U.S. 1092 (1987); State v. Montoya, 95 N.M. 433, 436, 622 P.2d 1053, 1056 (Ct. App. 1981) (following *McCarter*).
27. *Baca I*, 114 N.M. at 670, 845 P.2d at 764. Baca also appealed on "whether the trial court committed error in refusing to instruct the jury on the defense of duress to the charge of possession of a deadly weapon by a prisoner." *Id.*
28. *See id.* at 673, 845 P.2d at 767.

> In this case, Baca offered specific instances of [the victim's] violent conduct that he knew of, and specific instances of which he had no knowledge (the specific instances Gutierrez would have offered into evidence). He offered this evidence both to show that his apprehension of Valasquez was reasonable and to show that Valasquez was the first aggressor. *Under these circumstances, the evidence of specific instances known and unknown to Baca could have been admitted into evidence*, subject as always to the trial court's discretion under Rule 11-403.[29]

In *Baca II*, the defendants appealed on the ground that the victim's aggressiveness was an essential element of their defense which could not be proven without recourse to the excluded character evidence.[30] The defendants argued that the trial court abused its discretion in failing to follow the Rule 405(b) admissibility standard set forth in *Baca I*: namely that prior specific instances of a victim's conduct are admissible to prove the victim's aggressiveness, regardless of whether the defendants had prior knowledge of such acts.[31]

The state argued on appeal only that the evidence was properly excluded under Rule 403 as more cumulative than probative. Relying on the recent *Baca I* decision, the state conceded by silence the defendants' argument as to admissibility under Rule 405(b).[32] The court of appeals could have decided the case solely on a Rule 403 basis, as did the supreme court in *Baca I*. Instead, Judge Minzner took the opportunity to hold that prior specific instances of a victim's conduct are inadmissible under Rule 405(b) to prove that the victim was the first aggressor.[33]

## V. THE LAW IN OTHER JURISDICTIONS

Twelve federal-rule jurisdictions and nine non-federal-rule jurisdictions have adopted the position contemplated in *Baca I*, that prior specific instances are admissible both to show the defendant's state of mind and to prove that the victim was the probable aggressor.[34] Nearly all of them

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29. *Id.* at 672, 845 P.2d at 766 (emphasis added).
30. *Baca II*, 115 N.M. at 539, 854 P.2d at 366.
31. *Id.*
32. *Id.*
33. *Baca II*, 115 N.M. at 540, 854 P.2d at 367.
34. Federal Rule Jurisdictions: Amarok v. State, 671 P.2d 882, 883 (Alaska App. 1983); State v. Miranda, 405 A.2d 622, 625 (Conn. 1978) (victim's conduct admissible in a homicide case); State v. Maxwell, 618 A.2d 43, 49 (Conn. App. 1992) (victim's acts admissible only through convictions; factual predicate of convictions and other evidence of victim's acts not admissible; question left open whether victim's convictions admissible in non-homicide cases), *cert. denied*, Maxwell v. Connecticut, 113 S. Ct. 3057 (1993); Meyer v. City and County of Honolulu, 731 P.2d 149, 150 (Haw. 1986); State v. Dunson, 433 N.W.2d 676, 680 (Iowa 1988) (*but see* Klaes v. Scholl, 375 N.W.2d 671, 674-75 (Iowa 1985) (victim's acts admissible in criminal cases only)); Heidel v. State, 587 So.2d 835, 846 (Miss. 1991); State v. Sims, 331 N.W.2d 255, 258-59 (Neb. 1983); State v. LaVallee, 400 A.2d 480, 483 (N.H. 1979); State v. McIntyre, 488 N.W.2d 612, 616 (N.D. 1992) (victim's acts admissible to corroborate other evidence that victim was the aggressor); Jenkins v. State, 161 P.2d 90, 96 (Okla. Crim. App. 1945); Gonzales v. State, 838 S.W.2d 848, 859 (Tex. App. 1992) (citing Thompson v. State, 659 S.W.2d 649, 653 (Tex. Crim. App. 1983)); State v. Howell, 649 P.2d 91, 96 (Utah 1982) (only victim's convictions admissible to show victim was the

have applied the rule with some sort of limitation such as that in the Connecticut case of *State v. Miranda*,[35] which requires that only prior convictions are permissible to show the victim was the probable aggressor. In contrast, twenty-two federal-rule jurisdictions and eight non-federal rule jurisdictions have adopted the position contemplated in *Baca II*, that prior specific instances of a victim's conduct are admissible to show the defendant's state of mind, but not to show that the victim was the probable aggressor.[36] One state has yet to rule on the issue.[37]

## VI. ANALYSIS

The logical result of *Baca I*'s interpretation of Rule 405(b) is that prior-conduct evidence is more likely to be admitted to show the victim was the first aggressor than it is to show that the defendant acted out of fear of the victim. The *Baca I* result is ironic, given that a defendant's fear of the victim is more plausibly an "essential element" of the defense of self-defense than is the defendant's claim that the victim acted first.

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aggressor); and WYO. R. EVID. 405(B) (the rule itself was modified to allow victim's acts to show victim was the aggressor).

Non-Federal Rule Jurisdictions: Henderson v. State, 583 So.2d 276, 289 (Ala. Crim. App. 1990) (victim's acts admissible where conflicting accounts of who was aggressor), *aff'd*, *Ex parte* Henderson, 583 So.2d 305 (1991), *cert. denied*, 112 S. Ct. 1268 (1992); CAL. EVID. CODE § 1103(a)(1) and (b); Harris v. United States, 618 A.2d 140, 144 (D.C. Ct. App. 1992) (victim's acts admissible only in homicide cases); Chandler v. State, 405 S.E.2d 669, 673 (Ga. 1991); People v. Lynch, 470 N.E.2d 1018, 1020 (Ill. 1984) (victim's acts admissible where conflicting accounts of who was aggressor), *appeal after remand*, 503 N.E.2d 857 (1987), *app. denied*, 511 N.E.2d 434 (1987); Carrick v. McFadden, 533 P.2d 1249, 1251-52 (Kan. 1975) (victim's acts admissible where conflicting accounts of who was aggressor); Hemingway v. State, 543 A.2d 879, 881 (Md. Ct. App. 1988) (victim's acts admissible to show victim was the aggressor only if corroborates other evidence); Commonwealth v. Stewart, 394 A.2d 968, 970-71 (Pa. 1978); Jordan v. Commonwealth, 222 S.E.2d 573, 577 (Va. 1976).

35. 405 A.2d 622 (Conn. 1978).

36. Federal Rule Jurisdictions: Halfacre v. State, 639 S.W.2d 734, 735-36 (Ark. 1982); State v. Williams, 685 P.2d 764, 767 (Az. App. 1984); People v. Jones, 675 P.2d 9, 17 (Colo. 1984); Tice v. State, 624 A.2d 399, 402 (Del. 1993); State v. Smith, 573 So.2d 306, 318 (Fla. 1990); State v. Dallas, 710 P.2d 580, 589 (Idaho 1985), *denial of habeas corpus aff'd*, Dallas v. Arave, 984 F.2d 292 (9th Cir. 1993); State v. Edwards, 420 So.2d 663, 670 (La. 1982); State v. Doherty, 437 A.2d 876, 878 (Me. 1981); People v. Knott, 228 N.W.2d 838, 840-41 (Mich. 1975); State v. Irby, 368 N.W.2d 19, 23 (Minn. App. 1985); Burgeon v. State, 714 P.2d 576, 578 (Nev. 1986); State v. Burgess, 357 A.2d 62, 63-64 (N.J. 1976); State v. Tann, 291 S.E.2d 824, 827 (N.C. 1982) (assault case); State v. Johnson, 154 S.E.2d 48, 51 (N.C. 1967) (murder case); State v. Carlson, 508 N.E.2d 999, 1001 (Ohio App. 1986); State v. Parks, 693 P.2d 657, 659 (Or. App. 1985), *appeal after remand*, 751 P.2d 1115 (1988); State v. Padgett, 291 N.W.2d 796, 798 (S.D. 1980); State v. Furlough, 1993 WL 476357 (Tenn. 1993); State v. Roy, 557 A.2d 884, 892-93 (Vt. 1989), *habeas corpus denied*, Roy v. Coxon, 907 F.2d 385 (2d Cir. 1990); Gov't of Virgin Islands v. Carino, 631 F.2d 226, 229 (3d Cir. 1980); State v. Kelly, 685 P.2d 564, 570 (Wash. 1984); State v. Woodson, 382 S.E.2d 519, 524, n.5 (W. Va. 1989); and Werner v. State, 226 N.W.2d 402, 404-05 (Wis. 1975).

Non-Federal Rule Jurisdictions: Holder v. State, 571 N.E.2d 1250, 1254 (Ind. 1991); Thompson v. Commonwealth, 652 S.W.2d 78, 80 (Ky. 1983) (citing federal rules in support of restrictive interpretation of Kentucky rules regarding admissibility of victim's acts); Commonwealth v. Fontes, 488 N.E.2d 760, 763 (Mass. 1986); State v. Waller, 816 S.W.2d 212, 216 (Mo. 1991); *In re* Robert S., 420 N.E.2d 390, 391-92 (N.Y. 1981); State v. Tribble, 428 A.2d 1079, 1085 (R.I. 1981); State v. Alford, 212 S.E.2d 252, 254 (S.C. 1975).

37. MONT. R. EVID. 405 & cmt. ("Existing Montana law has dealt with this method of proof only in criminal cases involving the violent character of the victim offered by the accused to show that the amount of force used by the accused to defend himself was reasonable.").

The defendant's fear of the victim (or lack thereof) speaks directly to the defendant's state of mind: the degree to which the defendant was in fear for his or her safety at the time he or she committed violence against the victim is the same degree to which the defendant lacked the requisite intent to merit conviction of the crime in question. On the other hand, where a defendant proffers evidence of specific instances of the victim's conduct prior to the crime for the purpose of implying that the victim acted first, the defendant does no more than assert probabilities about the circumstances of the crime. Such an assertion is no more "essential" to a defense of self-defense than would be the prosecutor's assertion that the defendant's prior criminal history makes it more likely than not that the defendant must have committed the crime charged. Precisely because such an assertion is not essential to a proof of guilt, and in fact is more prejudicial than probative, prosecutors are prohibited from using such evidence at all. Thus, the approach taken in *Baca I* allows to defendants a strategy denied to prosecutors of "proving" a case on character issues alone.

Because strong policy arguments support both positions, jurisdictions in general have divided fairly evenly on this question (although a vast majority of the federal-rule jurisdictions takes a position like that adopted in *Baca II*). In *State v. Waller*,[38] the Missouri Supreme Court recently reconsidered five principal policy reasons for prohibiting testimony about a victim's prior acts for any evidentiary purpose:

> (1) A single act may have been exceptional, unusual and uncharacteristic; an isolated episode does not provide a true picture of the character of a person. The potential for unfair prejudice is great . . . . (2) Numerous collateral issues could be raised, resulting in a lengthy trial . . . . (3) Collateral issues might cloud the real issues and confuse the jury. The jury could be led to consider the victim's character to infer that the victim acted in conformity with former conduct . . . . (4) The state cannot anticipate and prepare to rebut every specific prior act of violence of a deceased victim . . . . (5) Since the state cannot introduce evidence of the defendant's past acts of violence, the defendant should not be permitted to benefit from evidence of specific acts of the victim. To allow the evidence creates a double standard favorable to the defendant . . . .[39]

After considering these policy issues, the *Waller* court decided to abandon a longstanding rule against admitting any evidence of a victim's prior acts, and held that a victim's acts are admissible to show the defendant's state of mind.[40] However, the court found the above-stated policy reasons compelling enough to maintain the prohibition against prior act evidence for the purpose of showing that the victim was the aggressor.[41]

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38. 816 S.W.2d 212 (Mo. 1991).
39. *Id.* at 214-15.
40. *Id.* at 215.
41. *Id.* at 216.

Not surprisingly, the most pointed arguments on either side of the issue are the dissents from courts that could not reach full agreement on the proper rule. For example, in *In re Robert S.*,[42] the dissent criticized the fundamental premise of the majority's decision, similar to that adopted in *Baca I*, that evidence of the victim's prior conduct to show that the victim was the probable aggressor should be excluded on the ground that it might confuse or mislead juries. The dissent argued that the majority proceeded "from the mistaken and, indeed, entirely unempirical assumption that modern juries . . . are 'bereft of educated and intelligent persons who can be expected to apply their ordinary judgment and practical experience' . . . ."[43] The dissent also discussed the special needs of defendants to present an adequate defense: "in criminal cases there is to be greater latitude in admitting exculpatory evidence than in determining whether prejudicial potentialities in proof offered to show guilt should result in its exclusion . . . ."[44]

The opposite proposition was argued with equal force in a special concurrence to *Chandler v. State*,[45] in which Georgia adopted the rule contemplated in *Baca I*. The concurring opinion cited three reasons for excluding evidence of specific instances of a victim's prior conduct in order to show that the victim was the probable aggressor. First, a single past act by the victim may not fairly illustrate the victim's true character.[46] Second, the prosecution could never adequately "anticipate and prepare to rebut each and every specific act of violence" which the defendant might raise.[47] Third, allowing testimony as to specific instances of the victim's past conduct "would multiply the issues, prolong the trial and confuse the jury . . . ."[48] The concurrence also warned that, in essence, juries would be invited to find for defendants on the ground that "the victim was a violent person and deserved to die."[49]

These arguments illustrate the equally valid policy grounds both of *Baca I* and *Baca II*. Aside from considerations of stare decisis, the judgment as to which rule is "better" depends first on how much importance is placed on interpreting the rule consistent with the intent of its framers, and second on how much importance is given to various competing policy goals. For example, courts must weigh the constitutional imperative to preserve a defendant's right to present a defense against the need to enforce laws, particularly criminal laws. If the court gives too much deference to defendants' rights, the result could be acquittals based on antipathy for the victim. On the other hand, if the court is too ready to mistrust a jury's ability to accurately understand and weigh complex

42. 420 N.E.2d 390 (N.Y. 1981).
43. *Id.* at 394 (Fuchsberg, J., dissenting).
44. *Id.*
45. 405 S.E.2d 669 (Ga. 1991) (Benham, J., concurring).
46. *Id.* at 675.
47. *Id.*
48. *Id.*
49. *Id.*

factual issues, the defendant's need to present an adequate defense could be compromised as a result. In addition, victims of severe abuse who kill or hurt their victimizers may be unfairly deprived of probative evidence that the victimizer acted first.

In response to these competing policy goals, some courts have fashioned compromise solutions. One such solution is to restrict the type of proof which may be made of a victim's prior specific acts of violence. This solution was adopted in Connecticut[50] and Utah,[51] where evidence of a victim's prior violent behavior is admissible only in the form of recent prior convictions for such behavior. In this way, juries are not exposed to inflammatory testimony of dubious substantive value, the *express* purpose of which is to justify allegedly criminal action. Convictions, by contrast, are not rendered with an eye to future use in unrelated trials. Convictions also rest on factual testimony that has been subject to careful scrutiny according to the rules of evidence.[52] Thus, convictions are inherently more trustworthy and less unfairly prejudicial to either side than the testimony of eyewitnesses, or records made out of court. At the same time, the factual predicates of the convictions are not admissible, since convictions can provide adequate proof of the same subject matter without unduly prejudicing or misleading the jury.[53] Of course, convictions are admissible whether the defendant was aware of those convictions or not, because state of mind is not the issue.[54] So far, Connecticut has upheld the admission of a victim's prior convictions only in homicide cases.[55] It has declined to rule as yet on whether such evidence is admissible in other types of cases.[56]

Another compromise solution is to limit the types of cases in which proof of a victim's prior acts of violence may be made at all. This solution was adopted in Iowa, which does not limit the type of proof a defendant may offer, but restricts its admission to criminal cases (the Iowa court having expressly declined to admit such evidence in civil assault cases).[57] This approach maximally protects a defendant's due process rights to defend against criminal prosecution where the defendant stands to lose life or liberty. At the same time, the restriction as to civil cases adequately addresses a policy which seeks justice from violent persons in a forum where the defendant risks only the loss of property.

The District of Columbia Court of Appeals has taken an approach similar to Iowa's, except that it allows evidence of specific instances of

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50. State v. Miranda, 405 A.2d 622, 625 (Conn. 1978), *quoted with approval in* State v. Baca, 114 N.M. 668, 672, 845 P.2d 762, 766 (1992).

51. State v. Howell, 649 P.2d 91, 96 (Utah 1992).

52. State v. Maxwell, 618 A.2d 43 (Conn. App. Ct. 1992), *cert. denied*, 621 A.2d 287 (1993).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. State v. Dunson, 433 N.W.2d 676, 680 (Iowa 1988). *But see* Klaes v. Scholl, 375 N.W.2d 671 (Iowa 1985).

a victim's prior violent conduct only in homicide cases.[58] Under this approach, broad protection is given to defendants in cases where the stakes for defendants are highest. In all cases where the stakes are less than punishment for homicide, defendants are barred from using prior act evidence at all; of course, defendants are still entirely free to make use of opinion and reputation testimony for the purpose of showing who was the probable aggressor.[59]

All of the policy considerations discussed so far were in the minds of the framers of the federal rules. The advisory committee's notes to F.R.E. 405 noted that:

> Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion . . . . This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine.[60]

The same policy issues were stated by the concurrence to *Chandler*.[61] Importantly, the advisory committee's argument is stated in terms of how evidence can be presented to the factfinder with the least risk of confusion or prejudice. The dissent argued in *In re Robert S.*[62] that a literal reading of Rule 405(b) places too many limitations on what juries may properly consider; but the argument is less convincing when considered in light of the number of hearsay exceptions and the broadened rules on expert testimony which were also incorporated into the federal rules. Those modifications also affect what juries may see and hear; in fact, juries now may hear and see much more at trial than was permitted before the federal rules were adopted. The framers of the federal rules probably did not proceed from the assumption that juries were "bereft of intelligent and educated persons," as Justice Fuchsberg complained.[63] Rather, it would seem that the framers legitimately perceived a real risk of excessive and confusing inquiries into collateral issues if evidence of a person's conduct were not significantly limited in scope and purpose.

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58. Harris v. United States, 618 A.2d 140, 144 (D.C. App. 1992). The District of Columbia does not use the Federal Rules of Evidence, nor has it codified its evidence rules according to any other system; rather, its evidence rules, at least with regard to the admissibility of prior acts evidence by the defendant to show the aggressiveness of the victim, are entirely stated in common law. *Cf. id.* at 144-47 (citing only to case law throughout the analysis, with no reference to any codified rules of evidence). The District of Columbia's rule on the admissibility of specific instances of a victim's conduct to show that the victim was the aggressor is presented here because it illustrates another "compromise" approach.

59. *Id.* at 144.

60. FED. R. EVID. 405 advisory committee's note.

61. *See supra* notes 47-51 and accompanying text.

62. 420 N.E.2d 390, 392-94 (N.Y. 1981) (Fuchsberg, J., dissenting).

63. *Id.* at 394 (Fuchsberg, J., dissenting).

## VII. CONCLUSION

Eventually, the New Mexico Supreme Court must decide whether to uphold the reasoning adopted in *Baca II* by the court of appeals, or to adopt a different rule. The decision in *Baca II* more precisely reflects the intention of those who formulated the federal fules which New Mexico adopted than does *Baca I*. *Baca II*'s interpretation of Rule 405(b) also conforms to interpretations of Rule 405(b) by federal courts, including the Tenth Circuit Court of Appeals.[64]

Moreover, the rule as stated in *Baca II* rests on the sound premise that the prior aggressiveness of the victim is not an "essential element" of the defense of self-defense, but only a circumstantial step in the defendant's chain of proof. For example, in a negligent retention case, the violent history of a third person who committed some act of violence while employed by the defendant is essential because knowledge of that history is crucial to determining whether the employer was negligent in failing to dismiss the employee. Likewise, in homicide or assault cases, the defendant's knowledge of a victim's prior violent history is "essential" where the defendant claims to have acted in accordance with that knowledge, i.e., with reasonable apprehension of suffering serious bodily harm from the victim. But where the defendant offers the victim's history of violence only to show that the victim was probably violent on the occasion at issue in trial, the defendant proves nothing "essential" about his or her own actions or the motivations for those actions.

Nevertheless, if the New Mexico Supreme Court decides that it must follow the minority of jurisdictions and overrule *Baca II*, the court should carefully consider the conflicting policy goals. The competing interests of defendants, plaintiffs, prosecutors and courts may best be protected through one of the compromise rules discussed above. The Connecticut and Iowa rules probably provide the best guidance since they both interpret Rule 405(b). The District of Columbia's rule, although interpretive of common law rather than Rule 405(b), may still provide useful guidance. The notion of allowing evidence of a victim's prior acts only in homicide cases has valid policy grounds, and such a limitation would result in the least-drastic departure from a straightforward interpretation of Rule 405(b), especially if combined with a Connecticut/Utah-rule limitation that allows prior-acts evidence only in the form of convictions. However, even a Connecticut/Utah compromise would require the court to overrule its holding in *McCarter* barring use of a victim's prior convictions to prove the victim's aggressiveness.[65]

In any case, a carte blanche expansion of Rule 405(b) to encompass any and all conduct evidence, which some states have adopted,[66] would

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64. *See, e.g.*, Perrin v. Anderson, 784 F.2d 1040 (10th Cir. 1986).

65. State v. McCarter, 93 N.M. 708, 712, 604 P.2d 1242, 1246 (1980).

66. Wyoming, for example, rewrote the rule itself to accommodate its own prior case law, which allowed conduct evidence to prove the victim was the aggressor: "In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, *or is in issue*

not conform to New Mexico caselaw. Even *Ardoin*, decided half a century before the present rules of evidence were adopted, was applied only in a case of homicide, and still required the defendant's prior knowledge of the victim's violent acts. The rule stated in *Baca II* is sound. It should be broadened sparingly, if at all.

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*under rule 404(a)(2)*, proof may also be made of specific instances of his conduct." WYO. R. EVID. 405 (emphasis added); *see also* the supreme court note to the rule: "The purpose of the added language in subdivision (b) is to insure that the accused in assault or homicide cases may introduce evidence of specific instances of the victim's conduct to prove that the victim was the first aggressor." *Id.*