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No Magic Formula: A New Approach for Calculating the Ten Year Time Period for Admission of Prior Conviction Evidence

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NO MAGIC FORMULA: A NEW APPROACH FOR CALCULATING THE TEN YEAR TIME PERIOD FOR ADMISSION OF PRIOR CONVICTION EVIDENCE

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INTRODUCTION

Federal Rule of Evidence 609 governs the admission of prior conviction evidence. The requirements for admitting evidence of prior convictions under the rule vary according to the amount of time that has elapsed from the later of either the date of conviction or the date of release from confinement for the conviction.[1] If less than ten years have passed, evidence of the conviction is more easily admitted than when more than ten years have elapsed.[2]

Calculating the ten year period is fairly straightforward in most cases. Calculation becomes confusing, however, when the witness has been confined for violating the terms of probation, parole, or some other period of conditional release.[3] Does the confinement for violation of conditional release (VOCR) constitute confinement for the original crime? Should the nature of the violation affect whether the VOCR confinement is deemed confinement for the original conviction? Should the ten year clock start over upon release from VOCR confinement? FRE 609 does not address these questions. Thus, courts and commentators have developed their own methods of calculating the time period to account for confinement for a VOCR.[4] The proposed solutions, however, have resulted in conflicting and unworkable results that are frequently at odds with the policies underlying FRE 609.[5]

This article proposes that courts should treat the ten year time period under FRE 609 as a statute of limitations which should be tolled for any periods of confinement for VOCRs. Under this approach, courts would measure the time period for prior conviction evidence without restarting

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[1] FED. R. EVID. 609 [hereinafter FRE 609].

[2] *Id.*

[3] This article refers to violations of any type of conditional release as "VOCR."

[4] *See* Part II, *infra*.

[5] *Id.*

the clock after a VOCR confinement. Thus, it avoids the harsh results that may be caused by entirely erasing any period of law abiding conduct before the VOCR confinement.[6] Additionally, this approach treats all VOCR confinements similarly. Thus, it enables courts to avoid the inconsistencies inherent in methods that vary the impact of the VOCR confinement according to the nature or severity of the conduct triggering the confinement.[7] The statute of limitations approach will be easier for courts to apply and is more consistent with the policies underlying the rule than the other approaches that have been proposed and adopted.[8]

Part I of this article traces the history of FRE 609.[9] Part II evaluates the different approaches for calculating the time period.[10] Part III proposes the statute of limitations approach, illustrating how it leads to superior results in the types of situations courts have faced in the past and are likely to face in the future.[11] This article concludes that litigants, trial courts, and appellate tribunals will be better served by the statute of limitations model.[12]

I. THE LANGUAGE AND HISTORY OF FRE 609

Under FRE 609, prior convictions are admissible only for impeachment and only in a limited number of situations. First, convictions involving crimes of dishonesty are automatically admitted if they are less than ten years old, without regard to the balance between potential prejudice and probative value.[13] Second, FRE 609 generally favors admission of felony[14] convictions that are less than ten years old.[15] If the witness is not a criminal defendant, the admission of a prior felony conviction is subject only to the requirements of FRE 403, which requires a court to admit the evidence unless the risk of unfair prejudice substantially outweighs the probative value of the evidence.[16] If the witness is a criminal

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[6] *See infra* text accompanying notes 81-91 and 137-38.

[7] *See infra* text accompanying notes 73-79.

[8] *See* Part III, *infra*.

[9] *See infra* text accompanying notes 13-35.

[10] *See infra* text accompanying notes 36-91.

[11] *See infra* text accompanying notes 92-139.

[12] *See infra* text accompanying note 140.

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

[14] Technically, the rule permits admission of convictions for crimes punishable by death or by more than one year of incarceration. This generally means that felony convictions will be admissible, although any crime that meets these requirements, whether or not denominated as a "felony," would be admissible under the rule. For the sake of simplicity, this article refers to crimes, other than crimes of dishonesty, that are punishable by death or more than one year in prison as "felonies."

[15] FED. R. EVID. 609(a)(1).

[16] *Id.*; FED. R. EVID. 403.

defendant, a prior felony conviction "shall be admitted" if the court makes the converse determination that its probative value outweighs its prejudicial impact.[17] By contrast, both dishonesty and felony convictions that are more than ten years old are presumptively inadmissable. Under FRE 609(b), older convictions may be admitted only if their probative value substantially outweighs their prejudicial impact.[18] Thus, the ten year mark defines the line between convictions that are automatically or generally admissible and those that are presumptively inadmissible. If ten years have elapsed since the later of the date of conviction or the release of the witness from confinement imposed for the conviction, the evidence is presumptively inadmissible, regardless of whether the conviction at issue is for a felony or a crime of dishonesty.

FRE 609 did not always measure the time period this way. In 1969, the Advisory Committee proposed a draft of the rule, proposed Rule 6-09(b), that contained a significant difference from the current version of FRE 609(b).[19] Under the proposed draft, a conviction became presumptively inadmissible after ten years had elapsed "since the date of the release of the witness from confinement, *or the expiration of the period of his parole, probation, or sentence, whichever is the later date.*"[20]

In proposing this language, the Advisory Committee acknowledged that few state evidence codes recognized a time limit for convictions but noted that "practical considerations of fairness and relevancy demand that some boundary be recognized."[21] Congress first demonstrated a desire for a recognized boundary in 1970, when it adopted a ten year time limit for impeaching convictions in the District of Columbia courts.[22] That evi-

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[17] FED. R. EVID. 609(a)(1). This formulation of the prejudice/probative value balancing test makes admission of felony convictions to impeach criminal defendants more difficult than for other witnesses. Nevertheless, it favors admissibility more than the test for older convictions under FRE 609(b). *See infra* note 18 and accompanying text.

[18] FRE 609(b), as it has appeared, unchanged, since 1975 provides:

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

[19] *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 296 (1969).

[20] *Id.* (emphasis added).

[21] *Id.* at 299.

[22] District of Columbia Court Reorganization Act of 1970, § 133(a), Pub. L. No. 91-358, 84 Stat. 473, 550-51 (1970) (codified as amended at D.C. CODE ANN. § 14-305 (1989)). An earlier version of the District of Columbia evidence rule contained no time period at all for the use of old convictions.

dence rule was the model both for proposed Rule 6-09(b) and the current version of Rule 609.[23]

In 1971, the Advisory Committee proposed a revised draft of the federal rule which deleted the language measuring the ten year time period from the date of expiration of "parole, probation, or sentence."[24] Following the Advisory Committee's submission of the revised draft, the Justice Department sought to change paragraph (b) of the rule to conform with the District of Columbia Code.[25] The Judicial Conference made the change, which was then adopted by the Supreme Court.[26] As submitted to Congress, the rule read:

> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed *since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.*[27]

Thus, the "parole, probation, or sentence" language was reinserted.[28] In addition, language was added permitting admission of *all* prior convictions if less than ten years had elapsed since *the most recent conviction*, not the conviction sought to be used.[29]

The changes were rejected, however, once the proposed rule reached the House Judiciary Committee. The Committee decided to retain the original language from the revised draft, which omitted the reference to "parole, probation or sentence" and established a ten year time limit for each individual conviction.[30] Congress concurred and adopted the rule as it exists today, requiring courts to measure the time period for admission of prior conviction evidence from the later of the date of conviction or the date

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See Part II of District of Columbia Code, Judiciary & Judicial Procedure, Pub. L. No. 88-241, 77 Stat. 478, 519 (1963).

[23] *See Rules of Evidence for United States Courts and Magistrates [Supreme Court Draft]*, 56 F.R.D. 183, 270 (the Supreme Court draft of FRE 609, which was based on proposed Rule 6-09, was "drafted to accord with the Congressional policy manifested in the 1970 legislation" enacting the provision of the D.C. Code permitting admission of prior conviction evidence).

[24] *Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates*, 51 F.R.D. 315, 391 (1971).

[25] *See* 28 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 6131 (1993) [hereinafter WRIGHT & GOLD].

[26] *Id.*

[27] *Rules of Evidence for United States Courts and Magistrates [Supreme Court Draft]*, 56 F.R.D. 183, 269-70 (1972) (emphasis added).

[28] *Id. Compare* notes 20 & 24, *supra*, and accompanying text.

[29] *See* WRIGHT & GOLD, *supra* note 25, § 6131.

[30] H.R. REP. NO. 650, 93d Cong., 1st Sess. (1973), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7085; *see* WRIGHT & GOLD, *supra* note 25, § 6131.

of release from confinement for that conviction.[31]

The Committee's rejection of the proposed language is instructive. It demonstrates that Congress' main goal was to establish a fixed period during which a particular criminal conviction is probative for impeachment.[32] At the end of that period, probative value evaporates. Congress could have set that time period to run at the end of intervals during which a convict is "in custody" (*i.e.*, on parole or probation), but not within prison walls. In addition, Congress could have required ten years of law abiding conduct from the most recent conviction before erasing the probative value of prior conviction evidence. Congress rejected both of these options. Instead, under the rule as adopted, the critical triggering event is release from confinement, and even then, only confinement for the conviction that a litigant seeks to admit into evidence.

Congress did not, however, completely eliminate the admissibility of older conviction evidence. The Senate Judiciary Committee, and later the entire Senate, approved an amendment to the House enactment conferring discretion on trial judges to admit convictions older than ten years that they deemed to be probative. Cryptically, the Committee reported that "[i]t is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances."[33] It is unclear whether the Committee thought that trial judges would rarely encounter situations in which a litigant would seek to admit evidence of an older conviction, or whether it believed that trial courts would only occasionally have reason to admit such evidence. The Conference Committee accepted the Senate's version of the rule and added its own amendment requiring the proponent of an old conviction to give notice to the other side.[34] The Conference Committee added the notice provision "to avoid surprise" at trial.[35] This requirement fortunately provided counsel and the trial court with time to determine the amount of time that had actually elapsed since release from confinement.

Although FRE 609(b) specifies that the ten year period begins at the later of the date of conviction or release from confinement, the rule does not specify whether a later confinement for a VOCR affects the calculation. Thus, courts have developed two methods for computing the time period when a witness has been confined for a VOCR after the date of conviction

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[31] FED. R. EVID. 609(b).

[32] *See* 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 284 (2d ed. 1994) [hereinafter MUELLER & KIRKPATRICK] ("Like most time limits set by law, the 10-year period established by FRE 609(b) has no magical properties, and serves mostly the need for some reasonable cutoff . . . .").

[33] S. REP. NO. 1277, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7062.

[34] H.R. CONF. REP. NO. 1597, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7103.

[35] *Id.*

or release from the initial period of confinement imposed for the conviction. Part II discusses these two approaches.

II. TWO APPROACHES FOR MEASURING THE TEN YEAR TIME PERIOD IN VOCR SITUATIONS

Courts have developed two undesirable approaches for measuring the ten year time period when the witness has been confined for a VOCR. The first approach, the "technical/substantive" approach, distinguishes between "technical" and "substantive" violations to determine whether release from confinement for a VOCR is the starting point for calculating the ten year period.[36] Under the second approach, the "bright-line" approach, the ten year time clock always starts over upon release from confinement for a VOCR, without regard either for the nature of the violation or for any period of law abiding conduct preceding the VOCR.[37] The results under the technical/substantive approach are unworkable and potentially inconsistent, while the results under the bright-line rule are often unduly harsh. Neither approach is in keeping with the policies underlying the rule.

United States v. Brewer, the first reported decision addressing the VOCR confinement question, is the source of both the technical/substantive and bright-line approaches.[38] In that case, Brewer moved to suppress the government's use of his past convictions in a trial scheduled for March 15, 1978.[39] On October 10, 1960, he had been convicted on a federal kidnapping charge and sentenced to ten years.[40] He was paroled on June 27, 1967,[41] but while on federal parole, he was convicted of three felony rape and assault charges in Ohio state court.[42] The Ohio convictions triggered a violation of parole in the federal case, and after serving five-and-a-half years for the state crimes, he was recommitted to federal custody on the earlier kidnapping conviction.[43] He was paroled from federal prison a second time on February 9, 1976.[44] The *Brewer* court ruled that all of the convictions were within the ten year time period of FRE 609(b).[45] Brewer's release from confinement for the state convictions was clearly within ten years of the 1978 trial.[46] As to the 1960 federal conviction, the

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[36] *See infra* text accompanying notes 38-80.
[37] *See infra* text accompanying notes 81-91.
[38] 451 F. Supp. 50 (E.D. Tenn. 1978).
[39] *Id.* at 51.
[40] *Id.* at 52.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 52-53.
[46] *Id.* at 52. The *Brewer* court unartfully stated its reasoning concerning the state convictions. The

court ruled that reconfinement on the parole violation was confinement for the original conviction, and that the 1976 release from reconfinement was within ten years of the 1978 trial.[47] Thus, the first reported decision established the position that the ten year period begins at the last release from confinement, even when the confinement is not for the original sentence, but rather is imposed for a VOCR.[48]

Building on *Brewer*, two Ninth Circuit panels developed the technical/substantive approach to applying FRE 609(b). In *United States v. McClintock*,[49] the Ninth Circuit Court of Appeals affirmed the trial court's ruling *in limine* permitting use of a prior conviction. McClintock was on trial for mail fraud arising out of professional fundraising activities.[50] He had previously been convicted of mail fraud in professional fundraising in December of 1967.[51] The court withheld sentence on the 1967 conviction, and he received five years of probation.[52] As one condition of his probation, McClintock was to refrain from engaging in fundraising activities. McClintock failed to comply with this condition,[53] and as a result, his probation was revoked in January of 1972. He was sentenced to three years in prison for violating the terms of his parole.[54] Despite the three-year sentence, McClintock was again paroled in February of 1973.[55] His second prosecution for mail fraud began on January 8, 1982.[56] Because the 1973 release from confinement on the probation revocation was less than ten years from the 1982 trial, the trial court admitted the conviction, and the Ninth Circuit affirmed.[57]

In ruling that the conviction fell within the ten year time period, the *McClintock* court determined that, under the circumstances of that case, release from confinement on a probation revocation should be treated no

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court failed to articulate clearly that the release from state confinement was in fact less than 10 years prior to trial. Rather, it said that the earliest possible release under the state sentences (which ranged from 1-5 to 3-20 years) was one year from the sentencing, which was within ten years. *Id.* The court made no mention of whether Brewer was credited with the time between arrest and sentence on conviction which, calculating from the date of sentence, would have changed the result under the court's reasoning.

[47] *Id.* at 52.

[48] Ultimately, the *Brewer* court refused to admit the kidnapping conviction because it determined that the three state convictions were more probative of truthfulness than the federal conviction was prejudicial. *Id.* at 54. Rather than risk what it called "overkill" in impeachment, the court disallowed use of the kidnapping conviction. *Id.*

[49] United States v. McClintock, 748 F.2d 1278 (9th Cir. 1984), *cert. denied*, 474 U.S. 822 (1985).

[50] *Id.* at 1281-82.

[51] *Id.* at 1287.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 1287-88.

[56] *Id.*

[57] *Id.* at 1288-89.

differently than the release from confinement on a parole revocation in *Brewer*.[58] The court's decision placed special emphasis on the conduct for which McClintock's probation had been revoked: failure to refrain from charitable fundraising.[59] The court believed that McClintock's failure to abide by the condition was a substantive violation of probation directly related to the underlying criminal conduct of fraudulent fundraising.[60] Rather than confine itself to the *Brewer* reasoning—that confinement for a VOCR relates back to the original conviction—the *McClintock* court held that confinement for a "substantive" probation violation implicating the underlying conviction is confinement on the underlying crime.[61] The court would not, however, endorse a blanket rule that confinement for a VOCR always represents confinement on the original conviction for FRE 609(b) purposes.[62] According to the *McClintock* court, district courts should have discretion in calculating the ten year period based upon the nature of the VOCR.[63]

The *McClintock* decision led a later Ninth Circuit panel to apply the technical/substantive approach in *United States v. Wallace*.[64] Wallace had two prior convictions, a 1970 heroin trafficking conviction, and a 1977 perjury conviction.[65] She had been paroled on the 1970 conviction,[66] although the Ninth Circuit decision does not give the date of her release. The 1977 perjury conviction, however, triggered a violation of her parole on the drug charge.[67] As a result, she was reconfined from 1977 until 1980.[68] In 1986, she went on trial again for heroin trafficking.[69] Wallace unsuccessfully moved the trial court to prohibit the prosecution from using her 1970 conviction for impeachment purposes.[70] On appeal, the Ninth Circuit ruled that the heroin conviction was inadmissible. Analogizing to *McClintock*, the *Wallace* court stated that perjury was not "substantively related or parallel to" the drug conviction.[71] Accordingly, the reconfinement for the parole

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[58] *Id.* at 1288.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* at 1289.

[63] *Id.*

[64] 848 F.2d 1464 (9th Cir. 1988).

[65] *Id.* at 1472.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1473 n.14.

[69] The Ninth Circuit does not give Wallace's precise trial date, but it appears that her trial began in 1986. She was indicted in January of 1986. *Id.* at 1467. In addition, the court noted that, at the time of the trial court's evidentiary ruling, six years had passed since her 1980 release from reconfinement, *id.* at 1472 n.14, which would place her trial sometime during 1986.

[70] *Id.* at 1472.

[71] *Id.*

violation was not confinement on the substance of the 1970 heroin conviction, thus placing the 1970 conviction outside of the ten year time limit.[72]

The technical/substantive approach is unworkable in theory and practice. In theory, the method is overinclusive. Under *McClintock*[73] and *Wallace*,[74] a VOCR is "substantive" if it parallels the underlying offense. Thus, if a witness commits a second crime that tracks an earlier conviction and is incarcerated both for the VOCR on the first crime *and* for the initial conviction on the second crime, both convictions become admissible under FRE 609. A witness who commits a second, unrelated crime, however, can only be impeached with the more recent conviction, assuming the ten year time period had expired on the earlier conviction. Thus, the technical/substantive distinction permits admission of an expanded, or overinclusive, criminal history in the former situation. This, in fact, is the very situation Congress rejected. As the history of the rule shows, Congress rejected the version of FRE 609(b) which allowed admission of all the witness' criminal history if less than ten years had elapsed from the release from confinement on the most *recent* conviction.[75] Thus, the technical/substantive approach permits admission of evidence Congress sought to exclude.

In practice, classification of VOCRs as "technical" or "substantive" is unworkable because courts cannot classify offenses uniformly. The definitions of "technical" and "substantive" that have been proposed by various courts and commentators are sufficiently different to illustrate the difficulty courts will have consistently distinguishing between the two. *McClintock* and *Wallace* define a "substantive" violation as one that "parallels or is closely related to" the underlying offense.[76] Thus, by implication, anything else, from failure to report to a parole officer to commission of a different crime, would constitute only a "technical" VOCR. One court, which ultimately rejected the reasoning in *Wallace*, offered the following nonexhaustive list of "technical" violations: "consumption of alcohol, leaving the county without a parole officer's permission, changing address without notifying the parole office, failure to participate in psychiatric

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[72] *Id.* at 1472-73. The appellate court also said that the trial judge abused his discretion under FRE 609(a) in admitting the prior heroin conviction. *Id.* at 1473. Because Wallace was being prosecuted for heroin dealing, her prior heroin conviction was unduly prejudicial, particularly when the perjury conviction was available to impeach her honesty. *Id.* Wallace conceded that the perjury conviction was automatically admissible because it was a conviction for a crime of dishonesty that was less than ten years old. *Id.* at 1472 n.11; *see* FED. R. EVID. 609(a)(2).

[73] 748 F.2d at 1288.

[74] 848 F.2d at 1472.

[75] *Rules of Evidence for United States Courts and Magistrates [Supreme Court Draft]*, 56 F.R.D. 183, 269-70 (1972); *see supra* text accompanying notes 27-30.

[76] *McClintock*, 748 F.2d at 1288; *Wallace*, 848 F.2d at 1472.

therapy, or failure to pay fines and costs. . . . "[77] Under this definition, presumably commission of any other crime would be a "substantive" violation, although this is not certain because the court specifically declined to state conclusively all types of conduct that would constitute "technical" violations.[78] One commentator offers the following definition of the terms "substantive" and "technical" that combines aspects of the definitions noted above:

> A substantive violation occurs where the witness engages in conduct related to the crime for which he was convicted. A technical violation occurs where the witness engages in unrelated conduct, such as committing an entirely different crime, leaving the jurisdiction, or failing to report to the probation or parole officer.[79]

Courts are likely to have difficulty determining what constitutes a technical or substantive violation for purposes of FRE 609. Theoretically, it is difficult to understand why commission of another crime is merely a "technical" violation of the conditions of release. Intuitively, it seems that a "technical" violation that is serious enough to warrant incarceration could be as relevant to the veracity of the witness as some "substantive" violations. Moreover, courts are likely to reach inconsistent decisions concerning the types of conduct that constitute "technical" and "substantive" violations. Even if decisions within a given jurisdiction are consistent, various jurisdictions are likely to have different views concerning the types of conduct that fall into each category. If different jurisdictions have divergent definitions of technical and substantive violations, it is unclear which jurisdiction's definition should control: the jurisdiction in which the VOCR occurred, or the jurisdiction in which the current litigation is proceeding. Resolving these questions may divert judicial resources from resolution of the underlying case and create confusion among courts and litigants.

Moreover, even if the courts could agree on the definitions of technical and substantive violations, the practical difficulties inherent in determining the precise nature of a particular violation make the distinction unworkable. As the Washington Court of Appeals recognized when it rejected the technical/substantive approach, each time a court is called upon to decide whether a VOCR is technical or substantive, "it would be necessary to get a transcript of the hearing before either the parole board or the court to find

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[77] Commonwealth v. Jackson, 585 A.2d 1000, 1003 n.* (Pa. 1991); *see also* MUELLER & KIRKPATRICK, *supra* note 32, § 284 (advocating substantive/technical distinction as "commendably simple and at least realistic" and defining "technical" violation as including conduct "such as failure to report or brief absence from the jurisdiction for an unexcused but apparently innocent purpose.").

[78] *Jackson*, 585 A.2d at 1003 n.*.

[79] WRIGHT & GOLD, *supra* note 25, § 6136. Wright & Gold also reject the technical/substantive distinction as an "unduly narrow reading" of FRE 609(b). *Id.*

out the exact basis of the revocation."[80] A potentially impeaching conviction can come from any one of the disparate state criminal justice systems across the United States. A federal court in Idaho may be unable to discern the treatment of a particular VOCR by the state courts of Maine. Thus, the practical difficulties presented by the technical/substantive approach indicate that it further confuses the question of admissibility of prior convictions, rather than simplifying it.

The few state decisions addressing this issue have rejected the technical/substantive approach for precisely these reasons.[81] Of course, the Federal Rules of Evidence do not apply in state courts, but they have influenced many state evidence codes and common law evidentiary rulings. In those states with rules similar to the Federal Rules of Evidence, the courts' discussions are instructive. In an attempt to avoid the difficulties inherent in the technical/substantive distinction, both the Washington Court of Appeals[82] and the Pennsylvania Supreme Court[83] have adopted a "bright-line" approach. The Washington court chose the bright-line rule of restarting the time clock after each release from VOCR confinement to "expedite trials and reduce the chance for error."[84] The Pennsylvania Supreme Court's view is that the probative life of a dishonest act is ten uninterrupted years of freedom.[85] The ten year period recommences after each confinement because incarceration eliminates the ability to demonstrate rehabilitation in society.[86] Both of these courts declined to apply the *McClintock/Wallace* analysis to look behind the violation to determine if the VOCR conduct paralleled the original crime.[87]

Certainly, time spent in incarceration does not demonstrate rehabilitation or entitle the witness to repose, but the bright-line approach is not the only way resolve the problem. In fact, the bright-line rule can lead to unnecessarily harsh results in some situations. For example, consider the case of an individual convicted of perjury who completes a period of law abiding conduct upon release from confinement, but who is incarcerated on a VOCR for committing a misdemeanor not involving dishonesty or false statements. Under the bright-line rule, the date of release from the confinement for the VOCR starts the ten year time period over. Perjury is a crime of false statement under FRE 609(a)(2), which provides that the evidence

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[80] State v. O'Dell, 854 P.2d 1096, 1099 (Wash. Ct. App. 1993), *cert. denied.*, 114 S. Ct. 1316 (1994).

[81] *See id.*; *see also infra* text accompanying notes 82-87.

[82] *O'Dell*, 854 P.2d 1096.

[83] Commonwealth v. Jackson, 585 A.2d 1001 (Pa. 1991).

[84] *O'Dell*, 854 P.2d at 1099.

[85] *Jackson*, 585 A.2d at 1003.

[86] *Id.*

[87] *Id.* n.*; *O'Dell*, 854 P.2d at 1099.

"shall be" admitted without regard to the balance between its probative value and prejudicial impact.[88] Thus, a court would have no discretion to exclude the evidence if the individual were called to testify within ten years of release from the VOCR confinement. This is the case even though the misdemeanor conviction would not itself be admissible under FRE 609 and has no bearing on veracity.

Technically, a witness could comply with the terms of release for a full ten years before being confined for a VOCR. In that case, the bright-line rule would require ten additional years of good conduct before granting repose because the time period would start over upon release from the VOCR confinement, effectively doubling the probative life of the conviction from the ten year period defined by Congress. This would be the case regardless of whether the VOCR had any bearing on veracity.[89]

In either of these situations, the bright-line rule is at odds with the policies underlying the rule as written. Because the bright-line rule starts the full ten year period over whenever a witness is incarcerated for a VOCR, a witness cannot be assured of repose until completing the entire term of conditional release. As noted above, however, Congress expressly rejected this approach when it removed the language measuring the time period from the later of conviction "or the expiration of his parole, probation or sentence . . . ."[90]

Moreover, like the technical/substantive approach, the bright-line rule is overinclusive because, in effect, it permits admission of the witness' entire criminal history if a conviction for a subsequent crime also triggers a VOCR on an older conviction. Rather than limiting impeachment to the more recent conviction, the bright-line rule permits admission of the older conviction by virtue of the fact that the time clock on the older conviction starts over upon release from confinement for the VOCR. Again, this accomplishes a result Congress explicitly sought to avoid when it rejected the Justice Department's proposal that all convictions be admissible until

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[88] FED. R. EVID. 609(a)(2). It should be noted that in Pennsylvania a witness may *only* be impeached with prior convictions for crimes of dishonesty. *See, e.g.*, Commonwealth v. Kilgore, 650 A.2d 462 (Pa. Super. Ct. 1994).

[89] This latter result may be inconsistent with one of the justifications offered by the Pennsylvania Supreme Court in adopting the bright-line rule—that a conviction retains its probative value until completion of 10 uninterrupted years of good behavior. *Jackson*, 585 A.2d at 1003. If 10 consecutive years of law abiding conduct entitles a witness to repose, then the conviction in such a situation should not be admissible in the absence of special circumstances because the witness has completed the requirements for repose. Yet the result of the bright-line rule is to start the clock over without regard for the period of law abiding conduct. As a consequence, the bright-line rule is potentially inconsistent with its proffered justification.

[90] *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 296 (1969); *Rules of Evidence for United States Courts and Magistrates [Supreme Court Draft]*, 56 F.R.D. 183, 269-70 (1972).

ten years have elapsed since the most recent conviction.[91]

Because FRE 609 provides no mechanism for measuring the ten year time period when a witness is confined for a VOCR, courts and commentators have been forced to adopt their own methods of calculating the time period under those circumstances. The technical/substantive approach recognizes that some VOCRs should affect the witness' repose from impeachment with prior conviction evidence, but that others are too minor to merit erasing any prior period of law abiding conduct. In attempting to take into account the individual circumstances of each situation, however, the technical/substantive approach further muddies the water because distinctions among the types of VOCRs become unworkable and inconsistent in practice. The bright-line rule, by contrast, sacrifices the equities of individual situations for the ease of applying a blanket rule. This can lead to unnecessarily harsh results. In addition, both of these approaches can be overinclusive, permitting admission of evidence Congress sought to exclude when it adopted the ten year time limit. In the next section, this article proposes an alternative solution that offers both consistency through ease of application and faithfulness to Congressional purpose—the statute of limitations model.

III. THE STATUTE OF LIMITATIONS MODEL

As a solution to the problems posed by the methods adopted by the courts and commentators, courts should treat the ten year time period as a statute of limitations beyond which prior conviction evidence cannot be admitted unless its probative value substantially outweighs its prejudicial impact. When a witness violates *any* term of conditional release, whether substantive or technical, and is incarcerated as a result, the "statute of limitations" on prior conviction evidence should be tolled for the period of incarceration, but the time clock should not start over again. Treating the time period as a statute of limitations finds support in both case law and commentary on the rule. In addition, it avoids the pitfalls of both the technical/substantive and bright-line approaches.

Under the statute of limitations approach, the time period calculations would be fairly simple: the starting date for the calculation would be the later of the date of conviction or release from any period of confinement initially imposed for the conviction. If less than ten years have elapsed from that date, the FRE 609(b) "statute of limitations" would not have run on the conviction, and admission of the evidence would be governed by FRE 609(a). This would be the case regardless of any period(s) of confinement

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[91] *See id*; *see also supra* text accompanying notes 25-30.

for VOCRs, and a court would have no occasion to consider the impact of any VOCR confinement in measuring the time period. If, however, more than ten years have elapsed since conviction or release from initial confinement, the court would need to consider whether the running of the "statute of limitations" had been tolled by any period(s) of incarceration for VOCRs. If more than ten years have passed from the date of the initial conviction or release from confinement, less any period(s) of confinement for VOCRs, FRE 609(a) would govern admission of the evidence. If the date were still more than ten years ago, even after allowing for any tolling period(s), then FRE 609(b) would govern admission of the evidence. This formula would apply regardless of the nature of the violation. If the violation also constituted a second crime, the formula would also have to be applied to that crime to determine independently if the second crime is admissible.

Date of conviction or release - from initial confinement	any period(s) of confinement for VOCR	> 10 years	= 609(b)
Date of conviction or release - from initial confinement	any period(s) of confinement for VOCR	< 10 years	= 609(a)

Case law supports the statute of limitations model. In *United States v. Mullins*,[92] the Fifth Circuit tolled the ten year time period while the defendant was a fugitive.[93] The defendant had been convicted of armed robbery and released from confinement in 1966. In 1974, he was indicted for kidnapping and the use of a firearm in the commission of a felony.[94] Rather than stand trial, he fled and remained a fugitive until December of 1976. At his trial, which began in February of 1977, evidence of the prior armed robbery conviction was introduced to impeach the defendant's testimony.[95] The defendant was convicted. On appeal, he argued that the district court erred in admitting his prior conviction because the ten year time limit on the conviction expired in 1976.[96] The court summarily rejected the defendant's argument, holding that the defendant's flight from justice tolled the ten year time period under FRE 609.[97] In reaching this decision, the Fifth Circuit drew an analogy between the FRE 609 time period and 18 U.S.C. § 3290, which provides that "[n]o statute of limita-

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[92] *Id.*

[93] United States v. Mullins, 562 F.2d 999 (5th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978).

[94] *Id.* at 1000.

[95] *Id.*

[96] *Id.*

[97] *Id.*

tions shall extend to any person fleeing from justice."[98] The court held that this statute reflected "a Congressional determination that defendants should not gain advantages of statutory limitations by means of flight."[99] Thus, the *Mullins* court expressly viewed the FRE 609 time period as a "statute of limitations" for admission of prior conviction evidence.

One Fourth Circuit decision also provides support for the statute of limitations approach.[100] In *United States v. Gray*, the defendant appealed his conviction for extortion and tax fraud, arguing, *inter alia*, that his prior bank robbery conviction should not have been admitted to impeach him.[101] Gray had been convicted of bank robbery approximately seventeen years earlier and had been paroled on the conviction twelve years before his extortion and tax fraud trial.[102] Nevertheless, Gray's parole for the bank robbery conviction was revoked for unspecified parole violations three years after he was released, and he remained incarcerated on the charge at the time of his extortion and tax fraud trial.[103] Thus, although the conviction was more than ten years old, Gray had not completed ten years of law abiding conduct under any method of calculating the time period. The Fourth Circuit ruled that the evidence was properly admitted, reasoning that ten year time limit in FRE 609(b) simply did not apply under those circumstances, and noting alternatively that the probative value of the conviction outweighed its prejudicial effect.[104] Although the Fourth Circuit referred to *United States v. McClintock*, in reality, the *Gray* court relied on *McClintock* only for its basic holding that recommitment for a parole violation represents incarceration on the original offense.[105] In fact, the result in *Gray* was to toll the ten year time period while Gray was incarcerated for the parole violation.[106]

Commentators also support the statute of limitations approach.[107] When a witness commits a "technical" VOCR, Mueller & Kirkpatrick would measure the time period as follows: "the beginning point of the measuring period should not be moved forward to a point any later than the date when the witness would have been released if he had been confined immediately and served his full sentence."[108] They go on to state that extending the probative value of a conviction based on a technical violation

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[98] *Id.*
[99] *Id.*
[100] United States v. Gray, 852 F.2d 136 (4th Cir. 1988).
[101] *Id.* at 139.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] WRIGHT & GOLD, *supra* note 25, § 6136 n.11 (treating *Gray* as a tolling case).
[107] MUELLER & KIRKPATRICK, *supra* note 32, § 284.
[108] *Id.*

"unrelated to the character traits indicated by the crime seems contrary to the purpose of the measuring period which is to provide a rule of thumb to weed out convictions whose age has drained away probative worth on veracity."[109] The effect of this approach would be the same as that under the statute of limitations model: the "impeaching life"[110] of the conviction would be extended by the length of time the witness spent in confinement for the VOCR. Whether this period is deducted from the amount of time that has elapsed since conviction or release from confinement, or whether the beginning point of the measuring period is moved forward, does not affect the ultimate result. The problem, of course, with this proposal is that it continues to rely on the technical/substantive distinction, which, as discussed above, is a problematic model.[111]

Applying a statute of limitations approach to *all* VOCRs, however, achieves more desirable results than either the technical/substantive or bright-line approaches. The statute of limitations model avoids the definitional problems and practical difficulties inherent in the technical/substantive approach by treating all VOCRs identically. Thus, it has the advantage of ease of application. Despite its uniform application, the statute of limitations model avoids the harsh results that occasionally occur under the bright-line rule. Moreover, the statute of limitations model avoids the overinclusiveness that can occur under either of the alternatives. In effect, it shifts the focus of the discretionary inquiry away from the measurement of the time period, placing it where it more appropriately belongs—in balancing the prejudicial impact and probative value of the evidence as required by FRE 609(b). These advantages can be demonstrated by applying the statute of limitations rule to cases and hypothetical situations under FRE 609.[112]

For example, in *McClintock*, the witness was convicted of mail fraud in December of 1967, but his probation was revoked in January of 1972.[113] He was paroled on the VOCR confinement in February of 1973,

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[109] *Id.* In fact, they suggest, confinement for technical VOCRs should be completely ignored for purposes of FRE 609. *Id.* It seems unlikely, however, that a witness will be incarcerated for a VOCR that truly is too inconsequential to be noticed at all. Moreover, if one assumes that less serious violations are likely to lead to shorter periods of VOCR incarceration, and that more serious ones to longer periods, the "impeaching life" of the conviction under the statute of limitations model will only be extended for a period of time that reflects the seriousness of the violation. In other words, minor violations that nonetheless warrant incarceration are likely to result in less extension of the 10 year time period than serious violations warranting longer periods of incarceration.

[110] *Id.*

[111] *See supra* text accompanying notes 73-80; *see also* WRIGHT & GOLD, *supra* note 25, § 6136 n.15 (rejecting this proposal because the technical/substantive distinction is unworkable).

[112] State v. O'Dell, 854 P.2d 1096 (Wash. Ct. App. 1993), *cert. denied*, 114 S. Ct. 1316 (1994), does not provide the date of release on the VOCR. Thus, it is impossible to calculate the 10 year period using the statute of limitations approach for that case.

[113] 748 F.2d 1278, 1287 (9th Cir. 1984), *cert. denied*, 474 U.S. 822 (1985).

and he was called as a witness in January of 1982.[114] Applying the statute of limitations test, ten years from the release from original confinement would have ended in December of 1977, but expiration of the time period would be tolled for thirteen months, until January of 1979. Thus, the conviction would not be presumptively admissible under FRE 609(a)(2), and evidence of it would only come in if FRE 609(b) were satisfied. As a result, the court could not have admitted the evidence unless it found that the probative value of the mail fraud conviction substantially outweighed the prejudicial impact.[115]

This result is more consistent with the policy behind the rule than *McClintock*'s strained interpretation of the confinement for a probation violation as relating back to the original crime only because the "violation involved a substantive probation condition and closely parallel[ed] the initial [criminal] activity."[116] The court went to great pains to stress that its "narrow" holding was limited to the facts of that case, and that it did not intend to state a converse rule that technical violations do not relate back to the original conviction.[117] A more principled way to limit the case to its facts is to say that admission of the conviction is governed by FRE 609(b) because, although it was more than ten years old, the unusual circumstances of the case dictated that it be admitted.[118]

The statute of limitations approach also leads to more principled results when applied to *Wallace*.[119] In that case, the witness was convicted on a drug charge in 1970 and on a perjury charge in 1977.[120] Because of the perjury conviction, her parole on the drug charge was revoked, and she was imprisoned for both perjury and VOCR.[121] The witness was released from reconfinement in 1980 and was on trial again in 1986.[122] The *Wallace* court held that the 1977 incarceration did not relate back to the 1970 conviction because the perjury conviction was unrelated to the drug

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[114] *Id.* at 1287-88.

[115] *See* FED. R. EVID. 609(b).

[116] 748 F.2d at 1288.

[117] *Id.* at 1288-89.

[118] One subtext that may underlie *McClintock* is the appellate court's reluctance to order a new trial based on an erroneous evidentiary ruling. Because the trial court ruled that the conviction was less than 10 years old, and therefore automatically admissible under FRE 609(a)(2) as a crime of dishonesty, it failed to make the requisite findings necessary to uphold admission under FRE 609(b). *Id.* at 1288. Thus, the appellate court had the choice of changing the calculation of the time period to justify affirming the trial court, or holding that the evidence was subject to FRE 609(b) balancing and possibly having to reverse the conviction. This provides yet another justification in favor of a uniform rule for calculating the time period. If trial courts have a uniform standard for calculating the age of a conviction, they can make the requisite findings to support admission or exclusion of the evidence and avoid situations in which appellate courts make strained rulings to avoid having to order new trials.

[119] 848 F.2d 1464 (9th Cir. 1988).

[120] *Id.* at 1472.

[121] *Id.*

[122] *Id.* at 1473 n.14; *see supra* note 69.

conviction, thus taking the 1970 conviction outside the ten year period.[123]

Under the statute of limitations approach, a court would achieve the same result without having to make the technical/substantive distinction. The witness completed approximately thirteen years of law abiding conduct between 1970 and 1986, after allowing for three years of tolling during the period of incarceration from 1977 until 1980. Thus, the drug conviction would be more than ten years old and would be inadmissible except under FRE 609(b), which is exactly the result the *Wallace* court reached. The perjury conviction, by contrast, is a separate conviction, and the ten year statute of limitations would not begin to run on it until the witness was released from confinement in 1980. As a result, the perjury conviction would have been automatically admissible under FRE 609(a)(2). This result is more consistent with the result Congress sought to achieve in rejecting the proposal that all convictions come in unless ten years have passed since the most recent conviction. It prevents admission of the entire criminal history, limiting impeachment to the one conviction falling within the ten year period, given that no exceptional circumstances justified admission of the older conviction.

One commentator, while rejecting the technical/substantive distinction, criticized the inconsistent results that can occur when courts undertake the balancing inquiry under FRE 609(b).[124] According to Wright & Gold, the intent of FRE 609(b) was to prevent admission of convictions more than ten years old except in very rare cases.[125] Thus, Wright & Gold assert, whenever a court questions whether to introduce an old conviction, it should not admit the evidence.[126]

Wright & Gold's rule, however, does not constitute a valid exercise of discretion, but rather, is a failure to exercise discretion altogether. In fact, the legislative history of FRE 609(b) does not clearly support Wright & Gold's conclusion concerning the circumstances in which older convictions should be admitted.[127] Moreover, an approach that permits discretion both in calculating the time period *and* in weighing the probative value and prejudicial impact of the evidence merely increases the confusion surrounding application of the rule by providing two opportunities for unjustified and inconsistent results.[128] Therefore, uniform application of the statute of

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[123] *Id.* at 1472-73.

[124] WRIGHT & GOLD, *supra* note 25, § 6136.

[125] *Id.*

[126] *Id.*

[127] *See supra* text accompanying note 33 (Committee's meaning in saying that older convictions "will be admitted very rarely and only in exceptional circumstances" is unclear).

[128] *See, e.g.*, United States v. McClintock, 748 F.2d 1278, 1289 (9th Cir. 1984) (permitting the district court to consider the reasons underlying a VOCR not only in the probative value/prejudice inquiry, but also in the calculation of the time period under FRE 609), *cert. denied*, 474 U.S. 822 (1985).

limitations approach in calculating the time period should create more consistent results, even when it places a conviction outside the ten year period.

As compared with the bright-line rule, the statute of limitations model produces more principled results. For example, in *Commonwealth v. Jackson*,[129] the Pennsylvania case adopting the bright-line rule, the witness had been convicted of robbery in 1973, was paroled on June 30, 1976, was reconfined for fifteen months for violating parole, and was released from the second confinement in 1984.[130] The witness was on trial again in 1988.[131] Thus, under the bright-line approach, only four years had passed since the release from reconfinement, rendering the release date well within ten years.[132] Using the statute of limitations approach, ten years from the parole date would be June 30, 1986, but expiration of the statute would be tolled for fifteen months for the VOCR, until approximately September 30, 1987. The evidence would not have been admissible in the 1988 trial, therefore, unless the specific facts warranted admission under Pennsylvania's equivalent of FRE 609(b).[133]

At this point, the Pennsylvania court could have applied the same considerations to balance the probative value and prejudicial impact of the evidence that convinced it to adopt the bright-line approach with respect to the time period. Thus, the court could have considered the fact that the VOCR on the robbery conviction was for theft,[134] which might be a factor militating toward admission of the older conviction. Moreover, as the court noted, the original robbery conviction would have been admissible for impeachment if the witness had served his entire ten year sentence.[135] Thus, the court could have admitted the evidence to prevent the witness from enjoying "a legally sheltered position due to the fact that he took advantage of society's leniency by accepting a parole in 1976 when he used the freedom obtained on parole to commit another crime."[136] These considerations are more appropriately raised in the probative value/prejudice inquiry, rather than in the calculation of the time period.

The statute of limitations approach also avoids the potentially harsh results of the bright-line rule. The probative value of the conviction would be extended for the amount of time the witness was incarcerated for the

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[129] 585 A.2d 1001 (Pa. 1991).

[130] *Id.* at 1001.

[131] *Id.*

[132] *Id.*

[133] *See id.* at 1002 (If more than 10 years have elapsed, the court cannot admit the evidence unless "the value of the evidence substantially outweighs its prejudicial effect.") (citing Commonwealth v. Randall, 528 A.2d 1326, 1329 (Pa. 1987)).

[134] 585 A.2d at 1001.

[135] *Id.* at 1003.

[136] *Id.*

VOCR, but the ten year time period would not start over. This would keep the witness from losing the benefit of the period of law abiding conduct but still take into account the fact that the witness cannot demonstrate rehabilitation during any period of confinement for the VOCR.

When the conviction is for a crime of dishonesty, the statute of limitations rule also allows courts to retain greater discretion to consider the potential prejudice and probative value associated with the evidence. Under FRE 609(a), courts lack the discretion to exclude evidence of crimes of dishonesty that are less than ten years old because such convictions are automatically admissible. Thus, as noted earlier,[137] the bright-line rule could remove a court's discretion to exclude an older conviction for a crime of dishonesty if the witness were incarcerated on an unrelated VOCR within ten years of the trial date. By extending the probative life of the conviction only for the period of VOCR confinement, rather than for another full, ten year period, the statute of limitations approach allows the trial court greater discretion to weigh admission of the evidence. Of course, even when the statute of limitations model places a conviction outside the ten year period, the court would still have discretion to admit the evidence if it determined that the specific facts of the situation warranted admission.[138] Thus, the statute of limitations approach permits admission of the evidence when appropriate, but allows trial courts to retain more discretion in determining when older convictions for crimes of dishonesty should be admitted.

Under the statute of limitations approach, two difficult questions arise: how to calculate the time period when the witness has completed ten or more years of law abiding conduct before being incarcerated for a VOCR; and how to measure the time period when the witness is still incarcerated for a VOCR at the time of trial. When the witness has completed ten or more years of law abiding conduct before being incarcerated for a VOCR, the statute of limitations approach deems the conviction more than ten years old because the statute would have run out before the VOCR confinement. Thus, the conviction would remain presumptively inadmissible unless the probative value substantially outweighs the prejudicial impact.

It could be argued that a witness who waits until the passage of more than ten years before violating the terms of conditional release is no more entitled to repose than one who has engaged in such conduct before the passage of ten years. To the extent this result presents concerns, however, it is better addressed in the prejudice/probative value inquiry than in the measurement of the time period. By automatically treating a conviction in that situation as one that is more than ten years old, the statute of limitations rule operates as the reverse of the bright-line rule because the bright-

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[137] *See supra* text accompanying notes 88-89.

[138] FED. R. EVID. 609(b).

line rule would automatically treat such a conviction as less than ten years old. As a result, the statute of limitations approach is no more arbitrary than the bright-line rule. Yet where the bright-line rule can operate to eliminate a court's discretion to exclude older convictions for crimes of dishonesty by restarting the clock upon release from VOCR confinement, the statute of limitations approach allows a court to retain discretion to admit the evidence under FRE 609(b) even when the VOCR confinement comes after the expiration of the statute. Moreover, if the confinement for a VOCR is occasioned by conviction for a second crime that otherwise is admissible under FRE 609, the second crime may fall within the ten year period and be admissible for impeachment even when the older crime is not.

When the witness is still incarcerated on the VOCR at the time of the trial, two results may occur.[139] In a case in which more than ten years had passed before the VOCR confinement, the statute of limitations approach would, as noted above, automatically place the conviction in the FRE 609(b) category, with the fact of current incarceration certainly being one special circumstance the court should consider in determining whether the probative value of the evidence substantially outweighs its prejudicial impact. In a case in which less than ten years had passed before the VOCR confinement, the conviction would remain less than ten years old during the confinement because the confinement tolls the statute. Thus, in the latter situation, the confinement would automatically fall within the ten year period and be admissible according to FRE 609(a).

Overall, the statute of limitations approach leads to superior results over both the technical/substantive and bright-line rules. It is more faithful to the policy considerations of granting repose from impeachment with prior conviction evidence to individuals who conform their conduct to the law for ten years. It also provides courts with a uniform method of applying the rule while maintaining their discretion to exclude or admit evidence based on its prejudicial impact or probative value, rather than attempting to achieve the same result through inconsistent methods of calculating the time period.

CONCLUSION

In adopting FRE 609(b), Congress did not establish a method for calculating the time limit for admission of prior conviction evidence. Trial courts, faced with motions *in limine* often filed only days before trial, must decide in short order whether to admit evidence without guidance from the

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[139] *See, e.g.*, United States v. Gray, 852 F.2d 136 (4th Cir. 1988); *see also supra* text accompanying notes 100-106 (discussing *Gray*).

rule or the Advisory Committee Notes. The appellate courts have not effectively addressed this question with the use of the technical/substantive and bright-line approaches.

The statute of limitations model achieves superior results for litigants, trial courts, and appellate tribunals. It considers the fact of confinement for VOCR, but does so in a way that both preserves the trial court's discretion and provides the trial court with a simple, easily applied test that avoids inconsistent results. In this way, prior conviction evidence can be used in an equitable, consistent manner without permitting those who have violated the law to avoid impeachment on the stand when appropriate. The ten year period "has no magical properties,"[140] and no magical formula is required to calculate the time. A workable formula, however, is a necessity. The statute of limitations model provides just such a formula.

[140] MUELLER & KIRKPATRICK, *supra* note 32, § 284.