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It's About Time: The Need for a Uniform Approach to Using a Prior Conviction to Impact a Witness.

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IT'S ABOUT TIME: THE NEED FOR A UNIFORM APPROACH TO USING A PRIOR CONVICTION TO IMPEACH A WITNESS

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This article is dedicated in loving memory of my brother, Lieutenant Colonel Daniel E. Holland, U.S. Army, who was killed in action in Iraq on May 18, 2006, while serving our Nation, and in gratitude to my wife, Carol A. Holland, for her constant encouragement.

I. INTRODUCTION

In a broad sense, impeachment is any attack upon the credibility of a witness.[1] There are a number of ways that a party may attempt to show that the witness is unworthy of belief. To demonstrate the witness's untruthfulness concerning the particular matter in controversy or toward a particular person, the opponent may introduce evidence of the witness's bias or of some specific motive to lie in the matter,[2] or may offer proof of prior inconsistent statements by the witness.[3] Sometimes, the attacker presents the opinion of another person that the witness is untruthful or shows that the witness has a poor reputation for truthfulness among those who know the witness well.[4]

Conspicuously absent from this list of permitted avenues of attack on the credibility of a witness is proof that the witness committed an act reflecting untruthfulness on some past occasion. In general, the law does not permit the opponent of a witness to introduce "specific acts of conduct" of a witness in an effort to show lack of truthfulness as an impeachment technique.[5] However, the law of evidence provides, as an important exception, that if the witness's past misconduct has resulted in a criminal conviction, then that conviction (provided it meets some additional criteria) may be used as circumstantial evidence of the witness's

1. Ransom v. State, 789 S.W.2d 572, 587 (Tex. Crim. App. 1989). To impeach is "to discredit the veracity," or truthfulness, of a witness. BLACK'S LAW DICTIONARY 768 (8th ed. 1999).

2. *See* TEX. R. EVID. 613(b) (outlining the means for examining a witness for bias); Carpenter v. State, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998) (explaining that the exposure of a witness's motivation in testifying is an important purpose of cross-examination); Gonzales v. State, 929 S.W.2d 546, 549 (Tex. App.—Austin 1996, pet. ref'd) (discussing the great latitude the Rules of Evidence allow "to prove a witness's bias"). For example, evidence that a prosecution witness has a deferred adjudication, or pending criminal charges at some other stage short of final conviction, may be admissible as evidence of the witness's "bias or [the] interest of the witness in helping the State." Maxwell v. State, 48 S.W.3d 196, 199 (Tex. Crim. App. 2001) (citing Davis v. Alaska, 415 U.S. 308, 316–17 (1974)).

3. *See* Michael v. State, 235 S.W.3d 723, 726–27 (Tex. Crim. App. 2007) (relating how a witness's credibility may be impeached by her prior inconsistent statements).

4. *See* TEX. R. EVID. 608(a) (permitting a witness to offer opinion and reputation in the community as evidence of another's veracity).

5. *See* TEX. R. EVID. 608(b) (prohibiting cross-examination about as well as the use of extrinsic evidence of a witness's specific instances of conduct to impeach the witness's credibility).

untruthful character.[6] Texas Rule of Evidence 609 regulates this mode of impeachment.[7]

This article focuses on the several ways in which sub-principles of Texas Rule of Evidence 609 depend on aspects of time, and details the inconsistent interpretation of these sub-principles by the Texas judiciary. The goal of this article is to suggest how the Texas Court of Criminal Appeals should provide for uniformity of interpretation in regard to four different time-related issues that arise when evaluating the admissibility of a prior conviction as impeachment evidence.

Historically, the law has regarded the criminal record of a witness as important circumstantial evidence that the witness cannot be counted on to tell the truth while testifying, or, worded differently, that the witness is presently of untruthful character.[8] From a common sense perspective, we can appreciate the logical supposition that a person whose past behavior demonstrates inability or unwillingness to conform to the penal laws of society is less likely than the average law-abiding citizen to heed the legal admonition to "tell the truth, the whole truth, and nothing but the truth" when placed under oath to testify as a witness. When the witness's past criminal behavior has been judicially determined and recorded as a conviction, that gives it a special cachet and objectivity, distinct from, say, another person's opinion or recollection about the past misbehavior of the witness.

On the other hand, there are logical counters to the broad principle that a past crime shows a current disposition to lie. For example, the broad principle ignores human experience suggesting

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6. *See id.* (establishing an exception to the general prohibition against the use of extrinsic evidence of specific instances of conduct).

7. *See* TEX. R. EVID. 609 (setting standards for the admission of impeaching convictions).

8. *Cf., e.g.*, Gordon v. United States, 383 F.2d 936, 939–40 (D.C. Cir. 1967) (acknowledging the probative value of prior convictions for impeachment).

> [T]he legitimate purpose of impeachment . . . is, of course, not to show that the accused who takes the stand is a "bad" person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses. In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity.

Id. at 940; *see also* Brown v. United States, 370 F.2d 242, 244 (D.C. Cir. 1966) ("The reason for exposing the defendant's prior record is to attack his *character*, to call into question his reliability for truth-telling by showing his prior, relevant antisocial conduct.").

(1) that people may well change their behavior over time, and (2) that certain criminal offenses are substantially less indicative of a deceitful character than others. Texas Rule of Evidence 609, like its counterpart in the federal system,[9] represents the current attempt to reconcile those competing considerations.

Rule 609 is especially important because it regulates one of the most effective (and thus most frequently encountered) means of undermining the believability of an opposing[10] witness before the trier of fact. The frequent courtroom battles over how Rule 609 should be applied show that a trial judge's ruling to permit or to bar the use of a prior conviction as impeachment often has critical consequence for the parties.[11]

That admissibility of prior convictions is so frequently contested ought not to surprise us, since many of the characters who appear as witnesses in criminal trials already have criminal records. With

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9. *See* FED. R. EVID. 609 (establishing the federal rule for the use of prior convictions as impeachment evidence).

10. To be sure, a party may even impeach its own witness. TEX. R. EVID. 607 (allowing the party to impeach any witness); *see* Russeau v. State, 785 S.W.2d 387, 390 (Tex. Crim. App. 1990) (noting that Rule 607 does away with the common law rule of not permitting a party to impeach its own witness). However, for obvious reasons, this is an unusual move, and for simplicity, this article concentrates on the more common situation, where counsel for a party wishes to undercut the credibility of a witness for the opposing party.

11. *See* Hankins v. State, 180 S.W.3d 177, 179–81 (Tex. App.—Austin 2005, pet. ref'd) (stating that old convictions can have minimal probative value while having a greater potential for prejudice and therefore, should meet a more stringent test before they are admitted); Deleon v. State, 126 S.W.3d 210, 217 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd) (acknowledging that appellant's two prior murder convictions were prejudicial but did not violate his substantial rights because of other factors); Morris v. State, 67 S.W.3d 257, 264–65 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (noting that while a defendant should be able to testify free from being impeached with remote convictions, the need for the State to impeach him with that conviction escalates if he is the sole witness on his own behalf); Enriquez v. State, 56 S.W.3d 596, 601 (Tex. App.—Corpus Christi 2001, pet. ref'd) (emphasizing that, in order for evidence of prior convictions to be admissible for impeachment, the probative value of the evidence must be balanced against its prejudicial effect); Jackson v. State, 50 S.W.3d 579, 593 (Tex. App.—Fort Worth 2001, pet. ref'd) (determining that impeachment was important because the defendant, although not the only defense witness, was the only one who was present during the offense); White v. State, 21 S.W.3d 642, 646–47 (Tex. App.—Waco 2000, pet. ref'd) (holding that a jury instruction to consider only the impeachment value of a burglary undercut the prejudice such a prior conviction generated when the defendant was on trial for a similar offense); Brown v. State, 880 S.W.2d 249, 253–54 (Tex. App.—El Paso 1994, no pet.) (holding that the admitted conviction harmed an important right because of the similarity to the offense charged).

recidivism so commonplace in our society,[12] the defendant who testifies on his own behalf is frequently a witness with one or more prior convictions on his record.[13] His eyewitnesses (whether vouching for an alibi, describing how the defendant acted in self-defense, or offering good character evidence) are often people with checkered pasts of their own.[14] Likewise, the prosecution's eyewitnesses are often encumbered with skeletons in their own closets, especially if they are informants or accomplices who have turned against the defendant.[15] For anyone with criminal trial

12. *See* United States v. Crawford, 372 F.3d 1048, 1069 (9th Cir. 2004) (Trott, J., concurring) (citing statistics from a 1994 U.S. Department of Justice report indicating that "'approximately 67 percent of former inmates released from state prisons were charged with at least one "serious" new crime within three years of their release'" (quoting Ewing v. California, 538 U.S. 11, 26 (2003))).

13. *See, e.g.*, *Hankins*, 180 S.W.3d at 179 (involving prior conviction for felony manufacture and distribution of cannabis); Berry v. State, 179 S.W.3d 175, 177 (Tex. App.—Texarkana 2005, no pet.) (discussing prior conviction for assault with a deadly weapon); *Deleon*, 126 S.W.3d at 212 (involving prior convictions for two murders and a burglary); Dale v. State, 90 S.W.3d 826, 829 (Tex. App.—San Antonio 2002, pet. ref'd) (discussing prior assault and cocaine possession convictions); *Morris*, 67 S.W.3d at 263 n.6 (involving prior convictions for theft and burglary); *Enriquez*, 56 S.W.3d at 601 (introducing three prior offenses for impeachment); *Jackson*, 50 S.W.3d at 592 (discussing prior convictions for deadly conduct, theft, escape, and assault with bodily injury); *White*, 21 S.W.3d at 646–47 (involving prior similar conviction for burglary of a habitation); Yates v. State, 917 S.W.2d 915, 919–20 (Tex. App.—Corpus Christi 1996, pet. ref'd) (discussing prior convictions for felony and misdemeanor thefts); *Brown*, 880 S.W.2d at 251 (involving fifteen-year-old prior conviction); Baker v. State, 841 S.W.2d 542, 543 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (discussing eight prior convictions in defendant's pen packet).

14. *See, e.g.*, Lucas v. State, 791 S.W.2d 35, 51 (Tex. Crim. App. 1989) (en banc) (involving defense alibi witness with prior forgery convictions); McKnight v. State, 874 S.W.2d 745, 747 (Tex. App.—Fort Worth 1994, no pet.) (discussing defense witness who was a member of gang).

15. *See, e.g.*, Thompson v. State, No. 03-06-00077-CR, 2007 WL 1647830, at *3 (Tex. App.—Austin June 8, 2007, no pet.) (mem. op., not designated for publication) (analyzing appellant's argument that impeachment of State's witness was his main means of challenging the witness's testimony); Yanez v. State, 199 S.W.3d 293, 304 (Tex. App.—Corpus Christi 2006, pet. ref'd) (discussing appellant's complaint that he was not allowed to impeach the victim with prior offenses); Moore v. State, 143 S.W.3d 305, 312–13 (Tex. App.—Waco 2004, pet. ref'd) (analyzing the admissibility of complainant's theft and DWI convictions); Arroyo v. State, 123 S.W.3d 517, 519–20 (Tex. App.—San Antonio 2003, pet. ref'd) (discussing a complaining witness with an unadjudicated offense for impersonating a licensed vocational nurse); Arnold v. State, 36 S.W.3d 542, 546–57 (Tex. App.—Tyler 2000, pet. ref'd) (discussing a complaining witness with prior negligent homicide conviction); Kizart v. State, 811 S.W.2d 137, 140–41 (Tex. App.—Dallas 1991, no pet.) (affirming trial court's exclusion of complainant's prior convictions for sexual abuse of a child, theft, and passing worthless checks).

Other cases discuss the admission of impeaching convictions against accomplices, co-

experience, then, it is no surprise that one of the trial situations most frequently encountered by practitioners and trial judges is the attempt by one party to undercut an opposing witness through evidence of that witness's criminal past.

Moreover, this sort of impeachment is not confined to criminal trials; in fact, issues about admissibility of prior convictions of witnesses also arise with some frequency during civil trials.[16] One

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conspirators, or informants. *See, e.g.*, Cantu v. State, No. 04-05-00473-CR, 2006 WL 2545909, at *6 (Tex. App.—San Antonio Sept. 6, 2006, no pet.) (mem. op., not designated for publication) (discussing impeaching conviction used against accomplice); Walter v. State, 209 S.W.3d 722, 732 (Tex. App.—Texarkana 2006) (analyzing the use of prior convictions against informant), *rev'd on other grounds*, No. PD-1929-06, 2008 WL 4414536 (Tex. Crim. App. Oct. 1, 2008).

Additionally, there are cases analyzing other prosecution witnesses. *See, e.g.*, Delk v. State, 855 S.W.2d 700, 703–05 (Tex. Crim. App. 1993) (attempting to impeach State's witness); Morris v. State, 214 S.W.3d 159, 186–88 (Tex. App.—Beaumont 2007, pet. granted) (discussing a deceased witness whose statement was offered as prosecution evidence as an exception to hearsay); Woodall v. State, 77 S.W.3d 388, 394 (Tex. App.—Fort Worth 2002, pet. ref'd) (attempting to impeach State's only eyewitness).

16. *Ex rel.* G.C.F., No. 2-06-282-CV, 2007 WL 1018570, at *3–4 (Tex. App.—Fort Worth Apr. 5, 2007, no pet.) (mem. op., not designated for publication) (considering the impeachment of a father who testified in a hearing to terminate parental rights with his prior convictions for sexual assault on a minor); Oyster Creek Fin. Corp. v. Richwood Invs. II, Inc., 176 S.W.3d 307, 315–16 (Tex. App.—Houston [1st Dist.] 2004, pet. denied) (impeaching borrower with his prior conviction for bank fraud); U.S.A. Precision Machining Co. v. Marshall, 95 S.W.3d 407, 410 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (attempting impeachment of plaintiff-employee with murder conviction); Magoon v. Savage, No. 09-01-331-CV, 2002 WL 31627965, at *2 (Tex. App.—Beaumont Nov. 21, 2002, no pet.) (mem. op., not designated for publication) (impeaching plaintiff-prisoner with his aggravated robbery conviction in his lawsuit against prison guards for unlawful punishment); Ortiz v. Furr's Supermarkets, 26 S.W.3d 646, 655 (Tex. App.—El Paso 2000, no pet.) (attempting impeachment of plaintiff in personal injury action with his prior conviction for possession of marijuana); Engelman Irrigation Dist. v. Shields Bros., Inc., 960 S.W.2d 343, 354–55 (Tex. App.—Corpus Christi 1997, pet. denied) (concluding that trial court was correct to exclude evidence of appellee's prior conviction); Porter v. Nemir, 900 S.W.2d 376, 382 (Tex. App.—Austin 1995, no writ) (trying to impeach defendant-counselor with prior conviction for sexual abuse to a child, in negligence action brought by former patient and wife against counselor). Other jurisdictions have dealt with civil litigation involving Rule 609 issues. *See generally* Teree E. Foster, *Rule 609(a) in the Civil Context: A Recommendation for Reform*, 57 FORDHAM L. REV. 1 (1988) (arguing that Rule 609 should no longer be used in civil cases); David A. Sonenshein, *Circuit Roulette: The Use of Prior Convictions to Impeach Credibility in Civil Cases Under the Federal Rules of Evidence*, 57 GEO. WASH. L. REV. 279 (1988) (discussing the "substantial disagreement" that exists in the federal courts about how evidence of prior convictions may be used in civil cases); David B. Harrison, Annotation, *Use of Unrelated Misdemeanor Conviction (Other Than for Traffic Offense) to Impeach General Credibility of Witness in State Civil Case*, 97 A.L.R.3D 1150 (1980) (analyzing different jurisdictions' use of misdemeanor convictions as impeachment evidence).

civil litigator has suggested that:

> In a civil jury trial, few types of evidence are more potent than evidence that a witness committed a crime. . . . If the witness is a party or if one party's case rests upon the witness's testimony, evidence that the witness committed a crime may alter the outcome of the trial, even if the crime is an unrelated crime, committed years earlier.[17]

Part II of this article describes the basic structure of Rule 609 in terms of a set of fundamental evidentiary sub-rules that govern the use of prior convictions. After these largely settled sub-rules are outlined as necessary background, Part III of the article identifies four areas where the courts have not settled on a consistent interpretation of Rule 609, and proposes how the Texas Court of Criminal Appeals should answer each question.

Despite the frequency of appeals involving issues related to impeachment by prior convictions, Rule 609 has not inspired much scholarly analysis. This is surprising, since, as discussed in Part III, the language of Rule 609 leaves so many important issues to judicial interpretation, and the courts' interpretation has been characterized by such inconsistency across Texas. These four areas of non-uniform interpretation, curiously enough, all involve different aspects of how the passage of time since a prior conviction should affect its admissibility in a current trial. Although all four are related to the temporal dimension, each issue involves a different aspect of Rule 609, a surprisingly complex rule of evidence designed to accommodate a variety of competing policy considerations. This article proposes answers to these four distinct Rule 609 issues that will promote sound and uniform interpretation of the central evidentiary rule that governs admissibility of prior convictions in civil and criminal trials.

II. FUNDAMENTAL ASPECTS OF RULE 609

A. *Applicability of the Rule*

Rule 609 only regulates the use of convictions as evidence if the evidence is offered "[f]or the purpose of attacking the credibility

17. Quentin Brogdon, *Admissibility of Criminal Convictions in Civil Cases*, 61 TEX. B.J. 1112, 1112 (1998).

of a witness."[18] Since any other use of a conviction would, in the most general sense, also be an attempt to provide evidence documenting a prior specific incident of conduct, one might suppose that Rule 608(b) would serve as a residual bar to any non-609 use of a conviction.[19] However, as will be discussed shortly, Texas has clear precedent that, in some narrow situations, a witness's prior conviction may legitimately be used, wholly aside from Rule 609, for other more specialized attacks on credibility.

While it may seem self-evident, Rule 609 only applies when a party seeks to prove that the witness "has been convicted of a crime," not misconduct which has resulted only in an accusation, arrest, or indictment.[20] The proponent has a choice of several acceptable modes of proof.[21] However, the conviction must be final, in the sense that no appeal is pending;[22] a conviction already reversed on appeal is not a final conviction.[23] A deferred

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18. TEX. R. EVID. 609(a).

19. *See* TEX. R. EVID. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.").

20. *See* TEX. R. EVID. 609(a) (specifying admissibility of criminal convictions). Likewise, in Rule 609(b), the pertinent criterion is "[e]vidence of a conviction." For purposes of Rule 609, Texas courts have consistently held that the terms "convicted" and "conviction" do not apply to situations where only arrest or indictment resulted. *See* Carpenter v. State, 979 S.W.2d 633, 634 (Tex. Crim. App. 1998) (holding that evidence of pending federal charges was not admissible as impeachment evidence); *Cantu*, 2006 WL 2545909, at *4–6 ("[A] witness's credibility cannot be impeached with prior acts of misconduct unless the misconduct resulted in a final conviction."). For a felony offense or a crime of moral turpitude, see Veteto v. State, 8 S.W.3d 805, 815 (Tex. App.—Waco 2000, pet. ref'd), which holds that the trial court should not have allowed the State to ask appellant about prior accusations of sexual misconduct. *See also* Chaddock v. State, 203 S.W.3d 916, 923 (Tex. App.—Dallas 2006, no pet.) (distinguishing between evidence of the prior underlying act of misconduct, which is sometimes admissible under 404(b), and evidence of a prior deferred adjudication for the same conduct, which cannot be admitted under 609).

21. *See* TEX. R. EVID. 609(a) (allowing the conviction to be proved by asking the witness to acknowledge that he was previously convicted of a crime or by introduction of official documentation of the conviction).

22. *See* TEX. R. EVID. 609(e) ("Pendency of an appeal renders evidence of a conviction inadmissible.").

23. *See* U.S.A. Precision Machining Co. v. Marshall, 95 S.W.3d 407, 410 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) ("[A] conviction for which a new trial has been granted . . . is not a final conviction under Rule 609."); *see also* Poore v. State, 524 S.W.2d 294, 296 (Tex. Crim. App. 1975) (applying evidence law that was in effect before adoption of Texas Rule of Criminal Evidence 609 in arriving at conclusion that a reversed conviction is inadmissible).

adjudication does not qualify as a conviction for purposes of Rule 609.[24] Moreover, when the sentence for a felony or misdemeanor conviction included probation, and the offender has successfully completed the probation, the conviction is not generally admissible under Rule 609.[25] An expunged conviction is not admissible under Rule 609.[26] Likewise, convictions that were sanitized by any of several methods based on findings of rehabilitation or innocence (such as a pardon) generally cannot be used.[27]

Next, Rule 609 permits the conviction to be used as impeachment evidence only when it was an adult adjudication.[28] Unless the impeachment is offered in a juvenile proceeding, a juvenile adjudication generally is not considered to be a qualifying prior conviction.[29]

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24. *See* Hernandez v. State, 897 S.W.2d 488, 492 (Tex. App.—Tyler 1995, no pet.) (noting error in the impeachment of defense witness with his status as person on probation after deferred adjudication of felony charge, because deferred adjudication is not a conviction); *see also* Moreno v. State, 22 S.W.3d 482, 485–86 (Tex. Crim. App. 1999) ("[U]nadjudicated crimes . . . [are] not admissible to show bad character for truthfulness.").

25. *See* TEX. R. EVID. 609(c)(2) (explaining that successful completion of probation renders a conviction inadmissible for purposes of impeachment); *Ex parte* Menchaca, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993) (holding that a prior conviction is inadmissible after "the probationary period has expired" regardless of whether the terms of probation were actually successfully completed). However, when the probationer has a subsequent conviction for a felony or crime of moral turpitude, the conviction that resulted in probation is fair game. *See* TEX. R. EVID. 609(c)(2) (permitting the admission of a conviction for which probation had been successfully completed if the witness has been subsequently convicted of a crime of moral turpitude).

26. Aguirre v. State, No. 03-05-00370-CR, 2007 WL 136028, at *7 (Tex. App.—Austin Jan. 19, 2007, pet. struck) (mem. op., not designated for publication) (holding that an expunged conviction is not a final prior conviction under Rule 609).

27. *See* TEX. R. EVID. 609(c)(1), (3) (listing situations in which a conviction that has been pardoned, annulled, or subject to "a finding of rehabilitation" may be "inappropriate for use as impeachment evidence"). A conviction may also be off-limits under Rule 609 when the sentence involved community service that was successfully completed. *See* Atkinson v. State, No. 2-05-445-CR, 2007 WL 529927, at *5 (Tex. App.—Fort Worth Feb. 22, 2007, no pet.) (mem. op., not designated for publication) (noting that trial court prevented appellant from impeaching a prosecution witness with a "prior conviction for harassment, for which [the witness] had completed community supervision," but ruling that appellant had not preserved the issue for appeal).

28. *See* TEX. R. EVID. 609(d) (prohibiting use of juvenile adjudications for impeachment except in circumstances required by the Texas Family Code or by the United States or Texas constitutions).

29. *See id.* (prohibiting use of juvenile adjudications for impeachment except in certain circumstances); Hatter v. State, No. 03-04-00359-CR, 2006 WL 1439090, at *7 (Tex. App.—Austin May 26, 2006, no pet.) (mem. op., not designated for publication) (recognizing that juvenile adjudications are not normally admissible as impeachment

We can, for simplicity of discussion, sum up these caveats by stating that in a situation where counsel seeks to show that a witness is likely to be a liar because of his or her criminal record, Rule 609 requires that the impeaching stain on the witness's record be for a final adult conviction that has not been officially washed away. But there are several more hurdles that must be jumped before the conviction may be admitted to impeach the witness.

First, only certain categories of conviction qualify under the rule, as will be discussed in Part II(C). Second, the trial judge must be satisfied that the qualifying conviction meets a certain balancing test before that conviction may be admitted as impeachment evidence, as will be discussed in Part II(D).

B. *For "Purpose of Attacking Credibility"*

Rule 609 only regulates the use of convictions as evidence when the evidence is offered "[f]or the purpose of attacking the credibility of a witness."[30] The courts have interpreted this clause narrowly, holding that Rule 609 simply does not govern the admissibility of a prior conviction of a witness in several specific impeachment situations: (1) where the conviction is offered to contradict a witness's assertion of a clean record, or to use the colloquial, where the witness has "opened the door,"[31] or (2)

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evidence); Foster v. State, 25 S.W.3d 792, 795 (Tex. App.—Waco 2000, pet. ref'd) (acknowledging that juvenile adjudications are not usually admissible). Rule 609(d) also recognizes that in some limited circumstances, the constitutional right to cross-examination may require a juvenile adjudication to be admitted. TEX. R. EVID. 609(d); *cf.* Carmona v. State, 698 S.W.2d 100, 101–02 (Tex. Crim. App. 1985) (permitting a pending burglary charge brought against the thirteen-year-old witness to be admitted to show bias or motive); Harris v. State, 642 S.W.2d 471, 475–76 (Tex. Crim. App. 1982) (observing how the Sixth Amendment may sometimes require the use of juvenile adjudications for impeachment); *Foster*, 25 S.W.3d at 795 (explaining that the constitutional right to cross-examination may require that a juvenile adjudication be used for impeachment).

30. TEX. R. EVID. 609(a).

31. Delk v. State, 855 S.W.2d 700, 704 (Tex. Crim. App. 1993). "[A]n exception to Rule 609 applies when a witness makes statements concerning his past conduct that suggest he has never been arrested, charged, or convicted of any offense." *Id.* In such a situation, the witness may be contradicted with the conviction, even if it does not meet the criteria of Rule 609. *See id.* (permitting "otherwise irrelevant" prior convictions to contradict a false impression); Grant v. State, 247 S.W.3d 360, 366–68 (Tex. App.—Austin 2008, pet. ref'd) (holding that, in 2004 trial for aggravated assault by stabbing, trial court did not err in admitting evidence of 1976 felony assault conviction for stabbing three people, after defendant testified on direct examination that he was not a violent person and had never stabbed anyone); Paita v. State, 125 S.W.3d 708, 713 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (holding that the door was opened for appellant's prior

where the conviction is offered to show that the witness has a bias or motive that affects his truthfulness,[32] or (3) where witness *B*,

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conviction for interference with the duties of a public servant when he testified that he had respect for police officers); Hernandez v. State, 897 S.W.2d 488, 494–95 (Tex. App.—Tyler 1995, no pet.) (permitting impeachment based upon the testimonial representation that appellant had "'not been in trouble before'"); Hardeman v. State, 868 S.W.2d 404, 407–08 (Tex. App.—Austin 1993) (opening the door when the defense entered evidence that the complainant may be the aggressor), *pet. dism'd, improvidently granted*, 891 S.W.2d 960 (Tex. Crim. App. 1995); Hinojosa v. State, 780 S.W.2d 299, 302–03 (Tex. App.—Beaumont 1989, pet. ref'd) (holding that impeachment should have been permitted when a witness made a misleading statement about whether he had been previously convicted).

Such contradiction of the assertion that the witness has a clean record is a distinct basis for impeachment and not regulated by the criteria of Rule 609. *See* Prescott v. State, 744 S.W.2d 128, 130–31, 131 n.3 (Tex. Crim. App. 1988) (permitting a party to correct false assertions about prior convictions regardless of "the nature of the offense or its remoteness"), *explained and cited with approval in* Theus v. State, 845 S.W.2d 874, 878–79 (Tex. Crim. App. 1992). Since this form of impeachment lies outside of Rule 609, the proponent may offer criminal charges that have not been finalized. *See* Royal v. State, 944 S.W.2d 33, 36 (Tex. App.—Texarkana 1997, pet. ref'd) (holding that the State could use a prior conviction that was "non-final" because the conviction had been overturned and remanded for a new trial).

However, a witness is considered to have "opened the door" to evidence of his prior conviction only when he does "more than just imply that he abides by the law—he must in some way convey the impression that he has never committed a crime." *Theus*, 845 S.W.2d at 879; Lewis v. State, 933 S.W.2d 172, 179 (Tex. App.—Corpus Christi 1996, pet. ref'd) (holding that door was not opened by the defendant's statements that "he 'will not' drink and drive" because it does not refer to his past behavior).

Recently, a Texas court denied the use of prior misconduct on the basis that the questions were narrowly framed and therefore should not have "opened the door." *See* Sirois v. State, No. 11-06-00240-CR, 2008 WL 1893291, at *4 (Tex. App.—Eastland Apr. 24, 2008, pet. ref'd) (mem. op., not designated for publication) (ruling that, in trial for sexual assault on a child, appellant's denial he would ever hurt a child did not open the door to rebuttal with a prior felony conviction for possession of marijuana).

The "opening of the door" doctrine is sometimes regarded as an exception to Rule 608(b) as well as to Rule 609. *See, e.g.*, *Grant*, 247 S.W.3d at 366–69 (noting that an exception to Rule 608 impeachment with specific instances of conduct are permitted on cross-examination if the opposing party creates a false impression). Rule 608 generally precludes the admission of "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609." TEX. R. EVID. 608(b). However, a recognized exception to that Rule is that evidence of conduct on a particular occasion may be admitted to correct an affirmative misrepresentation, on direct examination, that the defendant has never committed that kind of conduct. *Grant*, 247 S.W.3d at 367 (citing Lagrone v. State, 942 S.W.2d 602, 613 (Tex. Crim. App. 1997)).

32. *See* Maxwell v. State, 48 S.W.3d 196, 199 (Tex. Crim. App. 2001) (noting that even though a deferred adjudication or pending criminal charges at some other stage short of final conviction is usually not admissible under Rule 609, such evidence may be used to show the witness's bias or interest in assisting the State's case); Moreno v. State, 22 S.W.3d 482, 486 (Tex. Crim. App. 1999) (noting that although not admissible under Rule 609, evidence of probation or other unadjudicated crimes may be admitted "to show a witness's

who earlier gave opinion or reputation testimony about witness *A*'s good character for truthfulness, is cross-examined about knowledge that witness *A* has a prior conviction.[33] Thus, Rule 609 only provides the criteria for the admissibility of a conviction as impeachment evidence when the *sole* relevance of the conviction is its tendency to suggest that the witness should be regarded as less than truthful because of the general inference that a person with a demonstrated record of unlawful behavior is more likely to testify falsely.[34] Where the proponent can demonstrate that the conviction evidence serves to undercut a witness in some more specific way than its general circumstantial tendency to suggest poor credibility, Rule 609 is inapplicable.

C. *Qualifying Categories of Convictions*

To be admitted as impeachment evidence under Rule 609, the past conviction must be for a crime that was either "a felony or involved moral turpitude."[35] The type or amount of punishment included in the sentence is not pertinent to the earlier conviction's admissibility.[36] In effect, this means that for a non-felony

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bias or interest in the particular case"); Carroll v. State, 916 S.W.2d 494, 499–500 (Tex. Crim. App. 1996) (holding that prohibiting defendant from cross-examining State's witness concerning pending criminal charges violated defendant's right to confront witnesses against him); Paley v. State, 811 S.W.2d 226, 229 (Tex. App.—Houston [1st Dist.] 1991, pet. ref'd) (holding that testimony on deferred adjudication status was admissible to show that "the State might have influenced his testimony").

33. *See* Wilson v. State, 71 S.W.3d 346, 350 (Tex. Crim. App. 2002) (permitting cross-examination of a witness to test whether the witness is aware of a defendant's specific instances of conduct). Suppose, for example, that Witness *A* (who has a prior misdemeanor that does not involve moral turpitude) testifies. The opposing party attacks *A*'s "character for truthfulness" with character witnesses who provide their own negative opinions about, or relate *A*'s poor reputation in the community for, truthfulness. If the proponent of Witness *A* then calls Witness *B* to bolster Witness *A* with opinion or reputation evidence of *A*'s truthful character (under Rule 608(a)(2)), the opposing side may elect to undermine *B* by asking Witness *B* "have you heard" or "did you know" about Witness *A*'s prior conviction, even though *A* could not have been directly attacked with his misdemeanor conviction under the criteria of Rule 609. Such a counterattack use of Witness *A*'s criminal record is governed by Rule 405(a) and the Rule 403 balancing test, not by Rule 609. *See id.* (basing its decision on Rule 405); Murphy v. State, 4 S.W.3d 926, 932 (Tex. App.—Waco 1999, pet. ref'd) (explaining that Rule 405 allows a defendant to be cross-examined on specific instances of misconduct that would tend to affect the witness's opinion).

34. *See Theus*, 845 S.W.2d at 880 (noting that convictions are permitted under Rule 609 to impeach the credibility of the witness).

35. TEX. R. EVID. 609(a).

36. *See id.* ("[E]vidence [of the conviction] shall be admitted . . . only if the crime was

conviction to be admissible, the underlying crime must be a misdemeanor involving moral turpitude, and that is a qualifier not directly defined by statute but governed by common law.[37] Over the years, Texas courts have held that such crimes as making a false report to law enforcement personnel,[38] theft,[39] forgery,[40] receiving stolen property,[41] attempting to evade payment of federal income taxes by filing false and fraudulent income tax returns,[42] filing a false statement to obtain unemployment benefits,[43] public lewdness,[44] and assault on a woman,[45] all involve moral turpitude. However, by way of examples, Texas decisions indicate the following crimes do not involve moral

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a felony or involved moral turpitude, regardless of punishment . . . .").

37. *See* Ludwig v. State, 969 S.W.2d 22, 28 (Tex. App.—Fort Worth 1998, pet. ref'd) (providing the common law definition of moral turpitude). The commonly accepted definition of moral turpitude is: "(1) the quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita; (2) conduct that is base, vile, or depraved; and (3) something that is inherently immoral or dishonest." *Id.*; *see* Hardeman v. State, 868 S.W.2d 404, 405 (Tex. App.—Austin 1993) (defining moral turpitude as a crime that offends the "'moral sentiment of the community'" (citing BLACK'S LAW DICTIONARY 1008–09 (6th ed. 1990))), *pet. dism'd, improvidently granted*, 891 S.W.2d 960 (Tex. Crim. App. 1995); Polk v. State, 865 S.W.2d 627, 630 (Tex. App.—Fort Worth 1993, pet. ref'd) ("Moral turpitude has been defined to include acts which are base, vile or depraved."); Hutson v. State, 843 S.W.2d 106, 107 (Tex. App.—Texarkana 1992, no pet.) ("Generally, moral turpitude means something that is inherently immoral or dishonest.").

38. Lape v. State, 893 S.W.2d 949, 958 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

39. LaHood v. State, 171 S.W.3d 613, 620 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

40. Thompson v. State, No. 03-06-00077-CR, 2007 WL 1647830, at *4 (Tex. App.—Austin June 8, 2007, no pet.) (mem. op., not designated for publication).

41. Crisp v. State, 470 S.W.2d 58, 59 (Tex. Crim. App. 1971).

42. Turner v. Byers, 562 S.W.2d 507, 511 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

43. Am. Motorists Ins. Co. v. Evans, 577 S.W.2d 514, 515 (Tex. Civ. App.—Texarkana 1979, writ ref'd n.r.e.).

44. Escobedo v. State, 202 S.W.3d 844, 849 (Tex. App.—Waco 2006, pet. ref'd).

45. *See* Medley v. State, No. 01-07-00017-CR, 2008 WL 920342, at *4 (Tex. App.—Houston [1st Dist.] Apr. 3, 2008, no pet.) (mem. op., not designated for publication) (recognizing that a male's assault on a female is a crime of moral turpitude but declining to address whether domestic assault committed by a female upon a male is a crime of moral turpitude); Jackson v. State, 50 S.W.3d 579, 592 (Tex. App.—Fort Worth 2001, pet. ref'd) ("[A]ssault on a female [is a] crime[] of moral turpitude."); Ludwig v. State, 969 S.W.2d 22, 30 (Tex. App.—Fort Worth 1998, pet. ref'd) ("[A]ssault by a man against a woman is considered a crime of moral turpitude."); Hardeman v. State, 868 S.W.2d 404, 407 (Tex. App.—Austin 1993) (dealing with a misdemeanor assault on a woman), *pet. dism'd, improvidently granted*, 891 S.W.2d 960 (Tex. Crim. App. 1995).

turpitude: unlawfully carrying a pistol,[46] delivery of cocaine,[47] practicing medicine without a license,[48] driving while intoxicated,[49] and possession of marijuana.[50]

D. *Different Balancing Tests, Depending on the Conviction's Age*

Rule 609(a) provides the general rule that when a prior conviction is offered to attack credibility, evidence of it "shall be admitted" (1) if it is established by an acceptable mode of proof,[51] (2) if it fits into a qualifying category,[52] and (3) if the court determines that a specific balancing test is satisfied, i.e., that the "probative value of admitting this evidence outweighs its prejudicial effect to a party" (PV outweighs PE).[53]

That general rule is modified when the prior conviction in question is relatively old.[54] Older convictions, even though satisfying the three criteria of Rule 609(a), cannot be admitted without meeting a fourth criterion: "that the probative value of the conviction . . . *substantially* outweighs its prejudicial effect."[55]

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46. McKinney v. State, 505 S.W.2d 536, 540–41 (Tex. Crim. App. 1974).

47. Denman v. State, 193 S.W.3d 129, 136 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd).

48. Travelers Ins. Co. v. Buffington, 400 S.W.2d 800, 802 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.).

49. Shipman v. State, 604 S.W.2d 182, 184 (Tex. Crim. App. 1980); Lewis v. State, 933 S.W.2d 172, 177 n.1 (Tex. App.—Corpus Christi 1996, pet. ref'd).

50. *See* Ortiz v. Furr's Supermarkets, 26 S.W.3d 646, 655 (Tex. App.—El Paso 2000, no pet.) (upholding trial court's determination that possession of marijuana was not moral turpitude).

51. *See* TEX. R. EVID. 609(a) ("[E]vidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record . . . ."). Thus, the conviction may be proved by asking the witness to acknowledge that he was previously convicted of a crime, or by introduction of official documentation of the conviction. *Id.*

52. *See id.* (requiring the impeaching offense to be a felony or misdemeanor of moral turpitude, regardless of punishment received).

53. *See id.* ("[T]he probative value of admitting this evidence [must] outweigh[] its prejudicial effect to a party.").

54. *See* TEX. R. EVID. 609(b) (outlining balancing test for convictions older than ten years). By its terms, Rule 609(b) seems to classify a conviction as old or remote "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." *Id.* As discussed later, in Part III(C), many Texas appellate courts do not follow such a straightforward approach.

55. *Id.* (emphasis added).

> [C]onviction 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

This significantly different 609(b) balancing test compares the same two attributes of the conviction (its probative value, PV, and its prejudicial effect, PE) as does the 609(a) balancing test, but the tipping point required for admissibility is more restrictive; the fourth criterion is met only when PV *substantially* outweighs PE. Clearly, whenever PV "substantially outweighs" PE, then PV also "outweighs" PE; thus, the fourth criterion subsumes the third criterion, and the effect of Rule 609(b) is that, for those older convictions to which it applies, the conviction must ("shall") be admitted if and only if it meets the first two criteria of Rule 609(a) (acceptable mode of proof and qualifying nature of the conviction) in addition to meeting the "substantially outweighs" criterion.[56]

A simple way to summarize the two rules of 609(a) and (b) is this: first, that a recent prior conviction must be admitted if the mode and qualifying criteria are met, and if PV outweighs PE; second, that an older or more remote prior conviction can only be admitted if the mode and qualifying criteria are met, and if PV substantially outweighs PE.

E. *Evaluating the Balance: The* Theus *Factors*

Nothing in Rule 609 itself explains what the terms "probative value" or "prejudicial effect to a party" mean, or how they should be quantified. However, Texas courts have generally accepted the federal court's interpretation on its corollary rule that the probative value of a conviction is its tendency, if any, to show the witness's character for untruthfulness.[57] The prejudicial effect of

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confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Id.

56. *Compare* TEX. R. EVID. 609(b) (dictating a lower threshold of admissibility of newer convictions), *with* TEX. R. EVID. 609(a) (providing that the probative value must substantially outweigh prejudicial effect for older convictions).

57. *See, e.g.*, Theus v. State, 845 S.W.2d 874, 879–80 (Tex. Crim. App. 1992) ("Texas Rule 609 was derived from the corollary federal rule."). Additionally, "federal court interpretations of the federal rule will be of some guidance in our interpretation of the state rule." *Id.* at 880. *Theus* relied upon a federal decision to describe probative value as the measure of what a particular conviction tells others about the convicted person's truthfulness or lack thereof: "'Congress believed that all felonies have *some* probative value on the issue of credibility.'" *Id.* at 879 n.3 (quoting United States v. Lipscomb, 702 F.2d 1049, 1062 (D.C. Cir. 1983)).

the conviction is its potential, if any, to improperly derail the trier of fact from properly evaluating the evidence in the case.[58]

If the witness who is being impeached is the defendant, the chief danger of derailing the jury arises from the potential for "spill-over effect"; that is, the danger that the jury, learning that the defendant has previously been convicted of breaking the law, will consider it more likely that he is guilty of breaking the law as charged in his current trial, regardless of the presumption of innocence and the state of the other evidence presented by either side.[59] A few courts have articulated this danger, sometimes referred to as "unfair prejudice," in a slightly different (but clearly related) way: the danger of a chilling effect on the decision of the defendant-witness as to whether he should testify in his own defense.[60] These courts consider the unfair prejudice to result

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58. The definition offered is not expressly stated in *Theus* or its Texas progeny. However, the concept of unfair prejudice, and its potential applicability to any party in a civil or criminal trial, was recognized in the development of Federal Rule of Evidence 609, which provides for a similar balancing of probative value against prejudicial effect as one of the key tests of admissibility of any prior conviction offered for impeachment:

> Fewer decided cases address the question whether Rule 609(a) provides any protection against unduly prejudicial prior convictions used to impeach government witnesses. Some courts have read Rule 609(a) as giving the government no protection for its witnesses. This approach also is rejected by the amendment. There are cases in which impeachment of government witnesses with prior convictions that have little, if anything, to do with credibility may result in unfair prejudice to the government's interest in a fair trial and unnecessary embarrassment to a witness. . . . The amendment applies the general balancing test of Rule 403 to protect all litigants against unfair impeachment of witnesses. The balancing test protects civil litigants, the government in criminal cases, and the defendant in a criminal case who calls other witnesses.

FED. R. EVID. 609 advisory committee's note (citations omitted).

59. *See Theus*, 845 S.W.2d at 881, 882 n.9 (noting that appellant's prior arson conviction had the danger of causing the jurors to think of insurance fraud and "burning buildings"); Dale v. State, 90 S.W.3d 826, 830 (Tex. App.—San Antonio 2002, pet. ref'd) (recognizing that "a danger arises that the jury will convict the defendant based on a perception of past conduct rather than based upon the facts of the charged offense," especially when the prior conviction is similar to the one charged); Pierre v. State, 2 S.W.3d 439, 443 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (noting that a similar prior conviction raises the possibility that the jury will convict because it perceives a pattern); Simpson v. State, 886 S.W.2d 449, 452–53 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (noting the possibility of conviction based upon a similar prior conviction). The same danger exists in a civil case when the impeached witness is a party defendant. *See* Porter v. Nemir, 900 S.W.2d 376, 381–82 (Tex. App.—Austin 1995, no writ) (borrowing from criminal law cases to weigh the prejudicial effect and probative value of prior convictions).

60. *See* Jackson v. State, 11 S.W.3d 336, 340 (Tex. App.—Houston [1st Dist.] 1999,

from the defendant's Hobbsean choice to either remain silent, foregoing his chance to testify to his side of the story, or to testify but risk the spill-over effect when the jurors learn of his prior criminal record.[61]

In a situation where the witness threatened with impeachment is a prosecution witness, a few courts have viewed what might be called a "spill-across" danger as a pertinent form of prejudicial effect.[62] This is the danger that the prosecution witness, if

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pet. ref'd) (commenting that because the defendant's testimony was "critical to his claim of self-defense," this weighed against allowing the prosecution to use defendant's prior conviction to impeach him); *Pierre*, 2 S.W.3d at 443 (explaining, in case where the defendant was sole defense witness, that *Theus* factors four and five "counterbalance[] [each other], with each mitigating the other's effect"). This implies that the court regarded factor four as protective of the defendant's right to testify without risk of impeachment, and factor five as recognizing the prosecution's need to challenge the defendant's credibility as sole defense witness. A federal case similarly considered the danger that a defendant in a civil action "would avoid testifying because of the admission of evidence of a prior conviction." THK Am., Inc. v. NSK, Ltd., 917 F. Supp. 563, 570–71 (N.D. Ill. 1996).

61. *See Dale*, 90 S.W.3d at 831 (noting that the defendant's need to testify when he is the sole witness for the defense was great, and that the need for the testimony was greater than the need for the admission of the impeaching conviction); *Jackson*, 11 S.W.3d at 340 ("Appellant's testimony was critical to his claim of self-defense. This factor weighs against admissibility in order to allow appellant to testify without having to be impeached by his two remote prior convictions.").

In *Dale*, the defendant, on trial for murder, was the only defense witness as to events at the scene of the homicide. "Therefore, defendant's testimony was important. This fourth factor weighs against admissibility so as to allow defendant to testify without being impeached by his prior convictions." *Dale*, 90 S.W.3d at 831. However, in such a situation, the fifth factor (the importance of the witness's credibility) cuts the other way, so that the last two factors "counterbalance[] one another." *Id.*; *Pierre*, 2 S.W.3d at 443 (explaining, in case where defendant was sole defense witness, that factors four and five counterbalance each other, "with each mitigating the other's effect"). This implies that the court regarded factor four as favoring defendant's need to testify without risk of impeachment, and factor five as favoring the prosecution need to challenge defendant's credibility as sole defense witness. *Pierre*, 2 S.W.3d at 443.

62. *See* Walter v. State, 209 S.W.3d 722, 733 (Tex. App.—Texarkana 2006) (upholding trial court's refusal to allow defense to impeach prosecution witness in murder trial with his prior murder and robbery convictions because of similarity to offense being tried), *rev'd on other grounds*, No. PD-1929-06, 2008 WL 4414536 (Tex. Crim. App. Oct. 1, 2008). The *Walter* decision was upheld in part because the similarity between the prior offenses and the matter being tried "could have a prejudicial effect on the jury's consideration of the evidence presented against [appellant] and, instead, potentially shift blame or suspicion onto [the prosecution]." *Id.*; *cf.* Morris v. State, 214 S.W.3d 159, 186–88 (Tex. App.—Beaumont 2007, pet. granted) (upholding the exclusion of decedent's prior conviction for impeachment purposes of hearsay statements made before death). *Morris* also held that to allow the declarant to be impeached with his own prior manslaughter conviction could confuse the jury by shifting suspicion to the declarant as the possible

disclosed to have been convicted earlier of the same kind of crime that the defendant is on trial for, might be viewed by the jury as the more likely suspect than the defendant himself. The courts recognized that the witness's prior conviction might serve as a red herring that would illogically shift the jury's focus away from the accused person on trial, thus prejudicing the State's interest in having the jury dispassionately evaluate the evidence against the named defendant.[63]

In the most general sense, then, Rule 609 requires that the logical tendency of a particular prior conviction to shed light on the truthfulness of a testifying witness (its probative value, or PV) must outweigh any danger that the same information about the prior conviction would illogically or improperly distract the jury from its reasoned evaluation of the relative merits of the other evidence presented by the parties (its prejudicial effect, or PE). In 1992, in *Theus v. State*,[64] the court of criminal appeals provided some much-needed guidance about how a court should evaluate the relative weight of PE and PV when a particular prior conviction is offered as impeachment evidence.[65]

Theus involved a prosecution for cocaine distribution.[66] At trial, the defendant moved unsuccessfully in limine to exclude all evidence of his conviction for arson some five years before his drug trial.[67] He appealed, arguing that he was denied a fair trial

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driver of the boat, instead of the accused. *Morris*, 214 S.W.3d at 188.

63. *See Walter*, 209 S.W.3d at 733 (deciding that a potential prejudicial effect exists because it might "potentially shift blame onto [the] witness"); *see also Morris*, 214 S.W.3d at 188 (stating that allowance of the prior conviction may inadvertently confuse the jurors into thinking decedent was "more likely" to commit the offense than appellant).

64. Theus v. State, 845 S.W.2d 874 (Tex. Crim. App. 1992).

65. *See id.* at 880–81 (outlining a list of factors used by federal courts of appeals that it finds to be relevant in weighing prejudicial value against probative effect).

66. *Id.* at 876.

67. *Id.* at 877. Curiously, none of the appellate opinions in the long *Theus* saga specify the date of the trial that gave rise to the appeal or clearly identify the date when the defendant was released from the confinement imposed for his previous arson conviction. *See* Theus v. State, 816 S.W.2d 773 (Tex. App.—Houston [14th Dist.] 1991), *rev'd*, 845 S.W.2d 874 (Tex. Crim. App. 1992) (remanding for appellate review), *aff'd on remand*, 858 S.W.2d 25 (Tex. App.—Houston [14th Dist.] 1993), *vacated*, 863 S.W.2d 489 (Tex. Crim. App. 1993) (remanding for further appellate review), *aff'd on remand*, 874 S.W.2d 121 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd).

The date when the defendant was released from confinement for his prior arson conviction, together with either the date when the defendant's trial was conducted, the date of his testimony, or the date when he was impeached with his prior conviction, are needed to accurately analyze the admissibility of that prior conviction, as discussed in Part

because the prosecution was improperly permitted to impeach him with his arson conviction.[68] The appeal was rejected by the Fourteenth Court of Appeals, but the Texas Court of Criminal Appeals reversed and remanded for that court to make a harmless error analysis.[69] In concluding that the trial court abused its discretion in allowing the defendant to be impeached with the arson conviction,[70] *Theus* adopted, from federal jurisprudence, a new analytical approach to evaluating the weight of PE and PV.[71]

The court identified a number of factors that trial courts should consider as a means of "weighing the probative value of a conviction against its prejudicial effect."[72] *Theus* described these factors as important analytical tools, but cautioned that they must be considered (1) carefully in the context of the particular trial situation, and (2) not in a strictly mathematical manner.[73] The court of criminal appeals emphasized these factors as a "non-exclusive list": "(1) the impeachment value of the prior crime, (2) the temporal proximity of the past crime relative to the charged offense and the witness' subsequent history, (3) the similarity between the past crime and the offense being prosecuted, (4) the importance of the defendant's testimony, and (5) the importance of the credibility issue."[74] Since *Theus*, Texas courts have routinely used these factors to evaluate the relative weight of PV and PE in particular trial situations, and most of the factors have been consistently interpreted in those decisions.

The first factor is termed "the impeachment value of the prior crime."[75] *Theus* explained that the nature of some crimes, such as those rooted in dishonest conduct, have more impeachment value.

III(A). However, one can deduce from the first appellate opinion that after the arson conviction was imposed in 1985, the defendant initially went on probation; his probation was revoked and he served approximately two years in prison for the arson. *Theus*, 816 S.W.2d at 774. The trial at which he was impeached was sometime between February 1990 (when he was arrested during a narcotics transaction) and August 1991 (when his first appeal was decided). *See id.* at 773–74 (stating the date of arrest and date of the first appeal).

68. *Theus*, 845 S.W.2d at 879.

69. *Id.* at 876, 882.

70. *Id.* at 882.

71. *See id.* at 880–81 (adopting standards used by federal courts to weigh the probative value against the prejudicial effect of a prior conviction).

72. *Id.*

73. Theus v. State, 845 S.W.2d 874, 880–81 (Tex. Crim. App. 1992).

74. *Id.* at 880.

75. *Id.*

The court recognized that logically, "crimes that involve deception" are more probative of the actor's untruthful character.[76] By contrast, the type of misconduct reflected in some other convictions lacks much relevance to the truthful or untruthful character of the convicted person.[77] Crimes in the latter category, such as violent crimes, may, because of their limited indication of the credibility of the witness, simply stain the witness as a bad person, and so present a more worrisome "potential for prejudice" if presented to the jury.[78] Defendant Theus, on trial for drug offenses, had previously been convicted of arson, and the court characterized that offense as one which "had very little probative value concerning appellant's credibility"[79] and "great" potential for prejudice.[80] Since *Theus*, Texas courts have had little difficulty evaluating PV and PE using the first factor.[81]

Theus described the second factor as "the temporal proximity of the past crime relative to the charged offense and the witness' subsequent history."[82] Explaining this factor, the court indicated that a more recent conviction says more about the witness's character for truthfulness (i.e., has more "probative value") than one from his distant past, and thus the second factor "will favor

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76. *Id.* at 881.

77. *See id.* (noting that convictions for violent crimes are not probative of veracity and are prone to be highly prejudicial).

78. *Theus*, 845 S.W.2d at 881.

79. *Id.*

80. *Id.* at 882 n.9.

81. *See, e.g.*, Morris v. State, 214 S.W.3d 159, 187–88 (Tex. App.—Beaumont 2007, pet. granted) (holding that impeachment by a witness's manslaughter conviction, "a crime of violence," may confuse a jury in their determination of a defendant's culpability); Miller v. State, 196 S.W.3d 256, 268 (Tex. App.—Fort Worth 2006, pet. ref'd) (holding that a conviction for possession of a controlled substance, as a crime that does not involve lack of moral turpitude, does not meet the first *Theus* factor); LaHood v. State, 171 S.W.3d 613, 620–21 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (applying the first *Theus* factor to come to the conclusion that "[b]urglary and credit card abuse are crimes of deception"); Deleon v. State, 126 S.W.3d 210, 213, 215 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd) (using the first *Theus* factor as an argument against admission of appellant's two prior murder convictions as being crimes of violence); Dale v. State, 90 S.W.3d 826, 830 (Tex. App.—San Antonio 2002, pet. ref'd) (noting the first *Theus* factor weighs against admissibility of possession of cocaine and assault convictions as neither are crimes of deception); *cf.* Moore v. State, 143 S.W.3d 305, 313 (Tex. App.—Waco 2004, pet. ref'd) (mentioning the first *Theus* factor in its analysis that the admission of a theft conviction was not an abuse of discretion even though only two of the five factors weighed in favor of its use).

82. *Theus*, 845 S.W.2d at 880.

admission if the past crime is recent and if the witness has demonstrated a propensity for running afoul of the law."[83] Unfortunately, this factor has not been uniformly interpreted by Texas courts since its identification by *Theus*, and confusion surrounding it will be examined in Part III(C) of this article.

The third factor introduced in *Theus* is "the similarity between the past crime and the offense being prosecuted."[84] The court reasoned that when "the past crime and the charged crime are similar," there would be potential for unfair prejudice to the defendant because of the danger that "the jury would convict on the perception of a past pattern of conduct, instead of on the facts of the charged offense."[85] In the *Theus* case itself, the court of criminal appeals decided the witness-appellant's prior "arson conviction would not cause the jury to necessarily perceive [the defendant, on trial for cocaine distribution,] as a drug dealer because the two crimes are not similar,"[86] in effect finding the third factor did not suggest much potential for prejudice.

When it identified "similarity" as a factor, the *Theus* court faced the situation where the witness facing impeachment was the defendant,[87] and later courts' evaluations of the similarity factor in the defendant-witness situation have been quite uniform since *Theus*.[88] However, where the witness facing impeachment is not

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83. *Id.* at 881.

84. Theus v. State, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992).

85. *Id.* at 881; *see* Pierre v. State, 2 S.W.3d 439, 443 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (citing *Theus* in determining that similar past crimes can lead the jury to convict "based upon a perception of past conduct"); Simpson v. State, 886 S.W.2d 449, 452–53 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (stating that there is little chance the jury would convict upon the impeaching offense due to the lack of similarity with the current offense).

86. *Theus*, 845 S.W.2d at 881.

87. *See id.* at 877 ("[A]ppellant testified in his own defense and was impeached with evidence of the prior arson conviction.").

88. *See, e.g.*, Miller v. State, 196 S.W.3d 256, 268 (Tex. App.—Fort Worth 2006, pet. ref'd) (comparing appellant's conviction for possession of a controlled substance with the methamphetamine charge and determining that the similarities weighed against admission); LaHood v. State, 171 S.W.3d 613, 621 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (determining that appellant's prior convictions for burglary and credit card abuse weighed in favor of admission as they were dissimilar to the aggravated kidnapping and assault charges); Deleon v. State, 126 S.W.3d 210, 215 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd) (using *Theus* factors to determine that the similarity of the charged offense to prior murder convictions weighed against admission); Dale v. State, 90 S.W.3d 826, 830–31 (Tex. App.—San Antonio 2002, pet. ref'd) (noting the third *Theus* factor favored admission of appellant's prior cocaine possession and assault convictions because

the defendant, evaluation of the third factor has not been as consistent.

One appellate court modified the factor to examine any similarity between the witness's past crime and the role of the witness in the trial at which he or she is impeached.[89] The court found that the previous theft convictions of the complaining witness bore no similarity to the charge of retaliatory violence against a public official that was on trial, so it found no danger of prejudice indicated by the third factor.[90] The same "modification" approach was sensibly applied in two other factual situations, with the result that the particular nature of the similarity was found likely to result in prejudice to the party who called the witness.

Unfortunately, another appellate court simply declared that "similarity" was inapplicable as a factor in the non-defendant witness situation, reasoning that the danger posed by similarity is solely the potential for spill-over impact on a *defendant* arising from his own record of like misconduct.[91] It is true that in some cases where the witness under impeachment is not the criminal defendant, any similarity between the prior conviction and the charge being tried simply does not matter. For example, suppose a prosecution witness faces impeachment with his prior conviction for aggravated assault. If that witness testifies in defendant's murder trial about his observations of the sequence of events at the scene of a homicide during a confrontation between the

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of dissimilarity with the charged offense of murder); Morris v. State, 67 S.W.3d 257, 264 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (determining that although there is a question of similarity with the prior convictions, the fact that appellant denied ever using a gun during the offense opened the door for their admission); *Pierre*, 2 S.W.3d at 443 (citing *Theus* in determining that the similarity of appellant's prior offense weighed against admission because it involved violence against women and was overly prejudicial in the eyes of a jury); Butler v. State, 890 S.W.2d 951, 955 (Tex. App.—Waco 1995, pet. ref'd) (asserting the similarity of appellant's prior conviction involving sexual contact with children to the charged offense disfavored admission); *Simpson*, 886 S.W.2d at 452–53 (allowing appellant's prior offense to be admitted due to the lack of similarity with the current offense).

89. *See* Moore v. State, 143 S.W.3d 305, 313 (Tex. App.—Waco 2004, pet. ref'd) ("The third factor as modified [for a witness who is not the defendant] examines the similarity between the past crime and any conduct of the witness at issue in the present trial.").

90. *Id.* at 309, 312–13.

91. *See* Woodall v. State, 77 S.W.3d 388, 395 (Tex. App.—Fort Worth 2002, pet. ref'd) ("The third factor . . . is inapplicable here because [the impeached witness] was not being tried for a crime in this case.").

defendant and the deceased, and the key issue is self-defense rather than identity of the perpetrator, the jurors are unlikely to hold the prosecution witness's background against the defendant or to be confused into thinking that the prosecution witness was the real culprit. In such a case, a court could logically treat the similarity factor as inapplicable or neutral in the balance of probative value against prejudice.

However, it is overly simplistic to characterize the similarity factor as irrelevant to possible prejudice whenever the witness is someone other than the criminal defendant. More subtle possibilities of prejudice to a party (the State or criminal defendant, plaintiff or civil defendant) quite conceivably could flow from the similarity between a witness's prior conviction and some other aspect of the trial.[92] The language of Rule 609 itself refers to the "prejudicial effect to *a party*"[93] rather than solely the danger to the defendant. Consistent with that broader understanding of prejudice, several Texas courts have conducted a more probing analysis of the third factor in situations where impeachment of a witness other than the defendant was at issue.[94]

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92. *See* THK Am., Inc. v. NSK, Ltd., 917 F. Supp. 563, 570 (N.D. Ill. 1996) (finding, in a patent infringement trial, that impeachment of witness Teramachi, associated with the defendant, with a prior conviction for tax fraud that involved submitting false documents to Japanese taxing authorities, bore similarity to Teramachi's role in the alleged infringement, and thus posed a danger of unfair prejudice to the party defendant).

For another possible form of prejudice to a party flowing from similarity, even though the witness is not the defendant, suppose that defendant *D* is on trial for aggravated assault. He calls his friend, witness *DW*, to testify that *D* was acting in self-defense. If the prosecution can show that *DW* was himself previously convicted of aggravated assault, that similarity poses a very real danger of unfair prejudice to *D*, because the jurors may well follow the old adage that "birds of a feather flock together." If *D* hangs around with friends who are violent people, he is more likely himself to be the type of person who would act aggressively and wrongfully in the charged situation. Moreover, the jurors might also consider *DW*, as a person with a demonstrably violent past, to be a poor judge of whether *D* really needed to defend himself.

93. TEX. R. EVID. 609(a) (emphasis added).

94. *See, e.g.*, Morris v. State, 214 S.W.3d 159, 188 (Tex. App.—Beaumont 2007, pet. granted) (noting the potential prejudice to the prosecution's case if the similar prior conviction was used against prosecution's hearsay declarant). Where the defendant was on trial for killing several passengers by intoxication manslaughter when he crashed a speeding boat, the court recognized that impeachment of one of the deceased (who was a witness for the prosecution by virtue of his statement being introduced as an exception to hearsay) with a prior conviction for manslaughter posed a real danger of prejudice in that the jurors might be confused into treating the conviction as some evidence that the dead witness, not the defendant, was the driver of the speedboat at the time it crashed. *Id.*

In another case, the defendant was convicted of murdering three employees of a

Their reasoning convincingly demonstrates that whether similarity poses any potential for unfair prejudice to the party who called the witness must be carefully analyzed in light of the particular circumstances of each case, with special consideration of any plausible connection between the impeached witness and the crime or either party.

The fourth and fifth *Theus* factors, respectively, are "the importance of the defendant's testimony, and . . . the importance of the credibility issue."[95] To the extent that a defendant or other witness is the main source of critical information for the proponent party, the opposing party will understandably have an urgent need to impeach her with the disputed prior conviction.[96] For example, in cases where the defendant was the key witness in his own defense, the appellate courts frequently decide that factors four and five both favor allowing the State to attack the defendant's credibility with his conviction.[97] However, in other situations

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steakhouse after robbing the business. Walter v. State, 209 S.W.3d 722, 726 (Tex. App.—Texarkana 2006), *rev'd on other grounds*, No. PD-1929-06, 2008 WL 4414536 (Tex. Crim. App. Oct. 1, 2008). The prosecution called a convicted murderer, Johnson, to testify that the defendant, in private conversations, had confessed his role in the murders and robbery. *Id.* at 726 & n.2. The defense attempted to impeach Johnson with his convictions, committed more than a decade earlier, for murder and aggravated robbery. *Id.* at 731–32. The prosecution objected to the impeachment, and the trial court disallowed the impeachment. *Id.* The appellate court, after weighing the *Theus* factors, upheld the trial judge's ruling. *Id.* at 733. The court explained that:

> The similarity between *Johnson's* prior convictions [for two violent crimes] and the offense for which *Walter* was being tried [robbery murder] suggest that the evidence of these prior offenses could have a prejudicial effect on the jury's consideration of the evidence presented against Walter and, instead, potentially shift blame or suspicion onto witness Johnson. This increased potential for prejudice [against the State, the proponent of Johnson's testimony] weighs in favor of the trial court's decision [not to permit the impeachment].

Walter, 209 S.W.3d at 733.

Morris and *Walter* represent unusual cases in which appellate courts found the similarity factor significant enough to uphold trial rulings that the defense could not impeach a *prosecution* witness with his prior conviction "similar" to the crime being tried.

95. Theus v. State, 845 S.W.2d 874, 880 (Tex. Crim. App. 1992).

96. *Id.* at 881.

97. *See* Smith v. State, Nos. 01-05-01095-CR, 01-05-01096-CR, 2007 WL 79475, at *11 (Tex. App.—Houston [1st Dist.] Jan. 11, 2007, pet. ref'd) (mem. op., not designated for publication) (holding that admissibility of impeaching evidence is favored when there is no other evidence besides trial testimony, and it was appellant's word against the complainant's). Appellant denied the charge of aggravated sexual assault of a child and the complainant provided the only direct testimony concerning certain elements of the offense; "the credibility of the complainant and appellant were critical issues because

there was no physical evidence presented at trial" and "the fourth and fifth factors favor[ed] admission to impeach appellant's credibility." *Id.*; *see also* Tamez v. State, 205 S.W.3d 32, 38–39 (Tex. App.—Tyler 2006, no pet.) (determining that since only defendant testified about his need to act in self-defense, his testimony and his credibility were "very important" and "weigh[ed] in favor" of permitting the State to attack him with his prior conviction); Miller v. State, 196 S.W.3d 256, 268–69 (Tex. App.—Fort Worth 2006, pet. ref'd) (noting that even though the State failed to cross-examine one of appellant's witnesses, there was still a great need to impeach the appellant with his prior conviction because of credibility issues and the differences between his and the officer's testimony).

Many other decisions of the courts of appeals follow similar reasoning. *See* Baca v. State, 223 S.W.3d 478, 484 (Tex. App.—Amarillo 2006, no pet.) (noting the increased need of appellant's pen packet to impeach as he was the sole witness for the defense); *Miller*, 196 S.W.3d at 268–69 (weighing in favor of admitting impeachment convictions due to the fact that the testimony was not covered by appellant's other witness); LaHood v. State, 171 S.W.3d 613, 621 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (holding that crimes such as sexual assault where there are no eyewitnesses increase the need to permit impeaching evidence); Deleon v. State, 126 S.W.3d 210, 215 (Tex. App.—Houston [1st Dist.] 2003, pet. dism'd) (determining that the need to impeach was greater because none of the State's witnesses could corroborate appellant's version of events); Dale v. State, 90 S.W.3d 826, 831 (Tex. App.—San Antonio 2002, pet. ref'd) (holding that the impeaching conviction was made less admissible because of the fact that his testimony was possibly critical to rebut the testimony of the State's witnesses, but was simultaneously made more admissible by the fact that the defendant was the sole witness for the defense); Morris v. State, 67 S.W.3d 257, 264–65 (Tex. App.—Houston [1st Dist.] 2001, pet ref'd) (holding that because appellant was the only witness on his own behalf, the need to impeach was greater); Jackson v. State, 50 S.W.3d 579, 593 (Tex. App.—Fort Worth 2001, pet. ref'd) (weighing in favor of admission because none of defendant's proffered witnesses could testify about a critical event other than the appellant); White v. State, 21 S.W.3d 642, 647 (Tex. App.—Waco 2000, pet. ref'd) (holding that appellant's testimony was ripe for impeachment because the State had already discredited his other alibi witness); Cox v. State, No. 05-97-00634-CR, 1999 WL 99076, at *5 (Tex. App.—Dallas Feb. 26, 1999, no pet.) (mem. op., not designated for publication) (determining that the appellant was not harmed by the State's proffer of prior convictions that spurred his subsequent refusal to testify on his own behalf when he had no other witnesses on his behalf); Gaffney v. State, 937 S.W.2d 540, 543 (Tex. App.—Texarkana 1996, pet. ref'd) (acknowledging greater importance in permitting impeachment of a defendant who was the only person who testified in support of the defense's version of events); Cuba v. State, 905 S.W.2d 729, 734 (Tex. App.—Texarkana 1995, no pet.) (weighing in favor of admissibility because defendant was the only defense witness); Simpson v. State, 886 S.W.2d 449, 452–53 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (holding that there is greater importance for the State to be able to impeach if the case mainly rests upon testimony of witnesses); Polk v. State, 865 S.W.2d 627, 631 (Tex. App.—Fort Worth 1993, pet. ref'd) (favoring admissibility because the trial was a "swearing match" between witnesses).

Occasionally, however, an appellate decision has suggested that the importance of the defendant's need to testify in his own defense (and the chilling effect that impeachment with a prior conviction could have on that decision), amounts to a form of prejudice, rather than adding to the conviction's probative value. Under this reasoning, factor four favors the exclusion of the defendant's prior conviction. *Cf. Theus*, 845 S.W.2d at 879 (noting that defendant's increased need to rely upon his own testimony for his own defense if he lacks outside evidence supporting his claim of innocence is the obverse of the State's increased need to impeach the defendant's credibility).

where the offered conviction is not necessary to attack the witness's credibility[98] or the witness is less significant to the proponent's case, courts may consider the opponent's need to impeach that witness with the prior conviction to be less important or justifiable.[99]

F. *Procedural Aspects of Litigating the Admissibility of Prior Convictions*

It is well-established that the party who offers the prior conviction as impeachment evidence has the burden to demonstrate its admissibility, and this extends not only to showing that the conviction is of a qualifying type but that it meets the required balancing test.[100] The proponent must also show that the age of

98. *See Walter*, 209 S.W.3d at 733 (explaining that since the defense was able to impeach the credibility of prosecution informant with several other convictions, this "diminished the need to use" older robbery and murder convictions, therefore reducing the probative value of those convictions); Jackson v. State, 11 S.W.3d 336, 340–41 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (explaining that since the prosecution was able to attack defendant-witness's credibility with three recent theft convictions, it had "drastically lessened" need to impeach him with remote convictions for sexual assault and a crime against nature); *cf.* Woodall v. State, 77 S.W.3d 388, 397 (Tex. App.—Fort Worth 2002, pet. ref'd) (explaining that since defense was able to impeach credibility of prosecution witness with much more recent convictions, his older forgery conviction had less probative value for impeachment).

99. *See Woodall*, 77 S.W.3d at 396–97 (recognizing that where prosecution had other witnesses and physical evidence that corroborated the State's witness, the need for defense to impeach him with a forgery conviction, and thus its probative value, decreased); *see also* Thompson v. State, No. 03-06-00077-CR, 2007 WL 1647830, at *4 (Tex. App.—Austin June 8, 2007, no pet.) (mem. op., not designated for publication) (holding that no error resulted in exclusion of evidence of witness's prior convictions where other evidence corroborated witness's testimony).

100. *See Theus*, 845 S.W.2d at 880 (dictating that the proponent has the burden of establishing that probative value outweighs prejudicial effect); Davis v. State, 259 S.W.3d 778, 782 (Tex. App.—Houston [1st Dist.] 2008, pet. ref'd) (placing burden on the State to prove that defendant's impeaching conviction met the admissibility burden under Rule 609(b)); Yanez v. State, 199 S.W.3d 293, 305–06 (Tex. App.—Corpus Christi 2006, pet. ref'd) (holding that the defendant-proponent had not successfully met his burden at the trial level of showing that an impeaching conviction met the balancing test); Hankins v. State, 180 S.W.3d 177, 181 (Tex. App.—Austin 2005, pet. ref'd) (reviewing the evidence in the record and the trial court's comment about the conviction not having probative value and holding that the State failed to meet its burden of showing the conviction was admissible); Pierre v. State, 2 S.W.3d 439, 442–43 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (holding that the State did not meet its prescribed burden under *Theus* of showing the conviction was admissible); Kizart v. State, 811 S.W.2d 137, 141 (Tex. App.—Dallas 1991, no pet.) (noting that the burden is placed upon the proponent under both Rules 609(a) and (b)).

the conviction does not exceed ten years in order to avoid the more onerous requirement, applicable only to older convictions, that PV substantially outweighs PE.[101]

A party may object to the opponent's use of a prior conviction as impeachment by a motion in limine. However, to preserve the objection that the ruling improperly allowed the impeachment with that conviction, the witness must actually testify and be impeached by that conviction.[102] In other words, a criminal defendant cannot complain that the trial judge erred in refusing to exclude his prior conviction unless he suffers harm by actual impeachment with that conviction.[103] Likewise, if the defendant tries to preempt the prosecutor's expected impeachment by admitting to his prior conviction before he is cross-examined, the objection to the earlier adverse ruling in limine will be waived.[104]

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101. *See, e.g.*, Morris v. State, 214 S.W.3d 159, 187 (Tex. App.—Beaumont 2007, pet. granted) (holding that the trial court did not abuse its discretion in refusing to admit a conviction when the defendant-proponent failed to establish that the witness had been released from prison less than ten years prior to defendant's trial).

102. *See* Long v. State, 245 S.W.3d 563, 572 (Tex. App.—Houston [1st Dist.] 2007, no pet.) ("To preserve error from a trial court's pretrial ruling to allow impeachment of an appellant's testimony with prior convictions, an appellant must testify, because without the testimony, a harm analysis cannot be conducted."); Morgan v. State, 891 S.W.2d 733, 735 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (holding that defendant's failure to take the stand failed to preserve error for harm analysis in relation to a motion in limine); Perea v. State, 870 S.W.2d 314, 319 (Tex. App.—Tyler 1994, no pet.) (noting that appellant's failure to object at trial did not preserve error after the trial court ruled that his two felony convictions were admissible), *abrogated on other grounds by* Lopez v. State, 253 S.W.3d 680 (Tex. Crim. App. 2008); Richardson v. State, 832 S.W.2d 168, 172 (Tex. App.—Waco 1992, pet. ref'd) (holding that a decision not to testify based upon the trial court's failure to make a pre-trial ruling does not preserve error as it is impossible to tell what, if any, convictions the prosecution would have used for impeachment).

103. *See* Volk v. State, Nos. 01-07-00265-CR, 01-07-00266-CR, 01-07-00326-CR, 2008 WL 2854166, at *13 (Tex. App.—Houston [1st Dist.] July 24, 2008, no pet.) (mem. op., not designated for publication) (holding that a defendant who failed to testify did not preserve a claim of improper impeachment through prior convictions, despite the trial court's adverse ruling on a pre-trial motion to keep out impeaching convictions); White v. State, No. 14-01-01089-CR, 2002 WL 1494125, at *1 (Tex. App.—Houston [14th Dist.] July 11, 2002, no pet.) (mem. op., not designated for publication) (recognizing that appellant did not preserve objection to trial court's denial of defense's "motion in limine to bar the State's use for impeachment purposes of [appellant's] 25 year old conviction for aggravated robbery" since he did not testify); *cf.* Davis v. State, 203 S.W.3d 845, 855 n.42 (Tex. Crim. App. 2006) (citing with approval Luce v. United States, 469 U.S. 38, 41–42 (1984)) ("[A] defendant who declines to testify cannot complain on appeal that the trial court's in limine ruling permitting cross-examination with prior convictions . . . was erroneous.").

104. *Cf.* Rogers v. State, 853 S.W.2d 29, 35 (Tex. Crim. App. 1993) (op. on reh'g)

The trial court is afforded considerable discretion in determining whether to admit a particular prior conviction as impeachment evidence.[105] While encouraged to outline its appraisal of the balance between PV and PE on the record, the trial court is not required to do so.[106] The trial ruling will not be disturbed on appeal except for a clear abuse of discretion.[107]

III. CLEARING UP THE CONFUSION

A. *Determining the "Age" of a Conviction in Order to Choose Between Rule 609(a) or Rule 609(b)*

As previously discussed, the trial court's determination of

(stating that generally, any complaint on appeal that the trial court "improperly admitted evidence is waived if that same evidence" is first introduced by the complaining party or defense). This general rule is followed with respect to adverse rulings on admissibility of prior convictions. If the trial court has rejected the defense's motion in limine to exclude a prior conviction and the defendant decides to preemptively disclose his own prior conviction in an effort to reduce the impact it would have on the jury if brought out by prosecution cross-examination, the defendant waives any error in the earlier ruling. *See* Williams v. State, No. 03-07-00398-CR, 2008 WL 820919, at *5 (Tex. App.—Austin Mar. 28, 2008, pet. ref'd) (mem. op., not designated for publication) (holding that appellant's admission of the prior convictions without any effort to rebut them waives error on appeal); Nelson v. State, No. 14-06-00684-CR, 2007 WL 2790367, at *2 (Tex. App.—Houston [14th Dist.] Sept. 27, 2007, pet. ref'd) (mem. op., not designated for publication) (holding that admitting the convictions on direct examination waived error on appeal); Wootton v. State, 132 S.W.3d 80, 84 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (holding that appellant's efforts to preempt the State's attempt to admit impeaching convictions waived the right to complain on appeal).

105. Theus v. State, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992).

106. *Id.* at 880 n.6; Hankins v. State, 180 S.W.3d 177, 180 (Tex. App.—Austin 2005, pet. ref'd).

107. *See Theus*, 845 S.W.2d at 881 (outlining the requirements for reversing a trial court's ruling on erroneously admitted impeachment evidence on appeal).

> In reviewing the trial court's conduct in weighing these factors and decision in admitting into evidence a prior conviction, we must accord the trial court "wide discretion." Therefore, "a ruling permitting use of a prior conviction to impeach will be reversed on appeal only upon a showing of a clear abuse of discretion." If the trial judge's decision to admit a prior conviction lies outside the zone of reasonable disagreement, an appellate court should not hesitate to reverse the trial court's determination.

Id. (citations omitted); *see* Grant v. State, 247 S.W.3d 360, 366 (Tex. App.—Austin 2008, pet. ref'd) (reiterating that reversal will not lie unless the trial court abused its discretion); Montgomery v. State, 810 S.W.2d 372, 391 (Tex. Crim. App. 1990) (op. on reh'g) (holding that the appellate court should not reverse unless the trial court abused its discretion in admitting the convictions).

whether sub-Rule 609(a) or sub-Rule 609(b) governs admissibility of a disputed prior conviction is of critical importance because the two sections provide different balancing tests as a condition for admissibility. The stricter ("substantially outweighs") balancing test must be met whenever "more than ten years has elapsed" since the prior conviction.[108] For simplicity, one can regard the elapsed time since a conviction as the "age" of that conviction. In a close case, the age of the conviction (and thus the required balance between PV and PE) may be the crucial determinant of admissibility for a particular conviction because of the significant difference in the balancing tests. Therefore, a uniform approach to the dating of prior convictions is extremely important.

Measuring the age of anything requires one to establish its beginning point and end point. Rule 609 expressly provides that the beginning point is the later of the date of conviction or release from imprisonment for the conviction.[109] Judicial application of that principle has been straightforward[110] except in the case of parole.[111] However, the start point is only part of the calculation;

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108. TEX. R. EVID. 609(b); Hernandez v. State, 976 S.W.2d 753, 755 (Tex. App.—Houston [1st Dist.]) (citing TEX. R. EVID. 609(b)), *pet. ref'd*, 980 S.W.2d 652 (Tex. Crim. App. 1998).

109. TEX. R. EVID. 609(b).

110. *See, e.g.*, Thomas v. State, Nos. 05-04-01289-CR, 05-04-01290-CR, 2006 WL 1624393, at *1 (Tex. App.—Dallas June 13, 2006, pet. ref'd) (mem. op., not designated for publication) (measuring prior conviction from defendant's release date). The trial in *Thomas* occurred in August 2004. State v. Thomas, Nos. F03-58016-WS, F03-58480-IS (282nd Dist. Ct., Dallas County, Tex. Aug. 27, 2004). The defendant was impeached with a prior conviction for robbery. "Thomas was convicted of robbery in 1993 and sentenced to ten years' confinement. He admitted . . . [that] he was released from confinement for the robbery conviction in 2003 . . . ." *Thomas*, 2006 WL 1624393, at *1. Although the conviction was imposed more than ten years before trial, the appellate court and parties recognized that the later date of release from confinement (much less than ten years before trial) governed the choice between Rule 609(a) and (b). *Id.* Thus, the appellate court evaluated the trial court's admission of the evidence under Rule 609(a). *Id.*

111. When parole is substituted for confinement after a conviction, the courts have not been entirely clear on how to interpret the phrase "date . . . of the release of the witness from the confinement imposed for that conviction" in Rule 609(b). TEX. R. EVID. 609(b); *see* Walter v. State, 209 S.W.3d 722, 732 n.6 (Tex. App.—Texarkana 2006) (considering date of parole and date of release from parole as two possible dates of release from confinement), *rev'd on other grounds*, No. PD-1929-06, 2008 WL 4414536 (Tex. Crim. App. Oct. 1, 2008). In *Walter*, the trial date was not mentioned, but it can be inferred that the trial ended in 2004 because docketing information from the Texarkana Court of Appeals stated that notice of the appeal was filed on December 21, 2004. The court of appeals decided that Rule 609(a) governed whether witness Johnson's 1988 convictions for murder and robbery could be admitted to impeach him, even though those

convictions were adjudged at least fifteen (and probably more) years before trial. *Walter*, 209 S.W.3d at 732 n.6. Observing that Johnson began serving confinement for the murder-robbery upon his conviction in 1988, was briefly paroled in 1992, returned to serving his confinement in 1993, was paroled again in 1995, and was finally released from parole in 2000, the court declared that "release[] from confinement for the 1988 convictions" did not occur "until either 1995 . . . or 2000." *Id.* Because either 1995 or 2000 (the points at which the witness began parole and was released from parole, respectively) was less than ten years before the 2004 *Walters* trial, Rule 609(a) governed admissibility of Johnson's conviction, and the court found it unnecessary to decide whether the date of finally being paroled or the date of release from parole should be used as the precise point of release from confinement. *Id.*

In another case, the court specifically refused to decide whether the prior convictions dated from the imposition of, or release from, the actual confinement or the parole. Davis v. State, 259 S.W.3d 778, 783 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

The *Yanez* case shows the significance of how parole is regarded. Yanez v. State, 199 S.W.3d 293, 305–06 (Tex. App.—Corpus Christi 2006, pet. ref'd). In *Yanez*, the defendant was precluded from impeaching a prosecution witness, victim Duran, with three felony convictions, and the appeals court upheld the ruling, reasoning that (1) the convictions were more than ten years old, and (2) the defendant had failed to show that the probative value of the convictions outweighed their prejudicial effect. *Id.* The trial was in June 2004. *Id.* at 305. The appellate opinion described Duran's prior conviction history as follows:

> Duran admitted to three prior felony convictions. He was arrested for burglary of a habitation on September 23, 1985, pleaded guilty on February 28, 1986, and was sentenced to an eight-year prison term when probation was revoked for the subsequent offense. Duran was arrested on September 21, 1986, for burglary of a building, pleaded guilty on January 21, 1987, and was sentenced to an eight-year prison term that ran concurrently with the burglary of a habitation offense. He was released from prison on the burglary offenses in 1988 and, because of [an] attempted murder charge, his parole was revoked, and the original sentence was reinstated.
>
> Duran was . . . convicted . . . of the lesser offense of aggravated assault [instead of attempted murder]. On July 3, 1989, he was sentenced to a ten-year prison term. He was released on parole in 1990 for the aggravated assault conviction, the most recent, having served less than a year in prison. Duran testified, "I did all my 10 years parole" on that conviction. Duran agreed that a document, which defense counsel showed him in court but was not admitted in evidence, demonstrated he was paroled for the aggravated assault offense "until October 27, 1998."

Id. at 304 (footnote omitted). From this information, the trial and appellate courts were satisfied that "[t]he evidence establishe[d] that more than ten years ha[d] elapsed since Duran's release from the confinement imposed for his convictions." *Id.* at 305. But obviously the courts could reach that conclusion only by dating Duran's three convictions from 1990, when he was released from actual imprisonment and began his parole. If the date when the parole was finally completed (1998) was used as the end of the confinement, then it is clear that the three prior convictions were only about six years old. *See Yanez*, 199 S.W.3d at 304–05 (noting he was paroled from 1990 to 1998, the offense was in 2003, and the trial was in 2004). The *Yanez* approach, which does not view parole as the constructive equivalent of imprisonment for 609(b) purposes, has the advantage of simplicity and is consistent with the plain language of Rule 609(b): "since the date of the conviction or of the release of the witness from the confinement imposed for that

the *end point* is equally important, and here Texas courts have yet to clearly settle on a uniform approach.

Texas courts have measured the end point for the age of a conviction from several different points in time. Those various points on the timeline, which may be called "as of" dates, include: (1) the date(s) of the offense(s) currently being tried;[112] (2) the

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conviction, whichever is the later date." TEX. R. EVID. 609(b); *see Yanez*, 199 S.W.3d at 305 (dating conviction from release on parole).

However, in dicta, the Texarkana court has suggested that time spent on parole should be regarded as time spent in confinement. *Walter*, 209 S.W.3d at 732 n.6 (citing TEX. GOV'T CODE ANN. § 508.001(6) (Vernon 2004), for the proposition that parole is a "'discretionary and conditional release'" permitting an inmate to "'serve the remainder of the inmate's sentence under the supervision of the pardons and paroles division'" and citing the same as "suggesting that parole is not a release from confinement for purposes of Rule 609 of the Texas Rules of Evidence"). In other words, a person who is serving parole continues to be in constructive confinement and is only released from confinement for the prior conviction for Rule 609 purposes when the parole period ends. *Id.*

The *Walter* approach appears to be more sound because it applied the statutory definition of parole as a different mode of serving confinement, whereas *Yanez* ignored the parole period and dated the prior conviction as of the point when physical release from imprisonment occurs. *Compare Walter*, 209 S.W.3d at 732 n.6 (stating that confinement for 609(b) purposes continued during parole), *with Yanez*, 199 S.W.3d at 305 (holding that release from prison and placement on parole ended confinement for 609(b) purposes). In any event, the court of criminal appeals should clarify the matter so that courts treat all prior convictions involving a period of parole consistently for 609(b) purposes, rather than applying an ad hoc approach.

112. *See* Miller v. State, 196 S.W.3d 256, 268 (Tex. App.—Fort Worth 2006, pet. ref'd) (measuring from the date the charged offense occurred). The court seemed to measure from the prior conviction up to the time of the offense being tried, but the age of the conviction was nowhere close to ten years. *See id.* (failing to explain why 609(a) criteria applied, but noting that the 1997 prior conviction "occurred recently relative to the instant offense, which occurred on September 16, 2003"). In this regard, *Miller* seemed to follow the approach of *Theus*. *Compare* Theus v. State, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992) (measuring time for a finalized conviction used for impeachment purposes from when the defendant's probation was revoked), *with Miller*, 196 S.W.3d at 268 (measuring time for the offense being used for impeachment purposes from when the defendant's probation was revoked).

Another opinion mentions both the date of the charged offense (May 28, 2003) and the date of trial (June 24, 2004) without clearly deciding which to use as the "as of" date for time elapsed since a 1990 prior conviction. *Yanez*, 199 S.W.3d at 305. However, the court did not need to resolve the "as of" issue because, using either date, more than ten years had elapsed. The court simply ignored the issue:

> The date of Yanez's offenses is May 28, 2003. The date of the trial is June 24, 2004.
>
> The sole evidence before the trial court was that Duran was released from prison on the most recent felony offense in 1990 and successfully completed his ten-year parole term. The evidence establishes that *more than ten years have elapsed since* Duran's release from the confinement imposed for his convictions and *either the date of the offense or the date of trial.* We conclude that the trial court did not abuse its

date the defendant-witness was arrested for the offense(s) currently being tried;[113] (3) the start date of the trial in which the prior conviction is used as impeachment evidence;[114] and (4) the

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discretion on grounds that the convictions were inadmissible as too remote in time under Rule 609(b).

Id. (emphasis added) (footnote omitted).

113. *See, e.g.*, Bryant v. State, 997 S.W.2d 673, 676 (Tex. App.—Texarkana 1999, no pet.) (noting that the defendant-witness "was arrested for the offense on appeal on . . . a date that was within ten years of [his] release [from imprisonment for] both prior convictions").

114. *E.g.*, Jackson v. State, 50 S.W.3d 579, 591–92 (Tex. App.—Fort Worth 2001, pet. ref'd) (noting that "[m]ore than ten years had elapsed between Appellant's complained-of prior convictions [in 1983 and 1986] and his January 2000 *trial* for intoxication manslaughter," but he was impeached with other prior convictions of moral turpitude between 1993 and 1997 that occurred "within ten years of [his] current *trial*" (emphasis added)); Butler v. State, 890 S.W.2d 951, 954 (Tex. App.—Waco 1995, pet. ref'd) (accepting that Rule 609(b) applied because "[m]ore than ten years had elapsed between Butler's prior conviction (November 13, 1980) and his current *trial* (June 28–29, 1993)" (emphasis added)); Kizart v. State, 811 S.W.2d 137, 140–41 (Tex. App.—Dallas 1991, no pet.) (explaining that because the 1979 release date of the 1977 conviction for sexual abuse of a child "was more than ten years prior to the date of this [1989] trial," Rule 609(b) governed admissibility).

One First Court of Appeals decision clearly used the start date of trial for the "as of" date:

> Appellant had five prior felony convictions between September 22, 1975, and October 4, 1976. Appellant testified that he was released from prison for all of these prior offenses on November 12, 1978. The *trial commenced on May 9, 1989. Therefore, the prior convictions are more than 10 years old and fall under rule 609(b)* as presumptively inadmissible.

Sinegal v. State, 789 S.W.2d 383, 386 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (emphasis added) (footnote omitted). *Sinegal* further explained that the ten-year limitation addresses "the period of time between release from prison and trial" and then observed that "appellant was released from prison for his prior convictions [ten and a half] years prior to trial." *Id.* at 387–88.

Some other appellate opinions refer to "the date of trial" in a context that suggests that the court may have used that point to measure how much time had elapsed since the prior conviction; however, in those cases, the facts in the opinions suggest that the matter was not close enough to the ten-year line to matter whether the court measured to the start of trial, the date the witness testified, or the date when the impeachment was offered. *See, e.g.*, Smith v. State, Nos. 01-05-01095-CR, 01-05-01096-CR, 2007 WL 79475, at *9 n.7 (Tex. App.—Houston [1st Dist.] Jan. 11, 2007, pet. ref'd) (mem. op., not designated for publication) (holding that Rule 609(a) applied; defendant had not established precisely when he was released from confinement for his prior convictions (for burglary, manslaughter, and delivery of marijuana, in 1987, 1978, and 1975, respectively), but the court observed that the record included evidence that defendant had served confinement until 2003, only two years *before the 2005 trial* under appeal); Brown v. State, 880 S.W.2d 249, 251, 253 (Tex. App.—El Paso 1994, no pet.) (describing the prior rape conviction as fifteen years old, then later noting the conviction was in 1977, the witness was released from prison in 1981, and the trial in the appealed case was in 1992; the court evaluated

date when the witness testifies and the prior conviction is offered as impeachment evidence.[115] That Texas appellate decisions have not yet clearly and uniformly established which of these approaches is the correct approach is a serious problem because, as previously explained, determining the age of the prior conviction is a crucial threshold step to deciding the standard for admissibility of that prior conviction.

Even the landmark *Theus* decision skipped over this crucial step of the analysis. The opinion by the Texas Court of Criminal Appeals never explained why Rule 609(b) was inapplicable; in fact, *Theus* never mentions Rule 609(b) at all.[116] The court probably considered it obvious that Rule 609(a) applied. The trial and the allegedly improper impeachment occurred sometime in 1990 or 1991,[117] and the defendant's previous arson conviction

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admissibility of the conviction under Rule 609(b)).

115. *See* Moore v. State, 143 S.W.3d 305, 313 (Tex. App.—Waco 2004, pet. ref'd) ("[The second] factor examines the temporal proximity of the prior conviction *to the date the witness testifies* and the witness's subsequent history." (emphasis added)); Jackson v. State, 11 S.W.3d 336, 339 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (explaining that Rule 609(b) applies "[i]n the case of a prior conviction and release that took place more than 10 years *before being admitted at trial*" (emphasis added)); Simpson v. State, 886 S.W.2d 449, 452 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) ("Appellant was convicted of aggravated robbery on February 22, 1983. Evidence of appellant's prior convictions was offered by the [S]tate on November 10, 1993. Thus, more than 10 years had elapsed.").

The Eastland Court of Appeals has also embraced the rule that the "as of" date is the date when the prior conviction is offered as impeachment evidence. Battles v. State, No. 11-05-00166-CR, 2006 WL 1029072, at *2 (Tex. App.—Eastland Apr. 20, 2006, no pet.) (mem. op., not designated for publication) ("The age of a conviction is measured from the date of the conviction or release, whichever is later, to the date the evidence of the conviction is offered at trial.").

In at least one case, the First Court of Appeals in Houston used the date when the conviction is offered to impeach the witness in determining the age of the conviction (and thus whether to evaluate the admissibility of the conviction under Rule 609(a) or Rule 609(b)). *See* Pierre v. State, 2 S.W.3d 439, 442–43 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) ("The State offered evidence of appellant's prior convictions on July 29, 1997, and thus less than 10 years from the date of appellant's prior conviction."). However, another First Court of Appeals decision clearly used the start date of trial for the "as of" date. *See Sinegal*, 789 S.W.2d at 387 (noting a gap of over ten years between appellant's release from incarceration and the current trial).

116. *See Theus*, 845 S.W.2d at 880 (failing to discuss the age of the prior arson conviction).

117. *Cf.* Theus v. State, 816 S.W.2d 773, 774 (Tex. App.—Houston [14th Dist.] 1991) (dating the charged offense to February 1990), *rev'd and remanded*, 845 S.W.2d 874 (Tex. Crim. App. 1992). The trial date is not mentioned in the opinion of the lower court or the opinion of the Texas Court of Criminal Appeals. *Id.* at 773; *Theus*, 845 S.W.2d at 874.

became final when his probation was revoked in 1985.[118] Thus, the prior conviction could not have been more than four years old, by any measure, when it was used as impeachment evidence.[119]

However, the "as of" date or end date could be more problematic if the conviction (or release from confinement) occurred approximately ten years before the trial. To demonstrate the significance of this issue, consider this hypothetical: Suppose defense counsel attempted to impeach the prosecution's informant (*PW*) with *PW*'s perjury conviction. *PW* was convicted on July 1, 1996, and sentenced to confinement, from which *PW* was released on July 31, 1997. The defendant, *D*, was then tried for two offenses alleged to have occurred in January and April 2007, respectively. *D*'s lengthy trial began July 26, 2007. Suppose that on August 2, 2007, the defense counsel, on cross-examination, asked *PW* to acknowledge his prior conviction for perjury, and the prosecution objected. Was the proper test for the trial judge whether PV simply outweighed PE, or whether PV *substantially* outweighed PE?[120] The trial court's determination of whether to apply 609(a) or 609(b) depends on the age of the conviction. Clearly, the date of conviction is measured from July 31, 1997 (the date *PW* was released from confinement), not from 1996 (the date the conviction was adjudged). But should the period of time elapsed since the conviction be measured up until (or "as of") January, April, July, or August 2007?

However, the approximate time frame for the trial can be inferred from the lower court's mention that the alleged offense of cocaine delivery was in February 1990 and from the date of its opinion, August 1991. *Theus*, 816 S.W.2d at 774.

118. *See Theus*, 816 S.W.2d at 774 (implying that the conviction was considered to date from about 1987 because "Appellant had been convicted of arson in 1985 and given probation; he did not successfully complete its terms and served two years in prison").

119. *Cf. Theus*, 845 S.W.2d at 881 (noting a five-year span between the finalization of the impeaching conviction and the date of the new offense). The only point in the *Theus* opinion where the court of criminal appeals touched on the age of the conviction was when it assessed the second factor in applying the balancing test: "The arson conviction, which became final in 1985 when appellant's probation was revoked, *occurred recently, relative to the instant offense*, which happened in February 1990." *Id.* (emphasis added) (footnote omitted).

120. *Compare* TEX. R. EVID. 609(a) ("[E]vidence that the witness has been convicted of a crime shall be admitted if ... the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party."), *with* TEX. R. EVID. 609(b) ("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 ... unless ... the probative value of the conviction ... substantially outweighs its prejudicial effect.").

In this situation, the "as of" date used to choose between the admissibility tests of 609(a) or 609(b) is of considerable consequence. If the time "elapsed" since the July 1997 conviction is calculated as of the date when the trial judge faces the admissibility question (August 2, 2007), then more than ten years have elapsed, and Rule 609(b) allows the impeachment only if the circumstances satisfy the stricter balancing test. If, however, we measure the age of the 1997 conviction as of the time when the new offenses were supposedly committed, when the defendant was arrested, or when the trial commenced, then less than ten years have elapsed, and the applicable balancing test (from Rule 609(a)) is more favorable to the proponent. Today's crowded dockets may lengthen the interval between an offense and the start of trial, and the complexity of modern trials may lengthen the interval between the start of trial and the point at which the trial court must resolve the objection. Thus, it is increasingly important to have a sound, uniform approach to determining the "as of" date to calculate the age of a prior conviction.

The "as of" date for evaluating how much time has elapsed since a prior conviction should be the point in time that is most relevant to the rationale under which the law allows a party to impeach a witness with a prior conviction. The law permits impeachment evidence on the supposition that such evidence (here, the prior conviction) may help the jury evaluate how truthful the witness is *at the time he testifies*, not so that the jury can decide how truthful the accused was when he allegedly committed the crime(s), or when he was arrested, or at the start of trial.[121] Thus, the only logical point at which the trial court should assess how much time has elapsed since the conviction is the point in time when the witness testifies and is impeached.

The San Antonio court relied on this fundamental concept when it evaluated the age of the prior conviction in *Buffington v. State*.[122] After the defendant's 1978 murder conviction was reversed on appeal, he was retried in 1988.[123] At the 1988 trial,

121. *See* Sinegal v. State, 789 S.W.2d 383, 387 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (determining that in order for a prior conviction to have relevance as impeachment evidence, that conviction must have "some bearing on the present credibility of the witness").

122. Buffington v. State, 801 S.W.2d 151 (Tex. App.—San Antonio 1990, pet. ref'd).

123. *Id.* at 152–53.

the defendant was not permitted to impeach a prosecution witness with his burglary and attempted burglary convictions, which by 1988 were some eighteen years old.[124] The appellate court reasoned that "[t]he issue raised at the second trial was the witness' credibility at the time he testified. The controlling time for determining remoteness of the prior convictions was the date of the second trial."[125] The court considered this principle to be so compelling in determining the age of the conviction that it applied the Rule 609(b) standard even though impeachment was attempted at the first trial in 1978. At the first trial, a standard more favorable to admissibility applied because the prior conviction was less than ten years old at that time, but not at the time of the second trial.[126]

This date is in fact subject to some manipulation by either party, but only in the general sense that either party may attempt to influence the timing of the trial or the pace of the proceedings, and this is ultimately subject to the discretion and control of the trial judge.[127] The dates when the defendant allegedly committed the crimes that are the subject of the trial have no logical connection to witness credibility at all and to use these dates would cause several practical ambiguities. First, the trial may concern several alleged crimes on a number of different dates.[128] Second, crimes may be charged with "on or about" references.[129] Third, if the witness being impeached is not the defendant, those dates pertaining to the defendant have absolutely no bearing on the

124. *See id.* at 153 (noting that the witness was released from prison in 1970).

125. *Id.* at 154.

126. *See id.* at 153–54 (holding that the impeaching conviction should be measured in relation to when the witness is currently testifying).

127. *See* Renteria v. State, 206 S.W.3d 689, 699 (Tex. Crim. App. 2006) (holding that for criminal trials, "[t]he granting or denying of a motion for continuance is within the sound discretion of the trial court"); *cf.* Dow Chem. Co. v. Francis, 46 S.W.3d 237, 241 (Tex. 2001) (holding that in civil trials, "a trial court may properly intervene to maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of time").

128. *See, e.g.*, Cervantes v. State, 815 S.W.2d 569, 571 (Tex. Crim. App. 1991) (en banc) (articulating the general rule that charges stemming from multiple indictments may be consolidated into one trial).

129. *See, e.g.*, Sledge v. State, 953 S.W.2d 253, 255–56 (Tex. Crim. App. 1997) (en banc) (reiterating that an "on or about" date need not give a specific date, but only contain enough information so that the criminal act is anterior to the indictment and before the running of the statute of limitations).

recentness of the witness's conviction.[130] The other possible points on the chronology are equally easy to ascertain, but the most logically relevant point is the date when the impeachment is offered.[131] Since the entire justification for the admission of prior conviction evidence is the supposition that it may help the trier of fact to assess the truthfulness of a witness *at the time she testifies*, the court should logically use the point when that conviction is offered for the "as of" date when the age of the conviction ought to be assessed.

Fixing the age of a prior conviction as of the date when the witness testifies and is impeached is also consistent with the Texas practice for admissibility of prior convictions before the Texas Rules of Evidence were adopted in 1986.[132] Before the Rules, Texas courts generally did not allow a party to impeach a witness with a prior conviction more than ten years old.[133] Such convictions were deemed "remote" and considered to be so old that they no longer reliably indicated the untruthfulness of the witness.[134] The old common law practice was to measure the age

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130. *See, e.g.*, *Buffington*, 801 S.W.2d at 152–53 (stating that age of the witness's conviction governs whether the criteria of Rule 609(a) or 609(b) apply).

131. One could argue that when admissibility of a prior conviction is litigated in limine, this date is not yet fixed; but, the very nature of evidentiary rulings in limine is tentative, and the judge can readily make the ruling subject to an assumed date when the conviction will be offered and then adjust the analysis of admissibility later if the pace of trial is different than expected. *See* Geuder v. State, 115 S.W.3d 11, 14–15 (Tex. Crim. App. 2003) (stating that a court's ruling on a motion in limine is only a "preliminary ruling" and merely acts to pre-object to the evidence).

132. *See* Lucas v. State, 791 S.W.2d 35, 50–51 (Tex. Crim. App. 1989) (en banc) (noting the similarities between the old rule and the then-newly adopted Rule 609 in the Rules of Criminal Evidence).

133. *See id.* (stating the common law rule for impeachment). The pre-609 practice was summarized by the court as follows:

> A witness in a criminal case may be impeached with proof of a final felony conviction or a final misdemeanor conviction involving moral turpitude. However, this Court has placed limits on that general proposition by holding that evidence of extremely remote convictions cannot be admitted for purposes of impeachment. The general rule of thumb has evolved into one stating that where the release from confinement is less than ten years prior to the proceeding in which the conviction is sought to be used, the conviction is admissible.

Id. (citations omitted).

134. Taylor v. State, 612 S.W.2d 566, 572 (Tex. Crim. App. [panel op.] 1981). The court noted that:

> [O]ffenses must not be so remote in time so as not to be relevant to the present credibility of the witness.

of the conviction from the date of release from confinement (if later than the date the conviction was adjudged),[135] just as is now provided under Rule 609,[136] up to the date when the witness testified.[137] Since the rationale for the old common law ten-year rule (ensuring the prior conviction was relevant to the witness's truthfulness when he testified)[138] was the same as the rationale for the present ten-year dividing line of Rule 609,[139] it is only logical that the age of the conviction be calculated using the same datum.

. . . .

> The question of remoteness is largely a matter within the discretion of the trial court, although the general rule of thumb is that if the release from confinement is less than 10 years prior, the conviction may be admitted.

Id.

135. *Lucas*, 791 S.W.2d at 50–51 (stating the common law rule that an impeaching conviction is measured from the date the witness is released from confinement).

136. TEX. R. EVID. 609(b).

137. *See Taylor*, 612 S.W.2d at 572 (holding that the date the witness testifies is when the age of conviction is measured for impeachment purposes). Rule 609 took effect on September 1, 1986. *Lucas*, 791 S.W.2d at 50 n.9. Before that date, for criminal trials, the Texas courts followed the rule that remote convictions could not be used for impeachment, and "[w]ith regard to remoteness, it is the time between the date of release from confinement and the date of the witness' testimony that determines the issue." *Taylor*, 612 S.W.2d at 572. In *Taylor*, the court clearly analyzed the age of the prior conviction in this manner:

> Here, the record shows that appellant began his sentence [for a Minnesota conviction for aggravated forgery] on November 22, 1968 and served 18 months of his sentence before release, making the latter date approximately March 22, 1970. *Appellant testified on January 12, 1978.* The question of remoteness is largely a matter within the discretion of the trial court, although the general rule of thumb is that if the release from confinement is less than 10 years prior, the conviction may be admitted. We hold that there was no abuse of discretion in the trial court's allowing appellant's credibility to be attacked by use of the 1968 conviction.

Id. (emphasis added) (citations omitted).

138. *See Taylor*, 612 S.W.2d at 572 (implying that the date of testimony is relevant to the fact that the witness is putting his credibility on the line).

139. *See* Hernandez v. State, 980 S.W.2d 652, 652 (Tex. Crim. App. 1998) (Womack, J., concurring on refusal to grant discretionary review) ("'[C]onvictions over ten years old generally do not have much probative value' on the issue of character, which is why Rule 609(b) requires a high showing of relevance for admission of an old conviction." (citation omitted)). Older convictions have less probative value and "[r]emote convictions are inadmissible because of a presumption that one is capable of rehabilitation and that his character has reformed over a period of law abiding conduct." Morris v. State, 67 S.W.3d 257, 263 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd); *see also* Sinegal v. State, 789 S.W.2d 383, 387 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) ("The reason for the adoption of the remoteness limitation on impeachment evidence is that a remote conviction is a poor indication of the accused's present character.").

B. *Eliminating the "Tacking" Doctrine As a Means to Avoid the Stricter Balancing Test of Rule 609(b) for Older Convictions*

Before the Texas Rules of Evidence were adopted, Texas courts generally only allowed impeachment with prior convictions that were less than ten years old.[140] Conversely, a conviction more than ten years old was deemed "remote" and ordinarily did not qualify as impeachment evidence.[141] However, a well-established doctrine called "tacking" was recognized in cases where the witness had several prior convictions.[142] Under this doctrine, if a witness had a remote conviction *A*, that conviction could be "tacked" onto a later conviction *B* that was within the ten-year window.[143] As a result of this tacking, the older conviction was

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140. *See* Penix v. State, 488 S.W.2d 86, 88 (Tex. Crim. App. 1973) (citing authority for the proposition that the long-standing rule was to admit convictions that were less than ten years old).

141. *See* McClendon v. State, 509 S.W.2d 851, 857 (Tex. Crim. App. 1974) (holding it was error to allow defendant to be impeached with a remote conviction without an exception that could revive the conviction); Livingston v. State, 421 S.W.2d 108, 109 (Tex. Crim. App. 1967) (holding that it was error to allow defendant to be impeached with a conviction outside of the ten-year range unless there was a subsequent conviction involving moral turpitude).

142. *See* Hankins v. State, 180 S.W.3d 177, 179 (Tex. App.—Austin 2005, pet. ref'd) ("[Tacking is a]n exception to the common-law rule allow[ing] the trial court . . . to admit a remote conviction if the witness demonstrated a lack of reformation by committing a subsequent conviction . . . involving moral turpitude."); *see also* Crisp v. State, 470 S.W.2d 58, 59 (Tex. Crim. App. 1971) (holding that the prior convictions were too remote because there were no intervening convictions to revive the old conviction for impeachment purposes); *Livingston*, 421 S.W.2d at 108–09 ("'The testimony introduced by the appellant without objection, that she had not within the last ten years been convicted of a felony did not authorize the [S]tate to then prove that she had been convicted of murder over twelve years before the commission of the instant offense [unless there was an intervening] conviction . . . involving moral turpitude . . . .'" (quoting with approval Blessett v. State, 168 Tex. Crim. 517, 329 S.W.2d 434 (1959))).

143. *See McClendon*, 509 S.W.2d at 856–57 (discussing the requirements of reviving an old conviction through subsequent convictions). Tacking was permitted only if conviction *B*, in addition to being newer than ten years old, was qualified as a conviction for a felony or crime involving moral turpitude. *See id.* at 856 (giving the rule that an old conviction may only be revived by a subsequent conviction involving a felony or misdemeanor involving moral turpitude); *see also Hankins*, 180 S.W.3d at 179 ("An exception to the common-law rule allowed the trial court the discretion to admit a remote conviction if the witness demonstrated a lack of reformation by committing a subsequent [crime constituting] a felony or a misdemeanor involving moral turpitude.").

In *McClendon*, the Texas Court of Criminal Appeals rejected the applicability of the tacking doctrine to the twenty-three-year-old prior conviction because the newer convictions, onto which the prosecution wanted to tack the old murder conviction, were misdemeanors that did not involve moral turpitude. *McClendon*, 509 S.W.2d at 855; *see also Livingston*, 421 S.W.2d at 109 (distinguishing the case at bar from an earlier opinion

effectively "revitalized" or, in other words, was constructively transformed from a remote to a fresh conviction.[144]

Since the 1986 adoption of the Texas Rules of Evidence,[145] Texas courts have taken widely divergent positions on whether the tacking doctrine has continued vitality. In spite of that divergence, the Texas Court of Criminal Appeals has not subsequently intervened with any decision that would promote uniformity of interpretation of Rule 609 in this regard.[146]

Many intermediary courts continue to apply the pre-Rules tacking doctrine in situations where the witness has a remote conviction and at least one non-remote conviction onto which the older one can be tacked.[147] The result, of course, favors

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by holding that the intervening misdemeanors were admissible because they involved moral turpitude).

144. *See McClendon*, 509 S.W.2d at 855–56 ("[E]vidence of lack of reformation or subsequent conviction of another felony or misdemeanor involving moral turpitude causes the prior conviction not to be subject to the objection of remoteness.").

145. *See Ex parte* Menchaca, 854 S.W.2d 128, 130–31 (Tex. Crim. App. 1993) (explaining how the Texas Rule of Criminal Evidence 609 has governed "the admissibility of prior convictions" for impeachment purposes since its adoption on September 1, 1986). The same rule, renamed Texas Rule of Evidence 609, became effective for civil as well as criminal trials on March 1, 1998. Hernandez v. State, 976 S.W.2d 753, 755 n.2 (Tex. App.—Houston [1st Dist.]), *pet. ref'd*, 980 S.W.2d 652 (Tex. Crim. App. 1998).

146. The court has avoided taking up the matter by repeatedly rejecting petitions for discretionary review. *See, e.g.*, *Hankins*, 180 S.W.3d at 180 (rejecting the tacking doctrine); Jackson v. State, 50 S.W.3d 579, 591 (Tex. App.—Fort Worth 2001, pet. ref'd) (upholding the tacking doctrine).

147. *See* Medley v. State, No. 01-07-00017-CR, 2008 WL 920342, at *3 (Tex. App.—Houston [1st Dist.] Apr. 3, 2008, no pet.) (mem. op., not designated for publication) ("We recognize the practice of 'tacking' later convictions for felonies or misdemeanors involving moral turpitude to remove the taint of remoteness from prior convictions from more than ten years before the trial."); Smith v. State, Nos. 01-05-01095-CR, 01-05-01096-CR, 2007 WL 79475, at *10 (Tex. App.—Houston [1st Dist.] Jan. 11, 2007, pet. ref'd) (mem. op., not designated for publication) (explaining that all of the disputed convictions, even one from thirty years before trial, were subject to the Rule 609(a) balancing test, because the defendant-witness had a felony dated only two years before trial that removed "the taint of remoteness from [the older] convictions"); Walter v. State, 209 S.W.3d 722, 732 n.6 (Tex. App.—Texarkana 2006) (explaining, as alternate rationale, that two more recent felony convictions would "vitiate the remoteness of any prior convictions and place the older convictions back under the 'outweigh' standard of Rule 609(a)"), *rev'd on other grounds*, No. PD-1929-06, 2008 WL 4414536 (Tex. Crim. App. Oct. 1, 2008); Woodall v. State, 77 S.W.3d 388, 395 (Tex. App.—Fort Worth 2002, pet. ref'd) (illustrating how a subsequent conviction for a misdemeanor of moral turpitude brought other convictions older than ten years under coverage of Rule 609(a)); Morris v. State, 67 S.W.3d 257, 263–64 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (explaining that defendant-witness's convictions within ten years of trial "remove[d] the taint of remoteness from" two convictions older than ten years and that the court therefore applied "the Rule 609(a)

admissibility of the older conviction, because tacking transforms the otherwise remote prior conviction into a fresh conviction, and allows the proponent of the remote conviction to avoid the stricter balancing test of Rule 609(b) for that older conviction.[148]

At least five Texas courts of appeals have cited the First Court of Appeals' decision in *Hernandez v. State*[149] as precedent for continued use of the tacking doctrine despite the language of Rule 609(b).[150] In *Hernandez*, Justice Hedges's opinion explained that

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'outweigh' standard to determine whether admission of appellant's prior convictions more than ten years old was proper"); *Jackson*, 50 S.W.3d at 592 (holding that defendant's remote convictions for robbery were revitalized by later convictions for crimes of moral turpitude including deadly conduct, theft, escape, and assault on female); Rodriguez v. State, 31 S.W.3d 359, 363 (Tex. App.—San Antonio 2000, pet. ref'd) (explaining that because the defendant-witness also had a nine-year-old conviction, the tacking doctrine removed the taint of remoteness from two convictions older than ten years); *see also* Jackson v. State, 11 S.W.3d 336, 339 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (applying the tacking rule); Simpson v. State, 886 S.W.2d 449, 452 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd) (stating that Texas courts follow the tacking rule); Baker v. State, 841 S.W.2d 542, 543 (Tex. App.—Houston [1st Dist.] 1992, no pet.) (recognizing that an intervening conviction removes the remoteness of a prior conviction).

Note, however, that the courts that have allowed tacking under Rule 609 continue to limit tacking to situations where at least one subsequent conviction is either a felony or a crime involving moral turpitude, which is the same requirement as under pre-Rules law in Texas. *See Hernandez*, 976 S.W.2d at 755 (referring to earlier cases such as *McClendon*, 509 S.W.2d at 855–57, as authority for the conclusion that "Texas courts have historically looked at subsequent convictions of a felony or a misdemeanor involving moral turpitude").

148. *See* Adkins v. State, No. 14-06-00402-CR, 2007 WL 2330795, at *2–3 (Tex. App.—Houston [14th Dist.] Aug. 16, 2007, no pet.) (mem. op., not designated for publication) (evaluating convictions older than ten years under the 609(a) standard because they were tacked onto a seven-year-old felony conviction); *Morris*, 67 S.W.3d at 263–64 (holding that the defendant's otherwise remote felony convictions for burglary, his misdemeanor theft convictions, and his engaging in organized criminal activity should be examined under the 609(a) "outweighs" standard instead of the 609(b) "substantially outweighs" standard because the older convictions were tacked onto intervening theft and burglary convictions within ten years of the trial); *Hernandez*, 976 S.W.2d at 755 ("Under that circumstance, the 609(a) standard is appropriate because the 'tacking' of the intervening convictions causes a conviction older than ten years to be treated as not remote.").

149. Hernandez v. State, 976 S.W.2d 753 (Tex. App.—Houston [1st Dist.]), *pet. ref'd*, 980 S.W.2d 652 (Tex. Crim. App. 1998).

150. *See Adkins*, 2007 WL 2330795, at *2 (using *Hernandez* as a guideline for admitting old convictions through the tacking doctrine); *Walter*, 209 S.W.3d at 732 n.6 (explaining that an intervening felony put old convictions within the realm of Rule 609(a)); Mozee v. State, No. 05-00-01260-CR, 2001 WL 1590524, at *4 (Tex. App.—Dallas Dec. 14, 2001, no pet.) (mem. op., not designated for publication) (determining that a subsequent conviction for misdemeanor theft met the *Hernandez* standard for admissibility); *Jackson*, 50 S.W.3d at 592 (referring to *Hernandez* for the proposition that

when a witness is impeached with a conviction "more than 10 years old but ... [also has] subsequent convictions of felonies or misdemeanors involving moral turpitude[,] [those intervening convictions] remove the taint of its distance" from the remote conviction.[151] "Under that circumstance, the 609(a) standard is appropriate because the 'tacking' of the intervening convictions causes a conviction older than 10 years to be treated as not remote."[152]

However, the statement in the *Hernandez* decision that the tacking doctrine still operates to remove the "taint" of remoteness[153] was only dicta. The court actually decided, in that particular case, that no intervening conviction of moral turpitude within the ten-year limitation had been proven, tacking therefore could not be applied, and thus, the standard of Rule 609(b) governed admissibility of the remote convictions.[154] Moreover, the declaration by the *Hernandez* court that tacking continues to be a valid approach under Rule 609 is unpersuasive because it was justified only by reliance on precedent predating the adoption of the Texas Rules of Criminal Evidence.[155]

"subsequent misdemeanor convictions involving moral turpitude remove the taint of remoteness" from older convictions); Erevia v. State, No. 13-99-232-CR, 2000 WL 34410039, at *4 (Tex. App.—Corpus Christi Aug. 31, 2000, pet. ref'd) (mem. op., not designated for publication) (noting that *Hernandez* permitted tacking).

In another decision, the Fourteenth Court of Appeals in Houston incorrectly claimed that the compatibility of the tacking doctrine under Rule 609 was sanctioned by a decision of the Texas Court of Criminal Appeals:

> The Texas Court of Criminal Appeals has created an exception or interpretation of the general rule such that Rule 609(b)'s "substantially outweighs" test will not be applied to a prior conviction over ten years old if the witness's lack of reformation is shown by evidence of an intervening conviction for a felony or a misdemeanor involving moral turpitude.

LaHood v. State, 171 S.W.3d 613, 620 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing Lucas v. State, 791 S.W.2d 35, 51 (Tex. Crim. App. 1989) (en banc)). However, *Lucas* did not recognize any such "exception" under Rule 609(b); *Lucas*, in fact, involved impeachment in a trial that took place before Texas Rule of Evidence 609 was adopted. *Lucas*, 791 S.W.2d at 50–51 & n.9.

151. *Hernandez*, 976 S.W.2d at 755.

152. *Id.*

153. *Id.* at 755–56.

154. *Id.* at 756.

155. *Id.* at 755–56 (referring to pre-Rules authority to support tacking). *Hernandez*, using 1970's Texas Court of Criminal Appeals opinions as support, explained:

> In evaluating a complaint about the admission of a prior conviction, an appellate court . . . may find that [the prior conviction] is more than 10 years old but that

Some other Texas appellate courts have rejected or ignored the tacking approach and have instead tested the admissibility of a "remote" conviction under the express criteria of Rule 609(b).[156] Further, although the First Court of Appeals had frequently applied the tacking doctrine,[157] one of its recent decisions, *Davis v. State*,[158] suggests that it is no longer so sure about the propriety of that approach.[159]

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subsequent convictions of felonies or misdemeanors involving moral turpitude remove the taint of its distance. Under that circumstance, the 609(a) standard is appropriate because the "tacking" of the intervening convictions causes a conviction older than 10 years to be treated as not remote.

Hernandez, 976 S.W.2d at 755.

156. *See* Hankins v. State, 180 S.W.3d 177, 180 (Tex. App.—Austin 2005, pet. ref'd) (rejecting the tacking doctrine as inconsistent with the adoption of Rule 609 and finding error in admission of a conviction older than ten years using the "substantially outweigh" test of Rule 609(b)); Kizart v. State, 811 S.W.2d 137, 141 (Tex. App.—Dallas 1991, no pet.) (ignoring the possible application of the tacking doctrine for a prior conviction more than ten years old even though the witness also had two other convictions for misdemeanors involving moral turpitude that were within the ten year window, and applying the "more stringent balancing test" of Rule 609(b)).

157. *See* Morris v. State, 67 S.W.3d 257, 263–64 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd) (using the tacking doctrine). In the 2001 *Morris* decision, the First Court of Appeals clearly applied the tacking doctrine:

> As this court pointed out in *Hernandez v. State*, an appellate court may find that, while a prior conviction is more than 10 years old, later convictions for felonies or misdemeanors involving moral turpitude remove the taint of remoteness from the prior convictions. In such a circumstance, the Rule 609(a) "outweigh" standard is appropriate because the "tacking" of the intervening convictions renders convictions more than 10 years old no longer remote.
>
> In the present case [where the trial was in September 2000], evidence was presented, without objection, of appellant's convictions for theft of more than $20,000 and burglary of a habitation, both in 1991. These intervening felony convictions remove the taint of remoteness from the offered 1988 and 1990 convictions. Therefore, we apply the Rule 609(a) "outweigh" standard to determine whether admission of appellant's prior convictions more than 10 years old was proper.

Id. (citations omitted).

158 Davis v. State, 259 S.W.3d 778 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).

159. *See id.* at 781 (explaining but failing to use the tacking doctrine). The First Court of Appeals explained the tacking doctrine but did not clearly adopt it:

> [W]e note that Texas courts have held that subsequent convictions for felonies or misdemeanors involving moral turpitude may remove any taint of remoteness from prior convictions.
>
> Nevertheless, even if we consider only the dates of appellant's convictions as the relevant dates under Rule 609 and, thus, agree with appellant that the admission of his convictions should be evaluated under the "substantially outweighs" standard in Rule 609(b), it is well settled that whether to admit remote convictions under Rule

In a carefully reasoned opinion, *Hankins v. State*,[160] the Austin Court of Appeals rejected the tacking doctrine, finding it to be incompatible with the adoption of Rule 609.[161] Observing that Rule 609 expressly created different standards for the admissibility of convictions in two distinct categories (those that are more than ten years old, and those that are not), the court found no basis under the rule to create a third category to be governed by the tacking doctrine.[162]

The Texas Court of Criminal Appeals should adopt the *Hankins* analysis and rule that the old tacking doctrine has no place in the application of Rule 609 for several reasons. The tacking approach is incompatible with the more rigorous conditions that Rule 609 expressly provides for admitting convictions older than ten years, and it relegates that stricter standard for remote convictions to a sub-category of cases where the witness only has older convictions.

First, Rule 609 expressly gives a different test for admitting prior convictions that are older than ten years, as opposed to more recent convictions, and the rule does not provide a caveat that the stricter criteria for the older convictions do not apply when the witness also has a recent conviction.[163] The omission of such a caveat from the plain terms of the rule should not be regarded as accidental, since the very structure of the rule suggests that the admissibility of each prior conviction offered to impeach a particular witness should be separately analyzed.[164]

Second, the tacking approach illogically allows the proponent of

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609(b) still "lies within the trial court's discretion and depends on the facts and circumstances of each case."

Id. (footnote omitted) (citations omitted).

160. Hankins v. State, 180 S.W.3d 177 (Tex. App.—Austin 2005, pet. ref'd).

161. *See id.* at 180 (ruling that all convictions older than ten years must be analyzed under Rule 609(b)).

162. *See id.* ("Rule 609 does not include a third category of prior convictions codifying the *McClendon* exception.").

163. *Compare* TEX. R. EVID. 609(b) (providing that a ten-year-old conviction may only be admitted if it substantially outweighs the prejudicial effects), *with* TEX. R. EVID. 609(a) (providing that a newer conviction's probative value must merely outweigh its prejudicial effect).

164. *See generally* TEX. R. EVID. 609 (listing the requirements for admissibility of an impeaching conviction). This approach (considering admissibility of each conviction separately) is not incompatible with evaluating the impact of prior convictions already admitted against the witness as part of an inquiry into the impeaching party's need to use a particular prior conviction to challenge the truthfulness of that witness.

impeachment to circumvent the higher hurdle of Rule 609(b) when the very purpose of setting a stricter standard for admissibility of the remote conviction was that the long passage of time makes an older conviction so much less probative regarding the witness's current veracity.[165] If a witness had a felony conviction twenty years ago, and then was convicted of a moral turpitude offense just one year ago, the probative value of the latest conviction on the current credibility of the witness is evident. But that recent indication of deceptive character does not enhance the minimal tendency of the distant conviction to reflect present untruthfulness of the witness. The intervening event of a recent conviction, in other words, does not change the fact that the first conviction occurred twenty years ago. Whatever probative value the twenty-year-old conviction may have concerning the present character of the witness to testify untruthfully ought to be evaluated on its own merits, under the stricter criteria of Rule 609(b), not artificially revitalized and judged as if it were less than ten years old. The tacking approach evades the stricter condition for allowing use of an old prior conviction without any logical rationale except: "We always did it this way, before the new rule existed."

C. *Clarifying the Second* Theus *Factor*

As previously discussed, the Texas Court of Criminal Appeals has instructed courts to evaluate the balance between legitimate impeachment (probative value) and illegitimate damage to the opponent's case (prejudicial effect) by examining various factors. The court used the shorthand of "temporal proximity" to label the second of those factors,[166] but then described the factor as used by federal courts (who had already adopted a similar analysis) as "the temporal proximity of the past crime relative to the charged offense *and* the witness' subsequent history."[167] In another part of its opinion, the court adopted its own analysis: "the second factor will favor admission if the past crime is recent *and* if the

165. *See* Kizart v. State, 811 S.W.2d 137, 141 (Tex. App.—Dallas 1991, no pet.) (ruling that an old conviction could still be subject to tacking, but also acknowledging that "[t]he presumptive exclusion of remote convictions [by Rule 609(b)] is grounded on a belief in an individual's ability to reform").

166. Theus v. State, 845 S.W.2d 874, 881 (Tex. Crim. App. 1992).

167. *Id.* at 880 (emphasis added).

witness has . . . a propensity for running afoul of the law."[168]

From the use of the conjunctive language in each of these formulations, one leading Texas decision, *Woodall v. State*,[169] concluded that the second factor consists of two elements, and indicated that a conviction can *only* have high probative value where both elements are satisfied.[170] The *Woodall* court reviewed a defendant's complaint that he had been improperly blocked from attacking the State's only eyewitness with that witness's prior convictions that occurred over ten years before trial.[171] The Fort Worth court, upon reviewing the fourteen-year-old forgery conviction, found in its *Theus* analysis that the second factor weighed against admission because both of the two separate elements of the second factor were not satisfied.[172] The *Woodall* court reasoned that "the two elements [of the second *Theus* factor] have been set forth in the conjunctive, rather than the disjunctive."[173] The court observed that "although [the witness's] convictions tend[ed] to show he has a propensity for running afoul of the law, [his] forgery conviction [was] not 'recent' because it occurred over fourteen years prior to trial."[174] Thus, because only one prong of the second factor was satisfied, the Fort Worth court decided that the factor weighed against admissibility of the forgery conviction.[175]

Several other courts of appeals have also followed this two-prong, or conjunctive, approach to the second *Theus* factor.[176]

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168. *Id.* at 881 (emphasis added).

169. Woodall v. State, 77 S.W.3d 388 (Tex. App.—Fort Worth 2002, pet. ref'd).

170. *See id.* at 395–96 (applying the second factor to mean that admission of a conviction for forgery was not favored because even though the fact that his prior convictions show he has a tendency "for running afoul of the law," the defendant's impeaching conviction was fourteen years old).

171. *Id.* at 394.

172. *See id.* at 395–96 (reading *Theus* as requiring that the conviction be recent *and* that the witness "demonstrate a propensity for running afoul of the law").

173. *Id.* at 395.

174. *Woodall*, 77 S.W.3d at 395.

175. *Id.* at 395–96.

176. *See, e.g.*, Moore v. State, 143 S.W.3d 305, 313 (Tex. App.—Waco 2004, pet. ref'd) (determining that the fact that the witness had no further trouble with the law weighed against admission). In one appeal, for example, the Waco court examined the application of the second factor to two prior theft convictions that the trial court had barred the defense from using to impeach a key prosecution witness. *Id.* at 312. The appellate court said the probative value of those convictions was low, not so much because of the age of the convictions (some thirteen years before the trial), but because the

However, this approach is an unreasonably mechanical reading of the *Theus* opinion for several reasons. While the second *Theus* factor should logically consider both how recently the prior conviction occurred and what, if any, other misconduct the witness has engaged in since that conviction, the "temporal proximity" of a particular conviction may demonstrate a high degree of probative value on the witness's credibility even without any subsequent misconduct by the witness.

First, a careful analysis of the *Theus* decision itself shows that the opinion's reference to the "subsequent history" of the witness in connection with the second factor did not indicate a *necessary condition* for high probative value, but rather, a helpful and pertinent aspect to be considered. This is evident from the court's

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prosecution witness "had no further difficulties with the law." *Id.* at 313.

Several other opinions similarly concluded that the second factor showed low probative value (and thus weighed against admissibility for impeachment) because of the lack of other incidents of criminal conduct by the witness. *See, e.g.*, Sirois v. State, No. 11-06-00240-CR, 2008 WL 1893291, at *5 (Tex. App.—Eastland Apr. 24, 2008, pet. ref'd) (mem. op., not designated for publication) (explaining that the second factor's "militation against admission of the conviction is not lessened by appellant's propensity for running afoul of the law because there has been no showing of any such propensity to run afoul of the law"); Butler v. State, 890 S.W.2d 951, 955 (Tex. App.—Waco 1995, pet. ref'd) (deciding that the proximity factor showed little probative value for a thirteen-year-old conviction where the party attempting impeachment had not fulfilled "the burden of proving that [the witness's] subsequent criminal history made the [prior] conviction admissible").

In *Battles v. State*, No. 11-05-00166-CR, 2006 WL 1029072 (Tex. App.—Eastland Apr. 20, 2006, no pet.) (not designated for publication), the tacking doctrine was not triggered to revive an old conviction for purposes of the second *Theus* factor. *Id.* at *3. The court explained:

> [T]he record does not show that [the witness-appellant] was convicted of any felonies or crimes involving moral turpitude between [his prior] conviction and the time of trial. Therefore, the second factor, temporal proximity, weighs against admission in this cause because the conviction occurred so long [some seventeen years] before appellant's trial.

Id.

Several other decisions explained that the second factor indicated probative value for a prior conviction because the witness had subsequent criminal history. *See, e.g.*, Jackson v. State, 50 S.W.3d 579, 592–93 (Tex. App.—Fort Worth 2001, pet. ref'd) (emphasizing the conjunctive nature of the two prongs of the proximity factor and then concluding that "the frequency of [appellant-witness's] convictions demonstrates a propensity for running afoul of the law" so that the second factor supported admissibility for impeachment); Pierre v. State, 2 S.W.3d 439, 442–43 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (explaining that "the second factor favors admissibility" because the two convictions were only about five years old and the witness's "multiple convictions demonstrated his propensity for lawlessness").

own application of the second factor to the circumstances of the *Theus* case. The case involved a defendant-witness who objected to his impeachment with his single prior conviction for arson.[177] Applying the second factor to the facts presented by the appeal, the court never mentioned any other conviction that might show a "propensity for running afoul of the law" or "subsequent history" after the arson conviction; instead, the court simply concluded that the second factor (like three other factors) "favor[ed] admissibility" because the 1985 arson conviction occurred recently relative to the matter being tried.[178] In other words, the second factor favored admitting the five-year-old arson conviction simply because that prior conviction was relatively fresh (only five years old), not because the witness had any other subsequent history of running afoul of the law that suggested any lack of reformation. Thus, in the analysis of the *Theus* court itself, references to subsequent history as a pertinent aspect of the second factor were evidently not meant to make that aspect a required element for high probative value, as later suggested by *Woodall*.[179]

Second, a simple example shows how illogical it is to require a witness to have not only a recent conviction, but some other "subsequent history" of misconduct (or "propensity for running afoul of the law"), before concluding that the "temporal proximity" factor favors admissibility of that conviction. Suppose a party wishes to attack witness (*W*) with a felony perjury conviction that became final just nine months ago today, when *W* has absolutely no blemishes on his record subsequent to the perjury incident. Disregarding all other factors, the very fact that the conviction is so recent significantly adds to the relevance of that conviction to the jury's decision about whether *W* is a truthful witness. Clearly, a conviction just a few months ago carries much more probative value than a similar conviction nine years ago. But if one takes literally the *Theus* court's description of the second factor (i.e., admissibility is favored only if *both* temporal proximity

177. Theus v. State, 845 S.W.2d 874, 879 (Tex. Crim. App. 1992).

178. *Id.* at 881.

179. *Compare* Woodall v. State, 77 S.W.3d 388, 395 (Tex. App.—Fort Worth 2002, pet. ref'd) (reading *Theus* as meaning that the conviction must be both recent and show a "propensity to run afoul of the law"; thus, a fourteen-year-old conviction was inadmissible as it was not recent), *with Theus*, 845 S.W.2d at 881 (noting that a five-year-old conviction was recent simply because it was within the ten-year rule).

and propensity for running afoul of the law), there has not been enough time since the first conviction for *W* to show any propensity, and the court would evaluate the second factor as weighing against admissibility. In short, a requirement of repeated misbehavior as part of the second factor illogically discounts the relevance of a single, very recent crime as highly probative of the witness's untruthfulness, simply because the interval of time since that recent conviction has precluded any possibility of further misconduct. The Fourteenth Court of Appeals appears to have reached a similar conclusion in one case.[180]

Correspondingly, if the prior conviction occurred long ago, subsequent history does not necessarily add a great deal of probative weight to that remote conviction. Suppose that a party offers to impeach witness *M* with his thirty-year-old felony conviction, which was followed by other felony convictions some twenty-eight and twenty-six years ago. Further suppose that *M* has no other criminal history. Certainly, as recognized by the Austin Court of Appeals,[181] it would be illogical to suggest that the

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180. *See* Mendez v. State, No. 14-04-00024-CR, 2005 WL 1089408, at *5 (Tex. App.—Houston [14th Dist.] May 10, 2005, no pet.) (mem. op., not designated for publication) (facing a case in which the appealed ruling allowed impeachment with the appellant's only prior conviction (misdemeanor assault on a female), which was some thirty months before appellant's murder trial). Analyzing the second *Theus* factor, the court explained:

> Temporal proximity favors admission when the prior crime is recent and the witness has frequent instances where he or she has run afoul of the law. Here, the assault took place a little more than two and one-half years before appellant's murder trial, but there is no evidence that appellant has a propensity for running afoul of the law. This factor therefore weighs equally for admission and exclusion of the prior conviction.

Id. (citation omitted).

181. *See* Hankins v. State, 180 S.W.3d 177, 181 (Tex. App.—Austin 2005, pet. ref'd) (using the phrase "lack of reformation" to refer to a witness's further misconduct after the contested prior conviction). In *Hankins*, the appeal concerned admissibility of the defendant's 1989 conviction at his 2003 trial. *Id.* at 179. Analyzing the second of the *Theus* factors, the Austin court explained:

> The State presented no argument regarding the probative value of the prior conviction despite having the burden to do so, and simply justified the admittance of the 1989 conviction by arguing a lack of reformation as indicated by assault convictions from 2002 and 2003. *A lack of reformation does not necessarily lead to a conclusion that the probative value of a prior conviction substantially outweighs its prejudicial effect, but it may be considered within the balancing process* of Rule 609. [Here, t]he appellant's later convictions for assault could increase the probative value of the prior conviction as it may suggest lack of reformation. However, the more than ten-year gap between the 1989 drug conviction and the later convictions diminishes

subsequent history of *M* (itself very remote in time) adds much probative value to *M*'s thirty-year-old conviction when analyzed under the second *Theus* factor. Accordingly, the Texas Court of Criminal Appeals should clarify that although the subsequent history of a witness is a pertinent aspect of the second, or "temporal proximity" factor, it is not a necessary condition precedent to finding that the recent timing of a prior conviction adds to the probative value of that conviction.

D. *Using the* Theus *Factors for the Balancing Test for Prior Convictions More Than Ten Years Old*

According to the Texas Court of Criminal Appeals in *Theus*, a trial court evaluating the balance between the probative value of a witness's conviction and the prejudicial effect of that conviction, as required by Rule 609, should examine at least five factors.[182] However, the *Theus* appeal concerned impeachment of a witness with a conviction that became final only about five years before trial, so the decision directly implicated Rule 609(a).[183] No decision of the Texas Court of Criminal Appeals since *Theus* has addressed whether the so-called "*Theus* factors" are equally applicable to the more rigorous balancing test required by Rule 609(b), when the admissibility of a conviction more than ten years old is offered to impeach a witness. The lack of a consistent interpretation of this aspect of Rule 609 among the intermediate courts of appeals is yet another instance where the Texas Court of Criminal Appeals should act to ensure uniformity.

Two courts of appeals have suggested that the *Theus* factors should *not* be used to evaluate whether the probative value of a particular conviction more than ten years old substantially outweighs its prejudicial impact.[184]

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the probative value of the prior conviction.

Id. at 181 (emphasis added) (citations omitted).

182. *Theus*, 845 S.W.2d at 880–81. The court, noting that federal courts use a "non-exclusive" list of criteria, used five of those factors to analyze the admissibility of appellant's conviction. *Id.* at 880.

183. *See id.* at 881 (noting that the temporal proximity of the conviction favored admissibility because it happened five years before trial).

184. *See* Dale v. State, 90 S.W.3d 826, 830 (Tex. App.—San Antonio 2002, pet. ref'd) (suggesting in dicta that *Theus* factors do not apply to remote convictions); Hernandez v. State, 976 S.W.2d 753, 755 (Tex. App.—Houston [1st Dist.]) (holding that *Theus* only applies to Rule 609(a) convictions), *pet. ref'd*, 980 S.W.2d 652 (Tex. Crim. App. 1998).

Several years after *Theus*, the First Court of Appeals rejected the application of its factors to the Rule 609(b) situation.[185] Recognizing that *Theus* "did not involve a remote conviction" or admissibility under Rule 609(b), the opinion in *Hernandez* declared that when a remote conviction is involved (i.e., one more than ten years old), the "separate analysis standard" of Rule 609(b) requires the appellate court to "look exclusively to the strictures of [R]ule 609(b), not to the multiple factors of *Theus*."[186] In *Hernandez*, the appellant was convicted of possession of cocaine, and he complained on appeal that he was improperly impeached, over his objection, with his felony conviction for delivery of marijuana some nineteen years before trial.[187] The appellate court observed that although the appellant had five other misdemeanor convictions between the disputed felony conviction and his trial, none of them were for offenses of moral turpitude, and thus, the tacking doctrine did not apply.[188] Without any explanation of how the competing concepts of probative value or prejudicial effect ought to be evaluated, the court simply concluded that the record did not demonstrate "specific facts and circumstances showing that the probative value of the [nineteen-year-old] prior conviction substantially outweighs its prejudicial effect" and so ruled that the appellant was improperly impeached with the old conviction.[189]

A few years later, in *Dale v. State*,[190] the San Antonio Court of Appeals also declared that "[i]n instances in which remoteness is an issue, we look exclusively to the strictures of Rule 609(b), not to the *Theus* factors," incorrectly attributing that principle to the 1999 decision in *Jackson v. State*.[191] The San Antonio court's

185. *See Hernandez*, 976 S.W.2d at 755 (rejecting use of the *Theus* factors where remoteness is an issue).

186. *Id.*

187. *Id.* at 754–55.

188. *Id.* at 755–56.

189. *Id.* at 756.

190. Dale v. State, 90 S.W.3d 826 (Tex. App.—San Antonio 2002, pet. ref'd).

191. *Id.* at 830 (citing Jackson v. State, 11 S.W.3d 336, 339 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd)). In fact, the *Jackson* opinion contained no such statement and did not purport to apply Rule 609(b) at all. The *Jackson* court believed that the tacking doctrine allowed the appellant's two eleven-year-old convictions to be treated "as if [those] convictions were not remote." *Jackson*, 11 S.W.3d at 339. Accordingly, *Jackson* analyzed the appellant's two disputed convictions under Rule 609(a), and evaluated the balance between probative value and prejudicial effect using the *Theus* factors. *See id.* at

statement rejecting the *Theus* factors for Rule 609(b) situations was dicta.[192] In fact, the *Dale* court evaluated the admissibility of appellant's two convictions for impeachment expressly through application of the *Theus* factors and determined that the trial court did not abuse its discretion by admitting the two convictions, finding they satisfied the balancing test stated in Rule 609(a).[193]

On the other hand, at least four Texas courts of appeals have expressly relied upon the *Theus* factors in Rule 609(b) situations to evaluate whether the probative value of an old conviction substantially outweighs its prejudicial effect.[194] These courts regarded the analytical approach used by *Theus* for convictions less than ten years old as equally helpful in assessing the balance of interests for more remote convictions.

The *Hernandez-Dale* approach, rejecting reliance on the *Theus* factors in determining admissibility of older convictions, has several fundamental deficiencies. First, it is at odds with the parallel criteria of subsections (a) and (b) of Rule 609. Second, it requires courts to grapple with the competing concepts of probative value and prejudice without any meaningful tools.

The parallel criteria of the different tests provided for

339–40 ("[T]he [R]ule 609(a) 'outweigh' standard is appropriate because the 'tacking' of the intervening convictions renders a conviction older than ten years not remote.").

192. *See Dale*, 90 S.W.3d at 830 ("In instances in which remoteness is an issue, we look exclusively to the strictures of Rule 609(b), not to the *Theus* factors."). The prosecution "did not present evidence of the dates of [those] convictions." *Id.* However, the appellant failed to object at trial to the lack of evidence of the dates of his convictions. *Id.* Accordingly, the appellate court assumed that the convictions were less than ten years old, and evaluated their admissibility using the *Theus* factors and the balancing test provided by Rule 609(a). *Id.* at 830–32.

193. *Id.* at 831–32.

194. *See* Sirois v. State, No. 11-06-00240-CR, 2008 WL 1893291, at *4–5 (Tex. App.—Eastland Apr. 24, 2008, pet. ref'd) (mem. op., not designated for publication) (applying the *Theus* factors to determine the admission of a defendant's 1982 conviction for impeachment purposes); Moore v. State, 143 S.W.3d 305, 312 (Tex. App.—Waco 2004, pet. ref'd) (discussing the proper use of the *Theus* factors to determine the admissibility for impeachment purposes of convictions more than ten years old); Butler v. State, 890 S.W.2d 951, 954–55 (Tex. App.—Waco 1995, pet. ref'd) (asserting that the *Theus* factors apply in evaluating whether the probative value of admitting a remote conviction for impeachment purposes substantially outweighs its prejudicial effect); Brown v. State, 880 S.W.2d 249, 253–54 (Tex. App.—El Paso 1994, no pet.) (using the *Theus* factors to conclude that the trial court abused its discretion in admitting for impeachment purposes a defendant's fourteen-year-old rape conviction); Polk v. State, 865 S.W.2d 627, 630–31 (Tex. App.—Fort Worth 1993, pet. ref'd) (weighing the *Theus* factors to determine that the trial court did not abuse its discretion by admitting evidence of the defendant's remote conviction).

impeachment with recent and remote convictions, respectively, logically suggest that a parallel approach be employed. In his detailed and well-reasoned dissent to the *Hernandez* decision, Justice Taft noted that subsections (a) and (b) of Rule 609 each require a court to assess the relative strength of the same two concepts (probative value and prejudicial effect), although the standard for admissibility is much more rigorous on the older side of the ten-year dividing line.[195] Recognizing that the two sections require a comparison of the same two competing considerations, he reasoned that "there appears to be no reason for taking a fundamentally different analytical approach" for convictions older than ten years.[196] Neither the decision in *Hernandez* nor that in *Dale* articulates any such reason. In other words, *Hernandez* and *Dale* correctly note that the two sections require a conviction to meet different standards in order to be admitted for impeachment, but those opinions do not explain at all why the same *means of analysis* is not equally pertinent in judging whether the standard has been met for a particular conviction.

For a court to "weigh" the competing concepts of probative value and prejudice in connection with a particular prior conviction in a specific trial situation necessarily requires that the court somehow measure the strength of those two conceptual items. Of course, neither concept can be measured in concrete units like meters, kilograms, or foot-pounds. The utility of the factors approach provided in *Theus* is that it provides a practical means by which a court can articulate and then sum up the various factual vectors for two competing considerations called "probative value" and "prejudicial effect." Thus, a court can explain, under the first *Theus* factor, that the essential nature of a perjury conviction offers tremendous probative value on the issue of the witness's credibility, but under the second factor, because the same conviction occurred some thirty years ago, its age sharply detracts from its probative value. If the witness is the defendant and she is on trial for perjury, then the third *Theus* factor (similarity) assists in articulating the considerable potential for prejudice, namely the

195. *See* Hernandez v. State, 976 S.W.2d 753, 762 (Tex. App.—Houston [1st Dist.]) (Taft, J., dissenting) (arguing that both subsections analyze related problems and that there is no reason to take a "fundamentally different" approach for each one), *pet. ref'd*, 980 S.W.2d 652 (Tex. Crim. App. 1998).

196. *Id.*

danger that the jury will treat the past crime as propensity evidence. In this manner, examining a number of discrete factors provides an organized means of assessing the otherwise slippery concepts of probative value and prejudice, and serves as a more reasoned approach than simply announcing an overall legal conclusion about the relative strength of those two subjective commodities, as the First Court of Appeals did when it decided *Hernandez*.[197]

Significantly, as Justice Taft noted, *Theus* did not offer a closed set of analytical factors for measuring the relative strength of probative value and prejudice.[198] For a court to utilize other factors beyond those identified by *Theus* is not inconsistent with the *Theus* approach. In a particular trial situation, consideration of additional factors, such as the age of the witness when convicted of the earlier crime, may well be pertinent to balancing the competing considerations of Rule 609, especially in the case of a more remote conviction.[199]

To the extent that Texas Rule 609 provides different but parallel balancing tests for recent and remote convictions, its structure resembles that of its federal counterpart concerning the admissibility of prior felony convictions for impeachment of a defendant-witness.[200] That is, just as Texas Rule 609(a) allows impeachment by a felony conviction less than ten years old if probative value outweighs prejudice, but Texas Rule 609(b) allows impeachment by a felony conviction more than ten years old only if probative value *substantially* outweighs prejudice, the federal rule uses those two different standards in the same two categories

197. *See id.* at 757 (majority opinion) (holding that because both the State's and appellant's cases rested upon the believability of their witnesses, "the probative value of the prior conviction probably equaled, but did not substantially outweigh, its prejudicial value," and improper impeachment with defendant's conviction required reversal).

198. *Id.* at 762 (Taft, J., dissenting); *see* Theus v. State, 845 S.W.2d 874, 880 & n.7 (Tex. Crim. App. 1992) (describing the five factors used by federal courts as a "non-exclusive list" and referring to a treatise on federal court procedure for discussion of other factors).

199. *See* Buffington v. State, 801 S.W.2d 151, 155 (Tex. App.—San Antonio 1990, pet. ref'd) (concluding, in a pre-*Theus* decision, that factors considered in determining the admissibility of remote convictions before Rule 609 continued to be pertinent to the Rule 609 balancing test).

200. *Compare* FED. R. EVID. 609(a)(1), (b) (providing separate balancing tests for recent convictions and convictions older than ten years), *with* TEX. R. EVID. 609(a)–(b) (providing separate balancing tests for recent convictions and convictions older than ten years).

by age of conviction. With that structural similarity in mind, it is significant that when a federal court determines the admissibility of a prior conviction, it assesses the relative strength of probative value and prejudice by the same approach (examining various factors individually and then in the aggregate), regardless of whether the age of the conviction is less than or more than ten years.[201] These factors, of course, were incorporated into Texas evidence law as the *Theus* factors.[202]

Thus, the parallel balancing criteria of the two parts of Rule 609 and the federal approach both argue for application of the *Theus* factors when assessing the admissibility of remote as well as more recent convictions.

IV. SUMMARY

In 1992, the Texas Court of Criminal Appeals in *Theus* took a significant step toward a more logical approach under which Texas

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201. *See, e.g.*, THK Am., Inc. v. NSK, Ltd., 917 F. Supp. 563, 569–70 (N.D. Ill. 1996) (outlining the requirements for analysis of convictions under Federal Rule of Evidence 609(b)).

> The rule provides an exception to the ten-year time limit where "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." The Court may, within its sound discretion, admit evidence of a prior conviction over ten years old under this rule. *Stutzman v. CRST, Inc.*, 997 F.2d 291, 298–99 (7th Cir.1993). However, the court in *Zinman v. Black & Decker (U.S.), Inc.*, 983 F.2d 431 (2d Cir.1993), a case relied upon heavily by NSK, recognized "that Congress intended that convictions over ten years old be admitted very rarely and only in exceptional circumstances." *Zinman* at 434. In *Zinman*, the court allowed into evidence against a plaintiff whose vocation was a podiatrist, a conviction of medicare fraud and a podiatry license suspension. Since the plaintiff in *Zinman* claimed that because of a personal injury, he intended to practice podiatry until age 70, the court felt that the conviction and suspension was highly relevant to the issue of whether Zinman had discontinued his practice solely because of the claimed injury. The court concluded that any resulting prejudice to Zinman was substantially outweighed by the probative value of the evidence.
>
> Factors to consider in determining whether a conviction is sufficiently probative to outweigh its prejudice were listed in *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), *cert. denied*, 429 U.S. 1025, 97 S.Ct. 646, 50 L.Ed.2d 627 (1976). Those factors are "(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness' subsequent history; (3) the similarity between the past conviction and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue."

Id.

202. *See Theus*, 845 S.W.2d at 880 (incorporating the federal analysis for impeachment convictions).

courts determine the admissibility of prior convictions offered to impeach a witness. *Theus* provided trial judges a powerful set of factors to use when balancing the probative value against the potential prejudicial effect of a particular conviction used to attack a witness. However, in four different areas, Texas courts still do not interpret Rule 609 in a uniform manner.

First, although the age of the prior conviction determines which admissibility criteria must be met for that particular conviction to be used as impeachment, the courts continue to fix the "age" of the conviction in different ways. Because the purpose of such impeachment is to help the jury evaluate the truthfulness of the witness when he or she is testifying, the age of the conviction ought to be fixed as of that point in time.

Second, although Rule 609 expressly provides the criteria for admitting a conviction more than ten years old, some courts continue to subvert its strict test for impeachment by older convictions with the older tacking doctrine, which should be abandoned.

Next, some courts have misconstrued the "temporal proximity" factor as indicating significant probative value only if the witness has had other misconduct since the conviction in question. While subsequent history of misconduct by the witness will add to the probative value of a prior conviction, a relatively recent conviction, by itself, ought to be regarded as having considerable probative value toward the credibility of that witness.

Last, the Texas Court of Criminal Appeals should make clear that the factors approach it outlined for the balancing of interests for convictions less than ten years old are equally applicable to the balancing test required for older convictions.

The clarification of these four aspects of Rule 609 will significantly improve the application of a key rule of evidence by ensuring that courts across the state evaluate all prior convictions that are offered as attacks upon witnesses by uniform and logical criteria that reflect the central premise underlying Rule 609—that the logical tendency of a particular conviction to illuminate the credibility of a witness at trial must be balanced against any danger that the same conviction will subvert the jury's proper consideration of the merits of the case.