A REFUSAL TO CHANGE DESPITE ALL THE EVIDENCE

Ben Evans*

I. RULE 609 OF THE TEXAS RULES OF EVIDENCE AND THE TACKING DOCTRINE CANNOT COEXIST

As of 1998, Rule 609 of the Texas Rules of Evidence governs the use of prior convictions to impeach a witness.[1] Rule 609(a) provides the general rule for attacking the credibility of a witness with evidence of their prior convictions.[2] Rule 609 states that, for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record.[3] However, this evidence may only be used if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of the evidence outweighs its prejudicial effect to the witness.[4] Thus, Rule 609(a) sets out basic guidelines that evidence of a prior conviction must meet before an impeaching party may use such evidence against a witness for the purposes of impeachment.[5] In Rule 609(b), a qualification to the general rule is made.[6] Any evidence normally allowed under 609(a) is not admissible under 609(b) if a period of more than ten years has passed since the date of conviction or the date of release, whichever date is later.[7] This ten-year limitation can only be

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*Ben Evans, Associate at Haley & Olson P.C.; J.D., Baylor University School of Law, Winter 2014-15. I would like to thank Professor Brian Serr for his valuable guidance in writing this comment. Also, I am truly thankful for the staff of the Baylor Law Review for the hard work they put in to make this comment publishable. Finally, I would like to thank all of my amazing family and friends. Without their love, support, and understanding, this comment would not be possible.

[1] Tex. R. Evid. 609.

[2] *Id.* 609(a).

[3] *Id.*

[4] *Id.*

[5] Tex. R. Evid. 609.

[6] *Id.* 609(b).

[7] *Id.*

overcome when a court determines, in the interest of justice, the probative value of the conviction *substantially* outweighs its prejudicial effect.[8] Thus, Rule 609(b) lays out a different standard for evidence of prior convictions that occurred more than ten years ago.[9] Specifically, the 609(b) standard sets a higher burden for the proponent of the impeaching evidence, in that probative value of the conviction must "substantially outweigh" the prejudicial effect rather than the lower "outweigh" standard of 609(a).[10]

Rule 609 should be read and interpreted based upon the plain meaning of the Rule.[11] Rule 609 creates two distinct standards to decide when evidence of prior convictions is allowed to impeach a witness.[12] Courts should utilize the 609(a) standard for all prior convictions that occurred within ten years of trial.[13] For evidence of prior convictions that occurred over ten years ago, the courts must use the 609(b) standard.[14] It is important to note that, regardless of whether the 609(a) or 609(b) standard is used, the proponent must show that the crime being referenced is a felony or one which involved moral turpitude.[15] The difference between the two standards in Rule 609 is the burden upon the proponent of the impeaching evidence. Rule 609(a) permits a court to admit evidence of a prior conviction when its probative value simply outweighs its prejudicial effect.[16] However, 609(b) only permits the court to admit evidence of a prior conviction if its probative value substantially outweighs its prejudicial effect.[17]

The two distinct standards clearly laid out by Rule 609 have been confused and misapplied by Texas appellate courts.[18] This misapplication is due to a judicially created ideology known as the tacking doctrine, which

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

[9] *Id.*

[10] *Id.*

[11] See Leyba v. State, 416 S.W.3d 563, 569 (Tex. App.—Houston [14th Dist.] 2013, pet. struck).

[12] *Leyba*, 416 S.W.3d at 568; Hankins v. State, 180 S.W.3d 177, 179–80 (Tex. App.—Austin 2005, pet ref'd).

[13] *Leyba*, 416 S.W.3d at 568; *Hankins*, 180 S.W.3d at 179–80.

[14] Tex. R. Evid. 609(b); *Hankins*, 180 S.W.3d at 180.

[15] Tex. R. Evid. 609.

[16] Tex. R. Evid. 609(a).

[17] Tex. R. Evid. 609(b).

[18] *E.g.*, *Leyba*, 416 S.W.3d at 567–96 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

inexplicably still finds its way into Texas court opinions.[19] The tacking doctrine has been completely eliminated by Rule 609.[20] Courts use the tacking doctrine to admit evidence of prior convictions even when the convictions are more than ten years old.[21] While Rule 609(b) contemplates this practice, the tacking doctrine creates a problem. This problem is due to the tacking doctrine's large departure from the required 609(b) analysis that a court must use when admitting this type of evidence.[22] The tacking doctrine allows a court to admit evidence of a prior conviction using the 609(a) standard when there is further evidence showing that the witness has a separate 609 conviction occurring within the ten-year time period.[23] For example, if a witness were convicted of a felony 15 years ago, this would not be admissible without a showing that the evidence's probative value substantially outweighs it prejudicial effect, whether or not a court used the tacking doctrine or Rule 609.[24] Under the tacking doctrine, because there is no intervening conviction within ten years from the date of trial, there is nothing for this stale conviction to be tacked onto.[25] Thus, when there is no intervening conviction to tack the stale conviction onto, the analysis using either the tacking doctrine or Rule 609(b) would result in the same outcome. However, if this same witness also had a separate prior conviction of another felony five years ago, not only would evidence of the five-year old conviction be analyzed under the 609(a) analysis, but evidence of the fifteen-year old conviction would also be analyzed under 609(a) because the court would tack the stale conviction onto the ripe one.[26] This outcome would not occur if a court applied Rule 609. The language of Rule 609 does not contemplate a tacking system. Each conviction should be analyzed separately. The five-year-old claim should be analyzed under 609(a), while

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[19] *See id.* at 567; Jackson v. State, 50 S.W.3d 579, 591–92 (Tex. App.—Fort Worth 2001, pet. ref'd); Rodriguez v. State, 31 S.W.3d 359, 363 (Tex. App.—San Antonio 2000, pet. ref'd); Hernandez v. State, 976 S.W.2d 753, 755–56 (Tex. App.—Houston [1st Dist.] 1998, pet ref'd).

[20] *Leyba*, 416 S.W.3d at 569.

[21] *See Leyba*, 416 S.W.3d at 567; *Jackson*, 50 S.W.3d at 591–92; *Rodriguez*, 31 S.W.3d at 363; *Hernandez*, 976 S.W.2d at 755–56.

[22] *Leyba*, 416 S.W.3d at 568.

[23] *Id.* at 567.

[24] *See id.* at 567–68.

[25] *Id.*

[26] *Id.*

the fifteen-year-old claim should be analyzed under 609(b).[27] After the creation of Rule 609, courts should no longer be allowed use the tacking doctrine. The tacking doctrine essentially creates a third test that circumvents the clear language of Rule 609.[28] The doctrine allows a court to bypass the 609(b) analysis for the 609(a) analysis when a conviction that is older than ten years is coupled with another conviction within the ten-year limit.[29] This bypass mechanism is not contemplated by the language of Rule 609, and cannot be used by courts.[30] The language of Rule 609 specifically instructs that the stale conviction must be analyzed under the heightened standard of Rule 609(b).

A. The Tacking Doctrine Stems from Rule 609's Predecessor, Art. 38.29 of the Texas Code of Criminal Procedure

Article 38.29 of the Texas Code of Criminal Procedure governed the admissibility of evidence regarding prior convictions to impeach a witness before Rule 609 became effective.[31] One of the main differences between Rule 609 and Article 38.29 is the addition of the ten-year rule of Rule 609(b). The ten-year rule creates a clear reference point for distinguishing between stale convictions and ripe ones.[32] Because there was no time limit in the language of Article 38.29, it was up to the courts to determine what amount of time needed to pass before a prior conviction's prejudicial effect outweighed it probative value.[33] When discussing this issue, the Texas Court of Criminal Appeals held that the credibility of a witness could be attacked with a prior conviction, but only if such crime was a felony or was a crime involving moral turpitude.[34] Further, the Court held that the

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[27] *Id.* at 568 (noting that Rule 609 does not include a third category of prior convictions codifying the common law exception).

[28] *Id*. at 568; *Hankins v. State*, 180 S.W.3d 177, 180 (Tex. App.—Austin 2005, pet. ref'd).

[29] *Hankins*, 180 S.W.3d at 180; Jackson v. State, 50 S.W.3d 579, 592 (Tex. App.—Fort Worth 2001, pet. ref'd); Rodriguez v. State, 31 S.W.3d 359, 363–64 (Tex. App.—San Antonio 2000, pet. ref'd).

[30] *Leyba*, 516 S.W.3d at 568.

[31] *See Ex parte* Menchaca, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993); Nethery v. State, 692 S.W.2d 686, 699 (Tex. Crim. App. 1985) (en banc).

[32] Tex. Crim. Pro. Code Ann. art. 38.29 (West 1965, repealed 1986); Tex. R. Evid. 609(b); *See Leyba*, 416 S.W.3d at 566–67.

[33] McClendon v. State, 509 S.W.2d 851, 855–57 (Tex. Crim. App. 1974); Crisp v. State, 470 S.W.2d 58, 59–60 (Tex. Crim. App. 1971); *Leyba*, 416 S.W.3d at 567.

[34] *Leyba*, 416 S.W.3d at 567.

conviction could not be admitted if it was found to be "too remote."[35] Courts had a great deal of leniency in deciding what amount of time constituted "too remote," and could base their findings on the facts and circumstances of each case.[36] Eventually, a uniform test was created to decide when and which convictions were to be allowed into evidence: the tacking doctrine.[37]

1. The Creation of the Tacking Doctrine

Courts eventually came to the conclusion that if a prior conviction was ten years or more removed the case at bar, then that conviction was too old to be used as evidence to impeach a witness.[38] The reasoning behind the ten-year rule stems from the idea that a person convicted of a crime over ten years ago has had the time and opportunity to rehabilitate.[39] Because of this rehabilitation, the probative value of evidence of the prior conviction no longer outweighed the prejudicial effect the evidence would have to the witness.[40] However, courts began to realize that this reasoning no longer worked when a witness has displayed a lack of rehabilitation during the intervening ten years.[41] An exception needed to be developed in order to allow a court to admit evidence of prior convictions that would otherwise be considered as "too remote" when the witness displayed a clear lack of rehabilitation. Thus, the tacking doctrine was born.

2. Rehabilitation Was the Main Concern

As previously stated, the general rule courts developed was that evidence of prior felonious convictions, or those involving moral turpitude, were allowed unless "too remote."[42] The idea behind a conviction being too

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[35] *Id.*

[36] *McClendon*, 509 S.W.2d at 855–56; *Crisp*, 570 S.W.2d at 59.

[37] *See* Jackson v. State, 50 S.W.3d 579, 591 (Tex. App.—Fort Worth 2001, pet. ref'd).

[38] King v. State, 425 S.W.2d 356, 357 (Tex. Crim. App. 1968); *McClendon*, 509 S.W.2d at 855; Penix v. State, 488 S.W.2d 86, 88 (Tex. Crim. App. 1972).

[39] *See McClendon*, 509 S.W.2d at 855; *Leyba*, 416 S.W.3d at 567.

[40] *McLendon*, 509 S.W.2d at 855.

[41] *Id.* (holding that "evidence 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.").

[42] *McClendon*, 509 S.W.2d 851, 855–57; Crisp v. State, 470 S.W.2d 58, 59–60 (Tex. Crim. App. 1971); *Leyba*, 416 S.W.3d at 567.

remote centered on the idea that every person has the capacity to rehabilitate.[43] If a person, after being convicted of a crime, rehabilitated, courts considered it to be inequitable to allow evidence of a prior conviction for impeachment purposes.[44] However, this fairness argument is lost when a witness has clearly failed to rehabilitate.[45]

The roots of the tacking doctrine were first developed in *Oates v. State*.[46] In that case the Court of Criminal Appeals noted that in some instances evidence of a prior conviction should be considered too remote to be admissible.[47] In its analysis the Court cited *Winn v. State*, where a man plead guilty to stealing hogs in 1894 and was being tried for murder in 1908.[48] Fourteen years had passed since the man's theft conviction, and since the prior conviction, the man had not been found guilty of anything that impaired his reputation or standing.[49] Thus, evidence of the man's theft was inadmissible.[50] The Court then contrasted the facts before them with the facts in *Winn*.[51] It reasoned that when there is evidence that the defendant has not reformed, a court could admit evidence that would otherwise be considered too remote had there been a reformation.[52] In *Oates*, the defendant had been convicted of manslaughter in 1892, murder in the second degree in 1899, and murder in the first degree in 1904.[53] The defendant was facing chargers for another murder in 1911.[54] Defendant argued that the evidence of his prior convictions should not have been admitted because they were too remote.[55] The Court disagreed with the defendant's argument.[56] It reasoned that because there was evidence that the

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[43] *Crisp*, 470 S.W.2d at 59; *Leyba*, 416 S.W.3d at 567.

[44] *Leyba*, 416 S.W.3d at 567.

[45] See Lucas v. State, 791 S.W.2d 35, 51 (Tex. Crim. App. 1989); *McClendon*, 509 S.W.2d at 855; *Crisp*, 470 S.W.2d at 59; Jackson v. State, 50 S.W.3d 579, 591 (Tex. App.—Fort Worth 2001, pet. ref'd).

[46] 149 S.W. 1194 (Tex. Crim. App. 1912).

[47] *Id.* at 1196.

[48] *Id.*; Winn v. State, 113 S.W. 918 (Tex. Crim. App. 1908).

[49] *Oates*, 149 S.W. at 1197.

[50] *Id.* at 1196.

[51] *Id.* at 1197.

[52] *Id.*

[53] *Id.* at 1196.

[54] *Id.* at 1195.

[55] *Id.* at 1196.

[56] *Id.* at 1197.

defendant had not reformed, they could admit evidence that would otherwise be considered too remote.[57] Therefore, Texas courts have long recognized the rehabilitative reasoning behind the tacking doctrine.[58] However, the tacking doctrine did not receive its name until much later.[59] Allowing evidence of prior convictions over ten-years old due to an intervening prior conviction was first described as the tacking of convictions in *Hernandez v. State*.[60]

B. Rule 609 Creates Only Two Levels of Analyses: One for Convictions Within Ten Years and One For Convictions Beyond Ten Years

Rule 609 of the Texas Rules of Evidence unequivocally creates two distinct levels of analyses that must be respected by the courts. Rule 609(a) is to be used for all prior convictions within the ten years from the date of trial.[61] This rule contains its own standard, the "outweighs" standard, for whether evidence of a prior conviction should be admitted to impeach a witness.[62] Rule 609(b) is to be used for all prior convictions older than ten years.[63] Rule 609(b) has its own standard for whether evidence of a prior conviction should be admitted to impeach a witness, the "substantially outweighs" standard.[64] The language of 609 does not allow for the grouping of both stale and ripe convictions to allow a stale conviction to avoid 609(b)'s more burdensome "substantially outweighs" standard, which is precisely what the tacking doctrine accomplishes.[65] The two standards under Rule 609 are the only methods by which a court may determine the admissibility of evidence of prior convictions.[66] Due to its incompatibility with the new rule, the tacking doctrine analysis has been eliminated.[67]

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[57] *Id.*

[58] *Id.* at 1196–97; Williams v. State, 449 S.W.2d 264, 265–66 (Tex. Crim. App. 1970).

[59] Hernandez v. State, 976 S.W.2d 753, 755 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

[60] *Id.*

[61] Tex. R. Evid. 609(a).

[62] *Id.*

[63] *Id.* 609(b).

[64] *Id.*

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

[66] Leyba v. State, 146 S.W.3d 563, 568 (Tex. App. Houston [14th Dist.] 2013, pet. ref'd).

[67] *Id.*

1. Rule 609(a) Sets Forth Two Requirements That Must Be Met Before Any Prior Convictions, Whether They Are Within Ten Years or Not, May Be Used As Evidence Against a Witness

The first requirement of 609(a) states that the prior conviction must be a felony or involve moral turpitude.[68] Determining whether a crime is felonious is a simple analysis.[69] A crime is a felony if it is so classified as such in the Texas Penal Code.[70] To determine if a crime is one that involves moral turpitude, courts have created a broad definition for the meaning of moral turpitude. Moral turpitude includes crimes that involve:

> (1) "dishonesty, fraud, deceit, misrepresentation, or deliberate violence;" (2) matters of ''personal morality;" (3) conduct committed "knowingly contrary to justice, honesty, principle, or good morals;" (4) "baseness, vileness, or depravity;" (5) conduct "immoral in itself, regardless of whether it is punishable by law," in that the "doing of the act itself, and not its prohibition by statute, fixes the moral turpitude;" or (6) "immoral conduct" that is "willful, flagrant, or shameless, and which shows a moral indifference to the opinion of the good and respectable members of the community."[71]

The second requirement of 609(a) states that the court must determine that the probative value of admitting the evidence regarding the prior conviction outweighs the prejudicial effect to the witness.[72] When weighing the probative value of a conviction against its prejudicial effect, courts take multiple factors into account.[73] These factors include:

> (1) the impeachment value of the prior crime; (2) the temporal proximity of the past crime relative to the charged offense and the witness's subsequent history; (3) the

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[68] Tex. Crim. Proc. Code Ann. § 12.01 (West 2013).

[69] *See* Tex. Penal Code Ann. §§ 22.02(b), 29.02(b) (West 2012) (delineating the felony status of aggravated assault and robbery).

[70] *Id.*

[71] Escobedo v. State, 202 S.W.3d 844, 849 (Tex. App.—Waco 2006, pet. ref'd) (citing *In re* G.M.P., 909 S.W.2d 198, 208 (Tex. App.—Houston [14th Dist] 1995, no writ); Turton v. State Bar of Tex., 775 S.W.2d 712, 716 (Tex. App.—San Antonio 1989, writ denied)).

[72] Tex. R. Evid. 609(a).

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

> similarity of the prior conviction to the charged offense; (4) the importance of the witness's testimony; and (5) the importance of the witness's credibility.[74]

When making this determination, the trial court is given broad discretion.[75] Further, the trial court abuses this discretion when its decision to admit evidence of a prior conviction lies beyond the zone of reasonable disagreement.[76] Even if the court decision is beyond the zone of reasonable disagreement, the court's error is only reversible upon a showing that the error affected the defendant's substantial rights.[77]

2. Rule 609(b) Creates a Heightened Standard

Rule 609(b) specifically qualifies the general rule for the admission of evidence of prior convictions found in 609(a). Rule 609(b) creates a time limit for which the admissibility of evidence of prior convictions will be analyzed under Rule 609(a)'s "outweighs" standard.[78] The time limit states that evidence of a prior conviction will not be admitted if it occurred ten years or more before the date of trial.[79] However, if the court determines that the probative value of admitting the evidence regarding the prior conviction substantially outweighs the prejudicial effect to the witness, the court may admit that evidence.[80] Thus, if a prior conviction is ten years or older, a court may not use the analysis found in 609(a), but must use the analysis under 609(b).[81] This is a very important distinction. Rule 609(b) essentially codifies the common law rule that evidence of a conviction over ten years old should not be admitted because it is too remote and has little

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[74] *See id.* at 880; LaHood v. State, 171 S.W.3d 613, 620 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd); Leyba v. State, 416 S.W.3d 563, 571 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

[75] *Theus*, 845 S.W.2d at 881; United States v. Oaxaca, 569 F.2d 518, 526 (9th Cir.), *cert. denied*, 439 U.S. 926 (1978).

[76] Green v. State, 934 S.W.2d 92, 104 (Tex. Crim. App. 1996); Richardson v. State, 879 S.W.2d 874, 881 (Tex. Crim. App. 1993), *cert. denied*, 513 U.S. 1085 (1995).

[77] Tex. R. App. P. 44.2(b); King v. State, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997) (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)); Hankins v. State, 180 S.W.3d 177, 182 (Tex. App.—Austin 2005, pet. ref'd).

[78] Tex. R. Evid. 609(b).

[79] *Id.*

[80] *Id.*

[81] *Id.*

probative value.[82] The higher burden for the proponent under 609(b) is consistent with the aforementioned ideology of rehabilitation.[83] Because ten years is long enough for a person to rehabilitate, if a proponent wants to admit evidence of that old conviction, they must demonstrate to the court that the probative value of such evidence substantially outweighs it prejudicial effect.[84] Without this higher burden in 609(b), the equity argument of rehabilitation developed by common law would be rendered obsolete.[85]

It is obvious that the authors of the Texas Rules of Evidence did not intend the same analysis to be used for 609(a) and 609(b).[86] Section 609(a) requires a court to determine that the probative value of admitting the evidence "outweighs" the prejudicial effect to the party, while Section 609(b) requires the higher determination that the probative value of admitting the evidence "substantially outweighs" the prejudicial effect to the witness.[87]

II. WHY DOES THE TACKING DOCTRINE STILL REMAIN AS PART OF THE ANALYSIS THAT SOME TEXAS COURTS TAKE?

A survey of the Texas appellate courts shows a split on how courts analyze the admissibility of convictions older than ten years.[88] Some courts have realized the inevitable conflict that the tacking doctrine presents when applied alongside Rule 609.[89] However, other courts continue to use the tacking doctrine, and thus apply the incorrect test when deciding to admit evidence of a prior conviction.[90]

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[82] *Id.*

[83] Morris v. State, 67 S.W.3d 257, 263 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

[84] *Id.*

[85] *Id.*

[86] Tex. R. Evid. 609(b); *See* Hankins v. State, 180 S.W.3d 177, 180 (Tex. App.—Austin 2005, pet. ref'd).

[87] *Hankins*, 180 S.W.3d at 180.

[88] *See, e.g.*, Leyba v. State, 416 S.W.3d 563, 568 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *Hankins*, 180 S.W.3d at 180; Jackson v. State, 50 S.W.3d 579, 591–92 (Tex. App.—Fort Worth 2001, pet. ref'd); Rodriguez v. State, 31 S.W.3d 359, 363 (Tex. App.—San Antonio 2000, pet. ref'd); Hernandez v. State, 976 S.W.2d 753, 755–56 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

[89] *Leyba*, 416 S.W.3d at 568; *Hankins*, 180 S.W.3d at 180.

[90] *See, e.g.*, *Jackson*, 50 S.W.3d at 591–92; *Rodriguez*, 31 S.W.3d at 363; *Hernandez*, 976 S.W.2d at 755–56.

The tacking doctrine, when applied by Texas courts, removes a prior conviction older than ten years from the Rule 609(b) analysis and places it under the 609(a) analysis, which is not the correct application of Rule 609.[91] For example, suppose a defendant was convicted of two prior felonious crimes. The most recent conviction falls within ten years, while the other conviction is outside of ten years. If a court correctly applied Rule 609, the more recent conviction will be defaulted to the 609(a) analysis, only requiring the court to decide if the probative value of admitting the evidence outweighs its prejudicial effect, while the other conviction would be defaulted to the 609(b) analysis, requiring the court to decide if the probative value of admitting the evidence substantially outweighs the prejudicial effect.[92] However, when a court uses the tacking doctrine in this type of scenario, the conviction outside the ten-year limit is tacked onto the more recent conviction, constructively bringing the stale conviction within the time limit.[93] Now that both convictions are effectively within the time limit, only the 609(a) analysis needs to be used for both convictions. This result is incorrect and is not contemplated by the plain language of Rule 609.[94] The Rule specifically states that a conviction older than ten years is subject to the 609(b) analysis.[95] There is no mention of a tacking principle.[96] There is no mention of an exception for when a witness has both convictions over ten years and convictions within the ten-year limit.[97]

A. Can The Tacking Doctrine Work as an Alternative Analysis?

Some courts believe that the tacking doctrine has survived despite the clear language of Rule 609.[98] These courts reason that the tacking doctrine is a third option that courts can take when faced with a decision on whether to admit evidence of a prior conviction.[99] The first option is to be used

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[91] *Hernandez*, 976 S.W.2d at 755.

[92] *Id*.

[93] *Jackson*, 50 S.W.3d at 591.

[94] Tex. R. Evid. 609.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *See, e.g.*, *Jackson*, 50 S.W.3d at 591–92; Rodriguez v. State, 31 S.W.3d 359, 363 (Tex. App.—San Antonio 2000, pet. ref'd); Hernandez v. State, 976 S.W.2d 753, 755–56 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

[99] *Jackson*, 50 S.W.3d at 591–92.

when there are only prior convictions within the ten-year time limit.[100] The second option is to be used when there are only convictions that are outside the ten-year time limit.[101] Finally, the third option, the tacking doctrine option, is to be used when there are both convictions within and outside the ten-year time limit.[102] This reasoning, after looking at Rule 609's plain meaning, is incorrect.[103] A third analysis cannot be found within the language of Rule 609. In fact, the stronger argument is that the language of the Rule implicitly excludes this third option.[104] The perplexing aspect of the continued existence of the tacking doctrine is that the courts that still use the doctrine understand that Rule 609 has only two distinct analyses.[105] Inexplicably, however, these courts continue to use the tacking doctrine to create a third analysis.[106] Further, the courts that do use the tacking doctrine have failed to explain how the doctrine can be reconciled with Rule 609.[107] It appears that these courts are content with applying a doctrine that starkly contradicts 609 until told otherwise. In fact, one court has stated that because Rule 609 does not explicitly abolish the tacking doctrine and because appellate courts continue to apply the doctrine, there is no support for the argument that the tacking doctrine no longer applies.[108]

B. The Courts That Reject the Tacking Doctrine Understand That Each Conviction Is Analyzed Separately

The courts that do not follow the tacking doctrine any longer recognize that the doctrine became obsolete upon the creation of Rule 609.[109] In *Hankins v. State*, the Austin Court of Appeals stated that Rule 609 does not tolerate the use of the tacking doctrine.[110] The court opined that the tacking doctrine was never meant to survive the creation of the Rules of

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[100] *Id.*

[101] *Id.*

[102] *Id.*

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

[104] Leyba v. State, 416 S.W.3d 563, 568–69 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *Hankins*, 180 S.W.3d at 180.

[105] *See* Hernandez v. State, 976 S.W.2d 753, 755–56 (Tex. App.—Houston [1st Dist.] 1998, pet. ref'd).

[106] *Id.*

[107] *Leyba*, 416 S.W.3d at 568.

[108] Jackson v. State, 50 S.W.3d 579, 591–92 (Tex. App.—Fort Worth 2001, pet. ref'd).

[109] *Leyba*, 416 S.W.3d at 569; *Hankins*, 180 S.W.3d at 180.

[110] *Hankins*, 180 S.W.3d at 180.

Evidence.[111] Agreeing with the court in *Hankins*, the court in *Leyba v. State* stated that Rule 609 clearly creates two distinct categories of prior convictions, and there is no room for a third analysis that utilizes the tacking doctrine.[112] For a conviction that is over ten years old, a court must first apply the general requirements of Rule 609(a) to determine if the conviction is the type that even falls within the parameters of the Rule.[113] Then the court must further apply the standard set out by Rule 609(b), which prohibits admission for impeachment purposes of all prior convictions more than ten-years old absent a showing that "the probative value of the conviction . . . substantially outweighs its prejudicial effect."[114] In *Leyba*, the court stated that the language of Rule 609 was unambiguous, and to apply the tacking doctrine would be contrary to that language.[115]

The appellate courts that do not use the tacking doctrine, correctly apply Rule 609 to the situation where a witness has both a conviction within the ten-year period and another outside the ten-year period.[116] Every time there is a conviction ten years or older, the courts use the "substantially outweighs" analysis stated in Rule 609(b).[117] This is how the Rule was intended to be applied, given the plain language of the Rule.

C. The Legislative History of Rule 609 Makes Clear the Intent of Congress Was to Eliminate the Tacking Doctrine

The State of Texas uses the same exact verbiage in its version of Rule 609 as the United States uses in the Federal Rule of Evidence 609.[118] The legislative history of the United States' Rule 609, which includes both a House of Representatives Conference Report and a Senate Report, provides insight into how Congress intended the Rule to be applied by courts.[119] Senate Report 93-1277 clearly sets out that convictions over ten years old

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[111] *Id.*

[112] *Leyba*, 416 S.W.3d at 569.

[113] *Hankins*, 180 S.W.3d at 180.

[114] *Id.*

[115] *Leyba*, 416 S.W.3d at 568.

[116] *Id.*

[117] *Id.* at 569; *Hankins*, 180 S.W.3d at 180; Tex. R. Evid. 609(b).

[118] *Cf.* 28 U.S.C.A. 609; *with* Tex. R. Evid. 609.

[119] H.R. Conf. Rep. No. 93-1597 at 7103 (1974), *reprinted in* 1974 U.S.S.C.A.N. 7098; S. Rep. No. 93-1277, at 7062 (1974), *reprinted in* 1974 U.S.S.C.A.N. 7051.

must meet the "substantially outweighs" standard of Rule 609(b).[120] The allowance of stale convictions for impeachment evidence stems from an amendment by the Senate.[121] Originally, the bill did not allow for convictions ten years or older to be used as evidence at all.[122] The original bill was modeled after another state's rule of evidence, which did not allow for convictions over ten-years old to be used as impeachment evidence.[123] The Advisory Committee of the other state's rule of evidence, had the ideology that, "after ten years following a person's release from confinement (or from the date of his conviction) that the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible."[124] The Senate felt that this approach was too extreme; thus, it amended the bill to allow for certain situations where a conviction more than ten years ago could be used as impeachment evidence against a witness.[125] The report states that, "convictions over ten-years old generally do not have much probative value, [but] there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness."[126] Thus, evidence of these stale convictions should only be admitted as impeachment evidence under "exceptional circumstances."[127] The report further states, "It is intended that convictions over 10-years old will be admitted very rarely."[128] The Senate, which created this vehicle for stale convictions to survive, never intended for 609(b) to be an easy burden to achieve.[129] Only in very rare and exceptional circumstances should a conviction over ten-years old ever be allowed as evidence for impeachment purposes.[130] The House Conference Report similarly shows support for the idea that Congress intended a conviction older than ten years to go through a more difficult evaluation process by the court than those convictions under then

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[120] S. Rep. No. 93-1277.

[121] *Id.*

[122] H.R. Rep. No. 93-650, at 7085 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075.

[123] *Id.*

[124] *Id.*

[125] *See* S. Rep. No. 93-1277.

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

years ago.[131] The House Conference Report states that a conviction older than ten years "may not" be admitted as evidence unless the court determines that the probative value of admitting the evidence "substantially outweighs" the prejudicial effect.[132]

The continued use of the tacking doctrine by Texas courts does not make sense, when viewed with the knowledge of Congress' intent. While the legislative history of a Federal Rule of Evidence has no binding effect on how a Texas Court must interpret a Texas Rule of Evidence, a court should, at the very least, consider the congressional intent behind the Rule, especially when the state rule was modeled after it. As discussed, the courts are using the tacking doctrine as a bypass system to get around the difficult standard of Rule 609(b).[133] Nowhere in Rule 609's legislative history, in either the state or federal version, or in the language of Rule 609 itself, is there any support for this bypass system.[134] If a conviction is over ten years old, it must go through the rigorous test of 609(b) and should only be permitted as evidence in very rare and exceptional circumstances.

D. The Texas Criminal Court of Appeals Provides No Help to Resolve This Dispute

In the 26 years since the creation of the Texas Rules of Evidence, the Texas Criminal Court of Appeals has never specifically endorsed the tacking doctrine, nor has it ever rejected it.[135] In *Lucas v. State*, the Court provided an analysis using the then applicable Art. 38.29.[136] The Court noted the existence of an exception to the general ten-year rule, which seemingly showed an approval of the tacking doctrine.[137] The Court made sure to state that while the lack of reformation or subsequent convictions may cause a prior conviction to fall outside the general ten-year rule and not be subject to objection of remoteness; however, the trial court ultimately had discretion on whether to admit such evidence or not.[138] As stated, the Texas Court of Criminal Appeals has not once applied the tacking doctrine

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[131] H.R. Conf. Rep. No. 93-1597.

[132] *Id.*

[133] *Id.*

[134] Tex. R. Evid. 609(b).

[135] Leyba v. State, 416 S.W.3d 563, 569 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

[136] Lucas v. State, 791 S.W.2d 35, 50–51 (Tex. Crim. App. 1989) (en banc).

[137] *Id.*

[138] *Id.*

since Rule 609 became effective.[139] This lack of application implies a discontinued approval. However, without an express ruling from the Court, the appellate courts must rely on the language of the Rule, which does not allow the existence of the tacking doctrine.

III. A SOLUTION TO THE PROBLEM: ELIMINATE THE TACKING DOCTRINE

Rule 609 makes no mention of the tacking doctrine, and, in fact, the Rule implicitly eliminates it. The language of Texas Rule of Evidence 609 was directly copied from the Federal Rule of Evidence Rule 609. When reviewing the legislative history of Federal Rule 609, Congress made clear how courts were meant to interpret and apply the Rule. While this legislative history does not bind a Texas court in its decision, the logical analysis used by Congress in the creation of this Rule should be utilized by the Texas court system. Only in very rare and exceptional circumstances should a court allow evidence of a prior conviction for the purpose of impeaching a witness.

Texas courts should no longer use the tacking doctrine to completely bypass the more rigorous standard that Rule 609(b) sets out for stale convictions. A court cannot tack a 609(b) conviction onto a 609(a) conviction; there is no support for this type of action in the Rule. There is only one answer that correctly resolves the dispute over how to analyze evidence of a prior conviction over ten years old under Rule 609. The Rule states that if a prior conviction is over ten-years old, then the court may only admit it into evidence after going through the "substantially outweighs" analysis.

A court should view each conviction standing alone. Then run the tests set up by Rule 609 on each conviction separately. Do multiple prior convictions, some stale and others not, aid the court in deciding on whether a particular stale conviction's probative effect substantially outweighs the prejudicial effect of admitting that evidence? Yes, of course. However, it is crucially important that the court consider each conviction individually, allowing other convictions to only aid in their balancing test to that particular conviction rather than allowing a conviction in as evidence simply because of the presence of non-stale convictions.

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[139] *Leyba*, 416 S.W.3d at 569.