

Reexamining ER 609

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Strengthening
the **sixth**
JUSTICE FOR ALL

Roadmap

- I. Background on prior conviction impeachment:
 - History;
 - Washington;
 - Other states of interest.
- II. The need for reform in Washington
- III. What advocates can do right now
- IV. Changing the rule



Background

Prior conviction impeachment has roots in “competency rules”



Testimony prohibited from:

Interested parties

Those with “infamous”
criminal convictions

Those who refuse to swear an
oath

Some states: African-
Americans, Native Americans,
certain immigrants

Early Prior Conviction Impeachment in Washington

- “[N]o person shall be excluded as a witness because of the conviction of crime, but that such conviction may be shown for the purpose of affecting the weight of his testimony.”
 - State v. Evans, 145 Wash. 4, 14, 258 P. 845, 849 (1927) (citing Rem. Comp. Stat. § 2290)

Witness
disqualification
through dishonor

No honor = no
credibility

Prior conviction impeachment in Washington

2 categories of admissible conviction under ER 609(a):

1. **Felony conviction**, if court finds that its probative value outweighs the prejudice;
2. Conviction (felony or misdemeanor) for crime that “**involved dishonesty or false statement**”* – no judicial discretion to exclude.

* Courts have broadened this provision beyond the federal equivalent; see Silverstein brief urging Wash. Sup. Ct. to narrow it again.

Other states of interest

- **Hawai'i & Kansas:**
 - No prior conviction impeachment of those testifying in their own defense in criminal trials (unless the witness is found to have “opened the door”);
- **Montana:**
 - No prior conviction impeachment of any witness (unless the witness is found to have “opened the door”).

Note that these state rules have been cited in WA case law urging abolition, or at least partial abolition, in this state. Burton dissent.



The Need For Reform In Washington

Probabilistic Rationale for Prior Conviction Impeachment

- Convictions tell us something about a witness's "propensity for truthfulness."

Flaws with Probabilistic Rationale

1. Prior convictions are not necessarily the outcome of a well-functioning criminal legal system.
 - Systemic inequalities burden D's ability to go to trial
 - Pleas may not relate to conduct on the ground
 - Discrimination in the system means one defendant may have no prior convictions to be impeached with while another may, even with identical behavior.
2. No scientific backing for the idea that we can learn something about a witness's propensity for lying from the existence of a previous criminal conviction

What do fact-finders do with prior convictions?

- Lower the burden of proof in close cases
- “Evidence against a defendant with a prior conviction appears stronger to the jury”
 - Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1357 (2009)

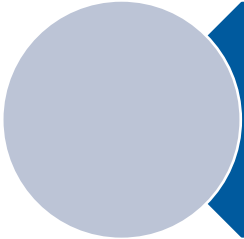
Unfair prejudice flagged by Wash. Sup. Ct.

- Deterrence of testimony:
 - Case law emphasizes this. Burton.
 - Jurors take silence as guilt. Burton dissent.
- Forbidden propensity risk. Burton dissent:
 - Prior conviction impeachment “by its very nature is highly prejudicial.” Burton.
 - Instructions can’t fix this. Alexis; Burton dissent; Jones.
- Risk jurors will convict someone they view as “bad.” Burton dissent; Newton (“extraordinary” risk means rule to be construed narrowly).

Number of People with Felony Convictions Has Drastically Increased



Size of U.S. criminal legal system has increased exponentially.



Number of adults with felony convictions increased from fewer than two million people in 1948 to nearly 20 million in 2010

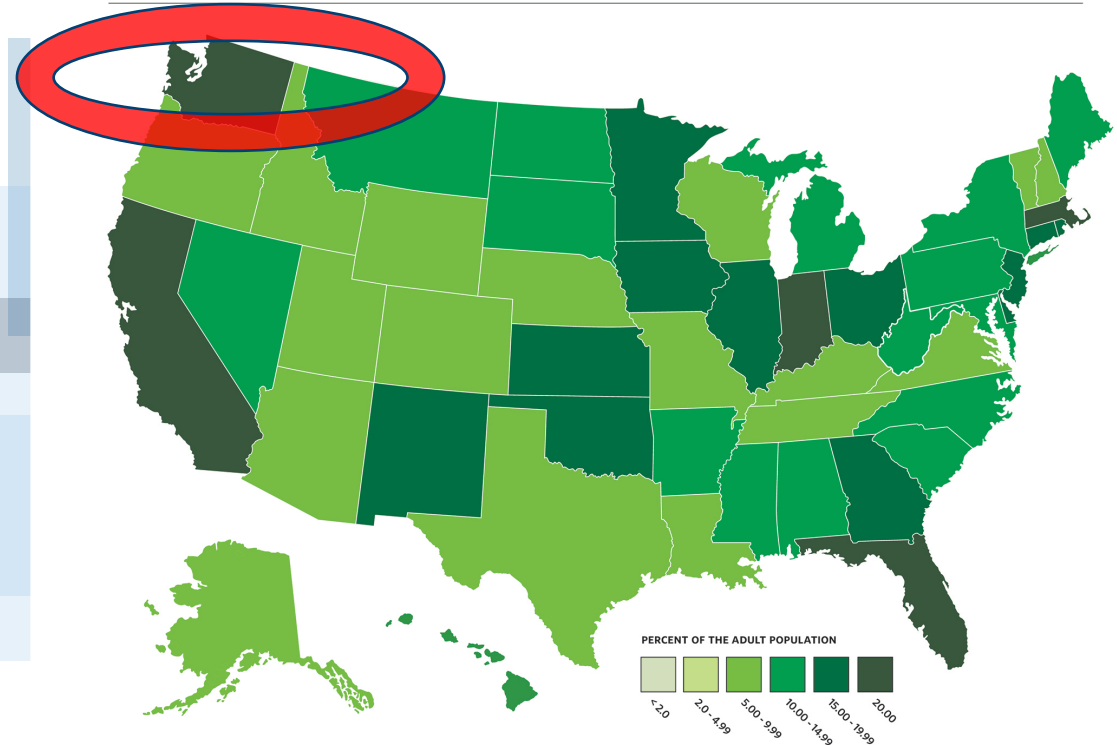


33 % of the African-American adult male population having a felony conviction

Washington State

In 2010, WA among states with **highest number of African-American adults with felony convictions >20%** (joined by CA, FL, MA, IN)

PERCENT OF AFRICAN AMERICAN ADULT POPULATION WITH FELONY RECORDS BY STATE, 2010

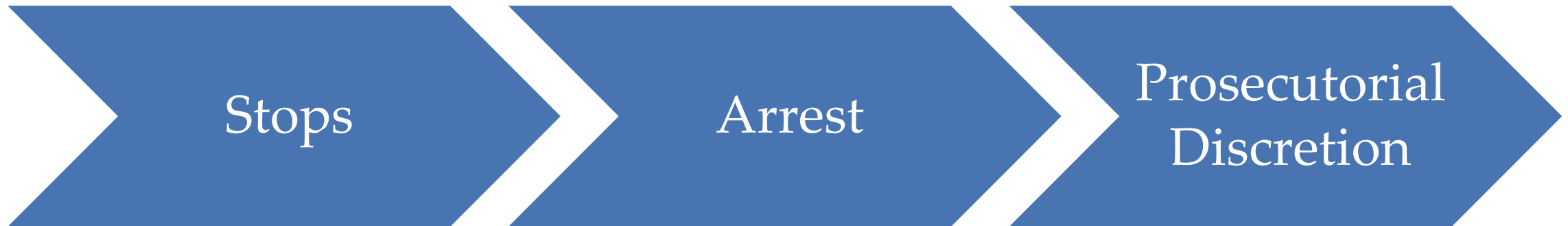


Washington State Cont'd

More recent reports:

- African-Americans represent **4.2 %** of Washingtonians
 - **11%** of Washingtonians with a criminal record
 - **15%** of Washingtonians with any felony record
 - **22%** of Washingtonians with a Class A felony record.

System Actors and Implicit Bias



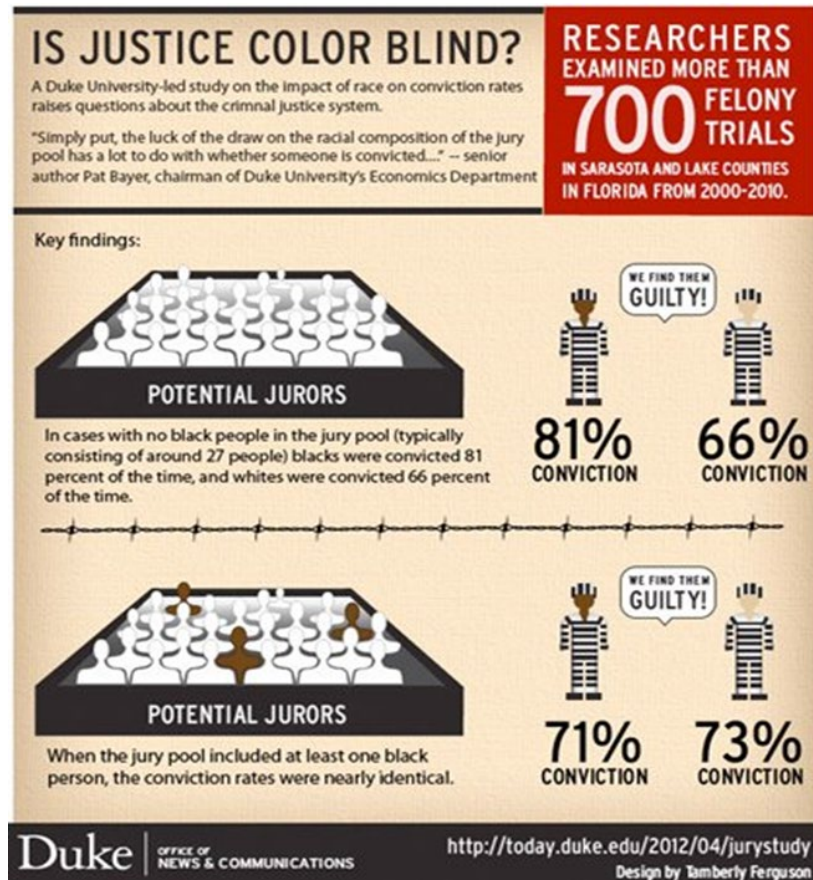
Racial Disparities in Prosecutorial Decision-making

- Throughout the pretrial process, the balance of power is heavily skewed toward prosecutors.
 - Whether to file charges
 - Even after taking legally relevant factors into account, whites are less likely to have charges filed against them.
 - charge the same act as a misdemeanor or a felony

Racial Disparities In The Courtroom

- Race has evidentiary value in America's courtrooms in that it "tends to prove or disprove something in the American justice system just as it does in society at large."
- Prior Convictions presents the risk Black pathological criminality.

Racial Disparities In How Jurors Treat Black Defendants



2018, 2019, and 2020, Black people were 2.7x more likely to be convicted than White people

Jurors in Washington were 3 times more likely to recommend a death sentence for black defendants

Juries formed from all-white jury pools convict black defendants (16 percentage points) more often than white defendants

Gap in conviction rates is entirely eliminated when the jury pool includes at least one black member.



What Advocates Can Do Now

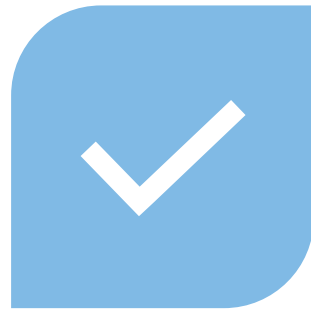
Raise and Preserve the Issue for Appeal



Raising the Issue



MAKE TIMELY OBJECTIONS



CLEARLY FRAME THE ISSUE
FOR APPEAL



MORE DEFENSE-FRIENDLY
STANDARD OF REVIEW (DE
NOVO VS. PLAIN ERROR)



EASIER TO OVERCOME
HARMLESS ERROR
ARGUMENTS

Waiver vs. Forfeiture

Waiver

- Intentionally relinquish a known right
- Invited error (seek a particular result, cannot challenge same on appeal).
- Expressing satisfaction (no objection).
- **Result: Extinguishes the error and courts don't need to review.**

Forfeiture

- Failing to timely raise an issue for appeal
- Failing to object
- Failing to seek a final ruling
- **Result: Will be reviewed for plain error**

Making the Record



Object! Object! Object! (Timely)



Get a final ruling



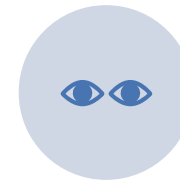
Memorialize off-record discussions-side bars, in-chambers.



Watch for inadvertent waiver



State legal grounds for the objection(s)



Be the eyes and ears of the appellate court: make note of glitches, physical movements of witnesses, or inability to assess witness demeanor.



Motions practice



Arguing the balancing test

Arguing probative value under WA case law

- “Abstract beliefs about the relation of prior convictions to credibility” aren’t enough to demonstrate probative value. Thompson; Calegar.
- A single act is “hardly a scientific method of determining character.” Burton dissent.
- Probative value further restricted where those on trial are impeachable in so many other ways. Burton dissent.
- State’s burden under the balancing test is “a difficult one.” Jones (adding that normally the court should err on the side of exclusion); Hardy (adding that prior drug convictions are generally not probative of veracity); Garcia; Vazquez.
- The necessity of hearing from the person on trial is “the most important consideration” in determining probative value. Jones.
- Less probative value if the person convicted didn’t testify at previous trial. Jones.

Arguing for narrowest possible reading of ER 609(a)(2)

2 categories of admissible conviction under ER 609(a):

1. **Felony conviction**, if court finds that its probative value outweighs the prejudice;
2. Conviction (felony or misdemeanor) for crime that **“involved dishonesty or false statement”*** – no judicial discretion to exclude.

* Courts have broadened this provision beyond the federal equivalent; see Silverstein brief urging Wash. Sup. Ct. to narrow it again.

Constitutional references in WA case law

- **Right to testify.** Newton; Hardy (stating that “forcing the accused to . . . a Hobson’s choice [between impeachment and silence] is not favored”)
 - Note state constitutional protections as well as federal. Burton; Jones; Silverstein brief.
 - Note that it was a Due Process claim, citing the right to testify, that led Hawai’i to prohibit this form of impeachment of those facing criminal charges
- **Right to a fair trial.**
 - Burton dissent (calling for full or partial abolition of this practice); Newton.



Changing The Rule

Reforms

1. Eliminate Impeachment with Prior Convictions
2. Permit Only Impeachment with Evidence of Lying under Oath

Impeachment with Evidence of Lying under Oath – Rule Proposal

EVIDENCE OF LYING UNDER OATH. A witness, not the defendant, may be impeached with evidence that he or she was untruthful about a material matter when making a statement under oath within the past ten years. This provision does not apply to past testimony by a witness as a defendant.

Reforms

1. Eliminate Impeachment with Prior Convictions
2. Permit Only Impeachment with Evidence of Lying under Oath
3. Permit Only Impeachment with Prior Convictions Involving Dishonesty or False Statement

Impeachment with Prior Convictions Involving Dishonesty or False Statement – Rule Proposal

IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION.
A witness, not the defendant, may be impeached with evidence that he or she was convicted of perjury or subordination of perjury, false statement, embezzlement or false pretense within the past ten years if the probative value of the conviction outweighs the risk of unfair prejudice.

Reforms

1. Eliminate Impeachment with Prior Convictions
2. Permit Only Impeachment with Evidence of Lying under Oath
3. Permit Only Impeachment with Prior Convictions Involving Dishonesty or False Statement
4. Prohibit Impeachment with Prior Convictions of Criminal Defendants

Prohibit Impeachment with Prior Convictions of Criminal Defendants – Rule Proposal

IMPEACHMENT OF DEFENDANT BY EVIDENCE OF A CRIMINAL CONVICTION. In a criminal case where the defendant takes the stand, the prosecution shall not ask the defendant or introduce evidence as to whether the defendant has been convicted of a crime for the purpose of attacking the defendant's credibility. If the defendant denies the existence of a conviction, that denial may be contradicted by evidence that the conviction exists

Reforms

1. Eliminate Impeachment with Prior Convictions
2. Permit Only Impeachment with Evidence of Lying under Oath
3. Permit Only Impeachment with Prior Convictions Involving Dishonesty or False Statement
4. Prohibit Impeachment with Prior Convictions of Criminal Defendants
5. Permit Criminal Defendants to Impeach the Witnesses Against Them

Permit Criminal Defendants to Impeach the Witnesses Against Them – Rule Proposal

DEFENDANT'S RIGHT TO IMPEACH. In a criminal case, impeachment by prior conviction is prohibited, except where the exclusion of such evidence would violate the defendant's constitutional rights.

Connecting with Us

- Our report on prior conviction impeachment in Washington and beyond is in your materials and here:
 - <https://strengthenthesixth.org/focus/PRIOR-CONVICTION-IMPEACHMENT-THE-NEED-FOR-REFORM>
- Our emails:
 - Monica Milton: mmilton@nacdl.org
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 - Anna Roberts: anna.roberts@brooklaw.edu