EVIDENCE

UNITED STATES v. BURKHEAD: MOTIONS IN LIMINE UNDER RULE 609

INTRODUCTION

In United States v. Burkhead,¹ the Eighth Circuit decided the propriety of a lower court's refusal to rule on a motion in limine under Federal Rule of Evidence 609(a)(1).² The motion requested that the defendant's previous convictions on severed narcotics charges not be admitted in the subsequent conspiracy trial.³ The Eighth Circuit found that it was an abuse of discretion for the trial court to refuse to rule on the pretrial order.⁴

This article will discuss the scope of appellate review of Rule 609(a)(1) decisions, as well as motions in limine under that rule. This discussion will aid the analysis of precedent established by Burkhead governing the use of severed prior convictions to impeach a defendant. This article will also examine the type of evidence which must be presented upon a motion in limine to obtain the advanced ruling.

FACTS AND HOLDING

Darrel Burkhead was charged in a seven count indictment for narcotics offenses.⁵ The trial court severed the conspiracy count and ordered a separate trial on that charge.⁶ Burkhead was con-

¹. 646 F.2d 1283 (8th Cir. 1981).
². FED. R. EVID. 609(a)(1). Rule 609 states in pertinent part:
(a) General rule—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year... and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.
(b) Time limit—Evidence of a conviction under this rule is not admissible if a period of more than ten years had elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. . . .

Id.
³. 646 F.2d at 1285.
⁴. Id. at 1286.
⁵. Id. at 1284.
⁶. Id.
victed on five of the six substantive counts and later went to trial on the conspiracy count. Burkhead refused to take the stand in the conspiracy trial because of the possibility that the prior convictions on the substantive counts would be used to impeach him on cross-examination. He was subsequently convicted on the conspiracy count.

On appeal to the Eighth Circuit, Burkhead argued that the district court abused its discretion in refusing to rule prior to trial on a motion in limine under Rule 609 to exclude evidence of the convictions on the substantive counts. Burkhead argued that this evidence was prejudicial and should have been excluded; the Eighth Circuit agreed and reversed the conspiracy conviction.

The Eighth Circuit determined that the prior convictions were inadmissible for impeachment purposes. The court held the district court had sufficient information to rule on the motion in limine and no reason existed for the district court's refusal to do so. Therefore, failure to rule before trial was an abuse of discretion and reversible error.

**BACKGROUND**

This article will focus on the use of a motion in limine under Rule 609(a)(1). However, an analysis of the information necessary for judicial ruling under Rule 609(a)(1) is necessary to fully examine the use of a motion in limine in this situation.

Rule 609 governs the use of prior convictions for impeachment purposes by balancing the prejudicial effect against the probative value. Some crimes are automatically admissible under the rule, while others carry a strong presumption against admissibility. However, a large number of prior convictions are admissible in the discretion of the court. Two oft-cited cases from the Dis-
strict of Columbia Circuit, *Luck v. United States*{superscript}19 and *Gordon v. United States*,{superscript}20 specify guidelines{superscript}21 for determining the admissibility of a prior conviction for impeachment.{superscript}22

**The Luck Doctrine**

Prior to the enactment of the Federal Rules of Evidence in 1975, most federal courts followed the discretionary criteria developed by the District of Columbia Circuit.{superscript}23 In *Luck*, the court of appeals held that a District of Columbia statute{superscript}24 allowed the use of a prior conviction for impeachment but did not require admission of such evidence.{superscript}25 The court explained that the admission or suppression of such evidence depends upon the "circumstances as they unfold in a particular case."{superscript}26 Judicial discretion was to be used to weigh the circumstances of the prior conviction and the importance of the defendant's testimony in the present case.{superscript}27

The development of discretionary criteria which began in *Luck* culminated in *Gordon v. United States*.{superscript}28 In *Gordon*, the court was presented with the question of the admissibility, during the trial for robbery and assault with a dangerous weapon,{superscript}29 of the defendant's five prior convictions.{superscript}30 The court identified five criteria to be used in the determination of admissibility: (1) the nature

except for a subset of crimes falling within Rule 609(a)(2), the use of other crimes for impeachment is within the discretion of the trial judge. *Id.*

{superscript}19. 348 F.2d 763 (D.C. Cir. 1965).
{superscript}21. *See* note 45 and accompanying text *infra*.
{superscript}22. 348 F.2d at 769; 383 F.2d at 940-41.
{superscript}24. 14 D.C. CODE § 305 (1961) reads in pertinent part:

No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, *but such fact may be given in evidence to affect his credit as a witness*, either upon the cross-examination of the witness or by evidence alibi; and the party cross-examining him shall not be concluded by his answers as to such matters. *Id.* (emphasis added).

{superscript}25. 348 F.2d at 768.
{superscript}26. *Id.*
{superscript}27. *Id.* at 769.
{superscript}29. 383 F.2d at 938 n. 2a.
{superscript}30. *Id.* at 938.
of the prior conviction, (2) the remoteness or nearness of the prior conviction to the trial, (3) the similarity of the prior conviction to the crime charged, (4) the importance of the defendant's testimony, and (5) the centrality of the issue of credibility to the finding of guilt.\footnote{31}

In describing the first criterion, the court set forth the general rule that convictions which rest on dishonest conduct, such as fraud or cheating, relate to credibility, whereas those which rest on violence or assault generally do not.\footnote{32}\footnote{33} The second criterion focuses on the nearness or remoteness of the conviction. The court explained that a prior conviction followed by a legally blameless life should be excluded on the grounds of remoteness.\footnote{34}

In discussing the third criterion, the degree of similarity between the prior conviction and the charged crime, the court cautioned that "strong reasons arise for excluding prior convictions which are for the same crime."\footnote{35} Jurors may believe that if the defendant committed the crime before, he probably did so this time.\footnote{36}

Even if the trial judge has determined that the probative value of the prior conviction outweighs its prejudicial effect, the trial judge may, in his discretion, exclude the evidence under the fourth criterion, the importance of the defendant's testimony.\footnote{37} In such a case, the defendant's own testimony may be so crucial to the determination of the finding of fact that the defendant should not be forced into electing between testifying, thereby risking impeachment, and remaining silent.\footnote{38}

When a case has reduced itself to an issue of credibility between the accused and the accuser, the fifth criterion is important.\footnote{39} When credibility is the only issue before the jury, the jurors should be informed of the defendant's criminal record.\footnote{40} Thus, \textit{Gordon} and \textit{Luck} formed the basis of analysis for determinations under Rule 609.\footnote{41}
Appellate Review under Rule 609.

In determining the admissibility of a prior conviction for impeachment purposes, Rule 609(a) states two tests.\(^1\) First, evidence of the defendant's prior conviction may be admissible if the crime was punishable by death or imprisonment in excess of one year, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant.\(^2\) Second, if the prior conviction involved dishonesty or false statements, the evidence is automatically admissible.\(^3\) Although Rule 609(a) (1) provides no specific factors to guide the court's exercise of judicial discretion,\(^4\) appellate courts have looked primarily to prior case law, especially *Gordon*, in determining the admissibility of a prior conviction.\(^5\)

Appellate courts have also recognized that there must be sufficient evidence on the record to show that the trial judge based his determination of admissibility on an adequate examination of the prior conviction.\(^6\) In *United States v. Crawford*, a case was remanded twice because of the trial court's failure to examine factors required for a Rule 609(a) (1) determination.\(^7\) In the first trial, the trial court during a pre-trial hearing inquired only into the age

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\(^1\) The text of Rule 609 is set out at note 2 supra.

\(^2\) Id.

\(^3\) Id. This article does not examine the admissibility of prior convictions under Rule 609(a) (2).

\(^4\) Id. The Conference Committee Report on Rule 609 does not set out any criteria directing the exercise of judicial discretion created in Rule 609(a) (1). See *United States v. Oakes*, 565 F.2d 170, 172 (1st Cir. 1977) ("The Committee's explanatory statement sheds little light on the factors a court must balance when the witness is the defendant").


Because of the difficulties in appellate review of a "cold record," a number of circuits have strongly urged that the trial judge make an on-the-record statement of the factors used in his decision and the relative importance he attached to each. See *United States v. Preston*, 608 F.2d 626, 639 (5th Cir. 1979) (mandatory explicit on-the-record review established); *United States v. Seamster*, 568 F.2d 186, 191 n.3 (10th Cir. 1978), cert. denied, 446 U.S. 940 (1980); *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir.), cert. denied, 429 U.S. 1025 (1976). See generally Note, *Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609*, 64 COLUM. L. REV. 416, 428-31 (1979).

\(^7\) 613 F.2d 1045 (D.C. Cir. 1979).

\(^8\) Id. at 1046.
of the previous conviction, deciding without further investigation that evidence of the conviction was admissible. The Second Circuit remanded for the trial judge's failure to make a sufficient investigation under Rule 609(a)(1). On remand, the trial judge stated simply that he was "going to make the finding that the prior conviction was admissible because the probative value outweighed the prejudicial effect." Again the Second Circuit remanded, stating that without the trial court's inquiry into the nature of the prior conviction or its surrounding circumstances, the court simply could not make the determination mandated by the rule.

In other cases, appellate courts have been willing to make an independent weighing of the Gordon factors to determine admissibility under Rule 609. In United States v. Jackson, the District of Columbia Circuit independently analyzed the Gordon factors and upheld the trial court's admission of a prior conviction for impeachment purposes. The defendant had a prior conviction of manslaughter and was now charged with distribution and conspiracy to distribute and possess heroin. In concluding that the probative value of the prior conviction was not outweighed by its prejudicial effect, the court examined the importance of the defendant's testimony weighed against the issue of credibility, as well as the highly prejudicial effect of the manslaughter conviction, and the fact that the prior conviction was not similar to the crime charged.

Cases in which appellate courts have engaged in this explicit, independent analysis have created a basis upon which other courts have relied to decide admissibility of prior conviction evidence. Thus, courts have been able to apply the reasoning of sev-

49. Id. at 1048.
50. Id. at 1049.
51. Id. at 1050.
52. Id. at 1052.
53. See United States v. Barnes, 622 F.2d 107, 108-09 (5th Cir. 1980) (the appellate court upheld use of prior conviction after determining that the defendant's credibility was at issue, and that the prior conviction was not substantially similar to the one charged); United States v. Field, 625 F.2d 862, 872 (9th Cir. 1980) (the court examined the age, nature and degree of similarity of the prior conviction to the crime charged). See also United States v. Ortiz, 553 F.2d 782, 786-88 (2d Cir.) (Mansfield, W., dissenting) (the dissent examined the nature of the prior narcotics conviction and its prejudicial effect), cert. denied, 434 U.S. 897 (1977). But see United States v. Hall, 588 F.2d 613, 615 (8th Cir. 1978) (the court upheld admission of prior conviction with no discussion of the Gordon criteria).
54. 627 F.2d 1198 (D.C. Cir. 1980).
55. Id. at 1209-10.
56. Id.
57. See, e.g., United States v. Preston, 608 F.2d 626, 638 n.15 (5th Cir. 1979), cert. denied, 446 U.S. 940 (1980) (the court cited previous cases to supports its narrow
eral appellate cases in judging the particular conviction before them. An example of this practice can be seen in the application of the first criteria, the nature of the prior conviction. In United States v. Hayes, the court was confronted with the question of whether evidence of a prior conviction for importation of cocaine was admissible in a trial for charges arising out of a bank robbery. Rather than examine the probative value of the prior conviction, the court referred to a scale of veracity-related crimes on which certain crimes, such as smuggling, were ranked high and other crimes, such as narcotics possession, were ranked low. Since the importation of cocaine was more closely related to the crime of smuggling, the court found the prior conviction to be probative of the defendant’s credibility and upheld its use at trial.

The Fifth Circuit in United States v. Martinez held that under certain circumstances the evidence of a substantially similar crime under the third Gordon criterion was per se inadmissible. The defendant was charged with conspiracy, and had been previously convicted on a severed charge for aiding and abetting. Both charges had arisen out of the same narcotics transaction. The court reasoned that the defendant’s credibility was in actual-
It was highly prejudicial to tell a jury that another fact-finder had found criminal culpability based on the same facts, the court warned that such use of prior conviction impeachment would amount to a “bootstrap” argument, pulling the weaker subsequent charge up with the stronger previous conviction.68

Although other circuits have explicitly employed the Gordon criteria in reviewing Rule 609(a) challenges, the Eighth Circuit has not done so.69 In United States v. Nelson,70 the Eighth Circuit affirmed the use of a prior conviction of robbery in a trial for two counts of distributing narcotics. Though Rule 609 was not in effect at the time of the lower court’s ruling, the Eighth Circuit cited the rule as persuasive authority that the trial judge had discretion to admit or exclude evidence.71 However, the Eighth Circuit did not discuss the balancing process mandated in the rule, nor did it set out any discernible criteria.72 Nelson has been criticized because “the court might have indicated more concern about the appropriate balance of the probative value of this particular conviction as weighed against its possible prejudicial impact.”73

This criticism could be equally applied to the Eighth Circuit’s decision in United States v. McMillian.74 In affirming the appellant’s conviction for robbery of a credit union, the Eighth Circuit upheld the trial court’s ruling admitting evidence of a previous robbery conviction after he had taken the stand and denied participa-

67. Id. at 1276.
68. Id. See United States v. Panetta, 436 F. Supp. 114 (E.D. Pa. 1977) (the court indicated that introduction of a prior conviction in a case in which the prosecution had segmented charges for the purpose of prior conviction impeachment could be violative of due process).
69. However, in Sears v. United States, 490 F.2d 150, 154 (8th Cir.), cert. denied, 417 U.S. 949 (1974), the court recognized the Gordon criteria as set out in United States v. Palumbo, 401 F.2d 270, 273 (2d Cir. 1968), cert. denied, 394 U.S. 947 (1969), but did not indicate its own analysis of the factors or the relative weight attached to each.
70. 592 F.2d 40, 41 (8th Cir.), cert. denied, 426 U.S. 922 (1976).
71. 592 F.2d at 42.
72. The lack of discussion of the probative value of the prior robbery conviction is especially troublesome since the probative value of a robbery conviction to a defendant’s veracity is questionable. Compare United States v. Smith, 551 F.2d 348, 362 (D.C. Cir. 1977) (a restrictive impression was seen by the court in Rule 609(a)(2)’s language that “dishonesty and false statement” has never been thought to comprehend robbery) with United States v. Oaxaca, 569 F.2d 518, 526-27 (9th Cir.), cert. denied, 439 U.S. 926 (1978) (conviction for a bank robbery reflects “adversely on a defendant’s honesty and integrity”).
74. 535 F.2d 1035 (8th Cir. 1976).
tion in the charged robbery. The Eighth Circuit stated only that "[u]nder the circumstances, the use of the [defendant’s] prior conviction was proper [under Rule 609]." Though impeachment with a prior conviction similar or identical to the one charged has been recognized as abnormally prejudicial, the Eighth Circuit neither explicitly examined the possibility of prejudice to the defendant nor applied the test under Rule 609(a)(1).

Motions in Limine Under Rule 609

Important tactical reasons prompt the defendant to request a pretrial determination on whether the prior conviction will be admitted. Uncertainty as to the admissibility of prior convictions will often keep the defendant from testifying for fear that the evidence will be used for impeachment on cross-examination. A ruling prior to trial will give the defense the opportunity to present the evidence in a manner least harmful to the defendant, and could be helpful in the voir dire of the jury.

Appellate courts have recognized the value of a motion in limine under Rule 609(a) and have strongly urged trial courts to

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75. Id. at 1039.
76. Id.
78. United States v. McMillian, 535 F.2d at 1039.
80. United States v. Veltre, 591 F.2d 347, 349 (5th Cir. 1979). The appellate court approved of the government eliciting from its witness the fact that she had pleaded guilty to the prior conviction. The court stated that it served "to blunt the impact of attacks on her credibility." Id.

In those jurisdictions in which the voir dire examination is conducted by counsel, a motion in limine can be used to prevent interrogation that will implant prejudice in the minds of the veniremen. For example, a motion in limine might be made by the defendant in a personal injury lawsuit to prevent voir dire inquiries as to whether any of the veniremen are employed in any capacity by an insurance company. Similarly, if the voir dire is handled by the trial judge, and if counsel's adversary has requested that certain possibly prejudicial matters be included in the court's interrogation of prospective jurors, the attorney can use a motion in limine, or its equivalent, to exclude such matters from the examination. If the objection is proper and timely made, and if opposing counsel is unable to make out sufficiently compelling reasons for including the sensitive topics in the questioning, the trial court must refrain from alluding to the matter and will be held in error on appeal if it fails to do so.

Id.
make the pretrial ruling when possible.\textsuperscript{82} However, they have refused to mandate that a ruling in advance of trial be made.\textsuperscript{83} Courts have based this refusal on a number of factors, one of which is the perceived unavailability of information in the record from which an appellate court may determine whether the motion was properly denied or granted.\textsuperscript{84} The courts have recognized that the motion in limine is within the discretion of the trial judge,\textsuperscript{85} and have refused to encroach in this area with an advance disclosure requirement. There is also a danger that the pretrial ruling may become merely advisory.\textsuperscript{86}

In \textit{United States v. Johnston},\textsuperscript{87} the Eighth Circuit ruled that a defendant was not entitled to a pretrial order prohibiting cross-examination concerning his prior conviction record.\textsuperscript{88} "[U]ntil [the defendant] took the stand, which he chose not to do, the court had no duty to rule on his pretrial motion regarding the admissibility of evidence of his prior convictions for purposes of impeachment."\textsuperscript{89}

The Eighth Circuit cited two cases in support of its conclusion. In \textit{United States v. Scarpellino},\textsuperscript{90} the appellant argued that the trial court had discretion under the \textit{Luck} doctrine to exclude a prior conviction for impeachment.\textsuperscript{91} The Eighth Circuit pointed out that the \textit{Luck} decision involved interpretation of a District of Columbia statute, and consequently had no precedential value in the Eighth Circuit.\textsuperscript{92} The court ruled that any defendant who takes the stand may be cross-examined with respect to prior convictions.\textsuperscript{93} In \textit{United States v. Merrill},\textsuperscript{94} the Eighth Circuit ruled that a defendant was not entitled to a pretrial order to exclude impeachment evidence, stating that "[i]t is hornbook law that one

\textsuperscript{82} See \textit{United States v. Cook}, 608 F.2d 1175, 1186 (9th Cir. 1979), \textit{cert. denied}, 444 U.S. 1034 (1980); \textit{United States v. Oakes}, 565 F.2d 170, 191 (1st Cir. 1977); 63 A.L.R. 3d 311, 318-22 (1975) (author surveys the use of motion in limine in state trials and documents its widespread acceptance in courts).

\textsuperscript{83} 608 F.2d at 1186; 565 F.2d at 171.

\textsuperscript{84} See 565 F.2d at 171. The court suggested that the defendant state the substance of his testimony when he makes the motion to avoid the problem of insufficient information. \textit{Id. See also} \textit{United States v. Golden}, 532 F.2d 1244, 1247 (9th Cir. 1976).

\textsuperscript{85} 608 F.2d at 1186.

\textsuperscript{86} See \textit{id. at} 1189 (Kennedy, J., dissenting).

\textsuperscript{87} 543 F.2d 55 (8th Cir. 1976).

\textsuperscript{88} \textit{id. at} 59. \textit{Accord} \textit{United States v. Cox}, 428 F.2d 683, 689 (7th Cir. 1970); \textit{United States v. Crisona}, 416 F.2d 107, 117 (2d Cir. 1969).

\textsuperscript{89} 543 F.2d at 59.

\textsuperscript{90} 431 F.2d 475 (8th Cir. 1970).

\textsuperscript{91} \textit{id. at} 478.

\textsuperscript{92} \textit{id. at} 478-79.

\textsuperscript{93} \textit{id. at} 479.

\textsuperscript{94} 484 F.2d 168 (8th Cir.), \textit{cert. denied}, 414 U.S. 1077 (1973).
who takes the stand in his own defense may be cross-examined relative to prior convictions.\textsuperscript{95}

In \textit{United States v. Oakes},\textsuperscript{96} the First Circuit rejected the defendant's claim that whenever the district court has sufficient information to perform the balancing mandated in Rule 609(a) (1), it must make an advance ruling on the issue of admissibility.\textsuperscript{97} After strongly urging that the trial judge should make an advance ruling when possible,\textsuperscript{98} the court refused to read the advance disclosure requirement into the Rule.\textsuperscript{99}

Relying on legislative history of Rule 609,\textsuperscript{100} the court decided that Congress intended the trial judge to determine prior conviction admissibility in each case according to its unique factual situation.\textsuperscript{101} In many cases, the judge may feel it is impossible to conscientiously accomplish this determination without having heard the defendant's testimony.\textsuperscript{102} The court further explained that an advance ruling requirement would invite lengthy voir dires and prolong trials.\textsuperscript{103} The court also warned that it would be unwise for an appellate court to begin "second guessing" a trial court in a matter so "intimately bound up with the conduct of the trial."\textsuperscript{104}

In \textit{United States v. Cook},\textsuperscript{105} the Ninth Circuit did not require a pretrial evidentiary ruling.\textsuperscript{106} However, the court established important procedural requirements which the defendant must meet to preserve the admissibility issue for appeal.\textsuperscript{107} The court in \textit{Cook} held that even though the defendant had not taken the stand, he could preserve the issue for appeal\textsuperscript{108} provided that he:

\begin{itemize}
\item \textsuperscript{95} \textit{Id.} at 171.
\item \textsuperscript{96} 565 F.2d 170 (1st Cir. 1977).
\item \textsuperscript{97} \textit{Id.} at 171.
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} \textit{Id.} at 173.
\item \textsuperscript{100} \textit{Id.} at 172-73.
\item \textsuperscript{101} \textit{Id.} at 173.
\item \textsuperscript{102} \textit{Id.}
\item \textsuperscript{103} \textit{Id.} at 173.
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} 608 F.2d 1175 (9th Cir. 1979), \textit{cert. denied}, 444 U.S. 1034 (1980).
\item \textsuperscript{106} \textit{Id.} at 1186.
\item \textsuperscript{107} \textit{Id.} Many circuits agree that a defendant does not waive his objection to an adverse ruling by not taking the stand. \textit{See} United States v. Provenzano, 620 F.2d 985, 1002 n.22 (3d Cir. 1980); United States v. Whitehead, 618 F.2d 523, 528 (4th Cir. 1980); United States v. LeBlance, 612 F.2d 1012 (6th Cir.), \textit{cert. denied}, 449 U.S. 849 (1980); United States v. Hickey, 596 F.2d 1082, 1087 (1st Cir. 1977); United States v. Smith, 551 F.2d 348, 357 (D.C. Cir. 1976); United States v. Palumbo, 401 F.2d 270, 274 (2d Cir. 1968), \textit{cert. denied}, 395 U.S. 947 (1969). \textit{See also} New Jersey v. Portash, 440 U.S. 450, 452 n.2 (1979). The Court reserved the question whether a defendant has to take the stand in order to preserve his right to contest an advance ruling.
\item \textsuperscript{108} 608 F.2d at at 1186 (Wallace, J., concurring).
\end{itemize}
(1) "[s]ufficiently outline the nature of his testimony," and (2) "[e]stablish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded." 109

ANALYSIS

The Eighth Circuit in United States v. Burkhead 110 examined two reasons for the postponement of a ruling on a motion in limine to exclude evidence under Rule 609(a) (1). 111 The first was the possibility that such rulings would only be advisory and thus would needlessly prolong trials. 112 The second was the perceived unavailability of information prior to trial with which the judge could perform the balancing required under Rule 609(a) (1). 113 If the defendant is able to overcome both these justifications for postponement, the trial judge's refusal to rule may be found to be an abuse of discretion. 114 The Eighth Circuit's holding provides important precedent for a defendant's request for a pretrial evidentiary ruling under Rule 609(a) (1). However, the opinion raises some questions as to the Eighth Circuit's definition of sufficient evidence for a Rule 609(a) (1) determination.

When the defense in Burkhead made its motion in limine, it set forth the substance of Burkhead's testimony and assured the trial court that Burkhead would testify if the prior narcotics conviction was ruled inadmissible. 115 At the close of the government's case, Burkhead stated under oath that he had refused to take the stand because he could not take the risk that his prior conviction would be introduced on cross-examination. 116 The Eighth Circuit concluded from these facts the Burkhead's refusal to take the stand was based on the trial court's failure to rule prior to trial. 117

However, there are a number of reasons why a defendant may refuse to take the stand even after he obtained a favorable ruling under Rule 609(a) (1). The Supreme Court has recognized that the actual conduct of the trial is a significant and legitimate factor in a defendant's election to testify. 118 Evaluation of the prosecutor's
case, the testimony of the defense witnesses,\textsuperscript{119} and even the demeanor of the defendant himself may lead the defense counsel to conclude that his client should not take the stand. Furthermore, a defendant cannot be bound by any pretrial statement of election; in fact, it would appear unconstitutional to do so.\textsuperscript{120}

Since the final decision whether to testify is to be made by the defendant and his counsel, appellate courts have refused to require advance evidentiary rulings on a motion in limine under Rule 609 because of the possibility that the ruling will only be advisory.\textsuperscript{121} A number of circuits have suggested that defense counsel present information very similar to the evidence presented by Burkhead in making the motion in limine.\textsuperscript{122} However, appellate courts have refused to require a pretrial ruling on the principle of avoidance of advisory opinions and the lack of information prior to trial on which to base a Rule 609(a)(1) determination.\textsuperscript{123}

The Eighth Circuit in Burkhead was satisfied that the defendant would have testified but for the trial judge's failure to rule.\textsuperscript{124} The court based its decision on the pretrial assurances given by the defense counsel and the defendant.\textsuperscript{125} Thus, Burkhead presents important precedent for the type of evidence which must be presented in a defendant's motion in limine. If the defense counsel sets forth the substance of the defendant's testimony and assures the court the defendant will testify, as in Burkhead, it seems that the Eighth Circuit will be satisfied that the pretrial ruling will be more than advisory.

The decision narrows the holding of United States v. Johnston,\textsuperscript{126} in which the Eighth Circuit ruled that a defendant is not entitled to a pretrial ruling under Rule 609.\textsuperscript{127} While the defendant may not have a constitutional right to testify without impeachment,\textsuperscript{128} Burkhead has provided an example in which the failure of

\textsuperscript{119} United States v. Cook, 608 F.2d 1175, 1189 (9th Cir. 1979), cert. denied, 444 U.S. 1034 (1980) (Kennedy, J., dissenting).
\textsuperscript{120} Id.; see 406 U.S. at 610-11 (The Supreme Court indicated that a restriction on a defendant's choice to testify is violative of a defendant's right to remain silent).
\textsuperscript{121} See notes 96-109 and accompanying text supra.
\textsuperscript{122} 608 F.2d at 1186; United States v. Oakes, 565 F.2d 170, 171 (1st Cir. 1977). See also United States v. Mahone, 537 F.2d 922, 928 (7th Cir.), cert. denied, 429 U.S. 1025 (1976) (the court suggested the scope of the hearing which it found appropriate for a pretrial decision under rule 609).
\textsuperscript{123} 565 F.2d at 173. See 608 F.2d at 1186.
\textsuperscript{124} 646 F.2d at 1286.
\textsuperscript{125} Id.
\textsuperscript{126} 543 F.2d 55 (8th Cir. 1976).
\textsuperscript{127} Id. at 59. See notes 87-89 and accompanying text supra.
\textsuperscript{128} United States v. Webster, 522 F.2d 384, 385-86 (8th Cir. 1975).
the trial judge to rule may be an abuse of discretion. However, before the pretrial motion can be obtained, there must be sufficient information available to the judge upon which to make the pretrial ruling. On this issue there is considerable question as to what the Eighth Circuit considers sufficient information.

A ruling on a motion in limine under Rule 609(a)(1) presupposes that a trial judge has enough information upon which to balance the probative value of the prior conviction against its prejudicial effect. Appellate courts' adoption of the Gordon criteria have not only provided a matrix from which the trial judge can draw in the exercise of his discretion, but have also provided a guide from which the trial judge can determine the sufficiency of the evidence. When faced with a pretrial motion in limine under Rule 609(a)(1), the trial judge can compare the information available to each of the Gordon criteria and make a reasoned determination.

The Eighth Circuit has not yet explicitly employed the Gordon criteria in its analysis. Burkhead does indicate that the third criterion, the degree of similarity of the prior conviction to the crime charged, may be a factor in its review of Rule 609(a)(1) de-

129. See notes 46-52 and accompanying text supra.
130. Id.
131. See notes 57-58 and accompanying text supra.
132. It is submitted that the first three Gordon criteria—the nature of the crime, the age of the conviction and the degree of similarity between the prior conviction and the crime charged—can be determined through an examination of the defendant's prior conviction record. This can easily be accomplished at a pretrial hearing. Note: There is dispute as to whether the circumstances surrounding the conviction should be examined in order to determine if the conviction warrants the description of "dishonest" conduct. Compare United States v. Papia, 560 F.2d 827, 847 (7th Cir. 1977), and E. Cleary, McCormick's Handbook of the Law of Evidence, § 43 at 13 n.79 (1972 & 1978 Supp.) (both stating that an explanation of the facts may be required before the conviction can be determined as probative of the defendant's veracity) with United States v. Lewis, 626 F.2d 940, 946 (D.C. Cir. 1980) and 3 J. Weinstein & M. Burger, Weinstein's Evidence § 609[04] at 609-75 (1981) (both urging that the fixed statutory definition should govern).

The last two Gordon criteria, the importance of the defendant's testimony and the centrality of the issue of credibility to the case, present a more difficult pretrial determination because they are both closely dependent upon the course of the trial itself. If the trial judge in his discretion believes that either of these criterion will be at issue in the case, he could delay ruling on the pretrial motion until the close of the defendant's cross-examination.

133. See notes 69-78 and accompanying text supra. See also United States v. Little, 567 F.2d 346, 350 (8th Cir. 1977), cert. denied, 435 U.S. 969 (1978) (dealing with Rule 609(b), the court affirmed the conviction for fraud on sale of oil and gas lease without mentioning the similarity to the crime charged—check kiting); Sears v. United States, 490 F.2d 150, 154 (8th Cir.), cert. denied, 417 U.S. 949 (1974) (the court did recognize the Gordon criteria but did not give an indication of the court's balancing of the criteria or of the relative weight attached to each).
However, this conclusion must be tempered because of the unusual circumstances of the case and recent contradictory cases decided by the Eighth Circuit.

The issue before the court in *Burkhead* dealt with the situation of severed conspiracy and narcotics charges arising out of the same transaction. The admission of the convictions would have been so highly prejudicial to the defendant that the Eighth Circuit was able to lay down a rule of per se inadmissibility in this instance. The court warned that the admission of such evidence would "virtually ensure a second conviction in every case in which the first trial resulted in conviction." Allowing the use of the prior conviction for impeachment would enable the government to try the strongest counts of an indictment first and "bootstrap" the weaker counts in a subsequent trial.

The Fifth Circuit in *United States v. Martinez* reached the same conclusion. Courts and commentators agree that prior convictions which are similar or identical to the crime for which the accused is charged are abnormally prejudicial. A charge of conspiracy is especially prejudicial because of the substantial overlapping of evidence with the substantive charge. Thus, the Eighth Circuit can draw ample support for its ruling of inadmissibility of *Burkhead*'s narcotics convictions. However, this does not indicate what the Eighth Circuit's position is on the admissibility of substantially similar crimes.

The Eighth Circuit's stance on the use of prior convictions which are similar to the crime charged becomes more questionable in light of its decision in *United States v. McMillian*. In this case, a prior robbery conviction was admitted for impeachment purposes in a subsequent robbery trial. It seems that the third Gordon criterion relied on in *Burkhead*, the degree of similarity of

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134. 646 F.2d at 1285.
135. See notes 69-78 and accompanying text *supra*.
136. 646 F.2d at 1283.
137. *Id.* at 1285.
138. *Id.*
139. *Id.*
140. 555 F.2d 1273 (5th Cir. 1977).
143. See notes 63-68 and accompanying text *supra*.
145. 555 F.2d 1035 (8th Cir. 1976).
146. *Id.* at 1039.
the prior conviction to the crime charged, would have made the prior conviction inadmissible. However, the Eighth Circuit made no comment on this. It may be inferred, therefore, that the court’s holding in *Burkhead* is limited to the facts of *Burkhead* and may not indicate the Eighth Circuit’s future stance in cases in which the past convictions are similar to the one charged.

Thus, the sufficiency of information prior to trial which was found in *Burkhead* was based in large part upon the unusual factual situation. While this is important precedent for future conspiracy trials, its applicability to cases in which there is less evidentiary overlap is questionable. However, *Burkhead* does establish guidelines for the defendant’s presentation of a motion in limine under Rule 609(a)(1) so as to overcome the postponement of the ruling by the trial judge who fears that the ruling would be merely advisory.

**CONCLUSION**

When the Eighth Circuit reversed Burkhead’s conspiracy conviction, it established important guidelines for both the defendant and the district judge in the use of a motion in limine under Rule 609(a)(1). While the guidelines are clear to the defendant desirous of obtaining an advanced ruling on a motion in limine under 609(a)(1), its effect upon the district judge ruling in advance is less clear. Until the Eighth Circuit specifies the factors upon which it reviews challenges to Rule 609(a)(1), the sufficiency of evidence requirement in *Burkhead* will be useful only in severed conspiracy cases, and its applicability to other cases will be unclear.

*Loretta S. Spellman—'83*