

## N.J.R.E. 608 AND SPECIFIC INSTANCES OF CONDUCT: THE TIME HAS COME FOR NEW JERSEY TO JOIN THE MAJORITY

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### I. INTRODUCTION

Every trial, whether criminal or civil, requires the factfinder, whether judge or jury, to carefully weigh the competing evidence and determine the disputed issues between the parties. As such, the right of the parties to impeach the credibility of the witnesses is fundamental to the truth-seeking process in all litigation. The right to impeach is considered such an important right that Federal Rule of Evidence (FRE) 607 expressly authorizes witness impeachment and provides that “[a]ny party, including the party that called the witness, may attack the witness’s credibility.”<sup>1</sup>

There are various, well-recognized grounds for impeaching the credibility of a witness. For example, a party may show that a witness is biased in favor of or against a particular party, that the witness lacks competency because of a mental or sensory incapacity or a lack of personal knowledge, or that the witness has made a prior statement which is inconsistent with the witness’s testimony.<sup>2</sup> Another recognized method for impeaching the credibility of a witness is to demonstrate that the witness possesses a character trait for untruthfulness. An attack on a witness’s character for truthfulness is designed to demonstrate that the witness is by disposition untruthful and therefore not credible as a witness in any case.<sup>3</sup> It is this impeachment attack that raises difficult questions as to the proper method for proving a witness’s character for truthfulness and the extent to

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<sup>1</sup> FED. R. EVID. 607. New Jersey Rule of Evidence 607 similarly authorizes and extends the right to impeach to the party calling the witness. See N.J. R. EVID. 607 (“Except as otherwise provided by Rules 405 and 608, for the purpose of impairing or supporting the credibility of a witness, any party including the party calling the witness may examine the witness and introduce extrinsic evidence relevant to the issue of credibility . . .”).

<sup>2</sup> ROGER PARK & TOM LININGER, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 2.1 (2017).

<sup>3</sup> CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, *FEDERAL PRACTICE AND PROCEDURE* § 6111 (2d ed. 2017).

which untruthful character evidence may be shown through cross-examination or through the introduction of extrinsic evidence.

Specifically, the question arises whether, and in what manner, a witness may be impeached with specific instances of non-conviction misconduct that are probative of the witness's character for truthfulness. The New Jersey Supreme Court recently addressed this issue in *State v. Scott*, a case which squarely presented the division between FRE 608 and New Jersey Rule of Evidence (N.J.R.E.) 608 and triggered two divergent concurring opinions as to the proper course for New Jersey law going forward.<sup>4</sup>

With respect to impeachment of a witness's character for truthfulness, both FRE 608(a) and N.J.R.E. 608(a) expressly provide that a party may attack or support a witness's character for truthfulness through the introduction of character witnesses who may testify in the form of reputation or opinion as to the witness's character for truthfulness.<sup>5</sup> In addition, FRE 608(b) and N.J.R.E. 608(a) both prohibit the introduction of extrinsic evidence to prove specific instances of conduct in order to attack or support a witness's character for truthfulness.<sup>6</sup>

FRE 608(b) and N.J.R.E. 608(a) diverge, however, on whether inquiry on cross-examination may be permitted as to specific instances of conduct that are probative of the witness's character for truthfulness. FRE 608(b) expressly provides that the court may allow such inquiry on cross-examination,<sup>7</sup> whereas N.J.R.E. 608(a) prohibits such inquiry.<sup>8</sup> N.J.R.E. 608(a) provides that "a trait of character cannot be proved by specific instances of conduct"<sup>9</sup> and New Jersey courts interpret this provision to prohibit not only the introduction of extrinsic evidence of specific instances of conduct, but also inquiry as to such conduct on cross-examination.<sup>10</sup> FRE 608(b) provides in pertinent part:

Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's

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<sup>4</sup> *State v. Scott*, 163 A.3d 325, 336 (N.J. 2017).

<sup>5</sup> FED. R. EVID. 608(a) ("A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character . . ."); N.J. R. EVID. 608(a) ("The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, provided, however, that the evidence relates only to the witness' character for truthfulness or untruthfulness . . .").

<sup>6</sup> See FED. R. EVID. 608(b); N.J. R. EVID. 608(a).

<sup>7</sup> FED. R. EVID. 608(b).

<sup>8</sup> N.J. R. EVID. 608(a).

<sup>9</sup> *Id.*

<sup>10</sup> *State v. Scott*, 163 A.3d 325, 336 (N.J. 2017) (Rabner, C.J., concurring) ("N.J.R.E. 608, however, bars not only the use of extrinsic evidence but also *cross-examination* into specific instances of misconduct.").

character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.<sup>11</sup>

N.J.R.E. 608(a) provides:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, provided, however, that the evidence relates only to the witness' character for truthfulness or untruthfulness, and provided further that evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. Except as otherwise provided by Rule 609 and by paragraph (b) of this rule, *a trait of character cannot be proved by specific instances of conduct.*<sup>12</sup>

New Jersey's formulation falls in the minority approach with respect to the use of specific instances of conduct to impeach a witness's character for truthfulness.<sup>13</sup> Only a few other states have a complete ban on the use of specific instances of conduct.<sup>14</sup> This departure from FRE 608(b) became the focal point of debate between Chief Justice Rabner and Justice Albin in *State v. Scott*.

In *State v. Scott*, the defendant, Thomas Scott, faced possession of heroin charges.<sup>15</sup> At trial, "[h]e argued that he did not knowingly possess the heroin because someone else placed it in his jeans pocket before he put them on."<sup>16</sup> Defendant planned to have his mother, Darlene Barbella, testify in support of this contention.<sup>17</sup> Barbella was going "to testify that she found the heroin in defendant's apartment" lying on a table next to "defendant's cousin and known drug user, Jordan Scott," and "placed the heroin in the pocket of a pair of jeans she believed belonged to Jordan."<sup>18</sup> To impeach her, the State planned to question Barbella about two prior instances where she allegedly lied to the police to exonerate her son, the defendant.<sup>19</sup> The trial court ruled that the State's evidence was admissible and as a result, defendant did not call Barbella but instead called another witness "to testify

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<sup>11</sup> FED. R. EVID. 608(b).

<sup>12</sup> N.J. R. EVID. 608(a) (emphasis added).

<sup>13</sup> *Scott*, 163 A.3d at 338 (Rabner, C.J., concurring).

<sup>14</sup> See FLA. STAT. § 90.609 (1978); ILL. R. EVID. 608; KAN. STAT. ANN. § 60-422(d) (1964); MASS. GUIDE EVID. 608(b); OR. R. EVID. 608; TEX. R. EVID. 608(b).

<sup>15</sup> *Scott*, 163 A.3d at 328.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

to the same events.”<sup>20</sup>

The Appellate Division affirmed the trial court’s ruling that the evidence would have been admissible at trial.<sup>21</sup> In holding that the trial court abused its discretion by ruling that the proposed impeachment testimony was admissible, the New Jersey Supreme Court rejected the State’s argument that Rule 608 provided grounds for admissibility.<sup>22</sup> The court noted that “Rule 608 explicitly excludes specific instances of conduct as a means of proving a character for untruthfulness, permitting only opinion or reputation evidence.”<sup>23</sup>

This finding by the court regarding the application of N.J.R.E. 608 prompted concurring opinions from Chief Justice Rabner and Justice Albin debating whether New Jersey’s bar on the use of specific instances of conduct to impeach a witness’s character for truthfulness is still a proper approach.<sup>24</sup> Chief Justice Rabner argued that the outcome of the case highlights the problems posed by the current rule.<sup>25</sup> As a result, the Chief Justice proposed that it is time to consider whether N.J.R.E. 608 should be revised to fall in line with the majority of states and its federal counterpart FRE 608.<sup>26</sup> Chief Justice Rabner highlighted the disadvantages of New Jersey’s rule and called upon the New Jersey Supreme Court Committee on the Rules of Evidence to consider the question for “a simple reason: the topic relates directly to the jury’s search for the truth, which a system of justice should foster.”<sup>27</sup>

In response, Justice Albin argued that no justification for altering the current version exists.<sup>28</sup> Justice Albin explained that the current Rule is in line with the development of New Jersey’s common law, which has always barred such evidence because its probative value “is outweighed by the potential prejudice of diverting jurors from the central issues in a case.”<sup>29</sup> Justice Albin posited that while New Jersey’s rules may not be perfect, they “accommodate two important goals: the search for truth and the need for fairness in [the] criminal and civil justice system.”<sup>30</sup>

*State v. Scott* highlighted some of the problems and dangers N.J.R.E. 608 has created, and presented the opportunity to assess New Jersey’s

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<sup>20</sup> *Id.*

<sup>21</sup> *Scott*, 163 A.3d. at 330.

<sup>22</sup> *Id.* at 333.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 335 (Rabner, C.J., concurring); *Id.* 340–41 (Albin, J., concurring).

<sup>25</sup> *Id.* at 339 (Rabner, C.J., concurring).

<sup>26</sup> *Id.* at 340.

<sup>27</sup> *Scott*, 163 A.3d at 340.

<sup>28</sup> *Id.* at 341 (Albin, J., concurring).

<sup>29</sup> *Id.* at 340.

<sup>30</sup> *Id.* at 341.

approach and determine whether change is needed. This Comment will examine the arguments set forth in the concurring opinions in *State v. Scott* and consider whether New Jersey should amend N.J.R.E. 608(a) and adopt the majority approach and allow, on cross-examination, the use of specific instances of conduct that are probative of the witness's character for truthfulness. Part II will review New Jersey's approach by examining the history and development of N.J.R.E. 608 from common law to its current formulation and review how the rule is applied with regard to specific instances of conduct. Part III will examine the majority approach with a focus on the formulation and application of the federal analogue to N.J.R.E. 608, FRE 608. Part IV will assess the potential dangers of allowing specific instances of conduct and examine the arguments and counter arguments regarding how the majority approach addresses these issues. Part V will examine New Jersey's options to address this issue and amend the current rule. Overall, this Comment will argue that New Jersey's current formulation of Rule 608 does not adequately address the use of specific instances of conduct. While apprehension for allowing the use of specific instances of conduct is valid, a complete bar raises equally valid concerns; adoption of a rule that takes a restrictive approach will provide an adequate compromise that properly addresses the issues raised on both sides.

## II. DEVELOPMENT OF N.J.R.E. 608

New Jersey is one of seven states that have a complete bar on the use of specific instances of conduct to impeach a witness's character for truthfulness.<sup>31</sup> This approach follows the New Jersey common-law rule. Early cases made clear that an attempt to impeach the character of a witness was limited to the witness's reputation in the community for truth and veracity.<sup>32</sup> For example, in an 1883 case, *Paul v. Paul*,<sup>33</sup> the court explained

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<sup>31</sup> See *supra* text accompanying notes 13–14.

<sup>32</sup> See *King v. Ruckman*, 20 N.J. Eq. 316, 357 (Ch. 1869) (“But the greatest portion of the testimony for King on this point is such as cannot be regarded. It is evidently founded upon the fact that Ruckman has been guilty of very improper conduct with regard to the cattle of his neighbors, [and] is a troublesome, litigious man . . . [s]uch witnesses are necessarily produced when they alone know or witnessed facts required to be proved; but when selected to give character to a witness, are not of much value. The only testimony allowed in such case is as to the general reputation of the witness impeached, in the neighborhood, for truth and veracity . . .”), *rev'd*, 21 N.J. Eq. 599 (1870); see also *Atwood v. Impson*, 20 N.J. Eq. 150, 157 (Ch. 1869) (“[Particular transactions are] not the evidence which the law permits, or should permit, to affect the credibility of a witness . . . . The object of the law is to show the character of the witness as to telling the truth; general reputation in the community where he is known, is the test and the only test which the law allows as to character.”); *State v. Hendrick*, 56 A. 247, 249 (N.J. 1903) (“A witness may be discredited by evidence attacking his character for truth and veracity but not by the proof of particular independent facts, though bearing upon the question of veracity.”).

<sup>33</sup> 37 N.J. Eq. 23 (Ch. 1883).

that unless character is the central issue, such as rape, or breach of promise, “proof that a witness was a common prostitute, offered to impeach her testimony, [wa]s incompetent.”<sup>34</sup> The court cited *La Beau v. People*, for the general rule that:

inquiries as to particular acts of immorality [are] inadmissible . . . it would be impossible for the witness to be prepared for a defense of particular acts, and it would lead to an indefinite number of issues. Therefore, on an issue upon the character of a witness, it cannot be allowed to inquire into particular facts.<sup>35</sup>

Thus, New Jersey courts recognized the potential dangers of allowing inquiries into specific instances of conduct to attack a witness’s character for truthfulness and as a result adopted a rule barring the use of such evidence.

In *State v. De Paola*, decided in 1950, the Supreme Court of New Jersey continued to apply this common-law rule.<sup>36</sup> The defendant was charged with murder.<sup>37</sup> At trial, the prosecution cross-examined the defendant regarding prior liquor-license applications in which the defendant allegedly falsely swore to questions on the applications while under oath.<sup>38</sup> The prosecution aimed to use the specific instances of conduct to show that if the defendant had lied on multiple applications, he was lying now and his testimony could not be trusted.<sup>39</sup> The defendant was compelled to answer the question and admitted that each year from 1941 to 1948, he had lied on the liquor-license applications.<sup>40</sup>

On appeal from his conviction, the defendant argued that the trial court erred in allowing this line of questioning on cross-examination.<sup>41</sup> The State argued that the ruling was within the trial court’s discretion and the challenged evidence was permissible to show defendant’s lack of veracity.<sup>42</sup> The court found little merit to the State’s theory, noting that there was no authority cited in support of its contention.<sup>43</sup>

The court examined New Jersey case law regarding the approach to this issue and found that New Jersey had adopted a “rule which excludes the proof of independent facts to discredit a witness.”<sup>44</sup> The court noted that the acts referred to were not connected to the charge upon which the defendant

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<sup>34</sup> *Id.* at 26.

<sup>35</sup> 33 How. Pr. 66, 72 (N.Y. Gen. Term. 1865).

<sup>36</sup> 73 A.2d 564 (N.J. 1950).

<sup>37</sup> *Id.* at 566.

<sup>38</sup> *Id.* at 568.

<sup>39</sup> *Id.* at 569

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *De Paola*, 73 A.2d at 569.

<sup>43</sup> *Id.* at 569.

<sup>44</sup> *Id.* at 570 (quoting *State v. Hendrick*, 56 A. 247, 249 (N.J. 1903)).

was being tried and were unrelated to the central issues of the case.<sup>45</sup> Moreover, the defendant had not been convicted of perjury or false swearing by reason of his liquor license misconduct.<sup>46</sup> In light of these findings, the court held that the admission of the testimony was reversible error.<sup>47</sup>

*De Paola* and the early New Jersey cases illustrate the rule regarding inquiry into specific instances of conduct that New Jersey courts had developed. Prior bad acts that did not result in a conviction that were probative of a witness's character for untruthfulness could not be inquired into on cross-examination. Some of the underlying rationales were that such testimony was collateral to the main issues of the case and it would be unreasonable to expect that a defendant-witness could be prepared to defend against possible questioning into any area of the witness's life.<sup>48</sup>

New Jersey formally codified the prohibition on specific instances of conduct in 1967 under N.J.R.E. 22(d), which provided, "as affecting the credibility of a witness . . . evidence of specific instances of his conduct, relevant only as tending to prove a trait of his character, shall be inadmissible."<sup>49</sup> When N.J.R.E. 22 was prepared it was "representative of current New Jersey [common] law."<sup>50</sup>

In the early 1980s, the New Jersey Supreme Court appointed a Committee on the Rules of Evidence to survey the feasibility of amending the New Jersey evidence rules.<sup>51</sup> The Committee was to consider "whether or to what extent New Jersey should adopt the Federal Rules of Evidence."<sup>52</sup> In 1991, the Committee recommended a sweeping change in the New Jersey evidence scheme and the new rules went into effect in 1993.<sup>53</sup> The revised rules constituted an amalgamation of the federal and then-current New Jersey evidence rules, following federal numeration and arrangement.<sup>54</sup>

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<sup>45</sup> *Id.* at 571.

<sup>46</sup> *Id.* at 569.

<sup>47</sup> *Id.* at 571.

<sup>48</sup> *See, e.g.,* Ippolito v. Turp, 19 A.2d 782, 784 (N.J. 1940) ("Every man is supposed to be capable of supporting his general reputation whenever it is attacked but not to meet specific transactions not an issue in the cause.").

<sup>49</sup> *State v. Scott*, 163 A.3d 325, 344 (N.J. 2017) (Albin, J., concurring) (quoting N.J. R. EVID. 22).

<sup>50</sup> REPORT OF THE NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE 71 (1963) (citing *De Paola*, 73 A.2d at 564)).

<sup>51</sup> Alma G. Lopez, *New Jersey's Other-Crimes Rules and the Evidence Committee's Abrogation of Almost Two Hundred Years of Judicial Precedent*, 24 SETON HALL L. REV. 394, 423 (1993).

<sup>52</sup> *Report of the New Jersey Supreme Court Committee on Evidence*, 129 N.J. L.J. 1, 1 (1991) [hereinafter *Report of the New Jersey Supreme Court Committee*].

<sup>53</sup> Lopez, *supra* note 51, at 425–26 (citing Stephen W. Townsend, Esq., *Notices to the Bar: Supreme Court of New Jersey Revisions to the Rules of Evidence*, 134 N.J. L.J. 798, 798 (1993)).

<sup>54</sup> *Id.* at 423.

New N.J.R.E. 608 incorporated the limiting principles of N.J.R.E. 22(d) with respect to admission of evidence of a trait of character for truthfulness or untruthfulness when offered under N.J.R.E. 20 to affect the credibility of a witness.<sup>55</sup> The Committee noted that N.J.R.E. 608 followed the formulation of FRE 608; however, the Committee rejected the provision in paragraph (b) of the federal rule that allowed for the use of specific instances of conduct on cross-examination.<sup>56</sup> The Committee believed that this rejection “retains present New Jersey practice” noting that “[N.J.R.E.], followed by this rule, prohibited ‘specific instances of conduct’ proof in any form if introduced to prove a trait of character.”<sup>57</sup> Further, the Committee believed that N.J.R.E. 607 already “afford[ed] sufficient scope for the effective impeachment of credibility.”<sup>58</sup> Thus, New Jersey maintained its approach to specific instances of conduct in rejecting the federal formulation.

In 2004, a case came before the New Jersey Supreme Court that forced the court to consider whether the general prohibition on specific conduct evidence could be subject to an exception in a particular context.<sup>59</sup> In *State v. Guenther*, in an opinion authored by Justice Albin, the court had to decide “whether the credibility of a witness who had accused a defendant of sexual abuse may be impeached by evidence that [the witness] made a prior false criminal accusation.”<sup>60</sup> Defendant was accused by his stepdaughter, D.F., of sexually abusing her over the course of five years.<sup>61</sup> During trial, defendant discovered documents revealing that D.F. admitted that she falsely accused her neighbor of sexually abusing her.<sup>62</sup> The defense requested permission to cross-examine D.F. regarding this prior false accusation and in the event that D.F. denied making the false accusation, defense stated his intent to impeach D.F. with extrinsic evidence.<sup>63</sup> The trial court denied this request and ruled that “the purported false accusation was ‘irrelevant’ and ‘extremely collateral’ and, therefore, inappropriate for consideration by the jury.”<sup>64</sup> The defendant was convicted of sexual assault.<sup>65</sup>

On appeal, the Appellate Division remanded for the determination of whether D.F. made the false accusation and, if so, whether it was false.<sup>66</sup> The

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<sup>55</sup> *Report of the New Jersey Supreme Court Committee*, *supra* note 52, at 25.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *State v. Guenther*, 854 A.2d 308, 309–10 (N.J. 2004).

<sup>60</sup> *Id.* at 309.

<sup>61</sup> *Id.* at 310.

<sup>62</sup> *Id.* at 309.

<sup>63</sup> *Id.* at 310.

<sup>64</sup> *Id.*

<sup>65</sup> *Guenther*, 854 A.2d at 309.

<sup>66</sup> *Id.* at 313.



court directed that if the trial court found that the accusation was made but determined that the evidence was inadmissible, the verdict would stand.<sup>67</sup> If the panel found, however, that D.F. made the false accusation and it was admissible, a new trial would be necessary.<sup>68</sup> The State petitioned for certification arguing that the decision was contrary to N.J.R.E. 608 and the New Jersey Supreme Court granted certification to address the issue.<sup>69</sup>

The court had to determine whether the common-law principle embodied in N.J.R.E. 608 had “continuing vitality when applied to evidence of a victim-witness’s prior false accusation.”<sup>70</sup> The court traced the development of the rule noting that, “it was not a lack of relevance that gave rise to the rule prohibiting” the use of specific instances of conduct to attack the witness’s character for truthfulness, “but the ‘auxiliary policies’ regarding unfairness to the witness, confusion of issues, and undue consumption of time.”<sup>71</sup> Thus, according to the court, these auxiliary policies illustrate that the bar on the use of specific-instance character evidence was adopted “for pragmatic reasons associated with the efficient and orderly presentation of a trial.”<sup>72</sup> The court explained, however, that when these “auxiliary policies” do not apply, “the rationale for the exclusion of such evidence no longer exists.”<sup>73</sup>

With these principles in mind, the court then addressed whether limited circumstances warrant an exception to N.J.R.E. 608.<sup>74</sup> The court noted that various jurisdictions across the country have addressed this issue and in sexual crime cases have permitted cross-examination of a witness-accuser who made prior false accusations involving a sexual crime.<sup>75</sup> In light of this, the court concluded that in a criminal case involving impeachment of a victim-witness whose credibility was the central issue in the case, “a defendant has the right to show that a victim-witness has made a prior false criminal accusation for the purpose of challenging that witness’s credibility.”<sup>76</sup>

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 313-14.

<sup>70</sup> *Id.* at 315.

<sup>71</sup> *Guenther*, 854 A.2d at 315 (citing 3A WIGMORE ON EVIDENCE § 979 (Chadborn rev.1970)).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 318.

<sup>75</sup> *Id.* at 310-323.

<sup>76</sup> *Id.* at 322, 324 (noting that the holding is limited to “criminal case[s] that involve[] the impeachment of a victim-witness whose credibility was the central issue in the case”). The exception recognized by the court here is reflected in N.J. R. EVID. 608(b):

The credibility of a witness in a criminal case may be attacked by evidence that the witness made a prior false accusation against any person

The court outlined the proper procedure for determining whether the evidence should be admitted as well as the relevant factors to consider, stressing that courts must ensure that “testimony on the subject does not become a second trial, eclipsing the trial of the crimes charged.”<sup>77</sup> The court emphasized that its ruling was not creating a new rule of evidence, but “merely carving out a narrow exception to [N.J.R.E. 608]” to allow for the introduction of relevant evidence that may affect jurors’ estimation of the credibility of a key witness.<sup>78</sup> Thus, the court concluded this limited exception will enhance the “fairness and truth-seeking function of a trial,”<sup>79</sup> and is consistent with the rationale underpinning the rule.<sup>80</sup> *Guenther* illustrates New Jersey’s current formulation of the rule with the now-added exception. Moreover, *Guenther* summarized the continuing rationale for maintaining the bar on specific instances of conduct but also outlined the circumstances that would render the rule and its underlying policies no longer necessary.

### III. MAJORITY APPROACH TO IMPEACHMENT OF A WITNESS’S CHARACTER FOR TRUTHFULNESS THROUGH SPECIFIC INSTANCES OF CONDUCT

This Part turns to the majority approach regarding specific conduct evidence in the context of attacking a witness’s character for truthfulness and how the rule is applied. FRE 608(b) is representative of the majority approach. A majority of states follow the federal approach and permit cross-examination into specific instances of conduct if they are probative of the witness’s character for truthfulness.<sup>81</sup>

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of a crime similar to the crime with which defendant is charged if the judge preliminarily determines, by a hearing pursuant to Rule 104(a), that the witness knowingly made the prior false accusation.

N.J. R. EVID. 608(b).

<sup>77</sup> *Guenther*, 854 A.2d at 324.

<sup>78</sup> *Id.* at 325.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 322.

<sup>81</sup> Twelve states track the language from the current version of FRE 608(b) as amended in 2011. *See* ARIZ. R. EVID. 608(b); DEL. R. EVID. 608(b); IDAHO R. EVID. 608(b); IOWA R. EVID. 608(b); ME. R. EVID. 608(b); MISS. R. EVID. 608(b); N.H. R. EVID. 608(b); N.M. R. EVID. 11-608(B); N.D. R. EVID. 608(b); S.D. CODIFIED LAWS § 19-19-608(b) (2016); UTAH R. EVID. 608(b); W. VA. R. EVID. 608(b). Six states track the language from the version of FRE 608(b) as amended in 2003. *See* COLO. R. EVID. 608(b); GA. CODE ANN. § 24-6-608(b) (2013); MINN. R. EVID. 608(b); OHIO R. EVID. 608(B); TENN. R. EVID. 608(b); WIS. STAT. ANN. § 906.08(2) (2018). Thirteen states track the language from the original 1975 version. *See* ARK. R. EVID. 608(b); KY. R. EVID. 608(b); MICH. R. EVID. 608(b); MONT. R. EVID. 608(b); NEB. REV. STAT. § 27-608(2) (1975); NEV. REV. STAT. § 50.085(3) (1975); N.C. GEN. STAT. § 8C-1 (1983); OKLA. STAT. tit. 12, § 2608(B) (1978); R.I. R. EVID. 608(b); S.C. R. EVID. 608(b); VT. R. EVID. 608(b); WASH. R. EVID. 608(b); WYO. R. EVID. 608(b). Six states

FRE 608 envisions three ways of showing that a witness is by character or disposition either truthful or untruthful: (1) by testimony as to reputation;<sup>82</sup> (2) by testimony in the form of opinion;<sup>83</sup> and (3) by evidence of specific instances of conduct.<sup>84</sup> With respect to specific instances of conduct, FRE 608(b) uses the verb “may” in this setting, making it clear that the matter is left to the discretion of the court.<sup>85</sup> This raises two questions: (a) what general considerations govern a court’s exercise of discretion under subdivision (b); and (b) when is specific-instance character evidence probative of truthfulness or untruthfulness?<sup>86</sup>

#### A. *What Governs the Court’s Exercise of Discretion?*

While the current text of FRE 608(b) does not explicitly provide guidance, the drafters made clear in the Advisory Committee Notes that FRE 403 and FRE 611 are relevant to the analysis.<sup>87</sup> Thus, courts recognize that FRE 403 and FRE 611 identify the principles controlling the exercise of

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adopted only the latter part of the rule, FRE 608(b)(2); they permit cross-examination of a character witness with specific instances of conduct about the character for truthfulness or untruthfulness of the underlying witness. *See* ALA. R. EVID. 608(b); ARK. R. EVID. 608(b); IND. R. EVID. 608(b); LA. CODE EVID. ANN. art. 608(B) (1989); PA. R. EVID. 608(b); VA. R. EVID. 2:608. Connecticut, Missouri, and New York do not track the language of the federal rule, but these states follow the federal approach and permit specific instances of conduct to attack a witness’s character for truthfulness. *See* CONN. CODE EVID. § 6–6(b); *Mitchell v. Kardesch*, 313 S.W.3d 667, 670 (Mo. 2010) (“[L]ong-standing Missouri law holds that the person may be asked about specific instances of his or her own conduct that speak to his or her own character for truth or veracity, even where the issue inquired about is not material to the substantive issues in the case.”); *People v. Smith*, 27 N.Y.3d 652, 660, 662 (2016) (“[W]itnesses—and indeed, even a testifying defendant—may be cross-examined on ‘prior specific criminal, vicious or immoral conduct,’ provided that ‘the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility.’” (quoting *People v. Sandoval*, 314 N.E.2d 413, 417 (1974))). Maryland also allows cross-examination about a witness’s prior conduct that is probative of untruthfulness, when the questioner, if challenged, “establishes a reasonable factual basis” outside the jury’s presence. MD. R. EVID. 5-608(b). Hawaii permits cross-examination about specific instances of a witness’s conduct, if probative of untruthfulness, and affords judges discretion to allow the use of extrinsic evidence. HAW. REV. STAT. § 626-608(b) (1993). California permits evidence of specific instances of conduct to challenge a witness’s credibility in criminal but not civil cases. *See* CAL. CONST. art. I, § 28; CAL. EVID. CODE § 787 (West 1967); *People v. Harris*, 767 P.2d 619, 640–41 (Cal. 1989).

<sup>82</sup> FED. R. EVID. 608(a).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* 608(b).

<sup>85</sup> *Id.* (“But the court *may*, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness . . . .”) (emphasis added).

<sup>86</sup> WRIGHT & GOLD, *supra* note 3, § 6118.

<sup>87</sup> FED. R. EVID. 608(b) advisory committee’s notes to 1972 proposed rules (“[T]he overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.”).

discretion under FRE 608(b).<sup>88</sup> These rules require the court to balance the probative value of specific-instance character evidence against the potential dangers and costs of that evidence,<sup>89</sup> and to exercise control over the “mode and order of examining witnesses.”<sup>90</sup>

Some of the general factors courts consider in this analysis are: (1) whether the witness’s testimony is crucial or unimportant; (2) the relevancy of the act of misconduct to truthfulness; (3) the nearness or remoteness of the misconduct to the time of trial; (4) whether the matter inquired into is likely to lead to time-consuming and distracting explanations on cross-examination; and (5) whether there will be unfair humiliation of the witness and undue prejudice to the party which called the witness.<sup>91</sup> It is further recognized that courts have broad discretion in making this determination and a trial judge’s ruling can be overturned only on a finding of abuse of discretion.<sup>92</sup>

For example, in *United States v. Bunchan*, the court of appeals addressed whether the trial court abused its discretion in limiting inquiry into specific instances of conduct on cross-examination.<sup>93</sup> The defendant sought to cross-examine a government witness about pending criminal charges

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<sup>88</sup> See WRIGHT & GOLD, *supra* note 3, § 6118, at 101; *United States v. Seymour*, 472 F.3d 969, 971 (7th Cir. 2007) (“Rule 608(b) is explicit that the determination of whether to allow specific instances of conduct to be used to challenge a witness’s reputation for truthfulness is committed to the discretion of the district judge, and Rule 403 establishes the standard for the exercise of the judge’s discretion in evidentiary matters . . .”).

<sup>89</sup> See FED. R. EVID. 403 (“[T]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”); see also *United States v. Saunders*, 166 F.3d 907, 920 (7th Cir. 1999) (finding probative value of evidence concerning character for veracity must outweigh danger of unfair prejudice, confusion of issues, or misleading jury).

<sup>90</sup> See FED. R. EVID. 611(a) (“The court should exercise reasonable control over the mode and order of examining witnesses . . . so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment.”).

<sup>91</sup> CHARLES T. MCCORMICK ET AL., MCCORMICK ON EVIDENCE § 41, at 93 (5th ed. 1999); see also *United States v. Leake*, 642 F.2d 715, 719 (4th Cir. 1981) (“[P]roper factors to be employed in measuring the scope of cross-examination [are]: the importance of the testimony to the government’s case, the relevance of the conduct to the witness’s truthfulness, and the danger of prejudice, confusion, or delay raised by evidence sought to be adduced.”); *Telum, Inc. v. E.F. Hutton Credit Corp.*, 859 F.2d 835, 839 (10th Cir. 1988) (finding the probative value of evidence that one of the defendant’s agents embezzled \$40,000 in connection with the plaintiff’s lease was greatly outweighed by risk of unfair prejudice).

<sup>92</sup> See 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 608.02 (2017); see also *United States v. Ortiz*, 5 F.3d 288, 290–91 (7th Cir. 1993) (holding no abuse of discretion in excluding, as irrelevant, personnel file of government agent offered for impeachment and finding that Rule 608(b) expressly provided that instances of conduct may be inquired into on cross-examination “in the discretion of the court” and that the “district court has broad discretion in assessing admissibility of any evidence”).

<sup>93</sup> 580 F.3d 66, 71 (1st Cir. 2009).

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against the witness for battery of a child and indecent assault.<sup>94</sup> The defendant argued that FRE 608(b) permitted the inquiry because it concerned a specific instance of conduct relevant to the witness's character for truthfulness.<sup>95</sup> The trial court permitted the defendant to elicit, through cross-examination of the witness, that there were state court charges currently pending against him.<sup>96</sup> But the trial court ordered that he could not inquire into the nature of the charges and found such an inquiry "far too prejudicial under [FRE] 403."<sup>97</sup>

The court of appeals found no abuse of discretion in the trial court's restriction of the cross-examination of the witness.<sup>98</sup> Citing FRE 403, the court of appeals noted that the ruling allowed the defendant to raise the possibility that the witness would receive lighter treatment on the state charges if he testified favorably for the government.<sup>99</sup> The court of appeals found, however, that exposing the nature of the pending state charges was not necessary to present such evidence.<sup>100</sup> The court of appeals explained that FRE 608(b) "only permits inquiry into prior conduct if the conduct is probative of the witness's character for truthfulness . . . ."<sup>101</sup> The court of appeals held that the trial court did not abuse its discretion in determining that "the nature of the sexual assault charges [were] not sufficiently probative of [the witness's] character for truthfulness to outweigh the serious danger of prejudicing the jury against him . . . ."<sup>102</sup>

*Bunchan* illustrates the role of FRE 403 in the determination of whether inquiry into specific instances of conduct on cross-examination will be permitted. This approach allows trial judges to balance the interests on both sides and take into account particular facts and circumstances of the case before the court. Moreover, as in this case, it allows the admittance of the evidence where it is probative of a witness's character for truthfulness but can limit the inquiry so as to preclude any of the dangers listed in FRE 403.

#### B. *What Conduct is Probative of Truthfulness?*

FRE 608(b) provides that a court may allow specific instances of conduct "if they are probative of the character for truthfulness or untruthfulness."<sup>103</sup> The critical question, therefore, is what kinds of conduct

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Bunchan*, 580 F.3d at 71.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> FED. R. EVID. 608.

are probative of truthfulness. Courts have taken three basic approaches to determine whether certain conduct is relevant to the witness's character for truthfulness.<sup>104</sup> Under the broad view, virtually any conduct indicating bad character relates to untruthfulness.<sup>105</sup> Under the middle view, "behavior seeking personal advantage by taking from others in violation of their rights" may be admissible if committed under circumstances reflecting on veracity.<sup>106</sup> Under the narrow view, conduct is admissible only if it directly involves falsehood or deception, such as forgery or perjury.<sup>107</sup>

The broad view's expansive scope of possible acts that indicate bad behavior opens up the witness's entire life to probing, leaving the witness vulnerable to embarrassment and abuse.<sup>108</sup> Recognizing these difficulties and potential for abuse, most modern decisions avoid adopting this view.<sup>109</sup> Most courts tend to fall in either the middle view or narrow view as they recognize the dangers the broad view presents and insist on closer links between the conduct and veracity.<sup>110</sup>

In *United States v. Manske*, the court of appeals had to decide whether FRE 608(b) allowed cross-examination concerning a prosecution witness's threats of violence which were intended to influence the truthfulness of other witnesses' testimony.<sup>111</sup> The trial court did not permit inquiry into the prior instances of conduct, holding that such evidence was irrelevant.<sup>112</sup> Further, it noted that FRE 608(b) did not allow the use of the threat evidence to cross-examine the witness because such evidence did not go to character for truthfulness "but rather, to the character [for] violence and [the witness's] threatening nature."<sup>113</sup>

On appeal, the court of appeals began by discussing the three approaches in determining whether this conduct was probative of truthfulness or untruthfulness.<sup>114</sup> The court of appeals ultimately adopted the middle view.<sup>115</sup> The court explained that under this view, specific-instance character evidence is admissible when, although "the specific instance of conduct may not facially appear relevant to truthfulness, closer inspection

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<sup>104</sup> 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:33 (4th ed. 2018).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* ("[V]irtually no modern decisions seem to take [the broad] view.").

<sup>110</sup> MUELLER & KIRKPATRICK, *supra* note 104, § 6:33.

<sup>111</sup> *United States v. Manske*, 186 F.3d 770, 774 (7th Cir. 1999).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 775.

<sup>115</sup> *Id.*

reveals that it bears on that issue.”<sup>116</sup> The court of appeals noted that this more flexible standard under the middle view is a wise approach.<sup>117</sup> This standard allows questions that would not be embraced by the narrow view, which precludes evidence that may not facially appear to be relevant to truthfulness.<sup>118</sup>

Applying this approach, the court of appeals held that FRE 608(b) did not limit inquiry only to conduct involving fraud or deceit but permits cross-examination into “acts that ‘reflect adversely on a [person’s] honesty and integrity.’”<sup>119</sup> Thus, the court held that “[t]hreatening to cause physical harm to a person who proposes to testify against you is . . . probative of truthfulness . . . .”<sup>120</sup> The court of appeals noted that the “trial court construed the threat evidence too narrowly” by perceiving the threats as probative only of violence.<sup>121</sup> The violent conduct, however, was a proper subject of inquiry on cross-examination because under the circumstances the threatening conduct was aimed at concealing or distorting the truth, thus implicating the witness’s character for truthfulness.<sup>122</sup>

While these categories are recognized, courts generally confine their analyses to the specific conduct raised before them and assess, on a case-by-case basis, whether the conduct is probative of truthfulness or untruthfulness.<sup>123</sup> For example, the court of appeals in *United States v. Leake* considered whether the trial court erred when it refused to allow defense counsel to cross-examine a witness regarding “various fraudulent financial schemes.”<sup>124</sup> In interpreting the scope of FRE 608 and, more specifically, what matters can be raised on cross-examination, the court of appeals found that FRE 608 “authorizes inquiry only into instances of misconduct that are ‘clearly probative of truthfulness or untruthfulness,’ such as perjury, fraud, swindling, forgery, bribery, and embezzlement.”<sup>125</sup>

The court of appeals held that the instances of conduct defense counsel intended to elicit on cross-examination were “probative of [the witness’s] truthfulness.”<sup>126</sup> The witness’s conduct included “obtaining money under false pretenses,” defrauding an innkeeper, and writing checks

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<sup>116</sup> *Id.*

<sup>117</sup> *Manske*, 186 F.3d at 775.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (quoting *Varhol v. Nat’l R.R. Passenger Corp.*, 909 F.2d 1557, 1567 (7th Cir. 1990)).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 776.

<sup>122</sup> *Id.*

<sup>123</sup> WRIGHT & GOLD, *supra* note 3, § 6118.

<sup>124</sup> *United States v. Leake*, 642 F.2d 715, 718 (4th Cir. 1981).

<sup>125</sup> *Id.* (quoting 3A WIGMORE ON EVIDENCE § 982 (Chadbourn rev. 1970)).

<sup>126</sup> *Id.* at 719.

that “had been returned for insufficient funds.”<sup>127</sup> In addition, “numerous default judgments had been entered against the witness in civil actions seeking repayment of loans,” and the witness, or firms that he controlled, had entered into contracts and received payment, but never completed the work under the contracts.<sup>128</sup> The court concluded that such conduct “certainly establish[ed] a pattern of fraudulent activity that, if revealed, would have placed [the witness’s] credibility in question.”<sup>129</sup>

Further examples of particular conduct that many courts have concluded is probative of truthfulness or untruthfulness include conduct that consists of acts clearly implicating veracity such as insurance fraud,<sup>130</sup> lying in court,<sup>131</sup> tax fraud,<sup>132</sup> using a false name or identity,<sup>133</sup> lying repeatedly,<sup>134</sup> lying on a credit card application,<sup>135</sup> lying on a job application,<sup>136</sup> lying on a license application,<sup>137</sup> bank fraud,<sup>138</sup> and bribery.<sup>139</sup> Conversely, courts have

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> See *United States v. Amahia*, 825 F.2d 177, 180 (8th Cir. 1987) (upholding cross-examination concerning specific facts of insurance fraud).

<sup>131</sup> See *United States v. Whitmore*, 359 F.3d 609, 619 (D.C. Cir. 2004) (“Nothing could be more probative of a witness’s character for untruthfulness than evidence that the witness has previously lied under oath.”).

<sup>132</sup> See *Chnapkova v. Koh*, 985 F.2d 79, 82 (2d Cir. 1993) (holding evidence that witness had not filed tax returns for eight years was a proper subject on cross-examination as it bore directly on her credibility as a witness), *abrogated by United States v. Lanham*, 541 F. App’x 34 (2013).

<sup>133</sup> See *United States v. Mansaw*, 714 F.2d 785, 789 (8th Cir. 1983) (“A witness[s] use of false names or false identities is a proper subject of cross-examination under [FRE] 608.”); *United States v. Reid*, 634 F.2d 469, 473 (9th Cir. 1980) (affirming cross-examination about statements made in a letter in which the witness admitted to falsifying his name, his occupation, and the name of his business).

<sup>134</sup> See *United States v. Jones*, 900 F.2d 512, 520–21 (2d Cir. 1990) (affirming cross-examination regarding false statements on applications for employment, apartment, driver’s license, loan, and membership in an association).

<sup>135</sup> See *United States v. Sperling*, 726 F.2d 69, 75 (2d Cir. 1984) (finding no abuse of discretion in allowing cross-examination of a witness regarding false credit card applications “to show a general lack of credibility”).

<sup>136</sup> See *United States v. Howard*, 774 F.2d 838, 845 (7th Cir. 1985) (affirming inquiry on cross-examination regarding false statements the witness made on two employment applications because the witness’s honesty or lack thereof on the applications was “plainly probative” of his character for truthfulness).

<sup>137</sup> See *United States v. Carlin*, 698 F.2d 1133, 1137 (11th Cir. 1983) (permitting cross-examination of witness as to the “truthfulness of his answer on his verified application” for used car dealer licenses).

<sup>138</sup> See *United States v. Chevalier*, 1 F.3d 581, 584 (7th Cir. 1993) (holding cross-examination into alleged bank fraud was proper because such conduct “constitutes specific instances of conduct probative of truthfulness”).

<sup>139</sup> See *United States v. Wilson*, 985 F.2d 348, 352 (7th Cir. 1993) (affirming cross-examination regarding prior acts of bribery because “bribery is probative of a witness[s] character for truthfulness”).



generally found that conduct is not probative of truthfulness or untruthfulness where the conduct consisted of marital infidelity,<sup>140</sup> prostitution,<sup>141</sup> drug-related acts,<sup>142</sup> domestic abuse,<sup>143</sup> child abuse,<sup>144</sup> violent crimes,<sup>145</sup> arson,<sup>146</sup> murder,<sup>147</sup> parole violations,<sup>148</sup> manslaughter,<sup>149</sup> and assault.<sup>150</sup>

Thus, whether conduct is probative of truthfulness or untruthfulness is largely left to the discretion of the court. Courts tend to look toward conduct that clearly speaks to veracity, and if presented with conduct that is not on

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<sup>140</sup> See *United States v. Ndiaye*, 434 F.3d 1270, 1290 (11th Cir. 2006) (finding a letter husband sent to female neighbor asking to meet up may suggest he “was not being entirely candid with his wife,” but it does not “directly relate to [the witness’s] truthfulness and honesty”); *United States v. Thiongo*, 344 F.3d 55, 60 (1st Cir. 2003) (evidence that the witness bore one man’s child while married to another was not probative of untruthfulness).

<sup>141</sup> See *United States v. Smith*, 831 F.2d 657, 661 (6th Cir. 1987) (citing *FED. R. EVID.* 608(b)) (holding no abuse of discretion in not permitting questions on cross-examination that witness dressed as a prostitute or engaged in prostitution as it would have little relevance to her credibility as a witness).

<sup>142</sup> See *United States v. Pickard*, 211 F. Supp. 2d 1287, 1292 (D. Kan. 2002) (“Drug use is not admissible under Rule 608(b) because it is not probative of truthfulness.”); *Elliott v. Aspen Brokers, Ltd.*, 811 F. Supp. 586, 590 (D. Colo. 1993) (“Courts generally agree that a witness[s] past drug activity is not probative of his character for truthfulness and routinely exclude evidence introduced for this purpose.”).

<sup>143</sup> See *Miller v. United States*, 135 F.3d 1254, 1256 (8th Cir. 1998) (upholding trial court’s decision to deny inquiry into instances of domestic violence because such acts are not probative of a witness’s propensity for truthfulness).

<sup>144</sup> See *Starling v. Union Pac. R.R. Co.*, 203 F.R.D. 468, 484 (D. Kan. 2001) (finding evidence of prior charge of child abuse, which did not result in a conviction, was not a proper subject on cross-examination under *FRE* 608(b)).

<sup>145</sup> See *United States v. Parker*, 133 F.3d 322, 327 (5th Cir. 1998) (holding violent crimes are irrelevant to a witness’s character for truthfulness); *United States v. Peña*, 978 F. Supp. 2d 254, 266 (S.D.N.Y. 2013) (prohibiting cross-examination about a witness’s violent acts toward women and finding no reason to depart from the “general rule” that evidence of acts relating to violence are properly excluded as having insufficient bearing on a witness’s credibility).

<sup>146</sup> See *United States v. Cudlitz*, 72 F.3d 992, 996 (1st Cir. 1996) (“[Witness] might have been cross-examined under Rule 608(b) as to prior instances of forgery or perjury; but soliciting arson, although showing bad character generally, is not ‘probative of . . . untruthfulness.’”) (quoting *FED. R. EVID.* 608(b)).

<sup>147</sup> See *United States v. Ramirez-Rivera*, 800 F.3d 1, 43 (1st Cir. 2015) (finding no abuse of discretion in prohibiting inquiry into specific details of murder as they do not tell anything of the witness’s tendency to be truthful); *United States v. Barrett*, 766 F.2d 609, 615 (1st Cir. 1985) (finding no abuse of discretion in refusing to allow cross-examination of witness concerning pending murder charge under *FRE* 608(b)).

<sup>148</sup> See *United States v. Tomaiolo*, 249 F.2d 683, 689 (2d Cir. 1957) (finding violation of the terms of the defendant-witness’s parole was not an offense relevant to his credibility).

<sup>149</sup> See *United States v. Pickard*, 211 F. Supp. 2d 1287, 1293 (D. Kan. 2002) (finding a charge of manslaughter and events surrounding it inadmissible under *FRE* 608(b) because they are not probative of the witness’s veracity).

<sup>150</sup> See *United States v. Lamb*, 99 F. App’x 843, 847 (10th Cir. 2004) (“[A]bsent more specific allegations, mere assault does not impugn a witness’s credibility . . .”).

its face probative of veracity, courts will evaluate the evidence in light of the circumstances to determine whether the conduct, upon closer inspection, bears on the question of veracity.<sup>151</sup>

### C. Prohibition of Extrinsic Evidence

Although FRE 608(b) permits inquiry on cross-examination about specific instances of conduct, the rule expressly prohibits the use of extrinsic evidence to prove such conduct occurred “in order to attack or support [a] witness’s character for truthfulness.”<sup>152</sup> Extrinsic evidence is evidence “offered through documents or other witnesses,” rather than elicited from “cross-examination of the witness himself or herself.”<sup>153</sup> For example, in *United States v. Mangiameli*, the court of appeals considered whether the trial court erred in excluding portions of a defense witness’s testimony that was offered to impeach the veracity of a prosecution witness.<sup>154</sup> The defense witness would have testified about specific instances in which the prosecution witness lied under oath.<sup>155</sup>

The court of appeals found that evidence of multiple instances of lying under oath was calculated to prove the prosecution witness’s general character for veracity, and thus, subject to the restrictions of FRE 608(b).<sup>156</sup> The court further noted that the provisions of FRE 608(b) provide that “specific instances of a witness[’s] conduct, for the purpose of attacking” his character for truthfulness, “may not be proved by extrinsic evidence.”<sup>157</sup> Therefore, the court of appeals concluded that the defense could properly inquire into the specific instances of conduct on cross-examination of the prosecution witness to attack the witness’s character for truthfulness.<sup>158</sup> But, by seeking to introduce the specific conduct evidence through the testimony of another witness, the defense attempted to attack the prosecution witness’s

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<sup>151</sup> See *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967) (“A ‘rule of thumb’ thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not . . .”), *superseded by rule*, FED. R. EVID. 609.

<sup>152</sup> FED. R. EVID. 608(b); see *United States v. Perez-Perez*, 72 F.3d 224, 227 (1st Cir. 1995) (“The notion underlying the rule is that while certain prior good or bad acts of a witness may constitute *character* evidence bearing on veracity, they are not evidence of enough force to justify the detour of extrinsic proof.”).

<sup>153</sup> WEINSTEIN & BERGER, *supra* note 92, § 608.20[1]; see also *United States v. Boulterice*, 325 F.3d 75, 82 n.5 (1st Cir. 2003) (explaining testimony elicited under cross-examination is not “extrinsic” and “[e]vidence is ‘extrinsic’ if offered through documents or other witnesses, rather than through cross-examination of the witness himself or herself”).

<sup>154</sup> *United States v. Mangiameli*, 668 F.2d 1172, 1175–76 (10th Cir. 1982).

<sup>155</sup> *Id.* at 1175.

<sup>156</sup> *Id.* at 1175–76.

<sup>157</sup> *Id.* at 1176.

<sup>158</sup> *Id.*

character for truthfulness by extrinsic evidence of conduct, “which is forbidden by Rule 608(b).”<sup>159</sup> Therefore, the court of appeals held that the evidence was properly excluded.<sup>160</sup>

Moreover, the prohibition on extrinsic evidence means that once counsel asks the witness about the specific instance of conduct, counsel is “bound by the witness’s answer.”<sup>161</sup> And if the witness denies the conduct, counsel may not introduce any further evidence by way of calling another witness or introducing physical evidence, to prove the witness committed the act.<sup>162</sup> Thus, FRE 608(b) requires the cross-examiner to “take the answer of the witness.”<sup>163</sup>

For example, in *United States v. Goings*, the court of appeals held that the trial court properly excluded written evidence that a government witness failed to repay the entire advance from her next paycheck.<sup>164</sup> The court of appeals explained that FRE 608(b) allows cross-examination about specific instances of conduct that concern the witness’s character for truthfulness, “but forbids the introduction of extrinsic evidence to prove the specific bad act occurred.”<sup>165</sup> Therefore, after the witness specifically denied that she had ever failed to fully repay a payroll advance from her next paycheck, “the defendants could not introduce extrinsic evidence to contradict her.”<sup>166</sup>

#### IV. ADVANTAGES AND DISADVANTAGES OF THE MAJORITY APPROACH TO IMPEACHMENT OF A WITNESS’S CHARACTER FOR TRUTHFULNESS THROUGH SPECIFIC INSTANCES OF CONDUCT

##### A. *Dangers of Allowing Inquiry into Specific Instances of Conduct*

While specific-instance character evidence may be relevant to the question of whether a witness is testifying truthfully, the use of such evidence may cause problems with judicial administration and unfairness to

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<sup>159</sup> *Id.*

<sup>160</sup> *Mangiameli*, 668 F.2d at 1176.

<sup>161</sup> WEINSTEIN & BERGER, *supra* note 92, § 608.22[1]; *see also* *United States v. Martinez*, 76 F.3d 1145, 1150 (10th Cir. 1996) (holding that if a witness denies making a particular statement on collateral matter, the examiner may not introduce extrinsic evidence to prove that witness did in fact make that statement); *United States v. Corbin*, 734 F.2d 643, 654–55 (11th Cir. 1984) (excluding evidence that government witness shot someone after he denied it on cross, because such evidence “falls squarely within Rule 608,” which limits inquiry to questions on cross).

<sup>162</sup> MUELLER & KIRKPATRICK, *supra* note 104, § 6:36.

<sup>163</sup> *Id.*; *see also* *United States v. Matthews*, 168 F.3d 1234, 1244 (11th Cir. 1999) (concluding if the witness denies conduct, it may not be proved by extrinsic evidence and the questioning party must take the witness’s answer).

<sup>164</sup> *United States v. Goings*, 313 F.3d 423, 426–27 (8th Cir. 2002).

<sup>165</sup> *Id.* at 427.

<sup>166</sup> *Id.*

the parties.<sup>167</sup> In fact, it has been argued that a complete bar on the use of specific instances of conduct to attack a witness's character for truthfulness may be the preferable approach "given the dangers of prejudice (particularly if the witness is a party), of distraction and confusion, of abuse by asking unfounded questions, and the difficulties of determining whether particular acts relate to character for truthfulness."<sup>168</sup>

In his concurring opinion in *State v. Scott*, Justice Albin illustrated these problems and noted that this form of impeachment has been prohibited because "the probative value of such questioning is outweighed by the potential prejudice of diverting jurors from the central issues in a case . . . ."<sup>169</sup> Moreover, Justice Albin explained that the threat of collateral attacks regarding specific instances that are "wholly unrelated to the litigation" could potentially discourage "crime victims from coming forward and injury victims from bringing their claims."<sup>170</sup> Such a threat might also deter defendants from taking the stand, and as a result, deprive the jury of their testimony.<sup>171</sup> Finally, parties would be encouraged to "forage for impeachment evidence to launch wide-ranging attacks on a witness's credibility."<sup>172</sup>

One of the general dangers presented by specific-instance character evidence is the potential to confuse or distract the jury from the substantive issues being tried.<sup>173</sup> Evidence of specific acts is usually not relevant to the issues being tried, which can create a danger of confusion for the jury.<sup>174</sup> In addition, it is doubtful that a jury would be able, even after instruction, to

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<sup>167</sup> See Victor Gold, *Two Jurisdictions, Three Standards: The Admissibility of Misconduct Evidence to Impeach*, 36 SW. U. L. REV. 769, 770–79 (2008) (discussing benefits and costs of misconduct impeachment, focusing on the adverse effect such evidence has on accurate fact finding, the tendency to encourage witness harassment, and the potential for undue delay); 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 979, at 1105 (1904) ("[E]ach additional witness introduces the entire group of questions as to his qualifications and his impeachment, and the amount of new evidence thus made possible may increase in far greater than geometrical proportion to the number of new witnesses, so that the trial may become in length extremely protracted, and with relatively little profit . . . [the] additional mass of testimony on minor points tends to overwhelm the material issues of the case and to confuse the tribunal . . . .").

<sup>168</sup> MCCORMICK ET AL., *supra* note 91, § 41, at 92.

<sup>169</sup> *State v. Scott*, 163 A.3d 325, 340 (N.J. 2017) (Albin, J., concurring).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See WRIGHT & GOLD, *supra* note 3, § 6112, at 35 ("Evidence of witness character also can undermine the integrity of jury decision-making by distracting the jury from the issues in the case and inducing a decision on an improper basis.").

<sup>174</sup> See *id.* ("[U]nlike evidence of bias or prior inconsistent statements, evidence concerning witness character bears no specific link to the facts or parties in a case."); see also *United States v. Perez-Perez*, 72 F.3d 224, 227 (1st Cir. 1995) (finding that evidence of police officer's misconduct was not material to defendant's guilt or innocence).

limit its consideration of specific instances of conduct solely to the evidence's effect on the witness's character for truthfulness.<sup>175</sup> More concerning is when the witness is a party, which makes the ramifications of this prejudicial effect especially serious. In a criminal case, this evidence exposes a testifying defendant to the danger that the jury may believe that the defendant is a bad person deserving of punishment, regardless of whether he or she committed the offense.<sup>176</sup>

Misconduct evidence also raises questions concerning the appropriate treatment of witnesses. Such evidence creates potential for unfairness and embarrassment.<sup>177</sup> Wigmore suggested that imposing limits on misconduct evidence was compelled by common decency: “[T]he ruthless flaying of personal character in the witness box is not only cowardly—because there is no escape for the victim—and brutal—because it inflicts the pain of public exposure of misdeeds to idle bystanders—but it has often not the slightest justification of necessity.”<sup>178</sup> Witnesses face the potential for unfair surprise because opposing counsel can forage through a witness's past and inquire into any conduct from his or her life that may bear on truthfulness.<sup>179</sup> This presents an unfair challenge as witnesses cannot be expected to defend against every aspect of their lives, thus increasing the chances a witness “will be surprised by, and unprepared to respond to, totally unfounded charges of misconduct.”<sup>180</sup> Misconduct evidence also may deter witnesses from coming forward for fear of being publicly humiliated since witnesses may be subjected to an unrestrained public dissection of their character, thus depriving “justice of the fullest opportunity to obtain useful testimony.”<sup>181</sup>

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<sup>175</sup> WEINSTEIN & BERGER, *supra* note 92, § 608.02[2]; *see also* *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (“The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction.”) (citation omitted)).

<sup>176</sup> MUELLER & KIRKPATRICK, *supra* note 104, § 6:34; *see also* WRIGHT & GOLD, *supra* note 3, § 6112 (“[W]hen the jury receives evidence that a witness is a bad man, it may be inclined to punish the party associated with that witness.”).

<sup>177</sup> *See* Gold, *supra* note 167, at 778.

<sup>178</sup> *Id.* (citing 3A WIGMORE ON EVIDENCE, § 979, at 826 (Chadbourn rev., 1970)).

<sup>179</sup> *See* *State v. Scott*, 163 A.3d 325, 342 (N.J. 2017) (Albin, J., concurring) (“Under our current rule, we have concluded that it would not be fair that a witness must answer for his whole life and respond to long ago instances of untruthful conduct.”).

<sup>180</sup> WRIGHT & GOLD, *supra* note 3, § 6112, at 37; *see also* WIGMORE, *supra* note 167, § 979, at 1105 (“This unfairness here lies in the fact that the opponent who desired by other witnesses to impeach by particular instances of misconduct might allege them as of any time and place that he pleased, and that, in spite of the utter falsity of the allegations, it would be practically impossible for the witness to have ready at the trial competent persons who would demonstrate the falsity of allegations that might range over the whole scope of his life.”).

<sup>181</sup> WEINSTEIN & BERGER, *supra* note 92, § 608.02[2] (citing 3A WIGMORE ON EVIDENCE, § 921, at 724 (Chadbourn rev., 1970)); Gold, *supra* note 167, at 778 (“This ‘ruthless flaying’ can even undermine accurate fact-finding. Witnesses may be reluctant to come forward, and important evidence may be lost, when witnesses are to be subjected to in-court dissection of

Finally, each of these dangers present the underlying possibility of causing undue delay.<sup>182</sup> The potential for “mini-trials” and side-excursions into each witness’s past, which as noted above is usually not relevant to the substantive issues of the case, create a real danger of not only confusing the issues but prolonging the trial.<sup>183</sup> There is also the possibility that a witness may not dispute the alleged misconduct but “may want to provide an explanation that diminishes its import or testify to other conduct that reveals the misconduct to be unrepresentative of her character,”<sup>184</sup> thus further detracting from the main issues and wasting time on collateral matters wholly unrelated to the case.

B. *Arguments for Using the Majority Approach to Impeachment of a Witness’s Character for Truthfulness Through Specific Instances of Conduct*

While the use of specific instances of conduct to attack a witness’s character for truthfulness presents various dangers, conscious awareness of these concerns provided the basis for crafting FRE 608.<sup>185</sup> Specific conduct evidence is not permitted wholesale and is subject to various limitations. In his concurring opinion in *State v. Scott*, Chief Justice Rabner illustrated the benefits of the majority approach, noting that there are safeguards put in place that protect against the acknowledged dangers.<sup>186</sup> In addition, Chief Justice Rabner emphasized that New Jersey’s current formulation shields witnesses from being questioned about specific-conduct character evidence that bears directly on credibility and thus has the effect of presenting witnesses to the jury “under an artificial light.”<sup>187</sup> Therefore, the majority approach as represented by FRE 608 is crafted in a way to alleviate the dangers outlined in the previous section and gives equal weight to the competing concern of fostering the search for the truth.<sup>188</sup>

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their character and past conduct.”).

<sup>182</sup> WEINSTEIN & BERGER, *supra* note 92, § 608.02[2]; Gold, *supra* note 167, at 778 (explaining that limits on the admissibility of misconduct evidence can be justified on the ground that such evidence has the potential to “burden a trial with distracting and time-consuming detours from the central issues”).

<sup>183</sup> WRIGHT & GOLD, *supra* note 3, § 6112, at 39 (“[W]ithout limits on admissibility, a case can dissolve into a series of mini-trials examining the life history of each witness. Such a process would distract and confuse the jury, thus undermining the fundamental goal of accurate fact-finding.”).

<sup>184</sup> Gold, *supra* note 167, at 779 (quoting 3A WIGMORE ON EVIDENCE, § 983, at 841 (Chadbourn rev., 1970)).

<sup>185</sup> FED. R. EVID. 608(b) advisory committee’s notes.

<sup>186</sup> *State v. Scott*, 163 A.3d 325, 339–40 (N.J. 2017) (Rabner, C.J., concurring).

<sup>187</sup> *Id.* at 336, 339.

<sup>188</sup> *See id.*

First, the Advisory Committee on the Federal Rules of Evidence recognized the potential for abuse and dangers, thus the federal rule was crafted to address the dangers of permitting specific conduct evidence.<sup>189</sup> The Advisory Committee Notes to subdivision (b) provide, “[e]ffective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently[,] safeguards are erected in the form of specific requirements . . . .”<sup>190</sup> Those requirements include that the conduct be probative of truthfulness or untruthfulness.<sup>191</sup> Moreover, the overriding protection of FRE 403 requires that probative value not be substantially outweighed by the danger of unfair prejudice, confusing the issues, or misleading the jury.<sup>192</sup> FRE 611 further bars harassment and undue embarrassment of witnesses.<sup>193</sup>

One of the major limitations contained in FRE 608(b) is the prohibition on the use of extrinsic evidence.<sup>194</sup> This limitation is designed to protect against undue delay as well as confusion of the issues.<sup>195</sup> As explained above, when a witness is questioned about prior misconduct, counsel is “bound” by the witness’s answer and may not introduce extrinsic evidence to prove the misconduct.<sup>196</sup> Thus, counsel may not call another witness or bring in other evidence to disprove a denial and show that the conduct occurred.<sup>197</sup> Absent this limitation, impeachment of the witness could trigger time consuming mini-trials on collateral issues.<sup>198</sup> This concern illustrates the principal purpose of this safeguard—to limit the time spent on issues that are not central to the case and to maintain the focus of the trial on substantive issues and matters bearing directly on credibility.<sup>199</sup> In addition, the limitation helps to reduce the extent of unfair prejudice that accompanies any

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<sup>189</sup> FED. R. EVID. 608 advisory committee’s notes.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> FED. R. EVID. 608(b) (“[E]xtrinsic evidence is not admissible to prove specific instances of a witness’s conduct in order to attack or support the witness’s character for truthfulness.”).

<sup>195</sup> See *State v. Scott*, 163 A.3d 325, 336 (N.J. 2017) (Rabner, C.J., concurring); see also *United States v. Simmons*, 444 F. Supp. 500, 507 (E.D. Pa. 1978) (finding FRE 608(b) excludes extrinsic evidence “to avoid minitrials on wholly collateral matters which tend to distract and confuse the jury”).

<sup>196</sup> See *supra* Part III.C.

<sup>197</sup> WEINSTEIN & BERGER, *supra* note 92, § 608.22[1]; see also *United States v. Martinez*, 76 F.3d 1145, 1150 (10th Cir. 1996) (holding if a witness denies making a particular statement on a collateral matter, the examiner may not introduce extrinsic evidence to prove that the witness did in fact make that statement).

<sup>198</sup> See MCCORMICK ET AL., *supra* note 91, § 49, at 200-01.

<sup>199</sup> MUELLER & KIRKPATRICK, *supra* note 104, § 6:36.

opening into behavior bearing on untruthfulness, since such behavior is likely to pertain to negative conduct and juries are likely to misuse the evidence.<sup>200</sup>

In sum, as explained by Chief Justice Rabner, the bar against extrinsic evidence alleviates the possible dangers from inquiry into specific instances of conduct for two reasons. First, “[t]here is no danger of confusion of issues, because the matter stops with question and answer.”<sup>201</sup> Second, “[t]here is no danger of unfair surprise, because the impeached witness is not obliged to be ready with other witnesses to answer the extrinsic testimony of the opponent, for there is none to be answered . . . .”<sup>202</sup> Thus, many of the major concerns that come with permitting inquiry into specific instances of conduct are addressed and properly limited by the prohibition against extrinsic evidence.

In addition, FRE 608(b) is also subject to FRE 403 and FRE 611 as further safeguards to bar testimony that would confuse the issues, distract the jury, or cause undue prejudice or harassment.<sup>203</sup> As explained above, the text of the rule leaves to the trial court’s discretion the determination of whether or not to allow inquiry into specific instances of conduct.<sup>204</sup> The court must consider whether the conduct is probative of truthfulness or untruthfulness. Moreover, the overriding requirements of FRE 403 require the court to balance the issues and ensure that the determination is guided by the understanding that such evidence can have a detrimental effect on the parties, and the policies and goals of the justice system.

*United States v. Shinderman* provides an illustration of the careful balancing process that courts employ.<sup>205</sup> In this case, the court of appeals had to determine whether the trial court abused its discretion in permitting the government, on cross-examination, to question the defendant about his responses to questions when applying for a medical license.<sup>206</sup> The defendant applied for a medical license in 2001 and 2002.<sup>207</sup> On each application, he answered “no” to a question asking whether he had ever “been charged, summonsed, indicted, arrested or convicted of any criminal

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<sup>200</sup> *Id.*

<sup>201</sup> *State v. Scott*, 163 A.3d 325, 336 (N.J. 2017) (Rabner, C.J., concurring) (quoting 3A WIGMORE ON EVIDENCE, § 981, at 838 (Chadbourne rev., 1970)).

<sup>202</sup> *Id.*

<sup>203</sup> FED. R. EVID. 608(b) advisory committee’s notes to 1972 proposed rules (“[T]he overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.”).

<sup>204</sup> *See supra* Part III.A.

<sup>205</sup> *United States v. Shinderman*, 515 F.3d 5 (1st Cir. 2008).

<sup>206</sup> *Id.* at 19.

<sup>207</sup> *Id.* at 16.



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offense.”<sup>208</sup> The government had evidence that defendant had been arrested twice for drug-related offenses, although neither arrest resulted in a conviction.<sup>209</sup>

The government wanted to cross-examine the defendant regarding the applications, in order to cast doubt upon his truthfulness.<sup>210</sup> The defendant objected and moved to exclude such an inquiry.<sup>211</sup> He admitted that he had been arrested, but asserted that the arrests had been expunged thus, he had answered the questions truthfully and on the advice of counsel.<sup>212</sup> Defendant offered an affidavit from his counsel to support this contention.<sup>213</sup> The trial court concluded that the affidavit “provided ‘no convincing ground’ to support the defendant’s belief that the arrests had vanished” and did not have to be disclosed on the applications.<sup>214</sup> The trial court ruled that the government could cross-examine defendant about his arrest-related answers, but precluded the introduction of the arrest records themselves into evidence.<sup>215</sup>

In assessing this ruling, the court of appeals noted that a trial judge’s discretion in determining the scope of cross-examination is “subject to the overarching need to balance probative worth against prejudicial impact.”<sup>216</sup> The court of appeals found no abuse of discretion and emphasized that a “witness’s willingness to lie to the government in an application for a license is highly probative of his character for truthfulness.”<sup>217</sup> Moreover, the court found that “temporal considerations” weighed in favor of permitting the evidence since defendant’s answers were “not remote in time but, rather, were roughly contemporaneous” with the criminal conduct charged.<sup>218</sup> Finally, the central factual issue at trial pertained to the defendant’s intent, making his credibility “highly relevant to the outcome of the case.”<sup>219</sup>

After determining that the misconduct evidence could be a matter for cross-examination under the requirements of FRE 608(b), the court then addressed the question of prejudice.<sup>220</sup> The court noted that evidence of prior

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<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Shinderman*, 515 F.3d at 16.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* (citing FED. R. EVID. 608(b) advisory committee’s notes to 1972 proposed rules) (noting that the balancing function is spelled out in FRE 403).

<sup>217</sup> *Shinderman*, 515 F.3d at 17.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

arrests carried some potential for adverse effect, however, it ultimately concluded that the effect was not particularly inflammatory or of such detriment to compel exclusion of the evidence.<sup>221</sup> Also relevant to this determination, the court explained, were the affirmative steps the trial court took to minimize the risk of unfair prejudice.<sup>222</sup> The trial court did not permit the government to elicit any unnecessary or “tawdry details” regarding the arrests.<sup>223</sup> The trial court “allowed the defendant to tell the jury about the ultimate disposition of the arrests and about his belief that they had been expunged,” and additionally, “offered to give a limiting instruction.”<sup>224</sup>

This case highlights the arguments in favor of the majority approach and illustrates all of the factors properly taken into account by trial judges when determining whether cross-examination into specific instances of conduct is appropriate. Further, the case demonstrates that this role given to judges is not taken lightly and the rule requires in-depth balancing which serves to alleviate and account for the possible dangers from the use of specific instances of conduct.

C. *Counterarguments to the Use of the Majority Approach to Impeachment of a Witness’s Character for Truthfulness Through Specific Instances of Conduct*

While the federal rule was crafted with these dangers in mind, it is argued that the limitations in FRE 608(b) and the other rules of evidence do not provide adequate safeguards to prevent these dangers, and in some cases actually serve to create additional concerns. As explained by Justice Albin in his concurring opinion in *State v. Scott*, the New Jersey Supreme Court has “determined that ‘wide-ranging collateral attacks on the general credibility of a witness’ may lead to jury confusion and distract the jury from ‘the true issues in the case.’”<sup>225</sup> Justice Albin argued that these concerns are not diminished merely because extrinsic evidence cannot be introduced.<sup>226</sup>

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<sup>221</sup> *Id.* (“We long have recognized that ‘all evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided.’”) (quoting *United States v. Rodríguez-Estrada*, 877 F.2d 153, 156 (1st Cir.1989)).

<sup>222</sup> *Id.*

<sup>223</sup> *Shinderman*, 515 F.3d at 17.

<sup>224</sup> *Id.*

<sup>225</sup> *State v. Scott*, 163 A.3d 325, 342 (N.J. 2017) (Albin, J., concurring) (quoting *State v. Guenther*, 854 A.2d 308, 315 (N.J. 2004)).

<sup>226</sup> *Id.* at 342–43 (“Allowing expansive collateral attacks on a witness’s credibility through prior specific conduct would likely have the unintended consequence of prompting attorneys to forage through a witness’s past . . . . Such prior acts of dishonesty would bear little relevance to the [witness’s] credibility in court but likely would have an outsized effect on the jury’s evaluation of that witness. The admission of the singular incident, or incidents, of untruthfulness would allow the jury to engage in the most simplistic and dangerous assumption—once a liar, always a liar.”).

Justice Albin also cautioned that the only limitation guarding the expansive use of specific instances of conduct is Rule 403, which leaves all of the concerns and potential for danger within the discretion of trial judges.<sup>227</sup>

First, regarding the limitation on the use of extrinsic evidence, it is recognized that the exclusion of extrinsic evidence of specific conduct to impeach a witness's character for truthfulness does not completely eliminate the danger of confusion and prejudice from inquiry into collateral matters "because the very question itself can convey the theoretically barred information to the jury."<sup>228</sup> Merely asking a question about a specific instance of misconduct and leaving with the jury only a bare denial from the witness can have prejudicial effects on the witness as well as allow the jury to engage in speculation on an issue that is collateral to the merits of the case.<sup>229</sup>

Moreover, the phrase that the cross-examiner must "take the answer of the witness" does not mean that the cross-examiner cannot continue pressing for an admission that the past conduct did occur.<sup>230</sup> FRE 608(b) authorizes this procedure.<sup>231</sup> Thus, while counsel is "bound by the witness's answer," this merely means extrinsic evidence may not be introduced.<sup>232</sup> Counsel may proceed, however, with questioning and continue pressing for admission, for instance, "by reminding the witness of the penalties for perjury."<sup>233</sup> This

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<sup>227</sup> *Id.* at 341–42.

<sup>228</sup> WEINSTEIN & BERGER, *supra* note 92, § 608.22[2][c][ii]; *see also* MUELLER & KIRKPATRICK, *supra* note 104, § 6:34 ("Simply asking can impeach. Few opportunities for lawyers provide better opportunity to inject prejudice and collateral issues into a case than cross-examination of witnesses on prior acts for purposes of suggesting untruthfulness. In some respects, this mechanism of impeachment invites abuse because the examining lawyer almost cannot lose.").

<sup>229</sup> *Scott*, 163 A.3d at 342 (Albin, J., concurring); *see also* *United States v. Davenport*, 753 F.2d 1460, 1463 (9th Cir. 1985) ("The prejudice to the defendant was, thus, created by the question itself rather than by the testimony given in response. The danger in such a situation is that the prosecution will use the question to waft an unwarranted innuendo into the jury box, knowing that the witness'[s] denial will only serve to defend her credibility, while leaving uncontradicted the reference to the defendant's prior bad conduct."); Gold, *supra* note 167, at 775 n.25 (citing 3A WIGMORE ON EVIDENCE, § 988, at 921 (Chadbourn rev., 1970)) ("This method of inquiry or cross-examination is frequently resorted to by counsel for the very purpose of injuring by indirection a character which they are forbidden directly to attack in that way; they rely upon the mere putting of the question (not caring that it is answered negatively) to convey their covert insinuation.").

<sup>230</sup> WEINSTEIN & BERGER, *supra* note 92, § 608.22[1].

<sup>231</sup> *See id.*

<sup>232</sup> MCCORMICK ET AL., *supra* note 91, § 41, at 94; *see also* *United States v. Ling*, 581 F.2d 1118, 1121 (4th Cir. 1978) ("[T]he examiner must be content with the witness'[s] answer . . . . Although the cross-examiner may continue to press the defendant for an admission, he cannot call other witnesses to prove the misconduct after defendant's denial.").

<sup>233</sup> MCCORMICK ET AL., *supra* note 91, § 41, at 94; *see also* MUELLER & KIRKPATRICK, *supra* note 104, § 6:36 ("[T]he cross-examiner need not take the first answer given. The very idea of cross implies testing and probing, which necessarily means that the lawyer conducting

creates concern for undue harassment and still leaves open the threat of jury distraction and confusion pertaining to issues collateral to the merits of the case.<sup>234</sup>

Second, apart from the limitation on extrinsic evidence, the only safeguard on the use of specific-instance character evidence is Rule 403.<sup>235</sup> The concern with Rule 403 is that while it does take into account the dangers that are associated with cross-examination on specific instances of conduct, trial courts are given broad discretion to make this determination.<sup>236</sup> Thus, all of these concerns are left in the hands of one judge and the determination cannot be overturned unless the reviewing court finds an abuse of discretion.<sup>237</sup> It has been argued that the task of regulating prejudice delegated by Rule 403 allocates broad power to trial judges to make individualized decisions about the relative importance of competing principles, and as such is “inconsistent with the general hierarchical structure of our legal system. Trial judges customarily exercise more limited, reviewable discretion within a framework of standards set by higher authority.”<sup>238</sup>

Moreover, as Justice Albin noted, even in cases involving similar conduct, different judges may come to different conclusions when weighing the Rule 403 factors or when determining whether conduct is probative of truthfulness.<sup>239</sup> Thus, it is argued, the admissibility of potentially damaging evidence is improperly left to a case-by-case determination that may not be uniformly or consistently applied.

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the cross-examination must have a chance to press and even to push the witness.”).

<sup>234</sup> MCCORMICK ET AL., *supra* note 91, § 41, at 94; *Scott*, 163 A.3d at 342 (Albin, J., concurring) (“Concerns about witness fairness and jury confusion are not diminished merely because extrinsic evidence cannot be introduced to impeach the witness.”).

<sup>235</sup> *Scott*, 163 A.3d at 341–42 (Albin, J., concurring).

<sup>236</sup> *See supra* note 92 and accompanying text.

<sup>237</sup> *See United States v. Brown*, 500 F.3d 48, 58 (1st Cir. 2007) (“We typically review Rule 403 determinations for abuse of discretion.”); *United States v. Shinderman*, 515 F.3d 5, 17 (1st Cir. 2008) (“Rule 403 judgments are typically battlefield determinations, and great deference is owed to the trial court’s superior coign of vantage. ‘Only rarely—and in extraordinarily compelling circumstances—will we, from the vista of a cold appellate record, reverse a district court’s on-the-spot judgment concerning the relative weighing of probative value and unfair effect.’”) (quoting *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1340 (1st Cir. 1988)).

<sup>238</sup> J. Alexander Tanford, *A Political-choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 832 (1989).

<sup>239</sup> *Scott*, 163 A.3d at 342 (Albin, J., concurring). *Compare Gustafson v. State*, 590 S.W.2d 853, 859 (Ark. 1979) (finding inquiry about theft under Rule 608(b) proper), *with Rhodes v. State*, 634 S.W.2d 107, 110–11 (Ark. 1982) (modifying *Gustafson* finding interpretation of Rule 608(b) too broad and holding inquiry about theft improper).

V. NEW JERSEY'S OPTIONS TO ADDRESS THE ISSUE AND MAKE CHANGES TO THE CURRENT RULE

While Justice Albin expressed valid concerns regarding the use of specific instances of conduct to impeach a witness's character for truthfulness, a complete ban on any use of such evidence presents equally troubling concerns. There are options to address the issues on both sides. Allowing inquiry into past misconduct does have benefits. While it is recognized that it can be difficult to point to past conduct and determine with any degree of certainty whether the witness is telling the truth or lying, credibility is a critical issue in almost every case.<sup>240</sup> "Character evidence, despite its flaws, may still serve a purpose in calling to the jury's attention to what might be an otherwise unknown deficiency of the witness and thus give the jury a more adequate basis for judging his testimony."<sup>241</sup>

"Witnesses are often carefully groomed and coached by counsel to project an in-court character which suggests a high level of credibility."<sup>242</sup> "Evidence [that reveals] the true character of a witness can be used to poke holes in this facade."<sup>243</sup> Further, character evidence can act as a check on an attorney to discourage the offering of an unreliable witness because that witness's lack of credibility could be revealed by opposing counsel on cross-examination.<sup>244</sup> Finally, admitting evidence regarding a witness's character for truthfulness can advance accurate fact-finding (a basic policy goal of the evidence rules), because "just as a jury can be prejudiced against the plaintiff by the inclusion of some evidence, it can be misled by the exclusion of other evidence."<sup>245</sup>

In light of the costs and benefits of allowing specific instances of conduct to impeach a witness's character for truthfulness and taking into account the arguments posed by both sides, it seems that New Jersey's current formulation does not do enough to address all of the concerns. The case that ignited this debate between the justices highlights the problems with New Jersey's current formulation. Where the prosecutor had a good-

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<sup>240</sup> WEINSTEIN & BERGER, *supra* note 92, § 608.02[1].

<sup>241</sup> *Id.* (quoting Mason Ladd, *Techniques and Theory of Character Testimony*, 24 IOWA L. REV. 498, 534 (1939)).

<sup>242</sup> WRIGHT & GOLD, *supra* note 3, § 6112, at 32; *see also* Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom*, 65 N.C. L. REV. 481, 484-86 (1987) (discussing "courtroom style" psychological techniques lawyers use that are aimed at inducing juries to employ an extralegal basis for its decisions).

<sup>243</sup> WRIGHT & GOLD, *supra* note 3, § 6112, at 32.

<sup>244</sup> *Id.*

<sup>245</sup> *Vichare v. AMBAC Inc.*, 106 F.3d 457, 468 (2d Cir. 1996) (explaining that "there are two sides to the 608(b) coin," prejudice and probative value, and exclusion of evidence solely because it may be prejudicial cuts against the primary policy implicated by FRE 608, accuracy, by depriving the jury of information that bears directly on a witness's credibility leading to inaccurate results).

faith basis to ask the question, why should it be improper to ask a witness whether she had lied before to protect her son about a serious matter? Such an inquiry bears directly on the witness's character for truthfulness. As expressed by Chief Justice Rabner, however, New Jersey's approach shields witnesses from this type of inquiry and as a result impedes the search for truth and presents witnesses to the jury in an artificial light.<sup>246</sup>

Moreover, it is difficult to reconcile why N.J.R.E. 608(b) allows evidence of a witness's prior false criminal accusations but inquiry into a witness's statements made to exonerate a person is prohibited.<sup>247</sup> The New Jersey Supreme Court made clear in *Guenther* that its decision was not made "on constitutional grounds, but rather by making a narrow exception to N.J.R.E. 608 consistent with the rationale of that rule."<sup>248</sup> Thus, the question remains as to what the logical difference is between a prior false statement of accusation and a prior false statement of exoneration that justifies the disparate treatment under N.J.R.E. 608. In addition, the exception to N.J.R.E. 608 that resulted from *Guenther*, now 608(b), allows "[t]he credibility of a witness in a criminal case [to] be attacked by evidence that the witness made a prior false accusation . . . ."<sup>249</sup> This exception not only allows inquiry into specific instances of conduct but goes beyond the federal rule and does not prohibit the use of extrinsic evidence; rather it is left within the discretion of trial judge as to whether such evidence should be admitted.<sup>250</sup> Thus, it is difficult to understand why FRE 608(b) is disfavored when it provides a rule of limited admissibility, protects against the dangers presented by specific instances of conduct, and does not go as far as N.J.R.E. 608(b) by prohibiting extrinsic evidence.

The facts of *State v. Scott* provide a good example of how FRE 608(b) could be applied to avoid any of the concerns regarding the use of specific instances of conduct.<sup>251</sup> The State sought to introduce evidence of two prior occasions on which the witness, Barbella, allegedly lied to police to exonerate her son, the defendant.<sup>252</sup> Applying FRE 608(b), the trial judge

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<sup>246</sup> *State v. Scott*, 163 A.3d 325, 335, 339 (N.J. 2017) (Rabner, C.J., concurring).

<sup>247</sup> *Id.* at 339–40 ("False testimony to exonerate is just as troublesome as a false criminal accusation. Both impede the search for the truth. Indeed, it is hard to explain to the public why one area can be probed and not the other.").

<sup>248</sup> *State v. Guenther*, 854 A.2d 308, 322 (N.J. 2004).

<sup>249</sup> N.J. R. EVID. 608(b) (emphasis added).

<sup>250</sup> *Id.*; see also *Guenther*, 854 A.2d at 324 ("Among the factors to be considered in deciding the issue of admissibility are . . . the number of witnesses, the items of extrinsic evidence, and the amount of time required for presentation of the issue at trial . . . . If the court, pursuant to its gate-keeping role, determines that evidence of the prior false accusation is admissible, the court has the discretion to limit the number of witnesses who will testify concerning the matter at trial.").

<sup>251</sup> See *supra* Part I.

<sup>252</sup> *Scott*, 163 A.3d at 328.

would have the discretion to admit the evidence. Whether such evidence could be permitted would be subject to Rule 403 and any testimony that would confuse the issues, distract the jury, or cause undue prejudice would not be permitted. The majority in *Scott*, and Chief Justice Rabner in his concurring opinion, noted that there was a question concerning the prejudicial effect that could result from asking about this prior conduct because it reveals that the defendant had previously been in trouble with the police.<sup>253</sup> The trial judge, however, could sanitize the evidence and only allow the State to ask whether Barbella lied to the police to exonerate *others* in the past. Thus, by removing the fact that she had lied to exonerate her son, the prejudice that could result against the defendant is eliminated but the jury would still receive the information that relates to the witness's character for untruthfulness. In addition, if Barbella chose to deny that she had made those statements, the prosecutor, under FRE 608(b), would have to take the witness's answer and no extrinsic evidence could come in to prove that Barbella engaged in the alleged conduct.

Given this illustration and the competing concerns regarding specific instances of conduct, it would be beneficial for New Jersey to change N.J.R.E. 608(a) to align with the majority approach. While the disadvantages outlined above do present valid concerns, New Jersey could use the federal rule as a starting point and craft a rule that will take into account the arguments and concerns expressed on both sides. The states have created different ways to handle the use of specific instances of conduct with many taking a more restrictive approach. For example, Tennessee's rule, which follows a more restrictive approach, could be a framework for New Jersey to follow.

#### A. *Tennessee Approach*

Tennessee Rule of Evidence 608(b) provides:

Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified.<sup>254</sup>

Both FRE 608(b) and Tennessee Rule of Evidence 608(b) allow for the

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<sup>253</sup> *Id.* at 333; *id.* at 339 (Rabner, C.J., concurring).

<sup>254</sup> TENN. R. EVID. 608(b).

impeachment of a witness by inquiring on cross-examination into specific instances of conduct that are probative of truthfulness or untruthfulness.<sup>255</sup> Tennessee Rule of Evidence 608(b) also does not permit the introduction of extrinsic evidence to prove the specific instance of conduct had occurred.<sup>256</sup>

Tennessee, however, has a number of added procedural safeguards that are designed to prevent common types of abuse on cross-examination.<sup>257</sup> Tennessee Rule of Evidence 608(b) has three specific provisions that must be satisfied in order to use specific conduct evidence to attack a witness's character for truthfulness:

(1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry; (2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.<sup>258</sup>

Tennessee also added a further restriction concerning juvenile conduct which has no comparable federal provision for such evidence.<sup>259</sup> Tennessee Rule of Evidence 608(c) provides:

Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such

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<sup>255</sup> FED. R. EVID. 608(b); TENN. R. EVID. 608(b).

<sup>256</sup> TENN. R. EVID. 608(b).

<sup>257</sup> Robert Banks, Jr., *Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part II*, 20 MEM. ST. U. L. REV. 499, 531–36 (1990).

<sup>258</sup> TENN. R. EVID. 608(b).

<sup>259</sup> Banks, Jr., *supra* note 257, at 536.



conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.<sup>260</sup>

B. *How New Jersey Can Incorporate Tennessee's Rule to Address Justice Albin's Concerns*

New Jersey has the capability of drafting a restrictive rule similar to Tennessee in order to fully address the concerns expressed by Justice Albin. Similar to Tennessee, New Jersey can require a hearing to determine that a reasonable factual basis exists for cross-examining a witness about specific instances of conduct and whether the alleged conduct has probative value in assessing the credibility of the witness. In addition, in criminal cases, the rule could require counsel to give pretrial notice of intent to question a witness about misconduct, provide an evidentiary basis, and show that the probative worth outweighs unfair prejudice.<sup>261</sup> This would expressly incorporate the requirements of Rule 403 into the language of the rule, make notice of the intent to use specific conduct evidence a requirement, and place a burden on the party seeking to admit such evidence to present specific facts and circumstances.

Moreover, if still not satisfied by Rule 403, New Jersey could adopt an altered balancing test for courts to employ in making the determination regarding prejudice. Minnesota, for example, in criminal cases, requires the court to employ a balancing test that "is not the Rule 403 test favoring admissibility unless probative value is 'substantially outweighed' by unfair prejudice."<sup>262</sup> Rather, the rule incorporated the balancing test used by the court in *State v. Fallin*,<sup>263</sup> and under this test, "the court should not allow the cross-examination if probative value and unfair prejudice are closely balanced."<sup>264</sup> The evidence should not be allowed unless the prosecutor establishes that the probative value on the issue of credibility outweighs the potential for unfair prejudice.<sup>265</sup> Thus, this rule would err on the side of exclusion if the prejudicial effect of the evidence is a closer call.

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<sup>260</sup> TENN. R. EVID. 608(c).

<sup>261</sup> Minnesota also has a similar restriction. See MINN. R. EVID. 608(c) (prosecutor must give pretrial notice of intent to question defendant or defense witnesses about misconduct, providing evidentiary basis, and showing that probative worth outweighs unfair prejudice).

<sup>262</sup> MINN. R. EVID. 608(c) advisory committee's comment to 2006 amendment.

<sup>263</sup> 540 N.W.2d 518 (Minn. 1995).

<sup>264</sup> MINN. R. EVID. 608(c) advisory committee's comment to 2006 amendment (citing *State v. Fallin*, 540 N.W.2d 518, 522 (Minn. 1995)).

<sup>265</sup> *Id.*

New Jersey can adopt a time limit that declares certain actions after a specified number of years presumptively barred. New Jersey could take this a step further and set a shorter time limit than the ten-year limit in Tennessee's rule and add any further burdens on the party seeking to present such evidence. New Jersey could also add further restrictions as deemed necessary like Tennessee did by adding subsection (c) to its rule to address specific concerns in particular contexts. Further, New Jersey could adopt restrictions and standards to help guide judges when making the determination to allow cross-examination into specific instances of conduct. With regard to conduct that is probative of truthfulness, New Jersey can elect to take the narrow view which provides that conduct is admissible only if it directly involves falsehood or deception.

## VI. CONCLUSION

The Supreme Court of New Jersey in *State v. Guenther* explained that New Jersey bars "the use of prior instances of conduct to attack the credibility of a witness for two essential reasons: to prevent unfairness to the witness and to avoid confusion of the issues before the jury."<sup>266</sup> These goals, however, can be met by carefully crafting a rule that would address such concerns and at the same time provide for the use of specific instances of conduct in cases, like the case at issue here, where such instances bear directly on a witness's veracity. As Justice Albin explained when writing for the court in *State v. Guenther*, when "the 'auxiliary policies' underlying the rule do not apply, the rationale for the exclusion of such evidence no longer exists."<sup>267</sup> As shown by FRE 608(b) and the majority of states that have adopted similar rules, it is possible to adopt a rule that will address the auxiliary policies and under such a rule, the rationale for total exclusion of specific instances of conduct would no longer exist.

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<sup>266</sup> *State v. Guenther*, 854 A.2d 308, 314 (N.J. 2004).

<sup>267</sup> *Id.* at 315.