



**FEDERAL PUBLIC  
DEFENDER**

— District of Nevada —

# The Busy Lawyer's Guide to Character and Impeachment

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# A Defender's Guide to Federal Evidence

*A Total Practice Handbook for Criminal Defense Attorneys*



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ARRESTING A WITCH.

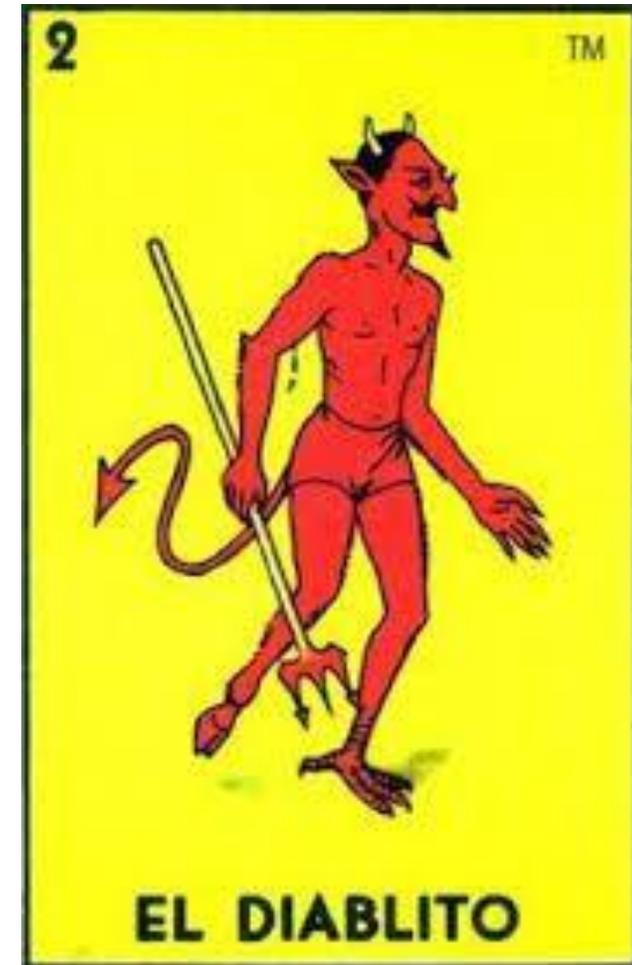
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# Character and Impeachment

- Character not defined in FRE
- Operational definition:
  - “Description of a person’s **disposition or a general trait** such as honesty, temperance, or peacefulness.”
- Federal Courtroom Evidence, 5<sup>th</sup> Edition, J. Cotchett
- We will focus on character and impeachment based on the **W’s character traits or past deeds**
- We will briefly discuss impeachment by prior inconsistent statement, bias, or sensory deficiency.

# FRE Roadmap

- **1. FRE 404(a)(1)-Propensity prohibition**
- 2. FRE 405-Methods of proving character
- 3. FRE 404(a)(2)-Exceptions for D/V
- 4. FRE 404(a)(3)-Exceptions for W (referencing FRE's 607, 608 and 609)
- 5. FRE 404(b)-Other crimes/wrongs
- 6. FRE 413/414-Similar crimes in Sexual Assault, Child Molestation



# 1. FRE 404(a)-Propensity Prohibition

- FRE 404(a)-Character not admissible to prove action in conformity
- FRE 404(b)(1)-propensity prohibition also applies to other crimes, wrongs, or acts



## Defense favorable case:

- United States v. Wells, 879 F.3d 900, 920 (9<sup>th</sup> Cir. 2018)
- A jury convicted the defendant of, *inter alia*, murder of a federal employee. In support of its case at trial, the government used the testimony of a psychologist to present a profile for a person who commits “targeted, intended workplace multiple-homicide violence.” The jurors were then invited by the government to determine if the lay witness testimony “fit” this profile.

- Holding

- In determining that this evidence was improperly admitted, the Ninth Circuit quoted Chief Justice Roberts: “Our law punishes people for what they do, not who they are.” Buck v. Davis, 137 S. Ct. 759, 778 (2017). Id. The Ninth Circuit determined that the psychologist testimony “was clearly inadmissible under Rule 401(a)(1).” The court reversed and remanded the case. Id. at 938.

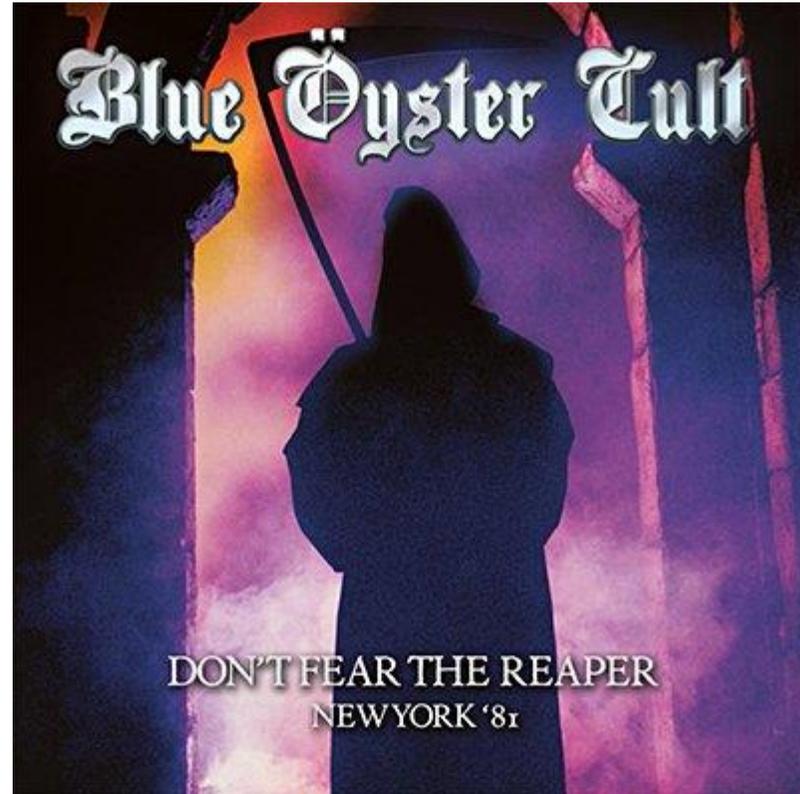
# Beware opening the door

- Entrapment
- U.S. v. Roper, 135 F3d. 430, 433 (6<sup>th</sup> Cir. 1998)  
(defendant opened door to character E by asserting entrapment D and arguing he had never sold drugs)



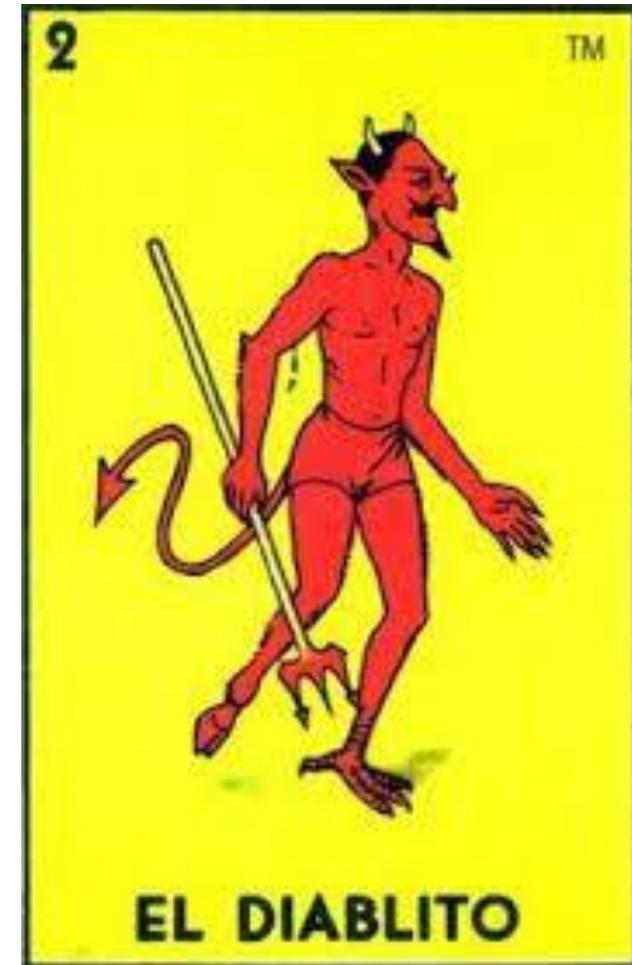
# Beware opening door (cont.)

- Impeachment
- U.S. v. Beverly, 5 F.3d 633, 639 (2d Cir. 1993) (D's testimony that he was not familiar with guns allowed Govt. to impeach him with E of prior shootings).



# FRE Roadmap

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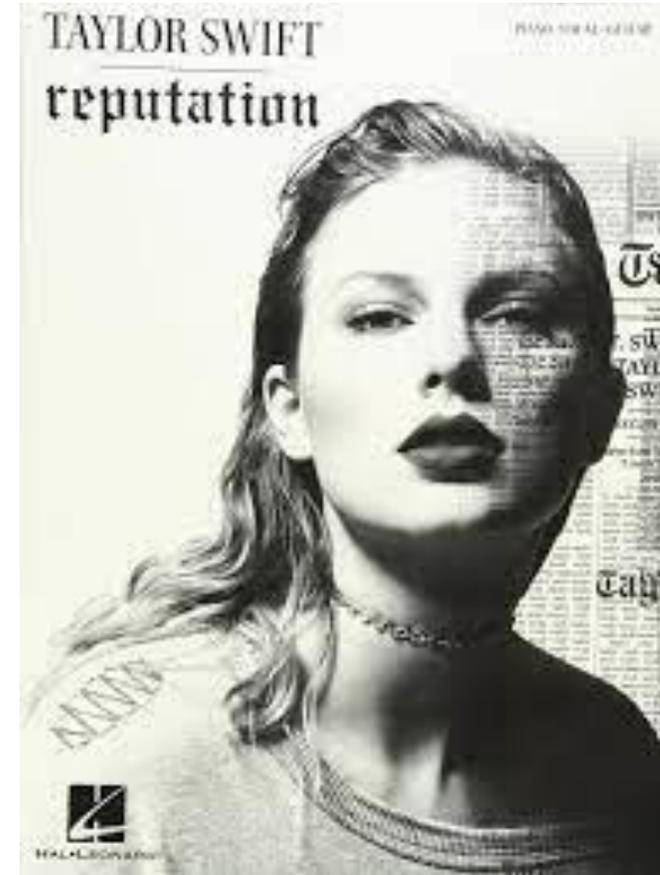


## 2. FRE 405-Methods of Proving Character

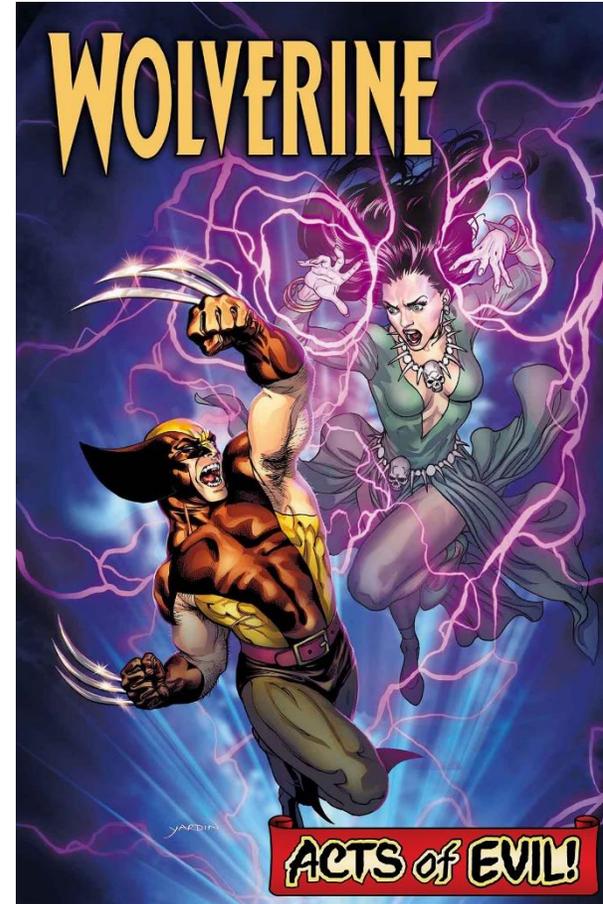
### (a) By Reputation or Opinion

When admissible, character may be proved by testimony about the person's **reputation** or by testimony in the form of an **opinion**.

On **cross-examination** of the character witness, the court may allow an inquiry into relevant **specific instances** of the person's conduct.

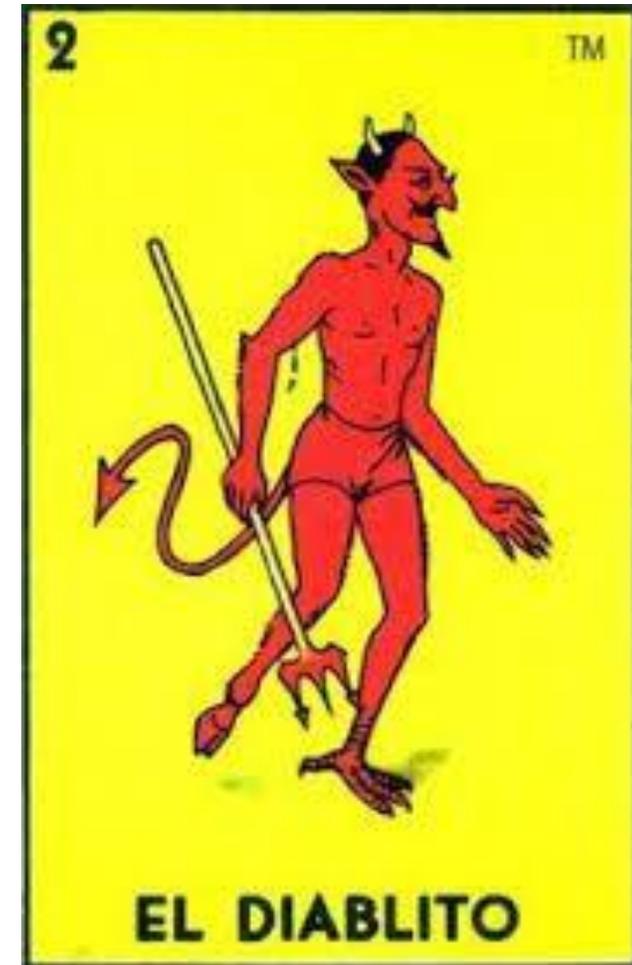


- **(b) By Specific Instances of Conduct**
- When a person's character or character trait is an **essential element of a charge, claim, or defense**, the character or trait may also be proved by relevant specific instances of the person's conduct.



# FRE Roadmap

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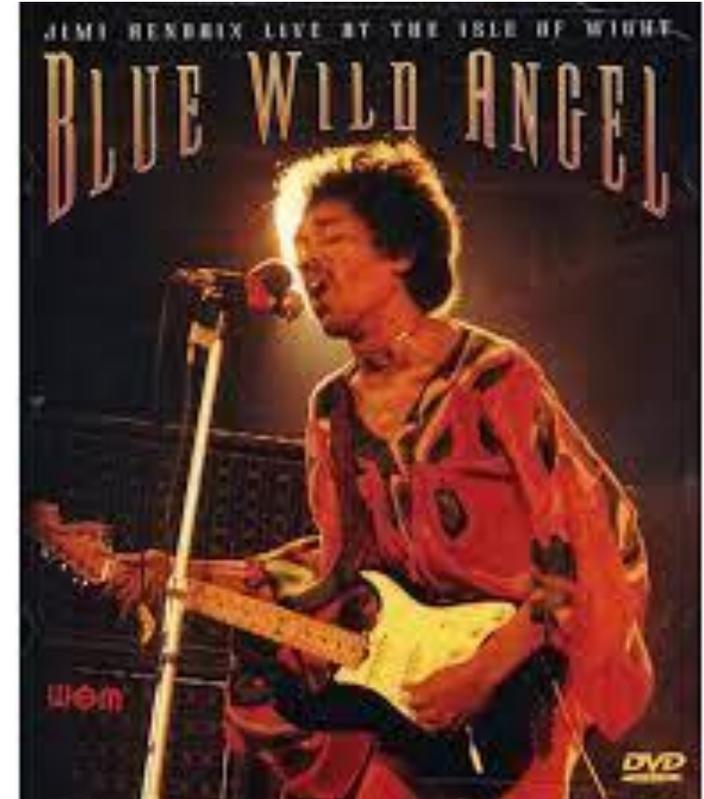
# 3. Exceptions for a D or V in a Criminal Case-FRE 404(a)(2)

- A. Evidence of D's good character
- B. Govt's right to rebut
- C. Evidence of V's character
- D. Govt's right to rebut
- E. Govt's right to rebut E that V was first aggressor
- F. Prohibited Use of V's sexual behavior or disposition



# A. Evidence of D's good character

- FRE 404(a)(2)(A) allows D to offer evidence of D's **pertinent** trait
- Pertinent is synonymous with relevant. United States v. Angelini, 678 F.2d 380 (1st Cir. 1982).
- Reputation for being **law-abiding** always relevant
- Method of proving: **reputation and opinion testimony.**



# Traits likely to be “pertinent” as to a criminal defendant:

- Peacefulness - if crime is one of violence
- Honesty - if crime is one that involves criminal intent or deceit
- Truthfulness - if crime is one that involves deceit or if defendant testifies
- Abstinence - if crime is one that involves drug or alcohol use

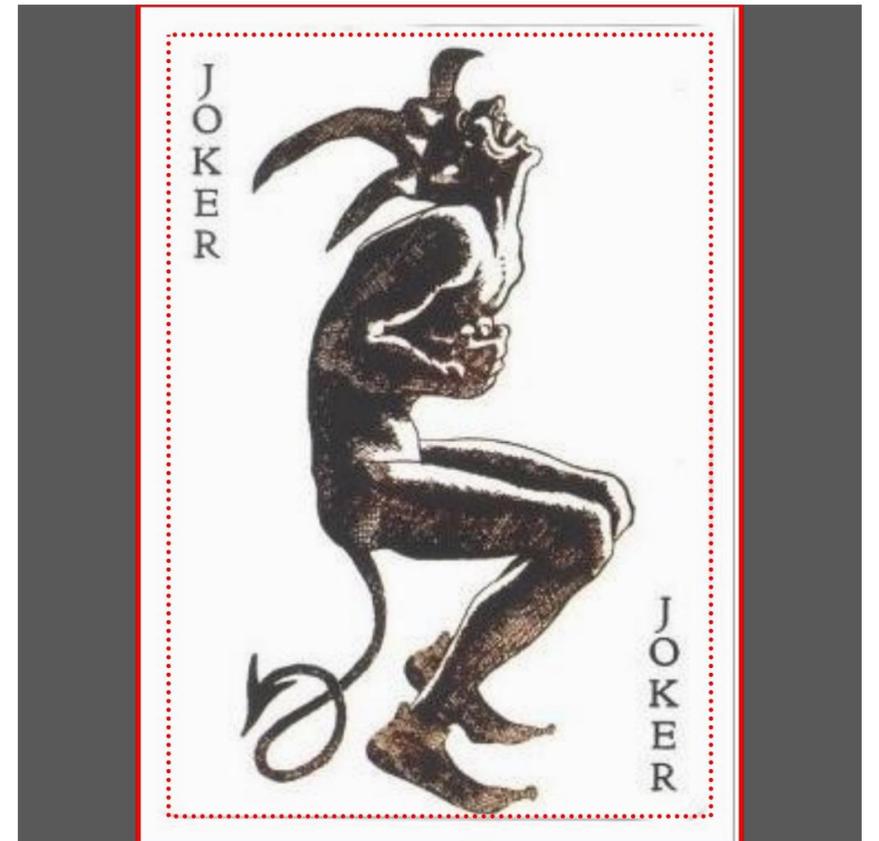
## Defense favorable case:

- U.S. v. John, 309 F.3d 298 (5<sup>th</sup> Cir. 2002)
- A jury convicted the defendant on two counts of sexual contact with a minor after he allegedly engaged in sexual contact with his eleven-year-old foster daughter.
- The defendant offered opinion testimony that he had a good marriage, was a good parent, had never been accused of sexual misconduct, and that he had a good reputation for sexual morality and decency in the community.
- The DC allowed the w's but denied a jury instruction regarding character

- The Fifth Circuit concluding that the district court committed reversible error by “failing to instruct the jury that it could consider evidence” of the defendant’s good character.
- The Fifth Circuit noted that there were no “witnesses or other corroborating evidence supporting the child’s accusations,” so “guilt hinged entirely on credibility.”
- The Fifth Circuit noted that the defendant’s theory was that he “did not commit the act at all” and that “[t]he fact that character evidence may create a reasonable doubt as to guilt...is most compelling in cases such as this, where the only evidence linking the defendant to the crime is the victim’s word.”
- The case was reversed and remanded.

# Defense favorable case:

- U.S. v. Hassouneh, 199 F.3d 175, 182-183 (4<sup>th</sup> Cir. 2000)
- D prosecuted for making false statements about placing bomb in airplane
- D argued that his reputation as a joker was relevant to negate finding that he acted maliciously
- District Court excluded E of D's reputation as a jokester
- Fourth Circuit reversed because E negates finding that he acted maliciously

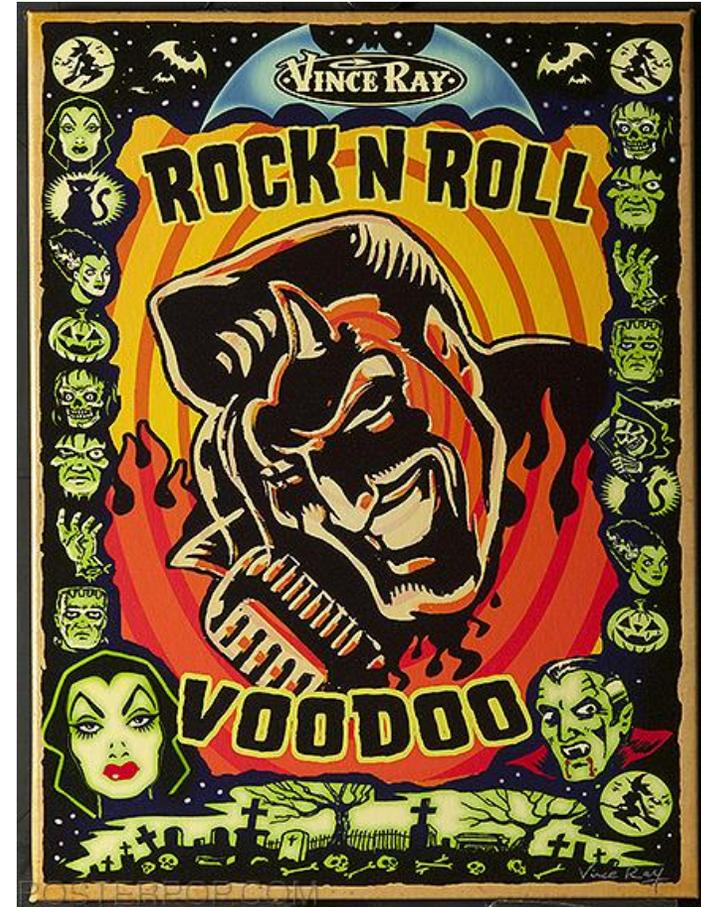


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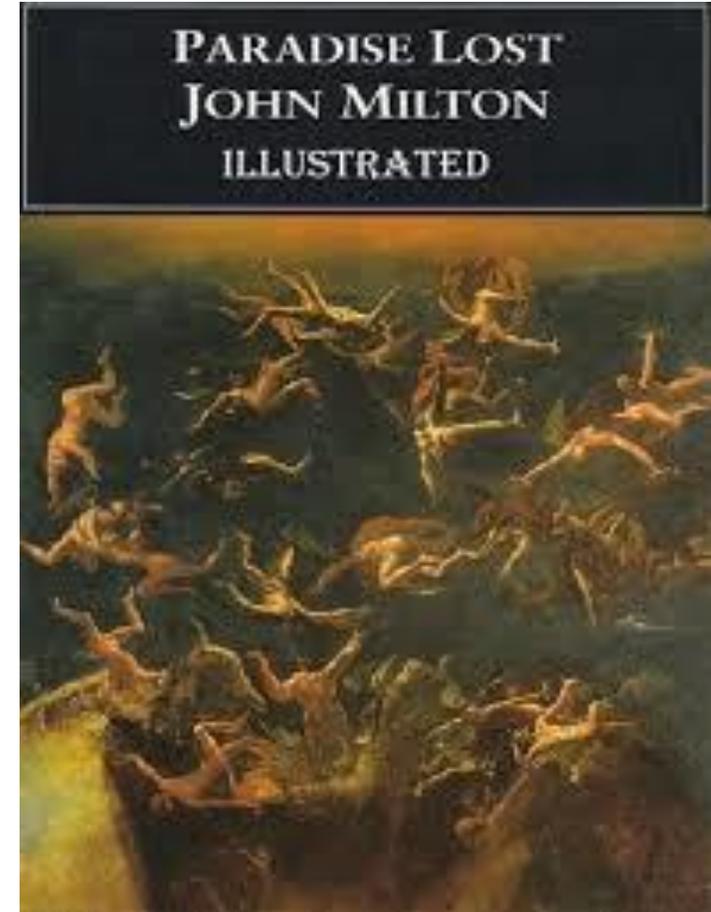
# B. Prosecution's right to rebut E of D's character

- FRE 404(a)(2)(A) gives the P the right to rebut if the D introduces evidence of their character.
- P evidence must be for same character trait raised by D.
- Method of proving: reputation and opinion testimony
- **On cross-examination, court may allow E of specific instances of conduct**



# Pros. right to rebut E of D's character (cont.)

- For prosecution to engage in cross examination regarding specific instances of conduct, it must be:
  - (1) Allowed by the court **in its discretion**
  - (2) Prosecution **must have good faith basis** for believing D committed act
  - (3) Prosecution is “**stuck**” with W's answer



## C. Victim's character

- FRE 404(a)(2)(B) gives the D the right to offer E of V's **pertinent** trait
- Method of proving: **reputation and opinion testimony.**
- This Rule is subject to the Limitations of **FRE 412** (Victim's predisposition in sex cases)



# D Favorable case: United States v. Keiser, 57 F.3d 847, 855 (9th Cir. 1995)

- The defendant was convicted of assault resulting in serious bodily injury. At trial, the defendant claimed that he was acting in defense of his brother.
- On appeal, the Ninth Circuit noted that the FRE's Advisory Committee's note to this rule "indicates that a victim's 'violent disposition' is exactly the sort of evidence" that Rule 404(a)(2) was intended to encompass." Whether the victim "is a violent and angry person is certainly relevant to the defendant's claim that he was acting in defense of his brother" because the victim's "**violent character makes it more likely that his behavior on the night of the shooting was violent**—which supports the defendant's defense that he was shooting to protect his brother—than it would be if [the victim] were peaceable."

The Court noted that **“the very purpose of victim character evidence is to suggest to the jury that the victim did indeed act in conformity with his violent character at the time of the alleged crime against him”** and that the defendant’s knowledge of the “victim’s character at the time of the crime has no bearing on whether victim character evidence should come in under section 404(a)(2).”

**the very purpose of victim character evidence is to suggest to the jury that the victim did indeed act in conformity with his violent character at the time of the alleged crime against him**

# D. Prosecution's right to rebut E of V's character

- FRE 404(a)(2)(B) gives the P the right to rebut if the D introduces evidence of the V's character:
  - (1) P can offer E of V's good character, and
  - (2) Offer E of D's same trait

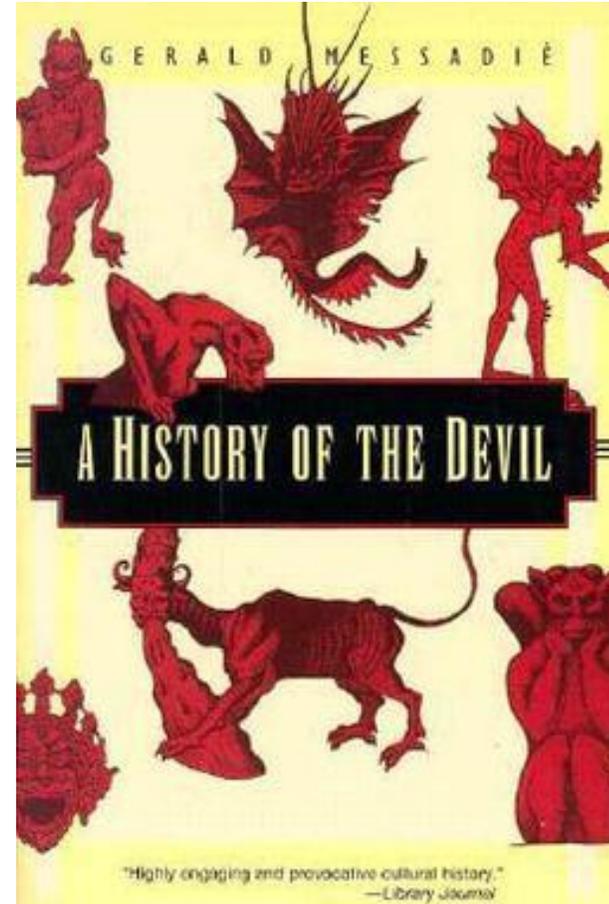


# D. Prosecution's right to rebut E of V's character (cont).

- Methods of proving:
- Method of proving: **reputation and opinion testimony**
- On cross-examination, court **may** allow E of specific instances of conduct
- For prosecution to engage in cross examination regarding specific instances of conduct, it must be:
  - (1) Allowed by the court in its discretion
  - (2) Prosecution must have good faith basis for believing D committed act
  - (3) Prosecution is “stuck” with W's answer

# E. FRE 40(a)(2)(C)-Gov't right to rebut E that V was first aggressor

- FRE 40(a)(2)(C) allows Govt to rebut E that V was first aggressor
- Must be a **homicide case**
- By offering E of V's trait for peacefulness
- Method of proving: **reputation and opinion testimony.**



# F. FRE 412-Limitations on E re: V's character in Sex Cases

- FRE 412 (a)(1) prohibits evidence that the V engaged in other **sexual behavior**
- FRE 412(a)(2) prohibits evidence of the V's **sexual predisposition**
- **Rule creates 3 exceptions in criminal cases:**
  - (1) FRE 412(b)(1)(A)-**Source of semen, injury or other physical E**
  - (2) FRE 412(b)(1)(B)-**Consent**
  - (3) FRE 412(b)(1)(C)-E whose exclusion would **violate D's Q right**
- Rule also creates a procedure to determine admissibility

# FRE 412-Limitations on E re: V's character in Sex Cases (cont.)

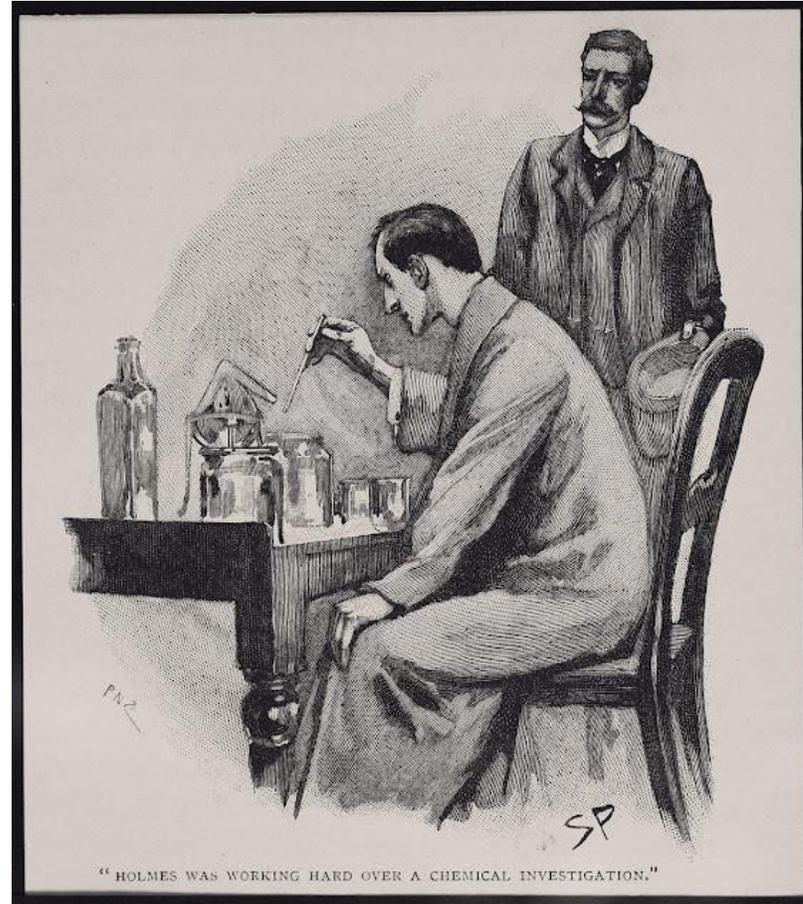
- “Sexual behavior” is given broad interpretation and includes:
  - Evidence of any physical sexual conduct,
  - Evidence that might imply sexual conduct (use of contraceptives, birth of out-of-wedlock child, venereal diseases)
- Victim’s mode of dress, speech or life-style
- Federal Courtroom Evidence, Fifth Edition, J. Cotchett

# Examples

- U.S. v. Withorn, 204 F.3d 790 (8<sup>th</sup> Cir. 2000)
- FRE 412 bars admission of evidence of past sexual behavior of victim including that this V had made prior accusation of sexual assault against another man
- U.S. v. Papakee, 573 F.3d 569, 572 (8<sup>th</sup> Cir. 2009)
- FRE 412 bars admission of V's sexual proposition to deputy taking her statement regarding sexual abuse because it was E of "sexual behavior"

# Exception to FRE 412(b)(1)(A)- Source of semen, injury or other physical E

- Defense favorable example:
- U.S. v. Bear Stops, 997 F.2d 451, 545 (8<sup>th</sup> Cir. 1993)
- E that V had been previously molested was admissible to show that D was not only person who could have caused V to exhibit manifestations of a sexually abused child



# Exception to FRE 412(b)(1)(B)- Consent

- **Defense favorable example:**
- **United States v. Begay, No. 16-2011 WJ, 2018 WL 2306981 (D.N.M. May 21, 2018):**
- The defendant was charged with sexual abuse and aggravated sexual abuse of his second cousin.
- The defense filed a motion seeking the admission of specific instances of sexual encounters between him and the victim to prove consent under Rule 412(b)(1)(B).
- At the hearing on the motion, defense counsel proffered that the defense intended “to put on evidence of numerous specific instances of consensual sexual encounters between Defendant and complainant that span a two-year period, including dates, times, and locations.” Id. at \*2.
- The court granted the defendant’s motion allowing this evidence under the Rule 412(b)(1)(B) consent exception. Id.

# **FRE 412(b)(1)(C)-E whose exclusion would violate D's Q rights**

**Defense favorable example:**

**U.S. v. Begay, 937 F.2d 515, 519 (10th Cir. 1991)**

- The defendant was charged with aggravated sexual abuse.
- At trial, a doctor testified that “it was impossible to determine...whether [the victim’s] symptoms reflected one violent sexual penetration or repeated penetrations over a period of time.”
- The trial court precluded the defense from presenting testimony that—on three separate occasions in the summer immediately preceding this incident—another man “assault[ed]” the victim.

- On appeal, the defendant argued that the trial court erred in excluding evidence of relevant incidents of the alleged victim's prior sexual activity under Fed. R. Evid. 412, and that exclusion violated Ds right to confrontation
- The Tenth Circuit reversed the defendant's conviction and remanded for a new trial, noting that the evidence should have been admitted to fully explain the victim's physical injuries and to support the defense theory that the injuries were caused by a previous assailant rather than by the defendant.

# FRE 412(c)- Procedure to determine admissibility

- If D intends to offer E under this FRE, it must:
  - 1. File a motion describing the E and its purpose
  - 2. Do so 14 days before trial (unless good cause)
  - 3. Serve motion on all parties
  - 4. Notify V or guardian/representative
  - 5. Court must conduct an *in camera* hearing and give the V and parties opportunity to be heard
  - 6. Motion/hearing must be sealed unless court orders otherwise

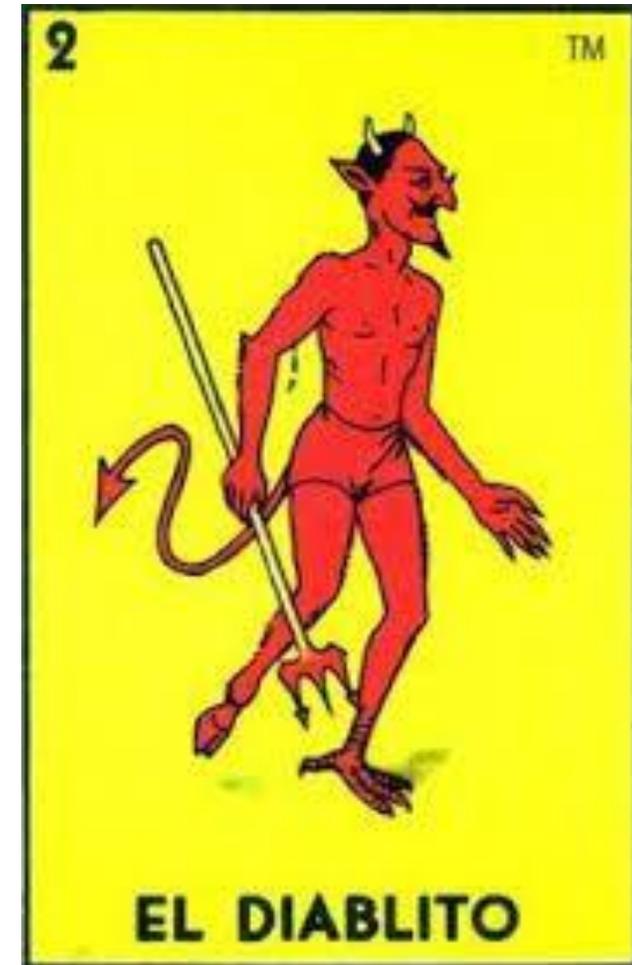
# Failure to follow FRE 412 admissibility procedure

- U.S. v. Seymour, 468 F.3d 378, 387
- D failed to follow admissibility procedure in FRE 412, therefore, District Court did not err in excluding testimony of D's friend that sexual relationship between D and V were consensual



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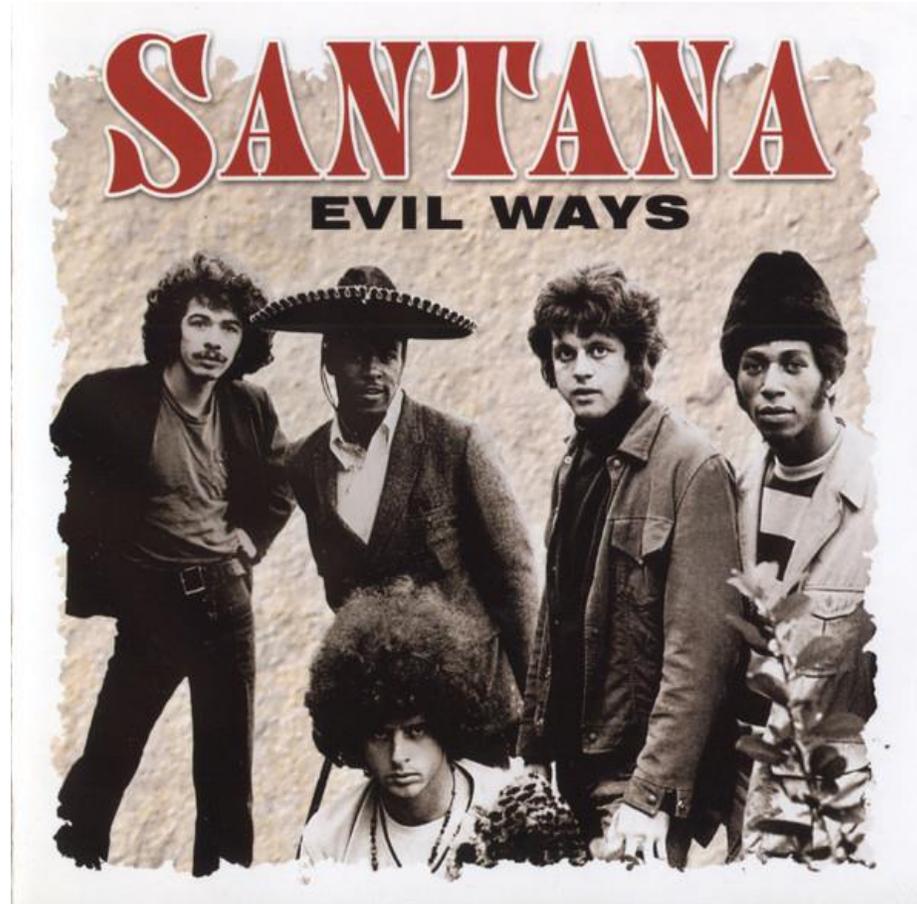


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# Exceptions for a Witness



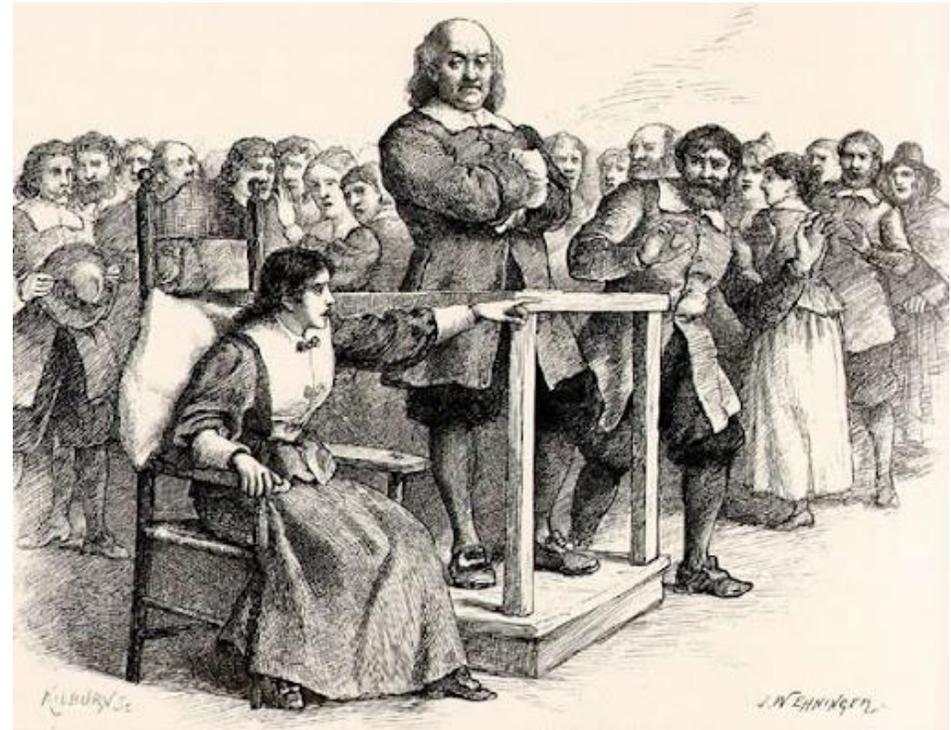
# FRE 608(a)-Character of W

- Only relevant character trait of a witness is **truthfulness or untruthfulness.**
- **Subject to FRE 403 balancing**
- E of truthful character of W only admissible **after character for truthfulness has been attacked.**



# FRE 608 (a)-Credibility of a W: Reputation/Opinion Testimony

- Opinion/Reputation evidence can support credibility or attack credibility.
- No E to support unless credibility is attacked



# FRE 608 (b)-Character of Witness Specific Instance of Conduct

- **No extrinsic evidence** about Specific Instances of Conduct (SIC) of a Witness.
- Cross-examination about SIC OK if the acts relate to truthfulness or untruthfulness of the witness, **in court's discretion.**
- Court might allow in c/e SIC E of either:
  - (1) the W, or
  - (2) another W whose character the W being cross-examined has testified about

# D favorable case:

- United States v. Meserve, 271 F.3d 314, 328 (1st Cir. 2001):
- The defendant was convicted of robbery and firearm offenses.
- At trial, the government asked a defense witness about being a “tough guy” and if he had “been in a lot of fights in [his] day.”
- On appeal, the defendant argued that the district court erred by permitting the government to cross-examine the defense witness about the fights and his alleged violent reputation.
- The First Circuit agreed, concluding that these questions were impermissible under Rule 608. Rule 608(a) specifically limits evidence of a witness’s character to **truthfulness or untruthfulness**

# Defense favorable case:

- United States v. Davis, 639 F.2d 239 (5th Cir. 1981):
- The defendant was convicted of, *inter alia*, possession with intent to distribute marijuana.
- At trial, the court excluded the defendant's two witnesses which were proffered to discredit the key government witness.
- On appeal, the Fifth Circuit noted that Rule 403 gives the trial court discretion to exclude evidence where the probative value is "substantially outweighed" by the needless presentation of cumulative evidence.
- However, the trial court's discretion to exclude otherwise admissible evidence brought by the defendant, is limited by his Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor."

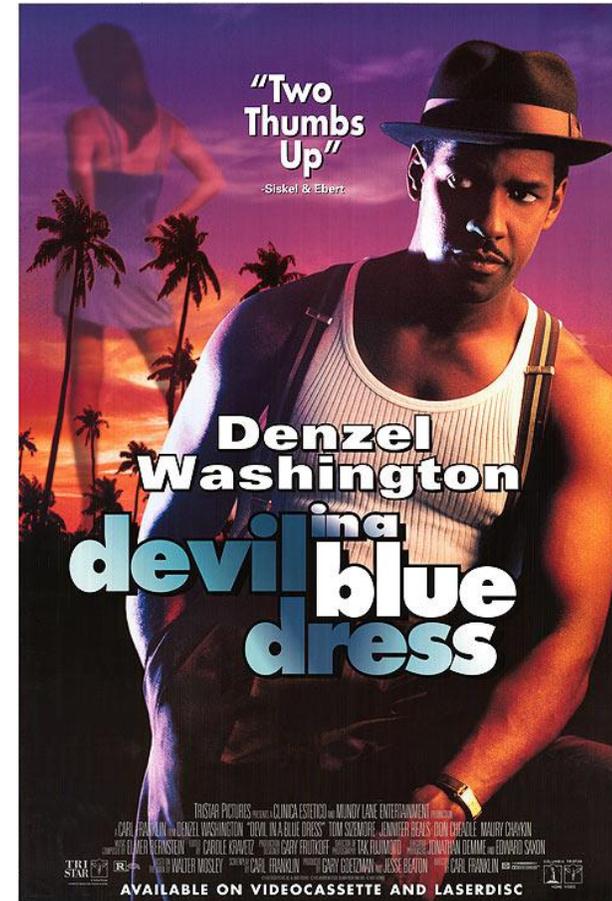
- The Fifth Circuit held that the district court erred in not allowing the defendant's impeachment evidence because the role of the government witness was so central to the case and the jury's perception so crucial to the conviction.
- Specifically, the court concluded that the defendant's impeachment testimony would not have been needlessly cumulative because no other impeachment evidence, except for the government witness's own admission of his prior felony convictions, was admitted. Also, no measurable delay would have resulted from the admission of the proffered evidence

# Defense favorable case

- United States v. Dotson, 799 F.2d 189 (5th Cir. 1986)
- The defendant was convicted of receiving firearms as a convicted felon.
- At trial, the defendant took the stand and presented a defense of necessity. To rebut his testimony, the government proffered several agents' opinion testimony regarding the defendant's veracity.
- On appeal, however, the Fifth Circuit held the agents lacked the proper foundation to present their testimony. For example, two agents only stated they took part in the investigation of the defendant and gave no other testimony about how long they had known him, "or in what way they had acted to form their opinions of his veracity." Additionally, another agent stated she knew the defendant for six or seven years but provided no **further** basis for her opinion other than the fact she also took part in the investigation.
- The Fifth Circuit concluded that the district court erred because the agents' testimony was not sufficiently reliable under Rule 608(a), and admitting their testimony was reversible error.

# FRE 607-Who might attack W's character for truthfulness ?

- FRE 607: Any party may attack the credibility of a witness including the party who called them to testify.



# FRE 609-Impeachment by E of Criminal Conviction

- FRE 609 allows a party to attack a W's credibility by E of prior conviction
- **Drivers:**
- What type of case is it? (Is dishonest act involved)
- Is the W the D?
- How much time has passed since conviction/release?
- Has the conviction been pardoned or annulled?
- Was adjudication a juvenile one?

# FRE 609-Specifics of Conviction

- The specifics of a conviction should not be allowed into evidence. Instead, what should be allowed are:
- Date of conviction,
- Jurisdiction of conviction,
- The offense or statute involved.
- **BEWARE:** Opening the door

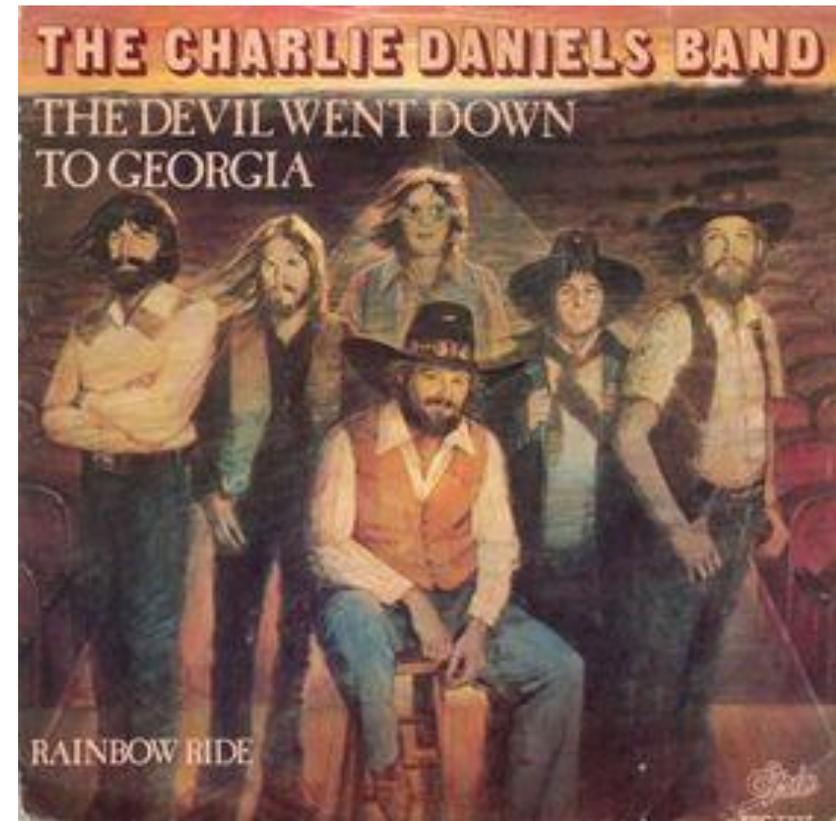


# Defense favorable case

- United States v. Commanche, 577 F.3d 1261, 1270-1271 (10th Cir. 2009):
  - The defendant was convicted of assault with a dangerous weapon with intent to do bodily harm. United States v. Commanche.
  - At trial, the government introduced the defendant's two prior convictions for aggravated battery. The government further cross-examined the defendant about the details of those crimes. For example, that the crimes involved cutting instruments consistent with the box cutter used in the present case.
  - On appeal, the Tenth Circuit held that while the prior convictions were admissible, the details of the crimes were not. The court reasoned that Rule 609(a)(1) makes "it improper for the prosecution to examine into the details of the crime for which the accused was convicted. The cross-examination should be confined to a showing of the essential facts of convictions, the nature of the crimes, and the punishment."
  - The Tenth Circuit concluded that the errors were not harmless and reversed and remanded the case.

# FRE 609(a)(2)-Dishonest act element of crime of conviction

- If dishonest act or false statement is **element of crime**: conviction can always be used to impeach W (false pretenses, forgery, fraud, etc.)
- Admissible whether conviction is felony or misdemeanor
- Court has **no discretion to exclude under FRE 403** (probative vs. prejudice)
- Subject to 10-year rule

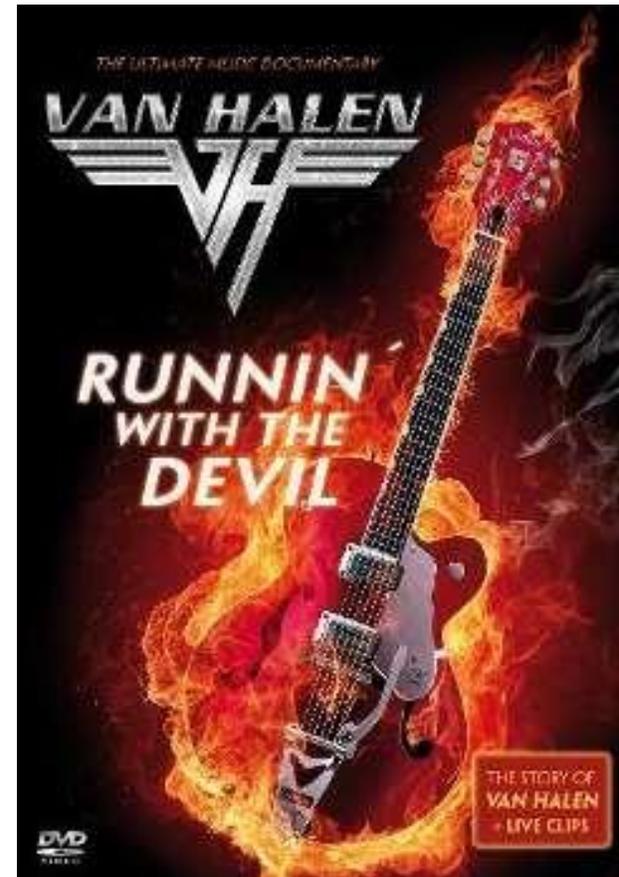


# Defense favorable example

- **United States v. Barb, 20 F.3d 694 (6th Cir. 1994):**
  - The defendant was convicted of aiding and abetting wire fraud.
  - At trial, the district court admitted evidence of the defendant's prior misdemeanor convictions for issuing worthless checks under Rule 609(a)(2).
  - On appeal, the defendant argued that the worthless check statute under which she was convicted, was “not a *per se* crime of dishonesty.” According to the defendant, “without inquir[ing] into the factual circumstances underlying her convictions, there [was] no evidence that the convictions involved dishonesty or false statement.”
  - The Sixth Circuit agreed and reversed the defendant's conviction. The court reasoned that issuing a worthless check is not, as a matter of law, “a conviction involving dishonesty and adds nothing to the factfinder's ability to judge the credibility or propensity for truthfulness of a witness, the purpose of Rule 609(a)(2).” The court reversed and remanded the conviction.

# FRE 609(a)(1)-Dishonest act not element of crime of conviction

- If dishonest act is not an element of crime:
- Conviction can be used if felony
- Can be used against D W if **probative value of e outweighs prejudicial evidence.**
- Will be used against other W's unless **probative value substantially outweighed by unfair prejudice.**
- Subject to 10-year rule.

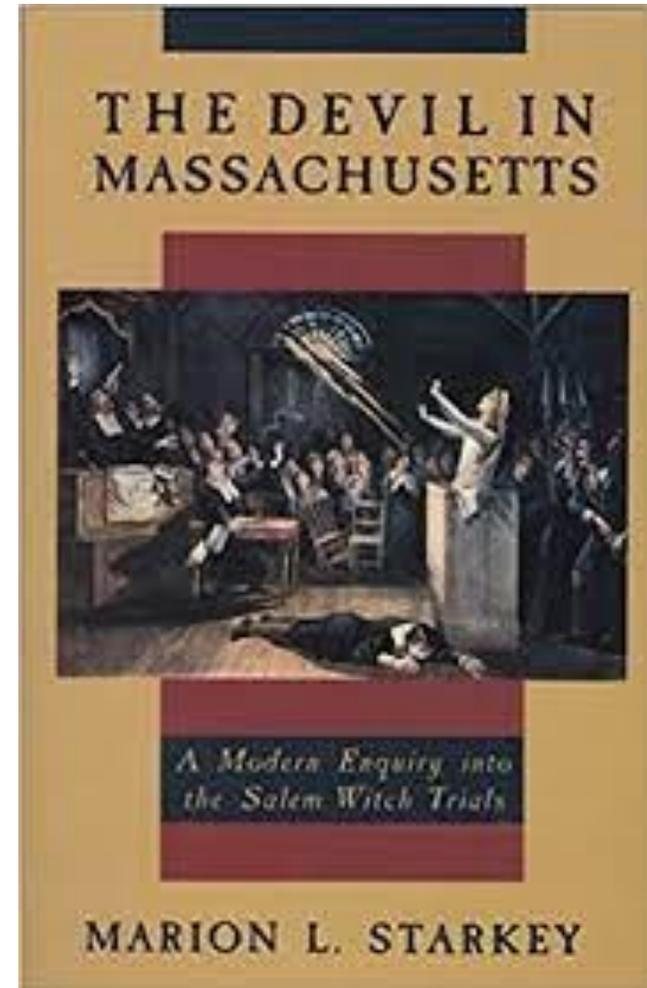


# Defense favorable case

- United States v. Sanders, 964 F.2d 295 (4th Cir. 1992):
  - 
  - The defendant was convicted of, *inter alia*, assault with a dangerous weapon with intent to do bodily harm.
  - At trial, the defendant testified, and the district court allowed the government to present evidence of his prior convictions for assault and possession of contraband.
  - On appeal, the Fourth Circuit noted that, although the prior conviction may be generally probative of the defendant's lack of credibility and admissible under 609(a)(1), the prior convictions were "extremely prejudicial because they involved the exact same type of conduct for which [the defendant] was on trial."
  - The Fourth Circuit reversed the assault conviction and remanded the case.

# FRE 609(b)-Ten-year rule

- If more than 10-years have passed since W's conviction or release from confinement, conviction does not come in unless:
- Probative value **substantially outweighs** prejudicial effect, **and**
- Proponent gives **reasonable written notice**



# FRE 609(c)-Effect of pardons

- E of a conviction not admissible if the person has been the subject of a **pardon, annulment or equivalent procedure**, and
- The person has not been **convicted of a later felony**, or
- The conviction has been the subject of a pardon, etc., based on **finding of innocence**



# FRE 609(d)-Juvenile convictions

- E of a juvenile adjudication is admissible **only if**:
- Adjudication was of a W **other than the D**
- An adult conviction for that offense **would be admissible** to attack W's credibility
- Admitting E is **necessary** to determine guilt or innocence



# Defense favorable case

- Davis v. Alaska, 415 U.S. 308 (1974):

- The petitioner was convicted of grand larceny and burglary.

- At trial, the prosecutor successfully sought a protective order to prevent the defense from referencing the witness's juvenile record on cross-examination.

- The United States Supreme Court held that denying the petitioner the opportunity to use this evidence on cross-examination violated his right of confrontation. The Court reasoned that the defendant "sought to introduce evidence of [the witness's] probation for the purpose of suggesting that [the witness] was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light." Moreover, the court opined that examining the witness about his juvenile record would have a "real possibility" of causing "serious damage to the strength of the State's case."

- Therefore, the defendant's right to question the possible bias in the testimony of a crucial identification witness outweighed any temporary embarrassment to the witness by the disclosure of his juvenile record.

# FRE 609(e)-Pendency of appeal

- A conviction that satisfies FRE 609 is admissible even if an appeal is pending
- **But**, E of the fact that appeal is pending is **also admissible**

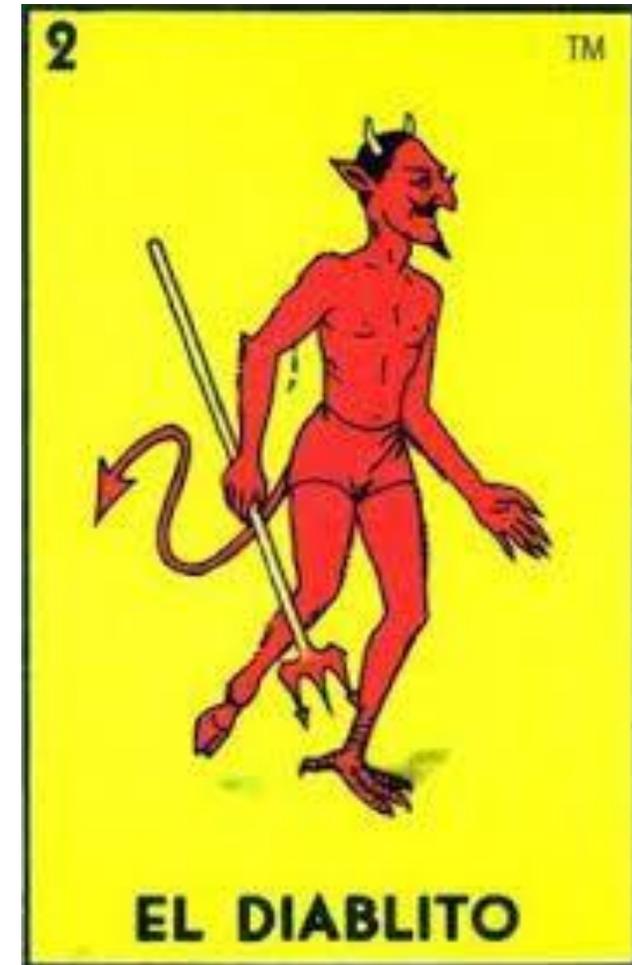


# FRE 609-Taking “sting” out of conviction

- A party may take the sting out of the impeachment by bringing the conviction up on direct.
- **BEWARE:**
- A defendant waives challenging on appeal the admission of a prior conviction if counsel brings up the convictions on direct examination to take the sting out.
- See Ohler v. United States, 529 U.S. 753, 760 (2000)(noting that “[a] defendant may not appeal an evidentiary ruling allowing the admission of evidence of a prior conviction if the defendant herself introduced the prior conviction, even if the defendant properly objected to the ruling.”);

# FRE Roadmap

- 1. FRE 404(a)(1)-Propensity prohibition
- 2. FRE 405-Methods of proving character
- 3. FRE 404(a)(2)-Exceptions for D/V
- 4. FRE 404(a)(3)-Exceptions for W (referencing FRE's 607, 608 and 609)
- 5. FRE 404(b)-Other crimes/wrongs
- 6. FRE 413/414-Similar crimes in Sexual Assault, Child Molestation



# FRE 404(b)(1)-Propensity prohibition

- FRE 404(b)(1) sets out prohibition on use of other crimes, wrongs or acts to establish propensity
- FRE 404(b)(2), however, permits other crimes, wrongs or acts E to establish **(MIMIC)**:
  - Motive
  - Intent
  - Modus operandi
  - Identity
  - Common scheme or plan
- FRE 404(b)(3)-Rule subject to **notice requirement**
- **Can be used by D**

# FRE 404(b)(3)-Important changes to Notice requirement

- A. Fed. R. Evid. 404(b) was amended effective **Dec. 1, 2021** in ways that should benefit defendants in criminal cases.
- B. Under the Amended Rule:
  - 1. The defendant does **not** have to request 404(b) notice anymore
  - Prosecution has to provide it if they want to use any 404(b) evidence

Please Notice This



# FRE 404(b)(3)-Important changes to Notice requirement (cont.).

- 2. The prosecution now has to:
  - a. Identify the bad act,
  - b. Articulate the non-propensity reason for which the evidence is offered,
  - c. Provide the basis for concluding why the evidence is relevant,
  - d. Do the above in writing before trial (unless excused, for good cause, by the court).

- In arguing that other acts evidence does not fall under the exception under **Fed. R. Evid. 404(b)(2)**, defense counsel should argue that:
  - The evidence is **propensity evidence**.
  - The evidence is **not relevant** to a consequential issue

- The evidence **does not support** a jury conclusion that act was committed by the defendant.
- Other acts evidence is not **sufficiently similar**
- Other acts evidence might be excluded if its probative value is substantially outweighed by the potential for unfair prejudice, confusion of issues, or undue delay.

- **United States v. Lail, 846 F.2d 1299 (11th Cir. 1988):**

- A jury found the defendant guilty of two bank robberies.

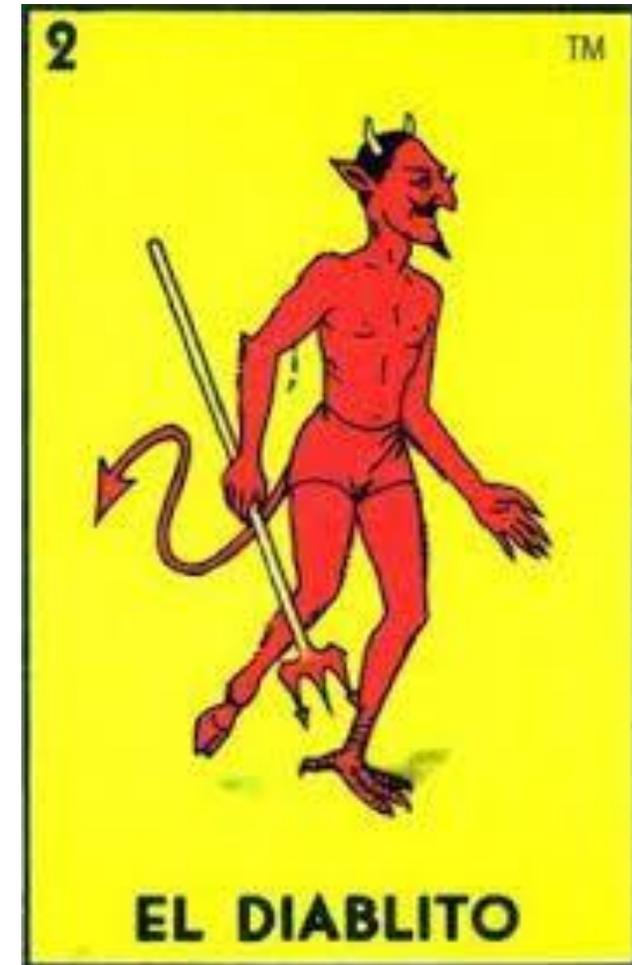
- In each robbery, a “lone white male dressed in a tee-shirt and jeans entered the bank with a briefcase,” approached a teller, took a gun out of the briefcase, demanded money, then fled on foot. In each case, the robber used “little or no disguise” and “was in the bank for only one to two minutes.” At trial, the prosecution offered the testimony of an eyewitness to a third, uncharged bank robbery.

- On appeal the defendant argued that the district court erred in allowing this evidence. The government maintained that the evidence was proper because the “404(b) robbery had four traits in common with the charged robberies: (1) a lone gunman, (2) use of a handgun, (3) lack of disguise, and (4) proximity in time of occurrence.”

- The Eleventh Circuit disagreed noting that the first three traits are common to many robberies and that none of them could be called a “signature” trait.
- The court also pointed out that the dissimilarities between the 404(b) robbery and the charged robberies were more striking. In the 404(b) robbery, the robber used dynamite as his main weapon, posed as a businessman and made two trips to the bank, and forced the bank manager to leave with him.
- The Eleventh Circuit concluded that due to the “substantial differences between the crimes, the 404(b) evidence should have been excluded.” The appellate court reversed the judgment of conviction and remanded the case.

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# FRE 413-Similar Crimes in Sexual-Assault Cases

- If Defendant accused of sexual assault case, the court may admit evidence that the defendant committed “any other sexual assault.”
- **Evidence might be considered for any matter to which it is relevant=propensity**
- **Evidence is subject to FRE 403 balancing**
- The prosecution must disclose its intent to offer the evidence;
- Disclosure includes “*witnesses’ statements or a summary of the expected testimony*”; and
- The prosecution must disclose *15 days prior to trial* or at a later time, if the court allows for good cause.

# FRE 414-Similar Crimes in Child-Molestation Cases

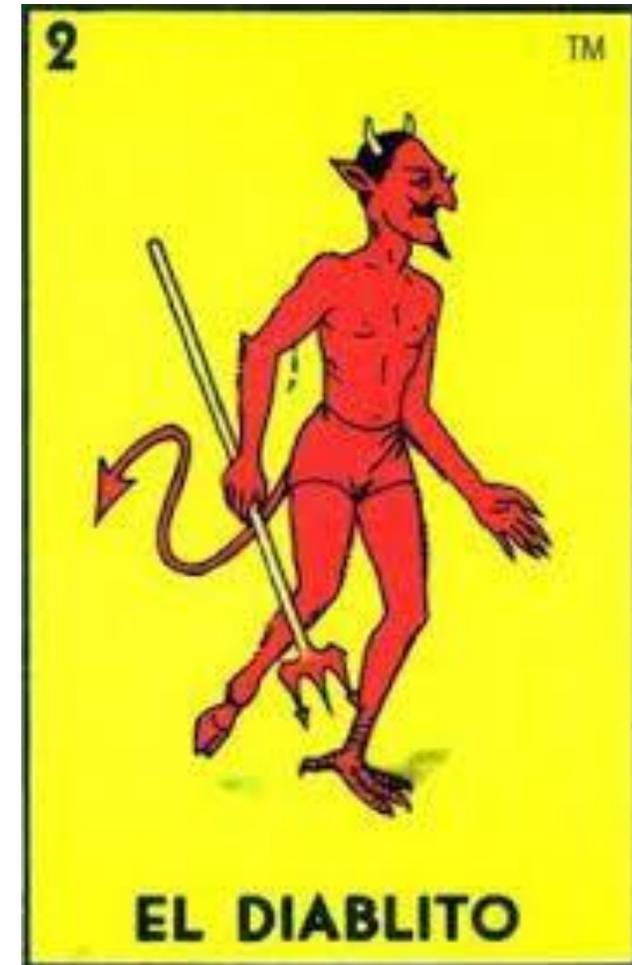
- If Defendant accused of child molestation, the court may admit evidence that the defendant committed “any other child molestation.”
- **Evidence might be considered for any matter to which it is relevant=propensity**
- **Evidence is subject to FRE 403 balancing**
- The prosecution must disclose its intent to offer the evidence;
- Disclosure includes “*witnesses’ statements or a summary* of the expected testimony”; and
- The prosecution must disclose *15 days prior to trial* or at a later time, if the court allows for good cause.

# Defense favorable case

- **United States v. Bunty, 617 F.Supp.2d 359 (E.D. Pa. 2008):**
- A grand jury indicted the defendant on charges of possession and transportation of child pornography. Prior to trial, the government filed a motion to admit evidence of other crimes under Federal Rules of Evidence 414 and 404(b). Specifically, the government sought to introduce evidence that the defendant sexually abused one of his sons and his granddaughter to show that the defendant had a propensity to commit sexual crimes involving prepubescent children.
- The court denied the government's motion, noting that the probative value of the testimony of the defendant's son and granddaughter was substantially outweighed by the danger of prejudice to the defendant. When conducting the requisite Rule 403 balancing test, the court noted that the acts that the defendant's son and granddaughter would testify to failed "to share enough similarities with the charged offense to make their testimony highly probative." The government's argument that the prior acts demonstrated the defendant's interest in prepubescent children was insufficient because "such a similarity is inherent in all Rule 414 evidence," and the alleged conduct was vastly different from the defendant's current charges.
- The testimony of the defendant's son and granddaughter would involve conduct "much more than just possession or transportation of child pornography" because their testimony involved "allegations that defendant engaged in direct sexual contact with children."

# FRE Roadmap

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