DETERRING DEFENDANTS FROM TAKING THE STAND: THE EXTENSION OF *STATE V. WICKHAM* TO RULE 404(b)

I. INTRODUCTION

In 1990, the Alaska Supreme Court ruled that a defendant must testify at trial to preserve his right to appeal an *in limine* ruling admitting impeachment evidence against him under Alaska Rule of Evidence 609(a). In *State v. Wickham*,[1] the court agreed with the United States Supreme Court's reasoning in *Luce v. United States*[2] that unless a defendant testifies in this context, the reviewing court cannot fairly determine whether the challenged evidence was prejudicial.[3] The *Wickham* court also recognized the possible danger under the prior standard, which did not require a defendant's trial testimony, of a defendant ensuring reversal of a conviction by claiming that it was the adverse ruling that prevented him from testifying.[4]

Although both *Luce* and *Wickham* were limited to Rule 609(a), which governs the admissibility for impeachment purposes of evidence concerning a witness' prior convictions, some courts, including the Alaska Court of Appeals, have extended the reasoning of those cases to the admission of evidence under other rules. The most troublesome of these extensions involves Rule 404(b), which governs the admissibility of evidence of a defendant's prior conduct as substantive proof of his guilt. This note focuses on the possible extension of the *Wickham* rationale to Alaska Rule 404(b) and discusses why such an extension should be rejected.

Part II of this note provides a brief overview of Rules 609(a) and 404(b). Part III discusses the *Luce* and *Wickham* decisions, and Part IV considers the possibility that Alaska will be faced with the decision on whether to extend *Wickham*. Finally, Part V discusses how extending *Luce* and *Wickham* to Rule 404(b) would unfairly burden a defendant's decision to testify and would deter defendants from taking the stand in their own defense.

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1. 796 P.2d 1354 (Alaska 1990).
2. 469 U.S. 38 (1984).
3. *Wickham*, 796 P.2d at 1358; *see Luce*, 469 U.S. at 41-42.
4. *Wickham*, 796 P.2d at 1357; *see Luce*, 469 U.S. at 42.

II. ALASKA RULES OF EVIDENCE 609(a) AND 404(b)

A. Alaska Rule of Evidence 609(a)

Alaska Rule of Evidence 609(a) governs the introduction of evidence of a witness' prior convictions for impeachment purposes. The rule expressly provides that: "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is only admissible if the crime involved dishonesty or false statement."[5] Unlike the federal rule, which allows admission of evidence of any felony for impeachment purposes,[6] the Alaska rule allows impeachment only when the previous crime involved dishonesty or false statement.[7] For example, if a defendant with a prior conviction for larceny is accused of rape, Alaska Rule 609(a) permits the introduction of evidence of the previous conviction to attack the defendant's credibility in the rape trial because the conviction is related to a crime involving dishonesty.[8] Alaska's approach to the introduction of impeachment evidence under Rule 609(a) is thus more restrictive than the federal approach.[9]

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5. ALASKA R. EVID. 609(a). The rationale for the limitation to crimes involving dishonesty is that it ensures that the evidence is used to impeach credibility, and not used to attack the witness' character in violation of Rules 404 and 405. *See* ALASKA R. EVID. 609, commentary. Even if otherwise admissible, evidence of the prior conviction can be used only if its probative value outweighs its prejudicial effect. As Rule 609(c) provides:

> Before a witness may be impeached by evidence of a prior conviction, the court shall be advised of the existence of the conviction and shall rule if the witness may be impeached by proof of the conviction by weighing its probative value against its prejudicial effect.

ALASKA R. EVID. 609(c).

6. *See* FED. R. EVID. 609. The rule, as it applies to the accused in a criminal trial, provides:

> (a) For the purpose of attacking the credibility of a witness,
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> (1) [ ] evidence that an accused has been convicted of [a crime punishable by death or imprisonment in excess of one year] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
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> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609.

7. ALASKA R. EVID. 609(a).

8. *Cf.* Alexander v. State, 611 P.2d 469, 475-76 (Alaska 1980) (evidence of prior robbery conviction admissible, although defendant could have limited the prejudice by requesting that it be referred to as a "larceny-type offense").

9. ALASKA R. EVID. 609(a); id., commentary at 399 ("The Federal Rule . . . permits all impeachment that this subdivision would permit plus impeachment on the basis of any other conviction, if the crime was punishable by death or imprisonment in excess of one year in the jurisdiction in which the witness was convicted and is more probative than prejudicial.").

In addition to the statutory protections of Rule 609(a), the Alaska Supreme Court further protects defendants from unfair prejudice by admitting prior convictions only in a protected form, that is, by identifying the prior conviction generically rather than referring to its most precise name. The supreme court fashioned this approach in *Alexander v. State*.[10] In *Alexander*, the trial court allowed the defendant, who was on trial for rape, to be impeached with evidence of a prior robbery conviction.[11] On appeal, the defendant argued that robbery was not a crime "involv[ing] dishonesty or false statement" as required by Rule 609(a) and was therefore wrongly admitted.[12] The supreme court disagreed, but indicated that the defendant could have limited the prejudicial effect of the evidence by requesting that the conviction be referred to only in protected form as "a larceny-type offense."[13] The court reasoned that the jury would be less prejudiced by being told of the "larceny-type offense," because a robbery conviction involves elements of force or violence not generally associated with larceny convictions.[14]

Frankson v. State[15] took the suggestion in *Alexander* one step further. In *Frankson*, the defendant was on trial for robbery. The court of appeals held that the trial court should have referred to the defendant's prior robbery conviction only as a "felony involving dishonesty or false statement."[16] The court recognized that since the defendant was currently being tried for an offense for which he had previously been convicted, the likely prejudice to the defendant from admitting the prior conviction was extremely high.[17] By limiting the jury's knowledge of the defendant's prior conviction, the court lessened the prejudice to the defendant.

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10. 611 P.2d 469 (Alaska 1980).

11. *Id.* at 475. *Alexander* was decided under the Alaska Criminal Rules, which were replaced by the Alaska Rules of Evidence effective August 1, 1979. *Id.*

12. *Id.* at 475.

13. *Id.* at 476 n.18.

14. *See id.* ("The forcible nature of the taking is not probative on the question of a witness' credibility and may have an inflammatory effect on a jury.").

15. 645 P.2d 225 (Alaska Ct. App. 1982).

16. *Id.* at 228.

17. *Id.* This danger of prejudice is due to the possibility that the jury will use the information as evidence of the defendant's character or as evidence of his propensity to commit crimes, in violation of Rule 404(b). *See* ALASKA R. EVID. 609, commentary; *see also* Dunbar v. State, 677 P.2d 1275, 1281 n.6 (Alaska Ct. App. 1984) (noting that evidence relating to the specific charge used to impeach a defendant was only slightly probative, but highly prejudicial). Although recognizing that evidence relating to the specific charge is substantially prejudicial, the court of appeals has sometimes found it harmless error on the facts of particular cases. *See Dunbar*, 677 P.2d at 1281.

Thus, under Alaska Rule 609(a) the introduction of evidence of a witness' prior convictions for impeachment purposes is permitted, but with two significant limitations: the prior conviction must have been for a felony involving dishonesty or false statements, and it must be referred to in a generic manner to prevent undue prejudice to the defendant.

B. Alaska Rule of Evidence 404(b)

Alaska Rule 404(b) allows for the introduction of a wider scope of evidence and provides for different uses of that evidence than does Rule 609(a). Rule 609(a) evidence is limited to prior convictions, and its only permissible purpose is to attack a witness' credibility.[18] Alaska Rule 404(b), on the other hand, allows evidence of "other crimes, wrongs, or acts" to be introduced for the substantive purpose of proving elements of the crime charged.[19]

While not admissible to show solely a propensity[20] to commit a crime,[21] prior conduct evidence is admissible under Rule 404(b) to show motive,[22] opportunity,[23] intent,[24] preparation,[25] plan,[26] knowledge,[27] identity,[28] absence of mistake,[29] or accident[30]. Rule 404(b)

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18. *See* ALASKA R. EVID. 609(a).

19. The relevant section of the Rule provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible if the sole purpose for offering the evidence is to prove the character of a person in order to show that the person acted in conformity therewith. It is, however, admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ALASKA R. EVID. 404(b)(1).

20. In Velez v. State, 762 P.2d 1297 (Alaska Ct. App. 1988), the court noted that the definition of "propensity" is unclear. *Id.* at 1300 n.4. The court indicated, however, that evidence was used to show propensity "whenever the jury is asked to infer from the fact that a defendant engaged in certain conduct in the past that the defendant had a disposition or propensity to engage in similar conduct on other occasions, and to further infer that the defendant acted in accordance with that disposition by engaging in the conduct which constitutes one or more of the elements of the crime in question." *Id.*

21. "No case by case balancing is permitted; a prior crime may not be admitted to show propensity." Oksoktaruk v. State, 611 P.2d 521, 524 (Alaska 1980).

22. State v. Grogan, 628 P.2d 570, 572 (Alaska 1981). *But see* Soper v. State, 731 P.2d 587, 590 (Alaska Ct. App. 1987); Pletnikoff v. State, 719 P.2d 1039, 1043-44 (Alaska Ct. App. 1986).

23. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 190(7), at 563 (Edward Cleary ed., 3d ed. 1984) [hereinafter MCCORMICK].

24. Adkinson v. State, 611 P.2d 528, 531 (Alaska), *cert. denied*, 449 U.S. 876 (1980); Demmert v. State, 565 P.2d 155, 157 (Alaska 1977).

25. Preparation is often considered the same as plan.

26. Fields v. State, 629 P.2d 46, 49-51 (Alaska 1981).

27. Rhodes v. State, 717 P.2d 422, 424-25 (Alaska Ct. App. 1986).

also expressly states that evidence of prior acts may be admitted to show purposes not listed.[31] In many cases, these permissible factors are essential elements of the alleged crime,[32] or factors that if not proven would mandate that the defendant be acquitted.

Assume, for example, that a defendant is on trial for child molestation, and the prosecution attempts to introduce evidence that the defendant previously attempted to entice a child by saying, "Please help me find my red toy truck." Even if the defendant was not charged with the previous solicitation, the evidence could be admitted under Rule 404(b) to show identity in the current trial.[33] Identity might then be established beyond a reasonable doubt, because it would be unlikely that another person would use the same method of solicitation.

The dramatic effect of Rule 404(b) evidence lies in its permissible purposes. Jurors are specifically instructed to use evidence admitted under Rule 404(b) substantively.[34] Rule 404(b) evidence thus has a greater chance of being the determinative factor in the minds of the jurors than evidence admitted under Rule 609(a). As a result, the risk that the evidence will be highly prejudicial, confuse the issues, or mislead the jury also increases.[35]

Before the Alaska Legislature amended Rule 404(b) in 1991,[36] the rule was interpreted as one of exclusion:[37] the rule precluded the use

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28. State v. Grogan, 628 P.2d 570, 572 (Alaska 1981); Coleman v. State, 621 P.2d 869, 874-75 (Alaska 1980), *cert. denied*, 454 U.S. 1090 (1981); Garner v. State, 711 P.2d 1191, 1192-94 (Alaska Ct. App. 1986).

29. Adkinson v. State, 611 P.2d 528, 531-32, 535-36 n.3 (Alaska), *cert. denied*, 449 U.S. 876 (1980).

30. *Id.*

31. *See* ALASKA R. EVID. 404(b)(1).

32. *See* Page v. State, 725 P.2d 1082, 1085 (Alaska Ct. App. 1986) (where defendant was charged with theft in the second degree, prior conviction was admissible on cross-examination on the issue of intent).

33. Of course, evidence offered under Alaska Rule of Evidence 404(b) is subject to the balancing test of Alaska Rule of Evidence 403, which provides:

> Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ALASKA R. EVID. 403. However, where the prior conduct is highly distinctive, as in the example provided, it is also highly probative of identity. For an example of how Rule 404(b) evidence can become sufficiently probative on cross-examination to meet the Rule 403 standard, see Page v. State, 725 P.2d 1082 (Alaska Ct. App. 1986).

34. ALASKA PATTERN JURY INSTRUCTIONS (CRIMINAL) 1.43 (revised 1987).

35. *See* Oksoktaruk v. State, 611 P.2d 521, 524 (Alaska 1980); *see also* ALASKA R. EVID. 403.

36. ALASKA R. EVID. 404(b) (1990), *amended by* Alaska H.B. 105, 17th Legis., 1st Sess., 1991 Alaska Sess. Laws 2.

37. *See Oksoktaruk*, 611 P.2d at 524.

of prior bad acts for any purpose other than those explicitly enumerated.[38] The exclusionary nature of Rule 404(b) modified the balancing of probativity and prejudice normally performed in evaluating the admissibility of evidence by creating a presumption that evidence of prior bad acts should be excluded if it was not being used for one of the purposes explicitly enumerated in the rule.[39]

In *Oksoktaruk v. State,*[40] the supreme court offered a rationale for this presumption and expressed its concern about the prejudice to a defendant when evidence of prior bad acts is admitted under Rule 404(b). The court noted that when a jury is informed that a defendant has previously been convicted of a crime, it is likely that jurors will draw a determinative inference of present culpability from the fact of past guilt.[41] The court recognized that the potential prejudice to the criminal defendant is of constitutional proportions, as the requirement that present guilt be proved beyond a reasonable doubt is actually diluted by the jury's knowledge of the defendant's prior bad acts.[42] The supreme court stated that, due to the extremely high level of prejudice, there is a "presumption in [Alaska] law that the prejudicial effect of introducing a prior crime outweighs what probative value may exist with regard to propensity."[43]

The 1991 amendment, however, eliminates the exclusionary nature of Rule 404(b),[44] and thereby also eliminates the protective presumption that prior conduct evidence should be excluded.[45] The amendment was designed to make Alaska Rule 404(b) a rule of inclusion, allowing evidence to be introduced even if it is relevant to a purpose not expressly listed in the rule.[46] The new Alaska Rule 404(b)

38. *See* Alaska H.B. 105, 17th Legis., 1st Sess., 1991 Alaska Sess. Laws 2 ("The state courts want evidence of other crimes to fit into the uses specifically set out in [Alaska] Evidence Rule 404(b). If the evidence is not relevant to one of these expressly stated purposes, state courts will generally find it inadmissible.").

39. *See* Lerchenstein v. State, 697 P.2d 312, 315 n.2 (Alaska Ct. App. 1985), *aff'd*, State v. Lerchenstein, 726 P.2d 546 (Alaska 1986) (per curiam). This balancing is performed under Alaska Rule of Evidence 403. *See supra* note 32 for the text of the rule.

The *Lerchenstein* dissenters recognized that Rule 403 provides the second step to any determination of admissibility under Rule 404(b). *Lerchenstein*, 726 P.2d at 550 (Rabinowitz, C.J., dissenting). The supreme court has noted that the balancing of probativity and prejudice conducted by the trial court under Alaska Rule 609(c) is similar to the balancing process required in Alaska Rule 403. *See* City of Fairbanks v. Johnson, 723 P.2d 79, 83 n.6 (Alaska 1986).

40. 611 P.2d 521 (Alaska 1980).

41. *Id.* at 524.

42. *Id.*

43. *Id.*

44. *See infra* notes 46-48 and accompanying text.

45. *See Lerchenstein*, 697 P.2d at 315 n.2.

46. *See Oksoktaruk*, 611 P.2d at 524.

thus adopts the approach used by the federal courts in interpreting Federal Rule 404(b),[47] which "allows [the] use of prior bad acts for any purpose relevant to the prosecution's case except to show criminal propensity."[48] In adopting this federal approach, Alaska has abandoned the presumption that prior acts evidence is inadmissible and has increased the potential for prejudice to defendants through the admission of such evidence.

III. *LUCE V. UNITED STATES* AND *STATE V. WICKHAM*

In *Luce v. United States,*[49] the United States Supreme Court held that a defendant must testify before appealing a district court's preliminary decision to allow the prosecution to impeach him with evidence of a prior conviction.[50] Petitioner Edward Luce was indicted on charges of conspiracy and possession of cocaine with intent to distribute.[51] He moved for an *in limine* ruling to bar the prosecution from using a previous conviction for possession of a controlled substance to impeach him if he testified.[52] The district court denied Luce's motion and ruled that, if he testified, his prior conviction would be admissible under Federal Rule 609(a).[53] Luce did not testify and was convicted. On appeal, Luce argued that the district court abused

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47. In the bill amending Rule 404(b), the House Judiciary Committee compared the Alaska approach with the less restrictive federal approach:

> [F]ederal courts treat [Rule 404(b)] as a rule of inclusion and are more willing to admit evidence of other charged acts when weighing the probative value of the evidence against the danger of unfair prejudice, generally allowing admissibility of the evidence for a nonpropensity purpose. The amendment of Rule 404(b)(1) . . . establishes that the nonpropensity purposes listed in the rule are not inclusive and that evidence can be admitted if it is relevant to a purpose not listed in the rule.

Alaska H.B. 105, 17th Legis., 1st Sess., ch. 79, 1991 Alaska Sess. Laws 2.

48. Velez v. State, 762 P.2d 1297, 1300 n.5 (Alaska Ct. App. 1988).

49. 469 U.S. 38 (1984).

50. *Id.* at 43.

51. *Id.* at 39.

52. *Id.*

53. *Id.* at 39-40 (discussing the district court's ruling). At that time, Federal Rule 609(a) provided:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime
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> (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or
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> (2) involved dishonesty or false statement, regardless of the punishment.

FED. R. EVID. 609(a) (1989). The rule has since been amended to remove the limitation that the conviction may only be elicited on cross-examination and has made clear

its discretion by denying his motion without making an explicit finding that the probative value of the prior conviction outweighed its prejudicial effect.[54] The court of appeals affirmed Luce's conviction, and held that Luce lost his right to appeal by not testifying.[55]

The Supreme Court affirmed the Sixth Circuit, providing several policy reasons for its decision. Foremost, the Court was concerned that, without the factual record provided by a defendant's testimony, a reviewing court could not accurately weigh the prior conviction's probative value against its prejudicial effect to the defendant, as is required by Federal Rule 609(a)(1).[56] By contrast, if a defendant testified, an appellate court would have a complete record of the defendant's testimony, the prosecutor's cross-examination, and the impact of the impeachment on the jury verdict.[57] With such a record, the court could more accurately perform the balancing of probativity and prejudice required under 609(a)(1).

The Court also stated that any harm resulting from the district court's *in limine* ruling was speculative.[58] Pursuant to a proper exercise of discretion, a trial judge may freely alter a previous *in limine* ruling during trial.[59] If a defendant does not testify, the reviewing court would not know whether the prosecution would have in fact used the prior conviction to impeach, and whether the trial judge would have taken the opportunity to reconsider the preliminary ruling.[60]

The Court then went further, stating that even if the aforementioned difficulties could be overcome, the reviewing court would still have to decide whether an erroneous *in limine* ruling constituted harmless error.[61] If Rule 609(a) *in limine* rulings were reviewable on appeal without the defendant's testimony, almost any error would result in automatic reversal because an appellate court could not logically term "harmless" an error that presumptively kept the defendant from testifying.[62] Given these factors, the Supreme Court determined that the "preferred method for raising claims such as [petitioner's] would be for the defendant to take the stand and appeal a subsequent

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that the ordinary balancing test of Federal Rule of Evidence 403 is sufficient to determine admissibility of prior convictions for impeachment of any witness other than the defendant. This change became effective December 1, 1990. *Id.*

54. United States v. Luce, 713 F.2d 1236, 1238 (6th Cir. 1983), *aff'd*, Luce v. United States, 469 U.S. 38 (1984).

55. *Id.* at 1242.

56. *Luce*, 469 U.S. at 41.

57. *Id.*

58. *Id.*

59. *Id.* at 41-42.

60. *Id.* at 42.

61. *Id.*

62. *Id.*

conviction."[63] The Court thus held that in order "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify."[64]

In *State v. Wickham,*[65] the Alaska Supreme Court found the reasoning of *Luce* persuasive and incorporated the *Luce* rule into Alaska's criminal procedure.[66] Defendant Phillip Wickham was indicted for manslaughter and third-degree assault in connection with an auto accident. The trial court made a preliminary ruling that the State could, under Alaska Rule of Evidence 609(a),[67] use Wickham's prior perjury conviction to impeach him if he testified.[68] After choosing not to testify and being convicted, Wickham appealed the trial court's ruling.[69] The court of appeals declined to follow *Luce,* and found that the record was reviewable even though Wickham had not testified.[70] The State appealed to the Alaska Supreme Court, contending that a defendant must testify in order to appeal the trial court's ruling.[71]

The Alaska Supreme Court agreed, stating that the "justifications underlying the *Luce* rule appl[ied] with equal force to Alaska criminal practice"[72] and holding that a "defendant must testify to preserve for review a claim of improper impeachment by prior conviction."[73] The supreme court cited reasons similar to those given in *Luce*, emphasizing the difficulty a reviewing court would have in determining whether a trial court's erroneous ruling was overly prejudicial to a defendant.[74] The court stressed that, in conducting the harmless error inquiry, a reviewing court would have to decide whether the admission of the prior conviction would have had a substantial effect on the jury.[75] The court believed that without the testimony of the defendant, this inquiry would be speculative.[76]

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63. *Id.* at 43 (quoting New Jersey v. Portash, 440 U.S. 450, 462 (1979) (Powell, J., concurring)).

64. *Id.* at 43.

65. 796 P.2d 1354 (Alaska 1990).

66. *Id.* at 1357.

67. *See supra* note 5 and accompanying text for the text of Alaska Rule of Evidence 609(a).

68. *Wickham*, 796 P.2d at 1355.

69. *Id.*

70. Wickham v. State, 770 P.2d 757, 761 (Alaska Ct. App. 1989), *aff'd*, State v. Wickham, 796 P.2d 1354 (Alaska 1990).

71. *Wickham*, 796 P.2d at 1356.

72. *Id.* at 1357.

73. *Id.* at 1358.

74. *Id.*

75. *Id.*

76. *Id.*

The Alaska Supreme Court has thus followed the United States Supreme Court, interpreting Alaska Rule 609(a) as requiring a defendant to testify before appealing a trial judge's ruling on impeachment with a prior conviction. In adopting the *Luce* approach, the court did not state whether it would take the view expressed by the concurring justices in *Luce* that defendants should only be required to testify to preserve appeals in the Rule 609(a) setting.[77] The court is therefore likely to face this issue again in appeals under other Rules of Evidence.

IV. THE EXTENSION OF *LUCE* TO RULE 404(b)

Lower federal courts have extended the *Luce* reasoning to motions under Federal Rules of Evidence other than Rule 609(a). For example, both the First and Ninth Circuits have applied the *Luce* reasoning to Federal Rule 403,[78] and the Second and Eleventh Circuits have applied *Luce* to Federal Rule 608(b).[79] While each extension of *Luce* raises slightly different issues, its extension to Rule 404(b) is particularly troublesome. The Eighth Circuit's application of *Luce* to appeals under Federal Rule 404(b) illustrates how Alaska courts could misuse the *Wickham* results to require defendants to testify to preserve their appeals in all Rule 404(b) cases.[80]

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77. *See Luce*, 469 U.S. at 44 (Brennan, J., concurring).

78. *See* United States v. Johnson, 903 F.2d 1219, 1222 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 520 (1990); United States v. Griffin, 818 F.2d 97, 105 (1st Cir. 1987), *cert. denied*, 484 U.S. 844 (1987). Federal Rule 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FED. R. EVID. 403.

79. United States v. Weichert, 783 F.2d 23, 25 (2d Cir.) (per curiam), *cert. denied*, 479 U.S. 831 (1986); United States v. Dimatteo, 759 F.2d 831, 832-33 (11th Cir. 1985) (per curiam), *cert. denied*, 474 U.S. 860 (1985). Federal Rule 608(b) states:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness
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> (1) concerning the witness' character for truthfulness or untruthfulness, or
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> (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
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> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

FED. R. EVID. 608(b).

80. *See, e.g.*, Page v. State, 725 P.2d 1082 (Alaska Ct. App. 1986); *see infra* notes 87-92 and accompanying text.

The defendants in the Eighth Circuit case, *United States v. Johnson*,[81] were on trial for conspiring to transport stolen property and for knowingly concealing and transporting such property.[82] The district court ruled *in limine* that the government could introduce evidence of similar crimes by the defendants under Rule 404(b) only during cross-examination and rebuttal.[83] The defendants did not testify and were convicted. On appeal, the defendants argued that the trial court had erred in denying their motion to exclude the 404(b) evidence.[84] The Eighth Circuit refused to consider the defendants' argument, stating that because the defendants had not testified, the appeal had not been properly preserved.[85] The court noted that the difficulties arising from the lack of a factual record in *Luce* were also present in this case and held that "[a]lthough *Luce* was decided under [Federal Rule of Evidence] 609(a)(1), its logic applies with equal force to motions under Rule 404."[86]

The Alaska Court of Appeals addressed this precise issue in *Page v. State*.[87] In *Page*, the court held that a defendant loses the right to appeal an adverse preliminary ruling on 404(b) evidence when he does not testify and the factual record is limited. Defendant Eddie Page was charged with theft of food from a supermarket.[88] Before trial, the judge denied the State's motion for a declaration that Page's prior conviction for theft was admissible under Rule 404(b).[89] At the close of the State's case, however, when the defendant announced he would testify, the judge limited his earlier ruling to the exclusion of 404(b) evidence in the State's case-in-chief, and ruled that the evidence would be admissible on the issue of intent for cross-examination. As a result, Page decided not to testify.[90]

Though it required Page to testify in order to preserve his appeal, the court of appeals stopped short of requiring defendants to testify in all Rule 404(b) cases. The court ruled that "the reasoning of *Luce*

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81. 767 F.2d 1259 (8th Cir. 1985).
82. *Id.* at 1263.
83. *Id.* at 1269. Federal Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(b).

84. *Johnson*, 767 F.2d at 1270.
85. *Id.*
86. *Id.*
87. 725 P.2d 1082 (Alaska Ct. App. 1986).
88. *Id.* at 1083.
89. *Id.* at 1085-86.
90. *Id.*

should apply where the record is as limited as it is in this case."[91] The court thus implied that a defendant might not have to testify when the record is more complete, such as where an offer of proof concerning the defendant's testimony is made.[92] The *Wickham* court noted the relative uncertainty that the *Page* decision generated for defendants trying to decide whether or not to testify: "In *Page*, the court of appeals implied that procedures short of actually testifying could preserve the issue for appeal."[93] The *Wickham* decision made clear, however, that in the context of Rule 609(a) at least, a defendant must testify to preserve for review a claim of improper impeachment by prior conviction.[94] In light of its discussion of *Page*, the question arises, as to whether the supreme court will make testimony mandatory in the context of Rule 404(b) in the same way it did with Rule 609(a).

V. IMPLICATIONS OF EXTENDING *WICKHAM* TO ALASKA RULE 404(b)

The negative implications of the *Wickham* rationale counsel against its extension to Rule 404(b). Extending *Wickham* to Alaska Rule 404(b) would unduly burden a defendant in his decision to testify. Although the Alaska Supreme Court dismissed this potential problem in *Wickham* as it applied to impeachment under Alaska Rule 609(a),[95] the problem becomes more acute in the 404(b) context. The "added pressure on the defendant to testify before a potentially prejudiced jury [with] the alternative being to forego appeal of an *in limine* ruling which may be erroneous"[96] has an even more harmful effect when that prejudicial evidence is used as substantive evidence to prove an element of the crime.

Under Rule 609(a) the jury may use the prior conduct evidence to develop some skepticism about the defendant's credibility. Therefore, since Rule 609(a) impeachment evidence is used only to counter the defendant's testimony, its admission at least theoretically cannot put the defendant in a worse position than if he had chosen not to testify. The worst that can happen, assuming the jurors follow the limiting

91. The court thus expressly adopted the "reasoning" but not the "holding" of *Luce*. *Page*, 725 P.2d at 1086; *see* State v. Wickham, 796 P.2d 1354, 1359 (Alaska 1990).

92. *See Page*, 725 P.2d at 1086 n.4.

93. *See Wickham*, 796 P.2d at 1359.

94. *Id.* at 1358. Because *Page* suggested that a defendant need not testify to preserve the issue for appeal, and because Phillip Wickham justifiably relied on this ruling, the *Wickham* court gave its ruling prospective application only. *Id.* at 1358-59.

95. *Id.* at 1354, 1358 n.6.

96. *Id.*

instructions, is that his positive assertions will be discredited, which should return his case only to the status quo ante.

Rule 404(b), by contrast, directs the jury to consider the evidence as substantive proof of the defendant's guilt.[97] Because Rule 404(b) evidence is used substantively, the defendant could place himself in a significantly worse position by testifying than if he had not testified since he may actually help prove the elements of the charged crime.[98] In essence, the defendant's testimony could be overwhelmed by negative evidence of past conduct and make him better off deciding not to testify at all. The extension of *Wickham* to Rule 404(b) would thus significantly deter defendants from testifying.

Extending *Wickham* to Rule 404(b) would be extremely prejudicial to defendants, who would be without the protections afforded them under analogous rules of evidence. Rule 609(a), for example, carries with it important protections that mitigate the prejudice to a defendant who is required to testify under *Wickham*. These protections include limiting impeachment evidence to convictions only,[99] restricting those convictions solely to crimes that involve dishonesty or false statement,[100] and allowing prior convictions to be admitted only in a generic form.[101] Because Alaska has carefully circumscribed the use of Rule 609(a) evidence in order to minimize prejudice to defendants, requiring defendants to testify to preserve appeals under that rule strikes an equitable balance between the state's interest in obtaining convictions and a defendant's interest in a fair trial.

Rule 404(b), in contrast, does not carry with it similar protections, and requiring a defendant to testify under 404(b) would upset the equitable balance and infringe upon the defendant's interest in a fair trial. The Alaska Supreme Court has recognized the particular problems involved in penalizing a defendant's decision to testify. In *McCracken v. Corey*,[102] the court held that where a parolee faces revocation of his parole and a criminal trial based on the same conduct, as long as the parolee objects, the evidence obtained at the revocation hearing is inadmissible in a subsequent trial.[103] The danger present in *McCracken* was that the defendant would give up his privilege against self-incrimination by testifying at the parole hearing and later have the information he disclosed used against him at a criminal trial.

97. *See* ALASKA R. EVID. 404(b).

98. *See id.* This is true even though the evidence is restricted to cross-examination and rebuttal.

99. *See* ALASKA R. EVID. 609(a).

100. *Id.*

101. *See* Alexander v. State, 611 P.2d 469, 476 (Alaska 1980).

102. 612 P.2d 990, 994 (Alaska 1980).

103. *Id.*

Although the court avoided ruling on the constitutional issue and instead based its decision on public policy,[104] it emphasized that placing such a risk of self-incrimination on the defendant's decision to testify, "[w]hile possibly not rising to the level of 'compulsion' prohibited by the Fifth Amendment, poses an unfair dilemma which 'runs counter to our historic aversion to cruelty reflected in the privilege against self-incrimination.' "[105]

The *McCracken* reasoning applies with equal force to the case against extending *Wickham* to Rule 404(b). First, 404(b) evidence can come in under a relaxed burden of proof.[106] A second problem is raised by the fact that Rule 404(b) evidence is not limited to convictions.[107] Finally, although the defendant retains the ultimate decision on whether to testify and is not "compelled" to do so, the extension would skew the fair balance between the state and the individual sought in criminal trials, a matter which concerned the court in *McCracken*.[108] Although that case concerned a situation analogous to multiple trials, the tension between a defendant's due process right to present a defense and the privilege against self-incrimination would also be present if *Wickham* were extended to Rule 404(b).[109]

The limited options available to a defendant under the *Wickham* rule illustrate how extending that rule to Rule 404(b) would skew the fair balance by deterring defendants from taking the stand. If the

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104. *Id.*

105. *Id.* at 996.

106. *See* McCormick § 190, at 564. McCormick states:

> A number of procedural and other substantive considerations also affect the admissibility of other crimes evidence pursuant to these ten exceptions. To begin with, the fact that the defendant is guilty of another relevant crime need not be proved beyond a reasonable doubt. The measure of proof that the defendant is guilty of the other crime is variously described, including "substantial" and "clear and convincing." If the quoted measures apply then the other crimes evidence should be potentially admissible even if the defendant was acquitted of the other charge.

Id. (footnotes omitted).

107. *Id.*

108. *See McCracken*, 612 P.2d at 996-97.

109. *See id.* at 993.

Wickham rule is extended, a defendant would have three basic options: (1) the defendant could refuse to testify,[110] (2) he could introduce the evidence of prior conduct on direct examination,[111] or (3) he could testify and face the prosecution's introduction of the evidence of his prior conduct on cross-examination or rebuttal.[112]

The first option presents the classic *Luce* and *Wickham* scenario. If a defendant's motion *in limine* to exclude evidence of prior conduct is denied, the defendant loses the right to appeal the denial of that motion unless he testifies. The justifications for this rule include the limited factual record that results when the defendant does not testify, and the problem of harmless error determination.[113] These problems would likely persist if defendants are not required to testify to preserve appeals under Rule 404(b). The corresponding danger, however, is that a defendant runs the risk of conviction without the ability to appeal a possibly erroneous ruling by the trial judge under Rule 404(b). The right to appeal would be lost to all defendants, including those who wanted to take the stand to offer truthful testimony, but did not want to risk conviction through the introduction of 404(b) evidence alone.

The second option is for the defendant to introduce the evidence himself on direct examination. This tactic has the advantage of reducing the prejudicial effect of the evidence,[114] but also forces the defendant to introduce potentially harmful information about prior conduct

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110. *See* Luce v. United States, 469 U.S. 38 (1984). The *Wickham* court noted that the defendant could petition for review of the *in limine* ruling in the court of appeals under Rule 402 of the Alaska Rules of Appellate Procedure. *Wickham*, 796 P.2d at 1358 n.6. Under Rule 402, a party may seek review in the appellate court when:

> [t]he sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:
>
> (1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right . . . . or . . . .
>
> (4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.

ALASKA R. APP. P. 402(a). If *Wickham* is extended to Rule 404(b), this might provide an avenue for some defendants to appeal erroneous *in limine* rulings despite the general requirement of taking the stand. However, under Rule 402, review would not be automatic. *See* ALASKA R. APP. P. 402(b) (review is not a matter of right).

111. *See* ALASKA R. EVID. 404(b) (no express limitation of the introduction of the evidence to cross-examination or rebuttal).

112. *See, e.g.*, Page v. State, 725 P.2d 1082, 1086 (Alaska Ct. App. 1986).

113. *See Luce*, 469 U.S at 41-43.

114. *See* FED. R. EVID. 609(a), advisory committee's note to 1990 amendment ("remov[ing] from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to 'remove the sting' of the impeachment.").

without knowing whether the judge would have changed his preliminary ruling in the context of cross-examination[115] or whether the prosecution would have used the evidence at all.[116] Risking this option for Rule 404(b) evidence is thus unlikely because, in so doing, the defense would take a substantial risk of hurting its own case.

Under the third option, the defendant could testify and the prosecution could then introduce the evidence of prior acts on cross-examination or rebuttal. In this situation, appellate review of the trial court's decision to admit the evidence would be preserved because the court would have an adequate factual record to review.[117] However, the aforementioned danger that the testifying defendant would put himself in a worse position than if he had not taken the stand at all is present in this circumstance.[118] Given these options, a requirement that defendants testify in order to preserve appeals under Rule 404(b) could thus have the anomalous result of reducing the likelihood that defendants would in fact testify.

VI. CONCLUSION

The differing relationship between Rules 609(a) and 404(b) in the federal and Alaska courts supports the conclusion that the rationale of *State v. Wickham* should not be extended to Rule 404(b) evidence. Assuming that a jury is able to follow instructions and limit its use of prior convictions under Rule 609(a) to the issue of the defendant's credibility, then the use of the conviction would be only for impeachment purposes. Under Rule 404(b), however, the nature of the evidence is different, and therefore creates greater prejudice to the defendant. Evidence under 404(b) is used to prove elements or supporting facts of the prosecutor's case.[119] The evidence is thus used for a substantive purpose, that is, as evidence of the defendant's guilt, and not his credibility. This substantive use can deter defendants from taking the stand for fear of producing greater harm to their case than the prejudice resulting from their silence.

Considering the great amount of care the Alaska courts have taken to protect defendants from the admission of highly prejudicial evidence in the impeachment context of Rule 609(a), it would be anomalous to force defendants to testify in order to preserve for review a claim of improper admission of prior conduct under 404(b), where the danger of prejudice is so much greater. Defendants do not enjoy

115. *See Luce*, 469 U.S. at 41-42.

116. *Id.* at 42.

117. *See* Page v. State, 725 P.2d 1082, 1086 (Alaska Ct. App. 1986).

118. *See supra* note 98 and accompanying text.

119. *See, e.g.*, *Page*, 725 P.2d at 1086 (evidence admissible on cross-examination on element of intent to a charge of theft in the second degree).

protections analogous to those under Rule 609(a) in the 404(b) context. Admittedly, not requiring defendants to testify might allow some defendants to plant reversible error in the record by arguing that an adverse ruling under Rule 404(b) motivated their decision not to testify.[120] However, defendants who actually intend to testify would be deterred from doing so by the extension of *Wickham* to Alaska Rule 404(b). The policy considerations against placing this burden on a defendant's decision to testify, and thereby infringing both his due process right to present a defense and his privilege against self-incrimination, therefore counsel against the extension of *Wickham* to Rule 404(b).

Jeanne Meyer
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120. *See* State v. Wickham, 796 P.2d 1354, 1357 (Alaska 1990).