OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PAUL GREEN, Petitioner V. BOCK LAUNDRY MACHINE COMPANY

CASE NO: 87-1816

PLACE: WASHINGTON, D.C.

DATE: January 18, 1989

PAGES: 1 - 45

ALDERSON REPORTING COMPANY
20 F Street, N.W.
Washington, D. C. 20001
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

PAUL GREEN,

Petitioner,

v. : No. 87-1816

BOCK LAUNDRY MACHINE COMPANY

Washington, D.C.

Wednesday, January 18, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

JOSEPH M. MELILLO, ESQ., Harrisburg, Pennsylvania; on behalf of the Petitioner.

THOMAS D. CALDWELL, JR., ESQ, Harrisburg, Pennsylvania on behalf of the Respondent.

CONTENTS

P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 87-1816, Paul Green v. The Bock Laundry. You may proceed whenever you are ready.

ARGUMENT OF JOSEPH M. MELILLO

ON BEHALF OF THE PETITIONER

MR. MELILLO: Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the Congress intended Federal Rule of Evidence 609-A-1 could be the standard for deciding whether to admit evidence of a party's felonies for purposes of impeachment in a civil case.

Petitioner takes the position that Congress intended no such thing. Such a view of the law of that particular rule leads to results which are not only unfair, but bizarre. Rather, Petitioner takes the view, as have most of the courts which have decided this issue that in civil cases, the trial judge must retain significant discretion over whether to admit such evidence.

By way of background, this case arose as a civil product liability case. Allegedly, a laundry water extractor manufactured by Bock Machine Company was

defective and that defect resulted in the Plaintiff, the 19-year old Plaintiff's arm being torn off.

In the Third Circuit, in the case of Diggs v. Lyons, there was a decision -- two to one -- that in civil cases, Rule 609(a)(1) mandates without any part of discretion, on the part of the trial judge, that evidence of impeachment felonies must be admitted in a civil case. For that reason, the trial judge was bound in this case to admit such evidence.

Since the Diggs decision, one other circuit court has joined that reasoning in the case of Greer v. -- Campbell v. Greer in the Seventh Circuit. And I would point out that since joining that decision, the Seventh Circuit now has a division within it -- excuse me, the Eighth Circuit now has a division within itself. So that now, there is not only a division between the Circuits, it is the one -- the First, Fifth, Sixth and Eighth takes the view that there is discretion, but now, the Third and Seventh oppose that. And within the Seventh there is itself, a division between panels.

It is Petitioner's position that Diggs and Campbell are wrong for the following reasons. The literal language of the rule could not sensibly be applied to civil cases, if it intended such a result.

Second, the legislative record does not show that Congress intended that result. Third, other principles of statutory construction, well settled in our law, would be violated if that result occurred.

Turning first to the literal language of the rule -- the rule says that felonies will be admitted unless -- unless the probative value of such evidence is outweighed by its prejudicial effect to the defendant. It does not say criminal defendant; it does not say civil defendant. If you were to apply that rule literally to civil cases, you would have to apply a weighing or balancing procedure to the civil defendant or the civil plaintiff or other witnesses would not have the advantage of that particular rule.

QUESTION: These rules are applicable in both criminal and civil proceedings, aren't they?

MR. MELILLO: Generally so.

QUESTION: So when they say the defendant in these rules, they could mean the criminal defendant?

MR. MELILLO: And I believe that is exactly what they did mean, the criminal defendant. But the point is that the rule is so ambiguous on its face, that it lends credence to the view which I intend to get into, that Congress never considered the effect the rule should have with respect to civil parties. Congress was

consumed solely with the plight of the criminal defendant when it debated and enacted this rule.

The rule cannot be sensibly applied in civil cases.

QUESTION: Why can't it? Why can't you say that the rule is talking about prejudicial effect to the criminal defendant? There is no criminal defendant in a civil case and therefore, the outweighing doesn't apply.

MR. MELILLO: You can do that, but I believe that if you are going to change the literal meaning of the rule, you are then bound to go into the legislative history and other rules of statutory construction to see what Congress might really have intended.

QUESTION: What was the old common law rule? Let all this evidence of prior convictions in, right?

MR. MELILLO: No, I don't believe it was that strict. Old, old common law, a felon was incompetent to testify. The rule was changed to simply permit the use of his felony conviction against him for impeachment purposes, but over the course of decades, that rule was modified to the extent that the trial court would retain discretion to judge whether the probative value of that particular was outweighed by its prejudicial effect.

QUESTION: Well, can you make that general a statement? I mean up until the time of the codification

of the Federal Rules of Evidence, it depended on the laws of the various states, didn't it?

MR. MELILLO: It was one of the sources that the Judges looked to. They also looked at Federal Rule of Civil Procedure 43, which was said to have a bias in favor of admissibility, federal equity cases and the rule of the states.

So that a federal common law developed which took its basis from many sources, and which while generally, admitting these felonies, did retain, or did provide that the trial court was some measure of discretion.

QUESTION: Do you take the position that Rule 403 is applicable?

MR. MELILLO: I think that is the most sensible view. I would prefer, as a plaintiff's attorney for the balancing test applicable to the criminal defendant to apply, but I must tell you very frankly that you will find nothing in the legislative history which would indicate that Congress intended that result.

QUESTION: Would you say that Rule 403 applies even in a criminal case, where the prior felony is one of honesty?

MR. MELILLO: Honesty or dishonesty?

QUESTION: Yes.

MR. MELILLO: I would say no. The main reason being it is much more arguable that Congress did intend to specifically cover that field when it enacted 609, if you look at the legislative history than it is in this particular case. That the legislative history is simply devoid of any consideration of how to treat the civil litigants.

There is another -- there is another way of looking at the rule, which I will mention now. There is a way to conform the literal language of the rule so that it can be applied sensibly. This was suggested by a district court judge in Pennsylvania after the Diggs decision came down.

That particular judge said the defendant should mean the defendant in the collateral criminal matter.

QUESTION: What did he mean by the collateral criminal matter?

MR. MELILLO: Well, where the conviction was obtained. That is, you were a defendant in a criminal case, in which a conviction was obtained and which is now being scught to be used against you. If you read to the defendant in that way, the rule makes sense.

QUESTION: Well, how does it make sense in

that way? What standard would you work under?

MR. MELILLO: A balancing test could then be applied to any witness or party in either civil or criminal litigation, because everybody against whom a conviction is sought to be offered was a defendant in a collateral criminal matter.

That makes sense out of the rule. The problem is the legislative history very obviously doesn't support that particular view either.

QUESTION: Well, also the language would then just change the word "defendant" to "witness," because the witness would always be the person who had committed the crime, against who, you know is being impeached.

MR. MELILLO: And a lot of courts who have considered this issue have done just that. They assume that Congress must have meant witness rather than defendant and that slipping in defendant was some kind of oversight.

QUESTION: The trouble with that, of course, is you never think of prejudice to a witness. You talk about prejudice to the parties to the case, normally.

MR MELILLO: Exactly right, also.

QUESTION: And what is your position in reference to witnesses?

MR. MELILLO: I think that in addition to

prejudice to witnesses, you have to do something to avoid undue harrassment of witnesses where --

QUESTION: Well, to begin with, where do I look -- rule 403?

MR. MELILLO: I would look at Rule 102 for that, or perhaps 611, which gives the courts, in general, some authority to avoid harrassment of witnesses, and to secure justice and avoid unfairness.

QUESTION: Well, why not 403?

MR. MELILLO: You could also look to 403, which states generally, where the probative effect of evidence is substantially outweighed by its prejudicial value, then the court may exclude it. So you can look there as well.

QUESTION: Four-zero-three is more general than 609, isn't it?

MR. MELILLO: Yes, it is. And it is intended to apply where there are not more specific rules. The point I am trying to make is that I do not believe that 609(a)(1) is specific as to civil cases, only as to criminal matters. Therefore, 403 can be applied. There is a whole line of cases which have, in fact, taken this approach, and I believe they state the best reasoning in this area.

QUESTION: Excuse me, the exception is not

specific, except as to criminal matters. But there are so many different ways of slicing the question here.

The provision, itself, which says it will be considered, as opposed to the exception, could be regarded as quite specific, for both criminal and civil matters.

MR. MELILLO: It could be and if Congress, when considering the -- this particular rule, anywhere indicated that is what they intended, I would have to say that is correct.

But Congress simply does not do so. And to apply such an interpretation to the rule would violate other statutory construction axioms, including that you should not change the prior practice -- that is the common law, well established -- unless you say so explicitly in a statute.

QUESTION: Well, why would you conceivably want this evidence to come in, in a criminal case, and not in a civil case?

I mean I can understand why you might want the exception to apply only in a criminal case and not in a civil case, but why would you want the whole rule of admitting this evidence to apply only -- only in criminal cases?

MR. MELILLO: I think that civil cases are

very different from criminal cases and for a rule to apply sensibly, you have to consider those differences.

First of all, a criminal defendant can always avoid impeachment simply by refusing to take the stand. And this goes not only as to his felonies, but as to his prior crimes of dishonesty and false statement. A civil party never has that luxury. A civil party can be forced to testify as on cross-examination and impeached.

A civil party's deposition can be taken pre-trial; he can be impeached there and that can be read into the record, regardless of whether he takes the stand. He can be forced to answer written questions as well and the same thing can be done.

A civil party has absolutely no protection from the effect of impeaching felonies, while the criminal defendant does.

QUESTION: Well, was -- was this designed to protect the integrity and reputation and privacy of the witness or the integrity of the fact-finding process?

MR. MELILLO: The integrity of the fact finding process, although I think that Congress --

QUESTION: Well, but as Justice Scalia's question suggests, I should think that in the criminal process the danger of prejudice is, is much greater.

MR. MELILLO: Yes, which is why Congress did

enact a very strict balancing test with regard to the criminal defendant. It is a stricter test than you find in 403. I don't think that it follows from that that --

QUESTION: In, in, in the first class of criminal offenses?

MR. MELILLO: That is right. It is simplyexcluded if the probative value is outweighed by the prejudicial effect, not substantially outweighed, but just outweighed. And I also believe that it is the prosecution's burden to show that it is not.

So, it is a very strict test that Congress devised on behalf of the criminal defendant. Recognizing, of course, that the effect of a criminal conviction is very severe, and that jurors might tend to use evidence of prior criminal behavior to assume that somebody who did something bad once would do it again -- that is the main danger of it.

I don't think it follows from that, that is, that Congress intended to protect the criminal defendant, that they intended to ignore or impose a rule harsher than the common law upon the civil plaintiff or civil witnesses.

I think what you mainly have is legislative oversight.

QUESTION: But the Conference Report says in

one sentence, doesn't it, that the Committee decided that they were not interested in considering the prejudice to a witness.

MR. MELILLO: In a criminal matter.

QUESTION: Well, but they don't say in a criminal matter.

MR. MELILLO: I thought that was the fair reading of it. They felt that the rights of the criminal defendant were so great that --

QUESTION: They did not say the criminal defendant either.

MR. MELILLO: I think it is clear reading the Conference Committee report that they are talking about conviction and defendant and they're talking -- and the plain meaning is really just criminal defendant. I don't really know that it can be read any other way.

QUESTION: Well, as the rule went over to Congress from us, you would have lost.

MR. MELILLO: Yes, when the final version of the rule came from the Judicial Conference and the Supreme Court, its language was a felony shall be admitted and --

QUESTION: And the only thing that happened to it was this provision for balancing if a -- with respect to if it would prejudice the defendant.

MR. MELILLO: I think a great deal more happened to it than that.

QUESTION: Well, it was talked a lot about.

MR. MELILLO: Yes, it was. It was.

The basic positions of the House and Senate atthe time --

QUESTION: Wasn't most of the real worry about criminal defendants?

MR. MELILLO: I think it was the only worry.

QUESTION: Yes, well, certainly you would have -- you would have the same worry apply to witnesses generally.

MR. MELILLO: You would, although I think you might make --

QUESTION: Civil, criminal, anything.

MR. MELILLO: I think that there is a distinction between the way that you might want to treat criminal witnesses and the way that you might want to treat witnesses in a civil case, because you are so concerned in the criminal arena about -- about the defendant, you might want to give the defendant the right to impeach those witnesses, where you might not want to do the same in a civil case.

Civil cases turn largely, many of them, on technical issues, especially the kinds that you find in

the federal courts. In diversity cases, you very often, for example, have product liability cases, wherein the record is consumed by expert testimony concerning the way a machine is designed, the way it operates and its safety features.

That was the case here. Credibility issues doexist in these cases, but they do not exist to the same extent and with the same importance as they do in the criminal matters. Therefore, I think that a rule much harsher than in the criminal case could not sensibly have been intended by Congress for civil cases.

QUESTION: Is your position that only subpart (1) of 609(a) applies only to criminal cases, or is it subpart (2) as well? Is, is the Court free to apply 403 and to exclude evidence that a witness, or a party in a civil case, had been convicted of a crime involving false statement?

MR. MELILLO: Well, since subpart (2) appears to be a very specific rule which is sensible on its face, I think it would have to be said that 403 cannot apply to it. That issue is not currently before the Court, and in order to really answer that question, I would have to analyze the entire legislative history very carefully to see what Congress considered, when it enacted that rule with regard to civil parties.

But I think, certainly the argument becomes much greater when you are dealing with (a)(2) than (a)(1).

QUESTION: But the point is that you can use the reference to the defendant which makes so little sense as applied to a civil defendant, to just elimlnatethe sole portion of 609 which says, and the Court determines that the probative value outweighs its prejudice to the defendant, you could use to eliminate that much.

Or you could use it to eliminate all of (1), or I suppose you could use it to eliminate both (1) and (2) and I was just trying to get what your theory is.

You say at least one and you are noncommittal as to the rest.

MR. MELILLO: My theory is that (1) applies solely in the criminal arena, because the language of the rule, on its face, talks about criminal cases, because the legislative history indicates that Congress was only concerned with criminal cases; (a)(2) on the other hand, both by its language, and very possibly by its legislative history, is specific as to both.

Therefore, I would not apply Rule 403 to (a)(2).

QUESTION: Well, rule (2) -- I mean number

(2), seems to just be an exception to the exception for criminal cases.

MR. MELILLO: I am sorry, I am not exactly sure what you mean.

QUESTION: Well, the first exception to Rule 609(a) deals apparently with criminal defendants.

MR. MELILLO: Correct.

QUESTION: And it says that you will limit the types of crimes or the evidence of prior crimes as against criminal defendants in a criminal case. But section -- part (2) says that you won't limit introduction of the crimes of dishonesty.

Now, the beginning of Rule 609 just states, as a general purpose, that for the purpose of attacking credibility of witnesses, evidence of prior conviction shall be admitted. That is the general rule -- it shall be admitted. And part (1), apparently makes an exception for the criminal defendant in a criminal case; and (2) makes an exception to that exception in criminal cases.

I mean that seems to be the import of the rule, doesn't it?

MR. MELILLO: Yes, but I think it is clear what Congress intended if you read the Conference Committee report and the other legislation, is that to

properly protect the criminal defendant, some of the evidence should be admissible against other witnesses in criminal proceedings, including the prosecution's witnesses.

That while it may be unfair to subject them to that, the interests of the defendant are so great in avoiding conviction, if he is not guilty, that thatshould be done.

QUESTION: I am not sure of the relevance of it. Are the states in some disarray on this or is a uniform consensus emerged as to whether or not such impeachments are desirable in a criminal -- civil trial?

MR. MELILLO: The states vary largely in their approach.

QUESTION: That is I thought.

MR. MELILLO: Pennsylvania, for example, where this case arose, at the time of this trial, never permitted the admission of felonies against a witness in a criminal or a civil case. And permitted the introduction of what we call crimen falsi evidence, only upon a balancing test.

Pennsylvania recently changed that rule to automatically permit the introduction of crimen falsi evidence, but still you cannot introduce evidence of felonies in a Pennsylvania civil or criminal action.

That is my understanding of it.

Which means that if this case had been brought in a Pennsylvania state court, Mr. Green's felonies would not have come in. And the harm of that, when you construe Rule 609(a) to be so harsh in civil cases, is that you will inevitably have forum shopping. If I had initiated this case in state court, it would have beenremoved to federal court; I could not have prevented it, if that is what the defendants wanted to do just to get the advantage.

QUESTION: Well, but if the states are in disarray then a state, other than Pennsylvania has a different rule, and what we decide would be in conformity with that.

So, whatever we do, there is going to be some forum shopping.

MR. MELILLO: Yes. Inevitably there are many, you know, the Federal Rules of Evidence probably conflict in many respects to certain state rules and there is always some forum shopping. You cannot avoid that altogether. I would just like to avoid the worst instances of it, if possible.

QUESTION: So, the worst instances are in Pennsylvania, I take it?

MR. MELILLO: Well, Pennsylvania is a good

example where it would occur.

One of the unspoken questions that the Diggs court did not answer and I think has to be addressed, is that when a rule is ambiguous on its face, so that it is capable of yielding bizarre results if interpreted literally, just what do you need to expect from the congressional record in order to say that it does ordoes not mean what it says literally?

Petitioner takes the position that you cannot construe congressional intent under those circumstances, simply from silence, congressional silence, that there must be some affirmative evidence in the congressional record indicating that Congress actually intended that kind of result.

That does not exist in this case. The Diggs Court did cite four -- what is called snippets -- comments by individual legislators, but they don't really amount to much when weighed against the whole legislative history, nor taken in context, do they really indicate that those Congressmen wanted this particular result.

To conclude, I really -- I really believe that Congress did not intend this interpretation. The plain language of the rule does not require that interpretation and standard principles of statutory

construction applied to this rule require that it not be deemed specific, as to civil parties and witnesses and that, therefore, Rule 403 may apply.

QUESTION: Why shouldn't we adopt the standard rule of statutory construction that the rules say and Congress clearly intended that the rules, as a whole, should apply both in civil and criminal cases?

MR. MELILLO: That is basically why the Diggs Court took their silence to mean acquiesence. That is, Congress knew that they were going to apply to both and therefore, you should presume that it applies to both.

QUESTION: That is right, except -- and -- and any exception from that rule, caused by the irrationality of the language, should be narrowed as much as necessary -- should be narrowed to the degree essential to eliminate the absurdity. And that would be eliminated simply by saying, you don't get an exception when it outweighs its prejudice to a civil defendant. That portion of it is deleted.

I mean, it seems to me that the burden is on you to show why a section in a -- in a provision of law that is meant to apply to both civil and criminal should not apply to both, and, and, and that the exception that we read into the text of the statute should be as now, as is necessary to solve the problem.

And you are giving us an interpretation that really goes much further than is necessary to solve the absurdity problem.

MR. MELILLO: But if you solve it in that manner, then what you wind up doing is putting the civil litigant and witness in a position much worse than they were at under the prior practice, while essentiallystacking the deck in favor of the criminal defendant, with a Congress which, in its legislative history, was trying to be innovative in this area.

While you could do that, it clashes against the proper interpretation of the congressional record, and it clashes against other principles of statutory construction, which are very meaningful.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Melillo. Mr. Caldwell, we will hear now from you.

ARGUMENT OF THOMAS D. CALDWELL, JR.

FOR THE RESPONDENT

MR. CALDWELL: Thank you, Mr. Chief Justice, and may it please the Court.

I would first like to address the proposition that the admission of the Plaintiff's prior conviction in this case was, at most, harmless error and therefore, this case should not be remanded, regardless of the

decision of this Court and its interpretation of Rule 609.

QUESTION: Mr. Caldwell, did you try this case below?

MR. CALDWELL: Mr. Nealon and Mr. Swartz, who are sitting next to me, tried it.

QUESTION: This is a products liability case, isn't it?

MR. CALDWELL: It is.

QUESTION: Where the man's arm was literally torn off from his shoulder?

MR. CALDWELL: That is correct.

QUESTION: Just as a matter of tactics, why were these prior felonies introduced?

MR. CALDWELL: Justice Blackmun, there were two issues in this case. One was --

QUESTION: Was there a feeling that the accident didn't happen at all?

MR. CALDWELL: No.

QUESTION: Did you want to make a liar out of him?

MR. CALDWELL: Yes.

QUESTION: In what respect?

MR. CALDWELL: There were two issues in the case. The first was that the machine was defective and

that became the battle of the experts. The second defense was assumption of the risk which is recognized as a defense in Pennsylvania in a products case.

There were four witnesses who testified in this case. And, of course, we knew that this was going to happen -- that they had warned the Plaintiff, below, not to attempt to stop this machine in the method in which he did.

We knew that he was going to testify that he was never warned. That set up an issue of credibility only as to really one of the four aspects of this case, and that is the reason it was introduced.

As it turned out, the jury never reached the assumption of the risk question. Credibility never really came into play. As a matter of fact, as to the warning on the machine, which is really the only part of the defect -- the defective machine that the Plaintiff testified to, the record contains the following:

"Did you see warning stickers on the machine?"

"No."

"Do you remember anything that was written on the machine?"

"No."

Now, that evidence given by the Plaintiff below was never contradicted by the Defendants. It, it

was admitted that there were not warnings on the machine.

QUESTION: Then why did you need the felony convictions?

MR. CALDWELL: Because of the element in the case of assumption of the risk and all of that evidence came in. The Plaintiff's testimony came in that he was never warned. The Defendant put four witnesses on the stand who testified in some detail about the warnings that were given to him.

QUESTION: Carried to an extreme, your theory would almost relegate a felony injured -- a felon who is injured -- almost prevent him from recovering, ever.

MR. CALDWELL: I don't think that that is so, Justice Blackmun.

There -- there -- the rationale of the exception which was made in Rule 609, by the Conference Committee, was guilty of one crime, guilty of another and that is why the criminal defendant -- and it is clear in this case that the only person who was going to take the stand who was going to get the benefit of the balancing test --

QUESTION: But we are not talking about a criminal defendant. We are talking about a civil plaintiff, here.

MR. CALDWELL: That is correct.

QUESTION: There is a bit of a distinction between the two.

MR. CALDWELL: There -- there is absolutely but the Conference Committee -- and when this was considered by the Advisory Committee on the Judiciary Committees of the House and Senate, they afforded the balancing test to the defendant because of the rationale that guilty of one crime, guilty of another.

QUESTION: Well, suppose -- suppose in this case, that the chief designer for the company was named as a co-defendant, and he testified about the design of the machine. And the plaintiff seeks to impeach him, what ruling -- he has been convicted, say, of theft?

MR. CALDWELL: The ruling would be that the felony or any crimen falsi under 609 is admissible, then he is not entitled to a balancing test.

QUESTION: And, and how do you justify that interpretation of the statute?

MR. CALDWELL: There are two philosophical arguments that can be made here. One, which was made --

QUESTION: Do those -- do those lead to a statutory argument at the end?

MR. CALDWELL: Yes, they do and I can state them briefly, Justice Kennedy. In one of the House debates, and I have tried to condense this, the theory

was a demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into -- into a willingness to give false testimony.

Now, Judge Gibbs -- Gibbons, in his dissent in Diggs, said, this rule mandates the admission of such evidence against a totally disinterested witness as to whether a light at an intersection was red or green. And that was the philosophical battle that was fought in the Advisory Committee; it was the philosophical battle that was caught -- fought in the Judiciary Committee of the House and the Senate and I might say that the rule that this Court promulgated and sent to Congress did not include a balancing test.

And so, that testimony, clearly under this Court's rule would have been admissible.

QUESTION: But -- so the impeachment testimony would be admissible to impeach the defendant?

MR. CALDWELL: It's -- it's -- it can impeach a witness and throughout the scheme of these rules, a party is a witness.

QUESTION: I'm -- I'm - I'm assuming that he is a defendant, and the defendant is not entitled to the balancing test?

MR. CALDWELL: A defendent in a criminal case

is not entitled --

QUESTION: No, no, in the hypothetical that I put.

MR. CALDWELL: No, in a civil case, he is not entitled. Oh, under this rule -- excuse me. A defendant in a civil case, if the rule was read literally, he would be entitled to it.

Our position is that the congressional record is clear that the only person who was to get the benefitof the balancing test was a defendant in a criminal case and that comes through very clearly, as I can point out in the record.

QUESTION: So, in my hypothetical, the impeachment is admitted and there is no balancing test?

MR. CALDWELL: That -- that is our answer, that is absolutely correct.

QUESTION: And that is because the statute is not read strictly?

MR. CALDWELL: That is true.

QUESTION: So if we are not going to read the statute strictly, why don't we give the balancing test to the plaintiff?

MR. CALDWELL: Because the intent of Congress was clear, when the balancing test was introduced, which did not happen until the Conference Committee considered

the bill passed by the House and the bill passed by the Senate, neither of which afforded a balancing test and the Conference Committee inserted a balancing test and in its report, it said as follows:

"Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of a trial by persuading the trier of fact to convict the defendant on the basis of his criminal record."

Now, there is no record of the debates in the Conference Committee. And where there are -- there is a great record in regards to the Advisory Committee and the Senate and House Judiciary Committees, there is a one-page record of the Conference Committee, and that language is contained in there.

And if you look back at the history of the Act, you will find that this Court's Advisory Committee, the Judiciary Committees, all considered, at one time or another, extending the balance -- of broadening the balancing test past a criminal defendant.

And the Advisory Committee of this Court -- both the Houses, the House and the Senate rejected that concept until the Conference Committee inserted that language in.

And I would submit that when it says, only be

excluded where it prevents a danger of convicting the defendant, that the intent of the legislature -- of the Congress is clear.

QUESTION: In other words, the statute is ambiguous, and we are to go to the legislative history?

MR. CALDWELL: Yes. I am not so sure, if you read it -- and I don't want to talk -- have a battle of semantics. I am not sure that when you read it, it is ambiguous, but certainly when you go to implement -- it sets up an unfair result in a civil case and therefore,the Congressional intent must be carefully considered.

That is correct.

If I may return to harmless error argument that I was making -- the instructions of the court were very thorough. The trial court, the judge said, the only purpose of that evidence is not to prejudice him, certainly. It is only to give you all the information that you are entitled to have in determining whether or not that witness is credible.

You may consider that evidence when you evaluate Mr. Green's testimony.

Now, in regard to the warning, the court said -- and that is a part of the product defect case -- you must determine if Bock Company gave a warning and

whether that warning was adequate. And these questions must be evaluated by the circumstances that existed in 1965, which is when the machine left the manufacturer's hand.

There were then four questions submitted to the jury. The first question is: "Has the Plaintiff shown by a fair preponderance of the evidence, that the extractor, manufactured by the Defendant in 1965, was defective when it left the Defendant's control?"

This, of course, is the principal question.

The second and third questions had to do withthe nature of the defect and causation.

The fourth question, which had to do with credibility, said, the fourth question is: "Has the defendant shown by a fair preponderance of the evidence that Paul Green appreciated and assumed the risk which caused his injury?"

Your answer to that is yes or no. Now, that was the question, the only question that bore on the Plaintiff's credibility.

The jury returned a verdict and this colloquy ensued. Judge: "Has the Plaintiff shown by a fair preponderance of the evidence that the extractor manufactured by the defendant in 1965 was defective, when it left the Plaintiff's control?"

The foreman answered no.

I would therefore submit that this case did not turn on credibility at all and that the evidence of the prior conviction would not have been prejudicial.

Now, I would now like to turn to congressional intent, and I think there are three considerations that have to be examined in considering that.

Now, the first is the prior rule. The second is the forces which converged on formulating these rules of evidence, and the third is the enactment of a rule and the enactment of the exception, because these were distinct occurrences.

Contrary to Mr. Melillo's view of this, I believe that it is clear that the prior rule was that there was no balancing test. The Advisory Committee note says, the weight of judicial authority has been to allow the use of felonies, generally, without regard to the nature of the particular offense and of crimen falsi without regard to the grade of the offense.

In one of the Congressional Committee's report, the following appears: The congressional -- the conventional view and hesitatingly supported by Wigmore has been that an accused, who elects to take the stand, is subject to impeachment as a witness, including impeachment by proof of conviction.

In 1961, and if the Advisory Committee was appointed and for, it began its consideration of the codification of the Rules of Evidence. In 1965, the District Court of the District of Columbia decided the Luck case, in which it inserted a balancing test into the D.C. Rule, which made -- which applied the traditional rule -- that is, any felony and any grade of crime crimen falsi.

There was immediate and adverse reaction to that in Congress. And Congress amended the D.C. Act and took out the word "may" and inserted the word "shall."

So that the practice in the District of Columbia is under the tradiitional rule, and there is no balancing test.

The Advisory Committee submitted its report to Congress, and it was considered extensively in the Judiciary Committees of the House and Senate. There is a report, from which I quote, "Almost 13 years of study by distinguished judges, Members of Congress, lawyers and others interested in, and affected by the administration of justice in the federal courts."

Now, the Petitioner says to you, well, they never looked at the civil cases, and that is simply not borne out by the record. The Senate Judiciary Committee reported out a balancing test as to all witnesses. That

was rejected in the final version by the Senate.

The bill passed by the Senate allowed impeachment by the introduction of conviction of a crimen falsi crime, or any other crime, if the imprisonment was in excess of one year. And that was the recommendation of this Court also to Congress.

The House impeachment was only as to crimen falsi crimes. In the Conference Committee -- and as I have said before -- there is a scant record, but the one record which is clear, is that they used the word "convict" when they applied the balancing test to the defendant.

And, as I have stated before, all of the bodies that were looking at this matter considered various alternatives and all of those -- some of those alternatives would have allowed the balancing test to be applied to witnesses, in any case. And, of course, Chief Justice Rehnquist, as you pointed out, under Rule 1101, it is very clear that these rules are applicable to both criminal and civil cases.

QUESTION: Mr. Caldwell, on that point, I know it is clear that the rules are applicable. In your review of the history, was there any discussion at all, that you found, of the possible application of the rule in a civil case?

MR. CALDWELL: Yes. The Advisory Committee considered -- well, if the question is, did they use the word "civil" --

QUESTION: Well, what I am really asking is, is it consistent with your reading of the legislative history that everybody was thinking about criminal cases throughout the discussion and did not really give any thought to the civil application?

MR. CALDWELL: Absolutely not.

QUESTION: It is not.

MR. CALDWELL: The rule had been uniformly applied for many, many years before 1961 to both civil and criminal.

QUESTION: Well, I understand that, but the problem that triggered the reconsideration was a criminal case and it is clear that they wanted to change the rule in criminal cases.

I am just -- I am not -- I don't know of any evidence, one way or the other, but I am just wondering if they talked about the civil problem at all?

MR. CALDWELL: There were four Congressmen, in debates, who referred to the fact that these rules are going to apply uniformly to both civil and criminal cases; and we have pointed that out, I believe. We have pointed that out in our brief --

QUESTION: After the die was pretty well cast, yes.

MR. CALDWELL: And that is what Judge Gibbons characterized as four snippets of legislative history.

As I said --

QUESTION: I guess there is a move afoot now to amend the rule, to apply a sort of 403 balancing, is that right?

MR. CALDWELL: I am not aware, Justice O'Connor, that there is --

QUESTION: The ABA has made a recommendation on other groups, is that right?

MR. CALDWELL: I don't know the answer to that question, I don't know.

QUESTION: All right.

MR. CALDWELL: As I said before, in the debates, when they did discuss applying the balancing test, they only discussed it as to a criminal defendant because they said that the jury, the prejudice of the jury might be that if he committed one crime, that he would commit another.

In this instance of a civil plaintiff, the rationale would have to be that because he was convicted of a crime, he is unworthy of a verdict.

And I just think that is a quantum leap and

that it is not applicable.

Now, in regard to Rule 403, I think there are several reasons, or three reasons, why 403 would not apply. It is, of course, a general rule and the note or the comment to that rule set a guide for handling situations for which no specific rules have been formulated.

It differs by one word from the balancing test in 609. The word is "substantially." But it seems to me that if they wanted 403, or if anyone understood that 403 was going to apply to 609, that they could have saved the time of the debates in regard to having any balancing test in 609.

Where it must fail, I believe, however, is in the 609(a)(1) and 609(a)(2) argument. If 403 applies to 609(a)(1), then it would apply to 609(a)(2).

Now, the report of the Conference Committee in speaking of the balancing test, given to a -- and they were speaking of convicting a -- defendant in a criminal case -- the admission of prior convictions involving dishonesty and false statement is not within the discretion of the court. Such convictions are particularly probative of credibility and under this rule, must always be admitted.

So, they just were speaking of the rule,

itself, and it is completely illogical to say that it applies to one subject -- one subsection and not the other.

The other problem that you run into in applying 403 to this rule is that there are other specific rules. And if you apply 403 to this one, then you have to look at every other rule and see if you are going to apply 403 to that.

Taking from the Petitioner's brief, the reasons that are set forth there in regard to his interpretation of the rule is that it should not vary the common law, except to the extent the change appears clearly in the language. Well, this rule would vary the common law as it existed prior to the enactment of the rule so far as the federal courts are concerned. That it should not conflict with companion statutes.

Well, the only other companion statute -- I don't know if it is a companion statute -- but the only other Congressional enactment on this is the D.C. statute, and that has no balancing test.

Finally, that it should not encourage forum shopping. Well, it seems to me that applying the balancing test, adding more broadly than the statute allows really does encourage forum shopping, because there are no guidelines really set forth as to how the

balancing should be applied, and some judges are going to apply it in favor of admitting evidence, and others are going to apply it in favor of excluding it.

Finally, it replaces uncertainty with, with certainty. Judge Marris, who was Chairman of the Supreme Court Committee, said, "The adoption of the Federal Rules of Evidence will provide clear, precise and readily available rules for trial judges and trial lawyers to follow which will be uniformly applicable throughout the federal judicial system."

And, of course, if you have a balancing test, you are going to wind up with different results. The Justice Department criticized in one of its reports to the Committees, the balancing test, because there was no standard for the trial judge to follow.

QUESTION: The balancing test applies in some cases governed by the rules, even under your submission.

MR. CALDWELL: It does. It does -- it does and there are no guidelines, as you pointed out, there are no guidelines, nonetheless.

It -- I might also point out to this Court, that congressional control over rules of evidence, if you look at the statutes and the 1971 Act, and the 1975 Act, you see a tightening of control rather than one of relaxing one and under, of course, those Acts, the

Supreme Court can suggest to the Congress what the rule should be.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you Mr. Caldwell.

Mr. Melillo, you have six minutes remaining.

REBUTTAL ARGUMENT OF JOSEPH M. MELILLO

MR. MELILLO: I will be brief.

QUESTION: Mr. Melillo, before your brief, something has occurred to me while I have been listening to this. You do acknowledge that in criminal cases, the witnesses for the prosecution are subject to this rule?

MR. MELILLO: Yes, I do.

QUESTION: So Congress must have thought that at least in criminal cases, it does serve the truth finding function to impeach any witness who has a felony?

MR. MELILLO: Yes.

QUESTION: Why would Congress think that is an appropriate rule in criminal cases, except of course, where it harms the defendant; but not think that it is an appropriate rule in civil cases?

MR. MELILLO: For two reasons. One is that Congress was so concerned about the rights of the defendant and that the defendant not be convicted, except if he is truly guilty.

Therefore, Congress would permit the criminal defendant to have the right to impeach the prosecution's witness while potentially, himself, being immune from impeachment.

QUESTION: Would --

MR. MELILLO: It also must be understood, though, that there are many avenues for impeaching civil parties that are not available in criminal cases, and therefore it is not necessary to have, even ask it to rule in civil cases with regard to impeachment.

There are many ways of getting at the truth in civil cases, that potentially are not available in criminal cases. This is the rationale as to fairness -- Congress did not really go to the trouble of considering all of this, but I think it"s, it's the basis for any fair and just statutory construction.

I just want to make a few brief points.

First, about the prior practice. I quoted this in my brief, but I guess it is worth repeating here. Judge Fremley of the Second Circuit testified before the Subcommittee of the House, and he was asked about the traditional practice and he said they were generally admissible, but of course, there was the overriding rule that the judge can always exclude testimony where probative value, he thinks, is

outweighed by its prejudicial effect.

He was, in effect, giving the common law to the Advisory Committee, and that is what he said. That particular statement comports very well with what Rule 403 says.

With respect to those four so-called snippets of legislative history, let me give you an idea of what they mean taken in context. For example, Representative Wiggins -- excuse me -- Lott indicated that it applies in all senses. But he also said, almost in the same statement, but of course, there is always Rule 401. What he meant was 403.

He believed that Rule 403 would cut across it.

Representative Hogan -- I believe, it is cited as Hungate in Respondent's brief -- opposed the version which the House handed down. The House handed down a version which would only admit evidence of dishonesty or false statement and so opposing it, he made some comments.

QUESTION: Well, if 403 would cut across everything like that, they wouldn't have needed to worry about putting some reservation in this rule.

MR. MELILLO: I think -- I think you are correct. I think though what it shows is that you can't

take these out of context statements for indicating or meaning more than they really do.

I won't go through each of them, but if you examine them in context, you come to a similar result. Some of them were by the opponents of the legislation --

QUESTION: Tell me if 403 is applicable, the way they amended the rule was absolutely useless.

MR. MELILLO: The way that they would -- I am not sure I follow exactly.

QUESTION: Well, if the balancing test was going to be applied, in any event, under 403, they certainly didn't need to provide especially for it in 609.

MR. MELILLO: Yes, with respect to the criminal defendant. The criminal defendant, I think, it is a stricter test.

QUESTION: Especially you would have thought that if 403 is going to apply -- if it applied anywhere, it would apply to the criminal defendant.

MR. MELILLO: But they, they actually devised is a stricter balancing test than they use in 403 -- they gave him something over and beyond what 403 contains.

The difference being substantial prejudice as opposed to mere prejudice, which I think is a very big

difference.

Let me just address this harmless error issue a second. I am not going to reiterate the brief, but I did point out that there was a credibility issue with respect to the warnings theory, as well, not just assumption of the risk.

Plus, I think that the Court has to be aware that when evidence is so prejudicial and poisonous, a jury can use it for purposes of simply finding against a party without, you know, really considering what its effect is with respect to any particular piece of evidence.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Melillo, the case is submitted.

(Whereupon, at 12:00 noon, the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 87-1816 - PAUL GREEN, Petitioner V. BOCK LAUNDRY MACHINE COMPANY

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

(REPORTER)