(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction: (1) for a crime that . . . was punishable by death or by imprisonment for more than one year, the evidence: (A) must be admitted, *subject to Rule 403,* in a civil case or in a criminal case in which the witness is not a defendant.

Fed. R. Evid. 609(a)(1)(A) (emphasis added).

FRE 403 has been construed as requiring that four factors be weighed against the potential for prejudice in admitting a conviction: (1) the nature of the conviction; (2) the time elapsed since the conviction; (3) the importance of the witness's testimony to the case; and (4) the importance of credibility to the claim at hand. Here, the Third Circuit found the district court's review to be inadequate: "In denying Sharif's motion in limine and admitting his four assault convictions, including the 2009 conviction underlying his § 1983 claim that is the focus of his appeal, the District Court failed to conduct the required Rule 403 analysis."

Because the lower court had allowed all three of Sharif's prior assault convictions to be admitted, "we agree that the additional probative value of the March 2009 conviction regarding Sharif's truthfulness was minimal, if not nil." (In a footnote, the Third Circuit cited precedent from a DC Court of Appeals case which discounts the connection between acts of violence and veracity: "In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence . . . generally have little or no direct bearing on honesty and veracity." (citation omitted).

Reversed and remanded.

http://www2.ca3.uscourts.gov/opinarch/124468p.pdf (last accessed Jan. 23, 2014).

Juries: Ninth Circuit Rules Peremptory Strikes Based On Sexual Orientation Require "Heightened Scrutiny"—Gay Jurors Protected Under *Windsor*

Smithkline Beecham Corp. v. Abbott Laboratories, Nos. 11-17357, 11-17373 (9th Cir. Jan. 21, 2014).

At the beginning stages of a controversial case involving allegations of antitrust and unfair trade practice between two big pharma corporations, an openly gay man was dismissed from the jury pool based purely on his sexual orientation. The case centered on a licensing agreement dispute over the pricing of HIV medications. Abbott Laboratories (Abbott) elected to use its first peremptory challenge to dismiss the

potential juror. Smithkline Beecham Corporation (Smithkline) objected. The district judge allowed Abbott's strike, saying said she would reconsider her ruling if Abbot struck any further potential gay jurors.

Smithkline was successful on the antitrust and unfair trade practice claims, and was awarded $3,486,240 in damages. Abbott appealed. On cross-appeal, Smithkline contended that a new trial was warranted because Abbott had unconstitutionally used a peremptory strike to exclude a juror on the basis of his sexual orientation.

HELD: The Ninth Circuit reversed and remanded for a new trial. The Circuit Court held that classifications based on sexual orientation are subject to heightened scrutiny, and that equal protection prohibits peremptory strikes based on sexual orientation.

DISCUSSION: The court began by inquiring as to whether Smithkline had first established a prima facie case of intentional discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986). *Batson* requires that the party challenging the jury strike must show (1) the excluded juror is a member of a cognizable group; (2) counsel used a peremptory strike; and (3) the totality of the circumstances raises the inference that the strike was motivated by the characteristic in question. The burden on the challenging party is not onerous—it is a burden of production, not of persuasion. The court found that, in light of the potential interest of a member of the gay community in an HIV drug case, Abbott would have ample motive to strike such a juror. Abbott had not offered a "nondiscriminatory reason" or any "colorable neutral explanation" for its actions. In the absence of any credible testimony to the contrary, and because the juror in question was the only juror to identify as a gay man and the litigation presented an issue of consequence to the gay community, Abbott's decision to use its first strike to remove the juror was sufficient to establish the prima facie case.

The Ninth Circuit then moved to the question of whether what level of scrutiny should apply to classifications based on sexual orientation. In *Batson*, the Supreme Court had clearly stated that the privilege of exercising peremptory challenges was subject to the Equal Protection clause. *Batson* had made it clear that peremptory challenges based on race where impermissible, and a successor case had established that gender also could not be the basis for a peremptory challenge.

The court relied heavily on the recent Defense of Marriage Act (DOMA) decision by the Supreme Court, *United States v. Windsor*, 133 S. Ct. 2675 (2013), which considered the application of equal protection to classifications based on sexual orientation. While *Windsor* had not expressly enunciated the level of scrutiny to apply, the Circuit Court held that "In its word and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review." One basis for this conclusion was in the *Windsor* Court's analysis of the underlying DOMA statute. As opposed to a rational basis approach, wherein a court accepts even a modicum of legislative rationale as sufficient, the Supreme Court had exhaustively reviewed the legislative history of DOMA and concluded that it had an unsustainably discriminatory purpose.

The Ninth Circuit reasoned that under *Windsor,* it was compelled to reexamine its own precedents: "Under that analysis, we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection".

http://cdn.ca9.uscourts.gov/datastore/opinions/2014/01/20/11-17357.pdf (last accessed Jan. 23, 2014)

Eminent Domain: Idaho Law Does Not Grant Cities Extraterritorial Eminent Domain Powers Unless Specifically Enumerated

Alliance for Property Rights v. City of Idaho Falls, No. 12-35800 (9th Cir. Dec. 31, 2013).

The City of Idaho Falls, Idaho owns Idaho Falls Power, which supplies electricity to thousands of commercial and residential customers in the City. The power lines and distribution systems for the electricity are both inside and outside the City's borders. With growing needs, the City embarked on an expansion, first put in place in the 70s and re-affirmed in 2007, which included plans to build transmission lines outside the City's borders to connect to existing substations. To execute the plans, easements for private property were needed. The City initially sought to buy the necessary properties, but when some owners refused to sell, the City sought to condemn the properties. In response the property owners joined together as the Alliance for Property Rights and sought injunctive and declaratory relief, contending 1) Idaho Falls could not condemn extraterritorial property in order to build transmission lines and 2) that without that authority, the condemnation would violate the Due Process Clause of the Fourteenth Amendment.

The City removed the case to federal district court which entered summary judgment for the Alliance, holding Idaho law did not give Idaho cities the power to condemn extraterritorial property for the purpose of building transmission lines. The City appealed.

HELD: The Ninth Circuit affirmed the district court, holding that Idaho law does not grant cities the express or implied authority to exercise the right of eminent domain over extraterritorial property for the purpose of constructing transmission lines.

DISCUSSION: The issue on appeal was whether Idaho law granted Idaho cities the power of eminent domain over easements that lie outside the borders of the City for the specific purpose of building electric transmission lines. Under Idaho Supreme Court precedent municipalities have three sources of power: "(1)] [p]owers granted in express words; [(2)] [p]owers fairly implied in or incident to those powers expressly granted; and [(3)] [p]owers essential to the accomplishment of the declared objects and purposes of the corporation."