Multistate Survey: How other States Handle Impeachment by Evidence of Conviction of a Crime

Submitted May 27, 2011 to the Judicial Council's Evidence & Civil Procedure Committee

By Attorney Bill Gleisner & Matthew Surridge[1]

INTRODUCTION

At the May 20, 2011 meeting of the Committee Gleisner agreed to do a survey of the law concerning this topic based on Blume's article.[2] Initially, he agreed to base this article on footnotes 19 & 20 of that article.[3]

However, after researching the topic, we discovered that those footnotes present only a partial picture of what is done in other states and is not entirely accurate. We also compared our research with the detailed appendix following Professor Blume's article and similarly found it to be somewhat less than accurate.

We decided that the best way to conduct a multistate survey of the treatment of the topic was to create a detailed appendix containing each of the statutes from the various states so that the committee members can judge for themselves just how the topic has been addressed throughout the country. The attached Appendix contains an indexed set of the statutes from each of the fifty states. We have also included Federal Rule of Evidence ("FRE") 609 to facilitate a comparative study of the often very different treatment the topic has received. On a number of occasions we have included excerpts from

[1] Attorney Surridge is Gleisner's associate.

[2] The recommended citation to that article is: Blume, John H., "The Dilemma of the Criminal Defendant with a Prior Record – Lessons from the Wrongfully Convicted" (2008), Cornell Law Facutly Publications, Paper 83. http://scholarship.law.cornell.edu/lsrp_papers/83/.

[3] Those footnotes read in part: "Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, Vermont, Washington, and Wyoming all have rules that are the same or substantially similar to FRE 609. California, Colorado, Idaho, Texas, and Virginia allow a defendant to be impeached with any felony conviction. North Carolina allows a defendant to be impeached with any felony and a number of misdemeanors. Louisiana, Maryland, Missouri, New Jersey, and Wisconsin allow a defendant to be impeached with any prior conviction. … Hawaii and Montana do not permit impeachment with prior convictions. State v. Santiago, 492 P.2d 657 (Ha. 1971); Mont. R. Evid. 609. West Virginia allows a defendant to be impeached with prior convictions only if the offense involves perjury or false statement and the court determines that the probative value of impeachment outweighs the prejudice to the accused. State v. McAboy, 236 S.E.2d 431 (W. Va. 1977); see Nichol, supra note 18."

advisory committee comments from the various states and on a number of occasions we have also included case law summaries from a number of the states. This paper is not intended as a completely comprehensive analysis, but the Appendix should allow for such an analysis by those who are so inclined.

Our purpose in this paper is modest. We first review the criticisms made of Wis. Stats. § 906.09 by Professor Blinka. We then survey some of the more prominent features of the treatment the topic has received in the various states in an effort to detect trends which differ from the Wisconsin treatment. Finally, we have some suggestions for improving § 906.09 which do not entail a complete adoption of FRE 906 but may nonetheless constitute a common sense improvement on the Wisconsin treatement which will meet some of Professor Blinka's objections.

I. PROFESSOR BLINKA'S CRITICISM

In 7 Wisconsin Practice Series – Evidence (Thomson-West 3d Ed. 2008) § 609.1, Professor Blinka has some harsh words for § 906.09. He notes that Wigmore dubbed this statute "'a queer rule' because of its dramatic departure from traditional practice." *Id.* At p. 505. He goes on to state:

> In essence, Wisconsin embraces a 'counting rule' by which the jury is informed only of the fact that the witness has been convicted of a crime and the number of prior convictions. No further information concerning the criminal record or the nature of the crime may be imparted to the jury, except where a witness's evasive answers compel an inquiry into the fact or proper number of convictions.

Id.

Professor Blinka is also troubled by the method by which the "counting" may be done. According to Blinka, § 906.09 imposes a duty on a judge to conduct a preliminary hearing on admissibility but in this hearing "the rules of evidence are not applicable … The criminal record may be proven through hearsay or by the testimony of the witness himself." *Id.* at 506. Blinka is also troubled that all prior criminal convictions, regardless of their nature, are "potential fodder for the counting rule. Misdemeanors 'count' as heavily as felonies. The crimes need not have any relevance to a person's character for truthfulness. The rule assumes that the longer the criminal record, the less credible the individual. …" *Id.* at 507.

The Professor is also troubled by the amount of discretion allotted to a judge by § 906.09. According to Blinka, "the trial court's discretion often seems to consist of little more than accurately tallying the witness's record."

Id. at 508. The Professor is also troubled by the effect of § 906.09 on appellate review. He states "[t]his social calculus yields no right or wrong answers, so appellate arguments usually boil down to whether objections were adequately preserved, the criminal record accurately tallied, and the trial record reveals a reasoned decision." *Id.*

II. PROFESSOR BLUME'S ARTICLE

It is not so much that Professor Blume does a bad job of summarizing the rules in the various states as it that this is not his focus. As we see it, Professor Blume has an agenda and he is only incidentally concerned with what has occurred in the states. We think his thesis centers on the danger that impeachment may result in wrongful convictions because of the negative effect of admitting evidence of prior convictions – for want of a better term, the propensity effect.[4] He is focused on "the controversy surrounding rules of evidence permitting criminal defendants to be impeached with prior convictions." Blume, *id.* at p. 478. There is nothing wrong with this focus, but we think it tends to distract from a critical analysis of all aspects of the laws in the various states.

For example, unlike Professor Blinka Professor Blume has only one critical comment regarding Wisconsin's rule. In footnote 19 of his article he states: "… Wisconsin allow[s] a defendant to be impeached with any prior conviction." He fails to discuss the other criticisms leveled at the statute by Blinka. In his appendix, Professor Blume summarizes only a part of the content of § 906.09 without any comment.

He spends a great deal of his article explaining how he gathered empirical evidence (*Id.* at 488-492) and then launches into a set of proposals for reform that are intended to reduce or eliminate the misuse of a criminal defendant's history of criminal convictions (*Id.* at 492-497). This results in his concluding as follows: "I have presented empirical evidence suggesting that the current rules of evidence, which permit criminal defendants to be impeached with a wide range of prior convictions, contribute to wrongful convictions." *Id.* at 498.

We do not take issue with Professor Blume's thesis nor do we find fault with his methods. The problem is that his approach does not help much with

[4] It might be more correct to state that his thesis is that the use of prior convictions for impeachment purposes results in fewer defendants with prior convictions taking the stand, which results in more wrongful convictions. What he seems to be primarily concerned with is finding a way to restrict the use of prior convictions so that those with prior convictions would not be deterred from taking the stand in their own defense.

the job of this committee which is to evaluate § 906.09 in comparison with similar rules in other jurisdictions.[5] In turn, such a comparison may point to drafting suggestions which will enable our committee to recommend improvements in § 906.09 which address at least some of Professor Blinka's criticisms.

III. TRENDS IN OTHER JURISDICTIONS

A. Pardons & Juvenile Adjudications

While a number of states closely follow the FRE 609 model, a number of states do not. However, there is one trend which predominates in a large number of states, regardless of whether they have adopted FRE 609. Most states go quite far in severely limiting references to pardons or juvenile adjudications. Let's begin by reviewing how FRE 609 deals with this subject:

> *(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.*
>
> *(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.*

See Appendix, p. v.

Wisconsin does not even mention the subject of pardons, and grants wide latitude to the trial court concerning adjudications of delinquency. This is an area where Wisconsin appears to be very much in the minority. Let's take a look at how other states deal with these issues:

- **Alabama** allows evidence of a conviction even if the conviction has been the subject of a pardon, annulment, etc. Evidence of juvenile adjudications is flat out prohibited. See Appendix, p. xiii.

[5] In fact, a number of states were not even listed in Blume's footnotes 19 & 20, including: Alaska, Connecticut, Indiana, Massachusetts, Michigan, New York, North Carolina, Oregon, Pennsylvania, Rhode Island and West Virginia.

- **Alaska** bans the use of convictions that have been pardoned or where there is proof rehabilitation. Juvenile adjudications may be allowed if the court is satisfied that admission would substantially assist in determining credibility. See Appendix, p. xv.

- **Arkansas** adopts FRE 609. See Appendix, p. xviii.

- **California** bans the use of convictions where there has been a pardon or a certificate of rehabilitation has been issued, or where an accusatory pleading has been dismissed. Juvenile adjudications are not addressed. See Appendix, pp. xx-xxi.

- **Delaware** adopts FRE 609. See Appendix, p. xxvi.

- **Florida** is silent on pardons but juvenile adjudications are inadmissible. See Appendix, p. xxvii.

- **Georgia** adopts a variation of FRE 609. It bans use of convictions where there is a pardon, annulment or other equivalent procedure based on a finding of innocence. Juvenile adjudications are inadmissible in a criminal case. See Appendix, p. xxix.

- **Hawaii** bans evidence of a conviction if it has been the subject of a pardon, but allows juvenile convictions. See Appendix, p. xxx.

- **Idaho** bans convictions where there has been a pardon, annulment or certificate of rehabilitation. Evidence of a withheld judgment or a vacated judgment is inadmissible. It does not mention juvenile adjudications. See Appendix, p. xxxii.

- **Illinois** adopts FRE 609. See Appendix, pp. xxxii-xxxiii.

- **Indiana** adopts FRE 609. See Appendix, p. xxxiii.

- **Iowa** bans evidence of a conviction if it was the subject of a pardon. Juvenile adjudications are generally not admissible, but in a criminal case a court may, under certain circumstances, allow evidence of a juvenile adjudication of a witness other than the accused. See Appendix, p. xxxv.

- **Kentucky** bans convictions where there is a pardon, annulment or certificate of rehabilitation. No mention is made of juvenile adjudications. See Appendix, p. xxxvi.

- **Louisiana** bans convictions that are the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence. Juvenile adjudications are 'generally not admissible." See Appendix xxxvi.

- **Maine** bans convictions that have been the subject of a pardon, annulment or certificate of rehabilitation. Juvenile adjudications that are "open to the public" may be admitted, but not otherwise. See Appendix, p. xxxviii.
- **Maryland's** law does not address juvenile adjudications, but provides as follows:

> *Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:*
> *(1) the conviction has been reversed or vacated;*
> *(2) the conviction has been the subject of a pardon; or*
> *(3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.*

See Appendix, p. xxxviii.

- **Michigan** has adopted FRE 609. See Appendix, p. xlv.

- **Minnesota** bans convictions based on a pardon, annulment, vacation or certificate of rehabilitation. Juvenile adjudications are not admissible. See Appendix, p. l-li.

- **Mississippi** has adopted FRE 609. See Appendix, p. lii.

- **Nebraska** has an absolute ban on any conviction which has been the subject of a pardon, annulment or other equivalent procedure which is based on innocence, and there is a similar absolute ban on juvenile adjudications. See Appendix, p. lviii.

- **New Hampshire** has adopted FRE 609. See Appendix, p. lx.

- **New Mexico** has adopted FRE 609. See Appendix, p. lxiii.

- **North Carolina** bans all convictions based on a pardon and adopts FRE 609 as to juvenile adjudications. See Appendix, p. lxvii.

- **North Dakota** adopts FRE 609. See Appendix, p. lxviii.

- **Ohio** adopts FRE 609 as to adult convictions but has an absolute ban on all juvenile adjudications. See Appendix, p. lxx.

- **Oklahoma** adopts FRE 609. See Appendix, p. lxxiv.

- **Oregon** has a very complex law when it comes to adult convictions (see *infra*) but appears to ban juvenile adjudications by stating "an adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime." See Appendix, p. lxxvi.

- **Pennsylvania** adopts FRE 609. See Appendix, p. lxxviii.

- **Rhode Island** has an absolute ban on convictions arising from a pardon or other equivalent procedure but adopts FRE 609 as to juvenile adjudications. See Appendix, p. lxxxi.

- **South Carolina** adopts FRE 609 as to pardons but has an absolute ban on juvenile adjudications. See Appendix, p. lxxxiv.

- **Tennessee** adopts FRE 609. See Appendix, pp. lxxv-lxxvi.

- **Texas** bans convictions that are based on a pardon, annulment or certificate of rehabilitation, as long as that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude. It also bans convictions where probation has been satisfactorily completed, as long long as that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude. It is difficult to discern Texas' position on juvenile adjudications without further research. See Appendix, p. lxxxvi.

- **Utah** adopts FRE 609. See Appendix, p. lxxxix.

- **Vermont** adopts FRE 609. See Appendix, p. xci.

- **Washington** adopts FRE 609. See Appendix, p. xcvi.

- **West Virginia** adopts FRE 609. See Appendix, p. xcvii.

- **Wyoming** adopts FRE 609. See Appendix, p. c.

B. Restrictions on Trial Court Discretion

While not as clear or pervasive as the trend in the states to adopt restrictions on convictions based on pardons or juvenile adjudications, there is nonetheless a trend among a number of states to impose absolute restrictions on trial court discretion. For example, consider the following.

Colorado's law states: "Evidence of a previous conviction of a felony where the witness testifying was convicted five years prior to the time when the witness testifies shall not be admissible in evidence in any civil action." See Appendix, p. xxv.

Florida flat out mandates that "Evidence of juvenile adjudications are inadmissible under this subsection." See Appendix, p. xxvii.

Hawaii law states: "[I]n a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime for the sole purpose of attacking credibility, unless the defendant has [put his character in evidence]." See Appendix, p. xxx.

Kansas in our opinion has the most restrictions on trial court discretion and also has a fairly "defendant friendly" law. Here is the entire Kansas law:

> *Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility. If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.*

See Appendix, p. xxxv.

However, for "defendant friendly," you can't beat Montana's law, which reads in its entirety as follows:

> *For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.*

See Appendix, p. lv.

Massachusetts law on this topic is really a litany of restraints on a trial court's discretion and is best appreciated by quoting it here in full:

> ***Conviction of Crime May Be Shown to Affect Credibility.***
> *The conviction of a witness of a crime may be shown to affect his credibility, except as follows:*
> ***First,*** *The record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.*
> ***Second,*** *The record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence*

to a reformatory prison, jail, or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.

Third, *The record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.*

Fourth, *the record of his conviction for a traffic violation upon which a fine only was imposed shall not be shown for such purpose unless he has been convicted of another crime or crimes within five years of the time of his testifying.*

For the purpose of this section, any period during which the defendant was a fugitive from justice shall be excluded in determining time limitations under the provisions of this section.

See Appendix, p. xl-xli.

Nebraska law mandates "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date." See Appendix, p. lviii.

Oregon law is very strange, to say the least, and if interested the reader is invited to review it in the Appendix, at pp. lxxiv-lxxvi. In Oregon, it appears that the trigger for using a whole laundry list of crimes in impeachment is whether "crimes against a family or household member" have occurred. The law also contains the following restriction on trial court discretion: "Evidence of a conviction under this section is not admissible if a period of more than 15 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date…" See Appendix, p. lxxvi.

III. HOW WISCONSIN COMPARES TO THE STRICTIST STATES

We understand Professor Blinka's criticisms, and agree with some of them. However, it is important to point out that there are some states that have truly draconian laws on the topic and which offer far less guidance than is found in § 906.09. Consider the following:

Missouri's law reads as follows:

> *Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.*

See Appendix, p. lv.

New Jersey's law is even more stark and reads as follows:

> *For the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes. Such conviction may be proved by examination, production of the record thereof, or by other competent evidence.*

See Appendix, p. lxi.

Virginia's law makes Wisconsin's law look verbose by comparison. Here is Virginia's law in its entirety:

> *A person convicted of a felony or perjury shall not be incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit.*

See Appendix, p. xci.

However, Virginia is a good example as to why we included some advisory commentary and case notes with many of the laws in the Appendix. While Virginia has a very brief law, please look at the extensive Common Law gloss which adheres to that law. See Appendix, pp. xci-xcvi.

IV. SOME PRELIMINARY SUGGESTIONS

We do think that many of Professor Blinka's criticisms have merit. At the same time, we agree with Tom Shriner that it would be unwise to try to do more than "tweak" a law which is so strongly favored by prosecutors and which has become the touchstone in Wisconsin for dealing with issues of impeachment because of prior convictions. However, we think some tweaking could occur without unduly changing the fundamental law.

We doubt that many would quarrel with the notion that convictions should not be used to impeach if based on pardons or similar certifications of innocence. Surely, something more similar to FRE 609 could be adopted

without doing fundamental harm to § 906.09. In a similar vein, how can it be argued that juvenile adjudications which have been sealed should be used to impeach? Why should a witness who testifies face the disclosure of something which would otherwise remain secret, irrespective of whether the witness is also a criminal defendant?

There are other aspects of § 906.09 which seem troubling and could stand with improvement, but might be less easy to sell. For example, we do think that there should be more stringent guidelines circumscribing the discretion of the trial court when confronted with issues of adult convictions – especially convictions for crimes which do not involve untruthfulness. We would respectfully suggest that consideration be given to adopting the following from the Connecticut law:

> *In determining whether to admit evidence of a conviction, the court shall consider:*
> *(1) The extent of the prejudice likely to arise,*
> *(2) the significance of the particular crime in indicating untruthfulness, and*
> *(3) the remoteness in time of the conviction.*
> *(b) Methods of proof. Evidence that a witness has been convicted of a crime may be introduced by the following methods:*
> *(1) Examination of the witness as to the conviction, or*
> *(2) introduction of a certified copy of the record of conviction into evidence, after the witness has been identified as the person named in the record.*
> *(c) Matters subject to proof. If, for purposes of impeaching the credibility of a witness, evidence is introduced that the witness has been convicted of a crime, the court shall limit the evidence to the name of the crime and when and where the conviction was rendered, except that (1) the court may exclude evidence of the name of the crime and (2) if the witness denies the conviction, the court may permit evidence of the punishment imposed.*

See Appendix, p. xxv.

Beyond that, we invite the reader to review the Appendix which contains a very exact rendition of the law in the 50 other states on the topic suggested by § 906.09.

Respectfully submitted this 27th day of May, 2011.

Attorney Bill Gleisner
Attorney Matthew Surridge

APPENDIX TO GLEISNER'S MAY 27, 2011 MULTISTATE SURVEY CONCERNING § 906.09

FEDERAL AND STATE RULES DEALING WITH IMPEACHMENT BY EVIDENCE OF A CRIME

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INTRODUCTION

The following was downloaded from Lexis during the week of May 23, 2011. An effort has been made to reproduce some relevant commentary. In some instances, some relevant case notes have also been reproduced. All Statutory text appears in italics.

THE FEDERAL AND STATE RULES

FRE 609

Rule 609. Impeachment by Evidence of Conviction of Crime [Caution: For amendments effective December 1, 2011, see prospective amendment note to this rule.]

(a) General rule. For the purpose of attacking the character for truthfulness of a witness,

> *(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and*
> *(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.*

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the

court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

FEDERAL ADVISORY COMMITTEE NOTES:

Notes of Advisory Committee on Rules. As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure; Criminal § 416 (1969). The weight of traditional authority has been to allow 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. This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. Luck v. United States, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the Congressional policy manifested in the 1970 legislation.

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many

crimes. For example, simple theft as compared with theft from interstate commerce. Other instances of borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States, 18 U.S.C. § 13, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, 28 U.S.C. § 1865. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See 28 U.S.C. § 1865, supra, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests--Current Trends, 89 U.Pa.L.Rev. 166, 176-177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing in Evidence Code, § 788(5), p. 142, Cal.Law Rev.Comm'n (1965), though not adopted. See California Evidence Code § 788.

Subdivision (c). A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character. If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation the situation is otherwise. The result under the rule is to render the conviction inadmissible. The alternative of allowing in evidence both the conviction and the rehabilitation has not been adopted for reasons of policy, economy of time, and difficulties of evaluation.

A similar provision is contained in California Evidence Code § 788. Cf. A.L.I. Model Penal Code, Proposed Official Draft § 306.6(3)(e) (1962), and discussion in A.L.I. Proceedings 310 (1961).

Pardons based on innocence have the effect, of course, of nullifying the conviction ab initio.

Subdivision (d). The prevailing view has been that a juvenile adjudication is not usable for impeachment. Thomas v. United States, 74 App.D.C. 167, 121 F.2d 905 (1941); Cotton v. United States, 355 F.2d 480 (10th Cir. 1966). This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of parens patriae, the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction. While In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While Gault was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. 387 U.S. at 25, 87 S.Ct. 1428. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum.L.Rev. 281, 289 (1967). In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore § 196; 3 Id. §§ 924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

Subdivision (e). The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for

impeachment. United States v. Empire Packing Co., 174 F.2d 16 (7th Cir.1949), cert. denied 337 U.S. 959, 69 S.Ct. 1534, 93 L.Ed. 1758; Bloch v. United States, 226 F.2d 185 (9th Cir.1955), cert. denied 350 U.S. 948, 76 S.Ct. 323, 100 L.Ed. 826 and 353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910; and see Newman v. United States, 331 F.2d 968 (8th Cir.1964), Contra, Campbell v. United States, 85 U.S.App.D.C. 133, 176 F.2d 45 (1949). The pendency of an appeal is, however, a qualifying circumstance properly considerable.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 609(a) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(1), enacted in 1970. The Rule provided that:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

As reported to the Committee by the Subcommittee, Rule 609(a) was amended to read as follows:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, i.e., crimes involving dishonesty or false statement.

Rule 609(b) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(2)(B), enacted in 1970. The Rule provided:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

Under this formulation, a witness' entire past record of criminal convictions could be used for impeachment (provided the conviction met the standard of subdivision (a)), if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction.

The Committee amended the Rule to read in the text of the 1971 Advisory Committee version to provide that upon the expiration of ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

Rule 609(c) as submitted by the Court provided in part that evidence of a witness' prior conviction is not admissible to attack his credibility if the conviction was the subject of a pardon, annulment, or other equivalent procedure, based on a showing of rehabilitation, and the witness has not been convicted of a subsequent crime. The Committee amended the Rule to provide that the "subsequent crime" must have been "punishable by death or imprisonment in excess of one year", on the ground that a subsequent conviction of an

offense not a felony is insufficient to rebut the finding that the witness has been rehabilitated. The Committee also intends that the words "based on a finding of the rehabilitation of the person convicted" apply not only to "certificate of rehabilitation, or other equivalent procedure," but also to "pardon" and "annulment."

Notes of Committee on the Judiciary, Senate Report No. 93-1277. As proposed by the Supreme Court, the rule would allow the use of prior convictions to impeach if the crime was a felony or a misdemeanor if the misdemeanor involved dishonesty or false statement. As modified by the House, the rule would admit prior convictions for impeachment purposes only if the offense, whether felony or misdemeanor, involved dishonesty or false statement.

The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity to testify truthfully.

With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

Notwithstanding this provision, proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions. Similarly, such records may be offered to rebut representations made by the defendant regarding his attitude toward or willingness to commit a general category of offense, although denials or other representations by the defendant regarding the specific conduct which forms the basis of the charge against him shall not make prior convictions admissible to rebut such statement.

In regard to either type of representation, of course, prior convictions may be offered in rebuttal only if the defendant's statement is made in response to defense counsel's questions or is made gratuitously in the course of cross-examination. Prior convictions may not be offered as rebuttal evidence if the prosecution has sought to circumvent the purpose of this rule by asking questions which elicit such representations from the defendant.

One other clarifying amendment has been added to this subsection, that is, to provide that the admissibility of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the

particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact. It is expected that, in fairness, the court will give the party against whom the conviction is introduced a full and adequate opportunity to contest its admission.

Notes of Conference Committee, House Report No. 93-1597. Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness' credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect to the defendant. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

The House bill provides in subsection (b) that evidence of conviction of a crime may not be used for impeachment purposes under subsection (a) if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement imposed for the conviction, whichever is later. The Senate amendment permits the use of convictions older than ten years, if the court determines, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

The Conference adopts the Senate amendment with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a

party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1990 amendment. The amendment to Rule 609(a) makes two changes in the rule. The first change removes 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. See e.g., United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977). The amendment does not contemplate that a court will necessarily permit proof of prior convictions through testimony, which might be time-consuming and more prejudicial than proof through a written record. Rules 403 and 611(a) provide sufficient authority for the court to protect against unfair or disruptive methods of proof.

The second change effected by the amendment resolves an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant. The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify. Thus, the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice--i.e., the danger that convictions that would be excluded under Fed. R. Evid. 404 will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.

Prior to the amendment, the rule appeared to give the defendant the benefit of the special balancing test when defense witnesses other than the defendant were called to testify. In practice, however, the concern about unfairness to the defendant is most acute when the defendant's own convictions are offered as evidence. Almost all of the decided cases concern this type of impeachment, and the amendment does not deprive the defendant of any meaningful protection, since Rule 403 now clearly protects against unfair impeachment of any defense witness other than the defendant. There are cases in which a defendant might be prejudiced when a defense witness is impeached. Such cases may arise, for example, when the witness bears a special relationship to the defendant such that the defendant is likely to suffer some spill-over effect from impeachment of the witness.

The amendment also protects other litigants from unfair impeachment of their witnesses. The danger of prejudice from the use of prior convictions is not confined to criminal defendants. Although the danger that prior convictions will be misused as character evidence is particularly acute when the defendant is impeached, the danger exists in other situations as well. The amendment reflects the view that it is desirable to protect all litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, is appropriate for assessing the admissibility of prior convictions for impeachment of any witness other than a criminal defendant.

The amendment reflects a judgment that decisions interpreting Rule 609(a) as requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results. See, e.g., Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), cert. denied, 105 S. Ct. 2157 (1985). The amendment provides the same protection against unfair prejudice arising from prior convictions used for impeachment purposes as the rules provide for other evidence. The amendment finds support in decided cases. See, e.g., Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985); Czaka v. Hickman, 703 F.2d 317 (8th Cir. 1983).

Fewer decided cases address the question whether Rule 609(a) provides any protection

against unduly prejudicial prior convictions used to impeach government witnesses. Some courts have read Rule 609(a) as giving the government no protection for its witnesses. See, e.g., United States v. Thorne, 547 F.2d 56 (8th Cir. 1976); United States v. Nevitt, 563 F.2d 406 (9th Cir. 1977), cert. denied, 444 U.S. 847 (1979). This approach also is rejected by the amendment. There are cases in which impeachment of government witnesses with prior convictions that have little, if anything, to do with credibility may result in unfair prejudice to the government's interest in a fair trial and unnecessary embarrassment to a witness. Fed. R. Evid. 412 already recognizes this and excluded certain evidence of past sexual behavior in the context of prosecutions for sexual assaults.

The amendment applies the general balancing test of Rule 403 to protect all litigants against unfair impeachment of witnesses. The balancing test protects civil litigants, the government in criminal cases, and the defendant in a criminal case who calls other witnesses. The amendment addresses prior convictions offered under Rule 609, not for other purposes, and does not run afoul, therefore, of Davis v. Alaska, 415 U.S. 308 (1974). Davis involved the use of a prior juvenile adjudication not to prove a past law violation, but to prove bias. The defendant in a criminal case has the right to demonstrate the bias of a witness and to be assured a fair trial, but not to unduly prejudice a trier of fact. See generally Rule 412. In any case in which the trial court believes that confrontation rights require admission of impeachment evidence, obviously the Constitution would take precedence over the rule.

The probability that prior convictions of an ordinary government witness will be unduly prejudicial is low in most criminal cases. Since the behavior of the witness is not the issue in dispute in most cases, there is little chance that the trier of fact will misuse the convictions offered as impeachment evidence as propensity evidence. Thus, trial courts will be skeptical when the government objects to impeachment of its witnesses with prior convictions. Only when the government is able to point to a real danger of prejudice that is sufficient to outweigh substantially the probative value of the conviction for impeachment purposes will the conviction be excluded.

The amendment continues to divide subdivision (a) into subsections (1) and (2). The Committee recommended no substantive change in subdivision (a)(2), even though some cases raise a concern about the proper interpretation of the words "dishonesty or false statement." These words were used but not explained in the original Advisory Committee Note accompanying Rule 609. Congress extensively debated the rule, and the Report of the House and Senate Conference Committee states that "[b]y the phrase 'dishonesty and false statement,' the Conference means crimes such as perjury, subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that arguably take an unduly broad view of "dishonesty," admitting convictions such as for bank robbery or bank larceny. Subsection (a)(2) continues to apply to any witness, including a criminal defendant.

Finally, the Committee determined that it was unnecessary to add to the rule language stating that, when a prior conviction is offered under Rule 609, the trial court is to consider the probative value of the prior conviction for impeachment, not for other purposes. The Committee concluded that the title of the rule, its first sentence, and its placement among the impeachment rules clearly establish that evidence offered under Rule 609 is offered only for purposes of impeachment.

Notes of Advisory Committee on 2006 amendments. The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection,

irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under subdivision (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, 90 J. Crim. L. & Criminology 1087 (2000).

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subdivision regardless of whether the crime was charged under a section that expressly references deceit (e.g., 18 U.S.C. § 1001, Material Misrepresentation to the Federal Government) or a section that does not (*e.g.*, 18 U.S.C. § 1503, Obstruction of Justice).

The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment--as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly--a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States*, 495 U.S. 575, 602 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States*, 125 S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

ALABAMA

Ala. R. Evid. Rule 609

(a) General rule.

For the purpose of attacking the credibility of a witness,

(1) (A) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

(B) evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(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.

(b) Time limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction, more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or equivalent procedure.

Evidence of a conviction is admissible under this rule even if the conviction has been the subject of a pardon, annulment, or equivalent procedure.

(d) Juvenile or youthful offender adjudications.

Evidence of juvenile or youthful offender adjudications is not admissible under this rule.

(e) Pendency of appeal.

The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

ALABAMA ADVISORY COMMITTEE'S NOTES:

Alabama Rule of Evidence 404(a) recognizes the general exclusionary rule under which evidence of a person's character is inadmissible to prove action in conformity therewith on the particular occasion being litigated. Rule 404(a)(3), however, carves out an exception to this general rule excluding evidence of character. Whenever a witness takes the stand and offers testimony, evidence of the witness's character for untruthfulness may be admitted as a basis from which to infer that the witness is not telling the truth. This opens the door to any character evidence that is relevant to credibility. Rule 609 serves as an example of such impeachment.

Section (a). General rule. The preexisting Alabama statutory provision authorizing impeachment by evidence showing conviction for a crime involving moral turpitude, Ala. Code 1975, § 12-21-162(b), has been superseded by Rule 609.

Under Rule 609, there will be alternative tests: one based upon the seriousness of the crime, met only if the crime was punishable by death or imprisonment in excess of one year, and the other based upon whether the crime involved dishonesty or false statement. This rule is based upon Federal Rule of Evidence 609(a) as amended January 26, 1990, effective December 1, 1990. The special balancing test embodied in Rule 609(a)(1)(B) is to be applied only to the criminal defendant who testifies in the criminal case in which he or she is being

prosecuted.

Crimes involving "dishonesty or false statement," as indicated in the report of the Senate Committee on the Judiciary during the process of adopting the corresponding Federal Rule 609, include crimes "such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity to testify truthfully." Senate Comm. on Judiciary, Fed. Rules of Evidence, S. Rep. No. 1277, 93d Cong., 2d Sess., 14 (1974).

This rule makes no distinction with regard to the court in which the conviction arises or with regard to the law that establishes the crime. Consequently, contrary to preexisting Alabama law, a conviction is usable even if it occurred in the municipal court or is for a crime that constitutes a violation of a municipal ordinance. Contra Parker v. State, 280 Ala. 685, 198 So. 2d 261 (1967); Muse v. State, 29 Ala. App. 271, 196 So. 148, 1940 Ala. App. LEXIS 172 (Ala. Ct. App. 1940), cert. denied, 239 Ala. 557, 196 So. 151 (1940).

Section (b). Time limit. As a general principle, Rule 609(b) recognizes that convictions over ten years old are too remote to be relevant on the question of a witness's current credibility. In rare circumstances, however, the trial judge may permit impeachment by a conviction more than ten years old, if two elements are met. First, the court must make a determination, in the interests of justice, that the probative value of the conviction, judged by specific facts and circumstances, substantially outweighs its prejudicial effect. Second, as a condition precedent to admissibility, the proponent must have given the adverse party sufficient advance written notice of the intent to use such evidence. Sufficiency of such notice is measured by whether it provides the adverse party a fair opportunity to contest the use of the conviction. Compare Ala. R. Evid. 404(b).
This rule constitutes a significant change in Alabama practice. Historically, remoteness has been determined on a case-by-case basis, with no arbitrary designation as to number of years or other length of time. Harbin v. State, 397 So. 2d 143 (Ala. Crim. App. 1981), cert. denied, 397 So. 2d 145 (Ala. 1981). Much has been left to the discretion of the trial court on this issue. See Davenport v. State, 50 Ala. App. 321, 278 So. 2d 769 (1973). If the conviction is not more than ten years old, Rule 609 would leave no discretion in the trial judge to exclude for remoteness, so long as the conviction otherwise meets the requirements of Rule 609. That discretion traditionally vested in Alabama trial judges would continue in regard to the admission of convictions that are more than ten years old.

Section (c). Effect of pardon, annulment, or equivalent procedure. Rule 609(c) affirms the historic practice in Alabama under which a pardon has had no impact upon the admissibility of evidence of a conviction offered for impeachment. Rush v. State, 253 Ala. 537, 45 So. 2d 761 (1950). See W. Schroeder, Evidentiary Use in Criminal Cases of Collateral Crimes and Acts: A Comparison of the Federal Rules and Alabama Law, 35 Ala. L. Rev. 241 (1984).

Section (d). Juvenile or youthful offender adjudications. Under Rule 609(d), if the prior crime was the subject of an adjudication in the juvenile court, then it may not be used to impeach. This rule of preclusion remains unchanged from preexisting Alabama law, as embodied in both a statute and the decisions interpreting that statute. See Ala. Code 1975, § 12-15-72(a) and (b) (providing that a disposition in the juvenile court is not a conviction and is not admissible as evidence against the child in any other proceeding in any other court); Copeland v. State Farm Mut. Ins. Co., 536 So. 2d 931 (Ala. 1988); C. Gamble, McElroy's Alabama Evidence § 145.01(4) (4th ed. 1991).

Rule 609, unlike its federal counterpart, extends this impeachment preclusion to youthful

offender adjudications. See Ala. Code 1975, § 12-15-72 (providing that youthful offender adjudications are not to be deemed convictions).

Juvenile adjudications or youthful offender adjudications may be used for impeachment, of course, if their exclusion would violate a litigant's constitutional rights, notwithstanding the language of Rule 609(d). See Lynn v. State, 477 So. 2d 1365, 1985 Ala. Crim. App. LEXIS 4935 (Crim. App. 1985), rev'd, 477 So. 2d 1385 (Ala. 1985).

Section (e). Pendency of appeal. A conviction, otherwise usable for impeachment purposes, is not rendered inadmissible by the fact that it is on appeal. This principle is consistent with preexisting Alabama law. Cups Coal Co. v. Tennessee River Pulp & Paper Co., 519 So. 2d 932 (Ala. 1988). Evidence of the fact that an appeal is pending is admissible.

ALASKA

Alaska R. Evid. 609
IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
(a) General Rule. *-- For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is only admissible if the crime involved dishonesty or false statement.*
(b) Time Limit. *-- Evidence of a conviction under this rule is inadmissible if a period of more than five years has elapsed since the date of the conviction. The court may, however, allow evidence of the conviction of the witness other than the accused in a criminal case after more than five years have elapsed if the court is satisfied that admission in evidence is necessary for a fair determination of the case.*
(c) Admissibility. *-- 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.*
(d) Effect of Pardon, Annulment, or Certificate of Rehabilitation. *-- Evidence of a conviction is inadmissible under this rule if:*
(1) The conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and
(2) The procedure under which the same was granted or issued required a substantial showing of rehabilitation or was based on innocence.
(e) Juvenile Adjudications. *-- The court may allow evidence of the juvenile adjudication of a witness if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence would substantially assist in determining the credibility of the witness.*
(f) Pendency of Appeal. *-- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

ARIZONA

Ariz. R. Evid. R. 609
Rule 609. Impeachment by evidence of conviction of crime
(a) General rule. *-- 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, if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect, and if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or (2) involved dishonesty or false statement, regardless of the punishment.*

(b) Time limit. *-- Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.*

(c) Effect of pardon, annulment, or certificate of rehabilitation. *-- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.*

(d) Juvenile adjudications. *-- Evidence of juvenile adjudication is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.*

(e) Pendency of appeal. *-- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

SELECTED ARIZONA CASE NOTES:

CONSTRUCTION.

The phrase "dishonesty or false statement" should be construed narrowly to include only those crimes involving some element of deceit or falsification. State v. Terrell, 156 Ariz. 499, 753 P.2d 189 (Ct. App. 1988).

COURT'S DISCRETION.

--IN GENERAL.

Admission of prior felony convictions is left to the sound discretion of the trial court. State v. Bloomer, 156 Ariz. 276, 751 P.2d 592 (Ct. App. 1987).

--EVIDENCE EXCLUDED.

The trial court did not abuse its discretion in excluding the felony conviction evidence in wrongful death action, where the evidence could have been highly prejudicial to defendant and the evidence went to the character of the defendant and was immaterial to any issue presented to the jury. Quinonez ex rel. Quinonez v. Andersen, 144 Ariz. 193, 696 P.2d 1342 (Ct. App. 1984).

--PREJUDICIAL EFFECT.

Without defendant's testimony, a reviewing court cannot properly weigh the probative value of the testimony against the prejudicial impact of the impeachment. State v. Conner, 163 Ariz. 97, 786 P.2d 948 (1990).

Factors which trial judge should take into account in order to determine the value of admitting evidence of prior convictions include: impeachment value of the prior; length of time since the prior conviction; the witness's history since the prior conviction; the similarity between the past and present crimes; the importance of defendant's testimony; and the centrality of the credibility issue. State v. Williams, 144 Ariz. 433, 698 P.2d 678 (1985); State v. Rendon, 148 Ariz. 524, 715 P.2d 777 (Ct. App. 1986).

Where it is clear from the record that the trial court balanced the probative value and the prejudicial effect of the admission of a prior conviction, the decision of the trial court will be reviewed only for an abuse of discretion. State v. Hunter, 137 Ariz. 234, 669 P.2d 1011 (Ct. App. 1983).

PRIOR CONVICTIONS.
--ADMISSIBLE.
The trial court did not err in sanitizing the witness's prior convictions for possession of child pornography and attempted child molestation to lessen the prejudicial effect of the prior convictions because the defendant was still able to bring out the fact of the witness's prior felony convictions on cross-examination. State v. Montano, 204 Ariz. 413, 397 Ariz. Adv. Rep. 9, 65 P.3d 61, 2003 Ariz. LEXIS 22 (2003).

Where defendant, who did not testify, introduced a 911 call made by defendant as evidence of his innocence, such evidence fell under the excited utterance exception to the hearsay rule, and the prosecution could impeach the hearsay by introducing evidence of defendant's prior convictions. State v. Hernandez, 191 Ariz. 553, 959 P.2d 810 (Ct. App. 1998).

Trial court did not err in treating defendant's two prior convictions separately for impeachment purposes, rather than treating them as a single conviction, notwithstanding fact that they arose out of a single occurrence. State v. Hernandez, 191 Ariz. 553, 959 P.2d 810 (Ct. App. 1998).

--DISHONESTY OR FALSE STATEMENT.
A witness may be impeached on cross-examination by evidence of a prior conviction if the conviction (1) was punishable by death or imprisonment in excess of one year, or (2) involved dishonesty or false statement, regardless of the punishment. State v. Ferguson, 149 Ariz. 200, 717 P.2d 879 (1986).

Trial court did not err in allowing the use of a misdemeanor conviction for tax evasion for impeachment purposes. Blankinship v. Duarte, 137 Ariz. 217, 669 P.2d 994 (Ct. App. 1983).

--PROBATIVE VALUE.
A convicted felon cannot automatically be impeached with a prior conviction; the trial court must use its discretion in allowing the use of prior convictions to impeach a witness. State v. Carriger, 143 Ariz. 142, 692 P.2d 991 (1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2347, 85 L. Ed. 2d 864 (1985).

The general rule for admissibility is that the probative value of the felony must outweigh its prejudicial effect, and the crime must have been punishable by death or imprisonment in excess of one year under the law under which defendant was convicted, or, the crime must have involved dishonesty. State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984).

--ADMISSIBLE PLEAS.
A conviction as a result of a plea of nolo contendere is admissible under this section. Wilson v. Riley Whittle, Inc., 145 Ariz. 317, 701 P.2d 575 (Ct. App. 1984).

--BURDEN OF PROOF.
Generally, in cases involving prior felony convictions, the state need only come forward with the date, place, and nature of the prior conviction in order to satisfy its initial burden of showing probative value. State v. Williams, 144 Ariz. 433, 698 P.2d 678 (1985).

If the defendant's evidence of unfair prejudice successfully counters probativeness of

veracity inherent in any prior felony conviction, the state will need to present additional evidence of probative value to sustain its burden of proof. State v. Williams, 144 Ariz. 433, 698 P.2d 678 (1985).

The state bears the burden of proof in establishing the admissibility of prior convictions for impeachment purposes. State v. Williams, 144 Ariz. 433, 698 P.2d 678 (1985).

Prior conviction was presumptively inadmissible under subsection (b) because probation is not confinement and does not extend the time for measuring the ten-year period. State v. Dunlap, 187 Ariz. 441, 930 P.2d 518 (Ct. App. 1996), cert. denied, 520 U.S. 1275, 117 S. Ct. 2456, 138 L. Ed. 2d 214 (1997).

Evidence of conviction is inadmissible only if the order setting aside conviction was based on a finding of rehabilitation or a finding of innocence. Blankinship v. Duarte, 137 Ariz. 217, 669 P.2d 994 (Ct. App. 1983).

REHABILITATION.
Neither § 13-905, this rule, nor any case law gives trial courts the inherent power to make a finding of rehabilitation. State v. Buonafede, 168 Ariz. 444, 814 P.2d 1381 (1991).

ARKANSAS

A.R.E. 609
Rule 609. Impeachment by evidence of conviction of crime.
(a) General Rule. *-- For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one [1] year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness, or (2) involved dishonesty or false statement, regardless of the punishment.*
(b) Time Limit. *-- Evidence of a conviction under this rule is not admissible if a period of more than ten [10] years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.*
(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. *-- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one [1] year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.*
(d) Juvenile Adjudications. *-- Evidence of juvenile adjudications is generally not admissible under this rule. Except as otherwise provided by statute, however, the court may in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.*
(e) Pendency of Appeal. *-- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

SELECTED ARKANSAS CASE NOTES:

This rule concerns itself with the credibility of a witness who is offering testimony in the current case, and that admissibility must be decided on a case-by-case basis. Thomas v. State, 315 Ark. 518, 868 S.W.2d 85 (1994).

CONSTRUCTION.

The state has a right to impeach the credibility of a witness with prior convictions under this rule; there is no justification for the dichotomy of permitting the state to introduce convictions for the rape of a child as probative evidence in its case-in-chief under the aegis of Evid. Rule 404(b), but to disallow the usage of these crimes for credibility purposes under this rule. Turner v. State, 325 Ark. 237, 926 S.W.2d 843 (1996).

APPLICABILITY.

This rule applies only when one is attempting to show that the witness himself has been convicted of a crime. Barker v. State, 21 Ark. App. 56, 728 S.W.2d 204 (1987).

CREDIBILITY OF WITNESS.

When a defendant in a criminal case takes the witness stand in his own behalf, his credibility becomes an issue and the State may, under certain circumstances, test that credibility by asking the defendant if he has been convicted of certain crimes or if he is guilty of certain misconduct. Gustafson v. State, 267 Ark. 278, 590 S.W.2d 853 (1979), criticized Rhodes v. State, 276 Ark. 203, 634 S.W.2d 107 (1982), questioned Sitz v. State, 23 Ark. App. 126, 743 S.W.2d 18 (1988).

Where a defendant in a criminal case testifies in his own behalf, his credibility is placed in issue, and the state may impeach his testimony by proof of prior felony convictions. Therefore, where the trial court in a murder prosecution determined that the probative value of the defendant's prior conviction for murder outweighed its prejudicial effect, the trial court did not abuse its discretion in admitting the prior felony conviction for purposes of impeaching the defendant's credibility. Washington v. State, 6 Ark. App. 85, 638 S.W.2d 690 (1982).

The state has the right to impeach a witness's credibility with prior convictions. Such questions would not shift the burden of proof; the questions are used to impeach credibility, not to prove the existence of prior convictions. Robinson v. State, 295 Ark. 693, 751 S.W.2d 335 (1988).

DISCRETION OF COURT.

The trial court has considerable discretion in determining whether the probative value of a prior conviction outweighs its prejudicial effect and will not be reversed absent an abuse of discretion. Jones v. State, 15 Ark. App. 283, 692 S.W.2d 775 (1985); Pollard v. State, 296 Ark. 299, 756 S.W.2d 455 (1988); Tackett v. State, 298 Ark. 20, 766 S.W.2d 410 (1989), overruled in part McCoy v. State, 347 Ark. 913, 69 S.W.3d 430 (2002); Griffin v. State, 307 Ark. 537, 823 S.W.2d 446 (1992).

Trial court has discretion in determining the admissibility of prior convictions for impeachment purposes; this rule places no limit on the number of convictions used. Kilpatrick v. State, 322 Ark. 728, 912 S.W.2d 917 (1995).

DISHONESTY OR FALSE STATEMENT.

Offenses involving dishonesty are admissible under subdivision (a)(2) of this rule regardless of whether they are felonies or misdemeanors; felony convictions may be admissible under subdivision (a)(1) of this rule regardless of their logical relation to

dishonesty. Sims v. State, 27 Ark. App. 46, 766 S.W.2d 20 (1989).

Where there was no offer of proof as to the factual circumstances involved in the victim's conviction for hindering apprehension, the court was unable to determine whether the conviction should have been admissible as one involving dishonesty or false statements. West v. State, 27 Ark. App. 49, 766 S.W.2d 22 (1989).

Assaulting a police officer involves neither dishonesty nor false statement; therefore it is not useable for impeachment. Razorback Cab of Ft. Smith, Inc. v. Lingo, 304 Ark. 323, 802 S.W.2d 444 (1991).

Check-kiting is a crime involving dishonesty for purposes of subsection (a) of this rule. Wal-Mart Stores v. Regions Bank Trust Dep't, 347 Ark. 826, 69 S.W.3d 20 (2002).

Admission of evidence of prior convictions involving dishonesty and false statements is not a matter within the discretion of the court; such evidence is always admissible for impeachment and its exclusion is an abuse of discretion. Wal-Mart Stores v. Regions Bank Trust Dep't, 347 Ark. 826, 69 S.W.3d 20 (2002).

DUTY OF TRIAL COURT.

Once defense counsel raises the issue of whether the defendant's prior convictions should be excluded from trial, the trial judge has the duty to see that he is informed of the relevant considerations before admitting the evidence. Hawksley v. State, 276 Ark. 504, 637 S.W.2d 573 (1982).

FACTORS GOVERNING ADMISSIBILITY.

Some of the factors which should be considered by the trial court in determining extent to which state may impeach defendant's credibility by proof of prior convictions are the impeachment value of the prior crime, the date of the conviction and the witness's subsequent history, the similarity between the prior conviction and the crime charged, the importance of the defendant's testimony and the centrality of the credibility issue. Bell v. State, 6 Ark. App. 388, 644 S.W.2d 601 (1982), criticized Lincoln v. State, 670 S.W.2d 819 (1984); Golston v. State, 26 Ark. App. 176, 762 S.W.2d 398 (1988); Sims v. State, 27 Ark. App. 46, 766 S.W.2d 20 (1989).

CALIFORNIA

Cal Evid Code § 787

Specific instances of conduct

Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

Cal Evid Code § 788

Prior felony conviction

For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

(a) *A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.*

(b) *A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with Section 4852.01) of Title 6 of Part 3 of the Penal Code.*

(c) *The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.*
(d) *The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).*

SELECTED CALIFORNIA CASE NOTES:

Although the Truth-in-Evidence Law (Cal Const Art I § 28, generally making relevant evidence admissible) abrogates the felony-convictions-only rule (Ev C § 788) in criminal cases and gives criminal courts broad discretion to admit or exclude acts of dishonesty or moral turpitude "relevant" to impeachment, evidence of the fact of a misdemeanor conviction, whether documentary or testimonial, is inadmissible hearsay when offered to impeach a witness's credibility. People v. Wheeler (1992) 4 Cal 4th 284, 14 Cal Rptr 2d 418, 841 P2d 938, 1992 Cal LEXIS 6099, rehearing denied (1993, Cal) 1993 Cal LEXIS 705, superseded by statute as stated in (2002, Cal App 2d Dist) 97 Cal App 4th 1448, 119 Cal Rptr 2d 272, 2002 Cal App LEXIS 4039.

Scope of Inquiry
If a defendant in a criminal prosecution chooses to testify, the People may impeach his credibility by showing that he has previously been convicted of a felony, but such impeachment evidence must be limited to identification of the conviction, and the courts will be zealous to insure that the prosecuting attorney is not permitted to delve into the details and circumstances of the prior crime. People v. Schader (1969) 71 Cal 2d 761, 80 Cal Rptr 1, 457 P2d 841, 1969 Cal LEXIS 286.

The permissible scope of inquiry into a defendant's prior felony record includes the right to question the defendant as to the number of felonies of which he has been convicted and when they were committed. People v. McClellan (1969) 71 Cal 2d 793, 80 Cal Rptr 31, 457 P2d 871, 1969 Cal LEXIS 287.
In cross-examining a defendant in a criminal prosecution as to prior convictions for impeachment purposes, the witness can be asked about anything which would appear on the face of the record of judgment since such record could itself be introduced into evidence for impeachment purposes. People v. McClellan (1969) 71 Cal 2d 793, 80 Cal Rptr 31, 457 P2d 871, 1969 Cal LEXIS 287.

Evidence of a witness' prior felony convictions, admissible under Ev C § 788, to impeach his credibility, is restricted to the name and nature of the crime and the date and place of conviction. People v. Terry (1974, Cal App 1st Dist) 38 Cal App 3d 432, 113 Cal Rptr 233, 1974 Cal App LEXIS 1065

Court's Discretion
The Legislature's use of the word "may," rather than "shall," in Ev C § 788, leaves the trial court with discretion to exclude proof of prior felony convictions offered in impeachment.

Among factors to be considered by the trial judge in exercising his discretion as to admission of a prior felony conviction for impeachment purposes, are its nearness or remoteness, its bearing on credibility, and the effect of a refusal by defendant to testify resulting from his fear of impeachment by the conviction. People v. Beagle (1972) 6 Cal 3d 441, 99 Cal Rptr 313, 492 P2d 1, 1972 Cal LEXIS 141, superseded by statute as stated in People v. Rogers (1985, Cal App 2d Dist) 173 Cal App 3d 205, 218 Cal Rptr 494, 1985 Cal App LEXIS 2618.

The latitude of a trial judge to exclude evidence of prior felony convictions for impeachment purposes is greater as to defendants than for other witnesses. People v. Carr (1973, Cal App 5th Dist) 32 Cal App 3d 700, 108 Cal Rptr 216, 1973 Cal App LEXIS 1008.

In a prosecution for burglary, grand theft, assault with a deadly weapon on a peace officer, murder, and prior felony convictions, it was an abuse of discretion to permit use of evidence of prior forgery convictions, over defense objections, to impeach defendant's credibility, where the case was close, the priors were remote in time, and the risk of prejudice and confusion resulting from reception of that evidence outweighed its probative value on the issue of credibility. People v. Antick (1975) 15 Cal 3d 79, 123 Cal Rptr 475, 539 P2d 43, 1975 Cal LEXIS 332, overruled in part People v. McCoy (2001) 25 Cal 4th 1111, 108 Cal Rptr 2d 188, 24 P3d 1210, 2001 Cal LEXIS 3791, superseded by statute as stated in People v. Burns (1985, Cal App 2d Dist) 174 Cal App 3d 127, 219 Cal Rptr 814, superseded by statute as stated in People v. Harrison (1984, Cal App 3d Dist) 150 Cal App 3d 1142, 198 Cal Rptr 762, 1984 Cal App LEXIS 1523.

In a prosecution for grand theft, the trial court properly refused to permit defense counsel to impeach a prosecution witness (the theft victim) by inquiring into a five-year-old misdemeanor conviction, where counsel conceded in his offer of proof that his sole purpose was to reflect on the credibility of the witness. Under Ev C § 788, impeachment by previous crimes is limited to felonies, and the trial judge properly exercised his discretion under Ev C § 352, in ruling that the offered evidence would have led "far afield from the basic issues." People v. Lent (1975) 15 Cal 3d 481, 124 Cal Rptr 905, 541 P2d 545, 1975 Cal LEXIS 246.

When an accused makes a timely objection to the introduction, under Ev C § 788, of evidence of a prior felony conviction for the purpose of impeaching his testimony, the trial court is under a duty, first, to determine the probative value of that evidence on the issue of the defendant's credibility as a witness; second, to appraise the degree of prejudice that the defendant would suffer from admission of the evidence; and third, to weigh the foregoing two factors against each other and exclude the evidence if its probative value of the issue of credibility is substantially outweighed by the probability that its admission will create substantial danger of undue prejudice (Ev C § 352). People v. Rollo (1977) 20 Cal 3d 109, 141 Cal Rptr 177, 569 P2d 771, 1977 Cal LEXIS 172, superseded by statute as stated in People v. Olmedo (1985, Cal App 2d Dist) 167 Cal App 3d 1085, 213 Cal Rptr 742, 1985 Cal App LEXIS 2048, superseded by statute as stated in People v. Harrison (1984, Cal App 3d Dist) 150 Cal App 3d 1142, 198 Cal Rptr 762, 1984 Cal App LEXIS 1523.

In a prosecution of two defendants for escape from lawful custody (Pen C § 4532), the trial court did not abuse its discretion in allowing prior robbery and burglary convictions to be used for the purpose of impeachment, even though defendants had been codefendants with respect to the burglary convictions, where that fact was not presented to the jury. People v. Condley (1977, Cal App 4th Dist) 69 Cal App 3d 999, 138 Cal Rptr 515, 1977 Cal App LEXIS 1484, cert den (1977) 434 US 988, 98 S Ct 619, 54 L Ed 2d 483, 1977 US LEXIS 4279.

In applying Ev C § 352's discretion of the trial court to exclude relevant evidence to an offer of proof of impeachment of a witness under authority of Ev C § 788, and judicial guidelines, a distinction is drawn between the defendant as the witness to be impeached and a nondefendant witness for either side. Accordingly, in a criminal prosecution, the trial court abused its discretion under Ev C § 352 in excluding evidence of a prior conviction of a hearsay declarant who died and whose testimony at the preliminary hearing was admitted against defendant, on the ground the conviction occurred over 18 years before trial, where the right to impeach such declarant was vital for defendant's defense and the conviction

related to dishonesty in spite of its relative antiquity. People v. Stevenson (1978, Cal App 2d Dist) 79 Cal App 3d 976, 145 Cal Rptr 301, 1978 Cal App LEXIS 1389.

Since Ev C § 788, authorizes the use of prior felony convictions only for the purpose of attacking the credibility of a witness, the first factor which the trial court must evaluate before admitting such evidence is whether the prior felony conviction reflects adversely on credibility. The sole trait relevant to impeaching credibility is truthfulness (Ev C § 786), and if a prior felony conviction does not involve the character trait of truthfulness, it must be excluded as irrelevant at the outset (Ev C § 350). Moreover, even felony convictions which are relevant to establish truthfulness are not equally probative of that issue, and if the trial court determines that the prior conviction involves truthfulness, it must consider the degree of probative value it has on that issue in ruling on a motion to exclude such evidence on grounds of undue prejudice. People v. Woodard (1979) 23 Cal 3d 329, 152 Cal Rptr 536, 590 P2d 391, 1979 Cal LEXIS 203, superseded by statute as stated in People v. Norwood (1985, Cal App 2d Dist) 174 Cal App 3d 358, 219 Cal Rptr 913, 1985 Cal App LEXIS 2747, superseded by statute as stated in People v. Harrison (1984, Cal App 3d Dist) 150 Cal App 3d 1142, 198 Cal Rptr 762, 1984 Cal App LEXIS 1523.

Although Ev C § 788, authorizes the use of a prior felony conviction to impeach the credibility of a witness, a trial court must, when requested, exercise its discretion as provided for by Ev C § 352, and exclude this impeachment evidence when the probative value of the prior conviction is outweighed by other considerations, such as the risk of undue prejudice. People v. Spearman (1979) 25 Cal 3d 107, 157 Cal Rptr 883, 599 P2d 74, 1979 Cal LEXIS 298, superseded by statute as stated in People v. Olmedo (1985, Cal App 2d Dist) 167 Cal App 3d 1085, 213 Cal Rptr 742, 1985 Cal App LEXIS 2048, superseded by statute as stated in People v. Harrison (1984, Cal App 3d Dist) 150 Cal App 3d 1142, 198 Cal Rptr 762, 1984 Cal App LEXIS 1523.

Cal Const Art I § 28, enacted in 1982 as part of Proposition 8, the so-called Victims' Bill of Rights, and providing in § 28, subd. (f), for the use of prior felony convictions "without limitation" for impeachment in criminal proceedings, was not intended to abrogate the traditional and inherent power of the trial court to control the admission of evidence by the exercise of discretion to exclude marginally relevant but prejudicial matter, as provided by Ev C § 352. This is in accord with policy considerations suggesting that the trial court should not be stripped of all discretion in ruling on the admissibility of evidence, and eliminates the conflict between § 28, subd. (f), and Cal Const Art I § 28 subd. (d), also enacted in Proposition 8, and which prohibits the exclusion of relevant evidence in criminal proceedings, while also providing that nothing "in this section shall affect" Ev C § 352. Moreover, § 28, subd. (f) applies to all witnesses in criminal proceedings--the prosecution's, the defense's, as well as those of the court. People v. Castro (1985) 38 Cal 3d 301, 211 Cal Rptr 719, 696 P2d 111, 1985 Cal LEXIS 261.

Subject to the trial court's discretion to exclude evidence under Ev C § 352, when probative value is outweighed by the risk of undue prejudice, Cal Const Art I § 28, subd. (f) (enacted in 1982 as part of Proposition 8, the so-called Victims' Bill of Rights), and providing in part for the use of prior felony convictions "without limitation" for impeachment in criminal proceedings, authorizes the use of prior felony convictions which necessarily involve moral turpitude, that is, the readiness to do evil, even if the immoral trait is one other than dishonesty. However, Cal Const Art I § 28, subd. (d) (also enacted as part of Proposition 8, and prohibiting the exclusion of relevant evidence in a criminal proceeding), as well as the due process clause of U.S. Const. Amend. 14, forbids the use of convictions of felonies which do not necessarily involve moral turpitude. (Per Kaus, Mosk and Broussard, JJ.) People v. Castro (1985) 38 Cal 3d 301, 211 Cal Rptr 719, 696 P2d 111, 1985 Cal LEXIS

261.

Cal Const Art I § 28 subd. (f), enacted in 1982 as part of Proposition 8, the so-called Victims' Bill of Rights, and providing in part for the use of prior felony convictions "without limitation" for impeachment in criminal proceedings, does not deny a criminal defendant due process of law. The trial court still retains discretion, even with respect to relevant prior convictions, pursuant to Ev C § 352, to exclude evidence when probative value is outweighed by the risk of undue prejudice. Also, § 28, subd. (f) is not in violation of equal protection, since as § 28, subd. (f) is interpreted, the differences between civil and criminal cases are nonexistent. (Per Kaus, Mosk and Broussard, JJ.) People v. Castro (1985) 38 Cal 3d 301, 211 Cal Rptr 719, 696 P2d 111, 1985 Cal LEXIS 261.

In prosecutions for offenses committed before the effective date of Cal Const Art I § 28, subd. (f) (allowing unlimited use of prior convictions for impeachment), the trial court, in deciding whether to admit into evidence a prior felony conviction to impeach the credibility of a witness pursuant to Ev C § 788, must exercise its discretion under Ev C § 352, and exclude the impeachment evidence if its probative value is outweighed by danger of undue prejudice, of confusing the issues, or of misleading the jury. In making this determination the trial court must consider whether the conviction reflects adversely on honesty or veracity; the nearness or remoteness of the prior conviction; the similarity between the prior conviction and the crime with which defendant is charged; and the risk that defendant does not testify out of fear of his being prejudiced because of impeachment, thereby depriving the jury of his version of the events. People v. Pickett (1985, Cal App 1st Dist) 163 Cal App 3d 1042, 210 Cal Rptr 85, 1985 Cal App LEXIS 1559.

Under Cal Const Art I § 28, subds. (d) and (f), a trial court still has discretion pursuant to Evid. Code, §§ 352 and 788, to exclude evidence of prior felony convictions when their probative value and credibility is outweighed by the risk of undue prejudice. Also, a trial court may still consider exercising its discretion in determining whether the prior conviction reflects on honesty and integrity, whether it is near or remote in time, whether it was suffered for the same or substantially similar conduct for which the witness- accused is on trial, and in determining what effect admission would have on the defendant's decision to testify. People v. Olmedo (1985, Cal App 2d Dist) 167 Cal App 3d 1085, 213 Cal Rptr 742, 1985 Cal App LEXIS 2048.

Admission of a prior felony conviction for impeachment in a civil action under Ev C § 788 is very much subject to the exercise of a court's discretion under Ev C § 352. Nguyen v. Proton Technology Corp. (1999, Cal App 1st Dist) 69 Cal App 4th 140, 81 Cal Rptr 2d 392, 1999 Cal App LEXIS 23.

COLORADO

C.R.S. 13-90-101

Who may testify - interest

All persons, without exception, other than those specified in sections 13-90-102 to 13-90-108 may be witnesses. Neither parties nor other persons who have an interest in the event of an action or proceeding shall be excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief. In every case the credibility of the witness may be drawn in question, as now provided by law, but the conviction of any person for any felony may be shown for the purpose of affecting the credibility of such witness. The fact of such conviction may be proved like any other fact, not of record, either by the witness himself, who shall be compelled to testify thereto, or by any

other person cognizant of such conviction as impeaching testimony or by any other competent testimony. Evidence of a previous conviction of a felony where the witness testifying was convicted five years prior to the time when the witness testifies shall not be admissible in evidence in any civil action.

SELECTED COLORADO CASE NOTES:

Distinction in handling defendant's evidence not violative of equal protection guarantees. Distinction between admitting evidence of prior felony convictions when a defendant chooses to testify, and excluding such evidence when the defendant has chosen not to take the witness stand does not violate equal protection guarantees. People v. Layton, 200 Colo. 59, 612 P.2d 83 (1980); People v. Diaz, 985 P.2d 83 (Colo. App. 1999).

This section does treat those defendants who choose to testify on their behalf differently than those defendants who do not take the witness stand, but these two classes of defendants are not similarly situated. People v. Layton, 200 Colo. 59, 612 P.2d 83 (1980).

Statute which permits impeachment in a criminal case by felony conviction over five years old, while such is not permissible in a civil proceeding, does not deny equal protection of the law. People v. Davis, 183 Colo. 228, 516 P.2d 120 (1973); People v. Velarde, 196Colo. 254, 586 P.2d 6 (1978).

To warrant suppression of a prior conviction, the accused must make a prima facie showing of a constitutional violation, and the mere showing of uncertainty as to whether a violation has occurred is insufficient. People v. Lemons, 824 P.2d 56 (Colo. App. 1991).

A balancing test is not required prior to admitting evidence of felony convictions for purposes of impeachment of an accused, given that this state has not adopted a rule of evidence similar to Fed. R. Evid. 609. People v. Diaz, 985 P.2d 83 (Colo. App. 1999).

CONNECTICUT

Conn. Code of Evidence 6-7

Evidence of Conviction of Crime

(a) General rule. *For the purpose of impeaching the credibility of a witness, evidence that a witness has been convicted of a crime is admissible if the crime was punishable by imprisonment for more than one year. In determining whether to admit evidence of a conviction, the court shall consider:*
(1) The extent of the prejudice likely to arise,
(2) the significance of the particular crime in indicating untruthfulness, and
(3) the remoteness in time of the conviction.
(b) Methods of proof. Evidence that a witness has been convicted of a crime may be introduced by the following methods:
(1) Examination of the witness as to the conviction, or
(2) introduction of a certified copy of the record of conviction into evidence, after the witness has been identified as the person named in the record.
(c) Matters subject to proof. *If, for purposes of impeaching the credibility of a witness, evidence is introduced that the witness has been convicted of a crime, the court shall limit the evidence to the name of the crime and when and where the conviction was rendered, except that (1) the court may exclude evidence of the name of the crime and (2) if the witness denies the conviction, the court may permit evidence of the punishment imposed.*
(d) Pendency of appeal. *The pendency of an appeal from a conviction does not render*

evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

DELAWARE

D.R.E. 609

Impeachment by evidence of conviction of crime

(a) General rule. *-- For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony 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 or (2) involved dishonesty or false statement, regardless of the punishment.*

(b) Time limit. *-- Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old, as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.*

(c) Effect of pardon, annulment or certificate of rehabilitation. *-- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent felony, or (2) the conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.*

(d) Juvenile adjudications. *-- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.*

(e) Pendency of appeal. *-- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

DELAWARE ADVISORY COMMITTEE NOTES:

The Permanent Advisory Committee on the Delaware Uniform Rules of Evidence recommended retaining D.R.E. 609 as it existed in 2001, with one minor word change in D.R.E. 609(c), and not adopt F.R.E. 609 in effect on December 31, 2000. The Committee recommended rejecting F.R.E. 609 because it applies a different test of admissibility for felony impeachment between a defendant-witness and a witness. The Committee believed that this rule should be the same for all witnesses. A question as to the admissibility of a felony conviction under DRE 609(a)(1) should first be presented to the trial judge out of the presence of the jury to permit the judge to apply the rule's required balancing analysis.

D.R.E. 609(b) tracks F.R.E. 609(b).

D.R.E. 609(c) tracks F.R.E. 609(c) except it substitutes the word "felony" for the words "crime which was punishable by death or imprisonment in excess of one year."

D.R.E. 609(d) and (e) tracks F.R.E. 609(d) and (e).

SELECTED DELAWARE CASE NOTES:

For cases illustrating the law covered by D.R.E. 609, see Archie v. State, Del. Supr., 721 A.2d 924 (1998); Wilson v. Sico, Del. Supr., 713 A.2d 923 (1998); Tucker v. State, Del. Supr., 692 A.2d 416 (1996) (Table); Webb v. State, Del. Supr., 663 A.2d 452 (1995); Gregory v. State, Del. Supr., 616 A.2d 1198 (1992).

SCOPE OF INQUIRY. --This Rule allows inquiry on cross-examination beyond the issue of whether a witness has been convicted of a felony or a crime of dishonesty; the cross-examination may inquire into what those crimes were, and where and when those convictions occurred. Archie v. State, 721 A.2d 924 (Del. 1998).

EVIDENCE PREJUDICIAL. --Trial court's failure to determine whether prior convictions for delivery and possession of marijuana with intent to deliver were crimes involving dishonesty or false statements within the meaning of subsection (a) of this rule created a substantial risk that the jury would draw the character inference, forbidden by Evid. R. 404(b), that the defendant acted in conformity with a character predisposed to selling drugs; that failure, in the absence of balancing its prejudicial effect, was clearly prejudicial to substantial rights so as to jeopardize the fairness and integrity of the trial process. Gregory v. State, 616 A.2d 1198 (Del. 1992).

Where a witness's drug arrest had no bearing on the charges against defendant, the trial court properly exercised its discretion under Evid. R. 609(a)(2) by excluding the evidence for impeachment purposes under Evid. R. 608(b). Coverdale v. State, 844 A.2d 979 (Del. 2004).

Trial judge properly excluded evidence of victim's three prior convictions for unlawful sexual assault during defendant's trial; judge properly determined, pursuant to subdivision (a)(1) of this rule, that the prejudicial effect of the evidence regarding the convictions outweighed its probative value. Taylor v. State, 849 A.2d 405 (Del. 2004).

Medical expert's 23-year-old drug convictions were not admissible for purposes of impeaching expert testimony, pursuant to Evid. R. 609, as they did not bear on expert's truthfulness and the probative value did not outweigh the prejudicial effect. Henry v. Nanticoke Surgical Assocs., P.A., -- A.3d --, 2007 Del. Super. LEXIS 41 (Del. Super. Ct. Jan. 30, 2007).

FLORIDA

Fla. Stat. § 90.610

Conviction of certain crimes as impeachment

(1) *A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:*

(a) Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.

(b) Evidence of juvenile adjudications are inadmissible under this subsection.

(2) *The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.*

(3) *Nothing in this section affects the admissibility of evidence under s. 90.404 or s. 90.608.*

SELECTED FLORIDA CASE NOTES:

9. Trial court erred in allowing the State to question a witness about his felony record and about his specific convictions as impeachment under Fla. Stat. § 90.610(1) because the witness volunteered nothing beyond confirming his prior felony convictions, did not give any false statements about his convictions, and did not mislead the jury; the error was not harmless. Stallworth v. State, 2011 Fla. App. LEXIS 1443 (Fla. 1st DCA Feb. 7, 2011).

17. It was improper under Fla. Stat. § 90.6110, to impeach defendant's character by introducing certified judgments of convictions setting out specific crimes. Defendant should have been asked whether he or she has ever been convicted of a felony or of a crime involving dishonesty or a false statement, and how many times. Porter v. State, 593 So. 2d 1158, 1992 Fla. App. LEXIS 1262 (Fla. 2nd DCA 1992).

36. Under Fla. Stat. § 90.610, a party may attack the credibility of any witness, including the accused, by evidence of a prior felony conviction; unless the witness answers untruthfully, that inquiry is generally restricted to the existence of prior convictions and the number of convictions. However, when defendant attempts to mislead or delude the jury about his prior convictions, the State is entitled to further question defendant concerning the convictions in order to negate any false impression given. Mosley v. State, 739 So. 2d 672, 1999 Fla. App. LEXIS 11547 (Fla. 4th DCA 1999).

92. Impeachment concerning prior convictions under Fla. Stat. § 90.610(1) is limited to two questions: (1) whether defendant had committed a felony or other offense involving dishonesty and; (2) if so, the number of such convictions. Britton v. State, 604 So. 2d 1288, 1992 Fla. App. LEXIS 9573 (Fla. 2nd DCA 1992).

GEORGIA

O.C.G.A. § 24-9-84.1

How witness impeached -- Prior convictions

(a) General rule. *For the purpose of attacking the credibility of a witness, or of the defendant, if the defendant testifies:*

(1) Evidence that a witness has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the witness was convicted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the witness;

(2) Evidence that the defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the defendant was convicted if the court determines that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant; and

(3) Evidence that any witness or the defendant has been convicted of a crime shall be admitted if it involved dishonesty or making a false statement, regardless of the punishment that could be imposed for such offense.

(b) Time limit. *Evidence of a conviction under subsection (a) of this Code section is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness or the defendant from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old, as calculated in this subsection, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.*

(c) Effect of pardon or annulment. *Evidence of a conviction is not admissible under this Code section if:*

(1) The conviction has been the subject of a pardon or annulment based on a finding of the rehabilitation of the person convicted and such person has not been convicted of a subsequent crime that was punishable by death or imprisonment for one year or more; or

(2) The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. *An adjudication of delinquency in juvenile court shall be inadmissible against a defendant in a criminal case. An adjudication of delinquency in juvenile court shall be presumed to be inadmissible against a witness in a criminal case; however, this presumption may be rebutted only if it is shown that:*

(1) The factual basis for the proven allegations of delinquency would have constituted a crime under the laws of the state of the juvenile court if committed by an adult at the time they were committed by the juvenile:

(2) The probative value of the evidence substantially outweighs the prejudicial effect of its admission; and

(3) The court finds that admission of the adjudication into evidence is necessary for a fair determination of the issue of guilt or innocence of the defendant.

(e) Pendency of appeal. The pendency of an appeal from a conviction does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal shall be admissible.

SELECTED GEORGIA CASE NOTES:

CRIMES INVOLVING DISHONESTY. --For impeachment purposes, crimes of "dishonesty" are limited to those crimes that bear upon a witness's propensity to testify truthfully; accordingly, misdemeanor theft by receiving stolen property is not a crime involving dishonesty within the meaning of O.C.G.A. § 24-9-84.1(a)(3). Adams v. State, 284 Ga. App. 534, 644 S.E.2d 426 (2007).

TRIAL COURT MUST ESTABLISH THAT IT BALANCED USE OF DEFENDANT'S PRIOR CONVICTION AGAINST RISK OF PREJUDICE. --With regard to defendant's conviction for aggravated assault, which was reversed on appeal as a result of the trial court erring in recharging the jury on a question it asked, the appellate court was unable to determine whether the trial court engaged in any meaningful analysis of the relevant factors of the evidence of defendant's prior felony conviction for possession of cocaine or whether the trial court balanced the probative value against the prejudicial effect to the accused. In the event of retrial, the trial court was directed to balance the probative value of defendant's prior felony conviction against its prejudicial effect and to make a finding on the record as to whether the former substantially outweighed the latter, subject to appellate review for an abuse of discretion. Quiroz v. State, 291 Ga. App. 423, 662 S.E.2d 235 (2008).

Defendant's conviction for possession of methamphetamine was reversed on appeal as the trial court erred by failing to perform the required balancing test, pursuant to O.C.G.A. § 24-9-84.1(a)(2), prior to permitting the state to impeach the defendant with a prior conviction for entering an automobile. The trial court also failed to consider the prejudicial effect of the impeachment evidence after only finding that the evidence did not have probative value. Abercrombie v. State, 297 Ga. App. 522, 677 S.E.2d 719 (2009).

LIMITING INSTRUCTION ON PRIOR CONVICTIONS NOT REQUIRED. --In a defendant's prosecution for malice murder and armed robbery, the trial court did not err in failing to instruct the jury without request that the jurors limit their consideration of the defendant's prior convictions to the purpose of impeachment only under O.C.G.A. § 24-9-84.1(a) as information regarding the defendant's prior convictions was not obtained in

violation of the defendant's constitutional rights against self-incrimination under U.S. Const., amend. 5. Phillips v. State, 285 Ga. 213, 675 S.E.2d 1 (2009).

HAWAII

HRE chap. 626, HRS Rule 609

Impeachment by evidence of conviction of crime. of conviction of crime.

(a) General rule. *For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is inadmissible except when the crime is one involving dishonesty. However, in a criminal case where the defendant takes the stand, the defendant shall not be questioned or evidence introduced as to whether the defendant has been convicted of a crime, for the sole purpose of attacking credibility, unless the defendant has oneself introduced testimony for the purpose of establishing the defendant's credibility as a witness, in which case the defendant shall be treated as any other witness as provided in this rule.*

(b) Effect of pardon. *Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon.*

(c) Juvenile convictions. *Evidence of juvenile convictions is admissible to the same extent as are criminal convictions under subsection (a) of this rule.*

(d) Pendency of appeal. *The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

HAWAII ADVISORY COMMITTEE NOTES:

This rule departs markedly from Fed. R. Evid. 609 for two reasons: (1) existing Hawaii law, based upon due process considerations, requires that defendants in criminal cases not be impeached with prior convictions, and this limitation is incorporated in Rule 609; and (2) the history of federal Rule 609 makes clear that, as finally approved by Congress, the rule was addressed, in significant measure, to the issue of impeachment of defendants in criminal cases. In addition, Fed. R. Evid. 609 is confusing, ambiguous, and awkwardly worded. It purports to mandate the admissibility of certain kinds of prior convictions, thus embodying a questionable exception to Rule 403's discretionary balance, and directs a discretionary, probative value/prejudicial effect judicial determination for other kinds of prior convictions, thus needlessly duplicating the Rule 403 principle. It also establishes an arbitrary, ten-year time limit for usable prior convictions, without regard to the nature of the crime.

This rule supersedes Hawaii Rev. Stat. § 621-22 (1976) (repealed 1980) (originally enacted as L 1876, c 32, § 57; am L 1972, c 104, § 1(q)), which provided for discretionary receipt, for credibility assessment of all witnesses other than criminal accused, of evidence of "felonies, or of misdemeanors involving moral turpitude." This statute was authoritatively construed in Asato v. Furtado, 52 Haw. 284, 474 P.2d 288, 1970 Haw. LEXIS 123 (1970):

We think that there are a great many criminal offenses the conviction of which has no bearing whatsoever upon the witness' propensity for lying or truthtelling, and that such convictions ought not to be admitted for purposes of impeachment...

This is true not only of minor offenses like parking tickets...but also of some major offenses like murder or assault and battery. It is hard to see any rational connection between, say, a crime of violence and the likelihood that the witness will tell the truth...

For these reasons, we think it unwise to admit evidence of any and all convictions on the issue of credibility. We hold that admission of such evidence should be limited to those convictions that are relevant to the issue of truth and veracity. A perjury conviction, for

example, would carry considerable probative value in a determination of whether a witness is likely to falsify under oath. We also think that other crimes that fall into the class of crimes involving dishonesty or false statement would have some value in a rational determination of credibility.

Subsection (a): The first sentence of this subsection reflects the wisdom of Asato v. Furtado, supra. The phrase " dishonesty or false statement," which appears in Asato and in Fed. R. Evid. 609(a), becomes simply "dishonesty" in the present rule. The intent is that crimes "involving dishonesty" be construed to include crimes involving false statement. The negative phraseology (the evidence "is inadmissible except when the crime is one involving dishonesty") is employed to make it clear that Rule 403's discretionary balance governs the question of admissibility under this rule. For purposes of this balance, the relevance of a prior conviction involving dishonesty will depend primarily upon the nature of the crime and the age of the conviction.

The second sentence of Rule 609(a) tracks the language of the previous statute, and implements the due process mandate of State v. Santiago, 53 Haw. 254, 492 P.2d 657, 1971 Haw. LEXIS 109 (1971).

Subsections (b), (c), (d): Subsection (b) of this rule, relating to the effect of a pardon upon the admissibility of a prior conviction, is similar to Fed. R. Evid. 609(c). Subsection (c), relating to the admissibility of juvenile adjudications, treats them as admissible " to the same extent as are criminal convictions under subsection (a)." This section, like the first sentence of subsection (a), is subject to the court's discretion under Rule 403 supra, to exclude relevant evidence when probative value is substantially outweighed by prejudicial impact or other negative factors. Subsection (d), regarding the pendency of an appeal from the previous conviction, is identical with Fed. R. Evid. 609(e).

IDAHO

I.R.E. Rule 609

Impeachment by evidence of conviction of crime.

(a) General rule.

For the purpose of attacking the credibility of a witness, evidence of the fact that the witness has been convicted of a felony and the nature of the felony shall be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the credibility of the witness and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness. If the evidence of the fact of a prior felony conviction, but not the nature of the conviction, is admitted for the purpose of impeachment of a party to the action or proceeding, the party shall have the option to present evidence of the nature of the conviction, but evidence of the circumstances of the conviction shall not be admissible.

(b) Time limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Withheld or vacated judgment; pardon for innocence.
Evidence of a withheld judgment or a vacated judgment shall not be admitted as a conviction. Nor shall a conviction that has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence be admissible under this rule.
(d) Pardon, annulment or certificate of rehabilitation not based on innocence; pendency of an appeal.
If the conviction has been the subject of a pardon, annulment or certificate of rehabilitation or other equivalent procedure not based on a finding of innocence, or is the subject of a pending appeal, the evidence of a conviction is not rendered inadmissible, but shall be considered by the court in determining admissibility. Evidence of the pardon, annulment, certificate of rehabilitation or other equivalent procedure, or pendency of an appeal is admissible if evidence of the conviction is admitted.

SELECTED IDAHO CASE NOTES:

In determining whether evidence of a prior conviction should be admitted, a trial court must (1) determine whether the fact or nature of the conviction is relevant to the witness's credibility, and (2) if so, whether the probative value of the evidence outweighs its prejudicial impact. State v. Thompson, 132 Idaho 628, 977 P.2d 890 (1999).

For the purpose of assuring proper introduction of evidence pursuant to subsection (a) of this rule, a trial court must make a record of its reasons for concluding that a felony conviction for any particular crime is relevant to the credibility of the witness with respect to whom the evidence is being adduced. State v. Franco, 128 Idaho 815, 919 P.2d 344 (Ct. App. 1996).

Although a felony record can be used to impeach the credibility of a witness, a careful line must be drawn between impeaching a witness's credibility and using a prior conviction to imply that a criminal would commit another crime simply because he has committed a crime in the past. State v. Palmer, 98 Idaho 845, 574 P.2d 533 (1978).

The use of a prior felony conviction for impeachment purposes did not deprive defendant of his right to a fair and impartial jury trial where a jury instruction limited the prejudicial impact by stating that the conviction could be considered only on the issue of credibility and that the conviction did not necessarily impair defendant's credibility. State v. Knee, 101 Idaho 484, 616 P.2d 263 (1980).

ILLINOIS

Ill. R. Evid. 609
Impeachment by Evidence of Conviction of Crime
(a) General Rule. *For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, or (2) involved dishonesty or false statement regardless of the punishment unless (3), in either case, the court determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.*
(b) Time Limit. *Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date.*
(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. *Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon,*

annulment, certificate of rehabilitation, or other equivalent procedure, and (2) the procedure under which the same was granted or issued required a substantial showing of rehabilitation or was based on innocence.
(d) Juvenile Adjudications. *Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.*
(e) Pendency of Appeal. *The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

INDIANA

Ind. R. Evid. 609
Impeachment by evidence of conviction of crime.
(a) General rule. *-- For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime shall be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, criminal confinement or perjury; or (2) a crime involving dishonesty or false statement.*
(b) Time limit. *-- Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or, if the conviction resulted in confinement of the witness then the date of the release of the witness from the confinement unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.*
(c) Effect of pardon, annulment, or certificate of rehabilitation. *-- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.*
(d) Juvenile adjudications. *-- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.*
(e) Pendency of appeal. *-- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

INDIANA ADVISORY COMMITTEE NOTES

COMMENTARY Subsection (a). Rejecting both the FRE and URE, this section preserves prior Indiana law. *See Roseberry v. State* (1986), 273 Ind. 179, 492 N.E.2d 1248; *Ashton v. Anderson* (1972), 258 Ind. 51, 279 N.E.2d 210; *Adams v. State* (1989), Ind. App., 542 N.E.2d 1362; *Mayes v. State* (1974), 162 Ind. App. 186, 318 N.E.2d 811; *Lessig v. State* (1986), Ind. App., 489 N.E.2d 978.

Subsection (b). The rule adopts the FRE's use of stale convictions for impeachment. It modifies prior Indiana law which did not presume passage of time rendered a criminal conviction of no probative value for impeachment. The presumption of inadmissibility may be rebutted only if the proponent of the conviction's use gives "sufficient written notice of intent to use such evidence" to the adverse party, and the trial court determines "in the interests of justice, that the probative value of the conviction ... substantially outweighs its prejudicial effect."

The proponent of a conviction otherwise inadmissible under Rule 609(b) must meet a heavy burden if he desires to use the conviction for impeachment. If contested, a hearing may be required to determine "specific facts and circumstances" which permits a stale conviction to be used for impeachment. The written notice of intent to use a stale conviction should contain: (1) the date of the conviction, (2) the jurisdiction, (3) the offense, and (4) the specific facts and circumstances alleged to justify admission.

Subsection (c). Adopting the language of the FRE, this section excludes from use for impeachment convictions that were the subject of a "pardon, annulment, certificate of rehabilitation" if the pardon, etc., was based upon a "finding of rehabilitation or a finding of innocence." If a pardon, certificate of rehabilitation, etc., was predicated upon a finding of rehabilitation and the witness is subsequently convicted of a felony, the preclusive effect of the pardon is removed. The Indiana Supreme Court first adopted Federal Rule 609(c) in *Nunn v. State* (1992), Ind., 601 N.E.2d 334 (proper to prevent impeachment by a conviction which has been pardoned after a finding of rehabilitation).

Subsection (d). Rule 609(d) adopts the language of the FRE, and makes a minor change in prior Indiana law. In a criminal case, the court has discretion to admit evidence of a juvenile adjudication of a witness other than the accused as impeachment evidence if the court "is satisfied that admission is necessary for a fair determination of guilt or innocence." The URE does not permit the use of a juvenile adjudication for impeachment. The FRE recognizes that refusal to permit a criminal defendant to use a juvenile adjudication to impeach a prosecution witness may, in some circumstances, violate due process. *See Davis v. Alaska,* 415 U.S. 308 (1974).

Subsection (e). Rule 609(e) adopts language found in both the FRE and URE. It does not change prior Indiana law. *See Rowan v. State* (1982), Ind., 431 N.E.2d 805; *Craig v. State* (1980), 273 Ind. 361, 404 N.E.2d 580; *Snelling v. State* (1975), 167 Ind. App. 70, 337 N.E.2d 829. It does make clear, however, that a witness impeached by evidence of a conviction has the right to inform the jury that the conviction is under appeal. Prior Indiana law was silent on this issue.

IOWA

Iowa R. Evid. 5.609

Impeachment by evidence of conviction of crime.

a. General rule. *For the purpose of attacking the credibility of a witness:*

(1) Evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to rule 5.403, if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(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.
b. Time limit. *Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.*
c. Effect of pardon. *Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon.*
d. Juvenile adjudications. *Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.*
e. Pendency of appeal. *The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

KANSAS

K.S.A. § 60-421
Limitations on evidence of conviction of crime as affecting credibility.
Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his or her credibility. If the witness be the accused in a criminal proceeding, no evidence of his or her conviction of a crime shall be admissible for the sole purpose of impairing his or her credibility unless the witness has first introduced evidence admissible solely for the purpose of supporting his or her credibility.

SELECTED KANSAS CASE NOTES:

Although Kan. Stat. Ann. § 60-421 and Kan. Stat. Ann. § 60-447 permitted a defendant to testify in his own behalf without having a history of past misconduct paraded before the jury, defendant's testimony, unsolicited by the prosecution, that he was telling the truth put his credibility at issue and opened the door to impeachment by his prior convictions involving dishonest and false statements. State v. Johnson, 21 Kan. App. 2d 576, 907 P.2d 144, 1995 Kan. App. LEXIS 152 (1995), review denied by 258 Kan. 861 (1995).

The conviction of a crime involving dishonesty or false statement is required before evidence of that crime was admissible for purposes of impairing credibility. STATE v. NELSON, 1987 Kan. App. LEXIS 839 (Kan. Ct. App. Feb. 26 1987).

KENTUCKY

KRE Rule 609
Impeachment by evidence of conviction of crime. of conviction of crime.
(a) General rule. *For the purpose of reflecting upon 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 if denied by the witness, but only if the crime was punishable*

by death or imprisonment for one (1) year or more under the law under which the witness was convicted. The identity of the crime upon which conviction was based may not be disclosed upon cross-examination unless the witness has denied the existence of the conviction. However, a witness against whom a conviction is admitted under this provision may choose to disclose the identity of the crime upon which the conviction is based.
(b) Time limit. *Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect.*
(c) Effect of pardon, annulment, or certificate of rehabilitation. *Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.*

SELECTED KENTUCKY CASE NOTES:

Construction with Federal Rule.
This rule differs in several respects from the federal rule (FRE 609); this rule does not, by its terms, divest the trial court of a limited discretion to admit a conviction more than ten years old. It is precatory rather than mandatory, and leaves room for a trial judge to rule such evidence admissible in circumstances where fairness so demands. McGinnis v. Commonwealth, 875 S.W.2d 518, 1994 Ky. LEXIS 37 (Ky. 1994), rehearing denied, 1994 Ky. LEXIS 94 (Ky. 1994).

LOUISIANA

La. C.E. Art. 609
Attacking credibility by evidence of conviction of crime in civil cases
A. General civil rule. *--For the purpose of attacking the credibility of a witness in civil cases, no evidence of the details of the crime of which he was convicted is admissible. However, evidence of the name of the crime of which he was convicted and the date of conviction is admissible if the crime:*
(1) Was punishable by death or imprisonment in excess of six months under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party; or
(2) Involved dishonesty or false statement, regardless of the punishment.
B. Time limit. *--Evidence of a conviction under this Article is not admissible if a period of more than ten years has elapsed since the date of the conviction.*
C. Effect of pardon or annulment. *--Evidence of a conviction is not admissible under this Article if the conviction has been the subject of a pardon, annulment, or other equivalent procedure explicitly based on a finding of innocence.*
D. Juvenile adjudications. *--Evidence of juvenile adjudications of delinquency is generally not admissible under this Article.*
E. Pendency of appeal. *--The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. When evidence of a conviction is admissible, evidence of the pendency of an appeal is also admissible.*
F. Arrest, indictment, or prosecution. *--Evidence of the arrest, indictment, or prosecution of a witness is not admissible for the purpose of attacking his credibility.*

LOUISIANA ADVISORY NOTES & COMMENTARY:

Commentary:
1988.
(a) This Article adopts Federal Rule of Evidence 609 in most respects and thereby substantially modifies Louisiana law. It continues the practice of admitting evidence of

convictions as well as the practice of excluding evidence of arrest, indictment, or prosecution, to attack the credibility of a witness.

(b) Under prior Louisiana law evidence of a conviction of any crime was admissible on the issue of credibility regardless of the nature of the crime or when it occurred. This Article changes that rule, limiting admissibility to crimes that because of their seriousness or nature are particularly relevant to the issue of character for truthfulness. The one year limitation of the corresponding federal rule has been reduced to six months. It should be observed that the balancing test of Article 609(A)(1) is phrased in terms slightly different from the balancing test of Article 403. Further, Article 609(A)(2) reflects a legislative determination that as to such matters the balance is in favor of admissibility.

(c) Paragraph (A) of this Article supersedes those Louisiana cases beginning with *State v. Jackson, 307 So. 2d 604 (La. 1975),* that permitted a cross-examiner not only to ask whether a witness had been convicted of a crime but also to elicit details of the crime, including other acts of misconduct for which the witness had not been convicted. Those cases have given difficulty and since have been limited in *State v. Oliver, 387 So. 2d 1154, 1156 (La. 1980).* In that case, which involved an attack on the credibility of the accused, the court (in dictum) said the Jackson case "must be narrowly, rather than broadly, construed and care must be taken to avoid prejudice to the rights of the accused by expansive reference to the details of a former conviction." The court subsequently said in *State v. Martin, 400 So. 2d 1063, 1075 (La. 1981):* "As Professor McCormick observes, the more reasonable practice, minimizing prejudice and distraction from the issues, is the generally prevailing one that beyond the name of the crime, the time and place of conviction, and the punishment, further details such as the name of the victim and the aggravating circumstances may not be inquired into."

(d) Paragraph (B) of this Article balances the probative value of a prior conviction against the inherently prejudicial effect of stale evidence. The prejudice in question may be either that to the party who testifies on his own behalf or the embarrassment suffered by a non-party whose long-past transgressions are now to be made public. Subparagraph (A)(1), by contrast, is concerned solely with unfair prejudice to a party, particularly the accused.

(e) Paragraph (C) of this Article adopts a modified version of Federal Rule of Evidence 609(c) by providing that a pardon, annulment or equivalent procedure must have cited a finding of innocence as its rationale in order to bar introduction of evidence of the conviction in a subsequent action. Pardons based on rehabilitation, and those automatically granted by La. Const. Art. IV, § 5(E) to first offenders who complete their sentences, do not qualify. See *State v. Adams, 355 So. 2d 917 (La. 1978),* discussed in Joseph, "The Work of the Louisiana Appellate Courts for the 1977 - 1978 Term," "Criminal Trial Procedure and Postconviction Procedure," 39 La. L. Rev. 933, 948 (1979). The Paragraph also lists expungement of a conviction as a bar to its being introduced into evidence. In such cases the state has expressed a strong policy of "wiping the slate clean" that would be undermined by a contrary rule. See C.Cr.P. Arts. 893, 894; R.S. 44:9.

(f) Paragraph (D) adopts the corresponding Paragraph of the Federal Rules of Evidence with the substitution of the word "shall" for the word "may." Under the narrow circumstances specified in this Paragraph, juvenile adjudications of deliquency are admissible for the purpose of attacking a witness' credibility. In regard to the confidentiality of juvenile records, see Code of Juvenile Procedure Articles 122 and 123. See also *Davis v. Alaska, 415 U.S. 308 (1974)*

(g) Paragraph (F) is not intended to change the prior jurisprudence to the effect that evidence of arrest, indictment or prosecution may be admitted if it has relevance independent

of the suggestion that the witness is unworthy of belief, as, for example, when independently relevant to show bias. See, e.g., *State v. Brady, 381 So. 2d 819 (La. 1980); State v. Bailey, 367 So. 2d 368 (La. 1979); State v. Robinson, 337 So. 2d 1168 (La. 1976).* See generally Art. 403, supra; Comment, "Admissibility of Evidence of Prior Arrests in Louisiana Criminal Trials," 19 La. L. Rev. 684 (1959).

MAINE

Me. R. Evid. 609

Impeachment by Evidence of Conviction of Crime

(a) General Rule. *For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a specific crime is admissible but only if the crime (1) was punishable by death or imprisonment for one year or more under the law under which the witness was convicted, or (2) involved dishonesty or false statement, regardless of the punishment. In either case admissibility shall depend upon a determination by the court that the probative value of this evidence upon witness credibility outweighs any unfair prejudice to a criminal defendant or to any civil party.*

(b) Time Limit. *Evidence of a conviction under this rule is admissible only if less than 15 years have transpired since said conviction or less than 10 years have transpired since termination of any incarceration period therefor.*

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. *Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure.*

(d) Juvenile Adjudications. *Evidence of a juvenile adjudication in the proceeding open to the public may be admitted under this rule. Evidence of a juvenile adjudication in a proceeding from which the public was excluded may be admitted under this rule only in another juvenile proceeding from which the public is excluded.*

MARYLAND

Md. Rule 5-609 ***Impeachment by evidence of conviction of crime***

(a) Generally. *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 examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.*

Cross references. -- Code, Courts Article, § 10-905.

Committee note. -- The requirement that the conviction, when offered for purposes of impeachment, be brought out during examination of the witness is for the protection of the witness. It does not apply to impeachment by evidence of prior conviction of a hearsay declarant who does not testify.

(b) Time limit. *Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.*

(c) Other limitations. *Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:*

(1) the conviction has been reversed or vacated;

(2) the conviction has been the subject of a pardon; or

(3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.

(d) Effect of plea of nolo contendere. For purposes of this Rule, "conviction" includes a plea

of nolo contendere followed by a sentence, whether or not the sentence is suspended.

MARYLAND ADVISORY COMMITTEE NOTES:

Committee note. -- See Code, Courts Article, § 3-8A-23 for the effect of juvenile adjudications and for restrictions on their admissibility as evidence generally. Evidence of these adjudications may be admissible under the Confrontation Clause to show bias; see *Davis v. Alaska,* 415 U.S. 308 (1974).

Source. -- This Rule is derived from F.R.Ev. 609 and Rule 1-502.

Effects of Amendments. -- The December 4, 2007 Order, effective January 1, 2008, in (d) in the Committee note substituted "§ 3-8A-23" for "§ 3-824".

Purpose of Rule. -- This Rule is designed to prevent a jury from convicting a defendant based on his past criminal record, or because the jury thinks the defendant is a bad person and thus imposes limitations on the use of past convictions in an effort to discriminate between the informative use of past convictions to test credibility, and the pretextual use of past convictions where the convictions are not probative of credibility but instead merely create a negative impression of the defendant. Jackson v. State, 340 Md. 705, 668 A.2d 8 (1995).

Limitation on evidence used. -- Only the name of the conviction, the date of the conviction, and the sentence imposed may be introduced to impeach a witness; a trial court should never conduct a mini-trial by examining the circumstances underlying the prior conviction. State v. Giddens, 335 Md. 205, 642 A.2d 870 (1994).

Test for admissibility. -- Former Rule 1-502 (now this Rule) essentially creates a three-part test for determining whether prior convictions may be admitted for impeachment purposes. First, section (a) sets forth the "eligible universe" of what convictions may be used to impeach a witness's credibility. This universe consists of two categories: (1) "infamous crimes" and (2) "other crimes relevant to the witness's credibility." If the crime falls within one of the two categories in the eligible universe, then the second step is for the proponent to establish that the conviction was not more than 15 years old, that it was not reversed on appeal, and that it was not the subject of a pardon or a pending appeal. Finally, in order to admit a prior conviction for impeachment purposes, the trial court must determine that the probative value of the prior conviction outweighs the danger of unfair prejudice to the witness or objecting party. State v. Giddens, 335 Md. 205, 642 A.2d 870 (1994).

This Rule creates a three-part test for determining whether a conviction is admissible for impeachment purposes: first, a conviction must fall within the eligible universe of infamous crimes or other crimes relevant to witness's credibility; second, if the crime falls within one of these two categories, the proponent must establish that the conviction is less than 15 years old; finally, the trial court must weigh the probative value of the impeaching evidence against the danger of unfair prejudice to the defendant. Jackson v. State, 340 Md. 705, 668 A.2d 8 (1995).

Assuming the crime is infamous or relevant to the witness's credibility, and less than fifteen years old, the trial court may, in its discretion, admit convictions to impeach the witness, and the trial court did not abuse its discretion in weighing the potential for prejudice and deciding to admit two convictions for the purpose of impeachment. Thomas v. State, 139 Md. App. 188, 775 A.2d 406 (2001), aff'd,

Balancing test. -- The balancing test of section (a) of this Rule must be applied to infamous crimes and other crimes bearing on credibility. Wallach v. Board of Educ., 99 Md. App. 386, 637 A.2d 859 (1994).

The balancing test provided for in this Rule is clearly a matter of trial court discretion. State v. Giddens, 335 Md. 205, 642 A.2d 870 (1994).

Although the trial judge did not expressly describe the considerations that led her to conclude that defendant's drug conviction was admissible to impeach, she engaged in the necessary balancing before admitting the evidence. There is no requirement that the trial court's exercise of discretion be detailed for the record, so long as the record reflects that the discretion was in fact exercised. State v. Woodland, 337 Md. 519, 654 A.2d 1314 (1995).

If more than fifteen years have passed since the date of the conviction or if the conviction is not final, it is not admissible; if the conviction is final and occurred within fifteen years, and if the crime was an infamous crime or a crime relevant to the witness's credibility, the trial judge must weigh the probative value of the evidence against the danger of unfair prejudice. Williams v. State, 110 Md. App. 1, 675 A.2d 1037 (1996).

The weighing process must be done prior to ruling on admissibility and, if the trial judge is presiding over a jury, out of the presence of the jury. Williams v. State, 110 Md. App. 1, 675 A.2d 1037 (1996).

Only prior convictions that assist in measuring credibility and veracity allowed. -- It is improper to impeach a defendant by telling the jury only of the existence of unnamed prior felony convictions without providing the names of the offenses, because admitting sanitized prior felony convictions into evidence would render meaningless Maryland's long line of cases emphasizing the importance of admitting only those prior convictions that assist the fact finder in measuring a witness's credibility and veracity. Bells v. State, 134 Md. App. 299, 759 A.2d 1149 (2000).

Probative value of past convictions. -- Courts have established guidelines to be considered in weighing the probative value of a past conviction against the prejudicial effect including: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the defendant's credibility, and while these factors should not be considered mechanically or exclusively, they may be a useful aid to trial courts in performing the balancing exercise mandated by the rule. Jackson v. State, 340 Md. 705, 668 A.2d 8 (1995).

Trial court properly admitted evidence of defendant's 12-year-old conviction for auto theft when defendant's credibilty was an important factor; the Mahone factors were used to balance the probative value of the evidence against is prejudicial effect. Calloway v. State, 141 Md. App. 114, 784 A.2d 636 (2001).

MASSACHUSETTS

ALM GL ch. 233, § 21

Conviction of Crime May Be Shown to Affect Credibility.

The conviction of a witness of a crime may be shown to affect his credibility, except as follows:

First, *The record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.*

Second, *The record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a reformatory prison, jail, or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.*

Third, *The record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.*

Fourth, *the record of his conviction for a traffic violation upon which a fine only was imposed shall not be shown for such purpose unless he has been convicted of another crime or crimes within five years of the time of his testifying.*

For the purpose of this section, any period during which the defendant was a fugitive from justice shall be excluded in determining time limitations under the provisions of this section. [Effective May 4, 2012.]

Upon order of the court, a party may obtain a witness's criminal offender record information from the department of criminal justice information services.

SELECTED MASSACHUSETTS CASE NOTES:

Section applies to criminal defendant testifying in his own behalf. Commonwealth v. Boyd (1975) 367 Mass 169, 326 NE2d 320, 1975 Mass LEXIS 836.

Discretionary exclusion of record

If a defendant seeks to exclude evidence of his prior conviction, the judge may, within constitutional limits, condition such exclusion on the defendant's agreement not to impeach Commonwealth witnesses similarly. Commonwealth v. Maguire (1984) 392 Mass 466, 467 NE2d 112, 1984 Mass LEXIS 1658.

In prosecution for rape, judge did not err in excluding defendant's prior rape conviction but refusing to rule as to admissibility of convictions of assault and battery, possession of burglary tools, breaking and entering, larceny, forgery, and possession of drugs until Commonwealth offered them, because advance ruling by judge, though preferable, was not required. Commonwealth v. Pina (1990) 406 Mass 540, 549 NE2d 106, 1990 Mass LEXIS 55, cert den (1990) 498 US 832, 112 L Ed 2d 67, 111 S Ct 96, 1990 US LEXIS 4030.

Judge who recognized that he had discretion to exclude evidence of defendant's prior convictions did not abuse discretion by excluding evidence of 5 prior convictions for breaking and entering and larceny but allowing use of one conviction of breaking and entering and larceny and one conviction for receiving stolen goods. Commonwealth v. Gallagher (1990) 408 Mass 510, 562 NE2d 80, 1990 Mass LEXIS 466.

Denial of defendant's motion to exclude evidence of prior criminal conviction to impeach his credibility was error requiring reversal of conviction, where judge acted erroneously in belief that he had no right to grant motion. Commonwealth v. McFarland (1983) 15 Mass App 948, 445 NE2d 1085, 1983 Mass App LEXIS 1231.

Judge did not err in denying defendant's pretrial motion in limine to exclude record of his

prior convictions without prejudice to renewal of motion as record developed. Commonwealth v. Riley (1983) 17 Mass App 950, 457 NE2d 660, 1983 Mass App LEXIS 1555.

Judge's ruling that she had no discretion to exclude record of conviction to impeach testimony of defense witness was in error; judgment of conviction reversed. Commonwealth v. Manning (1999) 47 Mass App 923, 714 NE2d 843, 1999 Mass App LEXIS 863.

--Prejudice due to similarity to crime charged

Although trial judge has no statutory discretion to exclude evidence of prior conviction which meets conditions of ALM GL c 233, § 21, judge can avoid unfairness by excluding such evidence in situation where likely prejudice to defendant is most intense, i.e., where evidence of prior conviction of defendant is offered, crime charged and prior crime are similar, and crimes do not bear directly on disposition of defendant to tell the truth. Commonwealth v. Chase (1977) 372 Mass 736, 363 NE2d 1105, 1977 Mass LEXIS 975.

Judge acted within his discretion in refusing to preclude impeachment of defendant by prior convictions for burglary and armed robbery, where defendant was charged with armed assault in dwelling with intent to commit felony and assault and battery by dangerous weapon. Commonwealth v. Smith (1988) 403 Mass 489, 531 NE2d 556, 1988 Mass LEXIS 288.

Trial judge has power to suppress use of prior convictions if possibility of unfairness outweighs usefulness of information. Commonwealth v. Overton (1981) 12 Mass App 996, 429 NE2d 70, 1981 Mass App LEXIS 1284.

Probability of prejudice from admission of record of defendant's 6 prior convictions for drug offenses outweighed any insight they would provide on credibility in trial for possession of marijuana with intent to distribute and would be barred at any retrial. Commonwealth v. Roucoulet (1986) 22 Mass App 603, 496 NE2d 166, 1986 Mass App LEXIS 1757.

Judge had discretion to allow prosecutor to ask defendant about cirumstances of prior drug-selling conviction admitted to impeach defendant's credibility, where evidence was probative of method by which crime was committed, i.e., stashing drugs in basement and selling them from apartment. Commonwealth v. Velasquez (1999) 48 Mass App 147, 718 NE2d 398, 1999 Mass App LEXIS 1123, review denied (Mass) 430 Mass 1114, 723 NE2d 34, 2000 Mass LEXIS 72.

--Admission for impeachment purposes

Decision whether to admit evidence of prior convictions to impeach witness involves exercise of discretion by judge which is reviewable on appeal. Commonwealth v. Fano (1987) 400 Mass 296, 508 NE2d 859, 1987 Mass LEXIS 1362.

Judge did not abuse discretion in refusing to exclude defendant's prior convictions for unarmed assault with intent to murder, unarmed robbery, and assault and battery to impeach his credibility, where prior convictions were sufficiently dissimilar from present charge of unlawfully carrying firearm. Commonwealth v. Weaver (1987) 400 Mass 612, 511 NE2d 545, 1987 Mass LEXIS 1428.

Judge properly exercised discretion in determining on motion in limine that defendant (charged with murder, armed robbery and unlawfully carrying firearm) could be impeached

by evidence of his prior convictions for larceny, robbery, and assault by means of dangerous weapon but not by evidence of prior conviction of armed robbery. Commonwealth v. Walker (1987) 401 Mass 338, 516 NE2d 1143, 1987 Mass LEXIS 1533.

Judge did not err by allowing impeachment of defendant charged with rape of child with prior convictions of arson, where judge excluded defendant's prior convictions of crimes involving homosexual rapes of minors. Commonwealth v. Sanchez (1989) 405 Mass 369, 540 NE2d 1316, 1989 Mass LEXIS 211.

Judge did not abuse discretion in murder prosecution by denying defendant's pretrial motion to exclude his record of prior conviction of armed robbery as means of impeachment, since armed robbery is not offense substantially similar to murder. Commonwealth v. Feroli (1990) 407 Mass 405, 553 NE2d 934, 1990 Mass LEXIS 203.

Judge did not abuse discretion by permitting impeachment of defendant with evidence of his conviction for possession of controlled substance with intent to distribute in school zone at his trial for murder. Commonwealth v. Carter (1999) 429 Mass 266, 708 NE2d 943, 1999 Mass LEXIS 128.

It is within the trial judge's discretion to admit evidence of prior prostitution convictions of a victim of an alleged rape pursuant to ALM GL c 233, § 21, but the exercise of that discretion must take into consideration the objectives of the rape-shield statute, ALM GL c 233, § 21B. Commonwealth v. Harris (2005) 443 Mass 714, 825 NE2d 58, 2005 Mass LEXIS 109.

Trial court did not abuse its discretion in ruling that defendant's prior armed robbery conviction could be used to impeach him if he chose to testify in his child rape trial, and the fact that defendant chose not to testify due to the potential admission of the conviction was not cause for reversal. Commonwealth v. King (2005) 445 Mass 217, 834 NE2d 1175, 2005 Mass LEXIS 541, 40 ALR6th 609, cert den King v. Massachusetts (2006) 546 US 1216, 164 L Ed 2d 136, 126 S Ct 1433, 2006 US LEXIS 1874.

Trial court did not abuse its discretion in allowing the admission of 14 prior convictions against defendant for impeachment purposes, as the court had excluded various other convictions that were similar to the charged crimes and the prejudicial effect of the admitted convictions was considered; the number of convictions alone or the type of convictions in combination were not causes to exclude them. Commonwealth v. Brown (2008) 451 Mass 200, 2008 Mass. LEXIS 225.

Judge has discretion to bar or limit reading of record of convictions of defendant when offered for impeachment purposes. Commonwealth v. Jakimenko (1978) 6 Mass App 924, 380 NE2d 1317, 1978 Mass App LEXIS 776.

Judge's exercise of discretion in admitting evidence of defendant's prior conviction for impeachment purposes is not issue of federal or state constitutional dimension. Commonwealth v. Gonzalez (1986) 22 Mass App 274, 493 NE2d 516, 1986 Mass App LEXIS 1600, review denied (1986) 398 Mass 1102, 497 NE2d 1096, 1986 Mass LEXIS 1472.

Judge had discretion, upon admitting convictions to impeach credibility of rape complainant, to forbid mentioning of sentences imposed on convictions. Commonwealth v. Ortiz (1999) 47 Mass App 777, 716 NE2d 659, 1999 Mass App LEXIS 1077, review denied (1999) 430 Mass 1110, 722 NE2d 977, 1999 Mass LEXIS 741.

Defendant's right to testify was not violated when a trial judge properly exercised the judge's discretion in declining, on defendant's motion in limine, to exclude defendant's prior criminal convictions as potential impeachment evidence. Commonwealth v. DeBerry (2003) 57 Mass App 93, 781 NE2d 858, 2003 Mass App LEXIS 49.

Defense counsel's failure to call petitioner in support of petitioner's theory of self-defense was not ineffective assistance because petitioner risked impeachment based on a prior conviction for a violent crime involving the use of a dangerous weapon; although the prior conviction might have been barred in a federal trial because propensity evidence was highly restricted, Fed. R. Evid. 404(a), and petitioner's prior crime was not one that impugned veracity, Fed. R. Evid. 609, Massachusetts' law was more friendly to impeachment by prior crimes. Epsom v. Hall (2003) 330 F3d 49, 2003 US App LEXIS 10700.

Conviction of particular offenses

The general rule applicable to witnesses, whether they are also parties or not, is that their credibility may not be impeached by inquiry into transactions irrelevant to the issue and derogatory to the witness; under this rule, it was improper to inquire of a witness whether while in the U.S. Navy he had been absent without leave and had received a dishonorable discharge, although admission of such evidence did not constitute reversible error because the defendant was not prejudiced thereby. Commonwealth v. Binkiewicz (1961) 342 Mass 740, 175 NE2d 473, 1961 Mass LEXIS 811.

Conviction for rape could be used to impeach murder defendant testifying in his own behalf. Commonwealth v. Boyd (1975) 367 Mass 169, 326 NE2d 320, 1975 Mass LEXIS 836.

Matters beyond scope of statute; use of evidence for purpose other than to affect credibility

Where the relationship between a son and his father during a particular period was material to the issue, and the son had testified that he had "bummed around the country for a couple of years" during that period, it was not improper as violative of this section to elicit from the son on cross-examination that during the several years in question he had been confined in penal institutions, because the latter testimony was contradictory of the son's direct testimony on the relevant facts of his activities and whereabouts, and the instant section was inapplicable. Wasserman v. Wasserman (1966) 351 Mass 700, 221 NE2d 467, 1966 Mass LEXIS 825.

The requirement of this section that proof of a crime committed by a witness can only be shown by the record of conviction applies only where proof of the crime is being used to impeach the credibility of the witness; the section does not prevent proof of facts, even though they might disclose the commission of a crime, which are relevant to a substantive issue in a criminal case, such as whether an alibi witness for the defendant was biased or interested in favor of defendant, nor does the statute prevent cross-examination of a defendant who makes voluntary reference on direct examination to crimes other than the one for which he is being tried. Commonwealth v. Redmond (1970) 357 Mass 333, 258 NE2d 287, 1970 Mass LEXIS 829.

Prosecutor's use of defendant's prior criminal record, not to impeach defendant's credibility but to establish substantively defendant's propensity for violence, was violation of ALM GL c 233, § 21; however, judge's intervention and limiting instructions obviated any harm to defendant. Commonwealth v. Roberts (1979) 378 Mass 116, 389 NE2d 989, 1979 Mass LEXIS 806.

There was no error in showing defendant his record of arrest during cross-examination where defendant was not impeached, record was not admitted in evidence, and jury never learned of its contents. Commonwealth v. Baldwin (1982) 385 Mass 165, 431 NE2d 194, 1982 Mass LEXIS 1260.

Prosecutor's questions about a witness's prior convictions were not designed solely for impeachment under ALM GL c 233, § 21, but for another, permissible reason, to underscore the witness's understanding that he would never be released from prison, which the prosecutor reasonably implied left him with nothing to lose and a motive to lie. Commonwealth v. Bly (2005) 444 Mass 640, 830 NE2d 1048, 2005 Mass LEXIS 313.

MICHIGAN

MRE 609

Impeachment by Evidence of Conviction of Crime.

(a) General rule. *For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been] elicited from the witness or established by public record during cross examination, and*

(1) the crime contained an element of dishonesty or false statement or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) Determining probative value and prejudicial effect. *For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.*

(c) Time limit. *Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.*

(d) Effect of pardon, annulment, or certificate of rehabilitation. *Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.*

(e) Juvenile adjudications. *Evidence of juvenile adjudications is generally not admissible under this rule, except in subsequent cases against the same child in the juvenile division of a probate court. The court may, however, in a criminal case or a juvenile proceeding against the child allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the case or proceeding.*

(f) Pendency of appeal. *The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

MICHIGAN ADVISORY NOTES & CASE NOTES:

NOTES

MRE 609(a) is a modified version of Rule 609(a) of the Federal Rules of Evidence, differing from the Federal Rule by inserting the word "theft" before the phrase "dishonesty or false statement", and by requiring a determination by the court that "the probative value of admitting this evidence on the issue of credibility outweighs its prejudicial effect" as a condition of admissibility as to all convictions used for impeachment. MRE 609(b) is identical with Rule 609(b) of the Federal Rules of Evidence except for omission from the first sentence of the phrase "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect" and the omission of the entire second sentence. Subdivisions (c), (d) and (e) are identical with the equivalent provisions of Rule 609 of the Federal Rules of Evidence. A "pardon" within the meaning of MRE 609(c) would not include, for example, a pardon granted solely to avoid deportation.

Factors court must consider.

In a methamphetamine manufacturing case, the trial court sufficiently articulated its analysis of the probative value and prejudicial effect of defendant's prior burglary conviction under MRE 609(a), (b), although the court did not expressly address the age of the conviction or the degree to which the conviction was indicative of veracity. People v Meshell (2005) 265 Mich App 616, 696 NW2d 754.

Where the prosecutor was permitted to use a prior conviction of the defendant for breaking and entering with intent to commit larceny "for credibility purposes only" if the defendant should testify, it was reversible error for the prosecutor to repeatedly use the prior conviction during cross-examination of the defendant for prohibited purposes. People v Jones (1998) 228 Mich App 191, 579 NW2d 82, mod in part and revd in part, remanded, app den (1998) 458 Mich 861, 587 NW2d 637.

Under revised MRE 609, applicable to cases beginning on or after March 1, 1988, where a party seeks to impeach a nondefendant witness with evidence of a prior theft conviction, the judge need only determine that the prior offense, in light of its nature and vintage, is significantly probative of veracity; if so, the impeachment evidence should be admitted, and there is no requirement that the court balance the prejudice versus the probative value of the evidence. People v Dixon (1989) 175 Mich App 472, 438 NW2d 303.

Evidence of prior convictions may be used to impeach the credibility of a criminal defendant who takes the stand and testifies, provided that the trial court, before admitting such testimony, considers the nature of the previous conviction, and the effect on the decisional process if the accused does not testify and then, in the exercise of its discretion, determines that the probative value of such testimony outweighs its prejudicial effect. People v Fernandez (1986) 153 Mich App 743, 396 NW2d 517, app den (1986) 426 Mich 879.

Two of the purposes for a trial judge's inquiry in determining whether evidence of a criminal defendant's prior convictions should be admitted for impeachment purposes are (1) to put before the jury only those prior convictions indicative of the defendant's disposition toward truthfulness and veracity, and (2) to keep from the jury those convictions which, although they may be indicative of the defendant's disposition toward truthfulness, may interfere with the jury's ability to determine the defendant's guilt or innocence on the basis of the evidence. People v Holmes (1984) 132 Mich App 730, 349 NW2d 230.; People v Cook (1984) 131 Mich App 796, 347 NW2d 720.

A trial court, in determining whether to permit impeachment of a criminal defendant by evidence of the defendant's prior felony conviction, must consider whether the prior offense

is for the same conduct for which defendant is on trial, and the effect on the decisional process if the defendant does not testify because of the use of the impeachment evidence; the trial court is required to determine whether the probative value of the impeachment evidence outweighs its prejudicial effect and must articulate on the record the factors considered in making its determination. People v Cortez (1984) 131 Mich App 316, 346 NW2d 540 (criticized as stated in People v Gentry (1984) 138 Mich App 225, 360 NW2d 863) and remanded (1985) 423 Mich 855, 376 NW2d 660.

Admission of prior convictions to impeach testimony of an accused is within discretion of trial court upon consideration of factors including nature of prior offense, whether it was for substantially same conduct for which accused is on trial, and effect thereof on decisional process if accused does not testify from fear of impeachment by prior conviction. People v Jones (1979) 92 Mich App 100, 284 NW2d 501 (ovrld in part on other grounds by People v Huff (1980) 101 Mich App 232, 300 NW2d 525).

In ruling on admissibility of prior convictions in a criminal case, trial judge is required to recognize his discretion on record and exercise it upon consideration of extent to which offense bears on credibility, similarity of prior offense to charged offense, and whether accused's defense will be severely impaired if fear of impeachment leads him to forego testifying. People v Love (1979) 91 Mich App 495, 283 NW2d 781.

Remoteness of prior convictions is relevant factor in determining abuse of discretion in admitting such conviction for impeachment purposes, more remote convictions rendering them less probative on issue of credibility in prosecution. People v Stein (1979) 90 Mich App 159, 282 NW2d 269 (disapproved as stated in People v Adkins (1982) 117 Mich App 583, 324 NW2d 88).

--Determining probative value.

If the probative nature of the evidence of a witness' prior conviction of a theft crime punishable by more than one year imprisonment does not outweigh its prejudicial effect, it must be excluded. People v Johnson (1988) 170 Mich App 808, 429 NW2d 237.

For purposes of determining probativeness, only an objective analysis of the degree to which the crime is indicative of veracity and the age of the conviction should be considered, not either party's need for the evidence. People v Johnson (1988) 167 Mich App 168, 421 NW2d 617.; People v Johnson (1988) 170 Mich App 808, 429 NW2d 237.; People v Minor (1988) 170 Mich App 731, 429 NW2d 229.; People v Reinhardt (1988) 167 Mich App 584, 423 NW2d 275, app den (1988) 430 Mich 874, later proceeding (1989, Mich) 1989 Mich LEXIS 68 and vacated on other grounds (1990) 436 Mich 866, 460 NW2d 226, on remand (1991) 188 Mich App 80, 469 NW2d 22, app den (1992) 439 Mich 999, 484 NW2d 657.

A factor a trial court must weigh in deciding whether or not to allow impeachment of a defendant in a criminal case by evidence of prior convictions is the nature of the prior offense. People v Miller (1985) 143 Mich App 274, 372 NW2d 329.; People v Martin (1986) 150 Mich App 630, 389 NW2d 713.; People v Howard (1981) 104 Mich App 598, 305 NW2d 268.; People v Cortez (1984) 131 Mich App 316, 346 NW2d 540 (criticized as stated in People v Gentry (1984) 138 Mich App 225, 360 NW2d 863) and remanded (1985) 423 Mich 855, 376 NW2d 660.; People v Lesperance (1985) 147 Mich App 379, 382 NW2d 788.

A factor to be considered by a trial court in deciding whether to permit impeachment by evidence of prior convictions is the nature of the prior offense and its relation to credibility. People v Owens (1983) 131 Mich App 76, 345 NW2d 904, vacated on other grounds (1988) 430 Mich 876, 423 NW2d 39.; People v Sesi (1980) 101 Mich App 256, 300 NW2d 535.

A factor a trial court must consider in deciding whether or not to allow impeachment of a defendant in a criminal case by evidence of prior convictions is the nature of the prior offenses (did they involve offenses bearing directly on credibility, such as perjury?). People v Ferrari (1983) 131 Mich App 621, 345 NW2d 645.; People v Holmes (1984) 132 Mich App 730, 349 NW2d 230.; People v Johnson (1981) 105 Mich App 332, 306 NW2d 501, appeal after remand (1982) 415 Mich 443, 330 NW2d 16, appeal after remand (1985) 141 Mich App 622, 368 NW2d 736, revd on other grounds (1985) 422 Mich 923, 369 NW2d 199.; People v Cook (1984) 131 Mich App 796, 347 NW2d 720.; People v Whigham (1980) 102 Mich App 96, 300 NW2d 753.

--Determining prejudicial effect.

Admission of evidence of a defendant's prior convictions for purposes of impeachment and as substantive similar-acts evidence did not unfairly prejudice a defendant where other evidence of his guilt was overwhelming, no inference could be drawn from the record that the trial court failed to consider whether the prior offenses were similar to the offenses charged, whether the recency of the prior offenses would be probative of the defendant's veracity if he chose to testify, and whether it was important to the truth-seeking process to obtain the defendant's version of the events. People v Wakeford (1983) 418 Mich 95, 341 NW2d 68 (criticized in People v Borghesi (2001, App) 40 P3d 15, 2001 Colo J C A R 1188).

In evaluating prejudice, the similarity of the charged offense to the prior conviction and the importance of the defendant's testimony to the decisional process are to be considered; it is the effect on the decisional process if the defendant does not testify which must predominate in such a determination. People v Minor (1988) 170 Mich App 731, 429 NW2d 229.; People v Johnson (1988) 170 Mich App 808, 429 NW2d 237.

The prejudice factor escalates with increased similarity and increased importance of the testimony to the decisional process. People v Johnson (1988) 170 Mich App 808, 429 NW2d 237.

For purposes of determining prejudice, only the similarity to the charged offense and the importance of defendant's testimony to the decisional process should be considered, if the witness is the defendant. People v Johnson (1988) 167 Mich App 168, 421 NW2d 617.; People v Johnson (1988) 170 Mich App 808, 429 NW2d 237.; People v Reinhardt (1988) 167 Mich App 584, 423 NW2d 275, app den (1988) 430 Mich 874, later proceeding (1989, Mich) 1989 Mich LEXIS 68 and vacated on other grounds (1990) 436 Mich 866, 460 NW2d 226, on remand (1991) 188 Mich App 80, 469 NW2d 22, app den (1992) 439 Mich 999, 484 NW2d 657.

A factor a trial court must weigh in deciding whether or not to allow impeachment of a defendant in a criminal case by evidence of prior convictions is whether the effect on the decisional process if the accused does not testify out of fear of impeachment by evidence of prior convictions. People v Miller (1985) 143 Mich App 274, 372 NW2d 329.; People v Martin (1986) 150 Mich App 630, 389 NW2d 713.; People v Owens (1983) 131 Mich App 76, 345 NW2d 904, vacated on other grounds (1988) 430 Mich 876, 423 NW2d 39.; People v Cummings (1984) 139 Mich App 286, 362 NW2d 252.; People v Lesperance (1985) 147 Mich App 379, 382 NW2d 788.

A factor a trial court must weigh in deciding whether or not to allow impeachment of a defendant in a criminal case by evidence of prior convictions is whether it is for substantially the same conduct for which defendant is on trial. People v Miller (1985) 143 Mich App 274, 372 NW2d 329.; People v Martin (1986) 150 Mich App 630, 389 NW2d 713.; People v Howard (1981) 104 Mich App 598, 305 NW2d 268.; People v Lesperance (1985) 147 Mich

App 379, 382 NW2d 788.; People v Fernandez (1986) 153 Mich App 743, 396 NW2d 517, app den (1986) 426 Mich 879.

The factors a trial court must weigh in deciding whether or not to allow impeachment of a defendant in a criminal case by evidence of prior convictions are: (1) whether it is for substantially the same conduct for which the defendant is on trial (are the offenses so closely related that the danger that the jury will consider the defendant a "bad man" or assume that because he was previously convicted he likely committed this crime, and therefore create prejudice which outweighs the probative value on the issue of credibility?); and (2) the effect on the decisional process if the accused does not testify out of fear of impeachment by prior convictions (are there alternative means of presenting a defense which would not require the defendant's testimony, i.e., can his side of the story be presented, or are there alternative, less prejudicial means of impeaching the defendant?); a trial court abuses its discretion when it fails to consider these factors in deciding to allow evidence of prior convictions. People v Holmes (1984) 132 Mich App 730, 349 NW2d 230.; People v Johnson (1981) 105 Mich App 332, 306 NW2d 501, appeal after remand (1982) 415 Mich 443, 330 NW2d 16, appeal after remand (1985) 141 Mich App 622, 368 NW2d 736, revd on other grounds (1985) 422 Mich 923, 369 NW2d 199.; People v Cook (1984) 131 Mich App 796, 347 NW2d 720.; People v Whigham (1980) 102 Mich App 96, 300 NW2d 753.

A factor to be considered by a trial court in deciding whether to permit impeachment by evidence of prior convictions is whether it is for substantially the same conduct for which defendant is on trial, with closely similar offenses requiring careful examination because of the likelihood of prejudice. People v Owens (1983) 131 Mich App 76, 345 NW2d 904, vacated on other grounds (1988) 430 Mich 876, 423 NW2d 39.

The factors a trial court must consider in deciding whether or not to allow impeachment of a defendant in a criminal case by evidence of prior convictions are: (1) whether the prior offense is for substantially the same conduct for which the defendant is on trial (are the offenses so closely related that the jury will consider the defendant a bad man, creating prejudice?); and (2) the effect on the decisional process if the accused does not testify out of fear of impeachment by prior convictions (are there alternate means of presenting a defense?). People v Ferrari (1983) 131 Mich App 621, 345 NW2d 645.

A trial court is required to exercise its discretion in deciding whether the probative value of admitting evidence of a defendant's previous convictions, including evidence of unspecified prior felony convictions, as bearing on a defendant's credibility, outweighs any possible prejudicial effect of admitting such evidence by considering the effect on the decisional process should the defendant choose not to testify out of fear of impeachment by use evidence of the prior convictions. People v Howard (1981) 104 Mich App 598, 305 NW2d 268.

Trial court's discretion in deciding whether to admit evidence of prior conviction is determined by: (1) whether conviction was for substantially same conduct as charged offense, and (2) affect on decisional process if accused does not testify. People v Sesi (1980) 101 Mich App 256, 300 NW2d 535.

General impeachment of a defense witness's testimony, with his prior conviction for a more than decade old unarmed robbery, even if it did violate MRE 609, was not so egregious as to render habeas petitioner's trial fundamentally unfair. The impeachment evidence was not a crucial, critical, highly significant factor in the peitioner's conviction. Daniels v Lafler (2006, CA6 Mich) 192 Fed Appx 408 (UNPUBLISHED), 2006 FED App 599N.

Distinction between impeaching defendant and other witnesses.

Considerations relating to propriety of impeaching defendants and other witnesses by prior conviction are not identical and when court is called upon to balance probative value of prior conviction for impeachment purposes against its prejudicial effect, it is manifest that closer attention to possible prejudicial effect is necessary when witness sought to be impeached is defendant. People v Hayes (1981) 410 Mich 422, 301 NW2d 828.

The Michigan evidence rule regarding the impeachment of a witness by evidence of conviction of a crime is not intended to prevent the exclusion of evidence of convictions of prosecution witnesses; however, courts should be more reluctant to exclude evidence of prior convictions of prosecution witnesses than prior convictions of defendants, because the prejudicial effect of the former is inherently less than that of the latter. People v Tait (1984) 136 Mich App 475, 356 NW2d 33.

The use of evidence of a witness's prior conviction of a crime for impeachment purposes is prohibited where the crime was not punishable by imprisonment for more than one year or did not involve theft, dishonesty, or false statement. People v Tait (1984) 136 Mich App 475, 356 NW2d 33.

Evidence of prior convictions for theft offenses may be used for purposes of impeachment. People v Davis (1984) 133 Mich App 707, 350 NW2d 796.

Defense counsel in a criminal case may impeach a witness without thereby opening the door for impeachment of the defendant; the trial judge must separately exercise his discretion as to each witness regarding the impeachment of that witness by the use of evidence of prior convictions. People v Hawkins (1982) 114 Mich App 714, 319 NW2d 644, later proceeding (1983, Mich) 335 NW2d 473.

MINNESOTA

Minn. R. Evid. 609

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. *For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted only if the crime (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, or (2) involved dishonesty or false statement, regardless of the punishment.*

(b) Time limit. *Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.*

(c) Effect of pardon, annulment, vacation or certificate of rehabilitation. *Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, vacation or certificate of rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, vacation or*

other equivalent procedure based on a finding of innocence.
(d) Juvenile adjudications. *Evidence of juvenile adjudications is not admissible under this rule unless permitted by statute or required by the state or federal constitution.*
(e) Pendency of appeal. *The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

MINNESOTA 1989 COMMITTEE COMMENT:

Committee Comment - 1989

Subdivision (a)

The question of impeachment by past conviction has given rise to much controversy. Originally convicted felons were incompetent to give testimony in courts. It was later determined that they should be permitted to testify but that the prior conviction would be evidence which the jury could consider in assessing the credibility of the witness. However, not all convictions reflect on the individual's character for truthfulness. In cases where a conviction is not probative of truthfulness the admission of such evidence theoretically on the issue of credibility breeds prejudice. The potential for prejudice is greater when the accused in a criminal case is impeached by past crimes that only indirectly speak to character for truthfulness or untruthfulness. The rule represents a workable solution to the problem. Those crimes which involve dishonesty or false statement are admissible for impeachment purposes because they involve acts directly bearing on a person's character for truthfulness. Dishonesty in this rule refers only to those crimes involving untruthful conduct. When dealing with other serious crimes, which do not directly involve dishonesty or false statement the Court has some discretion to exclude the offer where the probative value is outweighed by prejudice. Convictions for lesser offenses not involving dishonesty or false statement are inadmissible.

The substantive amendment is designed to conform this rule to the accepted practice in Minnesota, which is to allow the accused to introduce evidence of past crimes in the direct examination of the accused.

Contrary to the practice in federal courts, the defendant can preserve the issue at a motion in limine and need not testify to litigate the issue in post trial motions and appeals. Compare State v. Jones, 271 N.W.2d 534 (Minn.1978) with Luce v. United States, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). The trial judge should make explicit findings on the record as to the factors considered and the reasons for admitting or excluding the evidence. If the conviction is admitted, the court should give a limiting instruction to the jury whether or not one is requested. State v. Bissell, 368 N.W.2d 281 (Minn.1985).

Subdivision (b)

The rule places a ten year limit on the admissibility of convictions. This limitation is based on the assumption that after such an extended period of time the conviction has lost its probative value on the issue of credibility. Provision is made for going beyond the ten year limitation in unusual cases where the general assumption does not apply.

The rule will supersede Minnesota Statutes, section 595.07 (1974).

Subdivision (c)

The rule is predicated on the assumption that if the conviction has been "set aside" for

reasons that suggest rehabilitation, the probative value of the conviction on the issue of credibility is diminished. For example, pardons pursuant to Minnesota Constitution, Article 5, section 7 (restructured 1974), or Minnesota Statutes, section 638.02 (1974) would operate to make a prior conviction inadmissible as would a vacation of the conviction or subsequent nullification pursuant to Minnesota Statutes, sections 609.166-609.168 (1974), or Minnesota Statutes, section 242.01 et seq. (1974). A restoration of civil rights, which does not reflect findings of rehabilitation would not qualify under the rule. See Minnesota Statutes, section 609.165 (1974). If there is a later conviction, as defined in the rule, the assumption of rehabilitation is no longer valid. If otherwise relevant and competent both convictions may be used for impeachment purposes. Obviously, if the first conviction is "set aside" based on a finding of innocence, the conviction would have no more probative value under any circumstances. See rules 401-403.

Subdivision (d)

The amendment is a change in style not substance. Minnesota Statutes, section 260.211, subdivision 2 (1988) does permit the disclosure of juvenile records in limited circumstances. Pursuant to Minnesota Statutes, section 260.211, subdivision 1 (1988) a juvenile adjudication is not to be considered a conviction nor is it to impose civil liabilities that accompany the conviction of a crime. Rule 609(d) reflects this policy by precluding impeachment by evidence of a prior juvenile adjudication. It is conceivable that the state policy protecting juveniles as embodied in the statute and the evidentiary rule might conflict with certain constitutional provisions, e.g., the sixth amendment confrontation clause. Under these circumstances the evidentiary rule becomes inoperative. See Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), construed in State v. Schilling, 270 N.W.2d 769 (Minn. 1978).

MISSISSIPPI

Miss. R. Evid. Rule 609

Impeachment by evidence of conviction of crime.

(a) General rule. *-- For the purpose of attacking the character for truthfulness of a witness,*

(1) evidence that (A) a nonparty witness has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and (B) a party has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the party; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

(b) Time limit. *-- Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.*

(c) Effect of pardon, annulment, expungement or certificate of rehabilitation. *-- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been*

convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
(d) Juvenile adjudications. *-- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.*
(e) Pendency of appeal. *-- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.*

MISSISSIPPI ADVISORY COMMITTEE NOTES:

NOTES:
COMMENT -- Under Rule 609(a) crimes are divided into two categories for purposes of impeachment. 609(a)(1) deals with felony convictions and under the original version treated convictions of all witnesses the same. The second category, 609(a)(2), originally addressed crimes involving dishonesty or false statement, whether felonies or misdemeanors.

Rule 609(a)(1) was amended in 2002 to incorporate the rationale of decisions by the Mississippi Supreme Court which recognized the difference in the highly prejudicial effect of showing the convictions when the witness is the accused and the little prejudicial effect from such impeachment of other witnesses. It was reasoned that when the impeachment by convictions is of a witness other than the accused in a criminal case there is little or no unfair prejudice which can be caused to a party. Thus, the probative value on the credibility of the witness will almost always outweigh any prejudice. In *White v. State,* 785 So.2d 1059 (Miss.2001) it was held that the accused had the right, bolstered by his right of confrontation, to impeach a state's witness with his felony drug conviction. In *Moore v. State,* 787 So.2d 1282 (Miss.2001) the court held that the state was properly permitted to impeach a defense witness with his five prior convictions, noting that there was no prejudice against the accused.

The amendments here refer to parties instead of the accused to clearly apply to civil cases, as did the original rule. Under this amended rule, convictions offered under 609(a)(1) to impeach a party must be analyzed under the guidelines set forth in *Peterson v. State,* 518 So.2d 632 (Miss.1987) to determine if the probative value is great enough to overcome the presumed prejudicial effect to that party, and findings should be made on the record by the judge. Convictions offered to impeach any other witness are admissible unless the court is persuaded by the opponent that the probative value is substantially outweighed by negative factors included in Rule 403. A record of the findings on the issue is not required in that case. See Moore, above.

Convictions from any state or federal jurisdiction may be considered for admission under the rule.

The phrase "dishonesty or false statement" in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, forgery, embezzlement, false pretense or other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the witness' propensity to testify truthfully. Such convictions are peculiarly probative of credibility and are always to be admitted, not subject to the discretionary balancing by the judge.

Rule 609(a)(2) requires that the proponent have ready proof that the crime was in the nature

of crimen falsi. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment -- as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly -- a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States,* 110 S.Ct. 2143 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States,* 125 S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the rule does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of crimen falsi.

The reference in former 609(a) to proving a conviction during cross-examination is eliminated because the conviction may have to be proved in rebuttal if the witness refuses to admit the prior conviction on cross-examination.

The first sentence of 609(a) uses the term "character for truthfulness" instead of the prior term "credibility," because the limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. See, e.g., *United States v. Lopez,* 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

Subsection (b) imposes a time limitation on prior convictions. If the conviction occurred more than ten years earlier, it may not be used as impeachment evidence. The rationale underlying subsection (b) is based on fairness. A person's past should not be able to haunt the person for life. The judge may grant an exception in instances where the probativeness of the conviction substantially outweighs the prejudice. But, before the judge makes such a decision, the proponent must give the adversary sufficient notice so that the adversary may challenge the decision.

Prior to the rules Mississippi had no time limitation regarding prior convictions. The courts held only that the prior conviction should not be too remote in time from the case at bar. That principle obviously left a great deal of discretion with the trial judge in determining remoteness. Thus, the appellate court often upheld the use of prior convictions for impeachment which were far in excess of the ten-year limitation of Rule 609(b).

Subsection (c) expresses the public policy that a person who has been rehabilitated or whose conviction has been nullified based on a later finding of his innocence should not be tainted by this conviction. Subsection (c) does not apply to pardons which simply restore a person's civil rights. Rather, it is implicitly limited to cases in which rehabilitation has occurred or in which it can be shown that the person was innocent.

Subsection (d) prohibits impeachment based on juvenile adjudications. Reasons for this rule include the wish to free an adult from bearing the burden of a youthful mistake, the informality of youth court proceedings, and the confidential nature of those proceedings. *See*

FRE 609, Advisory Committee's Notes.

In pre-rule Mississippi practice, the use of juvenile adjudications for impeachment purposes has been governed by M.C.A. § 43-21-561 which provides that no adjudication against a child shall be deemed a criminal conviction. Indeed, the juvenile offender is permitted by statute to deny the fact of the prior adjudication. However, the statute permits cross-examination by either the state or the defendant in a criminal action or the respondent in a juvenile adjudication proceeding regarding prior juvenile offenses for the limited purpose of showing bias and interest. In short, the evidence could be used in these limited circumstances but not to attack the general credibility of the witness.

Under Rule 609(d) the court has the discretion to allow impeachment of a witness, other than a criminal defendant, by a prior juvenile adjudication if the judge determines that it is necessary. The court's discretion extends only to witnesses other than the accused in a criminal case.

Subsection (e) reflects the presumption that exists in favor of a trial court's decision. Until overturned, that decision is deemed to be the correct decision. Once the prior conviction has been introduced, the adversary can present evidence that an appeal of that conviction is pending. In theory, this gives a sense of balance to the use of the prior conviction. However, in practice, evidence of a pending appeal has insufficient weight to balance the use of the prior conviction.

[Amended effective March 1, 1989; May 2, 2002; July 1, 2009.]

MISSOURI

§ 491.050 R.S.Mo.

Convicts competent witnesses *-- convictions and certain pleas may be proved to affect credibility*

Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal convictions may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer.

MONTANA

Mont. Code Anno., Ch. 10, Rule 609

Impeachment by evidence of conviction of crime.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible.

MONTANA ADVISORY COMMISSION NOTES:

Commission Comments

This rule is unlike either the Federal or Uniform Rules (1974) Rule 609 in that they provide that evidence of conviction of a crime is admissible for the purpose of attacking credibility. Each of those rules provide substantial limitations upon the admissibility of this type of evidence: the discretion of the court; a time limit; and a pardon, annulment, or certificate of rehabilitation making such evidence inadmissible. Federal and Uniform Rules (1974) Rule 609(a), (b), and (c). The latter subdivision also provides an "other equivalent procedure" and

makes conviction inadmissible; while Montana does not have a certificate of rehabilitation, Article II, Section 28, 1972 Constitution of Montana, and Section 95-2227(3), R.C.M. 1947 [46-18-801], both provide that when a person is no longer under state supervision, his full rights of citizenship are restored. Adoption of this provision would mean that only those persons serving a sentence in prison, suspended sentence or on parole could be impeached by this method, and would severely limit the usefulness of the rule.

However, the Commission rejects the rule allowing impeachment by evidence of conviction of a crime, not only because of these Constitutional and statutory provisions but also and most importantly because of its low probative value in relation to credibility. The Commission does not accept as valid the theory that a person's willingness to break the law can automatically be translated into willingness to give false testimony. Advisory Committee Note to Federal Rule 609, 46 F.R.D. 161, 297, (1969). The Commission does believe that conviction of certain crimes is probative of credibility; however, it is the specific act of misconduct underlying the conviction which is really relevant, not whether it has led to a conviction. Allowing conviction of crime to be proved for the purpose of impeachment merely because it is a convenient method of proving the act of misconduct (Advisory Committee Note, *Id.*) is not acceptable to the Commission, particularly in light of Rule 608(b) allowing acts of misconduct to be admissible if they relate to credibility.

This rule is inconsistent with existing Montana law. Section 93-1901-11, R.C.M. 1947 [superseded], provides the methods of impeachment and includes, "...it may be shown by the examination of the witness, or the record of the judgment, that he has been convicted of a felony". It is also admissible under Section 93-2101-2, R.C.M. 1947 [26-2-302]. Section 93-1901-11, R.C.M. 1947 [superseded], was interpreted in State v. Coloff, 125 Mont. 31, 35, 231 P2d 343 (1951) to mean that the cross-examiner may ask the question, "Have you ever been convicted of a felony?" If the witness answers "Yes", then the inquiry is closed; if the witness answers "No", then proof may be made of conviction through the record of judgment. Montana also recognizes the rule that the witness may explain the felony conviction in an attempt to support his credibility. State v. McClellan, 23 Mont. 532, 538, 59 P 924 (1899); Osnes Livestock Co. v. Warren, 103 Mont. 284, 301, 62 P2d 206 (1936); and State v. Tully, 148 Mont. 166, 169, 418 P2d 549 (1966).

The Commission feels that, in addition to the reasons for rejecting the rule stated above, the present Montana practice can lead to one of two undesirable results. First, the mere fact that a witness can be asked whether he has been convicted of a felony can, in many instances, cause severe embarrassment on the part of the witness. This is particularly uncalled for where the conviction has no relation to credibility, such as manslaughter caused by an automobile accident. This could cause many witnesses to decide not to testify at all or, when the witness is a party, not to present or defend his side of the case at all. The fact that the witness can explain his conviction can simply add to the embarrassment and is no help. Second, when the witness answers that he has been convicted of a crime, no further inquiry is permitted. This can lead to confusion by jury members who see no connection between conviction of a crime and the case or to undue prejudice, particularly when the witness is a defendant testifying in his own behalf.

COMMISSION COMMENT TO JUNE 1990 AMENDMENT

The revision establishes gender neutral format only. No substantive change.

Evidence > Testimony > Credibility > Impeachment > Convictions > General Overview

Mont. R. Evid. 609 provides that, for the purpose of attacking the credibility of a witness,

evidence that the witness has been convicted of a crime is not admissible; Mont. R. Evid. 608(b) provides that specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may not be proved by extrinsic evidence. State v. Martin, 279 Mont. 185, 926 P.2d 1380, 1996 Mont. LEXIS 254, 53 Mont. St. Rep. 1109 (Mont. 1996).

Efforts to impeach a witness with prior convictions where that line of inquiry was not proper under Mont. R. Evid. 609 resulted in the admission of the witness's deposed testimony, which was free of attempts to impeach his credibility by exposing prior convictions; Mont. R. Evid. 609 specifically prohibits evidence of a witness's prior convictions. In re Seizure of $ 23,691.00 in United States Currency, 273 Mont. 474, 905 P.2d 148, 1995 Mont. LEXIS 235, 52 Mont. St. Rep. 1063 (Mont. 1995).

Pursuant to Mont. R. Evid. 609, for the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is not admissible. State v. Bristow, 267 Mont. 170, 882 P.2d 1041, 1994 Mont. LEXIS 230, 51 Mont. St. Rep. 1010 (Mont. 1994).

Pursuant to Mont. R. Evid. 609, it is not permissible to introduce evidence of a witness's criminal history to impeach his credibility. Admission of such evidence in defendant's kidnapping trial violated Mont. R. Evid. 609 because there was a reasonable possibility that the inherently prejudicial and inadmissible evidence of the witness's criminal history might have contributed to defendant's conviction. State v. Bristow, 267 Mont. 170, 882 P.2d 1041, 1994 Mont. LEXIS 230, 51 Mont. St. Rep. 1010 (Mont. 1994).

Because a court allowed the State to impeach a defense witness by asking if he had been convicted of a crime and by asking him to disclose what crimes he had committed, the State's inquiry was improper under Mont. R. Evid. 609. State v. Shaw, 237 Mont. 451, 775 P.2d 207, 1989 Mont. LEXIS 144 (Mont. 1989).

Despite the substance of certain testimony, an appellate court will not condone prosecutorial conduct that is in clear violation of Mont. R. Evid. 609. State v. Shaw, 237 Mont. 451, 775 P.2d 207, 1989 Mont. LEXIS 144 (Mont. 1989).

Even though a criminal defendant argued that under Mont. R. Evid. 607(a), a court erred in restraining defense counsel from inquiring into the criminal history of the State's witness, Rule 607 was intended to preserve traditional methods of impeachment, including impeachment by showing bias or motive to fabricate, and Montana statutorily prohibits, through Mont. R. Evid. 609, inquiry into prior criminal history for impeachment purposes. Sloan v. State, 236 Mont. 100, 768 P.2d 1365, 1989 Mont. LEXIS 36 (Mont. 1989).

Where a witness's alleged criminal conduct did not evidence a propensity for violence to support defendant's implication that the witness was an aggressor, the conduct did not tend to make any fact at issue in defendant's trial for assault more or less probable pursuant to Mont. R. Evid. 401 and Mont. R. Evid. 403; thus, a trial court did not abuse its discretion in excluding the evidence under Mont. R. Evid. 608 and Mont. R. Evid. 609. State v. Hammer, 233 Mont. 101, 759 P.2d 979, 1988 Mont. LEXIS 220, 45 Mont. St. Rep. 1326 (Mont. 1988).

When defendant testified that he had never burglarized any place, evidence of his prior burglary conviction was properly admitted under Mont. R. Evid. 404(b) to prove that he lied under oath, and the evidence was not barred by Mont. R. Evid. 609. State v. Austad, 197 Mont. 70, 641 P.2d 1373, 1982 Mont. LEXIS 747 (Mont. 1982).

Montana, unlike many states, does not recognize the use of prior convictions to impeach the general credibility of a witness under Mont. R. Evid. 609 Montana, unlike many states, does not recognize the use of prior convictions to impeach the general credibility of a witness; thus, the permissible use of juvenile records to demonstrating, by cross-examination, a witness' bias, prejudice, or motive. State v. Camitsch, 192 Mont. 124, 626 P.2d 1250, 1981 Mont. LEXIS 701 (Mont. 1981).

Because a county sheriff was a public employee, if not a public official, and his official duty involved maintaining contact with persons involved in the drug scene, there was no merit to defendant's argument that the sheriff's interpretation of a taped telephone conversation would be a criminal act under Mont. Code Ann. § 45-8-213(1)(c); further, it appeared that the evidence defendant sought to get before the jury, the sheriff's conviction for a criminal offense, was prohibited under Mont. R. Evid. 609. State v. Hanley, 186 Mont. 410, 608 P.2d 104, 1980 Mont. LEXIS 682 (Mont. 1980).

Evidence > Testimony > Credibility > Impeachment > Convictions > Inadmissibility

Co-defendant's prior convictions for misdemeanor offenses did not undermine his testimony that he never saw a dead body or watched someone be killed, as Mont. R. Evid. 609 precluded this kind of impeachment; even if the criminal record tended to discredit co-defendant, the evidence would have been inadmissible as cumulative, and thus the trial court did not violate defendant's right to confrontation under U.S. Const. amend. VI and Mont. Const. art. II, § 24 by limiting cross-examination. State v. Doyle, 2007 MT 125, 337 Mont. 308, 160 P.3d 516, 2007 Mont. LEXIS 232 (2007).

NEBRASKA

R.R.S. Neb. § 27-609 Impeachment by evidence of conviction of crime; general rule; time limit; effect of pardon, annulment, or equivalent procedure; juvenile adjudications; pendency of appeal

(1) For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination, but only if the crime (a) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (b) involved dishonesty or false statement regardless of the punishment.

(2) Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of such conviction or of the release of the witness from confinement, whichever is the later date.

(3) Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon, annulment, or other equivalent procedure which was based on innocence.

(4) Evidence of juvenile adjudications is not admissible under this rule.

(5) Pendency of an appeal renders evidence of a conviction inadmissible.

SELECTED NEBRASKA CASE NOTES:

PURPOSE

The purpose of this section is to allow the prosecutor to attack the credibility of a witness. The scope of the inquiry is limited so as not to confuse the jury with facts of another crime or have the defendant convicted based on the fact that he has previously been convicted of another crime. State v. Garza, 236 Neb. 202, 459 N.W.2d 739 (1990), overruled on other grounds, State v. Williams, 243 Neb. 959, 503 N.W.2d 561 (1993).

BURDEN OF PROOF

The burden remains with the state to prove a prior conviction in an enhancement proceeding; this cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. State v. Nowicki, 239 Neb. 130, 474 N.W.2d 478 (1991).

COLLATERAL ATTACK

Objections challenging the validity of a prior conviction offered for the purpose of sentence enhancement, beyond the issue of whether the defendant had counsel or waived the right to counsel, constitute a collateral attack on the judgment; such objections must be raised either by direct appeal from the prior conviction or in a separate proceeding commenced expressly for the purpose of setting aside the judgment alleged to be invalid. State v. Nowicki, 239 Neb. 130, 474 N.W.2d 478 (1991).

A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived by dependent, does not constitute a collateral attack on the former judgment. State v. Nowicki, 239 Neb. 130, 474 N.W.2d 478 (1991).

DISHONESTY OR FALSE STATEMENT

A conviction of the offense of issuing a bad check in violation of § 28-611 is, as a matter of law, a crime involving dishonesty or false statement for the purpose of subdivision (1)(b). State v. Fleming, 223 Neb. 169, 388 N.W.2d 497 (1986).

A crime involves "dishonesty or false statement" when intent to deceive or defraud is an element of the crime. State v. Fleming, 223 Neb. 169, 388 N.W.2d 497 (1986).

In the absence of something other than ordinary stealing, petit larceny is not a crimen falsi as contemplated by subdivision (1)(b). State v. Williams, 212 Neb. 860, 326 N.W.2d 678 (1982).

Crime of petit larceny without proof that the manner in which it was accomplished involved deceit or deception so as to be classified as "crimen falsi" may not be used to impeach witness's veracity under this section. State v. Ellis, 208 Neb. 379, 303 N.W.2d 741 (1981).

NEVADA

Nev. Rev. Stat. Ann. § 50.095 *Impeachment by evidence of conviction of crime.*

1. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime is admissible but only if the crime was punishable by death or imprisonment for more than 1 year under the law under which the witness was convicted.

2. Evidence of a conviction is inadmissible under this section if a period of more than 10 years has elapsed since:

(a) The date of the release of the witness from confinement; or

(b) The expiration of the period of the witness's parole, probation or sentence, whichever

is the later date.

3. Evidence of a conviction is inadmissible under this section if the conviction has been the subject of a pardon.

4. Evidence of juvenile adjudications is inadmissible under this section.

5. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

6. A certified copy of a conviction is prima facie evidence of the conviction.

NEW HAMSHIRE

N.H. Evid. Rule 609 *Impeachment by Evidence of Conviction of Crime*

(a) General rule.

For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate or rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.

The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.--Amended October 9, 2007, eff. January 1, 2008.

NEW JERSEY

***N.J. R. Evid. 609** Impeachment by Evidence of Conviction of Crime*

For the purpose of affecting the credibility of any witness, the witness' conviction of a crime shall be admitted unless excluded by the judge as remote or for other causes. Such conviction may be proved by examination, production of the record thereof, or by other competent evidence.

NEW JERSEY OFFICIAL COMMENTS:

OFFICIAL COMMENTS

Rule 609 is adopted in place of Fed.R.Evid. 609. The rule follows provisions contained in N.J.S.A. 2A:81-12 as interpreted by State v. Sands, 76 N.J. 127 (1978). There is no comparable 1967 rule, since the then proposed Rule 21, which contained restrictive provisions on the use of criminal convictions to impair credibility, was not adopted, the intention then being to leave N.J.S.A. 2A:81-12 in effect, except for the portion concerning the use in civil actions of judgments of conviction as substantive evidence of facts, which was superseded by virtue of the official note to N.J.Evid.R. 63(20). See R. 3:9-2 and R. 7:4-2(b).

The general rule stated by Fed.R.Evid. 609(a) limits the use of convictions to impeach the credibility of a witness to (1) crimes punishable by death or imprisonment in excess of a year and (2) all crimes involving dishonesty or false statement regardless of punishment. A further qualification in respect of the first category only is the determination by the judge that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant. This rule makes no admissibility distinction in terms of the crime of which the witness has been convicted. Evidence of any conviction of crime is subject to exclusion if its probative value is outweighed by its prejudicial effect, but it is the defendant who bears the burden of proving the exclusion. See State v. Kelly, 97 N.J. 178, 217 n. 21 (1984); State v. Balthrop, 92 N.J. 542, 544--547 (1983). Paragraph (b) of the federal rule deals with the admissibility of convictions which are more than ten years old. This rule does not refer explicitly to the ten-year limitation and exceptions thereto. These are matters dealt with by State v. Sands, supra, whose principles, similar to those embodied by Fed.R.Evid. 609(b), should be deemed to have been incorporated in this rule.

While this rule draws no distinction between crimes of dishonesty or false statement and other crimes, it is clear that it applies only to indictable offenses which are the subject of valid convictions. Neither evidence of arrests for or charges of crime are admissible under

this rule. See, e.g., State v. McBride, 213 N.J.Super. 255, 267 (App.Div.1986). Neither are convictions of disorderly persons offenses or traffic violations. See, e.g., State v. Rowe, 52 N.J. 293, 302 (1970). Nor are adjudications of juvenile delinquency. See State in Interest of K.P., 167 N.J.Super. 290, 293--294 (App.Div.1979), certif. denied, 87 N.J. 394 (1981). And, it has been held, uncounselled convictions are inadmissible. State v. Rios, 155 N.J.Super. 11, 15 (Law Div.1978). See also State v. Koch, 119 N.J.Super. 184 (App.Div.1972).

As to the impeachment use of a prior conviction against a witness in a criminal trial rather than against the defendant himself and particularly against a prosecution witness, see State v. Balthrop, supra, 92 N.J. at 544- 547, where the Court explained that while the same balancing test of probative value versus prejudicial effect applies to determine exclusion, nevertheless the prejudice to the defendant, not merely to the witness, must be a significant factor in the equation. In this regard, the federal rule is explicit, paragraph (a)(1) specifically defining prejudice as prejudice to the defendant.

As to the use of prior convictions for impeachment of witnesses in civil causes, see, e.g., Tonsberg v. VIP Coach Lines, Inc., 216 N.J.Super. 522, 529 (App.Div.1987); Vartenissian v. Food Haulers, Inc., 193 N.J.Super. 603, 610--611 (App.Div.1984).

With respect to the mode of proof of prior convictions, Fed.R.Evid. 609(a) expressly requires proof by way of public record or admission by the witness. This rule incorporates both modes, which have been held to be acceptable. See State v. H.G.G., 202 N.J.Super. 267 (App.Div.1985); State v. Mazur, 158 N.J.Super. 89, 106 (App.Div.1978), certif. denied, 75 N.J. 399 (1978). In addition, the rule also permits, without definition, proof by "other competent evidence." This provision may be deemed to incorporate N.J.S.A. 2C:44-4(d), which provides: "Any prior conviction may be proved by any evidence, including fingerprint records, made in connection with arrest, conviction or imprisonment, that reasonably satisfies the court that the defendant was convicted." Cf. State v. Carey, 232 N.J.Super. 553, 555--558 (App.Div.1989) (holding a computer printout of defendant's driving record admissible to prove a prior driving-while-intoxicated conviction). This rule contains no provisions comparable to Fed.R.Evid. 609(c), (d) and (e). Paragraph (c) of the federal rule deals with the effect of a pardon, annulment or other procedure upon the viability of the conviction. This subject is left for development by case law and the judicial interpretation of applicable statutes or other pertinent laws both of the jurisdiction in which the conviction was entered and in this jurisdiction. See, for example, N.J.S.A. 2C:52-27 which provides that, if an order of expungement is entered, the conviction "shall be deemed not to have occurred."

Paragraph (d) of the federal rule addresses juvenile adjudications. Since adjudications of juvenile delinquency are not convictions of crime in New Jersey, such adjudications do not come within this rule. State in Interest of K.P., supra, 167 N.J.Super. at 293--294. However, if a juvenile has been tried and convicted of a crime as an adult on a waiver of jurisdiction by the Chancery Division, Family Part, that conviction may be shown to impeach his credibility. State v. Steffanelli, 133 N.J.Super. 512 (App.Div.1975).

Paragraph (e) of Fed.R.Evid. 609 deals with effect of a pending appeal on the use of a conviction to impeach credibility and provides that such pendency does not render evidence of the conviction inadmissible. New Jersey case law holds to the contrary. See State v. Biegenwald, 96 N.J. 630, 638 (1984), citing with approval State v. Blue, 129 N.J.Super. 8, 12 (App.Div.1974), certif. denied, 66 N.J. 328 (1974). See also State v. Eddy, 189 N.J.Super. 22 (Law Div.1982). The conviction is, however, admissible pending appeal if the appeal challenges only the sentence and not the validity or integrity of the guilt adjudication. See State v. Anderson, 177 N.J.Super. 334 (App.Div.1981);

at 23. Cf. State v. Rodriguez, 202 N.J.Super. 543 (Law Div.1985).

This rule is not limited to convictions of crimes obtained in New Jersey. See State v. Koch, 118 N.J.Super. 421, 424--425 (App.Div.1972). Cf. State v. Lueder, 74 N.J. 62 (1977).

Note that New Jersey law permits a defendant who does not testify to appeal a trial court determination that a prior conviction could be used to impeach him if he were to testify at the trial. See State v. Whitehead, 104 N.J. 353 (1986). This is contrary to the federal rule which requires the defendant to testify in order to preserve for appeal the claim that a prior conviction was improperly admitted for impeachment purposes. See Luce v. United States, 469 U.S. 38, 83 L.Ed.2d 443 (1984).

NEW MEXICO

N.M. R.E. 11-609 *Impeachment by evidence of conviction of crime*

A. General rule. For the purpose of attacking the character for truthfulness of a witness:

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 11-403 NMRA, if the crime was punishable by death or imprisonment in excess of one (1) year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

B. Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

C. Effect of pardon, annulment or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one (1) year; or

(2) the conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.

D. Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

E. Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

NY CPL § 60.40. *Rules of evidence; proof of previous conviction; when allowed*

1. If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction. If in response to proper inquiry whether he has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

2. If a defendant in a criminal proceeding, through the testimony of a witness called by him, offers evidence of his good character, the people may independently prove any previous conviction of the defendant for an offense the commission of which would tend to negate any character trait or quality attributed to the defendant in such witness' testimony.

3. Subject to the limitations prescribed in section 200.60, the people may prove that a defendant has been previously convicted of an offense when the fact of such previous conviction constitutes an element of the offense charged, or proof thereof is otherwise essential to the establishment of a legally sufficient case.

NEW YORK ADVISORY COMMISSION NOTES:

Commission Staff Notes

This section is partly derived from Criminal Code § 393-c, which declares:
"When the defendant offers evidence of his character, the prosecution may offer in rebuttal thereof proof of his previous conviction of a crime."

That section is extremely vague and ambiguous, especially with respect to the question of when a defendant "offers evidence of his character." Judicial decisions indicate that he does not put his character in issue merely by taking the witness stand, but only by calling other witnesses to testify to his reputation (People v Hinksman, 1908, 192 NY 421, 437, 85 NE 676). If he does testify in his own behalf, he is, like any other witness, subject to cross-examination concerning prior criminal or immoral conduct, and he may be asked whether he has been convicted of a crime (People v Nelson, 1911, 145 App Div 680, 683, 130 NYS 488). Although not stated in the statute (Crim C § 393-c), it is apparently assumed in most quarters that if the defendant denies any prior conviction, either generally or specifically, independent proof thereof may be offered by the People.

The proposed section codifies these principles.

Subdivision 1, it should be observed, is not addressed to questions of when and to what extent a defendant may be cross-examined concerning prior convictions. Upon the assumption that the defendant's denial occurred during proper interrogation--and, if not, reversible error is committed in any event--it merely authorizes independent proof of conviction to rebut such a denial.

Subdivision 2, while expressly authorizing proof of prior conviction to refute character evidence, limits the convictions which may be proved for such purpose to those for offenses having some tendency to negate the particular character trait or traits which the character witness attributed to the defendant. Thus, in order to rebut testimony that the defendant has an excellent reputation for honesty, the People may introduce evidence of his prior

conviction for larceny, forgery or perjury, for example, but probably not for assault.

Subdivision 3 is something of a dragnet provision designed to assure that independent proof of a prior conviction is admissible in those cases, sparse though they may be, in which it constitutes an element or essential part of the People's case. A charge of perjury, for example, based upon an allegedly false sworn statement of the defendant that he had never been convicted of a crime obviously cannot be established without proving a prior conviction for a crime; and the same is true, with certain qualifications (Crim C § 275-b), of a charge of criminally possessing a dangerous weapon after prior conviction for a crime (Revised Penal Law § 265.05[3]).

SELECTED NEW YORK CASE NOTES:

Witness' prior convictions

It was not improper for the Trial Judge to refuse to preclude the prosecution from attacking the credibility of defendant's only witness by confronting her with a 32-year-old conviction of manslaughter for the fatal stabbing of her mother, since it was part of a skein of convictions covering too many years and too many jail sentences to fault the Judge for concluding that in a case where the only independent support for defendant's alibi was the witness, it was important that the jury know who and what she was, and *People v Sandoval* (34 NY2d 371), which sanctioned a procedure by which a Trial Judge may make an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility, is inapplicable to witnesses who are not defendants. People v Ocasio (1979) 47 NY2d 55, 416 NYS2d 581, 389 NE2d 1101.

Convictions involving theft of property are highly relevant to issue of credibility. People v Natal (1988, 2d Dept) 144 App Div 2d 587, 534 NYS2d 229, app gr (1989) 74 NY2d 667, 543 NYS2d 410, 541 NE2d 439 and affd (1990) 75 NY2d 379, 553 NYS2d 650, 553 NE2d 239, cert den (1990) 498 US 862, 112 L Ed 2d 134, 111 S Ct 169.

Criminal Procedure Law § 60.40, subd 1 gives the discretion to the adverse party rather than to the Court. People v Pritchett (1972) 69 Misc 2d 67, 329 NYS2d 147.

Arrests resulting in conviction are not "unproven charges" for purposes of general rule that "unproven charges" have little or no probative value in determining witness' credibility and therefore, when petitioner failed to give positive response to questions concerning prior conviction questions dealing with underlying arrest leading to such conviction were proper under CPL § 60.40. Stephens v Le Fevre (1979, SD NY) 467 F Supp 1026.

--Remoteness in time

In a robbery prosecution the trial court erred in ruling that defendant could be cross-examined regarding a conviction of petty larceny handed down more than 20 years earlier; however, the error was harmless where the web of circumstantial evidence connecting defendant to the commission of the crime was unusually convincing, including the identification of the car and some of its license plates, together with the close proximity of defendant to the site of the robbery and the similarity between the clothing worn by defendant and the description of the perpetrator. People v McKay (1984, 3d Dept) 101 App Div 2d 960, 479 NYS2d 87.

In a sodomy prosecution the trial court erred in ruling that defendant's petit larceny

conviction nine years prior to the incident in question could be the subject of cross-examination in view of defendant's rape conviction four years prior to that incident, since the fact that there were other subsequent convictions which could be used in cross-examination did not revive the prior, stale convictions, nor could the prosecutor impeach defendant's credibility by resort to convictions so remote in time. Additionally, the trial court erred in permitting use of the prior rape conviction, since there existed the possibility that the cross-examination would go beyond the issue of credibility and influence the jury to find defendant guilty of the instant crime on the basis of his conviction of a prior similar crime; the trial court could have satisfied the needs of credibility by using the "Sandoval compromise" which would have permitted introduction of a conviction of a prior serious felony into evidence without disclosing the nature of the felony. People v Cooke (1984, 3d Dept) 101 App Div 2d 983, 477 NYS2d 730.

In prosecution for 1991 murder, wherein 28-year-old defendant alleged that victim had made sexual advances toward him, court did not err in rejecting testimony concerning victim's 1978 conviction for sexual abuse of his daughter since that conviction was both remote and distinguishable from instant charges. People v Culver (1993, 3d Dept) 192 App Div 2d 10, 598 NYS2d 832, app den (1993) 82 NY2d 716, 602 NYS2d 813, 622 NE2d 314.

Under CPL § 60.40, subd 1, court properly exercised its discretion to disallow cross-examination of defendant concerning simple assault 8 years distant. People v King (1972) 72 Misc 2d 540, 339 NYS2d 358.

Under CPL § 60.40, subd 1, district attorney could not be enjoined from introducing evidence of defendant's prior convictions should defendant answer in negative to questions concerning his prior crimes where such introduction of prior crimes was not per se prejudicial, and where period of 5 years was not too remote to allow defendant's prior convictions to have a bearing on his credibility. People v Wilson (1973) 75 Misc 2d 720, 348 NYS2d 486.

--Scope of cross examination

The trial court in a first degree murder prosecution did not abuse its discretion in limiting defense counsel's cross-examination of a prosecution witness regarding the details of the witness' testimony at his own murder trial where the witness' crime was a collateral matter, and the trial court's limits were not unreasonable in light of the fact that defense counsel had already mounted a substantial attack on the credibility of the witness. People v Smith (1984) 63 NY2d 41, 479 NYS2d 706, 468 NE2d 879, cert den (1985) 469 US 1227, 84 L Ed 2d 364, 105 S Ct 1226, reh den (1985) 471 US 1049, 85 L Ed 2d 340, 105 S Ct 2042.

Admission by witness on cross-examination that he has been convicted of a crime does not preclude cross-examiner from questioning witness further to establish criminal act which was basis of conviction. People v Viger (1976, 3d Dept) 53 App Div 2d 991, 386 NYS2d 113.

Defendant's character witness who testifies solely with respect to defendant's reputation for peaceableness may not be cross-examined as to prior conviction of defendant which has no logical connection to character trait testified to on direct examination. People v Brinkworth (1985, 4th Dept) 112 App Div 2d 799, 492 NYS2d 309.

It was reversible error in robbery prosecution to preclude defense counsel from cross-examining complainant as to his prior conviction for criminal possession of dangerous weapon and as to disorderly conduct charge where People's case rested solely on

complainant's testimony; error of this nature could not be considered harmless in one-witness identification case where issue of complainant's credibility vis-a-vis that of defense witnesses assumed paramount importance. People v Memminger (1987, 2d Dept) 126 App Div 2d 752, 511 NYS2d 334.

Court properly limited scope of manslaughter defendant's cross examination of prosecution witness to instances resulting in criminal convictions, and properly refused to permit questions regarding mere arrests and court appearances. People v Fitzgibbon (1990, 3d Dept) 166 App Div 2d 745, 563 NYS2d 518, app den (1991) 77 NY2d 838, 567 NYS2d 206, 568 NE2d 655.

Statute, which provides in effect that if, in response to proper inquiry in criminal proceedings as to whether witness has been convicted of any offense, witness answers in the negative or in equivocal manner, adverse party may independently prove any previous conviction of witness, applies only if witness is properly asked about prior convictions on cross-examination; when trial court finds that the questioning goes beyond the bounds and becomes irrelevant, repetitious, harassing or unduly embarrassing, court may preclude its continuation. Cross-examiner may prove prior convictions of witness by use of independent evidence if witness denies conviction, but acknowledgment of prior immoral acts may only be elicited from the witness himself. People v Conyers (1976) 86 Misc 2d 754, 382 NYS2d 437, affd (1978, 1st Dept) 63 App Div 2d 634, 405 NYS2d 409.

NORTH CAROLINA

N.C. Gen. Stat. § 8C-1, Rule 609 *Impeachment by evidence of conviction of crime*

(a) General rule. -- For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) Time limit. -- Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon. -- Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.

(d) Juvenile adjudications. -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. -- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

NORTH DAKOTA

N.D.R. Ev. Rule 609 *Impeachment by evidence of conviction of crime.*

(a) General rule.

For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime must be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime must be admitted if the court determines that the probative value of admitting that evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime must be admitted regardless of the punishment, if the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from any confinement imposed for that conviction, whichever is the later date unless the witness is still in confinement for that conviction.

(c) Effect of pardon, annulment, or certificate of rehabilitation.

Evidence of a conviction is not admissible under this rule if (1) the conviction is vacated or has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.

Evidence of juvenile adjudications is generally not admissible under this rule. However, the court, in a criminal case, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

OHIO

Ohio Evid. R. 609 *Impeachment by Evidence of Conviction of Crime*

(A) General rule.

For the purpose of attacking the credibility of a witness:

(1) Subject to Evid. R. 403, evidence that a witness other than the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in

excess of one year pursuant to the law under which the witness was convicted.

(2) Notwithstanding Evid. R. 403(A), but subject to Evid. R. 403(B), evidence that the accused has been convicted of a crime is admissible if the crime was punishable by death or imprisonment in excess of one year pursuant to the law under which the accused was convicted and if the court determines that the probative value of the evidence outweighs the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

(3) Notwithstanding Evid. R. 403(A), but subject to Evid. R. 403(B), evidence that any witness, including an accused, has been convicted of a crime is admissible if the crime involved dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.

(B) Time limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, or the termination of community control sanctions, post-release control, or probation, shock probation, parole, or shock parole imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(C) Effect of pardon, annulment, expungement, or certificate of rehabilitation.

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, expungement, or other equivalent procedure based on a finding of innocence.

(D) Juvenile adjudication.

Evidence of juvenile adjudications is not admissible except as provided by statute enacted by the General Assembly.

(E) Pendency of appeal.

The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(F) Methods of proof.

When evidence of a witness's conviction of a crime is admissible under this rule, the fact of the conviction may be proved only by the testimony of the witness on direct or cross-examination, or by public record shown to the witness during his or her examination. If the witness denies that he or she is the person to whom the public record refers, the court may permit the introduction of additional evidence tending to establish that the witness is or is

not the person to whom the public record refers.

OHIO ADVISORY COMMITTEE NOTES:

7-1-03 AMENDMENT

Rule 609 Impeachment by Evidence of Conviction of Crime

The amendment added references to "community control sanctions" and "post-release control" in division (B) to reflect the availability of those forms of sanction along with the traditional devices of probation and parole already referred to in the rule. Under the rule as amended, the termination of community control sanctions and post-release control become additional events from which to date the staleness of a conviction under the rule's presumptive exclusion of convictions that are remote in time.

7-1-91 AMENDMENT

The amendment makes several changes. One change concerns the trial court's discretion to exclude evidence of prior convictions, and the other change concerns permissible methods of proving prior convictions.

RULE 609 (A) DISCRETION TO EXCLUDE

The amended rule clarifies the issue of the trial court's discretion in excluding prior convictions. As adopted in 1980, the Ohio rule differed from its federal counterpart. A clause in Federal Rule 609(a)(1) explicitly authorized the trial court to exclude "felony" convictions; these convictions were admissible only if the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." This clause was deleted from the Ohio rule.

It could have been argued that this deletion meant that Ohio courts did not have the authority to exclude prior felony convictions. In other words, any felony conviction was automatically admissible. Indeed, the rule specified that these convictions "shall be admitted." The Ohio Staff Note (1980), however, suggested otherwise. The Staff Note reads:

In limiting that discretionary grant, Rule 609(A) is directed to greater uniformity in application subject only to the provisions of Rule 403. The removal of the reference to the defendant insures that the application of the rule is not limited to criminal prosecutions.

The Supreme Court addressed the issue in State v. Wright (1990), 48 Ohio St.3d 5, 548 N.E.2d 923. The Court wrote:

" Evid. R. 609 must be considered in conjunction with Evid. R. 403. The trial judge therefore has broad discretion in determining the extent to which testimony will be admitted under Evid. R. 609."

The amended rule makes clear that Ohio trial judges have discretion to exclude prior convictions. It also specifies how this discretion is to be exercised. Evid. R. 609(A) is divided into three divisions. Division (1) concerns "felony" convictions of witnesses other than the accused (prosecution and defense witnesses in criminal cases and all witnesses in civil cases). The admissibility of these convictions is subject to Evid. R. 403.

Division (A)(2) concerns "felony" convictions of an accused in a criminal case. The risk that

a jury would misuse evidence of a prior conviction as evidence of propensity or general character, a use which is prohibited by Evid. R. 404, is far greater when a criminal accused is impeached. See C. McCormick, Evidence 99 (3d ed. 1984) ("The sharpest and most prejudicial impact of the practice of impeachment by conviction... is upon... the accused in a criminal case who elects to take the stand.").

Accordingly, admissibility of prior convictions is more readily achieved for witnesses other than the accused. Evid. R. 403 requires that the probative value of the evidence be "substantially" outweighed by unfair prejudice before exclusion is warranted. In other words, Evid. R. 403 is biased in favor of admissibility. This is not the case when the accused is impeached by a prior conviction under Evid. R. 609(A)(2); the unfair prejudice need only outweigh probative value, rather than "substantially" outweigh probative value.

In making this determination the court would consider a number of factors: "(1) the nature of the crime, (2) recency of the prior conviction, (3) similarity between the crime for which there was prior conviction and the crime charged, (4) the importance of defendant's testimony, and (5) the centrality of the credibility issue." C. McCormick, Evidence 94 n.9 (3d ed. 1984).

Division (A)(3) concerns dishonesty and false statement convictions. Because of the high probative value of these convictions in assessing credibility, they are not subject to exclusion because of unfair prejudice. This rule applies to the accused as well as other witnesses.

The issue raised by Ohio Evid. R. 609 also is raised by the Federal Rule, even though the federal provision explicitly recognized trial judge discretion to exclude evidence of prior convictions. Because the discretionary language in the federal rule referred to balancing the prejudicial effect to the "defendant," the applicability of this clause to civil cases and prosecution witnesses had been questioned. The U.S. Supreme Court in Green v. Bock Laundry (1989), 109 S. Ct. 1981, ruled that the discretion to exclude convictions under Federal Rule 609(a) did not apply to civil cases or to prosecution witnesses. Moreover, the court ruled that Rule 403 did not apply in this context. An amendment to the federal rule was adopted to change this result.

RULE 609(F) METHODS OF PROOF

The rule as adopted in 1980 specified that convictions admissible under the rule could be "elicited from him [the witness] or established by public record during cross-examination..." The use of the term "cross-examination" was unfortunate. Custom permits counsel to bring out evidence of prior convictions on direct examination "for the purpose of lessening the import of these convictions upon the jury." State v. Peoples (1971), 28 OApp2d 162, 168, 275 N.E.2d 626. Moreover, impeachment of a witness by proof of a prior conviction during direct examination is permitted under Evid. R. 607, which allows a party to impeach its own witnesses.

The traditional methods of proof are through examination of the witness or by public record. These methods are permissible under division (F).

RULE 609(A) GENERAL RULE

Rule 609(A) is a modified form of Federal Evidence Rule 609(a) and makes a significant modification of prior Ohio law.

Rule 609(A) departs from the federal counterpart in that it limits discretion of the court

when evidence of conviction of a crime punishable by death or by more than one year of imprisonment is offered to impeach a witness. The federal rule conditions the introduction of such evidence on the court's determination that the probative value of admission of the evidence outweighs its prejudicial effect upon the defendant. In limiting that discretionary grant, Rule 609(A) is directed to greater uniformity in application subject only to the provisions of Rule 403. The removal of the reference to the defendant insures that the application of the rule is not limited to criminal prosecutions.

Under prior Ohio law, R.C. 2945.42 provided that the conviction of a witness in a criminal prosecution could be shown for the purpose of affecting his credibility. The conviction could be for any crime and was not limited to the common law concept of the crimen falsi. State v. Murdock (1961), 172 OS 221, 15 OO2d 372, 174 NE2d 543. "Any crime" was held not to extend to convictions of ordinance violations. State v. Arrington (1975), 42 OS2d 114, 71 OO2d 81, 326 NE2d 667. Although R.C. 2945.42 is stated in terms of criminal prosecutions, an implication that the statute and Murdock apply in civil cases appears in Garland v. Standard Oil Co. (1963), 119 OApp 291, 26 OO2d 82, 196 NE2d 810.

Under prior Ohio law, it was well established that the credibility of a witness could be tested by inquiry into collateral offenses with such inquiry limited to those offenses that affected credibility, namely, treason, felony and crimen falsi. Kornreich v. Industrial Fire Ins. Co. (1936), 132 OS 78, 7 OO 198, 5 NE2d 153.

Rule 609(A) modifies prior Ohio law as stated in Murdock by limiting the collateral offenses inquiry to crimes punishable by death and crimes punishable by more than one year of imprisonment, and crimes involving dishonesty or false statement irrespective of punishment and extending the inclusion of offenses to ordinance violations. The term felony is not used in the rule because the definition of felony varies among jurisdictions.

Rule 609(A) applies to civil and criminal cases. It supersedes a part of R.C. 2945.42 and negates Murdock.

RULE 609(B) TIME LIMIT

This subdivision basically replicates its Federal Evidence Rule counterpart, but calculates the time limit not only from release of confinement, but also from the termination of probation or parole, or shock probation. Beyond the ten year period of time, the court has discretion to admit the conviction with the additional requirement that the proponent provide the adverse party sufficient advance notice in writing of his intent to employ such evidence. Such advance notice permits the adverse party an opportunity to contest the admission of the evidence.

RULE 609(C) EFFECT OF PARDON, ANNULMENT, EXPUNGEMENT OR CERTIFICATION OF REHABILITATION

This subdivision is identical to Federal Evidence Rule 609(c) with the exception that the word "expungement" is inserted. Although Ohio does not have the procedure of annulment or rehabilitation, the words were retained because of their availability in other jurisdictions.

R.C. 2953.32 relates to the expungement of the record of a felony conviction at the expiration of three years, or at the conclusion of one year if a misdemeanor. R.C. 2953.32(E) provides that proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of expungement was previously issued pursuant to R.C. 2953.31 to 2953.36. The rule conflicts with the

provision of the statute.

It is to be noted that Rule 609(C) could reduce the time limit provisions of Rule 609(B). If a criminal conviction is annulled, expunged or a certificate of rehabilitation is granted and the provisions of this subdivision apply the time period contemplated by subdivision (B) would not apply, notwithstanding the provisions of R.C. 2953.32(E). State v. Cox (1975), 42 OS2d 200, 71 OO2d 186, 327 NE2d 639, holds that notwithstanding the provisions of R.C. 2151.358 regarding expungement of juvenile records, confidentiality of juvenile records may not impinge upon the right of a criminal defendant to present relevant evidence pertinent to a material aspect of his defense. Obviously, this holding, predicated upon constitutional considerations, limits the permissible scope of this rule.

RULE 609(D) JUVENILE ADJUDICATIONS

This subdivision differs markedly from the federal rule both in wording and substance. The federal rule makes juvenile adjudications admissible in the discretion of the trial court whereas the Ohio Rule specifically excludes juvenile adjudication as a basis of impeachment unless provided by enactment of the general assembly. The rule preserves legislative prerogatives relating to consequences of juvenile adjudications. R.C. 2151.358 retains effectiveness in cases involving a juvenile. See, for example, R.C. 2151.358(H) pertaining to the use of evidence of a juvenile adjudication in determining appropriate sentencing or probation of the child in a subsequent proceeding.

The holding of State v. Hale (1969), 21 OApp2d 207, 50 OO2d 340, 256 NE2d 239, which permitted the use of juvenile adjudication to rebut claims of good character as a juvenile defendant is not by the precise language of this rule superseded unless the rebuttal evidence is considered as merely a form of impeachment.

OKLAHOMA

12 Okl. St. § 2609 *Impeachment by Evidence of Conviction of Crime*

A. For the purpose of attacking the credibility of a witness:

1. Evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Section 2403 of this title, if the crime was punishable by death or imprisonment in excess of one (1) year pursuant to the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

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.

B. Evidence of a conviction under this section is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is later, to the date of the witness's testimony, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, if the witness is a defendant currently charged with a sexual offense involving a child, testifying at a criminal proceeding regarding the current charge of the defendant and has a prior conviction for a sexual offense involving a child, the conviction of the prior sexual offense involving a child is admissible for the purpose of

impeachment of the defendant regardless of the age of the prior conviction. Evidence of a conviction more than ten (10) years old, as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence or unless, during the ten-year period, the witness has been convicted of a subsequent crime which is a misdemeanor involving moral turpitude or a felony.

C. Evidence of a conviction is not admissible under this Code if:

1. The conviction has been the subject of a pardon, annulment, certificate of rehabilitation or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one (1) year; or

2. The conviction has been the subject of a pardon, annulment or other equivalent procedure based on a finding of innocence.

D. Evidence of juvenile adjudications is not admissible under this Code. The court in a criminal case may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

E. The pendency of an appeal from the conviction does not render evidence of that conviction inadmissible. Evidence of the pendency of an appeal is admissible.

OREGON

ORS § 40.355 (2009)

40.355 Rule 609. Impeachment by evidence of conviction of crime; exceptions.

(1) 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, but only if the crime:

(a) Was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted; or

(b) Involved false statement or dishonesty.

(2)(a) If a defendant is charged with one or more of the crimes listed in paragraph (b) of this subsection, and the defendant is a witness, evidence that the defendant has been convicted of committing one or more of the following crimes against a family or household member, as defined in ORS 135.230, may be elicited from the defendant, or established by public record, and admitted into evidence for the purpose of attacking the credibility of the defendant:

(A) Assault in the fourth degree under ORS 163.160.

(B) Menacing under ORS 163.190.

(C) Harassment under ORS 166.065.

(D) Attempted assault in the fourth degree under ORS 163.160 (1).

(E) Attempted assault in the fourth degree under ORS 163.160 (3).

(F) Strangulation under ORS 163.187.

(G) The statutory counterpart in another jurisdiction to a crime listed in this paragraph.

(b) Evidence may be admitted into evidence for the purpose of attacking the credibility of a defendant under the provisions of this subsection only if the defendant is charged with committing one or more of the following crimes against a family or household member, as defined in ORS 135.230:

(A) Aggravated murder under ORS 163.095.

(B) Murder under ORS 163.115.

(C) Manslaughter in the first degree under ORS 163.118.

(D) Manslaughter in the second degree under ORS 163.125.

(E) Assault in the first degree under ORS 163.185.

(F) Assault in the second degree under ORS 163.175.

(G) Assault in the third degree under ORS 163.165.

(H) Assault in the fourth degree under ORS 163.160.

(I) Rape in the first degree under ORS 163.375 (1)(a).

(J) Sodomy in the first degree under ORS 163.405 (1)(a).

(K) Unlawful sexual penetration in the first degree under ORS 163.411 (1)(a).

(L) Sexual abuse in the first degree under ORS 163.427 (1)(a)(B).

(M) Kidnapping in the first degree under ORS 163.235.

(N) Kidnapping in the second degree under ORS 163.225.

(O) Burglary in the first degree under ORS 164.225.

(P) Coercion under ORS 163.275.

(Q) Stalking under ORS 163.732.

(R) Violating a court's stalking protective order under ORS 163.750.

(S) Menacing under ORS 163.190.

(T) Harassment under ORS 166.065.

(U) Strangulation under ORS 163.187.

(V) Attempting to commit a crime listed in this paragraph.

(3) Evidence of a conviction under this section is not admissible if:

(a) A period of more than 15 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date; or

(b) The conviction has been expunged by pardon, reversed, set aside or otherwise rendered nugatory.

(4) When the credibility of a witness is attacked by evidence that the witness has been convicted of a crime, the witness shall be allowed to explain briefly the circumstances of the crime or former conviction; once the witness explains the circumstances, the opposing side shall have the opportunity to rebut the explanation.

(5) The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(6) An adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime.

(7) A conviction of any of the statutory counterparts of offenses designated as violations as described in ORS 153.008 may not be used to impeach the character of a witness in any criminal or civil action or proceeding.

OREGON NOTES:

NOTES OF DECISIONS

Under former similar statute (ORS 45.600)

Introduction of documents other than the judgment order to show conviction of a crime was error because the extraneous documents contained evidence of particular wrongful acts. State v. Akles, 9 Or App 501, 497 P2d 1207 (1972)

The prosecutor may ask a defense witness the names of the crimes of which he has been convicted and the time and place of conviction. State v. Longoria, 17 Or App 1, 520 P2d 912 (1974), Sup Ct review denied

A juvenile witness may not be impeached by evidence that he admitted acts which would be a crime if committed by an adult. State v. Burr, 18 Or App 494, 525 P2d 1067 (1974)

Pendency of an appeal from a criminal conviction does not bar use of the conviction for impeachment. State v. Forsyth, 20 Or App 624, 533 P2d 176 (1975), Sup Ct review denied

The legislature intended by enacting this section to depart from the common law by removing the disqualification of a witness for a crime and by providing that a witness may be impeached by proof of conviction of a crime. Smith v. Durant, 271 Or 643, 534 P2d 955 (1975)

"Crime" means any crime and includes both felonies and misdemeanors. Smity v. Durant, 271 Or 643, 534 P2d 955 (1975)

Evidence of violations of municipal ordinances the violation of which is punishable by incarceration is admissible for impeachment purposes. State v. Bunse, 27 Or App 299, 555 P2d 1269 (1976)

The court has no discretion to deny impeachment of a witness by proof of prior conviction, as distinguished from prior arrest. State v. Bunse, 27 Or App 299, 555 P2d 1269 (1976)

Evidence of prior conviction was admissible notwithstanding that pretrial negotiations statute (ORS 135.435) making statements part of plea discussion inadmissible was applicable under circumstances. State v. Aldridge, 33 Or App 37, 575 P2d 675 (1978)

Trial court did not err in permitting prosecution to question defendant about prior conviction for crime which has since been removed from Criminal Code and which occurred twelve years before this trial. State v. Mack, 37 Or App 487, 587 P2d 516 (1978), Sup Ct review denied

Under Evidence Code

Under this section, admission of evidence of prior burglary convictions was not error even though crimes were similar to that charged and defendant's testimony was important to fair determination of issues presented. State v. Carden, 58 Or App 655, 650 P2d 97 (1982), Sup Ct review denied

Trial court erred in failing to declare mistrial where: 1) during defendant's trial on charges of sexual abuse and criminal trespass, prosecutor asked defendant whether he had been convicted of "strong arm rape" in 1972; 2) trial court and prosecutor knew before trial prosecutor did not have certified copy of any conviction; and 3) defendant had, in fact, been convicted of contributing to sexual delinquency of a minor, a misdemeanor not involving false statement and, therefore, not admissible to impeach. State v. Jenkins, 63 Or App 858, 666 P2d 869 (1983)

Where Class C felony conviction is given misdemeanor treatment by sentencing judge, it is still admissible under paragraph (1)(a) of this rule for impeachment purposes because it was punishable as felony. State v. Smith, 67 Or App 311, 677 P2d 715, aff'd 298 Or 173, 691 P2d 89 (1984)

Theft by taking is not a conviction involving false statement within meaning of portion of this section allowing evidence of prior conviction if crime involved false statement; to be admissible offense must include element of consciously misleading true owner or failing to reveal true ownership. State v. Reitz, 75 Or App 82, 705 P2d 762 (1985), Sup Ct review denied

Trial court's reliance on then newly amended version of this rule did not subject defendant to ex post facto application of law in violation of his constitutional rights, because amendments did not make defendant's act greater crime or impose greater punishment or permit conviction on lesser or different evidence. State v. Carr, 91 Or App 673, 756 P2d 1263 (1988), Sup Ct review denied; State v. Babb, 91 Or App 676, 756 P2d 1264 (1988), Sup Ct review denied

Amendment of this rule, deleting balancing of probative value against prejudicial effect,

makes ORS 40.160 (Rule 403) balancing inapplicable as to prior conviction evidence. State v. Carr, 91 Or App 673, 756 P2d 1263 (1988); State v. Babb, 91 Or App 676, 756 P2d 1264 (1988), Sup Ct review denied; State v. Dick, 91 Or App 294, 754 P2d 628 (1988), Sup Ct review denied; State v. King, 307 Or 332, 768 P2d 391 (1989); State v. Archer, 150 Or App 505, 947 P2d 620 (1997)

Theft in second degree is crime involving dishonesty. State v. Gallant, 307 Or 152, 764 P2d 920 (1988)

Where defendant filed motion for mistrial, did not request limiting instruction and none was given, reference to prior victim and her age by prosecutor was not sufficiently prejudicial to require mistrial. State v. Schwab, 95 Or App 593, 771 P2d 277 (1989)

This rule is applicable in civil cases. Boger v. Norris & Stevens, Inc., 109 Or App 90, 818 P2d 947 (1991), Sup Ct review denied

Where existence of prior conviction was established for impeachment purposes, court erred in preventing disclosure to jury of actual offense committed. State v. Venegas, 124 Or App 253, 862 P2d 529 (1993), Sup Ct review denied

To bring constitutional challenge, defendant must demonstrate how operation of this rule prevented or diminished constitutional protections. State v. Busby, 315 Or 292, 844 P2d 897 (1993)

Trial courts should rule on admissibility of prior crime impeachment evidence as soon as possible after issue is raised. State v. Busby, 315 Or 292, 844 P2d 897 (1993)

Trial court may exclude evidence of prior convictions offered to impeach if it is needless presentation of cumulative evidence, distinguishing State v. King, 307 Or 332, 768 P2d 391 (1989). State v. Pratt, 316 Or 561, 853 P2d 827 (1993)

Exception for municipal or justice court convictions was eliminated under 1986 amendment notwithstanding that ballot measure did not indicate text deletion. State v. Linn, 131 Or App 487, 885 P2d 721 (1994), Sup Ct review denied

PENNSYLVANIA

Pa.R.E. 609 *Impeachment by evidence of conviction of crime*

(a) General rule. For the purpose of attacking the credibility of any witness, evidence that the witness has been convicted of a crime, whether by verdict or by plea of guilty or nolo contendere, shall be admitted if it involved dishonesty or false statement.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon or other equivalent procedure or successful completion of

rehabilitation program. Evidence of a conviction is not admissible under this rule if the conviction has been the subject of one of the following:

(1) a pardon or other equivalent procedure based on a specific finding of innocence; or

(2) a pardon or other equivalent procedure based on a specific finding of rehabilitation of the person convicted, and that person has not been convicted of any subsequent crime.

(d) Juvenile Adjudications. In a criminal case only, evidence of the adjudication of delinquency for an offense under the Juvenile Act, 42 Pa.C.S. §§ 6301 et seq., may be used to impeach the credibility of a witness if conviction of the offense would be admissible to attack the credibility of an adult.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

PENNSYLVANIA COMMENTARY

Comment: Pa.R.E. 609(a) differs from F.R.E. 609(a). Pa.R.E. 609(a), subject to the time limitations in Pa.R.E. 609(b), is similar to F.R.E. 609(a)(2) because it permits impeachment of any witness by evidence of conviction of a crime involving dishonesty or false statement, regardless of what the punishment for that crime may be. However, Pa.R.E. 609(a) does not permit use of evidence of conviction of a crime punishable by death or imprisonment for more than one year, which is allowed under F.R.E. 609(a)(1), subject to certain balancing tests. This limitation on the type of crime evidence admissible is consistent with prior Pennsylvania case law. *See Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987); *Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973). Moreover, Pa.R.E. 609(a), unlike F.R.E. 609(a)(2), specifically provides that a conviction based upon a plea of nolo contendere may be used to impeach; this, too, is consistent with prior Pennsylvania case law. *See Commonwealth v. Snyder*, 408 Pa. 253, 182 A.2d 495 (1962).

As a general rule, evidence of a jury verdict of guilty or a plea of guilty or *nolo contendere* may not be used to impeach before the court has pronounced sentence. *See Commonwealth v. Zapata*, 455 Pa. 205, 314 A.2d 299 (1974). In addition, evidence of admission to an Accelerated Rehabilitative Disposition program under Pa.Rs.Crim.P. 310-320 may not be used to impeach credibility. *See Commonwealth v. Krall*, 290 Pa. Super. 1, 434 A.2d 99 (1981).

Where the target of impeachment is the accused in a criminal case, 42 Pa.C.S. § 5918 again comes into play. *See Comment* to Pa.Rs.E. 607, 608 pointing out that § 5918's prohibition against questioning defendant who takes stand about conviction of any offense other than the one for which he is on trial applies only to cross-examination. Hence, evidence of conviction of a crime may be introduced in rebuttal after the defendant has testified. *See Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973).

Pa.R.E. 609(b) differs slightly from F.R.E. 609(b) in that the phrase

"supported by specific facts and circumstances," used in the latter with respect to the balancing of probative value and prejudicial effect, has been eliminated. Pa.R.E. 609(b) basically tracks what was said in *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). Where the date of conviction or last date of confinement is within ten years of the trial, evidence of the conviction of a *crimen falsi* is per se admissible. If more than ten years have elapsed, the evidence may be used only after written notice and the trial judge's determination that its probative value substantially outweighs its prejudicial effect. The relevant factors for making this determination are set forth in *Bighum, supra*, and *Commonwealth v. Roots*, 482 Pa. 33, 393 A.2d 364 (1978). For the computation of the ten-year period, where there has been a reincarceration because of a parole violation, *see Commonwealth v. Jackson*, 526 Pa. 294, 585 A.2d 1061 (1991).

Pa.R.E. 609(c) is similar to F. R. E. 609(c). There are no Pennsylvania cases dealing squarely with the matters covered by section (c). Where a pardon is based upon a finding that a defendant was in fact innocent, the conviction is a nullity and has no probative value; accordingly, there is no basis to permit its use. A pardon based upon a finding of rehabilitation is an indication that the character flaw which gave rise to the inference of untruthfulness has been overcome and so should no longer be taken into account. A subsequent conviction of any crime, whether or not it involves dishonesty or false statement, casts substantial doubt on the finding of rehabilitation and justifies use of the evidence. In the case of both types of pardon, the instrument embodying the pardon must set forth the finding of innocence or rehabilitation. A pardon granted to restore civil rights or to reward good behavior does not make evidence of the conviction inadmissible under Pa.R.E. 609(c), but is admissible in rebuttal if the conviction is used to impeach. *Commonwealth v. Quaranta*, 295 Pa. 264, 145 A.2d 89 (1926).

Pa.R.E. 609(d) differs from F.R.E. 609(d). Under the latter, evidence of juvenile adjudications is generally inadmissible to impeach credibility, except in criminal cases against a witness other than the accused where the court finds that the evidence is necessary for a fair determination of guilt or innocence. Pa.R.E. 609(d), to be consistent with 42 Pa.C.S. § 6354(b)(4), permits a broader use; a juvenile adjudication of an offense may be used to impeach in a criminal case if conviction of the offense would be admissible if committed by an adult. Juvenile adjudications may also be admissible for other purposes. *See* 42 Pa.C.S. § 6354(b)(1), (2), and (3).

Moreover, under the confrontation clause of the United States Constitution, the accused in a criminal case has the right to use the juvenile record of a witness to show the witness' possible bias, regardless of the type of offense involved. *See Davis v. Alaska*, 415 U.S. 309 (1974); *Commonwealth v. Simmons*, 521 Pa. 218, 555 A.2d 860 (1989).

Pa.R.E. 609(e) is identical to F.R.E. 609(e). There is no

Pennsylvania law on this issue. According to the Advisory Committee Notes to F.R.E. 609(e), a witness may be impeached by evidence of a prior conviction regardless of a pending appeal because of the "presumption of correctness that ought to attend judicial proceedings." This is the predominant view. 1 McCormick, *Evidence*, § 42 (4th ed. 1992).

RHODE ISLAND

RI R. Evid. Art. VI, Rule 609 *Impeachment by evidence of conviction of crime.*

(a) General Rule. 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. "Convicted of a crime" includes (1) pleas of guilty, (2) pleas of nolo contendere followed by a sentence (i.e. fine or imprisonment), whether or not suspended and (3) adjudications of guilt.

(b) Discretion. Evidence of a conviction under this rule is not admissible if the court determines that its prejudicial effect substantially outweighs the probative value of the conviction. If more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, or if the conviction is for a misdemeanor not involving dishonesty or false statement, the proponent of such evidence shall make an offer of proof out of the hearing of the jury so that the adverse party shall have a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon. Evidence of a conviction is not admissible under this rule if the conviction has been the subject of a pardon or other equivalent procedure.

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

RHODE ISLAND ADVISORY COMMITTEE NOTES:

Rhode Island law differs in several important respects from the federal rule on the use of prior crimes to impeach credibility. Several changes are made in the federal rule to incorporate Rhode Island practice and to regulate the proof of prior crimes for impeachment purposes in a more consistent manner.

Section (a). General Rule. FRE 609(a) establishes the general rule that evidence of a criminal conviction is admissible only if it relates to a crime 1) punishable by death or more than one year in prison *and* the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant, or, 2) involving dishonesty or false statement, regardless of the punishment. Moreover, FRE 609(b) places a ten-year limit on the use of prior crimes unless the court determines in the interests of justice that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect, and sufficient advance written notice is given to the adverse

party.

Rhode Island's general rule is based on R.I.G.L. § 9-17-15, which provides that a witness' credibility may be impeached by showing the conviction or sentence for *any* crime or misdemeanor. This rule was recognized in *State v. McGuire,* 15 R.I. 23, 22 A. 1118 (1885), and recently reaffirmed in *State v. Lombardi,* 113 R.I. 206, 319 A.2d 346 (1974), and again in *State v. Wallace,* 428 A.2d 1070 (R.I. 1981). This general rule admitting criminal convictions is not restricted to the more serious crimes covered by FRE 609(a). See *Mercurio v. Fascitelli,* 107 R.I. 511, 268 A.2d 427 (1970) (no error in allowing evidence of traffic violations to impeach credibility of a witness in an action involving negligent motor vehicle operation). Evidence of conviction of crimes involving dishonesty or false statement have not been identified as any more or less acceptable for impeachment purposes than evidence of conviction of other crimes.

In applying this more expansive rule it is important to keep in mind the distinction between evidence offered under Rule 609 to impeach credibility and evidence offered under Rule 404 to prove conduct in conformance with character. This distinction is sometimes overlooked. In *State v. Dowell,* 512 A.2d 121, (R.I. 1986) the defendant was charged with first degree sexual assault and burglary. At trial defendant admitted pleading nolo contendere to two charges of disorderly conduct three years prior to the alleged attack. On cross-examination, the state asked defendant to acknowledge that both of the disorderly conduct charges had arisen out of the defendant's exposing himself to women in a public place. Under the proposed rule, defendant's prior convictions for disorderly conduct would be admissible to impeach his credibility even though they (1) were misdemeanors and did not involve dishonesty or false statement (Cf. FRE 609 which limits prior crimes to felonies or crimes involving dishonesty or false statement), and (2) grew out of nolo pleas (the defendant received a 90 day suspended sentence on each conviction).

However, it is hard to see how the underlying facts of these convictions are relevant to the defendant's credibility as a witness. Such details may be relevant under Rule 404(b) to prove intent or absence of mistake, but if offered for this purpose, the evidence would be analyzed differently than under Rule 609, and, if admitted, would be admissible substantively rather than for impeachment.

By statute, in Rhode Island a plea of nolo contendere which is followed by probation pursuant to G.L.R.I. § 12-18-1 (and which is completed without violation), rather than by the imposition of a sentence (i.e., fine or imprisonment, whether or not suspended), cannot be used to impeach the credibility of the person who offered it in a subsequent civil or criminal proceeding. G.I.R.L. § 12-18-3. See *State v. Conway,* 20 R.I. 270, 271, 38 A. 656, 657 (1896) (sustaining an appeal from a criminal conviction assigning as error the use of a prior nolo plea followed by payment of a nonstatutorily-authorized settlement and costs but not sentence to impeach the defendant's credibility); *State v. Young,* 456 A.2d 739, 741 (R.I. 1983) (plea of nolo contendere followed by probation is not a conviction for purposes of impeaching a witness in an unrelated proceeding); see also *State v. McElroy,* 71 R.I. 379, 392, 46 A.2d 397 (1942) (upholding conviction of defendant entering nolo plea on conspiracy charges). This statute reflects a clear legislative intent to provide a mechanism for the disposition of appropriate felony cases in a manner which will not leave the defendant with a permanent criminal record. Whether a particular case is appropriate for such a lenient disposition rests with the trial justice. However, once the judge has made a determination that under the circumstances of a particular case the defendant should not be stigmatized with a criminal record, the statute reflects a policy judgment that the court's decision should be honored elsewhere in the court system. The proposed rule accepts this policy determination and extends the statute's exclusion of nolo pleas followed by probation

to situations where the case is filed or sentence is deferred. See Rule 410. A nolo plea followed by a sentence (fine or imprisonment, whether or not suspended) *is* admissible for impeachment purposes, however, if the remaining requirements of this rule are met. *State v. Young, supra,* 456 A.2d at 741, citing *Korsak v. Prudential Property & Cas. Ins. Co.,* 441 A.2d 832 (R.I. 1982), and distinguishing *State v. Gobern,* 423 A.2d 1177 (R.I. 1981).

The court has insisted that the discrediting evidence show conviction, not merely arrest or criminal accusation, *State v. Milne,* 95 R.I. 315, 187 A.2d 136 (1962), and that the jury be instructed that its admission is for the sole purpose of impeaching credibility. *State v. Lombardi,* 113 R.I. 206, 319 A.2d 346 (1974). Although the prior conviction is inadmissible if the defendant was not represented by counsel, *State v. Palmigiano,* 112 R.I. 348, 309 A.2d 855 (1973), a sentence which is suspended does not obviate the existence of a criminal conviction. *Pedorella v. Hoffman,* 91 R.I. 487, 165 A.2d 721 (1960).

Section (b). Discretion. The Rhode Island Supreme Court has consistently held that prior convictions should not be too remote in time, *State v. Lombardi,* supra, 113 R.I. at 209, but there is no fixed time limit on the use of prior crimes. Rather, the determination of what is so remote as to constitute undue prejudice is an issue to be left to the discretion of the trial judge. See *State v. Pope,* 414 A.2d 781 (R.I. 1980) (upholding use of nineteen-year old conviction), and *State v. Wallace, supra,* (upholding use of twelve-year old conviction). But see *Mercurio v. Fascitelli,* 107 R.I. at 517, stating that the exclusion of convictions not earlier than 3 years prior to the time offered would be an abuse of discretion.

Section (c). Effect of Pardon. There is no case law in Rhode Island concerning the effect of a pardon, annulment or certificate of rehabilitation on the use of prior convictions, as addressed by FRE 609(c).

Section (d). Juvenile Adjudications. Under FRE 609(d), juvenile adjudications are "generally not admissible" but in a criminal case the court may allow evidence of a juvenile adjudication of a witness other than the accused if the adjudication would be admissible against an adult and fairness requires it be admitted. R.I.G.L. § 14-1-40 prohibits the use of a disposition of a child in any other proceeding. But in *State v. Meyers,* 115 R.I. 583, 586, 350 A.2d 611 (1976), this protection was not afforded to the juvenile witnesses because it would have resulted in the abridgement of the defendant's right to thorough cross-examination and deprived the jury of information which could have affected the ultimate issue of guilt or innocence. *Id.* at 589. This result is probably constitutionally compelled under *Davis v. Alaska,* 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d. 347 (1974). In any event, the combination of G.L. § 14-1-40 and the holding in the *Meyer* case results in close parallel between current Rhode Island law and FRE 609(d).

Section (e). Pendency of Appeals. Under FRE 609(e), the pendency of an appeal from a conviction in a trial court to an appeals court does not render evidence of a conviction inadmissible, but evidence of the appeal is admissible. This is consistent with Rhode Island law. See *State v. Rollins,* 116 R.I. 528, 535-36, 359 A.2d 315 (1976). However, it should be noted that convictions in the District Court on appeal to the Superior Court for a trial de novo, or the pendency of such an appeal, are not admissible under proposed Rule 609 until they are final. *State v. Roderick,* 121 R.I. 896, 403 A.2d 1090, 1092 (1979).

SOUTH CAROLINA

***Rule 609, SCRE**. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME*

(a) General Rule. For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(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.

For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to North Carolina v. Alford, 400 U.S. 25 (1970).

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation or Other Equivalent Procedure. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule if conviction of the crime would be admissible to attack the credibility of an adult.

(e) Pendency of Appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

SOUTH DAKOTA

S.D. Codified Laws § 19-14-12

(Rule 609 (a)) Impeachment by evidence of conviction of crime

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or the accused and the crime

(1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or

(2) involved dishonesty or false statement, regardless of the punishment.

TENNESSEE

***Tenn.** R. Evid. **Rule 609** Impeachment by evidence of conviction of crime.*

(a) General Rule.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:

(1) The witness must be asked about the conviction on cross-examination. If the witness denies having been convicted, the conviction may be established by public record. If the witness denies being the person named in the public record, identity may be established by other evidence.

(2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.

(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

(b) Time Limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed between the date of release from confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release. Evidence of a conviction not qualifying under the preceding sentence is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

(c) Effect of Pardon.

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon based on a finding of the rehabilitation of the person convicted and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon based on a finding of innocence.

(d) Juvenile Adjudications.

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, allow evidence of a juvenile adjudication of a witness other than the accused in a criminal case if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

(e) Pendency of Appeal.

The pendency of an appeal of a conviction does not render evidence of that conviction inadmissible. Evidence of the pendency of an appeal is admissible.

TEXAS

Tex. Evid. R. 609
Impeachment by Evidence of Conviction of Crime

(a) General Rule. --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 but only if the crime was a felony or involved moral turpitude, regardless of punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party.

(b) Time Limit. --Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

(c) Effect of Pardon, Annulment, or Certificate of Rehabilitation. --Evidence of a conviction is not admissible under this rule if:

(1) based on the finding of the rehabilitation of the person convicted, the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment;

(2) probation has been satisfactorily completed for the crime for which the person was convicted, and that person has not been convicted of a subsequent crime which was classified as a felony or involved moral turpitude, regardless of punishment; or

(3) based on a finding of innocence, the conviction has been the subject of a pardon, annulment, or other equivalent procedure.

(d) Juvenile Adjudications. --Evidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admitted by the Constitution of the United States or Texas.

(e) Pendency of Appeal. --Pendency of an appeal renders evidence of a conviction inadmissible.

(f) Notice. --Evidence of a conviction is not admissible if after timely written request by the adverse party specifying the witness or witnesses, the proponent fails to give to the adverse

party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

SELECTED TEXAS CASE NOTES:

Criminal Law & Procedure > Witnesses > Criminal Records

Trial court did not err in allowing the State of Texas to impeach defendant, who was being tried for robbery and evading arrest, evidence of defendant's nearly 30-year-old prior convictions for robbery pursuant to Tex. R. Evid. 609, as three of the five factors for determining the admissibility of the evidence weighed in favor of admissibility. Therefore, the court's decision did not lie outside the zone of reasonable disagreement. Bradden v. State, 2004 Tex. App. LEXIS 11142 (Tex. App. Waco Dec. 8 2004).

Trial court abused its discretion in allowing the State to impeach defendant, who was charged with murder, with his 16-year-old convictions for aggravated rape and a crime against nature because crimes of violence had a higher prejudicial potential than impeachment value, defendant's testimony was critical to his claim of self-defense, the State's ability to use defendant's recent theft convictions to impeach him drastically lessened its need to use the aggravated rape and crime against nature convictions and defendant did not open the door to the admission of these convictions by claiming that he had not been in trouble before. Jackson v. State, 11 S.W.3d 336, 1999 Tex. App. LEXIS 9471 (Tex. App. Houston 1st Dist. 1999).

Criminal Law & Procedure > Witnesses > Impeachment

In a murder trial, defendant was properly precluded from inquiring about a witness's juvenile probation because there was not a causal connection between the probation and the allegations against defendant. Patterson v. State, 2006 Tex. App. LEXIS 6141 (Tex. App. Dallas July 18 2006).

Court did not err in denying a mistrial where the State inquired into defendant's mother's criminal history where the trial court issued a definitive instruction to disregard both the question and the answer, and also advised the jury that the charge had been dismissed in 1986. In addition, given that the improper question arose during the punishment phase, the question was not so inflammatory or so likely to prejudice the jury's view of the defendant that the jury would have been unable to follow the trial court's instruction to disregard. Garza v. State, 2005 Tex. App. LEXIS 6843 (Tex. App. San Antonio Aug. 24 2005).

In a sexual assault case, a court properly allowed evidence of defendant's prior convictions to impeach his out-of-court statement that he was not responsible for the crime where, during the recross-examination of an officer, defense counsel elicited, without objection, defendant's out-of-court statement that he was not responsible for what he was being accused. By eliciting the statement during his cross-examination of a State's witness, defendant opened the door to the issue of his credibility. Flores v. State, 2004 Tex. App. LEXIS 7207 (Tex. App. Corpus Christi Aug. 12 2004).

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Testify

Counsel's advise that defendant not testify was reasonable trial strategy, in part because defendant had prior convictions. Although they were generally inadmissible under Tex. R. Evid. 609(b), it would have been possible for defendant to open the door to their admission through his testimony.

Mar. 10 2010).

Criminal Law & Procedure > Trials > Examination of Witnesses > Cross-Examination

There was no error in denying defendant the opportunity to cross-examine a witness about whether the witness was untruthful to the judge that presided over the witness's guilty plea to an assault charge. Tex. R. Evid. 609 did not apply because nothing in the appellate record showed that the witness had either been charged with or convicted of any crime. Reyes v. State, 2010 Tex. App. LEXIS 2359 (Tex. App. Corpus Christi Apr. 1 2010).

Criminal Law & Procedure > Witnesses > Credibility

In defendant's sexual assault case, evidence was improperly excluded because it was admissible to impeach the complainant's credibility. The evidence in the records not only addressed the complainant's mental state but directly addressed her inability to separate fantasy from reality; the therapist's notes raised the possibility that the complainant had not been abused by defendant but had created the event in her mind or confused an actual event with fantasy. State v. Moreno, 297 S.W.3d 512, 2009 Tex. App. LEXIS 7642 (Tex. App. Houston 14th Dist. 2009).

Criminal Law & Procedure > Jury Instructions > Curative Instructions

Court did not err in denying a mistrial where the State inquired into defendant's mother's criminal history where the trial court issued a definitive instruction to disregard both the question and the answer, and also advised the jury that the charge had been dismissed in 1986. In addition, given that the improper question arose during the punishment phase, the question was not so inflammatory or so likely to prejudice the jury's view of the defendant that the jury would have been unable to follow the trial court's instruction to disregard. Garza v. State, 2005 Tex. App. LEXIS 6843 (Tex. App. San Antonio Aug. 24 2005).

Criminal Law & Procedure > Sentencing > Guidelines > Adjustments & Enhancements > Criminal History > General Overview

Defendant's objections to the admission of his juvenile adjudications based on the lack of a judicial signature, the reliability of the adjudications, and their remoteness, based on Tex. R. Evid. 609, were misplaced because Rule 609 only applied to convictions admitted for impeachment, not convictions admitted during the punishment phase of a trial. His juvenile adjudications were properly admitted under Tex. Code Crim. Proc. Ann. art. 37.07. Avendano v. State, 2008 Tex. App. LEXIS 5832 (Tex. App. El Paso July 31 2008).

For there to be a conviction, there must ordinarily be a judgment of guilt for the crime in question; therefore, a trial court should not have allowed the State to impeach defendant under Tex. R. Evid. 609 with offenses that had been dismissed after being admitted and applied during sentencing in a prior case, pursuant to Tex. Penal Code Ann. § 12.45. Lopez v. State, 253 S.W.3d 680, 2008 Tex. Crim. App. LEXIS 642 (Tex. Crim. App. 2008).

Criminal Law & Procedure > Sentencing > Guidelines > Adjustments & Enhancements > Criminal History > Prior Felonies

In a case involving possession of heroin, a trial court did not err by overruling objections made to prior felony convictions from 1978 and 1988 because prior convictions introduced during the punishment phase of a trial were not subject to the remoteness limitation in Tex. R. Evid. 609(b). Therefore, defendant's sentence was properly enhanced, and a sentence of

16 years and 7 months was proper. Eisenmenger v. State, 2009 Tex. App. LEXIS 4042 (Tex. App. Dallas Apr. 14 2009).

Where defendant plead guilty to forgery and was sentenced to 19 years incarceration, the trial court had not acted improperly in considering convictions more than 10 years old to enhance his punishment where Tex. Pen. Code Ann. § 12.42 (Vernon 2003) did not impose a time limit on the use of prior convictions for the purpose of enhancing a defendant's punishment and counsel was not ineffective for having failed to object to the use of the prior convictions for enhancement purposes. Austin v. State, 2004 Tex. App. LEXIS 8114 (Tex. App. Amarillo Sept. 2 2004).

UTAH

Utah R. Evid. Rule 609
Impeachment by evidence of conviction of crime

(a) General rule. -- For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(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.

(b) Time limit. -- Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. -- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. -- The pendency of an appeal therefrom does not render evidence of

a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

VERMONT

V.R.E. Rule 609
Impeachment by Evidence of Conviction of Crime

(a) General rule. -- 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, if denied by the witness, if established by extrinsic evidence, but only if the crime:

(1) Involved untruthfulness or falsification regardless of the punishment, unless the court determines that the probative value of admitting this evidence is substantially outweighed by the danger of unfair prejudice. This subsection (1) applies only to those crimes whose statutory elements necessarily involve untruthfulness or falsification; or

(2) Was a felony conviction under the law of Vermont or was punishable by death or imprisonment in excess of one year under the law of another jurisdiction, under which the witness was convicted, and the court determines that the probative value of this evidence substantially outweighs its prejudicial effect.
The court shall articulate on the record the factors considered in making its determination.

(b) Time limit. -- Evidence of a conviction under this rule is not admissible if a period of more than 15 years has elapsed since the date of the conviction.

(c) Effect of pardon, annulment, certificate of rehabilitation, or appeal. -- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year; or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence; or (3) the conviction is the subject of a pending appeal.

(d) Juvenile adjudications. -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for fair determination of the issue of guilt or innocence.

VIRGINIA

Va. Code Ann. § 19.2-269
Convicts as witnesses

A person convicted of a felony or perjury shall not be incompetent to testify, but the fact of conviction may be shown in evidence to affect his credit.

VIRGINIA COMMENTARY:

NOTES: CROSS REFERENCES. --As to what constitutes a felony, see § 18.2-8. As to penalties for conviction of perjury, see § 18.2-434.

LAW REVIEW. --For article on evidence of other crimes in criminal cases, see 3 U. Rich. L. Rev. 62 (1968). For survey of Virginia criminal law for the year 1971-1972, see 58 Va. L. Rev. 1206 (1972). For review of Fourth Circuit cases on evidence, see 36 Wash. & Lee L. Rev. 562 (1979). For survey of Virginia law on evidence for the year 1978-1979, see 66 Va. L. Rev. 293 (1980). For 1987 survey of Virginia evidence law, see 21 U. Rich. L. Rev. 775 (1987). For survey on evidence in Virginia for 1989, see 23 U. Rich. L. Rev. 647 (1989).

MICHIE'S JURISPRUDENCE REFERENCES. --For related discussion, see 1A M.J. Accomplices and Accessories, § 6; 5B M.J. Criminal Procedure, § 59; 20 M.J. Witnesses, §§ 6, 39, 66.

LAW PRIOR TO ADOPTION OF SECTION. --Prior to the adoption of this section as § 4779 of the Code of 1919, convicted felons, as a rule, could not testify unless pardoned or punished, and a person convicted of perjury could not testify although pardoned or punished. Lincoln v. Commonwealth, 217 Va. 370, 228 S.E.2d 688 (1976).

PURPOSE OF SECTION. --This section makes material changes in the law governing the competency of witness to testify, so as to remove practically all disqualifications, and permit the courts to hear all evidence bearing on the question at issue just as is usual in the business affairs of life. In pursuance of this policy the law with reference to the testimony of those convicted of felony or perjury was changed. Epes' Adm'r v. Hardaway, 135 Va. 80, 115 S.E. 712 (1923).

IMPEACHMENT. --It is not proper to ask a witness if he has been indicted, and it is not proper to show that he has been convicted of an ordinary misdemeanor, but it may, for purposes of impeachment, be shown by the witness himself that he has been convicted of felony or of perjury. Smith v. Commonwealth, 155 Va. 1111, 156 S.E. 577 (1931).

A defendant/witness may be impeached by showing that he has been previously convicted of a felony. Powell v. Commonwealth, 13 Va. App. 17, 409 S.E.2d 622 (1991).

EFFECT OF IMPEACHMENT. --If a witness is impeached, it only goes to his credit, not to his competency. He is a competent witness even if he has convicted of perjury. Patterson v. Commonwealth, 139 Va. 589, 123 S.E. 657 (1924), appeal dismissed, 270 U.S. 632, 46 S. Ct. 349, 70 L. Ed. 771 (1926).

ENTITLEMENT TO DISCOUNT TESTIMONY. --At defendant's trial for grand larceny involving a stolen vehicle, the trial court was entitled to discount the defense testimony of defendant's girlfriend, who was a convicted felon. Randolph v. Commonwealth, No. 2162-02-1, 2003 Va. App. LEXIS 511 (Ct. of Appeals Oct. 14, 2003).

In defendant's prosecution for drug possession, although defendant denied knowledge of the drugs found in a car he was borrowing, the trial court was entitled to consider defendant's prior felony conviction in assessing his credibility under § 19.2-269. Etheridge v. Commonwealth, 2009 Va. App. LEXIS 134 (Mar. 24, 2009).

Defendant's conviction for grand larceny of a string trimmer was appropriate because the evidence was sufficient and the trial judge was entitled to consider defendant's prior felony conviction in assessing his credibility. Swiggett v. Commonwealth, 2010 Va. App. LEXIS 53 (Feb. 9, 2010).

PROOF OF PRIOR CONVICTION. --It has long been well settled in this state that the character of a witness for veracity cannot be impeached by proof of a prior conviction of crime, unless the crime be a felony or one which involved moral turpitude or the character of the witness for veracity.

Lincoln v. Commonwealth, 217 Va. 370, 228 S.E.2d 688 (1976).

BY COMMONWEALTH. --This section means that the fact of conviction of a felony may be shown by the Commonwealth. Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971).

"CONVICTION" INCLUDES GUILTY PLEA. --For the limited purposes of this section, the word "conviction" includes a guilty plea accepted by the court but for which no order has been entered stating a finding of guilt or imposing sentence; proof of such a guilty plea may be shown to impeach a witness. Jewel v. Commonwealth, 260 Va. 430, 536 S.E.2d 905, 2000 Va. LEXIS 145 (2000).

FELONY, OTHER THAN PERJURY, AND THE DETAILS THEREOF MAY NOT BE SHOWN. Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971).

So long as the defendant answers truthfully the inquiry as to a prior felony conviction, the name of the crime cannot be shown. Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971).

When the Commonwealth attempts to impeach the credibility of the accused by showing prior felony convictions, in order to avoid undue prejudice to the accused, neither the nature of the felony, other than perjury, nor the details of the crime are admissible; only the fact of a conviction can be shown.Powell v. Commonwealth, 13 Va. App. 17, 409 S.E.2d 622 (1991).

For purposes of impeachment, the fact of a prior conviction of a felony may be shown against a party-witness in a civil case, but the name of the felony, other than perjury, and the details thereof may not be shown. Payne v. Carroll, 250 Va. 336, 461 S.E.2d 837 (1995).

WITNESSES OTHER THAN DEFENDANT MAY BE ASKED NAMES OF FELONIES for which they have been convicted. This rule is not limited to witnesses for the Commonwealth. Dammerau v. Commonwealth, 3 Va. App. 285, 349 S.E.2d 409 (1986), overruled on other grounds, Vescuso v. Commonwealth, 5 Va. App. 59, 360 S.E.2d 547 (1987).

PRIOR CONVICTION MUST INVOLVE MORAL TURPITUDE. --It must be clearly shown that the prior conviction was for an offense involving moral turpitude; otherwise the inquiry should not be permitted. Chrisman v. Commonwealth, 3 Va. App. 89, 348 S.E.2d 399 (1986).

AND CHARACTER OF WITNESS FOR VERACITY. --The character of a witness' veracity cannot be impeached by proof of a prior conviction of crime, unless the crime be one which involved the character of the witness for veracity. Chrisman v. Commonwealth, 3 Va. App. 89, 348 S.E.2d 399 (1986).

MISDEMEANOR MUST INVOLVE MORAL TURPITUDE. --If the crime be a misdemeanor, the right to inquire is limited to those that involve moral turpitude. Chrisman v. Commonwealth, 3 Va. App. 89, 348 S.E.2d 399 (1986).

INDECENT EXPOSURE CONVICTION NOT ADMISSIBLE. --It was error to admit into evidence the fact of the defendant's prior conviction of indecent exposure. Chrisman v. Commonwealth, 3 Va. App. 89, 348 S.E.2d 399 (1986).

SINCE IT IS NOT DETERMINATIVE OF VERACITY. --The crime of indecent exposure is neither a crime of treason nor a felony, nor is it a crime of the sort known as crimen falsi at the Roman or common law. It does not involve deception, trickery, forgery, lying,

cheating or stealing. It is not an infamous crime. It does not involve moral turpitude as that phrase has been applied at common law relating to incompetency or impeachment. It is not determinative of the character of a person for veracity. Chrisman v. Commonwealth, 3 Va. App. 89, 348 S.E.2d 399 (1986).

EFFECT OF VOLUNTARILY TAKING STAND IN OWN DEFENSE. --When a defendant voluntarily takes the stand in his own defense and opens up matters by his own testimony, he subjects himself to cross-examination on the matters relevantly raised by that testimony. Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971).

Where defendant takes the witness stand in his own defense and testifies on direct examination that he has been convicted previously of a certain number of felonies, he may be cross-examined only with respect to the correctness of the number stated and, if his answers are truthful, without regard to the names or the nature of the offenses. McAmis v. Commonwealth, 225 Va. 419, 304 S.E.2d 2 (1983).

Where defendant on direct examination goes beyond merely testifying he has been convicted previously of a certain number of felonies and discloses additional information concerning his convictions, he may be held to have opened the door to inquiry concerning the names of the offenses. McAmis v. Commonwealth, 225 Va. 419, 304 S.E.2d 2 (1983).

When an accused testifies on his own behalf he may determine that it is in his best interests as a trial tactic to reveal the fact of his prior felony convictions in terms of bolstering his credibility with the trier of fact. If this is done truthfully and not in a manner calculated to mislead, it does not open the door for the Commonwealth on cross-examination to establish the names and nature of the prior felony convictions. Joyner v. Commonwealth, 10 Va. App. 290, 392 S.E.2d 822 (1990).

THIS SECTION PERMITS THE EXAMINATION OF A DEFENDANT AS TO ANY PRIOR FELONY CONVICTIONS should he become a witness in his own behalf. The sole purpose of such inquiry is to attack the defendant's credibility as a witness. His answer is not to be considered as evidence of his guilt or innocence of the crime charged. Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971).

RIGHT OF CROSS-EXAMINATION NOT UNLIMITED. --Where the Commonwealth attempts to impeach the accused under this section by establishing the number of prior convictions, the Commonwealth's right to cross-examine him about the name and nature of the prior convictions is not unlimited. Powell v. Commonwealth, 13 Va. App. 17, 409 S.E.2d 622 (1991).

CROSS-EXAMINATION OF DEFENDANT AS TO PRIOR FELONY CONVICTIONS. --The Commonwealth may ask a defendant who testifies in a criminal proceeding the number of times he has been convicted of a felony, but not the names of the felonies, other than perjury, and not the nature or details thereof. Thus, a defendant in a criminal trial who has been convicted of one or more felonies is not subject to as comprehensive cross-examination as nondefendant witnesses, notwithstanding the provisions of § 19.2-268. Sadoski v. Commonwealth, 219 Va. 1069, 254 S.E.2d 100 (1979).

EFFECT OF DEFENDANT'S DISCLOSURE OF FELONY ON DIRECT EXAMINATION. --Where the accused has disclosed on direct examination the nature of the felony conviction, he does not open the door for the Commonwealth to introduce evidence concerning the nature or character of another felony conviction he may have either purposefully or mistakenly misrepresented without first exploring the other alternatives to prove that the accused had more than one felony conviction and testified untruthfully. Able v. Commonwealth, 16 Va. App. 542, 431 S.E.2d 337 (1993).

REVERSIBLE ERROR IN PERMITTING EVIDENCE OF NAMES RATHER THAN NUMBER. --The trial court committed reversible error in permitting the Commonwealth to introduce evidence of the names rather than only the number of a defendant's prior felony convictions. Joyner v. Commonwealth, 10 Va. App. 290, 392 S.E.2d 822 (1990).

ERROR NOT HARMLESS. --In a cocaine possession conviction based on a bench trial, admission of the nature of defendant's prior conviction was not harmless error because it was impossible to determine if this evidence, which potentially prejudiced the trial court's decision, was limited to credibility. Lawrence v. Commonwealth, 2009 Va. App. LEXIS 426 (Sept. 29, 2009).

ERRONEOUS ADMISSION OF QUESTIONS ABOUT PRIOR CONVICTIONS HELD HARMLESS. --Although robbery defendant opened the door to questioning about one prior conviction for grand larceny, trial court abused its discretion in allowing the Commonwealth to question defendant as to the identity and nature of a second felony conviction and a misdemeanor conviction; the abuse was harmless error since defendant failed to show that admission of this testimony prejudiced his ability to receive a fair trial. Cole v. Commonwealth, 16 Va. App. 113, 428 S.E.2d 303 (1993).

DETAILS OF PRIOR CONVICTIONS. --Unless the defendant answers untruthfully any questions concerning the number of his felony convictions or voluntarily puts into issue the details of his prior convictions, the Commonwealth may not inquire as to the details of a prior offense. If a defendant answers falsely, however, he opens the door to the Commonwealth's impeachment of his response, and the Commonwealth may be permitted to inquire into the nature or character of the prior convictions. Farrow v. Commonwealth, No. 0861-89-3 (Ct. of Appeals Oct. 23, 1990).

DEFENDANT, WHO MISSTATED THE NUMBER OF HIS CONVICTIONS and qualified his answer by stating that the convictions were received "when I was younger," opened the door to further inquiry by the Commonwealth in order to identify which of the felonies he was admitting to in attempting to account for his prior convictions. Farrow v. Commonwealth, No. 0861-89-3 (Ct. of Appeals Oct. 23, 1990).

JURY IS ENTITLED TO KNOW BOTH THE NUMBER AND THE NATURE OF A WITNESS' FELONY CONVICTIONS, but not the details thereof, in order to evaluate his testimony and determine what credit it should be given. Johnson v. Commonwealth, 224 Va. 525, 298 S.E.2d 99 (1982).

THE TRIERS OF FACT WERE ENTITLED TO KNOW THE NUMBER AND NATURE, BUT NOT THE DETAILS, OF THE FELONY CONVICTIONS OF A WITNESS for the Commonwealth who had been granted immunity from prosecutions, so that they could evaluate his testimony and determine what credit it should be given. Hummel v. Commonwealth, 217 Va. 548, 231 S.E.2d 216 (1977), cert. denied, 440 U.S. 935, 99 S. Ct. 1278, 59 L. Ed. 2d 492 (1979).

While naming a prior felony conviction similar in nature to the offense for which a defendant is on trial during cross-examination of the defendant would be highly prejudicial to him, the naming of the prior convictions of a witness for the Commonwealth who has been granted immunity from prosecution in order to attack his credibility does not present the same risk of undue prejudice. Hummel v. Commonwealth, 217 Va. 548, 231 S.E.2d 216 (1977), cert. denied, 440 U.S. 935, 99 S. Ct. 1278, 59 L. Ed. 2d 492 (1979).

PROBATIVE VALUE OF PRIOR CONVICTION OUTWEIGHS PREJUDICIAL EFFECT. --Some prejudice rises against a defendant when it is disclosed that he has been

convicted of a felony, but its probative value as to his credit outweighs the prejudicial effect. Harmon v. Commonwealth, 212 Va. 442, 185 S.E.2d 48 (1971).

EXCLUSION OF NATURE OF PRIOR CONVICTIONS DEEMED HARMLESS ERROR. --Although a trial court erred in excluding defense counsel's attempts to question a malicious wounding victim as to the nature of his prior convictions, it was deemed harmless error because the jury knew that the victim was a convicted felon, as were the four defendants involved in the jailhouse attack, the jury was informed as to the number of prior convictions, and the nature of those felonies was not of particular importance, nor was it likely that they would have added to the impeachment potential. Justus v. Commonwealth, Nos. 1220-03-3, 1234-03-3, 1291-03-3, 2004 Va. App. LEXIS 256 (Ct. of Appeals June 1, 2004).

INDICTMENT INADMISSIBLE WHERE ACCUSED WAS CONVICTED OF LOWER OFFENSE. --It was error not to forbid the introduction before the jury of the record of the indictment of accused for housebreaking, upon which he was convicted of a mere assault and battery. Boggs v. Commonwealth, 199 Va. 478, 100 S.E.2d 766 (1957).

It was improper for the attorney for the Commonwealth to ask defendant whether he had been convicted of malicious wounding (a felony) when in fact he had been indicted for malicious wounding but convicted only of assault and battery (a misdemeanor). But defendant was not manifestly prejudiced by the question where no testimony was given in response to the question and where the trial court took prompt, direct and positive action in instructing the jury to disregard the question and all its effects. McLane v. Commonwealth, 202 Va. 197, 116 S.E.2d 274 (1960).

EFFECT OF FELONY UNDER FEDERAL STATUTE DECLARED MISDEMEANOR BY STATE STATUTE. --The conviction of a crime in a federal court, which is a felony under the federal statutes but which is declared to be a misdemeanor by the Virginia statutes, is not admissible in evidence under this section. Burford v. Commonwealth, 179 Va. 752, 20 S.E.2d 509 (1942).

ADJUDICATION AS JUVENILE DELINQUENT MAY NOT BE SHOWN. --In view of the provisions of the juvenile statutes no error was committed in refusing to allow defendant's counsel to ask a witness for the prosecution whether he had ever been adjudged a juvenile delinquent in a proceeding in a juvenile court involving a felonious offense or larceny, the purpose of the question being to affect the credibility of the witness. Questions which refer to the disposition of the child in a juvenile court are not permitted. Kiracofe v. Commonwealth, 198 Va. 833, 97 S.E.2d 14 (1957).

QUESTION ABOUT FELONY CONVICTION ASKED IN CONJUNCTION WITH PREJUDICIAL QUESTIONS ABOUT PRIOR CONDUCT. --That a question about a felony conviction may be improper when asked of an accused in conjunction with prejudicial questions about prior conduct, see Williams v. Commonwealth, 203 Va. 837, 127 S.E.2d 423 (1962).

ONLY A CONVICTION, NOT A REVOCATION OF PROBATION, may be used to impeach the credibility of a witness. Willis v. Commonwealth, No. 1195-95-3 (Ct. of Appeals April 23, 1996).

WITNESS NOT INCOMPETENT TO TESTIFY. --Under § 19.2-269, a witness is not incompetent to testify simply because he has a criminal record. Lester v. Commonwealth, No. 1719-03-3, 2004 Va. App. LEXIS 198 (Ct. of Appeals Apr. 27, 2004).

IMPEACHMENT BY JUVENILE ADJUDICATION. --Defendant's convictions for first-degree murder and use of a firearm in the commission of a felony were proper because, although she sought pretrial disclosure by the Commonwealth of the criminal records of several witnesses for the Commonwealth, including both adult and juvenile records, review of defendant's several motions in limine relating to juvenile records demonstrated that she sought juvenile records as part of general impeachment preparations. Bias or motivation was never identified as a justification; consequently, juvenile adjudications were not permitted to be used for the impeachment of a witness on the subject of general credibility. Thomas v. Commonwealth, 279 Va. 131, 688 S.E.2d 220, 2010 Va. LEXIS 11 (2010).

CIRCUIT COURT OPINIONS

IMPEACHMENT FOLLOWING REMOVAL OF POLITICAL DISABILITIES OF WITNESS. --Motion in limine by an accident victim in a negligence action was denied to the extent that the motion requested that a motorist was to be barred from impeaching the victim with the victim's felony convictions because, under § 19.2-269, the fact of the convictions could be used as evidence to affect the victim's credibility, even though the victim's political disabilities had been removed by the Governor of Virginia. Sulton v. FedEx Ground Package Sys., 80 Va. Cir. 385, 2010 Va. Cir. LEXIS 62 (Fairfax County June 1, 2010).

WASHINGTON

Wash. ER 609
Impeachment by evidence of conviction of crime

(a) General rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

WEST VIRGINIA

W.V.R.E., Rule 609
Impeachment by evidence of conviction of crime.

(a) General rule.

(1) Criminal defendants.

For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing.

(2) All witnesses other than criminal defendants.

For the purpose of attacking the credibility of a witness other than the accused

(A) evidence that the witness has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

(B) evidence that the witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) Time limit.

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten years old, as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation.

Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications.

Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal.

The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

WISCONSIN

Wis. Stat. § 906.09. Impeachment by evidence of conviction of crime or adjudication of delinquency.

(1) GENERAL RULE.

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer.

(2) EXCLUSION.

Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

(3) ADMISSIBILITY OF CONVICTION OR ADJUDICATION.

No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s. 901.04 whether the evidence should be excluded.

(5) PENDENCY OF APPEAL.

The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

WISCONSIN NOTES:

NOTES:

This section applies to both civil and criminal actions. When a plaintiff was asked by his own attorney whether he had ever been convicted of a crime, he could be asked on cross-examination as to the number of times. Underwood v. Strasser, 48 Wis. 2d 568, 180 N.W.2d 631 (1970).

It was not error to give an instruction as to prior convictions effect on credibility when the prior case was a misdemeanor. McKissick v. State, 49 Wis. 2d 537, 182 N.W.2d 282 (1971).

When a defendant's answers on direct examination with respect to the number of his prior convictions were inaccurate or incomplete, the correct and complete facts could be brought out on cross-examination, during which it was permissible to mention the crime by name in order to insure that the witness understood the particular conviction being referred to. Nicholas v. State, 49 Wis. 2d 683, 183 N.W.2d 11 (1971).

Proffered evidence that a witness had been convicted of drinking offenses 18 times in the last 19 years could be rejected as immaterial if the evidence did not affect his credibility. Barren v. State, 55 Wis. 2d 460, 198 N.W.2d 345 (1972).

When the defendant in a rape case denied the incident in an earlier rape case tried in juvenile court, impeachment evidence of a police officer that the defendant had admitted the incident at the time was not barred by sub. (4). Sanford v. State, 76 Wis. 2d 72, 250 N.W.2d 348 (1977).

When a witness truthfully acknowledges a prior conviction, inquiry into the nature of the conviction may not be made. Voith v. Buser, 83 Wis. 2d 540, 266 N.W.2d 304 (1978).

A defendant's 2 prior convictions for burglary were admissible to prove intent to use gloves, a long pocket knife, a crowbar, and a pillow case as burglarious tools. Vanlue v. State, 96 Wis. 2d 81, 291 N.W.2d 467 (1980).

Cross-examination on prior convictions without the trial court's threshold determination under sub. (3) was prejudicial. Gyrion v. Bauer, 132 Wis. 2d 434, 393 N.W.2d 107 (Ct. App. 1986).

An accepted guilty plea constitutes a "conviction" for purposes of impeachment under sub. (1). State v. Trudeau, 157 Wis. 2d 51, 458 N.W.2d 383 (Ct. App. 1990).

An expunged conviction is not admissible to attack witness credibility. State v. Anderson, 160 Wis. 2d 435, 466 N.W.2d 681 (Ct. App. 1991).

Whether to admit evidence of prior convictions for impeachment purposes requires consideration of: 1) the lapse of time since the conviction; 2) the rehabilitation of the person convicted; 3) the gravity of the crime; and 4) the involvement of dishonesty in the crime. If allowed, the existence and number of convictions may be admitted, but the nature of the convictions may not be discussed. State v. Smith, 203 Wis. 2d 288, 553 N.W.2d 824 (Ct. App. 1996), 94-3350.

Evidence that exposed a witness's prior life sentences and that he could suffer no penal consequences from confessing to the crime in question was properly admitted. State v. Scott, 2000 WI App 51, 234 Wis. 2d 129, 608 N.W.2d 753, 98-3105.

Even if the circuit court did not expressly state on the record that it considered the possible danger of unfair prejudice, the fact that the court gave a limiting instruction can reveal that the trial court considered the possibly prejudicial nature of evidence and was seeking to ensure that it was properly utilized by the jury in reaching its verdict. State v. Gary M. B. 2004 WI 33, 270 Wis. 2d 62, 676 N.W.2d 475, 01-3393.

WYOMING

W.R.E. Rule 609

Impeachment by evidence of conviction of crime.

(a) General rule. -- For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one (1) year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(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.

(b) Time limit. -- Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than ten (10) years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon, annulment, or certificate of rehabilitation. -- Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one (1) year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. -- Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness (other than the accused) if conviction of the offense would be admissible to attach the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. -- The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.