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Impeachment of Witnesses: Part II

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IMPEACHMENT OF WITNESSES: PART II

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This is the second of two articles on the impeachment of witnesses.

CHARACTER EVIDENCE

Ohio Evidence Rule 404(A) prohibits the use of character evidence unless one of three enumerated exceptions applies. The third exception provides: "Evidence of the character of a witness on the issue of credibility is admissible as provided in Rules 607, 608, and 609." Possible means by which a witness' untruthful character might be shown are reputation evidence, opinion evidence, and evidence of specific instances of conduct. Rule 608(A) permits the use of reputation and opinion evidence. Rule 608(B) permits the use of specific instances of conduct which did not result in conviction, so long as the evidence is clearly probative of untruthful character. Rule 609 deals with the admissibility of prior convictions.

OPINION AND REPUTATION EVIDENCE

Rule 608(A) permits the use of opinion and reputation evidence to show a witness' character for untruthfulness. In this context, character is used circumstantially; a person with a poor character for truth and veracity is more likely to testify untruthfully than a person with a good character for truth and veracity. *See also* Rule 803(20) (recognizing a hearsay exception for reputation evidence concerning character).

Impeachment under Rule 608 is limited to the character trait of untruthfulness. *See* Staff Note ("only evidence relating to veracity is admissible."). This limitation is imposed in order "to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive." Advisory Committee's Note, Fed. Evid. R. 608. This aspect of Rule 608 is consistent with prior Ohio law. In State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375 (1980), the Supreme Court held: "In impeaching the credibility of a witness, inquiry into general reputation or character should be restricted to reputation for *truth and veracity.*" *Id.* (syllabus, para. 3). *Accord*, Craig v. State, 5 Ohio St. 605 (1854); State v. Agner, 30 Ohio App.2d 96, 283 N.E.2d 443 (Hancock 1972); Schueler v. Lynam, 80 Ohio App. 325, 75 N.E.2d 464 (Montgomery 1947). Thus, evidence of a witness' general moral character is inadmissible. *See* State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375 (1980).

It is the witness' character for truth and veracity at the time of trial that is relevant. "Evidence as to such general impeachment must relate to the time at which such witness testified, or reasonably near thereto." Radke v. State, 107 Ohio St. 399, 140 N.E. 586 (1923) (syllabus, para. 2). *See also* Hamilton v. State, 34 Ohio St. 82 (1877) (reputation two years prior to trial admitted); McCormick, *Evidence* § 44 (3d ed. 1984).

The prior Ohio cases recognized the use of *reputation* evidence to show untruthful character. *See* State v. Scott, 61 Ohio St.2d 155, 400 N.E.2d 375 (1980); Cowan v. Kinney, 33 Ohio St. 422 (1878); French v. Millard, 2 Ohio St. 44 (1853); Bucklin v. State, 20 Ohio 18 (1851); State v. Rivers, 50 Ohio App.2d 129, 361 N.E.2d 1363 (Cuyahoga 1977). In addition, a character witness may be asked if "from such reputation he would not believe the witness sought to be impeached under oath." Hillis v. Wylie, 26 Ohio St. 574 (1875) (syllabus). *See also* State v. Agner, 30 Ohio App.2d 96, 283 N.E.2d 443 (Hancock 1972). Under the case law, the use of *opinion* evidence was not permitted. *See* Cowan v. Kinney, 3305 422 (1878); Bucklin v. State, 20 Ohio 18 (1851). Rule 608(A) however, changes the common law and permits the use of opinion evidence.

Foundational requirements

A foundation must be laid showing that the character witness is acquainted with the reputation of the principal witness before the character witness is permitted to state his opinion of that reputation. The Supreme Court described this foundational requirement in Radke v. State, 107 Ohio St. 399, 140 N.E. 586 (1923):

> [T]he impeaching witness must show on preliminary examination either that he has for some time lived in that community or done business in that community, or some other relation to that community that would qualify him to speak as to the community's general opinion touching the reputation of the party sought to be

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impeached. The preliminary qualifications of the impeaching witness must be such as to advise the court and the jury that he has the means of knowing such general reputation of the witness sought to be impeached in the community in which the witness lives. *Id.* (syllabus, para. 1).

See also State v. Rivers, 50 Ohio App.2d 129, 361 N.E.2d 1363 (Cuyahoga 1977). The community in which reputation is based may be "any substantial community of people among whom [the principal witness] is well known, such as the group with whom he works, does business, or goes to school." McCormick, *Evidence* 103 (3d ed. 1984). A similar foundation is required before a witness may express an opinion concerning the principal witness' character for truth and veracity. The inquiry, however, focuses on the character witness' relationship with the principal witness rather than on reputation in the community.

PRIOR CONVICTIONS

Rule 609 governs the admissibility of evidence of prior convictions offered for the purpose of impeachment. Rule 609 applies only when a prior *conviction* is offered to impeach a witness by showing *character* for untruthfulness. The admissibility of specific instances of conduct that have not resulted in a conviction is governed by Rule 608(B), not Rule 609. If the evidence is offered under an impeachment theory other than character, Rule 609 does not apply. For example, evidence of a conviction may be admitted to show that the witness has received or expects to receive favorable treatment by the prosecution. Such evidence shows bias and is not governed by Rule 609. Moreover, evidence of prior conduct that has resulted in conviction may be admissible for reasons other than impeachment. For example, evidence of "other crimes" may be admissible under Rule 404(B) as proof of motive, opportunity, intent, and so forth.

When evidence of a prior conviction is admitted, a limiting instruction is required upon request of a party. *See* Rule 105; Ohio Jury Instructions § 405.22.

Policy

Rule 609 deals with the impeachment use of character evidence. It recognizes that specific instances of conduct that have resulted in a conviction may be used to show untruthful character. The principal issue in drafting a provision such as Rule 609 is determining which crimes reflect untruthful character. For example, a prior conviction for driving while intoxicated reveals very little about a person's character for truthfulness, although it may reveal other things about that person's character.

Rule 609(A) limits the types of convictions that are admissible for the purpose of impeachment to (1) crimes punishable by death or imprisonment in excess of one year and (2) crimes of dishonesty and false statement, regardless of punishment. These limitations were not recognized under prior Ohio law. For example, RC 2945.42 provides that conviction of a crime "may be shown for the purpose of affecting the credibility of [a] witness." In State v. Murdock, 172 Ohio St. 221, 174 N.E.2d 543 (1961), the Supreme Court interpreted that provision as permitting the admission in evidence of *all* prior convictions, including misdemeanors. The Court also held, however, that an ordinance violation was not a "crime" within the meaning of the statute. *See* State v. Arrington, 42 Ohio St.2d 114, 326 N.E.2d 667 (1975); Harper v. State, 106 Ohio St. 481, 140 N.E. 364 (1922); Coble v. State, 31 Ohio St. 100 (1876).

Thus, Rule 609(A) changed the prior law in two respects. Most misdemeanors, admissible under prior law, are no longer admissible unless they involve crimes of dishonesty or false statement. Ordinance violations, however, which were excluded under prior law, are now admissible if they involve crimes of dishonesty or false statements. In addition, Rule 609(B) changes prior Ohio law by placing a time limitation on the use of prior convictions. Generally, convictions over ten years old are inadmissible under that provision.

According to the Ohio Supreme Court, a prior conviction in which pronouncement of sentence is still pending may be used for impeachment pursuant to Rule 609(A). State v. Cash, 40 Ohio St.3d 116 (1988). *See also* 3 Louisell & Mueller, *Federal Evidence* § 323, at 373-74 (1979).

Appellate Review

In Luce v. United States, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984), the defendant moved in limine to prevent the prosecution from using a prior conviction to impeach him. His motion was based on Federal Rule 609(a). The trial court denied the motion but indicated that the nature of Luce's trial testimony might affect its ruling. Luce, however, did not testify at trial. He was convicted and appealed.

On review, the Supreme Court ruled that Luce had failed to preserve the issue for appeal because he had not testified at trial: "We hold that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." *Id.* at 43. The Court set forth several reasons for its ruling. First, Federal Rule 609(a) requires the trial court to balance the probative value of the prior conviction for impeachment purposes against its prejudicial effect. Such an evaluation, in the Court's view, is impossible without knowing the precise nature of the defendant's testimony. Second, if the trial court's decision to admit the evidence is erroneous, an appellate court is handicapped in making the required harmless error determination without knowing the nature of the defendant's testimony.

Crimes punishable by death or one year imprisonment

Rule 609(A)(1) provides that evidence of prior convictions involving crimes punishable by death or imprisonment in excess of one year is admissible for impeachment. Convictions adjudged under federal law as well as the laws of other states fall within the rule. The authorized maximum punishment, rather than the actual punishment imposed, is determinative.

The Ohio rule differs from Federal Rule 609(a)(1) in one important respect. The federal rule contains the additional requirement that prior convictions falling within this category are admissible only if the "court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant." Thus, a federal court has discretion to exclude the evidence even if the prior conviction involves a crime punishable by death or

imprisonment in excess of one year.

In contrast, Ohio Rule 609(A) appears to provide that convictions falling within this category are *automatically* admissible. The deletion of the discretionary language contained in the federal rule supports this construction. The Staff Note, however, includes language that indicates that a trial court retains discretion to exclude evidence of prior convictions that fall within this category. The Staff Note, after referring to the discretion recognized in the federal rule, states: "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." This passage suggests that the drafters were concerned not with eliminating discretion but rather with its uniform application. This reading is supported by the Staff Note citation of Rule 403, which provides that the exclusion of relevant evidence is mandatory if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury. *See* Blakey, *A Short Introduction to the Ohio Rules of Evidence*, 10 Capital L. Rev. 237, 256-57 (1980).

If the rule permits the trial court to exclude evidence of prior convictions, several factors should affect that decision. These factors are drawn from Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), and its progeny, which were concerned with the dilemma facing a criminal defendant who has a record of prior convictions.

> The accused, who has a "record" but who thinks he has a defense to the present charge, is thus placed in a grievous dilemma. If he stays off the stand, his silence alone will prompt the jury to believe him guilty. If he elects to testify, his "record" becomes provable to impeach him, and this again is likely to doom his defense. McCormick, *Evidence* § 43, at 99 (3d ed. 1984).

The solution to this dilemma, according to *Luck*, is to recognize the trial court's discretion to exclude evidence of prior convictions. Only if the probative value of the prior conviction outweighs the unfair prejudice to the defendant is the evidence admissible. A leading case is Gordon v. United States, 383 F.2d 936 (D.C. Cir 1967), *cert. denied,* 390 U.S. 1029, 88 S.Ct. 1421, 20 L.Ed.2d 287 (1968). *Gordon* specified five factors which are to be considered in determining admissibility.

First, *the nature of the offense:* A prior conviction that bears upon veracity has high probative value. In contrast, conviction of a crime of violence has little probative value. Convictions involving crimes of dishonesty or false statement, however, are governed by Rule 609(A)(2).

Second, the *remoteness* of the conviction: A one-year old conviction is more probative than an eight-year old conviction. Convictions more than ten years old, however, are subject to the special limitations of Rule 609(B).

Third, the *similarity between the prior offense and the charged offense*: If a defendant is charged with a narcotics offense, evidence of a prior narcotics conviction is more prejudicial than evidence of a prior larceny conviction. The jury is more likely to use the prior narcotics conviction as evidence of character to commit narcotics offenses rather than as evidence of untruthful character.

Fourth, *the importance of and need for* the defendant's testimony: If the defendant is the only person who can provide defense evidence, the need for his testimony is greater, and the argument for exclusion of the prior conviction is stronger.

Fifth, the *importance or centrality of credibility in the case*: For example, if the case boils down to a "swearing contest," it is more important for the jury to know of any evidence affecting credibility, and the argument for admission of the prior conviction is greater. *See* 3 Louisell & Mueller, *Federal Evidence* § 316 (1979); 3 Weinstein & Berger, *Weinstein's Evidence* ¶ 609[03] (1987).

Crimes of dishonesty and false statement

Rule 609(A)(2) provides that evidence of prior convictions involving crimes of dishonesty and false statement is admissible for impeachment. Convictions falling into this category are *automatically* admissible; the trial court has no discretion to exclude these convictions. The Conference Report on Federal Rule 609 contains the following comment: "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." H.R. Rep. No. 1597, 93d Cong. 2d Sess, *reprinted in* [1974] U.S. Code Cong. & Ad. News 7098, 7103. *See* United States v. Toney, 615 F.2d 277, 279 (5th Cir. 1980), *cert. denied*, 449 U.S. 985, 101 S.Ct. 403, 66 L.Ed.2d 248 (1980).

The principal issue in applying this rule is determining what types of crimes involve "dishonesty" and "false statement." The Conference Report also contains a comment on this issue:

> 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. *Id.*

In addition to the crimes enumerated above, a forgery conviction would be admissible under Rule 609(A)(2). State v. Taliaferro, 2 Ohio App.3d 405, 2 O.B.R. 481, 442 N.E.2d 481 (Franklin 1981). On the other hand, crimes involving violence and controlled substances are not generally encompassed by the rule. *See* State v. Ellis, 8 Ohio App.3d 27, 8 O.B.R. 29, 455 N.E.2d 1025 (Franklin 1982) (misdemeanor assault conviction inadmissible).

Several Ohio cases mention the term crimen falsi. *See* Webb v. State, 29 Ohio St. 351, 358 (1876) (crimen falsi includes "forgery, perjury, subornation of perjury, and offenses affecting the public administration of justice."); State v. Hickman, 102 Ohio App. 78, 83, 141 N.E.2d 202 (Erie 1956) ("In the common law, the term, *'crimen falsi,'* contains the elements of falsehood and fraud."). In discussing that term in Kornreich v. Industrial Fire Insurance Co, 132 Ohio St. 78, 5 N.E.2d 153 (1936), the Supreme Court remarked: "The nature of the offense of assault and battery in no wise reflects upon credibility." *Id.* at 90.

Although theft offenses are typically thought to involve dishonesty, it is not clear, in light of the legislative history of the rule, whether evidence of such offenses is admissible

under this provision. *See* 3 Louisell & Mueller, *Federal Evidence* § 317, at 336-42 (1979); 3 Weinstein & Berger, *Weinstein's Evidence* ¶609[03] (1987). Several federal courts have adopted a restrictive view of the term "dishonesty." *See* United States v. Grandmont, 680 F.2d 867, 871 (1st Cir. 1982) (robbery is not a crime of dishonesty absent a showing that the crime was committed by deceitful or fraudulent means); United States v. Glenn, 667 F.2d 1269, 1273 (9th Cir. 1982) (crimes of violence, theft or stealth do not involve dishonesty or false statement unless committed by fraudulent or deceitful means).

In contrast, several Ohio courts have interpreted this provision to permit impeachment with misdemeanor convictions for petty theft. State v. Tolliver, 33 Ohio App.3d 110, 514 N.E.2d 922 (Guernsey 1986); Middleburg Heights v. Theiss, 28 Ohio App.3d 1, 5, 28 O.B.R. 9, 501 N.E.2d 1226 (Cuyahoga 1985); State v. Johnson, 10 Ohio App.3d 14, 14-16, 10 O.B.R. 20, 460 N.E.2d 625 (Franklin 1983); State v. Taliaferro, 2 Ohio App.3d 405, 2 O.B.R. 481, 442 N.E.2d 481 (Franklin 1981).

Time limit

Rule 609(B) provides that evidence of a prior conviction that satisfies the criteria of Rule 609(A) is nevertheless inadmissible if more than ten years has elapsed since the date of (1) conviction, (2) release from confinement, or (3) termination of probation, shock probation, parole, or shock parole, "whichever is the later date." The rule, however, does recognize an exception. Such convictions may be admissible if the proponent provides sufficient advance written notice to the adverse party and the court determines, based upon "specific facts and circumstances," that the probative value of the evidence substantially outweighs its prejudicial effect. *See* Annot., 43 A.L.R. Fed. 398 (1979).

The ten-year limitation represents a change in Ohio law. The rationale for this limitation is that convictions so remote in time are no longer relevant in assessing a witness' credibility.

The rule differs from Federal Rule 609(b) to the extent that computation of the time limit may be based on probation or parole termination dates in addition to the date of conviction or release from confinement. The time period commences at whichever date occurs last. The termination of parole and probation are governed by statute. *See* RC 2951.07 (probation); RC 2947.061 (shock probation); RC 2967.16 (parole); RC 2967.31 (shock parole).

The point at which the time period ends—date of indictment, date of trial, or date witness testifies—is unclear. *See* 3 Louisell & Mueller, *Federal Evidence* § 320, at 353 (1979). In State v. Chambers, 21 Ohio App.3d 99, 21 O.B.R. 106, 486 N.E.2d 1163 (Cuyahoga 1984), the court wrote: '[T]he time limit would apply to the date upon which the witness testifies." *Id.* at 100.

The exception

The exception that grants authority to the trial court to admit convictions that are more than ten years old was added to Federal Rule 609(b) by the Senate Judiciary Committee:

> 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.
>
> * * *
>
> 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. S. Rep. No. 1277, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7051, 7061, 7062 (emphasis added).

See also State v. Ellis, 8 Ohio App.3d 27, 29, 8 O.B.R. 29, 455 N.E.2d 1025 (Franklin 1982) (record does not support a finding under Evid. R. 609(B)).

The notice requirement was added to the federal rule by the Conference Committee. That Committee provided the following explanation: "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." H.R. Rep. No. 1597, 93d Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 7098, 7103.

Method of proving prior convictions

Prior convictions that are admissible under Rule 609 may be elicited from the witness on cross-examination or established by public record during cross-examination. According to State v. Hewit, 26 Ohio App.3d 72, 26 O.B.R. 246, 498 N.E.2d 215 (Shelby 1985), the record of conviction also may be admitted during the state's rebuttal.

Cross-examination

Permitting cross-examination of a witness concerning a prior conviction is consistent with pre-Rules cases. In State v. Arrington, 42 Ohio St.2d 114, 326 N.E.2d 667 (1975), the Supreme Court stated: "[T]he general rule established by a line of unanimous decisions of this court is that the defendant may be cross-examined as to his conviction of a crime under state or federal laws for the purpose of testing credibility." *Id.* at 120. *Accord*, State v. Kaiser, 56 Ohio St.2d 29, 381 N.E.2d 633 (1978).

Although the rule does not specify the amount of detail concerning the prior conviction that may be elicited on cross-examination, the "generally prevailing" practice is that "the name of the crime, the time and place of conviction, and the punishment" is admissible, but "details such as the name of the victim and the aggravating circumstances" are not. McCormick, *Evidence* § 43, at 98 (3d ed. 1984). The Supreme Court has written:

> We therefore hold that under Evid. R. 609, a trial court has broad discretion to limit any questioning of a witness on cross-examination which asks more than the name of the crime, the time and place of conviction and the punishment imposed, when the conviction is admissible solely to impeach general credibility. State

v. Amburgey, 33 Ohio St.3d 115, 117, 515 N.E.2d 925 (1987).

See also State v. Shields, 15 Ohio App.3d 112, 113, 15 O.B.R. 202, 472 N.E.2d 1110 (Cuyahoga 1984); State v. Fricke, 13 Ohio App.3d 331, 333, 13 O.B.R. 409, 469 N.E.2d 1035 (Hamilton 1984); State v. Hill, 111 Ohio App. 257, 259, 165 N.E.2d 241 (Hamilton 1959).

The rule uses the term "cross-examination." This provision, however, must be read in conjunction with Rule 607, which permits a party to impeach its own witnesses. Thus, it is proper to elicit prior conviction evidence during direct examination. Moreover, the rule should not be interpreted as barring counsel from bringing out evidence of prior convictions on direct examination "for the purpose of lessening the import of these convictions upon the jury." State v. Peoples, 28 Ohio App.2d 162, 168, 275 N.E.2d 626 (Mahoning 1971).

The questioning of a criminal defendant about prior convictions in the absence of proof of such convictions has been condemned. *See* State v. Cox, 42 Ohio St.2d 200, 207, 327 N.E.2d 639 (1975) (prejudicial error to question defendant "regarding prior convictions, without at some point in the trial offering proof thereof."); State v. Crawford, 17 Ohio App.2d 141, 244 N.E.2d 774 (Hamilton 1969); State v. Cole, 107 Ohio App. 444, 155 N.E.2d 507 (Hamilton 1958). The leading case is Wagner v. State, 115 Ohio St. 136, 152 N.E. 28 (1926), in which the Supreme Court commented:

> It is evident that the state had no information concerning any such convictions. Manifestly these questions were asked for the sole purpose of discrediting Wagner before the jury. . . When the state has no such further evidence, or produces none, then questions of his character become incompetent for any purpose, and, when counsel for the state knows that no convictions attended the indictments inquired about, then this line of cross-examination is wholly unfair, and is highly prejudicial to the accused. *Id.* at 137.

Record of conviction

The pre-Rules cases recognized that records of prior conviction are admissible. In Harper v. State, 106 Ohio St. 481, 140 N.E. 364 (1922), the Supreme Court held that if "the defendant denies his conviction of such crime, the proper record of the conviction, duly authenticated, may be offered by the state in rebuttal." *Id.* (syllabus, para. 3). Although Rule 609 does not require a prior denial as a prerequisite for admissibility of conviction records, it does limit the admissibility of extrinsic evidence to records of conviction. This is consistent with McCormick's view. "Here the cross-examiner need not 'lay a foundation' for proof by copy or record, nor is he bound to 'take the answer' if the witness denies the conviction, but may prove it by the record." McCormick, *Evidence* § 43 at 97 (3d ed. 1984).

A hearsay exception for judgments of previous convictions is recognized in Rule 803(21). A record of a prior conviction also would qualify as a public record under Rule 803(8) (hearsay exception), is often self-authenticating under Rule 902, and copies are admissible under Rule 1005 (best evidence rule). In addition, RC 2945.75(B) provides:

> Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

Witness' explanation

The rule does not specify whether a witness impeached with a prior conviction may offer some type of explanatory comment. McCormick recognized that a "substantial number of courts, while not opening the door to a retrial of the conviction, do permit the witness himself to make a brief and general statement in explanation, mitigation, or denial of guilt, or recognize a discretion in the trial judge to permit it." McCormick, *Evidence* § 43, at 99 (3d ed. 1984).

In Harper v. State, 106 Ohio St. 481, 140 N.E. 364 (1922), the Supreme Court may have rejected this view. "Such record [of conviction], unmodified or unreversed, may neither be impeached nor contradicted by the defendant, or any other witness in his behalf." *Id.* (syllabus, para. 4). However, in State v. Kirkland, 18 Ohio App.3d 1, 18 O.B.R. 25, 480 N.E.2d 85 (Cuyahoga 1984), the court wrote:

> The rule itself does not specify whether a witness may offer explanatory comment. See P. Giannelli, Ohio Rules (1982). . . . However, the admission of any collateral evidence which relates to the credibility of a witness' testimony lies within the discretion of the trial court. . . We reject the rigidity of Harper v. State. *Id.* at 4.

Effect of pardon, annulment, or expungement

Rule 609(C) provides that evidence of a prior conviction is inadmissible if the conviction has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure based on a "finding of rehabilitation," provided the witness has not been convicted of a subsequent crime punishable by death or imprisonment in excess of one year. In addition, evidence of a prior conviction is inadmissible if the conviction has been the subject of a pardon, annulment, expungement, or other equivalent procedure "based on a finding of innocence." *See* Annot, 42 A.L.R. Fed. 942 (1979).

The policy underlying this provision is stated in the Advisory Committee's Note to Federal Rule 609:

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

The House Judiciary Committee added the following comment on this provision: "The Committee. . . 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.' " H.R. Rep. No. 650, 93d

Cong. 1st Sess. (1973), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7075, 7085.

Except for the addition of the term "expungement," the rule is identical to Federal Rule 609(c). This addition was made because several Ohio statutes contain expungement provisions. *See* RC 2953.31 to 2953.36 (first offenders); RC 2151.358 (juveniles); Comment, *Expungement in Ohio: Assimilation into Society for the Former Criminal*, 8 Akron L. Rev. 480 (1975). Ohio does not have an annulment or rehabilitation procedure, but the rule recognizes such procedures if adopted by other jurisdictions.

Juvenile adjudications

In contrast to the federal rule, Rule 609(D) provides that evidence of a juvenile adjudication offered to impeach a witness is not admissible "except as provided by statute enacted by the General Assembly." This rule was amended to its present form in 1980 because the drafters considered the question of admissibility of juvenile adjudications to be substantive, and therefore beyond the Supreme Court's rulemaking authority. *See* Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 29 Case W.R. L. Rev. 16, 55 n. 207 (1978).

RC 2151.358(H) governs the admissibility of juvenile adjudications. It provides, in part:

> The disposition of a child under the judgment rendered or any evidence given in court is not admissible as evidence against the child in any other case or proceeding in any other court, except that the judgment rendered and the disposition of the child may be considered by any court only as to the matter of sentence or to the granting of probation.

In Malone v. State, 130 Ohio St. 443, 200 N.E. 473 (1936), the Supreme Court interpreted a predecessor statute as precluding the impeachment use of juvenile adjudications. "Motivated by a humanitarian impulse, the law prohibits the use of Juvenile Court proceedings, or of proof developed thereon, against a child in any other court to discredit him or to mark him as one possessing a criminal history." *Id.* at 453-54. *Accord*, Mason v. Klasserner, 114 Ohio App. 171, 180 N.E.2d 870 (Franklin 1961). *See also* Beatty v. Riegel, 115 Ohio App. 448, 185 N.E.2d 555 (Montgomery 1961).

Rule 609 applies only when a prior conviction is offered to impeach a witness by showing character for truth and veracity. If the evidence is offered for some other purpose, the rule does not apply, although the statute may apply. The courts, however, have recognized several exceptions to RC 2151.358. In State v. Cox, 42 Ohio St.2d 200, 327 N.E.2d 639 (1975), the Supreme Court held that the statute could not prevent a criminal defendant from impeaching a key government witness.

> Although the General Assembly may enact legislation to effectuate its policy of protecting the confidentiality of juvenile records, such enactment may not impinge upon the right of a defendant in a criminal case to present all available, relevant and probative evidence which is pertinent to a specific and material aspect of his defense. *Id.* at 204.

The United States Supreme Court reached the same result in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), finding that the exclusion of evidence of a prosecution witness' juvenile probationary status violated the right of confrontation. It should be noted that neither *Davis* nor *Cox* involved the use of a juvenile adjudication to show untruthful character; in *Davis* the evidence was offered to show bias, and in *Cox* the evidence was offered to show contradiction and probably was admissible on the merits as well. Thus, these two cases would not have been controlled by Rule 609 in any event. *See also* State v. White, 6 Ohio App.3d 1, 6 O.B.R. 23, 451 N.E.2d 533 (Cuyahoga 1982) (distinguishing *Davis* and *Cox*).

Pendency of appeal

Rule 609(E) provides that the pendency of an appeal does not affect the admissibility of evidence of a prior conviction. Evidence that an appeal is pending, however, is admissible and may affect the weight accorded to the prior conviction.

The rationale for this provision is set forth in the Advisory Committee's Note to Federal Rule 609(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. . . The pendency of an appeal is, however, a qualifying circumstance properly considerable." According to the Staff Note, Rule 609(E) "is in accord with prior Ohio law."

Unconstitutional convictions

In Loper v. Beto, 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972), the U.S. Supreme Court held that the impeachment use of a conviction based upon a trial in which the defendant was denied the right to counsel violates due process. The right to counsel violation in *Loper* was based upon Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The *Gideon* principle was extended subsequently to any criminal trial in which imprisonment is imposed. Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979); Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). *See also* Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980). Once the validity of a prior conviction is raised, the prosecution has the burden of establishing that the right to counsel requirements were met. *See* United States v. Lewis, 486 F.2d 217 (5th Cir. 1973).

See generally 3 Louisell & Mueller, *Federal Evidence* § 324 (1979); 3 Weinstein & Berger, *Weinstein's Evidence* ¶609[11] (1987).

Indictments and arrests

Evidence that a witness has been arrested or indicted may not be used to impeach if the evidence is offered only to show the witness' bad character. The conduct that is the basis for the arrest or indictment, however, may be admissible pursuant to Rule 608(B). Moreover, the evidence may be admissible if the impeachment is based on bias. State v. Hector, 19 Ohio St.2d 167, 249 N.E.2d 912 (1969); Keveney v. State, 109 Ohio St. 64, 141 N.E. 845 (1923).

SPECIFIC INSTANCES OF CONDUCT

Rule 608(B) provides that on cross-examination a

witness may be asked, subject to the trial court's discretion, about specific instances of conduct which are clearly probative of the witness' character for truthfulness. Extrinsic evidence of such conduct, however, may not be admitted; for example, the testimony of other witnesses who may have observed the conduct is inadmissible even if the witness denies the conduct on cross-examination. "[I]f the answers received on cross-examination do not satisfy the examiner, it is said that the examiner is bound by or 'stuck' with the responses." State v. Leuin, 11 Ohio St.3d 172, 174, 11 O.B.R. 486, 464 N.E.2d 552 (1984). *See also* State v. Kamel, 12 Ohio St.3d 306, 310-11, 12 O.B.R. 378, 466 N.E.2d 860 (1984) (error to admit extrinsic evidence).

Whether the pre-Rules cases permitted this type of impeachment is unclear. The Staff Note to Rule 608(B) cites State v. Browning, 98 Ohio App. 8, 128 N.E.2d 173 (Hamilton 1954), to support its contention that the rule is consistent with prior Ohio law. Several other cases also support this contention. *See* State v. Osborne, 50 Ohio St.2d 211, 218, 364 N.E.2d 216 (1977), *vacated on other grounds*, 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1157 (1978) ("Appellant's admission that. . . he lied to the police is singularly relevant and admissible as bearing upon his credibility."); Fawick Airflex Co. v. United Electrical, Radio and Machine Workers of America, 56 Abs. 419, 421, 92 N.E.2d 431 (App. Cuyahoga 1950) ("[A] witness on cross-examination may be asked questions tending to disclose his own character and may be interrogated on specific acts. . . if they have a legitimate bearing upon his credit as a witness."). Other cases, however, reached the opposite result. *See* State v. Schecter [Schechter], 47 Ohio App.2d 113, 121, 352 N.E.2d 617 (Cuyahoga 1974), *affirmed by* 44 Ohio St.2d 188, 339 N.E.2d 654 (1975) ("A witness can never be impeached through evidence of specific instances of bad character whether related to truthfulness or otherwise."); Brice v. Samuels, 59 Ohio App. 9, 14, 17 N.E.2d 280 (Hamilton 1938) ("[W]e know of no rule under which specific acts of wrongdoing may be admitted to affect the credibility of a witness.").

Rule 608(B) is not a bar to admissibility if evidence is relevant for some purpose other than character. In United States v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984), the prosecution offered extrinsic evidence showing that the defendant and a defense witness were members of a secret prison gang which had a creed requiring its members to deny its existence and lie for each other. The defendant argued, inter alia, that the evidence was inadmissible under Rule 608(b) because it was not sufficiently probative of truthfulness and was introduced by extrinsic evidence, *i.e.*, through the testimony of a prosecution witness. Without deciding whether the evidence satisfied the requirements of Rule 608(b), the Court held the evidence admissible for the purpose of impeachment by bias. According to the Court, "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary is the case." *Id.* at 56. *See also* State v. Williams, 21 Ohio St.3d 33, 21 O.B.R. 320, 487 N.E.2d 560 (1986) (evidence relevant to an element of the crime).

Determining admissibility

The admissibility of evidence pursuant to Rule 608(B) is entrusted to the discretion of the trial court. This approach represents a compromise between permitting a wide-ranging inquiry into specific instances of conduct and permitting no inquiry whatsoever. According to McCormick, the "latter view is arguably the fairest and most expedient practice because of the dangers otherwise of prejudice (particularly if the witness is a party), of distraction and confusion, of abuse by the asking of unfounded questions, and of the difficulties. . . of ascertaining whether particular acts relate to character for truthfulness." McCormick, *Evidence* § 42, at 90-91 (3d ed. 1984).

Although the rule permits the use of specific instances of conduct to impeach, the problems recognized by McCormick and the language of the rule suggest that a strong showing must be made before admissibility is warranted. As the Advisory Committee's Note to Federal Rule 608 indicates, the trial court's decision to admit such evidence is governed generally by Rule 403. "[T]he overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment." In this context, however, Rule 403 must be read in light of Rule 608, which imposes tighter restraints on admissibility. Only evidence relevant to truth and veracity is admissible. In addition, unlike Rule 403, Rule 608 requires the evidence to be "clearly" probative. The word "clearly" does not appear in the federal version of Rule 608, although it did appear in the revised draft of the Federal Rules. *See* 51 F.R.D. 389 (1971). The word "clearly" was inserted in the Ohio rule in order to require "a high degree of probative value of instances of prior conduct as to truthfulness or untruthfulness of the witness." Staff Note.

Wigmore favored limiting admissibility to "only *such misconduct as indicates a lack of veracity*—fraud, forgery, perjury, and the like." 3A Wigmore, *Evidence* § 983, at 840 (Chadbourn rev. 1970). A number of pre-Rules Ohio cases appear to be consistent with this approach. A witness' falsification of an application for a marriage license would be admissible under Rule 608. *See* State v. Porter, 14 Ohio St.2d 10, 235 N.E.2d 520 (1968). An admission by the witness that he lied to the police during the investigation of the crime would also qualify under Rule 608 because it relates directly to the veracity of the witness and because it is undisputed. *See* State v. Osborne, 50 Ohio St.2d 211, 218, 364 N.E.2d 216 (1977), *vacated on other grounds*, 438 U.S. 911, 98 S.Ct. 3137, 57 L.Ed.2d 1157 (1978). *See also* Plas v. Holmes Construction Co, 157 Ohio St. 95, 104 N.E.2d 689 (1952); State v. Cochrane, 151 Ohio St. 128, 84 N.E.2d 742 (1949) (excluding other acts); Wagner v. State, 115 Ohio St. 136, 152 N.E. 28 (1926) (excluding evidence of indictments); James v. Franks, 15 Ohio App.2d 215, 240 N.E.2d 508 (Montgomery 1968) (indictments); 3 Louisell & Mueller, *Federal Evidence* §§ 225-34 (1979).

Cases decided under the Evidence Rules also have limited admissibility to conduct relevant to untruthful character. *See* State v. Mann, 19 Ohio St.3d 34, 19 O.B.R. 28, 482 N.E.2d 592 (1985) (violation of a civil injunction not admissible); State v. Rodriquez, 31 Ohio App.3d 174,

31 O.B.R. 339, 509 N.E.2d 952 (Lorain 1986) (evidence of possession of marijuana not admissible); State v. Tolliver, 16 Ohio App.3d 120, 16 O.B.R. 126, 474 N.E.2d 642 (Cuyahoga 1984) (evidence of sex change not admissible). *See* State v. Greer, 39 Ohio St. 3d 236, 243 (1988) (violation of parole constitutes a specific instance of failure to keep his word).

The "remoteness" of the evidence also affects its relevancy. As proposed by the U.S. Supreme Court, Rule 608 required that the evidence "not [be] remote in time." 56 F.R.D. 267 (1973). Notwithstanding the deletion of this phrase from the rule as adopted, remoteness is a factor affecting admissibility. *See* State v. Scott, 61 Ohio St.2d 155, 164, 400 N.E.2d 375 (1980) ("[T]he trial court could have reasonably concluded that at the time of testimony the nine-year old finding was too remote to be relevant.").

Even if the evidence has a high degree of probative value, the trial court must weigh the probative value against the accompanying dangers of unfair prejudice, confusion of issues, and misleading the jury. It is important to note that, unlike Federal Rule 403, Ohio Rule 403(A) makes exclusion mandatory if the probative value is substantially outweighed by the accompanying dangers. The danger of unfair prejudice is especially acute if the defendant in a criminal case is the witness whose credibility is attacked under Rule 608(B).

Finally, the party inquiring into specific instances of conduct must have a good faith basis for asking the question. This is especially true in criminal cases where the unfair prejudice may be great. In Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978), the Fourth Circuit held that the prosecution's questions concerning prior bad acts, offered to impeach the defendant, violated due process where the evidentiary foundation for such questions was insufficient.