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Charles W. Ehrhardt
Florida State University College of Law

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USING CONVICTIONS TO IMPEACH UNDER THE FLORIDA EVIDENCE CODE†

CHARLES W. EHRHARDT*

I. INTRODUCTION

One of the most effective methods of impeaching a witness, especially in a criminal case, is by proving that he previously has been convicted of a crime. The extent to which a witness, particularly a criminal defendant who takes the witness stand, can be impeached with prior convictions has long been a matter of disagreement.[1] The controversy has centered around the type of crimes resulting in convictions that can be used to impeach, whether a criminal defendant will be unfairly prejudiced by the use of prior convictions and whether details surrounding the prior crime and sentence can be brought before the jury.

The theory supporting the use of a wide variety of convictions is that a person with a criminal record has demonstrated a willingness to violate the law, which bears upon his willingness to disregard his oath to tell the truth.[2] Others argue that the use of convictions should be limited to crimes which are directly related to veracity and indicate a tendency to be untruthful.[3]

When a criminal defendant testifies, he places his credibility in issue like any other witness.[4] Thus, he faces a dilemma; the danger is that not only will the jury draw the inference that because of his prior conviction, he is more likely to be untruthful, but that the jury also will infer that because the defendant has committed one or more crimes, he is either a "bad" person who should be convicted or is likely to have committed the crime in question.[5]

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* Ladd Professor of Evidence, Florida State University College of Law. B.S., 1962, Iowa State University; J.D., 1964, University of Iowa.

Part of this article will be included in the forthcoming revision of Ehrhardt's FLORIDA EVIDENCE, to be published by West Publishing Company.

1. *See, e.g.*, J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE §§ 609[01]-[03] (1981); E. LOUISELL & C. MUELLER, 3 FEDERAL EVIDENCE §§ 314-15 (1979); C. MCCORMICK, EVIDENCE § 43 (Cleary ed. 1972).

2. *See* United States v. Garber, 471 F.2d 212, 214-15 (5th Cir. 1972); Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 176 (1940).

3. *See* Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029; UNIF. R. EVID. 21 (1953) (superseded by UNIF. R. EVID. 609 (1974)).

4. Johnson v. State, 380 So. 2d 1024, 1026 (Fla. 1979) (use of convictions to impeach defendant does not violate due process).

5. *See* United States v. Martinez, 555 F.2d 1273, 1276 (5th Cir. 1977); Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 184 (1940).

Prior to the enactment of the Florida Evidence Code, evidence of a conviction of "any crime" was admissible to impeach.[6] Counsel could not question the witness about the nature of the crime; it could only be mentioned incidentally when a certified copy of the judgment of conviction was introduced to impeach an answer from the witness.[7] Section 90.610 of the Evidence Code substantially changed the Florida law relating to evidence of prior convictions. The type of convictions admissible to impeach are now limited to crimes which either (1) were punishable by death or imprisonment in excess of one year under the law of the jurisdiction where the conviction occurred or (2) involved dishonesty or false statement, regardless of the punishment.[8] In other words, if a misdemeanor conviction involves dishonesty or false statement, it is admissible; if a misdemeanor does not involve dishonesty or false statement it is not admissible. Section 90.610 was amended to its present form in 1978 and prior to that legislative action, Section 610 of the Code provided that only crimes involving dishonesty or false statement could be used to impeach.[9]

Section 90.610 is similar to Federal Rule 609. However, a number of significant differences exist between the two provisions. Probably most significant are the absence from 90.610 of a balancing test to be applied to the use of felony convictions and the absence of any provision excluding convictions in criminal cases on the grounds that they are too remote.

This article will discuss generally the use of prior convictions to impeach under the Evidence Code. In so doing, it will analyze a number of important recent decisions which interpret for the first time significant issues arising under Code Section 90.610. Where there has been no Florida decision interpreting the Code, the issue will be analyzed by discussing pre-Code Florida decisions and by comparing and applying Federal Rule 609 and the cases interpreting it to the Code.[10] Finally where the Evidence Code is unique,

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6. FLA. STAT. § 90.08 (1975) (repealed 1978).

7. *See* Fulton v. State, 335 So. 2d 280, 284 (Fla. 1976); McArthur v. Cook, 99 So. 2d 565, 567 (Fla. 1957).

8. FLA. STAT. § 90.610 (1981). Convictions can be used to impeach in both civil as well as criminal cases. *See* Hendrick v. Strazzulla, 135 So. 2d 1 (Fla. 1961).

9. FLA. STAT. § 90.610 (1977). *See* Ehrhardt, *A Look at Florida's Proposed Code of Evidence*, 2 FLA. ST. U.L. REV. 681, 698 (1974).

10. In Hall v. Oakley, 409 So. 2d 93, 97 (Fla. 1st Dist. Ct. App. 1982), the court in interpreting section 90.610 observed:

> [If] a Florida statute is patterned after a federal law on the same subject, it will take the same construction in the Florida courts as its prototype has been given in

these areas will be pointed out and the proper interpretation suggested.

II. Crimes Punishable by Death or Imprisonment of in Excess of One Year

In 1978, Section 90.610(1) was amended to provide that a witness could be impeached with a conviction for a crime which was punishable by death or imprisonment in excess of one year under the law of the jurisdiction in which the person was convicted.[11] The law of the place of conviction rather than the punishment established in the Florida Statutes for a similar crime is relevant to determining whether the conviction is admissible.[12] The term "was punishable" refers to the possible punishment that could have been imposed rather than the actual sentence received by the witness.

If the conviction occurred in Florida and was for a felony, the conviction almost always would be for a crime which was punishable by more than one year, imprisonment or death.[13] Under Section 775.082(4) of the Florida Statutes, the most severe penalty available for a misdemeanor is a term of imprisonment "not exceeding one year." A third degree felony has a maximum sentence of five years imprisonment.[14]

III. Crimes Involving Dishonesty or False Statement

Under Section 90.610(1) convictions for crimes involving dishonesty or false statement are admissible to attack the credibility of a witness, regardless of the punishment imposed. This prior criminal activity is relevant to impeachment because it involves the truthful character of the person, which is the issue it is offered to prove.

The Code, as originally proposed by the drafters and promulgated by the legislature, provided that only convictions for crimes

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the federal courts . . . . In light of these principles of statutory construction and the uniform construction given to Federal Rule of Evidence 609 by the federal courts, we can only conclude that the Florida Legislature intended a like interpretation for § 90.610(1), Florida Statutes (1978) (citation omitted).

11. 1978 Fla. Laws ch. 78-361, § 16.

12. *See* United States v. Barnes, 622 F.2d 107 (5th Cir. 1980).

13. There is at least one felony which does not involve a possible punishment of more than one year. Leaving the scene of an accident involving death or personal injury is a felony which carries a maximum of one year imprisonment. Fla. Stat. § 316.027 (1981).

14. Fla. Stat. § 775.082(3)(d) (1981).

involving dishonesty or false statement be permitted to impeach.[15] It was the drafters' intent that the provision be broadly construed so that it included not only crimes such as perjury and embezzlement, but also included crimes such as larceny, robbery and burglary. In the 1978 amendment adding a second type of conviction which could be used to impeach, i.e., convictions of crimes involving possible punishment of more than one year imprisonment, the legislature substantially conformed the Code to the Federal Rules with regard to the type of crimes that can be used to impeach. In amending Section 90.610, it is probable that the legislature intended to adopt an interpretation of those crimes involving dishonesty or false statement that is similar to the interpretation of the Federal Rule. Thus, the intent of the drafters to broadly construe those crimes involving dishonesty or false statement was probably negated by the 1978 amendment.[16]

Judicial interpretation of Federal Rule 609 reflects disagreement as to what crimes involve dishonesty or false statement. The view of a majority of courts,[17] apparently including the old Fifth Circuit,[18] is that if some false or fraudulent scienter is inherent in the crime, the crime involves dishonesty or false statement. In other words, crimes involving fraud, perjury, or false statement would qualify,[19] but a conviction for burglary or larceny may not.[20] The latter involve stealth rather than false statement. Similarly crimes of force or violence would be excluded.[21] Another view is that if the facts and circumstances surrounding a conviction, which is not on its face a crime involving dishonesty or false statement, establish that the crime did in fact involve dishonesty or false statement, the conviction could be used to impeach.[22] For example in *United States v. Hayes*,[23] the court said that a conviction for importing

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15. FLA. STAT. § 90.610 (1977).

16. *See* Hall v. Oakley, 409 So. 2d at 97 (court discusses legislative intent to change meaning of code provision).

17. *See, e.g.*, United States v. Fearwell, 595 F.2d 771, 775-77 (D.C. Cir. 1978).

18. *See* Howard v. Gonzales, 658 F.2d 352, 359 (5th Cir. 1981) (theft); United States v. Walker, 613 F.2d 1349, 1354 (5th Cir. 1980) (misdemeanor prostitution conviction inadmissible); United States v. Ashley, 569 F.2d 975, 978-79 (5th Cir. 1978), *cert. denied*, 439 U.S. 853 (1978) (shoplifting conviction inadmissible).

19. *See* United States v. Williams, 642 F.2d 136, 140 (5th Cir. Unit B 1981) (bribery); United States v. De La Torre, 639 F.2d 245, 249 (5th Cir. Unit A 1981) (perjury).

20. United States v. Seamster, 568 F.2d 188, 190-91 (10th Cir. 1978).

21. *See* United States v. Harvey, 588 F.2d 1201, 1203 (8th Cir. 1978).

22. *See* United States v. Barnes, 622 F.2d at 110; United States v. Cathey, 591 F.2d 268, 276, n.16 (5th Cir. 1979).

23. 553 F.2d 824 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977).

cocaine did not on its face involve dishonesty or false statement; it involved nothing more than stealth. However, the court indicated that if "the importation involved false written or oral statements . . . on customs forms"[24] it would involve dishonesty or false statement. The burden is upon the party wishing to use the conviction to demonstrate to the court that the necessary facts were present.[25] The difficulty with this view is that before a witness can be asked about many convictions, there must be a trial within the trial to determine whether the prior facts show dishonesty. The third, and minority view, is that the term "dishonesty" is broad enough to include such crimes as petit larcency (shoplifting) and burglary, but not public intoxication.[26]

Recently the First District Court of Appeal apparently adopted the middle view, permitting the offering party to demonstrate that the facts and circumstances surrounding the prior crime demonstrate that dishonesty or false statement was involved. In *Hall v. Oakley*,[27] the court held that a conviction for petit larceny could not be used to impeach as a crime involving dishonesty or false statement "unless the prosecution has demonstrated that such crime involves some element of deceit, untruthfulness or falsification bearing upon the defendant's capacity to testify truthfully."[28] Because of the uncertainty of whether a particular conviction involves dishonesty or false statement, one recent decision suggested that prior to the use of this type of impeachment, a trial court could inform the witness of the types of crimes which involve dishonesty or false statement. The witness thus could avoid either opening the door to the jury learning of the nature of specific crimes because of his failure to acknowledge such convictions or creating the impression of a pattern of criminal conduct by acknowledging more convictions than he is required to under the Code.[29]

IV. A "CONVICTION" FOR PURPOSE OF SECTION 90.610

Only evidence of criminal convictions is admissible under Sec-

24. 553 F.2d at 827-28.

25. *Id.* M. GRAHAM, HANDBOOK ON FEDERAL EVIDENCE 485 (1981).

26. *See* State v. Melendrez, 572 P.2d 1267, 1269 (N.M. Ct. App. 1977); Hall v. Oakley, 409 So. 2d at 97 (Thompson, J. dissenting).

27. 409 So. 2d 93.

28. *Id.* at 97.

29. Cummings v. State, 7 FLA. L.W. 838 (Fla. 4th Dist. Ct. App., Apr. 14, 1982).

tion 90.610;[30] a witness may not be interrogated as to former arrests or other accusations of crimes.[31] The fact of conviction makes the evidence admissible. It is immaterial whether the witness pleads not guilty, guilty or nolo contendere.[32]

The fact that the conviction is being appealed at the time of the trial during which it is offered for impeachment purposes does not bar admission of the conviction.[33] Similarly, the fact that the conviction has been the subject of a pardon does not render evidence of the conviction inadmissible.[34] However, both the pendency of the appeal and the pardon are admissible on redirect to rehabilitate the witness and mitigate the effect of the evidence.[35] Although there is no case or statutory law on point, it would seem that if a person's civil rights have been restored pursuant to Section 940.05, such restoration would be treated as a pardon for the purposes of Section 90.610.

If a person pleads guilty or is found guilty by a jury but the sentencing judge withholds an adjudication of guilt, there has been no conviction and the person's credibility cannot be impeached with it.[36] Sometimes convictions and other records relating to a

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30. A military court-martial conviction may be admissible to impeach. *See* Annot. 7 A.L.R. 4th 468 (1981). *But see* Braswell v. State, 306 So. 2d 609, 613 (Fla. 1st Dist. Ct. App. 1975), *cert. denied*, 328 So. 2d 845 (1976) (summary court-marital after World War II not admissible); United States v. Cathey, 591 F.2d at 273 (issue not decided). A conviction in a foreign country will be admissible unless it is shown by the objecting party that the trial or proceeding giving rise to the conviction lacked procedural protections so as to render it unfair. *See* United States v. Manafzadeh, 592 F.2d 81, 90 (2d Cir. 1979); United States v. Wilson, 556 F.2d 1177, 1178 (4th Cir.) *cert. denied*, 434 U.S. 986 (1977). *See generally*, Comment, *The Collateral Use of Foreign Convictions in American Criminal Trials*, 47 U. CHI. L. REV. 82 (1979).

The findings of a municipal administrative board were found not to be a "conviction" in United States v. Werbrouck, 589 F.2d 273, 277 (7th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979).

31. *See* Fulton v. State, 335 So. 2d at 284; Harmon v. State, 394 So. 2d 121, 125-26 (Fla. 1st Dist. Ct. App. 1980); Dennis v. State, 214 So. 2d 661, 662 (Fla. 3d Dist. Ct. App. 1968).

32. United States v. Williams, 642 F.2d at 138-39. *Cf.* Chesebrough v. State, 255 So. 2d 675, 676-77 (Fla. 1971), ("[A] defendant who is sentenced . . . [upon a plea of nolo contendere] is convicted of the offense charged."). *Cert. denied*, 406 U.S. 975, 976 (1972).

33. FLA. STAT. § 90.610(2) (1981). The Fifth Circuit, in a habeas corpus review of a Florida trial, ruled a conviction inadmissible to impeach when the pending appeal is on the ground of a violation of the sixth amendment right to counsel. Spiegel v. Sandstrom, 637 F.2d 405, 407 (5th Cir. Unit B 1981). *See generally, infra* notes 39-41 and accompanying text.

34. FLA. STAT. § 90.610(2) (1981).

35. McArthur v. Cook, 99 So. 2d 565. FLA. STAT. § 90.610(2) (1981) specifically provides for the admissibility of evidence that an appeal is pending.

36. *See* Barber v. State, 413 So. 2d 482 (Fla. 2d Dist. Ct. App. 1982); United States v. Georgalis, 631 F.2d 1199, 1203 n.3 (5th Cir. Unit B 1980).

person's criminal history are ordered expunged. Section 943.058(6) Florida Statutes (1981) provides that when criminal history records have been expunged or sealed, the person is restored to the status that she had before the criminal proceedings. The person's status before charges were brought was that she had not been convicted of the crime in question and therefore the expunged conviction would not be admissible. The statutory provision makes a specific exception for a person who is a defendant in a criminal proceeding. Thus, a conviction which had been expunged or sealed could be used to impeach a criminal defendant who testifies as a witness, but could not be used to impeach a witness in a civil case or any witness in a criminal case other than the defendant.[37]

If the prior offense occurred while the person was a juvenile and it was handled as a juvenile matter, evidence of the juvenile adjudication is inadmissible.[38] Section 90.610(1)(b) is consistent with other statutory provisions in which the adjudication of a juvenile is not treated as a criminal conviction.[39]

If the conviction was obtained in violation of the witness' sixth amendment right to counsel, it is not a valid conviction and may not be used to impeach.[40] However, unless the objection is timely raised, the matter will be treated as being waived.[41] Although it is unclear, apparently convictions which might be invalid because of

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However, if a jury verdict has been returned, but adjudication and sentencing has not yet taken place, or a defendant has plead guilty, but the judge has not adjudicated the defendant guilty and imposed sentence, the jury finding of guilt can be used as a conviction to impeach. *See* Barber v. State, 413 So. 2d 482; United States v. Klein, 560 F.2d 1236 (5th Cir. 1977), *cert. denied,* 434 U.S. 1073 (1978). On redirect, counsel may offer evidence that no adjudication has occurred to mitigate the impeachment. *See* Barber v. State, 414 So. 2d 482.

37. FLA. STAT. § 943.058(6)(b)(2) (1981).

38. FLA. STAT. § 90.610(1)(b) (1981). *See* Dunlap v. State, 404 So. 2d 853, 854-55 (Fla. 2d Dist. Ct. App. 1981); Crespo v. State, 344 So. 2d 598, 599 (Fla. 3d Dist. Ct. App. 1977). However, a conviction under the Federal Youth Corrections Act is a conviction for purposes of impeachment. *See* United States v. Ashley, 569 F.2d 975, 978 (5th Cir.), *reh'g denied,* 573 F.2d 85, *cert. denied,* 439 U.S. 853 (1978). Evidence of a juvenile adjudication would be admissible to contradict the witness, if a juvenile on direct examination testifies erroneously concerning his prior juvenile record. Jackson v. State, 336 So. 2d 633, 635 (Fla. 4th Dist. Ct. App. 1976). So, too, when a key prosecution witness is presently on probation as the result of a juvenile matter, the defense may cross-examine concerning the adjudication and probation to show the interest the witness has in cooperating with the prosecution. Davis v. Alaska, 415 U.S. 308, 319 (1974).

39. FLA. STAT. §§ 39.10(4), 39.12(6) (1981).

40. *See* Loper v. Beto, 405 U.S. 473, 483 (1972); Griffin v. Blackburn, 594 F.2d 1044, 1046 (5th Cir. 1979) (uncounseled misdemeanor conviction which could have, but did not, result in imprisonment, is admissible for impeachment purposes).

41. *See* United States v. Murray, 492 F.2d 178, 196 (9th Cir. 1973), *cert. denied sub nom.* Roberts v. United States, 419 U.S. 854 (1974).

subsequent appellate rulings holding that evidence was obtained in violation of other constitutional rights may be used as convictions under Section 90.610.[42]

V. GROUNDS TO EXCLUDE CONVICTIONS OFFERED FOR IMPEACHMENT

A. Probative Value versus Prejudice

When the witness who testifies is the criminal defendant, the jury is likely to consider convictions admitted to impeach as evidence the defendant is a "bad" person and use the evidence for that purpose, especially when there are a number of prior convictions.[43] Section 90.610 does not specifically allow the trial judge any flexibility in admitting convictions to impeach; it simply provides that counsel may offer certain convictions if he chooses to do so.

Federal Rule 609 contains a provision not found in Section 90.610. It provides that a felony conviction may be used to impeach only when the court determines that the probative value of admitting the conviction outweighs its prejudicial effect to a criminal defendant. There is no similar provision in the Federal Rules regarding crimes involving dishonesty and false statement. Rule 609 has generally been interpreted by the federal courts to require the trial judge to conduct a balancing test to determine the admissibility of felony convictions and to make an explicit, on-the-record finding that the probative value of admitting the conviction outweighs its prejudicial effect.[44] However convictions for crimes involving dishonesty and false statement are automatically admissible without a federal court employing a balancing test.[45] Since the

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42. *See* United States v. Penta, 475 F.2d 92 (1st Cir.), *cert. denied*, 414 U.S. 870 (1973); J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE § 609[11] (1981).

43. *See supra* note 5 and accompanying text.

44. United States v. Preston, 608 F.2d 626, 639 (5th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); United States v. Mahone, 537 F.2d 922, 928-29 (7th Cir.), *cert. denied* 429 U.S. 1025 (1976).

The basic concerns which the federal courts consider in balancing the factors are:

(1) The impeachment value of the prior crime.
(2) The point in time of the conviction and the witness' subsequent history.
(3) The similarity between the past crime and the charged crime.
(4) The importance of the defendant's testimony.
(5) The centrality of the credibility issue.

J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE § 609[04] (1981). A similar but more detailed list is suggested in M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 471-72 (1981).

45. *See, e.g.*, United States v. Toney, 615 F.2d 277, 279-80 (5th Cir.), *reh'g denied*, 622 F.2d 1043, *cert. denied*, 101 S. Ct. 403 (1980); United States v. Dorsey, 591 F.2d 922, 934

Rule 609 balancing test is limited to prejudice against a criminal defendant, felony convictions can be used to impeach a witness in a civil case or a prosecution witness in a criminal case without the balancing test being applied.[46]

Section 90.610(1) of the Evidence Code uses the same language in defining the types of convictions that are admissible to impeach except that the Florida Legislature omitted any requirement that the court conduct a balancing test before permitting the convictions to be used. Thus, it can be argued that the omission was intentional and a trial judge cannot exercise his discretion in excluding convictions of a felony or crime involving dishonesty or false statement. Section 90.610(1), in omitting any mention of a balancing test, was modeled after Federal Rule of Evidence 609 as it was submitted by the Supreme Court to the Congress before Congressional amendment. According to the Advisory Committee to the Federal Rules,[47] the proposed rule was intended to admit the convictions without any weighing or balancing of the competing interests by the Court. Thus it can be argued that if a conviction is of a type enumerated in Section 90.610, it is admissible and it is improper for the trial judge to exercise any discretion in determining its admissibility.

A counter-argument can be made that under the Evidence Code the trial judge should exercise some discretion in admitting convictions to impeach. Section 90.403 provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Section 90.610 convictions are relevant to the issue of the witness' credibility. Therefore, it is argued that Section 403 would be applicable to Section 610.[48]

If Section 403 is applicable to Section 610 convictions, there are two factors that will make the convictions more freely admissible in Florida than they are under the Federal counterpart. First, under the Federal Rules, cross-examining counsel can go into the nature of the crimes, the courts and the date of the offenses, even

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(D.C. Cir. 1979).

46. J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE § 609[04]-[05] (1981).

47. 56 F.R.D. 183, 270 (1972). Another argument to support the view of automatic admissibility is that the unfair prejudice test of Rule 403 is a general rule which is "designed as a guide for the handling of situations for which no specific rules have been formulated." FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES, Advisory Comm. Notes 25 (1975); *see* United States v. Toney, 615 F.2d at 280. Since section 90.610 is a specific provision dealing with a distinct rule of evidence, the argument is that 403 has no application.

48. United States v. Toney, 615 F.2d at 283-84 (Tuttle, J. dissenting).

if the witness answers truthfully.[49] However, in Florida use of the convictions is much more limited. Counsel can only ask how many times the witness has been convicted and not go into the details of the convictions.[50] Two of the criteria the federal courts have focused upon in determining whether the convictions should be admitted under their balancing test are 1) the nature of the prior crime and 2) the similarity of the prior crime to the one charged.[51] Since in the federal court the jury will almost always be apprised of the nature of the prior crime, there frequently is a danger the jury will convict a defendant who testifies because it believes he is a bad man who commits crimes of that sort. However, in Florida this danger is greatly decreased since Florida does not permit the nature of the prior offenses to come before the jury, unless the witness answers untruthfully.[52]

Furthermore, the test to be applied by the court under Federal Rule 609, whether "the probative value of admitting this evidence outweighs its prejudicial effect," is different from the test to be applied under Section 90.403, whether the probative value "is *substantially* outweighed by the danger of *unfair* prejudice."[53] Any time a criminal defendant testifies and is impeached with a prior conviction he will be prejudiced in the eyes of the jury. Otherwise the prosecution would not offer the evidence. Section 90.403 excludes the evidence only when the court determines the prejudice is "unfair" and it "substantially" outweighs the probative value. A greater showing must be made under Section 90.403 to exclude the evidence then would be necesary under Federal Rule 609.[54]

If Section 90.403 is applicable to convictions used for impeachment, the objecting party will have the burden of demonstrating to the court that the evidence should be excluded.[55] However, under Federal Rule 609 the prosecution has the burden of showing the

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49. *See* United States v. Wolf, 561 F.2d 1376, 1381 (10th Cir. 1977) (court noted that it ordinarily is improper to permit cross-examination into other details of the crime); Tucker v. United States, 409 F.2d 1291, 1294 n.1 (5th Cir. 1969).

50. *See, e.g.*, McArthur v. Cook, 99 So. 2d at 567; Cummings v. State, 7 FLA. L.W. 838 (Fla. 4th Dist. Ct. App., Apr. 14, 1982). *See infra* notes 64-65 and accompanying text.

51. *See* D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 316 (1979); M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 471-72 (1981) (listing eight additional factors courts may also consider).

52. *See infra* notes 64-69.

53. FLA. STAT. § 90.403.

54. For a discussion of the differences in these standards see Judge Tuttle's dissent in United States v. Toney, 615 F.2d at 283-84.

55. *See* C. MCCORMICK, EVIDENCE § 43 (Cleary ed. 1972) (1978 Supp.).

court why the evidence should be admitted.[56]

Therefore, if convictions meet the criteria of Section 90.610 they may be automatically admissible. If the court determines that Section 90.403 applies, nonetheless it would seem to be an unusual case in which the court would find the convictions to be inadmissible. It is unlikely a defendant would make the necessary showing to require exclusion. However, Section 90.403 would provide judges flexibility in cases where the possibility of prejudice is extremely great.

Some courts have indicated that the determination of whether a prior conviction is admissible to impeach is an appropriate matter for pre-trial determination by use of a motion in limine.[57] A pre-trial ruling obviously is helpful to counsel in planning the presentation of his case, e.g., whether the defendant will take the witness stand. A ruling prior to the witness being asked the questions about his prior convictions also aids the witness in not being confused in his answers.[58] However, the federal courts have found that there is no duty on the part of the trial judge to make such a ruling and that it is proper for the court to withhold any determination of admissibility until the defendant takes the stand.[59]

When a pre-trial order permitting the use of a prior conviction to impeach is entered, a defendant may elect not to take the stand during the trial and attempt to preserve the court's ruling for appeal. The federal courts permit the defendant to raise the alleged error even though he was not impeached during the trial.[60]

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56. *See* United States v. Hendershot, 614 F.2d 648, 652 (9th Cir. 1980); United States v. Hayes, 553 F.2d 824, 828 (2d Cir.), *cert. denied*, 434 U.S. 867 (1977).

57. *See, e.g.*, United States v. Oakes, 565 F.2d 170, 173 (1st Cir. 1977) ("[We] encourage judges to do what seems reasonable to facilitate an advance ruling in a proper case . . . ." The court, however, also concluded it would be improper to make a per se rule requiring pre-trial hearings because such a rule could unnecessarily lengthen voir dire and trial proceedings.)

58. In Cummings v. State, 7 FLA. L.W. 838, it was suggested that upon motion the court instruct the witness as to what crimes involve dishonesty.

59. United States v. Johnston, 543 F.2d 55, 59 (8th Cir. 1976).

60. *See, e.g.*, United States v. Toney, 615 F.2d at 279. In United States v. Cook, 608 F.2d 1175, 1186 (9th Cir. 1979), *cert. denied*, 444 U.S. 1034 (1980), the court commented on the necessary foundation to preserve the issue for appeal:

> In future cases, to preserve the issue for review, a defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609. The trial court can then articulate its reason for ruling as it does in each case. In future cases, a defendant who does not make the record contemplated in Rule 103 can

The argument that the defendant must take the stand and be impeached to preserve the point is based on the rationale that to hold otherwise would invite defense counsel to obtain a ruling prior to trial, never intending to call the defendant as a witness. Defense counsel would have obtained a "free ride" if the court was in error: "On appeal, the defendant should be expected to claim that he was kept off the stand by the court's adverse ruling, and that had he testified, he would have convinced the jury of his innocence or at least created a reasonable doubt as to his guilt."[61]

In *Hall v. Oakley*,[62] the only Florida decision on point, the court held that a defendant did not have to testify to preserve the issue because the court felt that requiring the defendant to testify would improperly condition the testimony upon the acceptance of the court's evidentiary ruling.

B. Remoteness

Section 90.610(1)(a) provides that a conviction is inadmissible in a civil case to impeach when "it is so remote in time as to have no bearing on the present character of the witness." Thus, the trial judge must exercise her discretion to determine whether the conviction has sufficient probative value to be admitted. The provision does not include an arbitrary time limitation beyond which the evidence will not be admitted.[63] In determining remoteness the trial judge will have to undertake the same balancing process generally discussed above.[64] It is the one provision in Section 90.610 specifically directing the court to excercise its discretion.

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fairly be said to have abandoned the point, and, accordingly, the teaching of the pre-Rule 609 cases in this circuit still has some value.

61. United States v. Toney, 615 F.2d at 281 (Tjoflat, J. concurring). This concurring opinion contains a strong argument for this view.

Generally, in Florida, to preserve for appeal a ruling on a motion in limine which does not exclude the evidence, an objection to the evidence must be made at trial. *See* Crespo v. State, 379 So. 2d 191 (Fla. 4th Dist. Ct. App. 1980), *cert. denied*, 388 So. 2d 1111 (Fla. 1981); Swan v. Florida Farm Bureau Ins. Co., 404 So. 2d 802, 803 (Fla. 5th Dist. Ct. App. 1981).

62. 409 So. 2d 93, 95.

63. Federal Rule 609(b) provides that if ten years have elapsed from the date of conviction or release from confinement, whichever is later, the conviction may not be used unless the court determines, in the interests of justice, that the probative value of the conviction substantially outweighs its prejudicial effect.

64. *See* Ward v. State, 343 So. 2d 77 (Fla. 2d Dist. Ct. App. 1977), where a 20-year-old perjury conviction was permitted to be used despite an argument that it was too remote because perjury had "greater weight against the credibility of a witness than any other crime." *Id.* at 78.

The remoteness doctrine of section 90.610(1)(a) is limited to civil cases; the section does not refer to the remoteness in criminal cases. In the legislative process prior to the adoption of the Evidence Code, a committee of the Legislature amended Section 90.610(1)(a) to delete its applicability to criminal cases as was recommended by the drafters.[65] Thus, the issue arises as to whether a conviction in a criminal case can be excluded because of remoteness. Obviously, it can be argued that the face of the statute itself discloses an intent to limit the doctrine of remoteness to civil cases and not to apply it in criminal cases. There are two arguments available to apply remoteness in criminal cases. First, because remote convictions were excluded in criminal cases in Florida prior to the adoption of the Evidence Code[66] and because Section 90.102 provides that the Evidence Code "shall replace and supersede existing statutory or common law in conflict with its provisions," the existing common law applying remoteness to criminal cases still governs since Section 90.610 is not in specific conflict with it. Second, if Section 90.403 applies to convictions offered under Section 90.610, the court would exclude a remote conviction because it lacked probative value and there was a danger of unfair prejudice.

Thus, although it appears from the face of Section 90.610 that remote convictions are excluded only in civil cases, a more desirable approach would be to apply the doctrine to convictions in criminal cases on one of the two grounds expressed above.

Whenever a court rules that a conviction is admissible to impeach, counsel can rehabilitate the witness on redirect examination by having the witness testify that the conviction occurred a number of years ago.[67]

VI. Procedures in Using Convictions

Although Section 90.610 only indicates which convictions are admissible to impeach and does not address the procedure that should be followed in examinating a witness about prior convictions during the trial, Florida appellate decisions have established a method for using the convictions. Questions regarding past convictions should not be asked unless counsel has knowledge of a

65. Florida Legislature, House Judiciary Committee, Subcommittee on Court Systems & Miscellaneous, meeting tape [believed by archives to be], May 15, 1975: Florida State Archives, Series 19, Box 210T; Florida Legislature, House Judiciary Committee, meeting tape, May 20, 1975: Florida State Archives, Series 19, Box 210T.

66. *See* Braswell v. State, 306 So. 2d 609, 613 (Fla. 1st Dist. Ct. App. 1975).

67. *See* McArthur v. Cook, 99 So. 2d at 567.

conviction and a certified copy of the judgment of conviction in his possession.[68] After a witness testifies on direct examination, she may be asked during cross-examination:

Q. "Have you ever been convicted of a felony?"
A. "Yes."
Q. "How many times?"
A. "Twice."
Q. "Have you ever been convicted of a crime involving dishonesty or false statement?"
A. "No."

If the witness answers the questions correctly, the questioning must cease; counsel can not go further and specify the nature of the crime of which the witness was convicted or the sentence that was imposed. However, if the witness answers a question incorrectly, counsel may impeach her testimony and prove that she has in fact been convicted of certain crimes by introducing a certified copy of the judgment of conviction for each crime.[69] Counsel may not attempt to prove the prior convictions with a "rap sheet."[70] Any remarks or questions concerning the details of the crime are inadmissible.[71]

There is a line of cases in Florida that permits counsel to attempt to refresh the recollection of a witness when he incorrectly answers concerning his prior convictions by asking the witness whether he was convicted of particular crimes on particular occasions. If the witness admits the convictions as a result of having his memory refreshed, no extrinsic evidence of the conviction would be admitted because his testimony could not be impeached.[72] However, later Florida decisions have apparently found it error to refresh the memory of the witness in this situation and have held that the only correct procedure following the incorrect answer of a

68. *See* Cummings v. State, 7 FLA. L.W. 838.

69. *See id.* (interpreting Section 90.610); Fulton v. State, 335 So. 2d at 384; McArthur v. Cook, 99 So. 2d at 567; Sneed v. State, 397 So. 2d 931, 933 (Fla. 5th Dist. Ct. App. 1981).

70. *See* Goodman v. State, 336 So. 2d 1264, 1267 (Fla. 4th Dist. Ct. App. 1976); Irvin v. State, 324 So. 2d 684, 686, n.2 (Fla. 4th Dist. Ct. App. 1976).

71. *See* Cummings v. State, 7 FLA. L.W. 838; Goodman v. State, 336 So. 2d at 1266; Hill v. Sadler, 186 So. 2d 52, 54 (Fla. 2d Dist. Ct. App. 1966). Prior to the Evidence Code, the fact that a conviction was for perjury or false statement could be revealed to the jury. Johnson v. State, 361 So. 2d 767 (Fla. 3d Dist. Ct. App. 1978).

72. *See* Cross v. State, 119 So. 380, 383 (Fla. 1928); Houston v. State, 337 So. 2d 852, 853 (Fla. 1st Dist. Ct. App. 1976); State v. Young, 283 So. 2d 58, 59-60 (Fla. 1st Dist. Ct. App. 1973).

witness is introduction of a certified copy of the judgment of conviction.[73]

A question may arise as to whether the witness who is testifying and having his credibility attacked is the same person who was convicted of the prior offense. At least three methods may be used to establish the identity of the person whose name appears on the prior judgment of conviction: 1) testimony by a person who was present during the proceedings in which the prior conviction occurred that the person previously convicted is the same person as the witness who denied the conviction;[74] 2) expert testimony that the fingerprints of the former offender are the same as those of the witness denying the conviction;[75] 3) the presumption of identity of a person which flows from the identity of the name of the person previously convicted with the person who testifies at the trial.[76] However, if the name is common and there is no other circumstantial evidence of identity, e.g., presence in the area at the time of conviction,[77] mere similarity of name will not be sufficient.[78] Essentially, the decision is within the discretion of the trial judge.

When a witness is impeached by the introduction of a past criminal conviction, the witness may be rehabilitated on redirect examination by showing any mitigating circumstances surrounding the conviction, e.g., that it is remote and no longer indicative of the person's character or that it is on appeal. However, the witness will not be allowed to retry the conviction.[79]

Counsel may attempt to mitigate the effect of a prior conviction by disclosing it during direct examination, rather than waiting for opposing counsel to bring it out on cross-examination. The rule against impeaching your own witness does not bar this technique.[80] During cross-examination, counsel is normally not allowed to go further than he would have if it had brought up the matter first.[81]

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73. *See* Fulton v. State, 335 So. 2d at 284; Irvin v. State, 324 So. 2d at 686.

74. *See* 3 AM. JUR. *Proof of Facts* 418-20 (1959).

75. People v. McKinley, 39 P.2d 411, 412 (Calif. 1934).

76. *See* Johnston v. State, 62 So. 655, 656 (1913) (proving identity of person obtaining liquor license); United States v. Rodriquez, 195 F. Supp. 513, 515 (S.D. Tex. 1960), *aff'd*, 292 F.2d 709 (5th Cir. 1961) (identity of person convicted of unlawfully acquiring marijuana).

77. *See* State v. Cunningham, 144 P.2d 303, 317 (1943).

78. *See* Rhodes v. State, 76 So. 776 (1917); Thompson v. State, 63 So. 423 (1913); 1 J. WIGMORE, EVIDENCE § 2529 (3d ed. 1940).

79. McArthur v. Cook, 99 So. 2d at 567; FLA. STAT. § 90.610.

80. Sneed v. State, 397 So. 2d 931, 933; United States v. Medical Therapy Sciences, Inc., 583 F.2d 36, 39 (2d Cir. 1978).

81. *See* Sneed v. State, 397 So. 2d 931, 933; Leonard v. State, 386 So. 2d 51, 52 (Fla. 2d Dist. Ct. App. 1980).

However, if during the attempt to explain away the prior conviction on direct examination, the witness attempts to minimize the conviction, cross-examination into the details of the conviction will be permitted.[82] The scope of this examination can result in the disclosure of more details of the crime than when the witness is not questioned about the convictions on direct. The witness cannot mislead the jury without opening the door.[83] Although a witness may explain away prior convictions on direct, he cannot be asked if he has been previously convicted during direct if his answer will be "no."[84] In the latter situation, he will be attempting to bolster his credibility before it has been attacked.

VII. CONVICTIONS ADMITTED FOR OTHER PURPOSES

The admissibility of prior convictions to attack the credibility of a witness simply because they occurred is controlled by Section 90.610. In addition to being admissible under that section, evidence of prior convictions may be admissible to attack the credibility of a witness in particular cases under one of the other theories set forth in Section 90.608, the general impeachment provision. For example, if a witness testifies on direct that she has never been in trouble with the law, proof of a prior conviction for petit larceny would be admissible to contradict the testimony of the witness.[85] The fact that a person was adjudicated a juvenile delinquent and was on probation at the time he was called as a key prosecution witness would be admissible to show the interest the witness would have in pleasing the prosecution with his testimony.[86] So too, the method of proving a conviction may change with the circumstances of the case, e.g., if a witness admits during deposition that he committed a crime, the deposition may be used as a prior inconsistent

82. *See* McCrae v. State, 395 So. 2d 1145, 1152 (Fla. 1981).

83. *See id.* (witness attempted to mislead jury into believing prior conviction was inconsequential); Nelson v. State, 395 So. 2d 176, 178 (Fla. 1st Dist. Ct. App. 1981) (witness testified that he had "plead guilty" to prior crimes because he was guilty, but that he plead "not guilty" in the instant case, because he was not guilty); Martin v. State, 411 So. 2d 987, 990 (Fla. 4th Dist. Ct. App. 1982); United States v. Wolf, 561 F.2d 1376 (10th Cir. 1977). *But see* Rommell v. Firestone Tire & Rubber Co., 394 So. 2d 572, 573 (Fla. 5th Dist. Ct. App. 1981).

84. *See* Wrobel v. State, 410 So. 2d 950, 951 (Fla. 5th Dist. Ct. App. 1982).

85. *See* FLA. STAT. § 90.608(1)(e).

86. *See* Davis v. Alaska, 415 U.S. 308; Howard v. State, 397 So. 2d 997, 998 (Fla. 4th Dist. Ct. App. 1981) (discussing the relationship between FLA. STAT. § 90.610 and evidence offered to show bias). FLA. STAT. § 90.608(1)(b).

statement if the witness denies a criminal record during the trial.[87]

VIII. CONCLUSION

Because of the likelihood that unfair prejudice will result when a conviction is improperly used to attack credibility, both the Florida and federal courts have required adherence to fairly precise guidelines when this impeachment technique is utilized. If counsel uses a conviction in an impermissible manner, the error that results is probably reversible. The most significant issue that has not been addressed by the Florida appellate courts involves whether, and when, the trial court should exercise its discretion in determining whether a particular conviction may not be used to impeach. As this and other unanswered issues are addressed, the Florida courts should remember that not only is it fair to use convictions to impeach a witness but that it is essential that the parties receive a fair trial.

87. *See* Scheel v. Metropolitan Dade County, 353 So. 2d 650, 651 (Fla. 3d Dist. Ct. App. 1977); FLA. STAT. § 90.608(1)(a).