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USING PRIOR CONVICTIONS TO IMPEACH THE CREDIBILITY OF A DEFENDANT-WITNESS IN MASSACHUSETTS – DO WE GO TOO FAR?

“A defendant’s earlier disregard for the law may suggest to the fact finder similar disregard for the courtroom oath.”¹

“While...the state has a legitimate interest to serve in showing that a defendant-witness is not worthy of belief, we cannot be unmindful of the tendency of a normal juror to accept testimony of prior convictions as a basis for finding a predisposition to commit the crime charged.”²

I. INTRODUCTION

In Massachusetts, attorneys may impeach a witness’ credibility with evidence of a prior conviction.³ During cross-examination, opposing

¹ Commonwealth v. Fano, 400 Mass. 296, 302-3, 508 N.E.2d 859, 863 (1987).

² Commonwealth v. Bigham, 452 Pa. 554, 556, 307 A.2d 255, 262 (1973).

³ See LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE § 6.9.2 (6th ed., 1994); Commonwealth v. Rivera, 425 Mass. 633, 682 N.E.2d 636 (1997) (holding defendant’s prior conviction admissible for limited purpose of impeaching defendant’s credibility); see also MASS. GEN. LAWS ANN. ch. 233, § 21, which reads in pertinent part:

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

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

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

counsel has the ability to tarnish the witness' testimony, by introducing prior convictions. In doing so, counsel presents the trier of fact with reasons to discredit the witness.⁴ Although impeachment is useful in the search for truth, using prior convictions may cause more harm than good. While courts do not recognize impeachment as substantive evidence that the defendant-witness is guilty of the crime charged, such evidence may be used to show that the defendant-witness is untrustworthy.⁵ Indeed many courts assert that in order to assign the proper weight to witness testimony, fact finders should be made aware of a witness' criminal background.⁶

Massachusetts General Laws 233 § 21 specifically authorize the use of prior convictions to impeach a defendant-witness' credibility.⁷ The Statute applies broadly allowing the courts to admit any felony or misdemeanor conviction that falls within the specified time restrictions.⁸ The

graph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section. *Id.*

⁴ For purposes of this publication the terms "trier of fact," "fact finder," and "jury" should be inferred to mean "trial jury."

⁵ See *Commonwealth v. Bassett*, 21 Mass. App. Ct. 713, 715, 490 N.E.2d 459, 461 (1986). The trial court allowed the jury to use the prior convictions to assist them in concluding that the defendant was guilty of the current crime. *Id.* Subsequently, the Appeals Court held that the trial judge's instructions to the jury were invalid because prior convictions may not be considered for the substantive purpose of establishing the propensity of the witness to commit the crime charged. *Id.*; see also *Commonwealth v. Roberts*, 378 Mass. 116, 126, 389 N.E.2d 989, 996 (1979) (holding witness' prior conviction can only be used for purpose of impeachment); David A. Sonenshein, *Circuit Roulette: The Use of Prior Convictions to Impeach Credibility in Civil Cases Under the Federal Rules of Evidence*, 57 GEO. WASH. L. REV. 279 (1988). A major reason for allowing prior convictions for impeachment is the belief that witnesses with a criminal history have more of a reason to lie under oath in order to hide their pasts than those witnesses who act within the social constraints of society. *Id.* But see *People v. Allen*, 429 Mich. 558, 579, 420 N.W.2d 499, 509 (1988) (quoting *West Virginia v. McAboy*, 160 W. Va. 497, 504, n.6, 236 S.E.2d 431, 435 n.6 (1977)) (limiting types of prior convictions used to impeach credibility of defendant-witness).

The ultimate paradox ... [i]t concerns a man so proud of his truthfulness that he challenges a person who called him a liar to a duel. He wins ... but is subsequently convicted of murder. Several years later, after release from prison, he is indicted on another crime. If he elects to testify, he knows that his propensity to lie will be evidenced by his prior conviction.

Id.

⁶ See Alan D. Hornstein, *Between a Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 56 (1997) (mentioning use prior convictions to impeach defendant-witness credibility).

⁷ See MASS. GEN. LAWS ANN. ch. 233, § 21.

⁸ See MASS. GEN. LAWS ANN. ch. 233, § 21. The statutes time restriction reads as

trial judge has sole discretion over whether to admit prior convictions; the decision is also subject to appellate review.⁹ In reaching a decision, a judge must balance “the danger of unfair prejudice,” against the probative value of the evidence for the purpose of impeachment.¹⁰ If the judge admits the prior conviction in violation of 233 § 21, it is considered a non-constitutional error, which results in a new trial.¹¹

When defendants testify, they assume the additional role of witness whose testimony forms integral part of the fact finder’s decision.¹² Thus, any impeachment evidence an attorney discusses while cross-examining the defendant-witness illustrates to the jury that the witness is not credible.¹³ Therefore, as a result of testifying, defendant-witnesses are subject to the possibility that the jury will improperly apply evidence of a prior conviction as proof of the defendant-witness’ propensity to commit the present crime charged.¹⁴ The likelihood that the jury will misuse evidence of prior convictions often prevents defendants from testifying on their on behalf.¹⁵

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

⁹ See *Commonwealth v. Maguire*, 392 Mass. 466, 470, 467 N.E.2d 112, 115 (1984) (deciding judges decision to admit prior convictions is subject to appellate review).

¹⁰ See *id.*

¹¹ See *Commonwealth v. Lavoie*, 47 Mass. App. Ct. 1, 5, 710 N.E.2d 1011, 1015 (1999). The reviewing court uses a non-prejudicial standard when reviewing a non-constitutional error. *Id.* An error is non-prejudicial only if the error did not influence the jury’s decision, or had only a slight effect. *Id.*

¹² See *Commonwealth v. Boyd*, 367 Mass. 169, 174, 326 N.E.2d 320, 324 (1975) (citing *Commonwealth v. Subilosky*, 352 Mass. 153, 167, 224 N.E.2d 197 (1967)) (stating criminal defendants are like other witnesses and may be impeached by proof of prior convictions).

¹³ See Hornstein, *supra* note 6.

¹⁴ See *Commonwealth v. Childs*, 23 Mass. App. Ct. 33, 38, 499 N.E.2d 299, 302 (1986) (acknowledging impeaching credibility with prior convictions subject to misconstruction by jury).

¹⁵ See *Commonwealth v. Chase*, 372 Mass. 736, 751, 363 N.E.2d 1105, 1115 (1977) (mentioning defendant did not testify due to likely adverse effect of prior conviction); see also *Spencer v. Texas*, 385 U.S. 554, 559 (1967). The defense counsel made the constitutional claim that the use of prior convictions in a criminal trial was so “egregiously unfair upon the issue of guilt or innocence as to offend the provisions of the Fourteenth Amendment that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’” *Spencer*, 385 U.S. at 559. The Court rejected this Constitutional claim. *Id.* at 564. The Court held that the possibility of some prejudice was not enough to deem the Texas statute unconstitutional. *Id.* *Commonwealth v. Diaz*, 383 Mass. 73, 417 N.E.2d 950

This note advocates for an alternative rule in Massachusetts regarding the impeachment of a defendant-witness with prior convictions. This note will begin by outlining the evolution of judicial discretion over admitting evidence of prior convictions and highlighting the steps Massachusetts has taken in attempting to ensure fairness. This note also discusses Massachusetts' failure in its efforts to bring fairness to the impeachment process, and suggests remedial steps that Massachusetts should apply. Finally, this note proposes that to increase the degree of fairness and reduce the potential for injustice in the impeachment process, Massachusetts should limit the types of prior convictions that are admissible to impeach a defendant-witness to crimes that involve dishonesty, false statements, or moral turpitude.¹⁶

Recently, in *Commonwealth v. Carter*,¹⁷ a defendant appealed his conviction to the Massachusetts Supreme Judicial Court (SJC), suggesting that the use of a prior conviction to impeach his credibility improperly influenced the jury.¹⁸ The defendant suggested that Massachusetts' courts limit the admissibility of prior convictions to only those crimes that reflect a defendant-witness' veracity, as opposed to admitting all types of prior convictions into evidence.¹⁹ The SJC ruled that it must follow the language of 233 § 21, and since that statute does not "make the distinction

(1981) (acknowledging state could constitutionally conclude past convictions have probative value in assessing credibility); *Commonwealth v. Sheeran*, 370 Mass. 82, 89, 345 N.E.2d 362, 367 (1976) (rejecting claim impeachment pursuant to statute violated constitutional requirement of due process); *Commonwealth v. Boyd*, 367 Mass. 169, 174, 326 N.E.2d 320, 324 (1975) (affirming past decisions and rejected claim of violation of due process); *Commonwealth v. DiMarzo*, 364 Mass. 669, 678, 308 N.E.2d 538, 544 (1974) (holding statute allowing use of prior convictions to impeach credibility does not breach constitutional rights). *But see* *People v. Allen*, 429 Mich. 558, 579, 420 N.W.2d 499, 506 n.10 (Mich. 1988). "Four justices in *Spencer* believed that the procedure in that case was unconstitutional, and a fifth justice...viewed the procedure as bad policy." *Id.* See generally Alan D. Hornstein, *Between a Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 3 (1997) (stating dilemmas faced by defendant-witnesses); Jane G. Bitz, *State v. Ray: All Theft Crimes now Admissible to Impeach Witness under ER 609*, 28 GONZ. L. REV. 141, 153 (1992/1993). "Hobson's choice: either refuse to testify and risk the effect of not presenting one's side of the story, or testify and risk the effect of inherent prejudice associated with prior conviction evidence." *Id.*

¹⁶ Compare MASS. LAWS ANN. ch. 233, § 21 (allowing all types of prior convictions to impeach credibility) with MICH. R. EVID. § 609; PA. R. EVID. § 609; W. VA. R. EVID. § 609 (allowing only certain types of prior convictions to impeach credibility).

¹⁷ 429 Mass. 266, 708 N.E.2d 943 (1999).

¹⁸ See *Carter*, 429 Mass. at 266, 708 N.E.2d at 943.

¹⁹ See *id.* at 266, 708 N.E.2d at 943.

that the defendant urges,” the SJC refused to alter its interpretation.²⁰

II. HISTORY

An attorney’s right to attack a witness’ credibility dates back to the early days of the Commonwealth.²¹ At one time, a person who had been previously convicted of a crime was thereafter considered incompetent by the court, and as a consequence was prohibited from testifying at any subsequent trials.²² Courts considered those convicted of previous crimes untrustworthy, and barred them from testifying in subsequent cases as additional punishment for their crimes.²³

Before long, courts in the Commonwealth began to modify common law and convictions no longer rendered witnesses incompetent. However, the courts did allow attorneys to use prior convictions to attack the witness’ credibility.²⁴ All felons were permitted to testify, but were always burdened with the likelihood that their prior convictions would discredit their testimony.²⁵

²⁰ *Id.* at 269, 708 N.E.2d at 945.

²¹ See *Commonwealth v. Quigley*, 170 Mass. 14, 48 N.E. 782, 783 (1897). Pub. St. ch. 169, § 19, provided: “The conviction of a witness of a crime may be shown, to affect his credibility.” *Id.* See also *Commonwealth v. Sullivan*, 150 Mass. 315, 316, 23 N.E. 47, 48 (1889) (holding record of conviction of crime was admissible to destroy defendant’s credibility); *Commonwealth v. Ford*, 146 Mass. 131, 15 N.E. 153 (1888) (ruling defendant could be impeached with his previous convictions); Tarleton David Williams, Jr. *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence to Put on the New Man and Forgive the Felon*, 65 TEMP. L. REV. 893, 894 (1992) (discussing competency of witness to testify over time in federal court).

²² See *Commonwealth v. Gorham*, 1868 WL 5430, at *1 (Mass. Super. March, 1868) (highlighting at one time common law caused witnesses convicted of infamous crimes to be incompetent); see also CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 43, at 93 (Edward W. Cleary ed., 3d ed. 1984) (discussing competency of witness convicted of felon at common law).

²³ See MCCORMICK, *supra* note 22, § 43, at 93 and accompanying text; Hossein Nowbar, *Admissibility of Prior Theft Convictions to Impeach Criminal Defendants in Washington State*, 68 WASH. L. REV. 161, 163 (1993) (discussing courts rationale for deeming persons with convictions as incompetent).

²⁴ See *Gorham*, 1868 WL 5430, at *1. “The technical rule [was] done away with; but evidence of moral guilt may be introduced.” *Id.* at *1. See also *Commonwealth v. Bonner*, 1867 WL 5650, at *1 (Mass. Super. November, 1867) (holding conviction of any crime may be shown to affect witness’ credibility).

²⁵ See Nowbar, *supra* note 23, at 894. “But as justice progressed, the incompetence rules preventing felons from testifying were replaced with rules allowing them to testify at the risk of being impeached by evidence regarding their prior convictions.” *Id.*

According to early Massachusetts law, parties had a right to impeach a witness,²⁶ however, the trial judge had no discretion over determining the admissibility of the evidence.²⁷ Thus, under *Commonwealth v. West*,²⁸ judges were unable to combat the unfair prejudice defendant-witnesses suffered when their testimony was impeached with a prior criminal conviction.²⁹ In fact, the SJC provided the cross-examiner with the sole authority to decide on the admissibility of the defendant-witness' prior conviction.³⁰ Judges were only authorized to offer a limiting instruction to protect defendant-witnesses from the possible prejudicial effects of their prior convictions.³¹

Judges provide limiting instructions to the jury when the evidence presented may be considered for one purpose and not for another. For instance, judges must notify juries that they may only use evidence of prior

²⁶ See *Commonwealth v. DiMarzo*, 364 Mass. 669, 678, 308 N.E.2d 538, 544 (1973) (holding statute specifying authorizes use of prior convictions).

²⁷ See *Commonwealth v. West*, 357 Mass. 245, 249, 258 N.E.2d 22, 24 (1970) (finding language of statute did not grant judges any power to rule on admissibility of prior convictions). Under MASS. GEN. LAWS ch. 233, § 21 the word "may" did not grant the trial judge discretion to admit or reject evidence of a witness' prior conviction. *Id.*

²⁸ 357 Mass. 245, 258 N.E.2d 22 (1970).

²⁹ See *West*, 357 Mass. at 249, 258 N.E.2d at 24. The judge cannot exclude the prior conviction, even when the evidence is highly prejudicial and has little or no probative value. *Id.* See also *Commonwealth v. DiMarzo*, 364 Mass. 669, 682, 308 N.E.2d 538, 547 (1973) (Hennessey, J., concurring) (opining defendant is deprived of fair trial when proceedings give rise to probability of prejudice).

³⁰ See *West*, 357 Mass. at 249, 258 N.E.2d at 24. The court followed the decision given by the Supreme Court of New Jersey in *New Jersey v. Hawthorne* which held the option to introduce prior convictions belonged to the parties and when the parties decided to present such evidence the court must allow it. See *New Jersey v. Hawthorne*, 49 N.J. 130, 135, 228 A.2d 682, 684 (1967).

³¹ See *Commonwealth v. DiMarzo*, 364 Mass. 669, 682, 308 N.E.2d 538, 547 (1973) (Hennessey, J. concurring). Since the Commonwealth, at this time, had not overruled *West*, the only defense to prejudice caused by the introduction of the prior convictions was a careful limiting instruction given by the trial judge. *Id.*; see also, e.g., *Commonwealth v. Chase*, 372 Mass. 736, 750, 363 N.E.2d 1105, 1114 (1977) (discussing defendant's only mode to combat prejudice suffered from impeachment was to pray to judges for careful limiting instructions); *Commonwealth v. Boyd*, 367 Mass. 169, 174, 326 N.E.2d 320, 324 (1975) (ruling defendant can request careful limiting instructions from judge); *Commonwealth v. Bumpus*, 362 Mass. 672, 683, 290 N.E.2d 167, 176 (1972) (instructing jury that they are ultimate arbitrators of credibility). But see *People v. Allen*, 429 Mich. 558, 573, 420 N.W.2d 499, 507 (1988). The judge usually gives the jury limiting instructions when more than one fact may be derived from the evidence admitted. *Id.* "Where the factors are so inextricably linked, we do not believe a jury can be reasonably expected to follow the instruction." *Id.* Accordingly, even many experts have the same trouble when looking at such evidence. *Id.*

convictions to assess the witness' credibility, and not to make the ultimate determination of guilt.³² Notwithstanding limiting instructions, defendant-witnesses in Massachusetts still suffer as a result of prejudice.³³ Since, *inter alia*, 233 § 21 allows all convictions within five years to come in as evidence, it is impossible to quantify how much weight the jury gives the impeachment evidence.

In a subsequent case, *Commonwealth v. Chase*,³⁴ the defendant was convicted of first-degree murder.³⁵ He had been convicted of murder in a prior case; therefore, he opted not take the stand for fear of impeachment.³⁶ On appeal, the SJC recognized that since both the previous conviction and the present crime charged were similar, there was a "lingering" sense of prejudice.³⁷ Nevertheless, the SJC affirmed the conviction because the defendant failed to object to the relevant statute at the trial level.³⁸ Although the statute did not expressly grant the judge discretion, the SJC realized the possibility of prejudice and gave trial judges the "right to avoid any question of unfairness by excluding such evidence in a situation where the likely prejudice to the defendant is most intense."³⁹ Thus, the SJC granted judges the authority to exclude otherwise admissible convictions on grounds of unfair prejudice.⁴⁰ Despite the fact that the exercise of this right was not put in terms of reviewable discretion, judges could ex-

³² See *Chase*, 372 Mass. at 750, 363 N.E.2d at 1114 (instructing jury they must only apply evidence to witness' credibility).

³³ See *id.* (noting in particular instances defendant may still be treated unfairly).

³⁴ 372 Mass. 736, 363 N.E.2d 1105 (1977).

³⁵ *Id.* at 736, 363 N.E.2d at 1105.

³⁶ *Id.* at 749, 363 N.E.2d at 1114.

³⁷ *Id.* at 750, 363 N.E.2d at 1115. The court acknowledges that a prior conviction of a similar crime causes greater prejudice to the defendant than a prior conviction of a crime substantially different from the crime the defendant is charged with. *Id.*; see also *Commonwealth v. Drumgold*, 423 Mass. 230, 668 N.E.2d 300 (1996) (stating defendant was not prejudiced because his previous crimes were not similar to his current crime); *Commonwealth v. Weaver* 400 Mass. 612, 511 N.E.2d 545 (Mass. 1987) (ruling prior convictions were dissimilar from present crime). *But see Commonwealth v. Leno*, 374 Mass. 716, 718, 374 N.E.2d 572, 573 (1978) (allowing defendant to be impeached with prior convictions that are related to crime presently charged). See generally *DiMarzo*, 364 Mass. 669, 681, 308 N.E.2d 538, 546 (1974) (Hennessey, J., concurring). "It is firmly and wisely established in our law that no defendant should be convicted of a crime by proof of his reputation or propensity to commit similar crimes." *Id.*

³⁸ See *Chase*, 372 Mass. at 750, 363 N.E.2d at 1115.

³⁹ *Id.*

⁴⁰ See *id.*; see also *Commonwealth v. Tabor*, 376 Mass. 811, 824, 384 N.E.2d 190, 199 (1978).

clude convictions to avoid any possibility of unfairness.⁴¹

Ultimately, in *Commonwealth v. Maguire*,⁴² the SJC made judicial exercise of discretion over the admissibility of prior convictions subject to appellate review.⁴³ The defendant in *Maguire* claimed the judge abused his discretion when he allowed the defendant's prior conviction into evidence for the purpose of impeachment.⁴⁴ Although the SJC agreed with the defendant, it did not find error in the admission of his prior conviction and affirmed the conviction.⁴⁵

Appellate review allows the courts to address the admission of prior convictions and assures uniform treatment of all defendants.⁴⁶ On appeal, the court will balance the unfair prejudice in admitting the prior conviction against its probative value.⁴⁷ This balancing test determines whether a judge abused his discretion when admitting a prior conviction into evidence.⁴⁸

III. COMMONWEALTH v. CARTER

In *Commonwealth v. Carter*,⁴⁹ the defendant challenged the admissibility of his prior conviction.⁵⁰ The defendant was convicted of premeditated murder in the first degree and four counts of armed assault with intent to murder.⁵¹ The trial judge refused to allow the government to impeach the defendant-witness with his prior conviction of murder.⁵² The

⁴¹ See *id.*; see also *Commonwealth v. Diaz*, 383 Mass. 73, 80, 417 N.E.2d 950, 955 (1981); *Commonwealth v. Knight*, 392 Mass. 192, 194-95, 465 N.E.2d 771, 773-74 (1984) (holding modern day courts now understand judges have discretion).

⁴² 392 Mass. 466, 467 N.E.2d 112 (1984).

⁴³ See *id.* at 469-70, 467 N.E.2d at 115. The court in *Knight* acknowledged that judges now have discretion. *Id.* By doing so, the court overruled *West* and gave the "word 'may' its normal meaning, that is, the admission of evidence of a prior conviction is subject to the exercise of reviewable discretion by the trial judge." *Id.*

⁴⁴ See *id.* at 469-70, 467 N.E.2d at 115. Defendant was previously convicted of "open and gross lewdness and lascivious behavior." *Id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *Maguire*, at 342 Mass. at 470, 467 N.E.2d at 115.

⁴⁹ 429 Mass. 266, 708 N.E.2d 943 (1999).

⁵⁰ *Id.* at 268, 708 N.E.2d at 945 (permitting use of defendant's narcotics conviction for impeachment purposes).

⁵¹ *Id.* at 266, 708 N.E.2d at 943.

⁵² *Id.* at 269, 708 N.E.2d at 945.

judge, however, did allow the prosecution to impeach the defendant using a prior conviction for possession of a controlled substance with intent to distribute in a school zone.⁵³ The defendant appealed the conviction and asked the court to limit the types of convictions used to impeach the credibility of a defendant-witness.⁵⁴ The defendant argued that since the prior conviction did not involve a crime of fraud or deceit, it should not of been admitted.⁵⁵ The SJC refused to change its position on the issue of impeachment and thus, affirmed the conviction.⁵⁶

IV. ANALYSIS

A. Other Jurisdictions

When challenging the breadth of the Massachusetts statute, practitioners should look to other states such as Michigan, Pennsylvania and West Virginia for support. Those jurisdictions limit impeachment *via* prior convictions to crimes solely involving dishonesty and false statements.

1. Michigan

In *People v. Allen*,⁵⁷ the Supreme Court of Michigan addressed its position on the rule that allows the impeachment of a defendant-witness with prior convictions.⁵⁸ In *Allen*, the court heard five consolidated ap-

⁵³ *Id.*

⁵⁴ *Carter*, 429 Mass. at 267, 708 N.E.2d at 944. The defendant wanted the court to limit the admissibility of evidence of a defendant's prior conviction to crimes involving dishonesty, false statements, or moral turpitude. *Id.*

⁵⁵ *See id.*

⁵⁶ *See id.* (ruling defendant's argument would abandon position court has taken after careful reflection).

⁵⁷ 429 Mich. 558, 420 N.W.2d 499 (1988).

⁵⁸ *Id.* at 429 Mich. 564, 420 N.W.2d at 503. In adopting the revised Michigan Rules of Evidence, the Michigan Supreme Court, consistent with prior case law, stated that crimes having an element of dishonesty or false statement are directly probative of a witness' truthfulness and can be understood as reflecting upon veracity by jurors without the mediation of their deciding that the defendant has a bad general character. *Id.* at 593-94, 420 N.W.2d at 516. "Such convictions are of high probative value and possess little likelihood of prejudice ... no crimes, other than those including elements of false statement or dishonesty are directly probative of veracity." *Id.* at 594-95, 420 N.W.2d at 516-517. *See*

peals on the issue of impeaching defendant-witnesses with prior criminal convictions.⁵⁹ That court concluded due to the prejudicial effects prior convictions has on defendant-witness, Michigan would narrow the scope of those crimes admitted into evidence. As a result, current Michigan law limits the admissibility of prior convictions to crimes involving dishonesty, false statements, or those which contain elements of theft.⁶⁰

It was not until the passage of 1861 P.A. 125 that a criminal defendant in Michigan could make a statement at his own trial.⁶¹ As time progressed, Michigan courts expanded the rules to allow a criminal defendant to testify on his own behalf.⁶² Thereafter, Michigan passed legislation allowing counsel to impeach the credibility of defendant-witnesses.⁶³ Over ninety years passed before the court in *People v. Jackson* acknowledged that jurors unfairly use evidence of prior convictions as evidence that the defendant committed the crime charged.⁶⁴ In *Jackson*, the court concluded that judges must have discretion over the admissibility of prior convictions used to impeach a defendant-witness' creditability.⁶⁵ The ruling in *Jackson* was subsequently codified, becoming part of the Michigan

also Tarleton David Williams, Jr., *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence to Put on the New Man and Forgive the Felon*, 65 TEMP. L. REV. 893, 916 (1992) (discussing different views of impeachment in different jurisdictions).

⁵⁹ See *Allen*, 429 Mich. at 564, 420 N.W.2d at 503

⁶⁰ See MICH. R. EVID. 609, which reads in pertinent part,

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

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

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

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

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

⁶¹ See *Allen*, 429 Mich. at 586, 420 N.W.2d at 513.

⁶² *Id.* at 597, 420 N.W.2d at 513.

⁶³ *Id.*

⁶⁴ *Allen*, 429 Mich. at 587-88, 420 N.W.2d at 513-14.

⁶⁵ See *id.*

Code of Evidence.⁶⁶ The Michigan Supreme Court asserts that crimes of dishonesty or false statement should be used for impeachment since they are directly probative of a witness' truthfulness.⁶⁷ Moreover, those crimes are less likely to be unduly prejudicial.⁶⁸ Michigan follows a "bright-line" rule that does not allow prior convictions for non-theft crimes that do not contain elements of dishonesty or false statements into evidence.⁶⁹

2. Pennsylvania

The defendant in *Commonwealth v. Bigham*⁷⁰ did not testify on his own behalf because he did not want to be impeached by evidence of his prior convictions.⁷¹ Although the court rejected the defendant's claim that the impeachment process violated his right to due process, it considered the issue of unfair prejudice.⁷² Prior to *Bigham*, Pennsylvania common law allowed a fact finder to consider certain felony or misdemeanor convictions as determinative of a witness' credibility.⁷³ Notwithstanding the years of precedent, the court was no longer comfortable relying on the jury instructions to ensure the proper use of the evidence, and it therefore, lim-

⁶⁶ *Id.* at 589, 420 N.W.2d at 514. According to *Jackson* and subsequent case law, the factors which the judge must weigh in making his determination include:

- (1) the nature of the prior offense.
- (2) whether it is for substantially the same conduct for which the defendant is on trial, and
- (3) the effect on the decisional process if the accused does not testify out of fear of impeachment by prior convictions.

See Allen, 429 Mich. at 589-90, 420 N.W.2d at 514.

⁶⁷ *See id.* at 593, 420 N.W.2d at 516 (applying strict rule in regard to impeaching credibility of defendant-witnesses).

⁶⁸ *See id.* Due to the ineffectiveness of jury instructions, it is less likely that a defendant-witness will suffer overwhelming prejudice when a crime of veracity is admitted. *Id.*

⁶⁹ *See id.* at 595, 420 N.W.2d at 517. "The bright-line rules will facilitate trial court determinations and greatly reduce the number of appeals." *Id.* at 597, 420 N.W.2d at 518. Rather than accept a per se rule of admissibility for *crimen falsi* convictions, the trial judges must now consider 1) the nature of the prior crimes and their proximity in time to the present case; 2) the depth of the defendant's criminal history; 3) the defendant's age and personal history at the time of the prior crime; 4) the need for the defendant's testimony versus the need to impeach the defendant with prior convictions; and 5) whether the defendant has other means to defend himself. *See Williams, supra* note 58, at 917.

⁷⁰ 452 Pa. 554, 307 A.2d 255 (1973).

⁷¹ *Id.* at 563, 307 A.2d at 260.

⁷² *Id.*

⁷³ *See Id.*; *see also Williams, supra* note 58, at 917.

ited the types of crimes that could be used to impeach witnesses.⁷⁴ The court suggested that it was more important for the jury to search for the truth in a particular case than to be made aware of a prior conviction that lacked any probative value.⁷⁵ Once admitted, the prior conviction often destroyed the defendant's case as opposed to solely discrediting his testimony.⁷⁶ The Supreme Court of Pennsylvania stated that "the avowed purpose of using prior convictions...is to cast doubt upon the defendant's veracity...[for] it is important to limit the convictions so used to crimes involving dishonesty or false statement."⁷⁷

In *Commonwealth v. Roots*,⁷⁸ the Court refined its holding in *Bighum*.⁷⁹ By asserting that an individual on trial is entitled to an objective, dispassionate and impartial trier of fact, the Court further reduced the possibility of unfair prejudice that a defendant-witness may suffer during the impeachment process.⁸⁰ The Court reemphasized the jury instructions' ineffectiveness to ensure proper application of evidence of a prior conviction in light of a jury's natural tendency to use the convictions as evidence of the defendant's propensity to commit the crime charged.⁸¹

Later, in *Commonwealth v. Randall*,⁸² the Court again modified the rule allowing impeachment by evidence of a prior conviction.⁸³ The Court adopted a "bright-line" test that makes a prior conviction of crimes involving dishonesty or false statements *per se* admissible.⁸⁴ The refined

⁷⁴ See *Bighum*, 452 Pa. at 565-66, 307 A.2d at 262. The court recognized that juries had a tendency to use testimony of prior convictions in order to conclude a predisposition to commit the crime charged. *Id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ *Id.*

⁷⁸ 482 Pa. 33, 393 A.2d 364 (1978).

⁷⁹ See *Roots*, 482 Pa. at 37, 393 A.2d at 365-66.

⁸⁰ *Id.*

⁸¹ See *id.*

⁸² 515 Pa. 410, 528 A.2d 1326 (1987).

⁸³ *Id.* at 415, 528 A.2d at 1329 (revising its holding in *Bighum* and *Roots*).

⁸⁴ See PA. R. EVID. 609, which reads in pertinent part:

(a) General Rule

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

(b) Time Limit

version of the Pennsylvania rule continues to exclude non-dishonesty felony convictions; providing only for the *per se* admissibility of crimes determined to be “uniquely probative of a witness’ veracity.”⁸⁵

3. West Virginia

West Virginia limits the type of prior convictions that can be used to impeach the credibility of a witness.⁸⁶ In *West Virginia v. McAboy*,⁸⁷ the court ruled that only prior convictions of perjury or false swearing are appropriate to impeach the credibility of defendant-witnesses.⁸⁸ According

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

⁸⁵ See Williams, *supra* note 58, at 920.

⁸⁶ See W. VA. R. EVID. 609, which reads in pertinent part,

(a) General Rule

- (1) Criminal Defendants: For the purpose of attacking the credibility of a witness accused in a criminal case, evidence that the accused has been convicted of a crime shall be admitted but only if the crime involved perjury or false swearing.

Id.; see also *West Virginia v. Clements*, 175 W. Va. 463, 472, 334 S.E.2d 600, 608 (1985). Rule 609(a)(1) codified the holding in *McAboy* then the holding was clarified in *Clements*. *Id.*

In the trial of a criminal case, a defendant who elects to testify may have his credibility impeached by showing prior convictions of perjury or false swearing and criminal convictions of making false statements with intent to deceive, but it is impermissible to impeach his credibility through any other prior convictions.

See *Clements*, 175 W. Va. at 471- 72, 175 S.E.2d at 608.

⁸⁷ 160 W. Va. 497, 236 S.E.2d 431 (1977).

⁸⁸ *Id.* at 508, 236 S.E.2d at 437 (opining that impeachment through evidence of prior conviction is remnant from our barbaric past). The court stated that its general rule prohibiting the use of evidence of prior criminal convictions to impeach the defendants credibility has two exceptions. First, if the defendant elects to place his good character in issue, evidence of prior convictions could then be introduced to refute the defendants affirmations

to the court, these crimes go directly to the defendant's credibility, as opposed to other crimes that do not cast doubt on his veracity.⁸⁹ Thus, the probative value of the defendant's prior conviction of such crimes outweighs any of the possible prejudicial effects he could suffer from their introduction into evidence.⁹⁰

Originally, courts in West Virginia were vehemently against any rules that allowed prior convictions to impeach a defendant-witness' credibility.⁹¹ However, in *State v. Friedman*,⁹² the court abandoned that evidentiary principle.⁹³ Subsequently, in *State v. McGee*,⁹⁴ the court placed a significant restriction on the use of prior convictions for impeachment.⁹⁵ In *McGee*, the court established a rule that required the trial court to consider the probative value of the prior conviction measured against the risk of undue prejudice that may occur as a result of the introduction of such evidence.⁹⁶ Finally, in *McAboy* the court abandoned the holding in *Friedman*, reverting the law regarding admissibility of prior convictions to its status pre-*Friedman*.⁹⁷ The *McAboy* court stated that

And second, the defendant may be impeached with evidence of prior convictions of perjury or false swearing. *Id.* at 507, 236 S.E.2d 437.

⁸⁹ *See id.* at 498, 508, 236 S.E.2d at 432, 437.

⁹⁰ *See id.*

⁹¹ *See id.* at 498, 236 S.E.2d at 432 (citing to prior cases which ruled prior convictions could not impeach defendant's creditability). In *State v. Webb*, the court stated that,

Many persons have been convicted of crimes and misdemeanors ... We can see no reason why such convictions would affect the credibility or veracity of such a person who is being tried for a subsequent and wholly unconnected offense ... [E]vidence that [the] defendant had previously served a term ... was prejudicial to him, and was influential in the finding of the verdict

See State v. Webb, 99 W. Va. 225, 230, 128 S.E. 97, 99 (1925).

⁹² 124 W. Va. 4, 18 S.E.2d 653 (1942).

⁹³ *See id.* at 4, 18 S.E.2d at 655-56 (indicating new interpretation of rule brought West Virginia in line with better view). However, the court abandoned this principle based on a misconception of the language of the revised West Virginia Code. *See McAboy*, 160 W. Va. at 499, 236 S.E.2d at 432-33. "It is apparent that the revision to W. Va. Code, 57-3-6 was to clarify the waiver problem and was not intended to change the law with regard to the use of prior convictions for impeachment of defendant's credibility." *Id.* at 501, 236 S.E.2d at 434.

⁹⁴ 160 W. Va. 1, 230 S.E.2d 832 (1976).

⁹⁵ *See id.* at 8-9, 230 S.E.2d at 837.

⁹⁶ *See id.* The court also stated that the trial judge was also required to instruct the jury regarding the limited purpose that they may use the evidence. *Id.*

⁹⁷ *See McAboy*, 160 W. Va. at 506, 236 S.E.2d at 436 (stating prior rulings were wrong).

“there are unquestionable prejudicial consequences flowing from the practice of allowing prior conviction impeachment.”⁹⁸ Therefore, the court reimposed its general policy which prohibited counsel from impeaching a defendant-witness with his prior convictions.⁹⁹ The court set narrow exceptions to the general rule. The primary exception allows prior convictions of perjury and false swearing as evidence to impeach the credibility of a defendant-witness during cross-examination.¹⁰⁰ Although the court has since refined the holding of *McAboy*, West Virginia courts still disallow prior convictions to impeach a defendant-witness unless the convictions have elements of veracity.¹⁰¹

B. Need for Statutory Reform in Massachusetts

Admitting prior convictions during the testimony of a defendant-witness is a double-edged sword. On one hand, if the prior conviction is admissible and the crime is relevant to the witness' propensity to testify truthfully, the prior conviction may help the jury in their quest to find the truth.¹⁰² On the other hand, if the prior conviction does not reveal the likelihood that a defendant-witness would be untruthful, it may unfairly paint a distorted picture of the defendant and destroy the defendant's case.¹⁰³ In some cases, a witness' credibility may be a decisive issue, and to unjustly tarnish this credibility may leave the defendant with an unjust verdict.¹⁰⁴ As a result, many defendants refuse to tell the fact finder their story in order to keep a prior conviction out of evidence.¹⁰⁵ Permitting all

⁹⁸ *Id.* at 504, 236 S.E.2d at 435.

⁹⁹ *See id.* at 507-8, 236 S.E.2d at 437.

¹⁰⁰ *See id.*

¹⁰¹ *See Clements*, 175 W. Va. 463, 471-72, 334 S.E.2d 600, 609 (amending its earlier holding). Here, the court merely clarified its holding in *McAboy*. *Id.* The court added the criminal convictions of making false statements with intent to deceive as additional convictions that may be introduced to impeach the credibility of witness that chooses to testify. *Id.*

¹⁰² *See Hornstein*, *supra* note 6 (discussing relevant prior convictions). *But see Commonwealth v. Kowalski*, 33 Mass. App. Ct. 49, 595 N.E.2d 798 (1992) (stating evidence of two prior convictions was admissible even though it did not reflect truth telling abilities).

¹⁰³ *See Commonwealth v. Young*, 22 Mass. App. Ct. 237, 241, 493 N.E.2d 213, 216 (1986). “[V]iolent crimes [are] always subject to possible misconstruction by a jury, who might improperly consider the impeachment as substantive evidence of guilt, not withstanding a limiting instruction.” *Id.*

¹⁰⁴ *See Hornstein*, *supra* note 6, at 8.

¹⁰⁵ *See Commonwealth v. Chase*, 372 Mass. 736, 749, 363 N.E.2d 1105, 1114 (1977)

types of prior convictions to impeach the witness' credibility undoubtedly puts the defendant at a disadvantage. Even with a judge's limiting instruction, jurors often mistakenly consider prior convictions as substantive evidence and, as a result, erroneously convict defendants.¹⁰⁶

Massachusetts should limit the types of prior convictions that can be introduced in court and thereby eliminate the admissibility of irrelevant prior convictions that the jury often misuses. For example, a rape or assault conviction may have nothing to do with a witness' ability to tell the truth, yet a conviction of theft, fraud or perjury will bear directly on the question of his truthfulness.¹⁰⁷ The probative value of crimes of dishonesty or false statement clearly outweighs the prejudice suffered by a defendant-witness.

If the judicial system relies on jurors to limit the purpose of the evidence they hear, it erroneously assumes that jurors understand technical

(mentioning defendant did not testify due to likely adverse effect of prior conviction); see also Bitz, *supra* note 15.

¹⁰⁶ See, e.g., *Commonwealth v. Lavoie*, 47 Mass. App. Ct. 1, 5, 710 N.E.2d 1011, 1015 (1999) (stating introduction of prior convictions only for impeachment is subject to misconstruction by jury); *Commonwealth v. Young*, 22 Mass. App. Ct. 237, 241, 493 N.E.2d 213, 216 (1986) (stating use of prior conviction of violent crime to impeach defendant's credibility is subject to misconstruction by jury); *Commonwealth v. Childs*, 23 Mass. App. Ct. 33, 38, 499 N.E.2d 299, 302 (1986) (concluding evidence of prior conviction not involving defendant's truthfulness could have prejudicial effects); see also *Commonwealth v. DiMarzo*, 364 Mass. 669, 681, 308 N.E.2d 538, 546 (1974) (Hennessey, J., concurring) (stating court should be skeptical of effectiveness of limiting instructions); *People v. Allen*, 429 Mich. 558, 575, 420 N.W.2d 499, 508 (1988). The court cites to studies done which undermine the belief that juries understand and properly apply the evidence according to the limiting instructions given by the judge. *Id.* One study states, "[t]he likelihood that a jury will convict the defendant is significantly higher if the defendant's record is made known to the jury...[t]hese effects are present in spite of the fact that jurors were given specific instructions." *Id.* Another study discusses the "halo" effect. *Id.* This is the "phenomenon by which a person will infer...negative characteristics about someone where unfavorable information has been received. *Id.* Finally, another study alerts the court that juries are unable or unwilling to understand the instructions given to them. *Id.* Moreover, the jurors "almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial." *Id.* But see *Commonwealth v. Todd*, 394 Mass. 791, 795-96, 477 N.E.2d 999, 1003 (1985) (upholding limiting instructions); *Commonwealth v. Leno*, 374 Mass. 716, 719, 374 N.E.2d 572, 574 (1978) (court believes in effectiveness of jury instructions).

¹⁰⁷ See *Commonwealth v. Sheeran*, 370 Mass. 82, 89, 345 N.E.2d 362, 367 (1976) (quoting *People v. Sandoval*, 34 N.Y.2d 371, 377, 357 N.Y.S.2d 849, 855 (1974)). "Commission of that crime significantly revealed a willingness...to place the advancement of his individual self-interest ahead...of society...proof thereof...may suggest his readiness to so again on the stand. *Id.* "A demonstrated determination deliberately to further self-interest at the expense of society...goes to the heart of honesty and integrity." *Id.*

aspects of the law, which even attorneys often misapply.¹⁰⁸ Therefore, when judges must decide whether to admit prior convictions to impeach the testimony of a witness, they should only be authorized to admit past convictions that deal with crimes of veracity.¹⁰⁹

V. CONCLUSION

In light of the SJC's recent decision in *Carter*, Massachusetts should reevaluate 233 § 21. Although the SJC has refused to change the rule, the court has recognized that other states have strict rules with regard to impeaching a defendant-witness. The Massachusetts statute's validity has evolved over time due not only to changes in legislation, but also to a reinterpretation by the tribunal. Therefore, if either branch of government were to move one step further, like Michigan, Pennsylvania, and West Virginia, Massachusetts would also be able to ensure absolute fairness and justice.

If witnesses have a strong propensity to fabricate their testimony, the trier of fact should be made so aware. Supplying the jury with proof that the witness has been deceitful or dishonest in the past is the best way of advising the jury of his propensity to lie. Forcing judges to exclude crimes that do not furnish the jury with relevant information affords defendants opportunities for justice without having their prior convictions predispose them to improper characterizations.

When a previously convicted individual has allegedly committed another illegal act, people automatically presume guilt. Although this is a natural reaction, courts must attempt to safeguard defendants' rights against potential unfair prejudice. Eliminating the entire impeachment process would be too extreme. However, limiting the admissibility of prior convictions to include only those crimes that are relevant to a wit-

¹⁰⁸ See *People v. Allen*, 429 Mich. 558, 420 N.W.2d 499 (1988); see also *Commonwealth v. DiMarzo*, 364 Mass. 669, 681, 308 N.E.2d 538, 546 (1974) (Hennessey, J., concurring). Judge Learned Hand stated it is not only beyond the power of the jury to perform this "mental gymnastic" but it is also beyond anybody else's power. *Id.* at 681, 308 N.E.2d at 546 (quoting *Nash v. United States*, 54 F.2d 1006, 1007 (2nd Cir. 1932)).

¹⁰⁹ See *Commonwealth v. Carter*, 429 Mass. 266, 268, 708 N.E.2d 943, 945 (1999) (rejecting defendant's plea to limit types of prior convictions allowed to impeach credibility). *But see* *Commonwealth v. Kowalski* 33 Mass. App. Ct. 49, 595 N.E.2d 798 (1992) (prior convictions which did not reflect on defendant's truth-telling abilities could be used to impeach). See generally Tarleton David Williams, Jr., *Witness Impeachment by Evidence of Prior Felony Convictions: The Time Has Come for the Federal Rules of Evidence to Put on the New Man and Forgive the Felon*, 65 TEMP. L. REV. 893, 894 (1992) (discussing problems using non-dishonesty prior convictions as method of impeachment).

ness' regard for honesty appropriately resolves the problem. By implementing such a limitation, juries are prevented from misusing earlier convictions of crimes which do not bear on the witnesses' capacity for truthfulness. Courts must therefore only admit evidence of convictions that will give fact finders' reasons to question the truthfulness of the defendant-witness' testimony.

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