

IMPEACHMENT BY PRIOR CONVICTION OF A CRIME

I. IMPEACHMENT OF DEFENDANT

You have heard evidence that the defendant was previously convicted of a crime. You may consider that information only for the purpose of helping you to decide whether or not to believe his (her) present testimony and how much weight, if any, to give it. You may not draw any inference of guilt against the defendant because of his (her) prior conviction.

The fact that the defendant was once found guilty of another crime does not mean that he (she) is guilty of this charge, and you must not consider that prior conviction to be any indication of guilt on this charge. You may consider the defendant's prior conviction solely to help you to determine whether or not he (she) is a truthful witness.

G.L. c. 233, § 21. The defendant waives the right to such a limiting instruction by not requesting it or objecting to its omission. *Commonwealth v. Whitehead*, 379 Mass. 640, 661, 400 N.E.2d 821, 836 (1980); *Commonwealth v. Cook*, 351 Mass. 231, 237, 218 N.E.2d 393, 397, cert. denied, 385 U.S. 981 (1966).

II. IMPEACHMENT OF NON-DEFENDANT WITNESS

You have heard evidence that (this) (a) witness was previously convicted of a crime. You may consider that information, along with any

other pertinent information, in deciding whether or not to believe (this) (the) witness's present testimony and how much weight, if any, to give it.

SUPPLEMENTAL INSTRUCTION

Crimes involving dishonesty.

It is for you to say how much weight you should give a prior conviction in determining the (defendant's) (witness's) credibility. You might want to consider whether past crimes involving dishonesty are more relevant than past crimes that did not involve dishonesty, but it is up to you to decide how relevant you think any particular past conviction is to the (defendant's) (witness's) present truthfulness.

Commonwealth v. Cefalo, 381 Mass. 319, 335, 409 N.E.2d 719, 729-730 (1980); *Commonwealth v. Bumpus*, 362 Mass. 672, 682-683, 290 N.E.2d 167, 176 (1972), vacated and remanded, 411 U.S. 945 (1973), aff'd on rehearing, 365 Mass. 66, 309 N.E.2d 491 (1974), denial of habeas corpus aff'd sub nom. *Bumpus v. Gunter*, 635 F.2d 907 (1st Cir. 1980), cert. denied, 450 U.S. 1003 (1981).

NOTES:

1. **Generally.** "The idea underlying G.L. c. 233, § 21, is that a conviction of a prior crime is a valid measure of the truthfulness of a witness, i.e., willingness to violate law translates to willingness to give false testimony, and it is solely for that purpose that the evidence of a prior conviction is received. That jurors, properly instructed, use a prior conviction only for that limited purpose may not be our most plausible legal fiction, but we adhere to it — not least because application of the statute so requires" (citations omitted). *Commonwealth v. Chartier*, 43 Mass. App. Ct. 758, 762-763, 686 N.E.2d 1055, 1058 (1997).

2. **Applicable statutes.** General Laws c. 233, § 21 limits the adult convictions which may be admitted

to impeach credibility. General Laws c. 119, § 60 provides that juvenile delinquency findings based on violations of statutes (but *not* those based on violations of municipal ordinances or by-laws) “may be used for impeachment purposes in subsequent delinquency or criminal proceedings in the same manner and to the same extent as prior criminal convictions.” General Laws c. 276, §§ 100A-100C and G.L. c. 94C, § 34 restrict the use of sealed convictions, subject to the constitutional right to show bias. *Commonwealth v. Santos*, 376 Mass. 920, 925-926, 384 N.E.2d 1202, 1204-1206 (1978).

3. **Judge’s discretion to exclude impeachment by prior conviction.** Although it is not apparent on the face of G.L. c. 233, § 21, a judge has discretion to preclude the use of a prior conviction to impeach the credibility of a criminal defendant who chooses to testify, and upon request the judge must exercise such discretion one way or the other. *Commonwealth v. Knight*, 392 Mass. 192, 193-195, 465 N.E.2d 771, 773-774 (1984). It is reversible error for the judge to refuse to do so. *Commonwealth v. Ruiz*, 22 Mass. App. Ct. 297, 301, 493 N.E.2d 511, 514 (1986), *aff’d*, 400 Mass. 214, 508 N.E.2d 607 (1987). A judge has the same discretion to exclude the use of a prior conviction to impeach a witness other than the defendant. *Commonwealth v. Bucknam*, 20 Mass. App. Ct. 121, 123-124, 478 N.E.2d 747, 749 (1985).

4. **Representation by counsel.** If the defendant’s prior conviction resulted in a jail sentence, the proponent must show that the defendant was represented by counsel or had validly waived counsel, *Loper v. Beto*, 405 U.S. 473, 483, 92 S.Ct. 1014, 1019 (1972); *Commonwealth v. Napier*, 417 Mass. 32, 33, 627 N.E.2d 913, 914 (1994); *Commonwealth v. Proctor*, 403 Mass. 146, 147, 526 N.E.2d 765, 766-767 (1988); *Gilday v. Commonwealth*, 355 Mass. 799, 247 N.E.2d 396 (1969). This requirement may be satisfied by a notation of the name of counsel on the face of the complaint, or a judge’s notation of waiver by the defendant, or a copy of the “Notice of Assignment of Counsel.” *Napier*, 417 Mass. at 33-34, 627 N.E.2d at 914. It is undecided whether representation by counsel must be shown before using the prior conviction of a nonparty witness. *Id.*

5. **Method of proof.** Generally a prior conviction may be proved only through a certified copy of the record of conviction and not through cross-examination of the witness. See, e.g. *Commonwealth v. Atkins*, 386 Mass. 593, 600, 436 N.E.2d 1203, 1207 (1982). The traditional procedure is to read the record of conviction, to ask the witness if he or she is the person named therein, and upon such admission to offer the record in evidence. *Commonwealth v. Connolly*, 356 Mass. 617, 626, 255 N.E.2d 191, 197 (1970).

The record of conviction should not be put before the jury, however, if it contains extraneous entries, such as defaults, aliases, or probation surrenders. *Commonwealth v. White*, 27 Mass. App. Ct. 789, 795, 543 N.E.2d 703, 707 (1989); *Commonwealth v. Ford*, 20 Mass. App. Ct. 575, 578-579, 481 N.E.2d 534, 536 (1985), *aff’d*, 397 Mass. 298, 300-301, 490 N.E.2d 1166, 1168 (1986); *Commonwealth v. Clark*, 23 Mass. App. Ct. 375, 380-383, 502 N.E.2d 564, 568 (1987). The “better reasoned approach” is also to exclude any reference to the sentence, except perhaps in cross-examination of a witness who denies the conviction. *Commonwealth v. Eugene*, 438 Mass. 343, 352-353 & n.7, 780 N.E.2d 893, 900-901 (2003). If the witness was convicted only of a lesser included offense, the better practice is to omit any reference to the greater charge. *Commonwealth v. Gagliardi*, 29 Mass. App. Ct. 225, 238, 559 N.E.2d 1234, 1243 (1990). “The problem could be readily avoided by proving the convictions through admissions by the defendant in response to the prosecutor’s questions without offering the certified papers; or by securing certifications of records properly abbreviated.” *Ford*, 20 Mass. App. Ct. at 578 n.4, 481 N.E.2d at 536 n.4.

6. **Limited authority to restrict multiple prior offenses.** A defendant’s prior convictions are admissible under G. L. c. 233, § 21 for impeachment purposes unless the danger of unfair prejudice outweighs their probative value. “It is at least difficult, if not impossible” to show an abuse of the judge’s discretion in admitting prior convictions unless there is a “substantial similarity” between a prior conviction and the offenses being tried. Introducing a large number of prior convictions does not by itself create a risk of unfair prejudice. Nor does § 21 authorize a judge to exclude multiple offenses that are dissimilar to the charged offenses because, in combination, they might imply that the defendant had a propensity for violence. “We have never considered the effect of prior convictions in combination, and we decline to do so now.” *Commonwealth v. Brown*, 451 Mass. 200, 884 N.E.2d 488 (2008).

7. **Pending charges.** Ordinarily the defense is entitled to impeach a prosecution witness with his or her pending criminal charges, in order to suggest bias because the witness has reason to curry favor with the prosecution. “There is, nevertheless, some room for the exercise of discretion” by the judge, e.g. where the witness made prior

consistent statements prior to his or her arrest. *Commonwealth v. DiMuro*, 28 Mass. App. Ct. 223, 228-229, 548 N.E.2d 896, 899-900 (1990). The judge may *not* routinely permit evidence of criminal charges pending against a *defense* witness unless the facts point to the possibility of particularized bias (e.g. the charges grow out of the same incident that is being tried). The theory that *any* pending charge inculcates a generalized bias against the Commonwealth is too tenuous to serve as a basis for impeaching a defense witness. *Commonwealth v. Smith*, 26 Mass. App. Ct. 673, 532 N.E.2d 57 (1988).

8. **Prior arrests.** Prior arrests not resulting in conviction are generally inadmissible to impeach a witness, unless there is some persuasive explanation why the arrest might indicate bias or a motive to lie (e.g. a witness found in a compromising situation who might himself or herself fear prosecution as a recidivist). *Commonwealth v. Allen*, 29 Mass. App. Ct. 373, 378, 560 N.E.2d 704, 707 (1990).

9. **Prior out-of-state OUI convictions.** With respect to prior out-of-state OUI convictions, see *Commonwealth v. Flaherty*, 61 Mass. App. Ct. 776, 777-779, 814 N.E.2d 398, 401 (2004) (conviction of a NH OUI criminal “violation” is a “conviction” for purposes of establishing a prior OUI offense under G.L. c. 90, § 24).

For a discussion of impeachment by prior conviction, see *Jury Trial Manual for Criminal Offenses Tried in the District Court* § 2.50.