

Garden State CLE Presents:



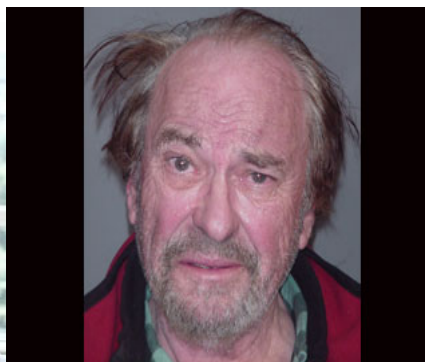
Prior Criminal Convictions:

Impeachment under N.J.R.E. 609

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Part I - Introduction

a.) Historical background - In New Jersey, at common law, a person who had been convicted of an infamous crime was deemed to be incompetent to be a witness. This strict doctrine of incompetency was based on the theory that one convicted of this type of crime was a person of such dubious character as to be unworthy of belief. Although this theory has not existed in New Jersey law since 1874, the principle of presumed untrustworthiness associated with prior convictions has survived to this day in the form of NJRE 609. (See the historical discussion in State v. Hawthorne, 49 N.J. 130, 133–35 (1967)).

b.) Purposes - The use of prior criminal convictions to impeach the credibility of a witness or the criminal defendant is generally permitted in New Jersey. Evidence of a prior conviction is offered by both the prosecutor and defense counsel on the theory that since the witness or defendant had been previously convicted of a crime, his character is such that he will be less likely to tell the truth while under oath than the average law-abiding citizen.

So, the overriding purpose of introducing such evidence is to acquaint the jury with the general character of the witness so that it may be better able to gauge his propensity to lie. Through this evaluation the jury can determine what weight (if any) should be given to the witness' testimony.

c.) Undue prejudice - The danger in the use of this type of evidence in a criminal trial is that the jury may view the impeachment questions/answers relating to prior convictions as proof that the defendant is an inveterate criminal who either probably committed the crimes in the indictment or deserves to be punished due to his previous life of crime. As a result, the case law and related *Rule of Court* provide certain procedural protections to ensure that the jury will consider impeachment evidence of conviction for prior crimes within the narrowly limited context for which it is intended.

d.) Use at trial - In the criminal trial, the use of impeachment by way of prior criminal convictions arises in the a variety of circumstances, including, but not limited to:

- 1.) Cross-examination of a fact witness;**
 - 2.) Cross-examination of an expert witness;**
 - 3.) Cross-examination of the defendant;**
 - 4.) Cross or direct examination of a character witness as to his knowledge of prior convictions by the defendant (NJRE 405(a)).**
 - 5.) Direct examination of a witness or the defendant in order to preemptively expose the convictions to the jury before it can be raised on cross-examination.**
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e.) Other uses of prior convictions - Note that evidence of a defendant's prior criminal conviction may also be admitted as substantive evidence of guilt under certain limited circumstances. This often arises in a criminal trial when the prosecution wishes to prove the defendant's guilt in a so-called signature crime. (e.g. State v. Fortin, 162 N.J. 517, 519 (2000). (Bite marks belonging to defendant on current victim. Use of prior conviction was used to reveal similar bite marks on the prior victim.))The limited substantive use of this evidence is controlled under NJRE 404(b) and is subject to an admissibility hearing under State v. Cofield, 127 N.J. 328 (1992). NJRE 404(b)(2) provides that this evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident when such matters are relevant to a material issue in dispute.

Part II – Foundational Rules of Evidence

The starting point for analysis of NJRE 609 begins with three related New Jersey Rules of Evidence:

a.) NJRE 401 - Definition of “Relevant Evidence:

“Relevant evidence” means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

Commentary: In general, evidence that a witness has previously committed a criminal offense is highly relevant as to his credibility while testifying under oath.

b.) NJRE 402 - Relevant Evidence Generally Admissible:

All relevant evidence is admissible, except as otherwise provided in these rules or by law.

Commentary: In a broad sense, since it is highly relevant, in theory, evidence that a witness has previously committed a criminal offense should always be admissible. Of course, that is not the case.

c.) NJRE 403 - Exclusion of Relevant Evidence: Except as otherwise provided by these rules or other law, the court may exclude relevant evidence if its probative value is substantially outweighed by the risk of:

(a) Undue prejudice, confusing the issues, or misleading the jury; or

(b) Undue delay, wasting time, or needlessly presenting cumulative evidence.

Commentary: Although relevant, the use of prior convictions in a criminal trial has the potential to foster undue prejudice and confusion among jurors. For these reasons, NJRE 609 seeks to strike a balance between the use of this type of impeachment evidence during direct or cross-examination while protecting the defendant from undue prejudice and confusion among the jurors. The trial judge's ruling on admissibility is one of discretion and will not be reversed absent a showing of abuse of discretion.

Part III – NJRE 609 – Text : Uses and Limitations

N.J.R.E. 609. Impeachment by Evidence of Conviction of Crime

(a) In General.

(1) For the purpose of attacking the credibility of any witness, the witness' conviction of a crime, subject to Rule 403, shall be admitted unless excluded by the court pursuant to paragraph (b) of this rule.

(2) (A) Except as provided in subparagraph (a) (2)(B) of this Rule, such conviction may be proved by examination, production of the record thereof, or by other competent evidence.

(B) In a criminal proceeding when the defendant is the witness, and

(i) the prior conviction is the same or similar to one of the offenses charged, or

(ii) the court determines that admitting the nature of the offense poses a risk of undue prejudice to a defendant, the prosecution may only introduce evidence of the defendant's prior convictions limited to the degree of the crimes, the dates of the convictions, and the sentences imposed, excluding any evidence of the specific crimes of which defendant was convicted, unless the defendant waives any objection to the non-sanitized form of the evidence.

(b) Use of Prior Conviction Evidence after Ten Years.

(1) If, on the date the trial begins, more than ten years have passed since the witness' conviction for a crime or release from confinement for it, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof.

(2) In determining whether the evidence of a conviction is admissible under subparagraph (b)(1) of this rule, the court may consider:

(i) Whether there are intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses,

(ii) Whether the conviction involved a crime of dishonesty, lack of veracity or fraud,

(iii) How remote the conviction is in time,

(iv) The seriousness of the crime.

a.) Admissibility – *Sands/Brunson* Hearing

In ruling on the admissibility of a witness's prior convictions, a trial judge must conduct a two-tier analysis under *State v. Sands*, 76 N.J. 127 (1978) and *State v. Brunson*, 132 N.J. 337 (1993). In order to satisfy the *Sands* tier under NJRE 609(a)(1), the trial court must first determine whether a witness's prior conviction is so remote that the prejudicial effect of its introduction outweighs its probative value. If the court determines that the conviction is more probative than prejudicial, it proceeds to the *Brunson* tier to determine whether the conviction “is the same or similar to the offense charged.” If the conviction meets these criteria, then the State may introduce evidence of the witness's prior conviction limited to the degree of the crime and the date of the offense but excluding any evidence of the specific crime of which the witness was convicted.

In 2008, our Supreme Court extended the *Brunson* holding to evidence of non-similar convictions. (*State v. Hamilton*, 193 N.J. 255, 268-69 (2008)). Subsequently, in 2014, N.J.R.E. 609 was amended to reflect the holdings of recent case law, including *Brunson* and *Hamilton*.

b.) Presumptions of admissibility – The ten-year Rule

Under N.J.R.E. 609, there are different standards for admissibility of a prior criminal conviction for impeachment purposes, depending on whether ‘more than ten years have passed’ since the defendant's conviction ‘or release from confinement for it, whichever is later.’

Under N.J.R.E. 609(a), a defendant's prior criminal conviction is admissible for impeachment purposes, unless the defense establishes, pursuant to N.J.R.E. 403, that its admission will be substantially more prejudicial than probative. However, N.J.R.E. 609(b)(1) creates a presumption that a conviction more remote than ten years is inadmissible for impeachment purposes, unless the State carries the burden of proving that its probative value outweighs its prejudicial effect, just as in NJRE 403.

Specifically, N.J.R.E. 609(b)(1) provides that if, on the date the trial begins, more than ten years have passed since the witness' conviction for a crime or release from confinement for the crime, whichever is later, then evidence of the conviction is admissible only if the court determines that its probative value outweighs its prejudicial effect, with the proponent of that evidence having the burden of proof.

In making that determination, pursuant to N.J.R.E. 609(b)(2), the court may consider:

- (i) Whether there are intervening convictions for crimes or offenses, and if so, the number, nature, and seriousness of those crimes or offenses,**
- (ii) Whether the conviction involved a crime of dishonesty, lack of veracity or fraud,**
- (iii) How remote the conviction is in time,**
- (iv) The seriousness of the crime.**

However, making findings as to those four factors is not enough. The court must then engage in the weighing process under (b)(1), to determine whether the State has carried its burden of proving that evidence of the remote conviction would not be more prejudicial than probative.

Thus, N.J.R.E. 609(b)(1) encompasses a more stringent admissibility standard, when more than ten years have passed since the conviction or the defendant's release from confinement for it, than N.J.R.E. 609(a), applicable when ten years or less have passed.

Confinement in this sense does not mean probation or a civil commitment, but rather a prison sentence for a crime, as opposed to a disorderly persons' offense, traffic ticket or an ordinance violation. State v. Hedgespeth, 464 N.J.Super. 421 (App. Div. 2020).

c.) Sanitized and un-sanitized records of conviction

Under N.J.R.E. 609(a)(2) permits the admission of an un-sanitized conviction record to impeach a testifying criminal defendant, when the prior conviction is dissimilar to the charged offense and the un-sanitized record does not pose a risk of undue prejudice or the defendant waives objection to the use of the un-sanitized record. See State v. Hamilton, 193 N.J. 255, 268-69 (2008),

Part III– Jury Instructions – Defendants and Witnesses

a.) CREDIBILITY - PRIOR CONVICTION OF A DEFENDANT

You have heard evidence that (name of defendant) has previously been convicted of [a] crime[s]. This evidence may only be used in determining the credibility or believability of the defendant’s testimony. You may not conclude that the defendant committed the crime charged in this case or is more likely to have committed the crime charged simply because he committed a crime on another occasion.

A jury has a right to consider whether a person who has previously failed to comply with society's rules as demonstrated through a criminal conviction would be more likely to ignore the oath requiring truthfulness on the witness stand than a person who has never been convicted of any crime. You may consider in determining this issue the nature and degree¹ of the prior conviction[s] and when it [they] occurred.

Our law permits a conviction to be received in evidence only for the purpose of affecting the credibility of the defendant and for no other purpose. You are not, however, obligated to change your opinion as to the credibility of the defendant simply because of [a] prior conviction[s]. You may consider such evidence along with all the other factors we previously discussed in determining the credibility of the defendant.

¹ State v. Brunson, 132 N.J. 377 (1993)

b.) CREDIBILITY - PRIOR CONVICTION OF A WITNESS

You have heard evidence that [name of witness(es)] has [have] previously been convicted of [a] crime[s]. This evidence may be only used in determining the credibility or believability of [these] witness' [witnesses'] testimony.

A jury has a right to consider whether a person who has previously failed to comply with society's rules as demonstrated through [a] criminal conviction(s) would be more likely to ignore the oath requiring truthfulness on the witness stand than a person who has never been convicted of a crime. You may consider in determining this issue the nature and degree² of the prior conviction[s] and when it [they] occurred.

You are not, however, obligated to change your opinion as to the credibility of this [these] witness[es] simply because of [a] prior conviction[s]. You may consider such evidence along with all the other factors we previously discussed in determining credibility.

² State v. Brunson, 132 N.J. 377 (1993)[sanitization of defendant's conviction].

**Part IV– Appendix – Leading cases discussing
NJRE 609**

State v. Hawthorne, 49 N.J. 130, 133–35 (1967) (History of the use of prior convictions for impeachment)

State v. R.J.M., 453 N.J. Super. 261 (App. Div. 2018) (Civil confinement not available for impeachment)

State v. Sands, 76 N.J. 127 (1978)

State v. Brunson, 132 N.J. 337 (1993) (Sanitizing convictions)

State v. Hamilton, 193 N.J. 255, 268-69 (2008) (Sanitizing convictions)

State v. Hedgespeth, 464 N.J. Super. 421 (App. Div. 2020) (Probation is not confinement)

State v. Rowe, 57 N.J. 293, 302-03 (1970) (Disorderly persons' offenses not crimes and thus not available for impeachment)

State v. Harris, 209 N.J. 431, 442 (2012) (Prior disorderly persons' offenses can be used to vitiate remoteness of criminal convictions more than 10-years old)