

*February 2021*  
*MPT-2*  
*Item*

*State v. Kilross*

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**State v. Kilross**

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**Smith & Smith LLP**  
Attorneys at Law  
85 West 12th Street  
Centralia, Franklin 33708

**MEMORANDUM**

**To:** Examinee  
**From:** Marie Smith  
**Date:** February 23, 2021  
**Re:** State v. Kilross

We represent Bryan Kilross in a criminal case. The State of Franklin has charged Kilross with armed robbery, a felony. The State alleges that Kilross robbed a liquor store using a handgun.

Kilross agrees that he was at the liquor store early in the evening of the robbery. However, he denies committing the robbery that occurred soon after he left and tells us that he was elsewhere at the time. He has only his own statement to confirm where he was when the robbery occurred. The prosecution's case rests on the testimony of a single witness, the liquor store clerk. We must, therefore, seriously consider having Kilross take the stand to testify in his own defense.

In making this decision, we will have to anticipate any impeachment evidence that the State might use against Kilross as a witness. Kilross has an eight-year-old felony conviction for robbery, for which he long ago completed his sentence. Before making a final decision on whether Kilross will testify, we will file a pretrial motion seeking to prevent the prosecution from using the prior robbery conviction for impeachment.

I want you to draft our brief in support of this pretrial motion. You should argue that the prosecution cannot satisfy the requirements of Franklin Rule of Evidence 609 concerning the use of prior convictions for impeachment. As you know, the Franklin Rules of Evidence are identical to the Federal Rules of Evidence. Do not address the admissibility of this evidence under any other evidentiary rule.

Follow the attached guidelines for writing persuasive briefs in trial courts. Draft only the "legal argument" section; others will draft the statement of facts.

**Smith & Smith LLP**

**OFFICE MEMORANDUM**

**To:** Associates  
**From:** Marie Smith  
**Date:** July 8, 2018  
**Re:** Guidelines for Persuasive Briefs in Trial Courts

The following guidelines apply to briefs filed in support of motions in trial courts.

**I. Captions**

[omitted]

**II. Statement of Facts**

[omitted]

**III. Legal Argument**

Your legal argument should make your points clearly and succinctly, citing relevant authority for each legal proposition. Do not restate the facts as a whole at the beginning of your legal argument. Instead, integrate the facts into your legal argument in a way that makes the strongest case for our client.

Use headings to separate the sections of your argument. Your headings should not state abstract conclusions but should integrate the facts into legal propositions to make them more persuasive. An ineffective heading states only: "The court should not admit evidence of the victim's character." An effective heading states: "The court should refuse to admit evidence of the victim's character for violence because the defendant has not raised a claim of self-defense."

In the body of your argument, analyze applicable legal authority and persuasively argue how both the facts and the law support our client's position. Supporting authority should be emphasized, but contrary authority should also be cited, addressed in the argument, and explained or distinguished.

Do not assume that we will have an opportunity to submit a reply brief. Anticipate the other party's arguments and respond to them in the body of your argument. Structure your argument in such a way as to highlight your argument's strengths and minimize its weaknesses.

**Transcript of Interview with Bryan Kilross**  
**November 20, 2020**

**Att’y Smith:** Bryan, tell me what happened.

**Kilross:** I was going downtown to pick up a woman I had started dating, Janice Malone, to go out for dinner. We were going to have some drinks before going out. I decided to buy a bottle of wine. The Pack ’N Go was on the way, so I stopped there.

**Smith:** Had you been there before?

**Kilross:** Yes, the day before, for some beer. The guy behind the counter kept watching me and wasn’t very friendly. But that didn’t bother me at the time.

**Smith:** What time did you go to the Pack ’N Go on the next day?

**Kilross:** I was supposed to get to Janice’s place at 6:30, so probably a little after 6 p.m.

**Smith:** What happened when you went in?

**Kilross:** I went over to the wine section and spent some time deciding what to get. I got some red wine that I’d heard about and wanted to check out. The same guy was working behind the counter, giving me the same nasty look. He carded me, which was fine, and I paid and left.

**Smith:** Where did you go?

**Kilross:** I was heading to Janice’s apartment building when she called and said that she had to cancel. She said that she had heard some bad news from her parents, who needed her to come home right away. I guess they live about three hours away, in Columbia City, so she had to leave then. I told her to call me when she got back.

**Smith:** And then?

**Kilross:** I wasn’t sure what to do. I didn’t want to go out on my own, but I didn’t feel like going home. So I just drove around for a while.

**Smith:** Why didn’t you go straight home?

**Kilross:** I wanted to cool down. I had been looking forward to being with Janice and felt like she had just blown me off. It turns out she was telling the truth, but I didn’t know that then.

**Smith:** Where did you go?

**Kilross:** I don’t really remember. I know I drove through downtown, then out into the countryside for maybe an hour. Then I came home, around 8 p.m.

**Smith:** What happened when you got home?

**Kilross:** I was at my front door when two police officers came up behind me. They asked if they could come in and said they had some questions. I told them yes. They asked whether I had gone to the Pack 'N Go earlier and I said yes. One of them got a call and stepped outside. When she came back in, she arrested me for robbing the liquor store. They cuffed me, took me downstairs, and then drove me to the police station.

**Smith:** And then?

**Kilross:** They put me in a room. After a while, a detective came in, gave me the Miranda warnings, and started questioning me. He asked me why I had gone back to the store, where I had put the money, and where I had stashed the gun; he thought I had robbed the place. I kept telling him what had happened, but he didn't believe me. He kept talking about my old conviction. Eventually, I shut up and called your number. I was glad you answered.

**Smith:** After you called, what happened?

**Kilross:** Not much, until the lineup, which you saw.

**Smith:** Yes, the clerk from the Pack 'N Go identified you. We'll be getting copies of his statement soon. Let me ask you, were there any other people in the Pack 'N Go when you bought that wine?

**Kilross:** No.

**Smith:** Did you see anyone else when you left?

**Kilross:** No.

**Smith:** What were you wearing that night?

**Kilross:** Jeans, a jean jacket, a T-shirt. I think a wool knit hat: it was cold.

**Smith:** All right. Now, tell me about your old conviction.

**Kilross:** Eight years ago, I pled guilty to robbing a convenience store with a friend of mine. It was a stupid thing to do, but I didn't know any better. I confessed as soon as I was caught, and my lawyer got me six months in jail and a year on probation. My friend was arrested a few days later and he also pled guilty.

**Smith:** Can you tell me what you did?

**Kilross:** Not much to tell. I drove, and we parked in front of the convenience store, put on ski masks, and went inside. My friend pretended to have a gun in his jacket while I held

out a bag for the store clerk to put the money in. He gave us the money and we left. Apparently the parking lot video camera recorded my license plate, and the police found me later that night. Like I said, it was stupid to do it at all.

**Smith:** Since you got off probation, what has happened?

**Kilross:** I've stayed out of trouble. It was hard finding a job at first, but then I got work at a warehouse, loading and unloading trucks. I worked my way up to shift supervisor. I'll lose that job if I get convicted again.

**Smith:** Any other trouble with the law?

**Kilross:** Two speeding tickets. I pled guilty to both and paid the fines.

**Smith:** Okay. I see that you posted bail. . . .

\* \* \*

**Smith & Smith LLP**

**FILE MEMORANDUM**

**From:** Adrienne Burns, Investigator  
**Date:** January 29, 2021  
**Re:** State v. Kilross, Case No. 2020 CF 702: Summary of Evidence

This memorandum summarizes the evidence that the district attorney's office has disclosed to us and the information that I have acquired through my investigation.

**Statement of Benjamin Grier:** Grier is the store clerk who was on duty the night of the robbery at the Pack 'N Go. He stated that at about 6 p.m. that night, he saw a man who he recognized as Bryan Kilross enter the store. He recognized Kilross because Kilross had bought beer at the same store the previous day. He stated that Kilross went to the wine section and lingered for a few minutes before selecting a bottle. Grier asked Kilross for ID, which he gave. Kilross paid and then left.

According to Grier, about 15 minutes later, a man came into the store wearing the same clothes as Kilross: jeans and a buttoned jean jacket. The man had a stocking pulled over his head and held a gun. He asked Grier for the money in the cash register, which Grier gave him. Grier said he was pretty sure it was the same guy who had just bought the wine because he looked and sounded the same. Then the man left. Grier didn't see him drive away. Grier called the police and gave them Kilross's name, which he remembered from the ID.

**Lineup:** The police brought Grier in to view a lineup later that night. Grier identified Kilross as the robber with no hesitation.

**Store Video:** The police have two video feeds from the store, one from the interior and one from the parking lot. The interior video shows the back of a man matching Kilross's description bringing something to the counter at 6:12 p.m. This man has a hat on. The clerk appears to ask for ID, which the buyer offers. At no time is Kilross's face visible.

The interior video also shows another man approaching the counter at 6:24 p.m., with similar pants and jacket to the first, but with a stocking over his head and what appears to be a weapon. The events that follow match Grier's statement. At no time is this man's face visible.

The parking lot video does not show either Kilross or the other man driving into the lot, entering the store, or driving away.



**Statement of Janice Malone:** In my interview with her, Ms. Malone confirmed that she and Kilross were set to meet at her apartment at 6:30 p.m. At 5:45 that night, Ms. Malone received news from her parents and decided she had to leave to go visit them immediately. She stated that she called Kilross well before 6:30 to let him know. She did not remember the time of the call. She did not have further contact with him that night.

**Prior Conviction:** The police file contains a copy of the indictment and a transcript of the hearing on Kilross's guilty plea to the felony of robbery in 2013.

**STATE OF FRANKLIN  
DISTRICT COURT OF MERCIA COUNTY**

**State of Franklin,**

**Plaintiff,**

v.

**Case No. 2013 CF 427**

**Bryan Kilross,**

**Defendant.**

**INDICTMENT**

The Grand Jury of Mercia County, State of Franklin, charges that on or about May 30, 2013, Bryan Kilross committed the felony of robbery under Franklin Criminal Code § 29. The Grand Jury more specifically states as follows:

1. That on or about that date, Bryan Kilross did take the property of the Quik Pantry convenience store located at 1507 Perimeter Drive, Franklin City, Franklin.

2. With the intent to commit theft, Bryan Kilross used force, or used intimidation, threat, or coercion, or placed employees of the Quik Pantry in fear of immediate serious bodily injury to themselves.

Wherefore, Bryan Kilross did act against the peace and dignity of the State of Franklin.

Dated: June 26, 2013



Glen Hodas  
District Attorney  
Mercia County  
State of Franklin

A TRUE BILL;



Jean Schmidt  
Presiding Juror of Grand Jury  
Mercia County

**Excerpt from Hearing on Plea Agreement of Bryan Kilross, Case No. 2013 CF 427**  
**July 17, 2013**

...

**Court:** Mr. Kilross, please describe what happened.

**Kilross:** Yes, sir. Dave and I drove to the Quik Pantry convenience store in my car. We parked in front of the store. Dave had a toy gun, which he put in his jacket pocket. We put on ski masks, because we thought that if we had the masks on, no one would recognize us and we wouldn't get caught. When we went into the store, Dave pointed the toy gun through his jacket pocket at the clerk and asked for all the money in the register. Dave said, "I have a gun." I held open a paper bag while the clerk put all the bills into it. When we had the money, we ran out of the store, got in the car, and drove away.

**Court:** Anything else, Mr. Kilross?

**Kilross:** No, sir. That's what happened.

**Court:** Do you have any other statement you want to make?

**Kilross:** Yes, sir. I am really sorry that I did this. I know that it was wrong and that I should not have done it. Also, I want the court to know that all the money was returned to the store.

**Court:** Is the state satisfied?

**The State:** Yes, your honor. . . .

**LIBRARY**

## **Excerpts from Franklin Criminal Code and Franklin Rules of Evidence**

### **Franklin Criminal Code § 25 Theft**

A person commits the offense of theft when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

...

### **Franklin Criminal Code § 29 Robbery**

(a) A person commits the offense of robbery when, with intent to commit theft, he takes property of another from the person or the immediate presence of another

(1) by use of force;

(2) by intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury to himself or to another; or

(3) by sudden snatching.

(b) A person convicted of the offense of robbery shall be punished by imprisonment for not less than 1 nor more than 20 years. Robbery under this section is a felony.

### **Franklin Rules of Evidence**

#### **Rule 609. Impeachment by Evidence of a Criminal Conviction**

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that was punishable by death or by imprisonment for more than one year, the evidence

...

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement.

**State v. Thorpe**  
Franklin Supreme Court (2012)

This case requires us to determine whether a prior conviction for robbery can be used to impeach a witness under Franklin Rule of Evidence 609(a)(2). This is a case of first impression in Franklin. Courts in other jurisdictions have reached contradictory conclusions on this question.

Jerome Thorpe robbed three different stores, on three separate days in July 2008. Thorpe pled guilty to two of these robberies, both of which were unarmed. In the third robbery, Thorpe and an accomplice presented a threatening note to a cashier; the accomplice had a pistol, which he pointed at the cashier. Thorpe contested the charge of aiding and abetting a robbery, claiming that he did not know that his accomplice had a gun.

Before trial, Thorpe indicated that he would testify and filed a pretrial motion to exclude the use of his guilty pleas to the two unarmed robberies for impeachment under Rule 609(a)(2). The trial court denied the motion. Thorpe testified and was impeached with the two guilty pleas. Thorpe was convicted, and the court of appeal affirmed. We review for abuse of discretion.

In relevant part, Rule 609(a)(2) provides generally that evidence of a prior conviction of a crime for which at least one element required proof of dishonesty or false statement, whether a felony or misdemeanor, may be used for impeachment, regardless of the severity of the offense. If a prior conviction falls within this category, the proponent of this impeachment evidence has an absolute right to use it for that purpose.

“Dishonesty” has at least two meanings. Broadly, the word connotes a breach of trust, including a “lack of . . . probity or integrity in principle,” “lack of fairness,” or a “disposition to betray.” Robbery may fit within this broad definition. More narrowly, “dishonesty” is defined as “deceitful behavior, or a disposition to lie, cheat, or defraud.” Robbery does not fit this definition because it is a crime of violent and not deceitful taking.

The Franklin Rules of Evidence are identical to the Federal Rules of Evidence. Given this, we have held that our courts may use federal legislative history as persuasive authority in interpreting the Franklin Rules. We find that the federal drafters intended the narrower definition of the term “dishonesty or false statement” [citations omitted]. Congress intended Rule 609(a)(2) to apply only to crimes that require proof of an element of misrepresentation or deceit, such as perjury, false statement, or criminal fraud, any of which bear directly on a witness’s propensity to testify truthfully.

Franklin's definition of robbery includes no requirement that the prosecution prove an act of dishonesty or false statement to obtain a conviction. *See* FR. CRIM. CODE § 29. Moreover, the definition of robbery references "theft" as a predicate offense. The crime of theft may involve dishonesty or false statement. But deception is not an essential element of theft; the definition in Franklin Criminal Code § 25 also does not require such proof. Therefore, we hold that the crime of robbery is not a crime with an element requiring proof of dishonesty or false statement that could automatically be used to impeach a witness under Rule 609(a)(2).

However, our inquiry does not end there. The State contends that recent revisions to the Federal and Franklin Rules of Evidence permit the court to look beyond statutory definitions to the factual circumstances underlying the prior offenses. We agree, but only up to a point. A 2007 amendment to Franklin Rule 609(a)(2) mirrors an identical 2006 amendment to the Federal Rules. This amendment permits use of a prior conviction for impeachment if facts in the record establish an act of dishonesty or false statement.

The Federal Advisory Committee Note to the 2006 amendment offers clear guidance on this new language:

Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute, . . . a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the fact-finder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding. . . .

In the case at hand, the prosecution can point to nothing in the record that establishes that Thorpe engaged in any act of deception or false statement when committing the two unarmed robberies. The prosecution could have done so by relying either on the language of its indictment or on facts admitted by the witness during the hearing on his guilty pleas, but it did not.

By way of example, in *State v. Frederick* (Fr. Ct. App. 2008), the defendant was charged with theft. The prosecution sought to introduce the defendant's plea to an earlier shoplifting case. At her plea hearing in the shoplifting case, the defendant admitted that she had placed unpurchased items in a backpack and then lied about its contents to a security officer. We held that the prosecution had sufficiently proved acts of deception to use the prior crime to impeach the defendant under Rule 609. By contrast, in this case, the prosecution offered no such proof. In admitting the evidence, the trial court abused its discretion.

Reversed.

**State v. Hartwell**  
Franklin Court of Appeal (2014)

Michael Hartwell was convicted of being a felon in possession of a firearm under the Franklin Criminal Code. In this appeal, Hartwell contends that the trial court erred in admitting evidence of a prior conviction for firearms possession to impeach his testimony at trial.

Hartwell was arrested after a police officer allegedly saw him pull a weapon out of his pocket and hold it behind his back while he and Tim Wagner walked past the officer's cruiser. The officer jumped out of the car and advised Hartwell and Wagner to drop their weapons. The officer testified that he saw a gun drop to the ground between Wagner's legs. Hartwell was arrested. As he was taken into custody, Hartwell exclaimed, "That's not my gun. You didn't see me with a gun." Later, a records search revealed that Hartwell was a convicted felon who was not permitted to possess a firearm.

At trial, Hartwell sought to prove that Wagner had possessed the gun and sought to impeach the testimony of the arresting officer. Hartwell also took the stand to testify that he had pulled his cell phone from his pocket, not a gun. Relying on Franklin Rule of Evidence 609(a)(1)(B), the trial court permitted the State to impeach Hartwell with a certified copy of a six-year-old federal conviction for possession of a firearm by a convicted felon, a federal offense identical to the one for which Hartwell was on trial. Hartwell was convicted.

Rule 609 permits evidence of a prior felony conviction to be offered to impeach a testifying witness. However, when the testifying witness is also the defendant in a criminal trial, the prior conviction is admitted only "if the probative value of the evidence outweighs its prejudicial effect to that defendant." FR. RULE OF EVID. 609(a)(1)(B). This reflects a heightened balancing test and creates a preference for exclusion. We review evidentiary decisions for abuse of discretion.

We consider four factors when weighing the probative value against the prejudicial effect under this heightened test: (1) the nature of the prior crime involved, (2) when the conviction occurred, (3) the importance of the defendant's testimony to the case, and (4) the importance of the credibility of the defendant.

**(1) The nature of the prior crime:** In evaluating the "nature of the prior crime," courts should consider the impeachment value of the prior conviction and its similarity to the charged crime. "Impeachment value" refers to how probative the prior conviction is of the witness's character for truthfulness. Crimes of violence generally have lower probative value in weighing



credibility. By contrast, crimes that by their nature imply some dishonesty have much higher impeachment value. In this case, Hartwell's prior conviction for possession of a firearm does not imply dishonesty and thus has relatively low probative value as impeachment.

As to "similarity," the more similar the prior crime is to the present charge, the stronger the grounds for exclusion. Admission of evidence of a similar offense can lead the jury to draw the impermissible inference that, because the defendant was convicted before, it is more likely that he committed the present offense. As stated in the Advisory Committee Notes to Rule 609, "the danger that prior convictions will be misused as character evidence is particularly acute when the defendant is impeached." Given this potential prejudice, evidence of similar offenses for impeachment under Rule 609 should be admitted sparingly if at all. Hartwell's prior conviction is for a crime virtually identical to the one for which he was tried in this case, maximizing the risk of prejudice.

**(2) The age of the prior conviction:** The Franklin Rules presumptively exclude convictions more than 10 years old. But even for convictions less than 10 years old, the passage of time can reduce the conviction's probative value, especially where other circumstances suggest a changed character. A prior conviction may have less probative value when the defendant has maintained a spotless record since the earlier conviction. Here, the prior conviction is six years old, and Hartwell has incurred no further convictions during that time.

**(3) The importance of the defendant's testimony:** The third factor focuses on the importance of the defendant's testimony to his defense at trial. If the defendant's only rebuttal comes from his own testimony, the court should consider whether impeachment with a prior conviction would prevent the defendant from taking the stand on his own behalf, severely undercutting his ability to present a defense. By contrast, if the defendant can establish his defense with evidence other than his own testimony, impeaching with a prior conviction would have less of an impact on the defendant's case. Wagner, Hartwell's companion, chose not to testify, exercising his Fifth Amendment right against self-incrimination. Thus, Hartwell had only his own testimony to support his theory at trial.

**(4) The importance of the defendant's credibility:** Where the defendant's credibility is the focus of the trial, the significance of admitting a prior conviction is heightened. But if the defendant testifies to unimportant matters or to uncontested facts, his credibility matters less and the need to impeach with prior convictions is lessened.

Hartwell's credibility is a central issue in the case, as is that of the arresting officer. But all other factors weigh *against* use of the prior conviction. The probative value of the prior conviction for attacking the defendant's credibility is low and is lessened still further by its age (six years) and the defendant's spotless record since that time. Further, the fact that the past conviction is virtually identical to the present offense creates a heightened risk of prejudice, one that has a significant impact on the central theory of the defendant's case.

We hold that the State has failed to meet its burden of establishing that the probative value of the prior offense for impeachment purposes outweighs its prejudicial impact. Thus, the trial court abused its discretion in admitting this evidence.

Reversed.

2)

To: Marie Smith

From: [REDACTED]

Date: February 23, 2021

Re: Draft of Legal Argument for Kilross Issue

**Brief in Support of Defendant's Motion in Limine**

**I. Captions**

[omitted]

**II. Statement of Facts**

[omitted]

**III. Legal Argument**

The Court should exclude evidence of Mr. Killross' prior conviction for robbery because it does not satisfy Franklin Rule of Evidence 609(a)(2) and is unfairly prejudicial to the Defendant.

Rule 609 states that: "for a crime that was punishable by death or by imprisonment for more than one year, the evidence must be admitted in a

criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving- or the witness's admitting- a dishonest act or false statement.

i. The Defendant's Prior Conviction for Robbery Should Not be Admitted Under FRE 609(a)(1)(B) Because its Admission would be Unfairly Prejudicial

As stated above, under Rule 609, "for a crime that was punishable by death or by imprisonment for more than one year, the evidence must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant." This rule reflects a heightened balancing test and creates a preference for exclusion. *Hartwell*. When determining whether the probative value against the prejudicial effect the court looks to: 1) the nature of the prior crime involved, 2) when the conviction occurred, 3) the importance of the defendant's testimony to the case; and 4) the importance of the credibility of the defendant. *Id.*

**1) The Nature of the Prior Crime**

When looking at the nature of the prior crime, Courts consider the impeachment value of the prior conviction and its similarity to the charged crime. *Id.* Impeachment value is how probative the prior conviction is of the

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witness's character for truthfulness. Crimes of violence generally have lower probative value in weighing credibility. Crimes that imply some dishonesty have much higher impeachment value. In *Hartwell*, the Court found that the prior conviction for possession of a firearm did not imply dishonesty and had relatively low probative value as to impeachment.

Here, and as further discussed in section ii, the prior crime of robbery does not imply any dishonesty. Here the Defendant was charged with robbery and the court in *Thorpe* stated summarily that robbery is not a crime of dishonesty. Because of this clear language the prior conviction for robbery does not imply dishonesty and has relatively low probative value as impeachment.

When looking at similarity, the more similar the prior crime is to the present charge, the stronger the grounds for exclusion. This is so because the similar offense can lead the jury to draw the impermissible inference that, because the defendant was convicted before, it is more likely that he committed the present offense.

Here, the prior conviction and alleged robbery at hand are almost identical, in both cases there was a robbery at the store and the defendant in both cases was wearing a mask to conceal his identity. Because they are identical it should be excluded because its impeachment value is low and it will make the jury believe that because he already committed robbery once it must have been him this time.

## **2) Age of the Prior Conviction**

The Rules presumptively exclude convictions more than 10 years old. *Hartwell*. But if the conviction is less than 10 years old, the passage of time can reduce the conviction's probative value, especially where other circumstances suggest a changed character. Also, it has less probative value if the defendant has maintained a spotless record since the prior conviction. *Id.*

Here, the Defendant's conviction was over 8 years old which is almost presumptively excludable. Also, the Defendant has a changed character, he admitted he was dumb in doing the previous crime and has had gainful employment since that crime and has even been promoted at work as the record tells us. Also the Defendant does not have any convictions since his only conviction 8 years ago besides nominal speeding tickets.

For these reasons the prior conviction is too remote and the Defendant's character has changed so the evidence should not be available for impeachment purposes.

## **3) Importance of the Defendant's Testimony**

In *Hartwell*, the court stated that if the defendant's only rebuttal comes from his own testimony, the court should consider whether impeachment with a prior conviction would prevent the defendant from taking the stand on his own behalf, severely undercutting his ability to present a defense. However, if the defendant

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can establish his defense with evidence other than his own testimony, impeaching with a prior conviction would have less of an impact on the defendant's case.

Here it is evident that this fact weighs strongly in Defendant's favor. The only testimony Defendant has is his testimony that he was elsewhere when the crime was committed. The only evidence that is relevant is his testimony and the clerk's testimony which the prosecutor is using. All video obtained from the store is inconclusive because it does not show who the defendant is. Here, allowing the prior conviction will prevent the Defendant from taking the stand and will ultimately make him be guilty because he has no other evidence available.

For these reasons, the evidence should not be admitted because the Defendant's only opportunity for his defense is if he testifies at trial.

#### **4) Importance of the Defendant's Credibility**

The court in *Hartwell*, stated that where the defendant's credibility is the focus of the trial, the significance of admitting a prior conviction is heightened. But if the Defendant testifies to unimportant matters his credibility matters less.

Here as in *Hartwell*, the Defendant's credibility is the sole issue in the case because it is his testimony against the prosecution's witness and there is no other evidence. This factor weighs in favor of the Prosecution.

When looking at all of the factors in total it is clear that this evidence should be excluded because only one factor weighs in favor of the Prosecution and all other factors favor the Defendant.

Admitting this evidence can have a chilling effect on the Defendants rights and could make him ultimately guilty if he does not take the stand for fear of impeachment.

ii. The Defendant's Prior Conviction for Robbery Should Not be Admitted Under FRE 609(a)(2) Because His Prior Conviction Did Not Require the Proving a Dishonest Act or False Statement Because Robbery is a Crime of Violent and Not Deceitful Taking

**1. Mr. Kilross' prior conviction should be excluded because Robbery does not require the prove an act of dishonesty or deceit.**

Mr. Killross' prior conviction for robbery should be excluded because under the narrower definition of the term "dishonesty or false statement" his prior conviction did not require proof of an element of misrepresentation or deceit.

As stated above, under FRE 609, "for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving- or the witness's admitting- a dishonest act or false statement." If the prior conviction falls in this



category, the proponent of the impeachment evidence has an absolute right to use it for that purpose.

The first issue is defining what "dishonesty" means. Dishonesty is defined as "deceitful behavior, or a disposition to lie, cheat, or defraud." *Id.* The Court then summarily stated that "robbery does not fit this definition because it is a crime of violent and not deceitful taking." *Id.* The Court noted that Franklins Rules are identical to the Federal Rules and looked to Congress' legislative intent in the new rule, and found that Congress intended to use the narrower definition of dishonesty as stated above. The Court then states that Rule 609(a)(2) is only to apply to crimes that require proof of an element of misrepresentation or deceit, such as perjury, false statement, or criminal fraud, any of which bear directly on a witness's propensity to testify truthfully. *Id.* The Court then goes on to say that Robbery includes no requirement that the prosecution prove an act of dishonesty or false statement to obtain a conviction. *Id.*

Under this initial reasoning the Court here should not admit Mr. Killross' prior conviction because it was for robbery. The Court in *Thorpe* clearly stated that Robbery was "not an element requiring proof of dishonesty or false statement that could automatically be used to impeach a witness under Rule 609(a)(2)." Because of this clear language the Prosecution cannot use the prior conviction to impeach the Defendant.

**2. Mr. Killross' prior conviction should not be admissible for impeachment purposes because the record of his prior conviction does not establish that he engaged in any act of deception or false statement when committing the robbery**

This prior conviction cannot be used to impeach the defendant because the Prosecution failed to provide in the record for that robbery that Mr. Killross' prior conviction that he engaged in any act of deception or false statement.

The Court in *Thorpe*, noted that due to revisions to the Rules of Evidence the court can look beyond statutory definitions to the factual circumstances underlying the prior offense. The Court held that this amendment "permits use of a prior conviction for impeachment if facts in the record establish an act of dishonesty or false statement." *Id.*

The Court then looked to the Federal Advisory Committee's interpretation of the amendment for guidance. It states that "where the deceitful nature of the crime is not apparent from the statute, a proponent may offer information such as an indictment, a statement of admitted facts . . . to show that the fact-finder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted." *Id.* However, this amendment does not allow for a mini-trial in which the court "plumbs the record of the previous proceeding." *Id.*

In *Thorpe*, the Court found that the prosecution could not point to anything in the record that establishes that the Defendant engaged in any act of deception or false statement when committing the prior armed robberies, however they said the prosecution could have. *ID*. However, the Court noted a case in which this application of the new amendment was effective.

In *Frederick*, the Defendant was charged with theft and the prosecution sought to introduce the defendant's plea to an earlier shoplifting case. In that prior case the defendant admitted that she had placed unpurchased items in a backpack and then lied about its contents to a security officer. *Id*. The Court found that here the prosecution had proved acts of deception to use the prior crime to impeach the defendant.

When looking at our case it is evident that the Prosecution did not meet its burden of proving such facts in the record. In Mr. Killross' prior indictment it was found that Mr. Kilross took property from a convenience store with the intent to commit theft and used force, intimidation, threat, or coercion. The indictment by itself states no findings of fact that Mr. Kilross was deceitful in the carrying out of his crime and that the possibility of deceit was not considered when proving his guilt. For these reasons, under the indictment alone this evidence should not be allowed for impeachment purposes.

Next, when looking at the Hearing on the Plea Agreement the Prosecution did not meet its burden. Mr. Kilross states that they put on ski masks to rob the store

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because they thought that if they had the masks on no one would recognize them and they wouldn't get caught. Next, the record of the Hearing states that Mr. Kilross' friend pointed a toy gun through his pocket and said he had a gun to rob the store. Finally, Mr Kilross stated that he returned all of the money to the store.

Here, if there is any deception evident from the record it is that his friend Dave acted with deceit and Mr. Kilross did not. The prosecution will argue that a use of the toy gun, which the store employee did not know was fake was deceitful but it was not Mr. Kilross that had this gun or used it he simply held the bag. This inference that ties Mr. Kilross to the gun would be "plumbing" the record because it is making contentious ties between the two actors when Mr. Kilross did not act with deceit. Finally, Mr. Kilross acted in the complete opposite of dishonesty because he returned all of the money to the store. Under his prior conviction the Prosecution did not make it so that the proving of dishonesty or deceit was a requirement for Mr. Kilross to be found guilty. These facts also fall far from the *Frederick* case discussed above. Mr. Kilross did not make any deceitful or dishonest statement to anyone, the only one who made a statement like this was his friend.

Due to the foregoing reasons the evidence should not be admitted under Rule 609(a)(2).

**END OF EXAM**