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Commonwealth v. Maguire, 392 Mass. 466, 467 N.E.2d 112 (1984)

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COMMONWEALTH v. MAGUIRE

I. INTRODUCTION

In *Commonwealth v. Maguire*,[1] the Supreme Judicial Court of Massachusetts held that MASS. GEN. LAWS ANN., ch. 233, section 21[2] gave a trial court reviewable discretion to exclude or admit evidence of prior convictions intended to impeach a criminal defendant on the stand.[3] The court, in expressly overruling *Commonwealth v. West*,[4] which held that trial courts have no discretion concerning the admission of prior convictions under chapter 233, section 21,[5] professed a concern about fairness to the defendant if the trial court were to lack reviewable discretion.[6] The *Maguire* court agreed, therefore, to hear "seasonably raised challenges"[7] to the trial court's discretion in admitting prior convictions, testing the abuse of that discretion by weighing the probative value against the possibility of prejudice to the defendant.[8] The court, however, applied the test deferentially to the case at bar,[9] demonstrating that the seemingly broad rule created in the case is likely to be limited in its application.[10]

Lawrence Maguire, the defendant, was tried on charges of aggravated rape of one woman and assault with intent to rape another.[11]

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1. 392 Mass. 466, 467 N.E.2d 112 (1984).

2. MASS. GEN. LAWS ANN. ch. 233, § 21 (West 1959 & Supp. 1984) reads in part: "The conviction of a witness of a crime *may* be shown to affect his credibility." Id. (emphasis added).

3. 392 Mass. at 470, 467 N.E.2d at 115.

4. 357 Mass. 245, 258 N.E.2d 22 (1970).

5. *Id.* at 249, 258 N.E.2d at 24.

6. *Maguire*, 392 Mass. at 469-70, 467 N.E.2d at 114-15.

7. *Id.* at 470, 467 N.E.2d at 115.

8. *Id.* The inquiry focuses on abuse of discretion. The balancing test is the same test a trial court should use before it admits the convictions. *See Maguire*, 392 Mass. at 469, 467 N.E.2d at 114-15.

9. *Maguire*, 392 Mass. at 470-71, 467 N.E.2d at 115-16. *See infra* notes 73-75 and accompanying text.

10. "Limited" refers to the actual exclusion of prior convictions at the trial level. Most convictions will probably be admissible under the rule to impeach the defendant and very few will be considered prejudicial so long as the trial court uses limiting instructions to reduce the impact. *See infra* notes 73-75 and accompanying text; *see also* Spencer v. Texas, 385 U.S. 554, 561 (1967). *But see* Commonwealth v. DiMarzo, 364 Mass. 669, 681, 308 N.E.2d 538, 546 (1974) (Hennessey, J., concurring) (effectiveness of limiting instructions used to avert prejudice questionable).

11. *Maguire*, 392 Mass. at 467, 467 N.E.2d at 113. The defendant was also indicted

When he testified in his defense, the prosecution impeached him with evidence of a prior sex-related conviction.[12] The defendant moved to exclude the evidence[13] but the trial court denied the motion.[14] The trial judge did, however, give two separate limiting instructions to the jury about the conviction.[15] After a long trial and four days of deliberation, the jury found Maguire guilty on all charges.[16]

The defendant appealed, presenting two significant questions to the supreme judicial court: (1) is a trial court's discretion to admit or exclude prior convictions, described as a non-reviewable right in *Commonwealth v. Diaz*,[17] reviewable by an appellate court;[18] and (2) if so, what standard of review should be applied?[19] The court also confronted another issue that the defendant's appeal had not raised: Does a trial court in Massachusetts have the discretion to exclude prior convictions?[20]

II. The Decision

The court began its opinion by addressing the latter unspoken question. Although the issue of whether the trial court has discretion when prior convictions are involved was arguably settled by the holdings in *Commonwealth v. Chase*[21] and *Commonwealth v. Diaz*,[22] the

on related charges of assault and battery during the aggravated rape and of breaking and entering during the attempted rape. *Id.* at 467 n.1, 467 N.E.2d at 113 n.1.

12. *Id.* at 467, 467 N.E.2d at 113. The prior conviction was under MASS. GEN. LAWS ANN. ch. 272, § 16 (West 1970), for open and gross lewdness and lascivious behavior in front of four women. The defendant paid a fine of $250 upon conviction. *Maguire*, 392 Mass. at 467, 471, 467 N.E.2d at 113, 115.

13. *Maguire*, 392 Mass. at 470-71, 467 N.E.2d at 115. The motion was made *in limine* and denied by the trial court before the defendant testified. *Id.*

14. *Id.*

15. *Id.* at 467, 467 N.E.2d at 113. The trial court instructed the jury that the conviction was introduced and admitted solely on the issue of the defendant's credibility both immediately after it admitted the evidence and again when it gave the charge. *Id.*

16. *Id.* at 466-67, 467 N.E.2d at 113.

17. 383 Mass. 73, 80, 417 N.E.2d 950, 955 (1981).

18. *See Maguire*, 392 Mass. at 467, 467 N.E.2d at 113.

19. *See id.* at 470, 467 N.E.2d at 115. The defendant also argued that the trial court abused its discretion in denying a jury request for a transcript of the testimony of one witness and in excluding a report written by the same witness. *Id.* The *Maguire* court found no merit in the defendant's contentions, dismissing the trial court rulings as straightforward evidence rulings at the end of the opinion. *Id.* at 472-73, 467 N.E.2d at 116-17.

20. Prior opinions interpreting the rule set out in chapter 233, section 21 never actually addressed the question. Before *Maguire*, the supreme judicial court avoided reinterpreting chapter 233, section 21 by terming the discretionary authority as a "right" to exclude prior convictions. *See infra* text accompanying notes 23-29.

21. 372 Mass. 736, 363 N.E.2d 1105 (1977).

22. 383 Mass. 73, 417 N.E.2d 950 (1981).

court felt the need to address it in light of *West*'s holding that the language in chapter 233, section 21 referred to the admission of prior convictions as an option of the cross-examining party, not as a matter of trial court discretion.[23] The *Chase* court had held that *West* still applied to most situations,[24] but had also stated that the trial court possessed a "right" to exclude evidence of prior convictions if the likelihood of intense prejudice to the defendant due to the convictions created a question of unfairness.[25] The *Diaz* court expanded on the *Chase* position, casting the "right" in terms of an absolute, nonreviewable decision by the trial court.[26] A more recent case, *Commonwealth v. Knight*,[27] baldly stated that "judges now have discretion to preclude the use of prior convictions to impeach a defendant's credibility."[28] Although all these decisions seem to contradict *West*, their holdings created an exception to the *West* rule instead of overruling it.[29]

Perhaps recognizing the anomaly in its prior decisions, the supreme judicial court in *Maguire* launched into a justification of giving trial courts discretionary authority to exclude prior convictions as evidence for impeachment uses[30] before reaching the merits of the case. Pointing out that most states adhere to Federal Rule of Evidence

23. *West*, 357 Mass. at 249, 258 N.E.2d at 24. The *Maguire* court effectively addressed the issue of trial court discretion first by laying out the *West* holding and then discrediting it with a subsequent discussion of the attractiveness of recognizing trial court discretionary authority to exclude prior convictions. *Maguire*, 392 Mass. at 467-69, 467 N.E.2d at 113-15. The *West* court reasoned that because the defendant was a witness on the stand when he testified, he was as open to cross-examination and impeachment as any other witness. *West*, 357 Mass. at 249, 258 N.E.2d at 24. The *West* court then stated that the use of prior convictions was one of many options available to the cross-examining party for impeaching a witness. *Id.* The court, consequently, held that chapter 233, section 21 referred to that option, not trial court discretion. *Id.*

24. *Chase*, 372 Mass. at 749-50, 363 N.E.2d at 1114.

25. *Id.* at 750, 363 N.E.2d at 1114-15.

26. *Diaz*, 383 Mass. at 80, 417 N.E.2d at 955.

27. 392 Mass. 192, 465 N.E.2d 771 (1984).

28. *Id.* at 194, 465 N.E.2d at 773.

29. The *Chase* court discussed *West* as a general rule to follow, claiming that the *only* exception to it was when the likelihood of prejudice was intense. *Chase*, 372 Mass. at 749-50, 363 N.E.2d at 1114-15. Specifically, the court stated: "[W]e would not deny the right of a judge to avoid any question of unfairness by excluding [prior convictions] where the likely prejudice to the defendant is most intense." *Id.* at 750, 363 N.E.2d at 1114-15. Constitutional concerns of due process seem to underlie the exception, although the *Chase* court did not feel they applied to the case at bar. *Id.* at 751, 363 N.E.2d at 1115. The *Diaz* court cited to *West* in passing, relying primarily on *Chase* for support. *Diaz*, 383 Mass. at 80, 417 N.E.2d at 954. By the time *Knight* was decided, this example of the exception emasculating the rule was firmly entrenched in Massachusetts case law. *See* Commonwealth v. King, 391 Mass. 691, 463 N.E.2d 1168 (1984).

30. *Maguire*, 392 Mass. at 468-69, 467 N.E.2d at 114.

609(a),[31] the court concluded that previously it had effectively granted discretion to Massachusetts trial courts.[32] The court noted with approval that trial court discretion avoided prejudice to the defendant either when the conviction and the charge were substantially similar[33] or when the prior conviction did not affect untruthfulness.[34] The court also observed that trial court discretion aided the fact-finder by encouraging the defendant to testify.[35] The *Maguire* court then addressed the issues raised in the defendant's appeal. Although the court did not find constitutional problems with a lack of appellate review of discretion to admit prior convictions,[36] its concern with fairness to the defendant led it to overrule *West* expressly[37] and to reinterpret the language of chapter 233, section 21 to allow the trial court reviewable discretion.[38] The court then established a standard for review that focused on balancing the probative value of the prior conviction against the likelihood of unfair prejudice to the defendant.[39]

Applying its standard to the facts before it, the court found no abuse of discretion.[40] It held that the trial court averted prejudice to

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31. *Id.* at 468 & nn.2-6, 467 N.E.2d at 114 & nn.2-6. The court noted that most states have adopted a position similar to Rule 609(a), granting the trial court discretion in admitting prior convictions either by statute, by rule, or by court decision. *Id.* at 468-69, 467 N.E.2d at 114. Footnotes 2 through 6 on the cited pages of the decision provide an extensive list of cases, statutes, and rules in which the adoption of Rule 609(a) can be found and portray the method by which the rule was incorporated into state law. *See Maguire*, 392 Mass. at 468 & nn.2-6, 467 N.E.2d at 114 & nn.2-6. *See also* 3 J. WEINSTEIN & M. BERGER, EVIDENCE ¶ 609[12], at 609-109 to 609-137 (1982 & Supp. 1984).

32. *Maguire*, 392 Mass. at 469, 467 N.E.2d at 114.

33. *Id.*

34. *Id.*

35. *Id.* at 469, 467 N.E.2d at 115.

36. *Id.* at 470, 467 N.E.2d at 115. The primary authority for the lack of concern lies in Spencer v. Texas, 385 U.S. 554 (1967). In *Spencer*, the United States Supreme Court considered a due process challenge to the use of prior convictions for impeachment of a defendant in a murder case under a Texas statute authorizing the use of the convictions. The *Spencer* court held that, because of the legitimate state purpose in using prior convictions for impeachment and the guard against prejudice through the use of limiting instructions, no due process problem existed. *Spencer*, 385 U.S. at 561. Although the *Spencer* court also discussed discretion of the trial court as a factor in averting prejudice, *id.*, this has been dismissed as dicta in federal court interpretations of *Spencer*. *See* United States v. Belt, 514 F.2d 837, 848-50 (D.C. Cir. 1975); Dixon v. United States, 287 A.2d 89, 94 (D.C. Ct. App. 1972), *cert. denied* 407 U.S. 926 (1972). *See also* Leno v. Gaughan, 664 F.2d 314, 315 (1st Cir. 1981) (per curiam).

37. *Maguire*, 392 Mass. at 469-70, 467 N.E.2d at 114-15. "Fairness" has been an overriding concern in other prior Massachusetts cases as well. *See* Commonwealth v. Chase, 372 Mass. 736, 750, 363 N.E.2d 1105, 1114-15 (1977); Commonwealth v. DiMarzo, 364 Mass. 669, 678, 308 N.E.2d 538, 544 (1974) (Hennessey, J., concurring).

38. *Maguire*, 392 Mass. at 470, 467 N.E.2d at 115.

39. *Id.*

40. *Id.* at 470-71, 467 N.E.2d at 115-16.

the defendant through the use of two limiting instructions[41] and noted that the prosecutor did not misuse the conviction.[42] The court also concluded that since the prior conviction was not the result of a serious offense[43] and was a sex-related crime,[44] it was not substantially similar to a serious, violence-related crime such as rape.[45] Finding no abuse of discretion or substantial likelihood of unfair prejudice, the supreme judicial court affirmed the conviction.[46]

III. Analysis

In creating the *Maguire* rule, the supreme judicial court brought Massachusetts into accord with a majority of jurisdictions in the country.[47] The court moved away from the position that the status of criminal defendants did not entitle them to special protection from their prior convictions when they testify[48] to the position that the right of defendants to a fair trial entitled them to trial court scrutiny of their prior convictions and perhaps appellate scrutiny as well.[49] In essence, the latter position matches the one taken by Federal Rule of Evidence 609(a) and states that adopted it.[50] In substance, however, the new Massachusetts rule differs significantly from Rule 609(a) and its progeny.

The language in Rule 609(a) establishes more restrictive boundaries than the rule announced in the *Maguire* opinion. Rule 609(a) delineates a general rule that most convictions are admissible to impeach

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41. *Id.* at 470, 467 N.E.2d at 115.

42. *Id.*

43. *Id.* at 471, 467 N.E.2d at 116.

44. *Id.*

45. *Id.*

46. *Id.* at 473, 467 N.E.2d at 116-17.

47. *See id.* at 468-69 & nn.2-6, 467 N.E.2d at 114 & nn.2-6. *See also* Weinstein & Berger, *supra* note 31, ¶ 609[12], at 609-109 to 609-137.

48. Commonwealth v. West, 357 Mass. 245, 258 N.E.2d 22 (1970).

49. *Maguire*, 392 Mass. at 466, 467 N.E.2d at 112. *See, e.g.*, Commonwealth v. Chase, 372 Mass. 736, 363 N.E.2d 1105 (1977).

50. Fed. R. Evid. 609(a) states in part:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted . . . only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Id.

A federal court held the discretion under Rule 609 to be reviewable in United States v. Hendershot, 614 F.2d 648, 651 (9th Cir. 1980). For a list of states which have adopted or rejected the rule, see State Correlation Tables, [Finding Aids Volume] Fed. R. Evid. Serv. (Callaghan 1979).

a witness.[51] The rule contains restrictions, however, that regulate permissible convictions[52] and that also carve out an exception to the rule when a criminal defendant testifies.[53] First, the conviction must be either on a charge equivalent to a federal felony[54] or for a crime involving dishonesty or untruthfulness.[55] No restrictions apply to the latter class of conviction because of its high probative value for impeachment.[56] The potential prejudice involved in the former class of conviction, however, especially when a criminal defendant takes the stand,[57] led the committees involved in the Federal Rules to require that the trial court weigh the probative value of the conviction against its prejudicial effect before allowing it to be used against an accused.[58]

In contrast, the language in *Maguire* neither expressly limits the classes of convictions admissible nor does it limit the trial court's balancing process to a particular type of witness. Although the supreme judicial court noted that certain convictions—such as crimes substantially similar to the charge[59] and convictions which do not affect untruthfulness[60]—may create a likelihood of prejudice, in *Maguire* it left the determination of whether to admit convictions entirely to the discretion of the trial court.[61] The only restrictions on the *Maguire* rule lie in the defendant's right to appeal the exercise of a trial court's discretion[62] and in the express limitations contained in chapter 233, section 21.[63]

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51. FED. R. EVID. 609(a).

52. *See id.*

53. FED. R. EVID. 609(a)(1).

54. *Id.*

55. FED. R. EVID. 609(a)(2).

56. *See* House, Senate, and Conference Committee Reports on FED. R. EVID. 609(a), Rules of Evidence, [Finding Aids Volume] FED. R. EVID. SERV. (Callaghan 1979). Rule 609(a)(2) also allows the use of misdemeanor convictions involving untruthfulness or dishonesty. *See id.*

57. *See id.* The reports can be read to narrow the exception to apply to only criminal defendants. *Id.*

58. FED. R. EVID. 609(a)(1); *see* House, Senate, and Conference Committee Reports on FED. R. EVID. 609(a), Rules of Evidence, [Finding Aids Volume] FED. R. EVID. SERV. (Callaghan 1979). Note that Rule 609(a)(1) requires that the prejudicial effect merely outweigh the probative value, not substantially outweigh it. *Cf.* FED. R. EVID. 403.

59. *Maguire*, 392 Mass. at 469, 467 N.E.2d at 115.

60. *Id.*

61. *Id.* at 470, 467 N.E.2d at 115. The court merely stated that discretion existed under chapter 233, section 21 and that it is reviewable, nothing more. *Id.*

62. It should be pointed out that appellate review is also available to the defendant, if in superior court, as an interlocutory appeal under MASS. R. CRIM. PRO. 15(b)(2). To assure such an appeal, the motion to suppress the conviction must be *in limine* and be decided before the trial begins. *See* MASS. R. CRIM. PRO. 15(c).

63. MASS. GEN. LAWS ANN. ch. 233, § 21 (West 1959 & Supp. 1984). In its intro-

Arguably, the *Maguire* court reached a logical result when one recognizes that the rule operates under a statute the purpose of which is to allow the use of any conviction except those specifically excluded.[64] The rule's lack of discernable boundaries, however, opens the door for applications that could not occur under Rule 609(a). Under *Maguire*, a trial court could conceivably allow the use of a misdemeanor conviction not involving untruthfulness or dishonesty to impeach a witness. At the other extreme, the trial court could exclude, in a trial for embezzlement, a prior embezzlement conviction on the grounds of "substantial similarity" to the charge. Furthermore, *Maguire* places most of this power of application in the hands of the trial judge, while Rule 609(a) restricts application in several areas.

The *Maguire* rule is also dissimilar on its face to Massachusetts Proposed Rule of Evidence 609(a),[65] rejected by the supreme judicial court in 1983.[66] Like Federal Rule of Evidence 609(a), the proposed rule advanced a probative value-prejudicial effect test only when a criminal defendant was involved;[67] it did not, however, place limits on admissible convictions.[68] *Maguire* differs from both the proposed rule and the federal rule in that it neither commands nor restricts the use of a balancing test when the accused testifies. Although the court stated that a balancing test will be used on appeal to judge whether the trial court abused its discretion in admitting the conviction,[69] it did not expressly require the trial court to use a balancing test whenever the accused's prior convictions are offered to impeach him. Moreover, the

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ductory paragraph the statute states that as a general rule convictions may be admitted to impeach the credibility of a witness; it then lists specific exceptions. The exceptions include time limitations on the period a conviction may be used after it goes on record (misdemeanor—five years; felony—ten years), and an exclusion of traffic violations for which only a fine was imposed. *Id.*

64. *Id. See supra* note 63.

65. MASS. PROP. R. EVID. 609(a) reads as follows:

> For the purpose of impeaching the credibility of a witness, evidence that he has been convicted of a crime is admissible. In a criminal case, the court shall have the discretion to exclude evidence of a prior conviction offered to impeach the credibility of the accused if it finds that its probative value is outweighed by the danger of unfair prejudice. There shall be no discretion to exclude a prior conviction offered to impeach the credibility of any other witness. A plea of guilty or a finding or verdict of guilty shall constitute a conviction.

Hughes, *Evidence*, 19 MASS. PRACTICE SERIES 376 (West Supp. 1981).

66. *See SJC Rejects Evidence Code*, 11 MASS. LAW. WEEKLY 457 (1983).

67. MASS. PROP. R. EVID. 609(a).

68. *Id.* The drafters of the proposed rule saw the rule as a compromise between the need to protect an accused on the stand and the *West* court's interpretation of chapter 233, section 21. *See* Advisory Committee's Note to MASS. PROP. R. EVID. 609(a), in Hughes, *Evidence*, 19 MASS. PRACTICE SERIES 376-77 (West Supp. 1981).

69. *Maguire*, 392 Mass. at 470, 467 N.E.2d at 115.

Maguire court did not limit the use of trial court discretion only to the accused. Theoretically, a trial court after *Maguire* could exclude *any* conviction offered to impeach *any* witness.[70] In addition, only a defendant witness would have the right to appeal the exercise of discretion.[71] The *Maguire* court, by changing the interpretation of one word in a statute, gave the trial court, in effect, more power than the drafters of both the Federal Rules of Evidence and the Massachusetts Proposed Rules of Evidence were willing to give it.[72]

Even when a criminal defendant is involved, the *Maguire* court's application of its rule indicated that great deference will be given to the trial court. In *Maguire*, the court was strongly influenced by the fact that the trial court gave two limiting instructions about the prior conviction.[73] Its analysis of the relationship between the prior conviction and the defendant's charge was superficial; the court failed to recognize that many people (and juries) still might equate rape with sex instead of violence.[74] If the court were to give similar scrutiny to other defendants' appeals under the *Maguire* rule, "abuse of discretion" and "substantial similarity"[75] might develop into large hurdles.

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70. The theory arises from the fact that discretion under the statute exists without a qualification other than "witness." *See* MASS. GEN. LAWS ANN. ch. 233, § 21 (West 1959 & Supp. 1984).

71. *Maguire*, 392 Mass. at 470, 467 N.E.2d at 115. "We will consider seasonably raised challenges to the admission of evidence of prior convictions of a *defendant* who testified at trial." *Id.* (emphasis added). In practice, the right of appeal will probably extend only to criminal defendants, since many of the concerns about misuse diminish substantially in a civil trial.

72. Another aspect of FED. R. EVID. 609(a) which illustrates the difference in the discretionary power allocated to the trial court lies in the requirement that the trial court, when weighing the probative value against the prejudicial effect, must make a record of its findings and explicitly use the test in its ruling. *See, e.g.*, United States v. Mahone, 537 F.2d 922, 928-29 (7th Cir. 1976). Trial judges in Massachusetts might be wise to follow the procedure in order to ensure stability and protect their rulings.

73. *Maguire*, 392 Mass. at 470, 467 N.E.2d at 115.

74. *Id.* at 471, 467 N.E.2d at 116. "Substantially similar" is in the eyes of the beholder. The supreme judicial court ignored any possible confusion the jury might have had about the natures of the two convictions. Arguably, however, the problem could have been corrected by the trial court's limiting instructions.

75. The *Maguire* court's use of these labels without clarifications, however, also introduces the possibility that the defendant will abuse the rule if confronted with a sympathetic trial judge. *Maguire* gives almost absolute power to a trial court to apply its discretion as it wishes, subject only to a deferential appellate review. A balanced application of *Maguire* by a trial judge will ensure that *Maguire*'s goal of fairness to the defendant will be preserved. An uneven application of the rule, however, might tend either to allow the defendant to cripple the prosecution's cross-examination or to allow the prosecution to use questionable convictions (such as the prior conviction in *Maguire*). The *Maguire* court tried to construct safeguards against abuse by giving appellate review to the defendant and by giving potential limits on the defendant's challenges to admission to the prosecution. *See* supra notes 70 & 71 and accompanying text. The use of checks, however, still depends

Other aspects of the opinion make it of limited benefit to a criminal defendant. First, in a footnote the court stated that if a defendant sought to exclude a prior conviction, the judge could condition the exclusion on the defendant's agreement not to impeach Commonwealth witnesses similarly.[76] Second, the trial court would not have to consider the circumstances of the conviction in its ruling on admissibility,[77] although the rule permits such consideration.[78] Massachusetts courts, however, permit no evidence of circumstances to explain the conviction other than what the record contains.[79] Both factors, in addition to a deferential review by the supreme judicial court, indicate a rule that, despite its apparently broad language, will be restrictive in application.

IV. Conclusion

The *Maguire* holding can be characterized as the supreme judicial court's attempt at a definitive solution to an evidence rule which has produced many constitutional challenges and unsettling questions about its fairness.[80] The *Maguire* rule provides the last assurance needed to guarantee a fair application of the rule: discretion provides a check on prejudice and appellate review provides a check on the abuse of the discretion. Although the rule's language is broader than that of most jurisdictions and contains few limits on admissible convictions, the rule in practice promises to be restrictive in other areas. *Maguire*'s use in trial and appellate courts will ensure that prior convictions will be admitted only when prejudicial questions have been eliminated. The prejudice involved, however, will have to be substan-

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on the trial court. *See Maguire*, 392 Mass. at 470-71 & nn.9-10, 467 N.E.2d at 115-16 & nn.9-10.

76. *Maguire*, 392 Mass. at 470 n.9, 467 N.E.2d at 115 n.9. The court indicated, however, that the condition may be limited by constitutional barriers such as the right to confrontation of witnesses under the sixth amendment to the United States Constitution. *Id.*

77. *Id.* at 471 n.10, 467 N.E.2d at 115-16 n.10. The defendant in *Maguire* offered to describe the circumstances of the crime, which involved homosexual rather than heterosexual propositions to women who were intended to relay them to football team members. *Id.*

78. *Id.*

79. *Id. See* Lamoureux v. N.Y., N. H. & H. R.R., 169 Mass. 338, 340, 47 N.E. 1009, 1010 (1897).

80. The following cases have dealt with and rejected constitutional challenges to the *West* rule under either the state or federal constitution; *Maguire*, 392 Mass. 466, 467 N.E.2d 112; *Knight*, 392 Mass. 192, 465 N.E.2d 771; *King*, 391 Mass. 691, 463 N.E.2d 1168; *Diaz*, 383 Mass. 73, 417 N.E.2d 950; *Chase*, 372 Mass. 736, 363 N.E.2d 1105; Commonwealth v. Dimarzo, 364 Mass. 669, 308 N.E.2d 538 (1974). On the question of unfairness, *See Chase*, 372 Mass. 736, 363 N.E.2d 1105; *DiMarzo*, 364 Mass. 669, 308 N.E.2d 538.

tial in order to exclude the convictions, despite the rule's broad language.

Kevin C. McGee