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Note, The Fourth Circuit Threatens Impeachment with Prior Acts of Misconduct in North Carolina

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EVIDENCE—THE FOURTH CIRCUIT THREATENS IMPEACHMENT WITH PRIOR ACTS OF MISCONDUCT IN NORTH CAROLINA—*Watkins v. Foster*

INTRODUCTION

North Carolina permits a prosecutor, on cross-examination, to impeach a criminal defendant's character by inquiring into prior acts of misconduct.[1] The rule, however, is not totally unbridled. A cross-examiner may not harass or annoy the defendant with unfounded accusations, but may inquire only in "good faith" upon information that some reprehensible conduct in fact occurred.[2] This good faith rule of cross-examination is a rule of proof. It is designed to assure that the cross-examiner's impeaching questions are based upon factual material. When the good faith of the cross-examiner is challenged, the court should evaluate the proof supporting the cross-examiner's belief that the witness committed the misconduct which is the subject of the inquiry.[3] Further limiting inquiry into acts of misconduct is the rule that a witness's response to character impeaching questions is conclusive; no extrinsic evidence may be introduced to rebut a witness's denial of misconduct.[4]

In *State v. Foster*,[5] the North Carolina Supreme Court affirmed the burglary conviction of Willie Foster, Jr. after the trial court had permitted the prosecutor, despite defense counsel's objection,[6] to ask the defendant-witness if he had committed[7] several unrelated burglaries which were the subject of grand jury indictments. The United States District Court for the Western District of North Carolina, on habeas corpus petition, set aside

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1. State v. Lowery, 286 N.C. 698, 213 S.E.2d 255, *death sentence vacated mem.*, 428 U.S. 902 (1975); 1 D. STANSBURY, NORTH CAROLINA EVIDENCE § 111 (Brandis rev. 1973) [hereinafter cited as STANSBURY]. Acts of misconduct referred to in this note are unproven acts.

2. State v. Spaulding, 288 N.C. 397, 219 S.E.2d 178, *death sentence vacated mem.*, 428 U.S. 904 (1975). STANSBURY, *supra* note 1, § 111.

3. It was conceded in *State v. Foster* that the good faith requirement is designed to assure that the impeaching questions are based upon facts. Watkins v. Foster, 570 F.2d 501, 505 (4th Cir. 1978), *citing* Brief for Appellant at 8.

4. State v. Cross, 284 N.C. 174, 200 S.E.2d 27 (1973); Pearce v. Barham, 267 N.C. 707, 149 S.E.2d 22 (1966); STANSBURY, *supra* note 1, § 111. *Cf.* State v. Coleman, 17 N.C. App. 11, 193 S.E.2d 395 (1972) (no error in admitting testimony from state rebuttal witness that defendant had performed abortion on her where no objection and motion to strike came too late).

5. 284 N.C. 259, 200 S.E.2d 782 (1973).

6. Record at 74-77. All subsequent references to the Record and to Briefs are to State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973).

7. In State v. Williams, 279 N.C. 633, 185 S.E.2d 174 (1971), the court prohibited asking a defendant-witness if he had been indicted or arrested for any crime. But, interpreting that decision in State v. Mack, 282 N.C. 334, 342, 193 S.E.2d 71, 76 (1972), the North Carolina Supreme Court stated that inquiry into specific acts underlying the indictments is permissible. *See* text accompanying notes 57-66 *infra*.

the conviction.[8] In *Watkins v. Foster*,[9] the Fourth Circuit affirmed the district court, holding that the subsequent dismissal of the indictments showed that the prosecutor lacked sufficient material information to satisfy the good faith requirement for bad act impeachment.[10] The Fourth Circuit's holding implicitly excludes character impeachment by inquiry into any misconduct not subject of a conviction,[11] despite the North Carolina Supreme Court's express rejection of such a limitation.[12] Additionally, *Watkins* presents the North Carolina cross-examiner with a dilemma. By evaluating good faith on the basis of events occurring after trial, the Fourth Circuit has set a standard for good faith that the cross-examiner cannot be sure of at trial.[13] The conflict between the Fourth Circuit and the North Carolina Supreme Court over the good faith rule presents an opportunity to reexamine the principles behind the rule, to reevaluate the benefits of allowing bad act impeachment on cross-examination, and to suggest means of circumventing the evidentiary problem created by the good faith rule.

I. THE CASE

On September 5, 1978, an intruder burgled the home of James and Rosa Davis. While investigating the crime, the police discovered the fingerprint of Willie Foster, Jr. on a flowerpot in the home,[14] and accordingly,

8. Foster v. Watkins, 423 F. Supp. 53 (W.D.N.C. 1976).

9. 570 F.2d 501 (4th Cir. 1978).

10. *Id.* at 505-06.

11. *See id.* at 507-08 (Widener, J., dissenting).

12. State v. Foster, 284 N.C. 259, 275, 200 S.E.2d 782, 794 (1973). The defendant had requested the supreme court to abandon the rule permitting inquiry into prior acts of misconduct, and to limit character impeachment on cross-examination to inquiry into prior convictions. Brief for Appellant at 28.

13. Good faith relates to information known to the prosecutor at the time of the questioning. Upon that basis the North Carolina courts impliedly found that the prosecutor in *Foster* had some information to support good faith, since they permitted the cross-examination over defendant's objection. Record at 74-77. *See* State v. McLean, 294 N.C. 623, 242 S.E.2d 814 (1978) (when impossible to determine good faith from record, judge's action in permitting question presumed correct). The Fourth Circuit's finding of bad faith referred to the same cross-examination and had to be based on the same information known to the prosecutor at the time of the questioning. The Fourth Circuit, however, rejected the credibility of the prosecutor's underlying information at trial on the basis of the dismissals, after trial, of the indictments supporting the cross-examination. The prosecutor thus faces the problem of having his good faith at trial determined by events discrediting his information after trial and having that knowledge imputed to him at the earlier trial date.

Justification for the *Watkins* procedure may be its effect in preventing a prosecutor from providing his own basis for good faith by obtaining indictments on flimsy information knowing full well he will take dismissals on those charges after the initial trial in which he uses the charges for impeachment. *See* text accompanying notes 104-05 *infra*.

14. It was never explained why the police had Foster's fingerprints on file when he had no prior arrest record. The jury was instructed to discount that fact because it was common for police to have extensive fingerprint files. Record at 98. The North Carolina Supreme Court dismissed defendant's contention that no foundation was laid to establish that the

arrested Foster. Two of the arrest warrants, for first degree burglary and assault with intent to rape, related to the Davis incident. However, seven other warrants pertaining to seven separate charges of burglary and housebreaking were also issued. On January 3, 1972, a grand jury returned nine indictments against Willie Foster, Jr.[15] The state brought Foster to trial separately on the two Davis indictments. The prosecutor's case relied heavily on the lone fingerprint taken from the flowerpot in the burgled home and stressed that the homeowners did not know Foster, that he had never been invited into their house, and that the flowerpot always had been kept inside.[16] The defense never attempted to explain the damning fingerprint, but offered testimony from Foster and his wife that he spent the evening of September 4, 1972, at home.[17] On cross-examination for impeachment, the prosecutor questioned Foster about the other burglaries, the subject of grand jury indictments which were not being tried. Without mentioning the indictments,[18] the prosecutor asked one-by-one if Foster had committed each of those crimes, specifying details such as dates and victims' names. Foster replied that he had not committed any of the crimes.[19] One of the indictments already had been dismissed at the time

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fingerprints were indeed his. 284 N.C. at 273-74, 200 S.E.2d at 793-94. The question was not at issue before the Fourth Circuit. Watkins v. Foster, 570 F.2d 501 n.1 (4th Cir. 1978).

15. Watkins v. Foster, 570 F.2d at 503.

16. State v. Foster, 284 N.C. 259, 262, 200 S.E.2d 782, 786 (1973).

17. Record at 68-69.

18. *See* note 7 *supra.*

19. State v. Foster, 284 N.C. 259, 281-83, 200 S.E.2d 782, 798-99 (Bobbitt, C.J., dissenting).

The dialogue as it appears in the record follows:

Q. Now, I will ask you if on October 20, or 19, excuse me, on August 3, of 1971 if you didn't break into Martha W. Pitts' house . . .

MR. HICKS: Objection.

Q. At 2416 Rozzelles Ferry Road here in the city?

MR. HICKS: Objection.

A. No, I sure didn't.

MR. HICKS: I object to a question like this.

Q. Did you touch anything around the screen window there?

A. I wasn't there.

Q. On the 11th day of October 1971 . . .

MR. HICKS: Your Honor, I object to these. I would like to be heard on questions like this.

COURT: All right. I will hear your Motion.

(The jury was excused for lunch.)

The defense stated the reasons for its objection, that it appeared the prosecution was going to ask questions concerning each of the other alleged offenses against the defendant calendared for trial at this session but not called for trial as yet, *as to which the defendant has not been tried, has not been convicted of, and has pled or will plead Not Guilty.*

COURT: (To Mr. Hicks) I suspect he can ask these questions. You can ask him on Cross Examination and by way of jury argument. All right.

DEFENDANT'S EXCEPTION NO. 23 . . .

Q. I will ask you if you didn't break in the residence of James Sinclair at 312

of the questioning,[20] and the others subsequently were dismissed for insufficient evidence.[21]

Center Street on October 11, 1971, by going into the front door and reaching up and unscrewing with your fingers a light bulb in the ceiling?
MR. HICKS: Objection.
COURT: Overruled.
DEFENDANT'S EXCEPTION NO. 24
Q. Did you or did you not?
A. What you mean "did I"? No, I didn't.
Q. I will ask you if you didn't break into the residence of Lonnie Bell Wallace at 217 South Turner Street? How far is South Turner Street from there on Center Street?
MR. HICKS: Objection.
A. I couldn't tell you.
Q. I will ask you if you didn't break into Lonnie Bell Wallace's house on February 20, 1971, between 6:30 and 11:00 o'clock and by breaking out the center glass window in the front door?
MR. HICKS: Objection.
COURT: Overruled.
DEFENDANT'S EXCEPTION NO. 25
A. Sure didn't.
Q. I will ask you if you did not break into the residence of Teretha Phillips at 2224 Roslyn Avenue on the 23rd of May, 1971, by prying open her kitchen window and breaking out the window pane?
MR. HICKS: Objection.
COURT: Overruled.
DEFENDANT'S EXCEPTION NO. 26
A. Sure didn't.
Q. I will ask you if on the 17th of September, 1971, you didn't break into the home of Shirley Torrence at 514 Honeywood, Apartment No. 3, by taking the screen off the window and breaking out the front window?
MR. HICKS: Objection.
COURT: Overruled.
DEFENDANT'S EXCEPTION NO. 27
A. Sure didn't.
Q. And I will ask you if you on the 25th day of July 1971 you didn't break into the residence of Roy Lee Armstrong at 201 South Turner Avenue?
MR. HICKS: Objection.
COURT: Overruled.
DEFENDANT'S EXCEPTION NO. 28
A. Sure didn't.
Q. Do you know where South Turner Avenue is?
MR. HICKS: Objection.
COURT: Overruled.
DEFENDANT'S EXCEPTION NO. 29
A. Sure don't.

Record at 74-77, State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973) (emphasis added).

20. It is not absolutely clear, but presumably the prosecutor did not know at the time of the questioning that the indictment already had been dismissed. *But see* Watkins v. Foster, 570 F.2d at 506.

21. *Id.* at 505. The only indication in the record is that the indictments were dismissed for insufficient evidence. *Id.* at 506; *see* note 101 *infra.*

In Mecklenburg Superior Court,[22] a jury acquitted Foster on the charge of assault with intent to rape, but convicted him of first degree burglary and recommended the maximum sentence.[23] On appeal, the North Carolina Supreme Court found no error.[24] The United States District Court, however, set aside the conviction on habeas corpus petition,[25] stating:

> It must be borne in mind that the prosecution's case depended upon a number of extended inferences from one limited piece of evidence . . . .
>
> To allow the prosecutor to ask questions about other alleged crimes, completely unsupported by fact or evidence, in the detail which was allowed here, makes a shambles of fair trial and deprives the defendant of due process of law.[26]

The Fourth Circuit Court of Appeals affirmed[27] the district court, "[b]ecause of the 'reasonable possibility' that Foster was tried not only

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22. Schedule "D" Regular Criminal Session (Mecklenburg Sup. Ct., Feb. 19, 1973). Record at 5.

Foster was convicted initially May 2, 1972, in Schedule "C" Regular Criminal Session of Mecklenburg Superior Court. Record at 4. However, due to the erroneous admission of hearsay evidence, Foster was awarded a new trial. State v. Foster, 282 N.C. 189, 200, 192 S.E.2d 320, 327 (1972). All references in this note are to the second trial and subsequent appeals.

23. Foster received a life sentence, the maximum penalty permitted under statute for first degree burglary. Because of the severity of the sentence Foster challenged the punishment as cruel and unusual. The North Carolina Supreme Court held that granting the maximum sentence allowable under statute was not per se cruel and unusual punishment. State v. Foster, 284 N.C. 259, 266-67, 200 S.E.2d 782, 788-89 (1973).

24. State v. Foster, 284 N.C. 259, 200 S.E.2d 782 (1973). In his eleventh and twelfth assignments of errors, the defendant excepted to the cross-examination regarding the acts underlying the indictments. Record at 145-48. At trial the defendant's objection was heard away from the jury where the defendant argued that he had not been tried on any of the indictments and that he would plead not guilty. *See* note 19 *supra.* The term "good faith," however, was never expressly mentioned, and it is not clear that the trial judge understood the objection to be a challenge to the prosecutor's information underlying his questions. On appeal, the defendant asked that the rule allowing impeachment with prior acts of misconduct be reexamined but did not specifically challenge the good faith of the prosecutor. In dissent, Chief Justice Bobbitt expressly evaluated the good faith of the prosecutor, recognizing that the defendant's objection implicitly challenged the basis-in-fact for the prosecutor's inquiry. Drawing implications of insufficient information to support good faith from the fact that the other indictments were not brought to trial, Chief Justice Bobbitt would have condemned the impeaching cross-examination and granted Foster a new trial. State v. Foster, 284 N.C. at 283-84, 200 S.E.2d at 799.

25. Foster v. Watkins, 423 F. Supp. 53 (W.D.N.C. 1976), *aff'd,* 570 F.2d 501 (4th Cir. 1978).

26. *Id.* at 55. The reference to the impeaching questions being "completely unsupported by fact or evidence" points out the paradox of the good faith rule. No evidence is permitted to prove or disprove the prosecutor's underlying information; consequently, the record cannot show any evidence to support inquiry into the other alleged crimes. *See* text accompanying notes 92-93 *infra.*

27. Watkins v. Foster, 570 F.2d 501 (4th Cir. 1978).

on the evidence, but also on the detailed 'facts'[28] recounted in the prosecutor's questions . . . ."[29]

II. BACKGROUND

When the issue of allowing character impeachment with prior acts of misconduct arises, opposing policies collide.[30] The rationale for permitting a broad assault on a witness's character is the great reliance placed on juries to weigh testimony and to determine truth. Logically, the jury should be aware of any character flaws bearing on a witness's credibility in order better to evaluate his testimony and arrive at the truth.[31] In competition with this policy, however, is the presumption that a criminal defendant is innocent until proven guilty. Exposing the defendant's unsavory character increases the chance that an innocent defendant might be convicted of a present charge on the basis of unrelated past acts.[32]

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28. If the impeaching questions had not been so detailed, then the Fourth Circuit may have been less condemning of the prosecutor's good faith in asking the witness if he had committed certain acts. The specificity of the prosecutor's questions presumably added to the credibility of his allegations before the jury. *See* note 19 *supra.*

29. *Id.* at 507 (citations omitted). The court also noted that no limiting instructions were given to inform the jury that the impeaching questions could be considered only on the issue of Foster's credibility. While this point was significant to the court, and may be seized as a means of limiting the decision (*see* text accompanying notes 111-12 *infra*), the court did not base its holding on the absence of limiting instructions. After a lengthy discussion of the highly prejudicial nature of the cross-examination, the majority in *Watkins v. Foster* referred to the lack of limiting instructions as an "aggravating" factor. 570 F.2d at 506.

30. The problem of impeaching a defendant-witness is of recent origin, since at common law, the accused often was not competent to testify in his own behalf. Because of the defendant's self-interest, it was presumed his statements were unreliable. 2 J. WIGMORE, WIGMORE ON EVIDENCE § 576 (3d ed. 1960) [hereinafter cited as WIGMORE]. Most jurisdictions changed the common law rule by statute. *See, e.g.*, N.C. GEN. STAT. § 8-54 (1969). *But see Ferguson v. Georgia*, 365 U.S. 570 (1961) (Court declared a state statute denying a defendant the right to testify unconstitutional as violative of the fourteenth amendment's due process clause).

31. For the arguments against restricting inquiry into acts of misconduct, see Hale, *Specific Acts and Related Matters as Affecting Credibility*, 1 HASTINGS L.J. 89, 91 (1950).

32. *See* Comment, *Use of Bad Character and Prior Convictions to Impeach a Defendant-Witness*, 34 FORDHAM L. REV. 107 (1965).

This consideration of unfair prejudice is distinct from the considerations of unfair surprise and confusion of issues in the concept of legal relevancy (*see* text accompanying notes 38-47 *infra*). Legal relevancy balances the probative worth of the evidence against the harms in offering proof on collateral matters. The consideration of unfair prejudice excludes evidence because it may be "too probative." Evidence of crimes similar to the crime charged should be prohibited as impeachment evidence because a jury is likely to think that, if the defendant committed the crime once, he probably did it again. *See, e.g.*, United States v. Burch, 490 F.2d 1300, 1304 (8th Cir.), *cert. denied*, 416 U.S. 990 (1974). On that basis, the impeaching questions in *State v. Foster*, regarding other unrelated burglaries should have been prohibited in Foster's burglary trial. The question of unfair prejudice was alluded to by the Fourth Circuit in Watkins v. Foster, 570 F.2d 501, 502 (4th Cir. 1978), but the court's holding was based on a lack of good faith. *Id.* at 505. This note is concerned primarily with the good faith issue. See the balance proposed in People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974), when considering admission into evidence of a defen-

A further consideration regarding character impeachment with prior acts of misconduct is that character impeachment is a collateral matter bearing on the credibility of a witness, but not contributing anything directly to the substantive issue at trial.[33] To avoid the problems of confusion, undue consumption of court time, and unfair surprise inherent in the admission of character evidence,[34] courts may exclude the evidence as being legally irrelevant,[35] regardless of the competing arguments on the merits and drawbacks of character impeachment generally.

North Carolina favors expansive admission of character impeaching evidence.[36] In furtherance of this policy, the North Carolina good faith rule has developed to solve the legal relevancy problem inherent in admitting character evidence on cross-examination—a collateral matter. The good faith rule requires, without admission of evidence and consequently without legal relevancy problems, that a cross-examiner's questions have some basis-in-fact.[37] Since it is the good faith rule which overcomes the legal relevancy exclusion and justifies admission of character impeachment with

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dant's prior conviction or immoral act. The factors weighed in *Sandoval* included (1) the possibility of overwhelming prejudice where the prior crimes or acts are similar to the crime presently charged; (2) the effect on the fact-finding process where, in fear of cross-examination regarding prior misconduct, a witness decides not to testify; (3) the actual probative relevance of the prior crime to credibility; and (4) the remoteness of the prior bad act or conviction. *Id.* at 376-78, 314 N.E.2d at 417-18, 357 N.Y.S.2d at 855-56.

33. Character impeachment should be distinguished from impeachment to show bias, interest, or corruption, which are not considered collateral. *See* 3A WIGMORE, *supra* note 30, §§ 943-69, at 777-820; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 40, at 78-81 (2d ed. 1972) [hereinafter cited as MCCORMICK].

34. STANSBURY, *supra* note 1, § 111, at 339; *see* text accompanying notes 38-47 *infra.*

35. 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 608[05], at 608-22 (1972); MCCORMICK, *supra* note 33, § 185, at 438-40. Professor Wigmore uses the term "auxiliary policy" to describe the same considerations referred to in this note as legal relevancy. 3A WIGMORE, *supra* note 30, § 978, at 826-27. *See also* STANSBURY, *supra* note 1, §§ 111-112, at 339-46.

The Federal Rules of Evidence grant the court discretion to limit interrogation of witnesses to avoid needless consumption of court time, FED. R. EVID. 611(a)(2), and to exclude evidence whose probative value is outweighed substantially by danger of prejudice, confusion, or delay. FED. R. EVID. 403.

36. *See, e.g.,* Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 156 S.E.2d 265 (1967) (permissible to inquire into various traffic offenses; the court favors the certainty of an all-inclusive rule and the jury will give proper weight to the evidence).

All crimes and acts of misconduct are considered logically relevant to a witness's credibility in North Carolina. *See* STANSBURY, *supra* note 1, § 111, at 341 n.11. The North Carolina rule follows a two-step presumption. First, any misconduct is presumed to reflect bad character; second, all bad character traits are presumed to bear on credibility.

Many jurisdictions view only crimes or misconduct which bear on traits for truth or veracity as logically relevant. See FED. R. EVID. 608 set out in note 49 *infra.* See also Circuit Judge Warren Burger's rule of thumb "that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not . . . ." Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029 (1968). *See generally* Note, *Evidence—Impeaching the Credibility of the Defendant-Witness,* 41 BROOKLYN L. REV. 665, 678-80 (1975) (discussing problems with the rule of thumb).

37. *See* text accompanying notes 52-56 *infra.*

prior acts of misconduct on cross-examination, analysis of North Carolina's expansive view of character impeachment necessarily centers on the good faith rule and the concept of legal relevancy.

A. *Relevancy and Good Faith*

To be admitted at trial, character evidence[38] must satisfy the two-pronged test of legal and logical relevancy.[39] Evidence is logically relevant if it has probative value in establishing a material proposition in issue.[40] Evidence is legally relevant when the benefit of its probative value outweighs harms inherent in admitting the evidence.[41] The concept of legal relevancy allows courts the discretion to exclude extrinsic evidence on collateral matters when the problems of unfair surprise, confusion of issues, and inefficient use of court time, problems arising from the introduction of evidence, outweigh the probative worth of the evidence offered.[42]

Legal relevancy, therefore, prohibits impeaching the credibility of one witness with testimony from a second witness recounting the principal witness's specific acts of misconduct.[43] If allowed, intolerable confusion of issues would arise from such impeachment because the impeaching witness's testimony would be evidence of the specific bad acts alleged.[44] To be fair, the principal witness would have to be allowed to present additional evidence refuting each disparaging allegation. The consequence of such practice would be to involve the court and the jury in the trial of numerous unrelated accusations, diverting the jury's attention from the single point of the trial and taking up precious court time.[45]

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38. Where character is directly in issue, evidence of specific acts to prove character is admissible. *See, e.g.,* Cameron v. Cameron, 232 N.C. 686, 61 S.E.2d 913 (1950) (fitness of mother to have custody of her children). Additionally, evidence of prior crimes or bad acts is admissible when it tends to establish an element of the crime charged. For an exemplary list of elements, see People v. Molineux, 168 N.Y. 264, 293, 61 N.E. 286, 294 (1901):

> (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial.

39. *See* McCORMICK, *supra* note 33, § 185.

40. *See* FED. R. EVID. 401. Evidence of convictions and bad acts are logically relevant because whenever a witness testifies his credibility, as reflected by his character, is in issue. *See* note 36 *supra.*

41. Professor McCormick defines "legal relevancy" as the term used to describe the aggregate of rules formulated from the precedents of discretionary rulings on the balance of value against damage. McCORMICK, *supra* note 33, § 185, at 441.

42. 3A WIGMORE, *supra* note 30, § 979, at 826-27; McCORMICK, *supra* note 33, § 185, at 438-41; FED. R. EVID. 403, 611.

42. State v. Greene, 285 N.C. 482, 494-96, 206 S.E.2d 229, 236-38 (1974).

44. Distinguish between the situation in which a second witness testifies regarding specific acts of a principal witness and the situation in which a witness who has testified on direct is cross-examined about specific bad acts of his own. On cross-examination the questions themselves are not evidence and therefore are allowed. *See* text accompanying notes 52-56 *infra.*

45. 3A WIGMORE, *supra* note 30, § 979.

Additionally, admitting evidence of specific bad acts would frequently surprise the principal witness with matters he could not be prepared to disprove. Through impeaching witnesses, an opponent might allege particular instances of misconduct regarding any time or place. In spite of the falsity of such accusations, it would be impossible for the principal witness to have assembled at trial evidence demonstrating his innocence of charges ranging over his entire life.[46] Implicit in the policy of protecting against confusion and unfair surprise is the realization that the impeaching evidence may be false. A witness could not complain of surprise if the allegations of misconduct were true because no amount of preparation could produce evidence to explain away that truth. Similarly, if the allegations could be absolutely substantiated, the allegations alone could be admitted without the need to hear supporting and contrary evidence.

Thus evidence of misconduct to impeach the character of a witness is prohibited because the benefits of admitting the evidence are outweighed by the difficulty in proving it. If those difficulties could be minimized or eliminated, evidence of the act should be admitted.[47] On that basis, character impeachment by evidence of criminal convictions,[48] and by inquiring into prior acts of misconduct on cross-examination[49] traditionally have been allowed on the assumption that reference to the act could be admitted fairly, without the need of proof to support the allegation.

Impeachment with a record of conviction avoids the harms inherent in the introduction of evidence on a collateral matter because the act in

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46. *Id.*

47. *Id.*

48. The rule concerning character impeachment by reference to criminal convictions varies wideley. *See* Note, *Federal Rule of Evidence 609(b)—The Fourth Circuit Limits the Use of Remote Criminal Convictions to Impeach the Credibility of Criminal Defendants—United States v. Cavender*, 15 WAKE FOREST L. REV. 403 (1979).

49. Professor Irving Younger points out that there are at least six different rules in various jurisdictions regarding impeachment with prior acts of misconduct:

> First, that it is permissible; second, that it is permissible, but only with respect to misconduct bearing directly on credibility; third, that it is permissible, but only with respect to misconduct evincing such extraordinary wickedness "[*sic*] as would likely render [the witness] insensible to the obligations of an oath; fourth, that is is permissible, but only if the witness is someone other than the defendant in a criminal case; fifth, that it is permissible in the discretion of the trial judge; and sixth, that it is not permissible at all. [Citations omitted].

Younger, *Impeachment With Prior Bad Acts Under the Federal Rules of Evidence*, 1976 TRIAL LAW. GUIDE 121, 121. Rule 608(b) of the Federal Rules of Evidence states in pertinent part:

> (b) **Specific instances of conduct.**— Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

question has already been proven.[50] There is no risk of confusion of issues because the judgment is proof of the act without further evidence.[51] Additionally, no danger of unfair surprise exists since a witness presumably has notice of his past conviction, and, even absent notice, there could be no prejudice in surprise since the judgment conclusively bars further inquiry.

On cross-examination of a witness whose character is in issue, inquiry into prior acts of misconduct historically has been permitted, again, because the elements of confusion and unfair surprise are absent. The surface argument upholding this view is tenable, but closer analysis exposes the legal fiction underlying the theory saving bad act impeachment on cross-examination from exclusion on legal relevancy grounds.

The fundamental rule regarding character impeachment with prior acts of misconduct on cross-examination is simple; extrinsic evidence is prohibited.[52] The cross-examiner must accept the witness's response to his inquiries about misconduct without challenge.[53] Technically, a prosecutor's questions are not evidence; therefore, it is reasoned, no confusion and no unfair surprise results from cross-examination because no evidence enters the case if the witness denies the allegation.

Every lawyer, however, knows differently. "[T]he very question itself conveys the theoretically barred information to the jury."[54] This is true

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50. WEINSTEIN, *supra* note 35, § 608[05], at 608-22. North Carolina permits a cross-examiner to ask a witness about any conviction to impeach credibility. Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 279-82, 156 S.E.2d 265, 268-70 (1967) (numerous traffic offenses and public drunkenness). *But cf.* State v. King, 224 N.C. 329, 30 S.E.2d 230 (1944) (suggesting inquiry into traffic offenses should be barred, but that rule never adopted). In North Carolina the record of conviction may not be introduced as evidence if the witness denies the conviction. For a criticism of this rule, see STANSBURY, *supra* note 1, § 112, at 343-44. *See* note 107 *infra.*

51. The confusion referred to involves the number of issues presented to a jury, and the corresponding problem of what evidence is to be considered on which issue. The danger of a witness being convicted on the basis of unrelated past acts remains.

52. State v. Cross, 284 N.C. 174, 177-78, 200 S.E.2d 27, 30 (1973). Again distinguish between evidence in the form a witness's testimony on the one hand, and a cross-examiner's inquiry on the other. *See* note 44 *supra.*

53. The no-extrinsic-evidence rule prohibits a cross-examiner from calling other witnesses to prove the misconduct after a witness's denial. The rule is misleading however, in suggesting that a cross-examiner cannot continue to press for an admission. In North Carolina a cross-examiner may continue to "sift" a witness concerning a specific act that the witness has denied. State v. Fountain, 282 N.C. 58, 61-69, 191 S.E.2d 674, 681-82 (1972); *see* note 19 *supra. But see* State v. Dickerson, 6 N.C. App. 131, 169 S.E.2d 510 (1969) (reversal of a conviction when judge took over cross-examination of a defendant).

54. WEINSTEIN, *supra* note 17, § 608[05], at 608-22; STANSBURY, *supra* note 1, § 111, at 342. For an account described by Arthur Train, see *My Day in Court,* SATURDAY EVENING POST Oct. 15, 1938, *reprinted in* 3A WIGMORE, *supra* note 30, § 980a, at 837. "Although, if he deny any impeachment, the prosecutor is nominally 'bound by the witness' answer,' the effect on the jury, who assume that the district attorney knows whereof he speaks, is impressive. For this reason, questions put to a witness as to his past, if unfounded, become accusations which the jury are apt to accept as true." *See also* Douglas v. Alabama, 380 U.S. 415, 419 (1965) ("Although the Solicitor's reading of Loyd's alleged statement, and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in

because of the insinuations cast by the questions, and because by definition the good faith rule tells the fact finder that evidence exists supporting the cross-examiner's inquiries.[55] In effect the cross-examiner is a witness testifying that the misconduct occurred. With admission of that "evidence," the problems of confusion of issues and unfair surprise also enter because the information underlying the cross-examiner's questions has never been proven.[56] The very existence of the good faith rule is recognition, that the view that a prosecutor's questions have no effect on a jury is a legal fiction, and that there is a need for some assurance of the factual basis of the allegations contained in the prosecutor's questions.

B. Indictments and Good Faith

With the 1971 decision in *State v. Williams,*[57] North Carolina joined the great majority of jurisdictions which prohibit character impeachment on cross-examination by inquiring whether the witness has been indicted or arrested for a specific crime.[58] The *Williams* court expressly reaffirmed the North Carolina rule permitting a cross-examiner to ask a witness if he had been *convicted* of a crime,[59] so long as the inquiry is made in good faith, but distinguished inquiry into indictments or arrests because "an indictment cannot rightly be considered as more than an unproved accusation."[60] Discussing the evidentiary value represented in an indictment, the court noted that a prosecutor prepares the indictment for the grand jury, that it is merely a procedure to put a person on trial, that it is based on hearsay evidence, and that an indictment raises no presumption of guilt.[61]

Later in the same term the North Carolina Supreme Court indicated in *State v. Gainey*[62] that while *Williams* prohibited inquiry into indictments, that decision did not alter the rule allowing a cross-examiner to ask whether a witness had committed specific criminal or reprehensible acts that might be the subject of an indictment.[63] *State v. Mack*[64] followed the dictum of *Gainey,* limiting the *Williams* rule to censorship of the word "indictment," but allowing inquiry into the misconduct subject of the

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the jury's mind of testimony that Loyd in fact made the statement . . . .").

55. This logic presumes the jury knows North Carolina's rules of evidence, which is unlikely. When a judge is the fact finder, however, he is surely aware of the implications of the good faith rule.

56. Distinguish use of convictions which are proof of the misconduct beyond a reasonable doubt, having already been tried, from the unproven facts supporting a cross-examiner's good faith inquiry into misconduct, where the issue has never been tried, but is assured as true only because the cross-examiner says so.

57. 279 N.C. 663, 185 S.E.2d 174 (1971).

58. *See* Annot., 20 A.L.R.2d 1421, 1425 (1951) (near unanimity).

59. 279 N.C. at 699, 185 S.E.2d at 178.

60. *Id.* at 672, 185 S.E.2d at 180.

61. *Id.* at 672-73, 185 S.E.2d at 180.

62. 280 N.C. 366, 185 S.E.2d 874 (1972).

63. *Id.* at 373, 185 S.E.2d at 879 (dictum).

64. 282 N.C. 334, 193 S.E.2d 71 (1972).

indictment. Citing *Williams*, the *Mack* court upheld a cross-examiner's inquiry asking a witness if he had *committed* several criminal acts, even though the witness had not been convicted of a crime on the basis of those acts.[65] *Mack* quoted *Williams'* language that "[s]uch questions relate to matters *within the knowledge of the witness*, not to accusations of any kind made by others."[66]

The *Mack* court reiterated the rule that such questions must be asked in good faith, but did not state what information provided the cross-examiner's good faith.[67] Presumably, the defendant in *Mack* had been indicted or arrested for the acts subject of the cross-examination, but the court did not discuss whether such indictments or arrests, prohibited from inquiry because they are mere accusations, could nevertheless provide the basis-in-fact necessary to support the good faith rule.

Without discussion and citing no authority, the court in *State v. Lowery*[68] responded affirmatively to the question of whether an indictment was sufficient basis-in-fact to satisfy the good faith requirement. The defendant in *Lowery* did not present lack of good faith as an issue on appeal, but the *Lowery* court stated on its own that the "defendant was in fact indicted at the time of this trial . . . hence, there was ample basis for the question to be asked in good faith."[69]

At trial in *State v. Foster*[70] the good faith of the prosecutor was challenged when defense counsel objected to the prosecutor's questions regarding the misconduct underlying several indictments.[71] The objection raises several questions. First, how can a cross-examiner's good faith be challenged where evidence is not admissible to prove or refute his underlying information?[72] Second, how can an indictment be considered sufficient proof to support a cross-examiner's good faith, when the indictment itself cannot be the subject of inquiry because an indictment is no more than a mere accusation?[73]

III. ANALYSIS

A. *The North Carolina "Good Faith" Rule as Applied in* State v. Foster

When a defendant in North Carolina elects to testify in his own behalf he knows he will be subject to impeachment by questions relating to acts of criminal and degrading conduct.[74] The defendant in *Foster* conceded the North Carolina rule, but requested the court to reexamine and repudiate

65. *See id.* at 341, 193 S.E.2d at 76.
66. *Id.* at 342, 193 S.E.2d at 76.
67. *Id.*
68. 286 N.C. 698, 213 S.E.2d 255, *death sentence vacated mem.*, 428 U.S. 902 (1975).
69. *Id.* at 708, 213 S.E.2d at 261.
70. 284 N.C. 259, 200 S.E.2d 782 (1973).
71. Record at 74; *see* note 24 *supra.*
72. *See* text accompanying notes 92-93 *infra.*
73. *See* text accompanying notes 80-91 *infra.*
74. State v. Foster, 284 N.C. at 275, 200 S.E.2d at 794.

it.[75] The North Carolina Supreme Court, in a sentence, refused. "The rule is necessary," stated Justice Huskins, "to enable the State to sift the witness and impeach, if it can, the credibility of a defendant's self-serving testimony."[76] It seems a desperate defense[77] to rely on the court to overrule a line of cases dating from the nineteenth century,[78] but Willie Foster probably expected a more sympathetic disposition of his plea in light of the 1971 decision in *State v. Williams*[79] than he received.

1. Indictments as the basis-in-fact

Williams prohibited cross-examination of a witness about whether he had been, or was presently, under indictment for an unrelated offense "on the basic ground that an indictment cannot rightly be considered as more than an unproved accusation."[80] In prohibiting inquiry into indictments, the North Carolina Supreme Court necessarily found the indictment to be an insufficient basis to presume that the misconduct that was the subject of the indictment in fact occurred. It would seem to follow that if the probable cause evidence necessary to indict[81] is insufficient factual basis to support good faith inquiry into indictments, then questioning about the acts themselves, with only the indictment as the basis-in-fact to justify the inquiry, would also violate the good faith rule. This logical extension of *Williams* has not been followed.

In *State v. Foster,*[82] the cross-examiner asked the defendant if he had committed several burglaries which were the subject of seven indictments issued against him. Because of the *Williams* prohibition, however, the cross-examiner never mentioned the fact of indictment. The trial judge permitted the questions despite vigorous objection by defendant's counsel.[83] Outside the presence of the jury, defense counsel stressed to the trial judge that Foster had not been tried for the alleged offenses and would plead not guilty to those charges.[84] The trial judge admitted the questions without requesting any evidence from the prosecutor to verify his challenged good faith,[85] implicitly relying on the indictments as sufficient evidence to support the basis-in-fact requirement of the good faith rule.

The factual bases supporting the prosecutors' inquiries in both *Williams* and *Foster* were the indictments returned by a grand jury. In

75. *Id.; see also* Brief for Appellant at 28.
76. State v. Foster, 284 N.C. at 275, 200 S.E.2d at 794.
77. The appellant presented 19 assignments of error, so he was not relying totally on repudiation of the rule to gain a new trial. Brief for Appellant at 1-4.
78. State v. Taylor, 121 N.C. 674, 28 S.E. 493 (1897).
79. 279 N.C. 663, 185 S.E.2d 174 (1971).
80. *Id.* at 672, 185 S.E.2d at 180.
81. *See* N.C. GEN. STAT. § 15A-628 (1978); 279 N.C. at 673, 185 S.E.2d at 180.
82. 284 N.C. 259, 200 S.E.2d 782 (1973).
83. Record at 74-75; *see* note 24 *supra.*
84. Record at 74-75.
85. *Id.* at 74-77.

Williams upon such basis-in-fact, inquiry into the indictment was disallowed because an indictment is merely an unproved accusation, while in *Foster* the trial judge and the North Carolina Supreme Court found the indictment sufficient proof to support inquiry into the acts underlying the indictment.[86]

The cases appear irreconcilable on that basis, yet the majority in *Foster* cited *Williams* to support the view that a witness cannot be cross-examined regarding any indictment, but can be questioned about the specific misconduct underlying the indictment. Significantly, Chief Justice Bobbitt, author of the majority opinion in *Williams,* strongly dissented in *Foster* because he found good faith lacking.[87]

To avoid the *Williams* rule, a prosecutor need only rephrase his question and inquire whether a witness committed a specific act, rather than asking whether the witness has been indicted for the misconduct.[88] Inquiries into specific acts must be in good faith. If the fact of indictment satisfies good faith, as the *Foster* court necessarily found,[89] all the information held inadmissible in *Williams* as mere accusation would be admitted, with the same accusations supplying the basis-in-fact for good faith.

The *Williams* court would allow inquiry into the acts underlying an indictment as distinguished from inquiry into the indictment itself on the grounds that the former "relate[s] to matters within the knowledge of the witness" while the latter is hearsay.[90] This distinction does not provide a rationale for allowing a cross-examiner to escape the overriding logic of the *Williams* decision. Hearsay problems have not bothered the courts regarding other issues of character impeachment such as impeachment by reputation or opinion, or regarding the out-of-court proof relied on to support the good faith rule. To discount the reliability of an indictment because it is based on hearsay evidence, yet rely on the same unproven out-of-court assertions to presume good faith mocks rationality.

Additionally, the fact that a cross-examiner's questions relate to matters within the knowledge of the witness does nothing to curb potential abuse by a cross-examiner in casting aspersions with his questions. All a defendant can do to object to such tactics is to challenge the cross-

86. *See* State v. Lowery, 286 N.C. 698, 213 S.E.2d 255 (indictment sufficient basis-in-fact to support good faith), *death sentence vacated mem.,* 428 U.S. 902 (1975).

If a defendant admits he was indicted or arrested for a crime, no misconduct is proved because it only admits he was accused. If a defendant admits he committed the misconduct, however, that does bear on his character. This distinction very likely is lost on a jury and does not justify use of an indictment to provide the basis-in-fact for good faith.

87. State v. Foster, 284 N.C. at 283-84, 200 S.E.2d at 799 (Bobbitt, C.J., dissenting). Justice Sharp joined Chief Justice Bobbitt dissenting in *Foster,* although she wrote for the majority in *Gainey.*

88. Note, *Admissibility of Evidence to Impeach Credibility,* 51 N.C.L. REV. 1070, 1073 (1973).

89. The *Foster* court could have cited State v. Lowery, 286 N.C. 698, 213 S.E.2d 255, *death sentence vacated mem.,* 428 U.S. 902 (1975), for the rule that an indictment is sufficient basis-in-fact to satisfy good faith. *See* text accompanying notes 68-69 *supra.*

90. State v. Williams, 279 N.C. at 675, 185 S.E.2d at 181.

examiner's good faith, and since evidence is inadmissible to support the challenge, the defendant's protection from such questions is inadequate.[91]

2. Challenging the basis-in-fact

Distinguishing between inquiry into indictments and inquiry into the underlying misconduct raises the problem of proof underlying the exclusion policy of legal relevancy. The good faith requirement is the only assurance that a cross-examiner's questions insinuating misconduct are based in fact. When the good faith of the cross-examiner is challenged, however, a circular argument regarding proof arises.

Extrinsic evidence of specific bad acts to impeach a witness is legally irrelevant and therefore inadmissible.[92] On cross-examination, inquiry into specific bad acts is permissible because it is not evidence; but the inquiry is subject to the good faith rule.[93] The utility of challenging good faith, however, can be preserved only by admitting evidence to prove or disprove the cross-examiner's basis-in-fact for his inquiry, yet evidence on collateral matters such as character impeachment is inadmissible. That is the paradox of the good faith rule. The rule attempts to assure truth without proof, and yet challenging good faith requires proof.

B. The Fourth Circuit Defines Good Faith for North Carolina

The indictments that constituted the basis-in-fact for the prosecutor's character impeachment were dismissed after the North Carolina Supreme Court affirmed Willie Foster's conviction. Thereafter, on habeas corpus petition, the federal district court set aside the conviction,[94] holding that Foster had been denied a fair trial because of the detailed cross-examination regarding alleged crimes "completely unsupported by fact or evidence."[95] The district court implied that the subsequent dismissal of the indictments proved the prosecutor lacked sufficient evidence of wrongdoing to support North Carolina's good faith requirement for impeachment on cross-examination. On appeal the Fourth Circuit agreed that the prosecutor in *State v. Foster*[96] lacked good faith, and found the erroneous admission of his impeaching questions prejudicial error in light of the minimal evidence supporting the conviction.[97]

The dismissal of the indictments for insufficient evidence indicates only that the prosecutor lacked evidence to prove the charges beyond a reasonable doubt. Nine indictments were issued against Foster, but the district attorney brought the defendant to trial on only two of the indict-

91. *See* text accompanying notes 92-93 *infra.*
92. *See* text accompanying notes 42-47 *supra.*
93. *See* text accompanying notes 1-4 *supra.*
94. Foster v. Watkins, 423 F. Supp. 53 (W.D.N.C. 1976).
95. *Id.* at 55.
96. 284 N.C. 259, 200 S.E.2d 782 (1973).
97. Watkins v. Foster, 570 F.2d 501, 506-07 (4th Cir. 1978).

ments,[98] presumably the indictments supported by the greatest evidence.[99] While the prosecutor may have had some information to connect Foster with the other alleged crimes, that evidence apparently was insufficient to convict,[100] and consequently the indictments were dismissed.[101] The Fourth Circuit ruled that the subsequent dismissal of the indictments indicated that the prosecutor lacked good faith when questioning Foster at trial about the acts underlying the indictments, since the indictments were dismissed because the prosecutor lacked sufficient evidence to prove his case beyond a reasonable doubt. The court's conclusion that dismissal of the indictments establishes bad faith indicates that anything short of proof beyond a reasonable doubt is insufficient basis-in-fact to satisfy the good faith requirement for character impeachment.[102] Thus the effect of the Fourth Circuit's holding in *Watkins v. Foster*[103] is to eliminate character impeachment on cross-examination with any misconduct not the subject of a conviction, a result the North Carolina Supreme Court refused to reach in *State v. Foster*.[104]

As a consequence of *Watkins v. Foster*, prosecutors in North Carolina face a dilemma when impeaching a defendant on cross-examination. If the prosecutor impeaches the defendant with inquiry into the misconduct underlying an indictment, and the defendant is convicted of the crime charged in the state court, the prisoner subsequently may be released on federal habeas corpus petition if the indictments evidencing the misconduct are later dismissed. *Watkins v. Foster* indicates that the Fourth Circuit will judge a cross-examiner's good faith at trial on the basis of events

98. State v. Foster, 282 N.C. 189, 195, 192 S.E.2d 320, 324-25 (1972).

99. State v. Foster, 284 N.C. at 283, 200 S.E.2d at 799 (Bobbitt, C.J., dissenting). The evidence supporting the indictments, like the evidence supporting the Davis indictments, consisted entirely of fingerprints.

100. The prosecutor in *Foster* does not concede this point. The evidence against Foster supporting the seven other indictments was similar fingerprint evidence. Foster's fingerprints were found at the sites of nine similar burglaries all in the same neighborhood and all of which occurred at the same time of night over the course of a three month period. Foster was tried on the Davis indictments because in that case, the prosecutor had the additional charge of assault with intent to rape. Interview with Peter S. Gilchrist, District Attorney for the Twenty-Sixth Prosecutorial District, Charlotte, North Carolina, in Charlotte, N.C., May 3, 1979.

101. Watkins v. Foster, 570 F.2d 501, 507 (4th Cir. 1978) (Widener, J., dissenting). The *Foster* prosecutor argues that there were other reasons for the dismissals. He explains that the indictments were dismissed because Foster already had been convicted and given a life sentence. He took dismissals on the indictments outstanding against Foster because a heavy caseload required that time and priority be given to other cases. Interview with Peter S. Gilchrist, District Attorney for the Twenty-Sixth Prosecutorial District, Charlotte, N.C., in Charlotte, May 3, 1979.

Based on information in the record, however, the only presumption that an appellate court could make concerning the seven other indictments is that they were dismissed for insufficient evidence.

102. 570 F.2d at 507-08.

103. 570 F.2d 501 (4th Cir. 1978).

104. 284 N.C. at 275, 200 S.E.2d at 794.

which may occur after trial. Consequently, North Carolina prosecutors may be forced to abandon inquiry into any misconduct subject of an indictment, not because it is impermissible in North Carolina, but because a conviction may be lost due to circumstances about the indictment unknown to the prosecutor at trial and probably out of his control after trial.[105]

In contrast to the unpredictable rule of leaving to the court's discretion what constitutes good faith, permitting character impeachment only with a record of conviction would provide a simple, sure rule. If character impeachment were allowed only with a record of conviction, witnesses and lawyers would not have to fret about dark skeletons from the past suddenly destroying testimony. The record of conviction equally notifies all parties about possible credibility problems and would allow the parties to prepare accordingly.

Additionally, limiting character impeachment to evidence of convictions would benefit the fact-finding mechanics of a trial. Excluding impeachment with acts of misconduct diminishes the likelihood that a witness will forego testifying for fear of embarrassing cross-examination. He can testify with the assurance that he knows the worst the cross-examiner can do to him. Presumably the less fear the public and a defendant have of the witness stand, the better the trial because the witness will testify and the jury will be exposed to all the evidence.[106]

Abandonment of the good faith rule is another advantage to permitting character impeachment only with convictions.[107] Because legal relevancy excludes evidence on collateral matters, the good faith of a cross-examiner cannot be challenged adequately.[108] By barring character impeachment with inquiry into acts of misconduct the fiction of assuring a basis-in-fact to support good faith inquiry into unproven acts is discarded. A witness's credibility could still be impeached but only when a conviction provided actual proof of the misconduct.[109]Prohibiting inquiry into specific bad acts eliminates the legal relevancy problems of impeachment on cross-examination, while ample tools to impeach credibility remain. In addition

105. *See* note 13 *supra.*

106. *See* Luck v. United States, 348 F.2d 763, 768 (1965). There is a compromise in this analysis. In order to assure that a jury hears all the facts, it is necessary to protect the witness from bad act impeachment. The result, however, is that the jury is then denied some information bearing on a witness's credibility. One justification to effect this compromise is the argument that even people of bad character only lie for a reason, and impeachment to show bias and motive is still permissible.

107. Because North Carolina does not allow the record of conviction to be admitted into evidence, the good faith rule applies to impeachment with convictions also. The North Carolina rule is not necessary. The record of conviction should be admitted to assure that a cross-examiner's questions are based in fact, because admitting the record would not create legal relevancy problems. *See* text accompanying notes 50-52 *supra. See also* STANSBURY, *supra* note 1, § 112 (criticism of North Carolina's rule prohibiting admission of a record of conviction).

108. *See* text accompanying notes 91-93 *supra.*

109. *See* text accompanying notes 48-50 *supra.*

to the self-verifying impeachment evidence of conviction, impeachment with character witnesses testifying to the principal witness's reputation also is available.[110] Consequently, even the despicable character who somehow has eluded conviction may still have his credibility attacked before the jury, but without the potential for abuse inherent in specific bad act impeachment.

C. *The Effect of* Watkins v. Foster *on the North Carolina Good Faith Rule*

1. *Limiting the effect of* Watkins v. Foster

North Carolina courts consistently have supported admission of character impeachment with prior acts of misconduct,[111] despite the difficulties of administering the good faith rule and the chilling effect such impeachment has on a potential witness's decision whether to testify. The North Carolina Supreme Court believes that the need to inform a jury about facts relating to a witness's credibility outweighs the potential dangers and difficulties inherent in bad act impeachment.[112] Consequently, it can be expected that the North Carolina courts will limit *Watkins v. Foster*[113] and reject the implication that proof beyond a reasonable doubt is necessary to satisfy the good faith rule. The most effective limitation of *Watkins* on a legal issue will result from emphasizing the Fourth Circuit's notation that Foster was deprived a fair trial "[b]ecause of the 'reasonable possibility' . . . that Foster was tried not only on the evidence, but also on the detailed 'facts' recounted in the prosecutor's questions, *with no limiting instructions by the judge . . . .*"[114]

The good faith rule and proper jury instructions are the two safeguards against misuse of bad act impeachment in North Carolina. The good faith rule presumably assures that the impeached witness actually committed the misconduct that is the subject of the cross-examination.[115] Limiting instructions then guarantee that the established misconduct is considered only as it affects credibility, and not as evidence that the defendant committed the substantive offense charged.

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110. Despite the legal relevancy exclusion, general reputation evidence is admissible in North Carolina to impeach a witness's character. The theory is that, although a witness cannot come prepared to defend himself against particular charges without notice, every person may be presumed capable of defending his general character. Additionally, good character witnesses can easily be called to defend the principal witness's reputation simply by refuting the impeaching witness's general allegations. Specific allegations do not need to be met, so no notice or evidentiary problems exist.

111. *See* Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 156 S.E.2d 265 (1967) (traffic offenses and public drunkeness); State v. Sims, 213 N.C. 590, 197 S.E 176 (1938) ("beating a ride" and gambling); State v. McGuinn, 6 N.C. App. 554, 170 S.E.2d 616 (1969) (defendant and wife had several children prior to marriage).

112. *See* State v. Foster, 284 N.C. at 275, 200 S.E.2d at 794.

113. 570 F.2d 501 (4th Cir. 1978).

114. *Id.* at 507; *see* note 29 *supra.*

115. *See* note 3 *supra* and accompanying text; text accompanying notes 92-93 *supra.*

The Fourth Circuit in *Watkins* viewed the lack of limiting instructions merely as an "aggravating factor" adding to the prejudicial effect of the crucial error that the impeaching questions were unsupported by fact.[116] *Watkins* challenges North Carolina's application of the good faith rule. Since North Carolina courts are not ready to reconsider the good faith rule, they are likely to emphasize the "no limiting instructions" language in the Fourth Circuit's opinion. They would agree, at least, that the failure to give limiting instructions is error, and it is simpler to administer the correction of that error than to reconsider the good faith rule.

2. *Assuring good faith under* Watkins v. Foster

The North Carolina court eventually will have to meet the *Watkins* challenge to the good faith rule. In doing so the court should consider additional procedures to protect defendants from impeachment with unproven accusations. The voir dire and the pretrial conference offer some protection.

One alternative to the evidentiary problem of the good faith rule is for the trial judge to conduct a voir dire hearing and accept evidence to determine good faith when a defendant challenges the basis-in-fact for a cross-examiner's questions. Accepting evidence on voir dire would guarantee that no witness was impeached with false accusations. Additionally, because the evidence regarding good faith would be heard outside the jury's presence, there would be no problem of confusing the jury with collateral issues.

Conducting a voir dire examination, however, would consume court time on a collateral matter in conflict with the legal relevancy concern for efficient use of court time.[117] Also, because the witness may still be surprised with a cross-examiner's accusations, even more time may be needed to allow the witness to gather evidence to defend against the allegations.[118]

At least one North Carolina trial judge already has experimented with a voir dire hearing to accept evidence concerning a cross-examiner's good faith. In *State v. Heard,*[119] the trial judge accepted the court record as proof that the witness had been charged and acquitted of shoplifting and found the record sufficient evidence to support good faith. In *State v. Gaiten*[120] the North Carolina Supreme Court stated that a voir dire hearing to find

116. Watkins v. Foster, 570 F.2d at 506; *see* note 29 *supra.*

117. *See* text accompanying notes 41-45 *supra.*

118. *See* text accompanying note 46 *supra.*

119. 262 N.C. 599, 138 S.E.2d 243 (1964).

120. 277 N.C. 236, 176 S.E.2d 778 (1970). The trial court in *Gaiten* did not conduct a voir dire to find those facts, but rather presumed good faith. On appeal, the *Gaiten* court found the record failed to show that the questions asked were not based on information and asked in good faith, and when the record is silent, the trial judge is presumed correct. The record failed to show lack of good faith, because a voir dire hearing to find facts concerning good faith was not conducted.

facts concerning a cross-examiner's good faith is permissible but is not required.

A second procedure a trial judge may consider to verify good faith is a pretrial hearing. A pretrial determination of impeachment questions offers the same improvement over the present application of the good faith rule as a voir dire hearing. The impeaching accusation could be substantiated by evidence at a pretrial hearing without confusing the jury. In addition a pretrial determination of the extent of impeachment to be allowed at trial would enable a witness to decide whether to testify based on the absolute knowledge of how his credibility will be attacked.[121]

Like a voir dire hearing, a pretrial hearing still presents the problem of consuming court time on a collateral issue. In recognition of the problem of trial delays, the trial judge should have wide discretion in granting a voir dire or pretrial hearing to determine the scope of cross-examination.[122]

IV. CONCLUSION

North Carolina courts are not likely to abandon bad act impeachment, even though limiting character impeachment to impeachment with a record of conviction or with reputation evidence would be a simpler, fairer rule.[123] But, the challenge to the good faith rule presented in *Watkins v. Foster*[124] may provide an impetus for North Carolina courts to structure greater safeguards against impeachment with false allegations than the good faith rule presently provides. A voir dire or a pretrial hearing could be utilized to hear evidence regarding a prosecutor's challenged cross-examination. Because evidence would be admitted, either of these options would provide a witness greater protection against false impeachment than the assurance of the good faith rule which is backed by promises and not by proof.

DONALD T. BOGAN

121. In People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974), the New York Court of Appeals provided for a pretrail hearing where the objecting witness could request the court to disallow questions regarding particular acts of misconduct. However, the burden was placed on the witness to have the question excluded. Where unproven acts of misconduct are the problem, the witness risks informing his opponent prior to trial of damaging information his opponent might not have been aware of, then being denied his request to have the questions excluded at trial.

122. *See* text accompanying notes 105-10 *supra.*

123. 570 F.2d 501 (4th Cir. 1978).

124. The focus of this note is the admission of evidence to support good faith, rather than the standard of proof necessary once evidence is admitted. The voir dire and pretrial solutions leave open the question of apparent conflict between the North Carolina Supreme Court and the Fourth Circuit as to what degree of proof, probable cause, beyond a reasonable doubt, or some standard in between, is necessary to support the good faith basis-in-fact requirement.