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What is a "Crime Relevant to Credibility"?

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D. What Is a "Crime Relevant to Credibility"?

Evidence of a person's character[1] is generally not admissible in court,[2] however, there are many exceptions to this general rule.[3] One of these exceptions, evidence of a prior conviction used to impeach credibility, has long been recognized in one form or another.[4] This exception was codified most recently in Maryland Rule 5-609.[5] Rule 5-609 does not change existing Maryland law significantly, yet its silence on exactly which crimes are relevant to credibility will continue to promote substantial litigation on the matter.

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1. "Character . . . means the aggregate of a person's traits, including those relating to care and skill and their opposites." MODEL CODE OF EVIDENCE Rule 304 (1942).

2. *See* MD. R. 5-404(a)(1) ("Evidence of a person's character . . . is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .").

3. *See, e.g.*, MD. R. 5-404(a)(1)(A) ("Evidence of a pertinent trait of character of an accused offered by the accused, or by the prosecution to rebut the same" is admissible).

4. *See* discussion *infra* Part 1.

5. Rule 5-609 provides:

> Impeachment by Evidence of Conviction of Crime:
>
> (a) *Generally.*—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility and (2) the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
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> (b) *Time Limit.*—Evidence of a conviction is not admissible under this Rule if a period of more than 15 years has elapsed since the date of the conviction.
>
> (c) *Other Limitations.*—Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:
>
> (1) the conviction has been reversed or vacated;
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> (2) the conviction has been the subject of a pardon; or
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> (3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.
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> (d) *Effect of Plea of Nolo Contendere.*—For purposes of this Rule, "conviction" includes a plea of nolo contendere followed by a sentence, whether or not the sentence is suspended.

MD. R. 5-609.

1. Rationale for Maryland Rule 5-609.—Since the late 1600s, restrictions have been placed on witnesses who have been convicted of a crime.[6] Initially, the restriction was a prohibition on testimony and considered part of the punishment for the crime.[7] "Nevertheless, in whatever degree the disqualification may have been thought of as a part of the punishment of the offender himself, it was obvious that this theory could not of itself justify the incidental punishment of innocent persons who might need the convict's testimony . . . ."[8] Thus, the theory upon which the restriction rested became one of credibility; the "desired inference is that a person who commits a criminal offense is likely—or at least more likely than one who has not committed such an act—to give false testimony."[9] This theory maintained the common law doctrine that declared a convicted person incompetent.[10] In the 1800s, the prohibition was transformed into a method of impeaching the credibility of a witness.[11]

Legislators, however, failed to restrict evidence of prior convictions to those crimes directly relating to a witness's credibility,[12] an oversight which exposed other weaknesses of this method of impeachment. The use of a prior conviction might "predicate the witness's unreliability on the basis of a single act even though this act may be atypical of the witness's character."[13] Divulgence of a criminal background also "may make the possessors of a criminal record reluctant to testify . . . to the detriment of the judicial system's interest."[14] Even greater risks exist when the witness with a conviction is also a party to the action. The conviction may be "translated into finding him guilty or liable without regard to whether he, in fact, committed the act with which he is charged."[15] Although this combination of low probative value and a high possibility of prejudice has led to demands for reform,[16] the rule remains intact "because of an unwillingness among courts and legislators to allow [a witness] to appear as a truthful per-

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6. *See* 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 519 (James H. Chadbourn rev. 1979).

7. 2 *id.* § 519, at 726.

8. 2 *id.*

9. GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 81, at 286 (1978).

10. 2 WIGMORE, *supra* note 6, § 519, at 727.

11. 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 609[02] (1994) (discussing the premise that underlies the use of prior convictions to impeach witnesses as a presumption "that a person who has been convicted is unworthy of belief").

12. 3 *id.*

13. 3 *id.* at 609-30.

14. 3 *id.*

15. 3 *id.*

16. 3 *id.* at 609-32.

son when his record of convictions, if made known to the jury, would cast serious doubt on his testimony."[17]

2. Historical Development of Maryland Rule 5-609.—At common law, only potential witnesses who had been convicted of infamous crimes were deemed incompetent to testify.[18] Infamous crimes included treason, any felony, misdemeanors involving dishonesty (crimen falsi), and obstruction of justice.[19] Today, states principally rely upon statutes or rules to allow prior convictions as a ground for impeachment of credibility.[20]

The Maryland General Assembly first addressed the common-law rule in Chapter 109 of the Acts of 1864[21] by removing the common-law disqualification of witnesses with prior convictions.[22] The legislature did not entirely remove the stigma of a prior conviction. Rather than allow "these witnesses to testify free from the taint of their prior infamous convictions, the legislature chose to make these convictions admissible for impeachment purposes."[23] The statute has retained its original substance for over 125 years, most recently reformulated in Section 10-905 of the Courts and Judicial Proceedings Article,[24] which allows the admission of evidence of conviction of infamous crimes for impeachment purposes.[25]

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17. LILLY, *supra* note 9, § 81, at 292.

18. 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 42 (John W. Strong ed., 4th ed. 1992) [hereinafter MCCORMICK].

19. 1 *id.*

20. 1 *id.*

21. *See* Prout v. State, 311 Md. 348, 358, 535 A.2d 445, 450 (1988) (tracing the roots of impeachment by prior conviction in Maryland).

22. *Id.* at 359, 535 A.2d at 450.

23. *Id.*

24. Section 10-905 provides:

> (a) *In general.*—Evidence is admissible to prove the interest of a witness in any proceeding, or the fact of his conviction of an infamous crime. Evidence of conviction is not admissible if an appeal is pending, or the time for an appeal has not expired, or the conviction has been reversed, and there has been no retrial or reconviction.
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> (b) *Certificate under seal as evidence.*—The certificate, under the seal of the clerk of the court, of the court in which the conviction occurred is sufficient evidence of the conviction.

MD. CODE ANN., CTS. & JUD. PROC. § 10-905 (1989).

25. *See Prout*, 311 Md. at 359, 535 A.2d at 450.

Although the phrase "infamous crimes" is generally thought to be well-defined,[26] Maryland courts have struggled with it. In a 1927 case, *Nelson v. Seiler*,[27] the Court of Appeals reasoned:

> It is not required that the evidence [of conviction of a crime to impeach a witness] be restricted to infamous crimes or those involving moral turpitude on the one hand, but, on the other, the purpose of the admission, to impeach credibility, must impose some limits; the convictions should be of infringements of the law that may have some tendency to impeach credibility, and not all infringements do.[28]

In 1981, the Court of Appeals adopted this concept of a crime of moral turpitude as a separate category of crimes relevant to credibility.[29] Seven years later, the court concluded that "the drafters of this legislation had no intention of creating a class of infamous crime known as a crime of moral turpitude."[30] When considering the admissibility of evidence of conviction of a crime other than an infamous crime, trial judges were instructed to make a reasoned judgment as to whether the offense was one that affected the defendant's credibility; if it did not, it was inadmissible for purposes of impeachment.[31]

On January 1, 1992, Maryland Rule 1-502[32] became the governing rule for impeachment by prior conviction, "trump[ing]" Section 10-

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26. *See id.* at 363, 535 A.2d at 452 (stating that infamous crimes include common-law felonies and crimen falsi); *see also* Garitee v. Bond, 102 Md. 379, 383, 62 A. 631, 633 (1905) (stating that crimes that common law regarded as infamous included "treason, felony, perjury, forgery and those other offenses, classified generally as *crimen falsi*"); HYMAN GINSBERG & ISIDORE GINSBERG, CRIMINAL LAW AND PROCEDURE IN MARYLAND 5 (1940) ("Infamous crimes in Maryland embrace treason, felonies and those misdemeanors which are founded in fraud."); 1 MCCORMICK, *supra* note 18, § 42 ("[T]reason or any felony, or . . . a misdemeanor involving dishonesty or false statement (crimen falsi), or the obstruction of justice . . . were said to be 'infamous' crimes.").

27. Nelson v. Seiler, 154 Md. 63, 139 A. 564 (1927).

28. *Id.* at 69, 139 A. at 566.

29. *See* Ricketts v. State, 291 Md. 701, 711, 436 A.2d 906, 912 (1981) ("Moral turpitude, while being somewhat less specific than infamous crimes, . . . connotes such a disregard for social values on the part of the perpetrator, that one could reasonably infer that such a person's testimony is suspect.").

30. *Prout*, 311 Md. at 363, 535 A.2d at 452.

31. *Id.*

32. Rule 1-502 provided:

> (a) *Generally.*—For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination, but only if the crime was an infamous crime or other crime relevant to the witness's credibility and the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness or the objecting party.
>
> (b) *Time Limit.*—Evidence of a conviction under this Rule is not admissible if a period of more than 15 years has elapsed since the date of the conviction.

905 of the Courts and Judicial Proceedings Article.[33] Rule 1-502 made several significant changes in Maryland law. First, the Rule required the trial judge to balance probative value with prejudicial effect for *all* prior convictions, including convictions for infamous crimes.[34] Under Section 10-905 of the Courts and Judicial Proceedings Article and then-existing Maryland case law, this balancing test applied only if the conviction was for other than an infamous crime. Second, Rule 1-502 declared inadmissible evidence of any conviction that occurred more than fifteen years prior to the testimony,[35] whereas no specific time limit had existed previously. Third, Rule 1-502 clarified the handling of nolo contendere pleas, stating that such pleas followed by a sentence were convictions for purposes of the rule.[36] As a result of these changes, the Court of Appeals noted:

> [R]ule 1-502 essentially create[d] a three-part test . . . . First, subsection (a) set forth the "eligible universe" for what convictions may be used to impeach a witness's credibility. This universe consist[ed] of two categories: (1) "infamous crimes" and (2) "other crimes relevant to the witness's credibility." . . . If a crime d[id] not fall within one of the two categories, then it [was] inadmissible and the analysis end[ed]. . . .
>
> If the crime [fell] within one of the two categories in the eligible universe, then the second step [was] for the proponent to [satisfy the conditions in sections (b) and (c)]. Finally, . . . the trial court must determine that the probative value of the prior conviction outweigh[ed] the danger of unfair prejudice to the witness or objecting party.[37]

(c) *Other Limitations.*—Evidence of a conviction otherwise admissible under section (a) of this Rule shall be excluded if:

(1) the conviction has been reversed or vacated;

(2) the conviction has been the subject of a pardon; or

(3) an appeal or application for leave to appeal from the judgment of conviction is pending, or the time for noting an appeal or filing an application for leave to appeal has not expired.

(d) *Effect of Plea of Nolo Contendere.*—For purposes of this Rule, "conviction" includes a plea of nolo contendere followed by a sentence, whether or not the sentence is suspended.

MD. R. 1-502 (rescinded 1994).

33. *See* JOSEPH F. MURPHY, JR., MARYLAND EVIDENCE HANDBOOK § 1302(B), at 647 (2d ed. 1993).

34. LYNN MCLAIN, MARYLAND RULES OF EVIDENCE § 2.609.2 (1994).

35. *Id.*

36. *Id.*

37. State v. Giddens, 335 Md. 205, 213-14, 642 A.2d 870, 874 (1994) (internal citations omitted).

While Rule 1-502 clarified many aspects of the use of prior convictions to impeach a witness's testimony, it did not address the most problematic area: exactly which crimes were admissible for impeachment purposes? The list of "infamous crimes" was relatively clear,[38] but a definition of the "lesser crimes relative to a person's credibility" remained elusive.[39]

On December 15, 1993, the Court of Appeals adopted Title 5 of the Maryland Rules—Evidence,[40] which became effective on July 1, 1994.[41] Maryland Rule 1-502 was replaced by the virtually identical Maryland Rule 5-609. One difference between the two rules is that Rule 5-609(a) uses the phrase "during examination" rather than "on cross examination."[42] This allows convictions to be brought out on direct examination to "draw the sting," permitting the impeachment of one's own witness in accordance with Rule 5-607.[43] Maryland Rule 5-609 also delineated paragraph (a) into subsections (1) and (2). This change in form clarifies that the balancing test of paragraph (a) applies to both infamous crimes and lesser crimes.[44]

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38. *See supra* note 26.

39. *Compare* Wallach v. Board of Educ., 99 Md. App. 386, 392, 637 A.2d 859, 862 (finding a conviction for conspiracy to distribute marijuana "is not admissible for impeachment purposes, and its admission constitutes reversible error"), *cert. granted*, 336 Md. 98, 646 A.2d 1019 (1994) *with* State v. Giddens, 335 Md. 205, 217, 642 A.2d 870, 876 (1994) (holding that "a prior conviction for distribution of cocaine is relevant to credibility and as such is admissible for impeachment purposes"), *rev'g* 97 Md. App. 582, 592, 631 A.2d 499, 504 (1993) (concluding "that distribution of a controlled dangerous substance is not a crime relevant to credibility and may not, therefore, be used under Rule 1-502 for impeachment purposes").

40. 21 Md. Reg. 1 (Jan. 7, 1994).

41. *Id.* The new rules apply to all trials commencing after July 1, 1994.

42. MD. R. 5-609(a).

43. MCLAIN, *supra* note 34, § 2.609.1. The Committee note reflects this difference, stating that "[t]he requirement that the conviction, when offered for purposes of impeachment, be brought out during examination of the witness is for the protection of the witness. It does not apply to impeachment by evidence of prior conviction of a hearsay declarant who does not testify." MD. R. 609 committee note (1994). The Committee note that followed old Rule 1-502(a) had originally stated "[t]he requirement that the conviction, when offered for purposes of impeachment, be brought out during cross-examination is for the protection of the witness and is not intended either to authorize or to preclude the party calling the witness from bringing out the conviction on direct examination." MD. R. 1-502 committee note (1994).

44. MCLAIN, *supra* note 34, § 2.609.1. This change in form codified the result reached by the Court of Appeals in Beales v. State, 329 Md. 263, 619 A.2d 105 (1993), in which the court stated "the rule aims to impose a weighing of probative value against unfair prejudice for all convictions used to impeach . . . [and] . . . abandons every vestige of per se admissibility regarding evidence of prior convictions for the purposes of impeachment." *Id.* at 272-73, 619 A.2d at 109-10. The State had argued in *Beales* that if the prior conviction in question was for an infamous crime, that conviction should automatically be admitted for impeachment purposes, and that the discretionary balancing test was required only when

3. A Comparison: Maryland Rule 5-609 and Federal Rule of Evidence 609.—The new Maryland Rules of Evidence are patterned generally after the Federal Rules of Evidence.[45] Rule 5-609, however, differs substantially from its federal counterpart by virtue of its more specific and more restrictive language.

Federal Rule 609[46] uses two categories of prior convictions: crimes involving dishonesty or false statement and felonies, that is, crimes punishable by death or imprisonment in excess of one year.[47]

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the conviction in question was for a lesser crime dealing with credibility. *Id.* at 270, 619 A.2d at 108.

45. Court of Appeals of Maryland Rules Order, 21 Md. Reg. 1 (Jan. 7, 1994) (Chasanow, J., dissenting in part).

46. Rule 609. Impeachment by Evidence of Conviction of Crime:

(a) *General rule.*—For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

(b) *Time Limit.*—Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation.*—Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications.*—Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal.*—The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

FED. R. EVID. 609.

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

Convictions of crimes involving dishonesty or false statement of any witness, including the accused, are automatically admissible.[48] Convictions of felonies of a witness other than the accused are subject to the balancing test of Federal Rule 403.[49] If the accused has been convicted of a felony, evidence of "such a crime shall be admitted if the . . . probative value of admitting the evidence outweighs its prejudicial effect to the accused."[50] The Maryland Rule, on the other hand, utilizes different categories of crimes and requires a balancing of probativeness versus prejudice as to all prior convictions.

Under the Federal Rule, evidence of a prior conviction is not admissible if more than ten years has passed since the latter of the date of conviction or the date of release from prison.[51] This limit to admissibility, however, can be hurdled by demonstrating that the "probative value of the conviction . . . substantially outweighs its prejudicial effect."[52] The Maryland Rule strictly prohibits evidence of a conviction

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48. FED. R. EVID. 609(a)(2). "The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and . . . are always to be admitted." FED. R. EVID. 609 Report of the House and Senate Conferees, *reprinted in* 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 680 (5th ed. 1990).

49. FED. R. EVID. 609(a)(1). Federal Rule of Evidence 403 provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." FED. R. EVID. 403. The reference to this rule was added by a 1990 amendment. Prior to that amendment, Rule 609 stated that "evidence . . . *shall* be admitted . . . if the crime [was a felony] and the court determines that the probative value . . . outweighs its prejudicial effect *to the defendant* . . . ." FED. R. EVID. 609(a) (1989) (emphasis added). The Supreme Court interpreted this language to mean that government witnesses in criminal trials and all witnesses in civil litigation were not subject to the balancing test for prejudice because there was no possibility of prejudice *to the defendant* by admitting evidence of the prior conviction of a witness other than the defendant. The Court held that "only the accused in a criminal case [is] protected from unfair prejudice by the balance set out in Rule 609(a)(1)." Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989). Under the 1990 amendment to Rule 609, "Rule 403 now clearly protects against unfair impeachment of any defense witness other than the defendant[, as well as protecting all] other litigants from unfair impeachment of their witnesses." FED. R. EVID. 609(a) advisory committee's note. The Maryland Rule addresses this problem by making the balancing test applicable to all crimes and requiring the probative value to outweigh the "danger of unfair prejudice to the *witness or the objecting party*," thereby protecting all witnesses and litigants equally. MD. R. 5-609(a) (emphasis added).

50. FED. R. EVID. 609(a)(1). This balancing test, as applied to prior felony convictions of a defendant, places the burden on the government to prove that the probative value outweighs the prejudicial effect. FED. R. EVID. 609(a) advisory committee note (1990 amendment). This differs from the balancing test applied by Rule 403 to felony convictions of all other witnesses, which places the burden on the party opposing introduction of the evidence to demonstrate that danger of unfair prejudice substantially outweighs the probative value. *Id.*

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

52. *Id.* Additionally, evidence of a conviction older than 10 years is admissible only if the adverse party is given sufficient written notice of intent to use such evidence, and the

that occurred more than fifteen years prior to the proposed testimony.[53]

Both the Maryland and Federal Rules exclude some otherwise admissible evidence of convictions based on post-conviction action. Federal Rule 609 excludes evidence of a conviction if it was pardoned, annulled, or otherwise overturned based on a finding of the rehabilitation of the person convicted.[54] The Rule also excludes evidence of a conviction that has been the "subject of a pardon, annulment or other equivalent procedure based on a finding of innocence."[55] Under the Maryland Rule, evidence of a conviction that has been subject to a pardon of any type is excluded.[56] The Maryland Rule also excludes evidence of a conviction if an appeal is pending or the time for an appeal has not lapsed.[57] The Federal Rule allows evidence of the appeal to be introduced, but does not exclude evidence of a conviction based on its appellate status.[58] Finally, the Maryland Rule excludes evidence of a conviction that has been reversed or vacated,[59] while the Federal Rule is silent on the subject.

4. Analysis.—Maryland Rule 5-609, while patterned after Federal Rule of Evidence 609, has benefitted considerably from nearly twenty-five years of federal litigation. The Maryland Rule did not, however, follow the example set by the Federal Rule which more clearly delineates the crimes subject to the rule. This oversight is the single major weakness of Maryland Rule 5-609.

"One of the primary purposes for enacting a set of evidentiary rules is to present precise answers to frequently posed questions."[60] Maryland's adaptation of the Federal Rule provides this guidance by the establishment of a bright line test to govern the admissibility of older convictions,[61] by the clear description of post-conviction action

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adverse party must have a fair opportunity to argue against the admissibility of such evidence. *Id.*

53. MD. R. 5-609(b).

54. *See* FED. R. EVID. 609(c).

55. *Id.*

56. MD. R. 5-609(c)(2).

57. MD. R. 5-609(c)(3).

58. *See* FED. R. EVID. 609(e).

59. MD. R. 5-609(c)(1).

60. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 534 (1989) (Blackmun, J., dissenting).

61. Previously, the length of time since the prior conviction was one factor that the trial judge considered when deciding the admissibility of a lesser crime used to impeach the credibility of a witness. Ricketts v. State, 291 Md. 701, 708, 436 A.2d 906, 910 (1981). Infamous crimes were per se admissible and no time limit applied. Kirby v. State, 48 Md. App. 205, 209, 426 A.2d 423, 426 (1981) (concluding that defendant's 25-year old sodomy

that deem convictions inadmissible for impeachment,[62] and by the explicit statement that nolo contendere pleas followed by sentences are considered convictions for the purposes of the Rule.[63] Maryland Rule 5-609 fails, however, to define clearly and exactly which crimes are relevant to a witness's credibility as well as what factors bear upon that determination.

Although a "codification should be so wrought that it supplies answers to a lawyer's questions simpler, more comprehensible, and more easily found than the lawyer could discover without the codification,"[64] the Maryland courts have already demonstrated that Maryland Rule 5-609 provides no simple, comprehensible, easily found answer to the question of which crimes are relevant to credibility.[65]

This difficulty is well illustrated by the recent decision by the Court of Appeals in *State v. Giddens*.[66] In *Giddens*, the defendant was tried and convicted for assault by a jury in the Circuit Court for Kent County in November 1992.[67] The State's case consisted of the testimony of the victim and corroborating testimony from the victim's girlfriend.[68] Giddens denied the incident, claiming that the victim identified the wrong person.[69] Upon learning that the defendant would testify in his own behalf, the prosecutor informed the court that the State would impeach the defendant's credibility by introducing evidence of a 1989 conviction for distribution of cocaine.[70] Over defense objection, the trial judge ruled this evidence admissible under

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conviction was admissible to impeach his credibility in trial for assault and assault with intent to rape).

62. Prior to the adoption of Maryland Rule 1-502, Maryland had not "addressed specifically the question of the admissibility of convictions if the individual [had] received a pardon, annulment, or certificate of rehabilitation with regard to it." 6 LYNN MCLAIN, MARYLAND PRACTICE: MARYLAND EVIDENCE STATE AND FEDERAL § 609.5 (1987). Section 10-905 of the Courts and Judicial Proceedings Article addressed post-conviction action only by stating that "[e]vidence of conviction is not admissible if an appeal is pending, or the time for an appeal has not expired, or the conviction has been reversed, and there has been no retrial or reconviction." MD. CODE ANN., CTS. & JUD. PROC. § 10-905(a) (1989); *see supra* notes 24-26.

63. *See* 6 MCLAIN, *supra* note 62, § 609.1 at 22 (Supp. 1994).

64. Irving Younger, *Introduction* to Symposium, *The Federal Rules of Evidence*, 12 HOFSTRA L. REV. 251, 252 (1984).

65. *See, e.g.*, State v. Giddens, 335 Md. 205, 642 A.2d 870 (1994). The court in *Giddens* was struggling to define a "crime relevant to credibility" under Maryland Rule 1-502; however, as discussed in Part 2, *supra*, that rule is virtually identical to Maryland Rule 5-609 and any differences between them have no effect on the discussion.

66. 333 Md. 205, 642 A.2d 870 (1994).

67. *Id.* at 208, 642 A.2d at 871.

68. *Id.*

69. *Id.*

70. *Id.* at 208-09, 642 A.2d at 871-72.

Maryland Rule 1-502.[71] The trial judge found that the crime met the requirement for felonious intent, involved conduct that was "'base or vile and contrary to the accepted and customary conduct between men'" and, therefore, was a crime of moral turpitude.[72] After conducting the required balancing test, the trial judge admitted the evidence.[73]

The Court of Special Appeals of Maryland reversed the trial court in a split decision.[74] Chief Judge Wilner reasoned that whatever determines whether a crime is relevant to credibility, it is "*not* determined by whether the crime in question is a felony or by whether it involves moral turpitude."[75] The court found that distribution of cocaine was not a crime relevant to credibility because "[d]istribution of a controlled dangerous substance . . . does not, inherently and of itself, indicate that the person is not to be believed"[76] and "[d]rug distribution, even when engaged in for profit, is not necessarily surreptitious or furtive."[77]

Judge Motz reluctantly concurred, but wrote that the "Court of Appeals' precedent requires reversal,"[78] although "if [this court] were writing on a clean slate, it would certainly be my view that a conviction of distribution of a controlled substance is admissible for impeachment purposes in at least some circumstances."[79]

Judge Murphy dissented on the grounds that, as a matter of law, a "conviction for distribution of cocaine is relevant to a person's credibility."[80] His dissent followed the trial judge's analysis that the crime was both one of moral turpitude and a felony relevant to the defend-

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71. *Id.* at 209, 642 A.2d at 872.

72. *Id.* (quoting the trial record).

73. *Id.*

74. Giddens v. State, 97 Md. App. 582, 631 A.2d 499 (1993), *rev'd*, 335 Md. 205, 642 A.2d 870 (1994).

75. *Id.* at 588, 631 A.2d at 502.

76. *Id.* at 591, 631 A.2d at 503; *see also* Ricketts v. State, 291 Md. 701, 713, 436 A.2d 906, 913 (1981) ("If the crime is so ill-defined that it causes the factfinder to speculate as to what conduct is impacting on the defendant's credibility, it should be excluded.").

77. *Giddens*, 97 Md. App. at 592, 631 A.2d at 503. The underlying facts of the crime are not admissible: "[I]t is the crime itself, as defined in the law, that must have a special relevance to credibility, not the particular manner in which the crime was committed." *Id.* at 592 n.2, 631 A.2d at 504 n.2.

78. *Id.* at 594, 631 A.2d at 504 (Motz, J., concurring).

79. *Id.* at 593, 631 A.2d at 504. Judge Motz's belief that Court of Appeals precedent determined that distribution of a controlled substance was not a crime relevant to credibility further illustrates the confusion that exists in this area, even among the appellate judges of Maryland. In reversing the lower court, the Court of Appeals did not agree with her interpretation of precedent but insisted it was not overruling itself. *See* State v. Giddens, 335 Md. 205, 213-18, 642 A.2d 870, 874-76 (1994).

80. *Giddens*, 97 Md. App. at 594, 631 A.2d at 505 (Murphy, J., dissenting).

ant's credibility.[81] The dissent also supported the notion that the defendant could have discussed the circumstances of his conviction in an attempt to mitigate the effects of its admission.[82]

The Court of Appeals subsequently reversed the Court of Special Appeals, holding that "the trial court properly admitted Giddens's prior conviction for distribution of cocaine for the limited purpose of impeaching his credibility."[83] The court discussed the application of Maryland Rule 1-502 and noted that, while "a prior conviction for simple possession of narcotics has no bearing on credibility,"[84] the court had never "expressly considered whether a conviction for drug dealing . . . is probative of a lack of veracity."[85] The court then decided that an "individual convicted of cocaine distribution would be willing to lie under oath . . . '[because that individual] lives a life of secrecy and dissembling in the course of that activity, being prepared to say whatever is required by the demands of the moment, whether the truth or a lie.'"[86]

The Court of Appeals was not persuaded by Giddens's argument that "some activity which has little bearing on truthfulness, such as passing a marijuana cigarette to a friend at a party or concert, is included within the technical definition of drug distribution,"[87] nor did they believe that "[t]he crime of cocaine distribution is . . . so 'ill-defined' that a jury would have difficulty determining the precise nature of the offense."[88] Finally, the Court of Appeals said that the trial court, although improperly using the term "moral turpitude," "properly weighed the probative value against the danger of prejudice."[89] The dissenting judges agreed with the opinion below of Chief Judge Wilner.[90]

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81. *Id.*

82. *Id.* at 595, 436 A.2d at 505.

83. State v. Giddens, 335 Md. 205, 222, 642 A.2d 870, 878 (1994).

84. *Id.* at 216, 642 A.2d at 875.

85. *Id.*

86. *Id.* at 217, 642 A.2d at 876 (quoting United States v. Ortiz, 553 F.2d 782, 784 (2d Cir.), *cert. denied*, 434 U.S. 897 (1977)).

87. *Id.* at 218, 642 A.2d at 876.

88. *Id.*

89. *Id.* at 221, 642 A.2d at 878. The Court of Appeals, although reversing the Court of Special Appeals, did not agree entirely with Judge Murphy's dissent below, reiterating that "only the name of the conviction, the date of the conviction, and the sentence imposed may be introduced to impeach a witness." *Id.* at 222, 642 A.2d at 878.

90. *Id.* at 223, 642 A.2d at 878-79 (Eldridge and Bell, JJ., dissenting).

Unfortunately, the *Giddens* decision did no more than add one specific crime to a piecemeal list of crimes relevant to credibility.[91] The court issued no rules to guide trial judges in this matter of law, nor did it clarify what information could be used to make the determination.[92] Trial judges and litigants still face the uncertainty of which unspecified crimes are relevant to credibility. The Court of Appeals has not satisfied one of the primary purposes for enacting a set of evidentiary rules: it failed to present a precise answer to this frequently posed question.

This issue, although not addressed by the new Maryland Rules of Evidence, was considered at a public meeting conducted by the court on October 24, 1991.[93] At that meeting, Chief Judge Murphy noted that failure to define clearly which crimes are relevant to a person's credibility "leaves the trial judges . . . hanging out there not knowing . . . what . . . is eligible."[94] The court could have adopted a number of alternatives in Rule 5-609 that would have solved this problem. The simple deletion of the phrase "other crime relevant to the witness's credibility" provides one workable solution. This revision would limit the scope of the Rule to convictions for infamous crimes, similar to the common-law practice.[95]

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91. *See also* Carter v. State, 80 Md. App. 686, 693, 56 A.2d 131, 134 (1989) (conviction for drug manufacturing). For cases specifying crimes *not* relevant to credibility, see, for example, Morales v. State, 325 Md. 330, 338-39, 600 A.2d 851, 855 (1992) (possession of PCP, assault and battery, disorderly conduct, and motor vehicle offenses); Lowery v. State, 292 Md. 2, 2, 437 A.2d 193, 193-94 (1981) (possession of barbiturates); Ricketts v. State, 291 Md. 701, 713-14, 436 A.2d 906, 912-13 (1981) (indecent exposure); Wallach v. Board of Educ., 99 Md. App. 386, 637 A.2d 859 (conspiracy to distribute marijuana), *cert. granted*, 336 Md. 98, 646 A.2d 1019 (1994).

92. *Giddens*, 335 Md. at 213, 642 A.2d at 874 ("This threshold question of whether or not a crime bears upon credibility is a matter of law.").

93. *Id.* at 216, 642 A.2d at 875. Although the court was addressing Rule 1-502, the discussion is equally pertinent to Rule 5-609. The question was apparently not discussed specifically by the Rules Committee when drafting Rule 5-609. *See* Minutes of Court of Appeals Standing Committee on Rules of Practice and Procedure (Mar. 12, 1993); Minutes of Court of Appeals Standing Committee on Rules of Practice and Procedure (Feb. 12, 1993).

94. *Giddens*, 335 Md. at 216 n.8, 642 A.2d at 875 n.8. The *Giddens* court, however, specifically limited its discussion to whether drug distribution and the possession of drugs with intent to sell were crimes relevant to credibility. The court has subsequently held that conviction for possession of a controlled dangerous substance with the intent to distribute is admissible for purposes of impeachment. State v. Woodland, No. 94-91, slip op. at 1 (Md. Mar. 9, 1995).

95. There still lingers some question over the exact definition of an "infamous crime." *See* Beales v. State, 329 Md. 263, 270, 619 A.2d 105, 108 (1993) (stating that theft is among crimen falsi and therefore an infamous crime); Watson v. State, 311 Md. 370, 375, 535 A.2d 455, 458 (1988) (holding that attempted rape is not an infamous crime). Admittedly, this approach will not completely solve the problem.

The inclusion within the Rule itself of a complete list of crimes relevant to credibility would offer another solution. Naturally, the operation of the present Rule will eventually follow this approach as the Court of Appeals rules on the relevance to credibility on a crime-by-crime basis, but the list will then exist in case law rather than in the Rule. The Rules Committee could have easily anticipated this eventuality and avoided the present confusion. The Rules Committee, nevertheless, would have faced the difficult challenge of creating a satisfactory list of specific crimes relevant to credibility because "'[i]n a purely philosophical sense[,] . . . all violations of the law, by their very nature involve some element of dishonesty.'"[96]

The approach of the Federal Rules—defining a broad category of crimes that could be considered, such as crimes meeting the definition of felony—presents another method.[97] The advantage to this approach is that it allows all parties to predict the outcome of a ruling.[98] If such an approach were applied to the Maryland Rule, it would operate as follows:

1. Start with a list of all crimes.
2. Reduce the universe of crimes to include only those crimes known at common law as infamous crimes and those crimes meeting the definition of a felony (or otherwise defined category).
3. Remove those crimes whose introduction is more prejudicial than probative.
4. Reduce the universe further by the fifteen-year time limit and post-conviction action exclusion.

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96. *Giddens*, 335 Md. at 215, 642 A.2d at 875 (quoting Gregory v. State, 616 A.2d 1198, 1204 (Del. 1992)).

97. Unanimous approval of the federal approach by no means exists.

> Probably no single Rule provoked as much controversy as Rule 609. There was support for the common law view. There was also support for the so-called "Luck" rule, Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965), which gave the Trial Judge the power to balance the probative value against the prejudicial effect of all prior convictions and which was adopted in almost every Circuit. In the House of Representatives, the prevailing view was that a prior conviction should only be introduced if the crime involved dishonesty or false statement.

1 SALTZBURG & MARTIN, *supra* note 48, at 634. The Federal Rule was a compromise of many different viewpoints. *Id.*

98. This method would satisfy Judge McAuliffe's view that "[i]t is neither logical nor appropriate to permit one judge to find a crime to be [a lesser crime relevant to credibility] and another judge to find the same crime to [not be a lesser crime relevant to credibility]." Prout v. State, 311 Md. 348, 367, 535 A.2d 445, 454 (1988) (McAuliffe, J., dissenting). Trial judges would have the discretion only to balance probativeness versus prejudice. The way the rule currently operates, different trial judges are likely to rule differently on the same crime until that specific crime has been addressed by the Court of Appeals.

If a conviction survives each of these steps, it would be admissible to use it to impeach the credibility of a witness. It is important to note that the trial judge still retains the discretion to rule evidence of a prior conviction inadmissible.[99]

A final approach would bar evidence of any prior convictions to impeach the credibility of a witness. This view received support from Oliver Wendell Holmes, who wrote:

> [W]hen it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.[100]

Although questions about the relevancy of the evidence continue,[101] the likelihood for adoption of this alternative approach appears slim.[102]

Although the above proposals might have reduced the potential problems surrounding Maryland Rule 5-609, they were not adopted. Since a court's ruling on this question may often determine which

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99. An increase in the trial judge's discretion is not necessarily the most favorable solution. "Thus does the serpent of uncertainty crawl into the Eden of trial administration. . . . [S]hifting the burden to the judge's discretion raises problems as to the adequacy of his information or basis upon which to exercise discretion." 1 MCCORMICK, *supra* note 18, § 42 n.5. Without a discretionary ruling by the judge, however, evidence of a prior conviction would not be admissible in the absence of a per se admissibility rule. Trial judges, moreover, make such discretionary rulings on almost every piece of evidence. Therefore, the increase in the trial judge's discretion would be minimal and more than offset by the reduced waste of judicial energy spent in appellate litigation.

Another benefit to this approach is that a ruling on the admission of evidence of a prior conviction would be reviewable only under an abuse of discretion standard, because questions of law are already decided by whether the crime fits into the category defined by the rule. Under the present rule, this decision is discretionary (in the absence of case law dealing with the same crime), but is subject to a de novo review as a question of law.

100. Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78 (1884).

101. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 508 n.4, 512 n.11 (1989) (discussing the continuing debate over the relevancy and fairness of evidence of prior conviction used to impeach a witness).

102. For further analysis on alternative approaches, see LILLY, *supra* note 9, § 81; Additional Views of Hon. Lawrence J. Hogan on FED. R. EVID. 609, *reprinted in* 1 SALTZBURG & MARTIN, *supra* note 48, at 675-78.

witnesses will testify—especially for the defense—parties will continue to seek rulings *in limine*.[103]

5. Conclusion.—Maryland Rule 5-609 is a result of over 125 years of common-law and statutory experience with the admissibility of evidence of a prior conviction used to impeach a witness. Yet, this experience has still not satisfactorily defined which crimes are relevant to credibility. Maryland Rule 5-609 does little to assist in this effort.

Because Maryland Rule 5-609 did not change Maryland law substantially, its failure to clarify exactly which crimes are relevant to a person's credibility will inevitably generate litigation that might otherwise have been avoided. The Court of Appeals Standing Committee on Rules of Practice and Procedure missed the perfect opportunity to provide a more precise answer to a troublesome and frequently posed question. As a result, the Court of Appeals will find itself supplying these answers piece by piece, crime by crime, for many years to come.

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103. An *in limine* decision, of course, benefits the opposing party as well as the trial judge. The opposing party gains the opportunity to plan its cross examination more effectively. "The advantage to the Trial Judge . . . is that there is time to consider the delicate balancing required by [MD. R. 5-609, and it] gives the Judge advance notice of the need for a ruling and time to prepare a statement." 1 SALTZBURG & MARTIN, *supra* note 48, at 638.