

2020

***Rosales V. State: Time for a Change, Witness Impeachment by Use of a Prior Conviction Under Maryland Law***

John Karpinski

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/endnotes>

---

**Recommended Citation**

John Karpinski, *Rosales V. State: Time for a Change, Witness Impeachment by Use of a Prior Conviction Under Maryland Law*, 79 Md. Law Rev. Online 101 (2020),  
Available at: <https://digitalcommons.law.umaryland.edu/endnotes/66>

This Articles from Volume 79 is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review Online by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

**NOTE**  
**ROSALES V. STATE: TIME FOR A CHANGE, WITNESS**  
**IMPEACHMENT BY USE OF A PRIOR CONVICTION UNDER**  
**MARYLAND LAW**

JOHN KARPINSKI\*

As a general principle, evidence doctrine bars the use of character evidence to prove that a person acted in accordance with a particular trait on a specific occasion.<sup>1</sup> The federal courts and most states, including Maryland, make an exception to this general pronouncement, allowing a witness to be impeached with evidence of prior criminal convictions.<sup>2</sup> This exception is among the most controversial evidence rules.<sup>3</sup> In *Rosales v. State*,<sup>4</sup> the Court of Appeals held that a conviction under the Violent Crime in Aid of Racketeering Activity statute<sup>5</sup> (“VICAR”) is a proper conviction for witness impeachment under Maryland Rule 5-609.<sup>6</sup> In doing so, the Court of Appeals

---

© 2020 John Karpinski.

\* J.D. Candidate, 2021, University of Maryland Francis King Carey School of Law. The author wishes to thank all of his *Maryland Law Review* editors, particularly Lauren Fash, Gina Bohannon and Andrew White, for their thoughtful feedback, support, and guidance throughout the writing process, as well as Professor Amanda Pustilnik for her knowledge and insight. The author also wishes to thank his parents, Anne and Kevin, and brothers Christopher and William for their unrelenting encouragement, kindness, and support. Lastly, the author wishes to thank Professors Sherri Lee Keene and Kathy Frey-Balter for their invaluable advice and encouragement.

1. See MD. R. 5-404(a) (establishing that “evidence of a person’s character or character trait is not admissible to prove that the person acted in accordance with the character or trait on a particular occasion”); FED. R. EVID. 404(a)(1) (establishing that “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait”).

2. FED. R. EVID. 609; Md. R. 5-609.

3. Montrè D. Carodine, “*The Mis-Characterization of the Negro*”: *A Race Critique of the Prior Conviction Impeachment Rule*, 84 IND. L.J. 521, 524 (2009); Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1, 6 (1997).

4. 463 Md. 552, 206 A.3d 916 (2019).

5. 18 U.S.C. § 1959 (2018).

6. *Rosales*, 463 Md. at 556–57, 206 A.3d at 918.

The Rule states in relevant part,

(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.

further blurred the line of admissible convictions under Maryland Rule 5-609. The current Rule sets forth a confusing framework for trial judges to decipher which crimes qualify for impeachment. As such, the Rule is ripe for replacement. While no alternative would be flawless, implementing Federal Rule of Evidence 609, or alternatively Alabama Rule of Evidence 609 or Indiana Rule of Evidence 609, would cure many of the defects in Maryland Rule 5-609.

Part I of this Note will discuss the underlying facts in *Rosales* and the Maryland Court of Special Appeals' unreported decision. Part II will examine the legal history of witness impeachment by use of a prior conviction in Maryland as well as the intricate features of Maryland Rule 5-609. Part III will review the Court of Appeals' unanimous decision in *Rosales*. Part IV of this Note will argue that the Court of Appeals improperly expanded rule 5-609 by interpreting VICAR convictions as relevant to a witness's credibility. Part IV will further advocate that due to the Rule's inaccessible framework, as demonstrated in *Rosales*, Maryland Rule 5-609 should be replaced in favor of a more workable rule, such as Federal Rule of Evidence 609, Alabama Rule of Evidence 609, or Indiana Rule of Evidence 609.

## I. THE CASE

In September 2012, Wilfredo Rosales was arrested in connection with an assault in Langley Park in Prince George's County, Maryland.<sup>7</sup> The victim of the assault, Hector Hernandez-Melendez, alleged that seven MS-13 gang members approached him at the park and asked him to identify himself.<sup>8</sup> After refusing to identify himself or lift up his shirt to reveal identifying tattoos, the assailants threw Mr. Hernandez-Melendez to the ground and stabbed him.<sup>9</sup> Mr. Hernandez-Melendez was only able to identify Mr. Rosales out of the seven assailants.<sup>10</sup> Mr. Hernandez-Melendez knew Mr. Rosales did not commit the assault; however, he alleged Mr. Rosales

---

(b) Time Limit. Evidence of a conviction is not admissible under this Rule if a period of more than [fifteen] years has elapsed since the date of the conviction, except as to a conviction for perjury for which no time limit applies.

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

7. *Rosales*, 463 Md. at 558, 206 A.3d at 919.

8. *Id.*

9. *Id.*

10. *Id.* Mr. Hernandez-Melendez had a prior relationship with Mr. Rosales. *Id.* In 2006, Mr. Hernandez-Melendez "walk[ed] through" Mr. Rosales. *Id.* (alteration in original). "Walking through" is the procedure to gain membership in MS-13. *Id.* at 558 n.1, 206 A.3d at 919 n.1. Mr. Hernandez-Melendez "walk[ed] through" Mr. Rosales for roughly four months before the two lost contact. *Id.* They did not regain contact until the incident in September of 2012. *Id.* at 558-59, 206 A.3d at 919.

orchestrated the attack.<sup>11</sup> Further, Mr. Hernandez-Melendez alleged Mr. Rosales took “\$150 from his wallet” after the attack was complete.<sup>12</sup>

Mr. Hernandez-Melendez alleged members of the MS-13 gang ordered the attack as retaliation for his testimony in a 2009 District of Columbia criminal case against other members of the gang.<sup>13</sup> Between 2005 and 2006, the District of Columbia Metropolitan Police Department identified Mr. Hernandez-Melendez as a full-fledged MS-13 gang member.<sup>14</sup> Likewise, Mr. Rosales was a validated MS-13 gang member.<sup>15</sup> Mr. Hernandez-Melendez believed that a “green light,” or death order, was put out on him for his prior cooperation with law enforcement.<sup>16</sup>

In May of 2013, a jury trial against Mr. Rosales commenced in the Circuit Court for Prince George’s County.<sup>17</sup> The State brought nine charges against Mr. Rosales arising from the assault of Mr. Hernandez-Melendez.<sup>18</sup> As part of its case, the State called Mr. Hernandez-Melendez as a victim-witness.<sup>19</sup> Prior to the cross-examination of Mr. Hernandez-Melendez, the State moved *in limine* to preclude the defense from asking about Mr. Hernandez-Melendez’s 2011 federal convictions for “conspiracy to commit assault with a dangerous weapon in aid of racketeering and threatening to commit a crime of violence in aid of racketeering.”<sup>20</sup>

The State argued that the convictions should be excluded for impeachment purposes because they did not meet the criteria under Maryland Rule 5-609.<sup>21</sup> Rule 5-609 states, in relevant part:

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

---

11. *Id.* at 558, 206 A.3d at 919. When questioned by detectives at Washington Hospital Center, Mr. Hernandez-Melendez informed detectives that he could not identify the person who stabbed him but that he recognized Mr. Rosales when he removed the money from his wallet. *Id.*

12. *Id.*

13. *Rosales v. State*, No. 2659, 2017 WL 6312861, at \*1 (Md. Ct. Spec. App. Dec. 11, 2017), *aff’d in part, rev’d in part*, 463 Md. 552, 206 A.3d 916 (2019). Mr. Hernandez-Melendez testified as a government witness in a federal homicide trial. *Rosales*, 463 at 559, 206 A.2d at 920. Detective Eliseo Medina, of the District of Columbia Metropolitan Police Department, characterized Mr. Hernandez-Melendez’s testimony as “very crucial and important.” *Rosales*, 2017 WL 6312861 at \*2.

14. *Rosales*, 2017 WL 6312861 at \*2.

15. *Id.* Detective Medina had stopped Mr. Rosales dozens of times based on his connection with other documented MS-13 gang members. *Id.* Further, “based on investigations, pictures, and interviews,” Mr. Rosales had been classified as a validated gang member. *Id.*

16. *Id.* (“The number one rule violation leading to a green light is ‘associating with rivals or associating with law enforcement.’”).

17. *Rosales*, 463 Md. at 559, 206 A.3d at 920. The case was docketed Case No. CT121814X. *Id.* at 552, 206 A.3d at 916.

18. *Id.* at 559, 206 A.3d at 920.

19. *Id.*

20. *Id.*

21. *Id.*

examination of the witness, but only if (1) the crime was an infamous crime or other crime relevant to the witness's credibility . . . .<sup>22</sup>

At trial, the defense argued Mr. Hernandez-Melendez's convictions were relevant to his credibility, and further, "were different from other crimes of violence."<sup>23</sup> The trial court disagreed with the defense and granted the State's motion to exclude.<sup>24</sup> Mr. Rosales was convicted of "retaliation against a witness" and "participation in a criminal gang."<sup>25</sup>

Mr. Rosales appealed the judgement to the Court of Special Appeals.<sup>26</sup> The main question to be answered on appeal was whether, "the trial court err[ed] in excluding the victim-witness' prior convictions for crimes of violence in aid of racketeering activity?"<sup>27</sup> A three-judge panel, comprised of Judges Graeff, Leahy, and Beachley, unanimously held that the circuit court did not err by excluding Mr. Hernandez-Melendez's prior convictions.<sup>28</sup> Relying on precedent, the court ruled that whether a conviction for conspiracy qualifies under rule 5-609 "depends on the objective of the conspiracy."<sup>29</sup>

The Court of Special Appeals examined the substantive crimes underlying the VICAR convictions to decide whether Mr. Hernandez-Melendez's convictions qualified under the Rule.<sup>30</sup> The court determined that the substantive acts underlying Mr. Hernandez-Melendez's convictions "involve[d] acts of violence."<sup>31</sup> Maryland precedent is clear that violent crimes, "generally have little, if any, bearing on honesty and veracity."<sup>32</sup> Because crimes of violence are not eligible under Maryland Rule 5-609, the Court of Special Appeals held Mr. Hernandez-Melendez's convictions were

---

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

23. *Rosales*, 463 Md. at 559, 206 A.3d at 920.

24. *Id.*

25. *Id.* at 560, 206 A.3d at 920. Mr. Rosales received a twelve-year sentence, with all but six years suspended on the retaliation charge and ten years with all but five suspended on the participation in a criminal gang charge. *Id.* Mr. Rosales was acquitted of "first and second degree assault, armed robbery, robbery, theft, and carrying a weapon." *Rosales v. State*, No. 2659, 2017 WL 6312861, at \*3 (Md. Ct. Spec. App. Dec. 11, 2017), *aff'd in part, rev'd in part*, 463 Md. 552, 206 A.3d 916 (2019).

26. *Rosales*, 2017 WL 6312861, at \*1.

27. *Id.*

28. *Id.* at \*13.

29. *Id.* at \*7 (noting that a conviction for cocaine distribution was an impeachable offense under Maryland Rule 5-609 (citing *In re Gary T.*, 222 Md. App. 374, 386, 112 A.3d 1108, 1115 (2015))).

30. *Id.* at \*6.

31. *Id.* The crimes underlying Mr. Rosales's convictions were "assault with a dangerous weapon in aid of racketeering activity and threatening to commit a crime of violence in aid of racketeering activity." *Id.* at \*3.

32. *Id.* at \*6 (citing *Prout v. State*, 311 Md. 348, 364, 535 A.2d 445, 453 (1988) (finding that prostitution and solicitation are not proper crimes for impeachment)).

not proper for impeachment.<sup>33</sup> Subsequently, the Court of Appeals granted Mr. Rosales’ petition for writ of certiorari to decide: (1) Whether a prior federal conviction “for committing a violent crime in aid of racketeering” was admissible for witness impeachment, and (2) whether the trial court’s failure to allow the defendant to use the witness’s prior convictions for the purposes of impeachment constituted harmless error.<sup>34</sup>

## II. LEGAL BACKGROUND

The issue of witness impeachment by use of a prior conviction dates back to the English Common Law.<sup>35</sup> Under the common law, “one who had been convicted of treason, any felony, a misdemeanor involving dishonesty, or crimes relating to the obstruction of justice, was considered incompetent to testify at any trial.”<sup>36</sup> In 1898, for the first time, English law granted criminal defendants the right to testify on their own behalf.<sup>37</sup> Interestingly enough, this law specifically forbid prosecutors from inquiring into the defendant’s prior convictions.<sup>38</sup> Since then, courts around the United States have grappled with how to properly restrict witness impeachment by use of a prior conviction.<sup>39</sup> Section II.A discusses the historical development of Maryland Rule 5-609. Section II.B examines the purpose of the Rule. Section II.C explores the “eligible universe” of crimes suitable for

---

33. *Id.* at \*8.

34. *Rosales v. State*, 463 Md. 552, 556, 206 A.3d 916, 917 (2019). Following the grant of certiorari, the Court of Appeals *sua sponte* raised the additional question of whether there was jurisdiction to hear petitioner’s untimely appeal. *See id.* at 565 n.4, 206 A.3d at 923 n.4 (thanking the Standing Committee on Rules of Practice and Procedure for bringing the inconsistency to the court’s attention); *see also* Oral Argument at 15:50, *Rosales v. State*, 463 Md. 552, 206 A.3d 916 (2019) (No. 6), <https://www.courts.state.md.us/sites/default/files/import/coappeals/media/2018/coa20180907caseno6.mp4>.

35. *State v. Giddens*, 335 Md. 205, 214, 642 A.2d 870, 874 (1994).

36. *Id.* (citing CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 42, at 142 (John William Strong ed., 4th ed. 1992)).

37. Criminal Evidence Act 1898, 61 & 62 Vict. c. 36, § 1(f) (Eng.).

38. *Id.* The Act lists three exceptions to this general bar. The Act states, in relevant part, (f) A person charged and called as a witness in pursuance of this Act shall not be asked . . . any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defense is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence.

*Id.*

39. *See infra* Section IV.B.2.

impeachment. Finally, Section II.D ponders the facial approach of Maryland Rule 5-609. Section II.E surveys the balancing test employed by Maryland Rule 5-609.

*A. The Historical Development of Maryland Rule 5-609*

The Maryland legislature first addressed the disqualification of felons from testifying in 1864 when the General Assembly enacted Chapter 109.<sup>40</sup> Chapter 109 eliminated the total bar to testifying for those convicted of infamous crimes but made those convictions eligible for witness impeachment.<sup>41</sup> This statute has remained largely the same for over 150 years<sup>42</sup> and was most recently codified as Annotated Code of Maryland, Courts and Judicial Procedure, section 10-905.<sup>43</sup> Section 10-905 states, in relevant part, “Evidence is admissible to prove . . . [the witness’s] conviction of an infamous crime.”<sup>44</sup>

On January 2, 1975, Congress passed the Federal Rules of Evidence.<sup>45</sup> The Federal Rules of Evidence include rule 609, which allows for the impeachment of a witness by use of a qualifying prior conviction.<sup>46</sup> Using Federal Rule 609 as a model, on November 1, 1991, the Court of Appeals adopted rule 1-502 to govern witness impeachment by use of a prior conviction in Maryland.<sup>47</sup> On July 1, 1994, in an effort to consolidate and

40. 1864 Md. Laws 136; *see also* State v. Westpoint, 404 Md. 455, 474, 947 A.2d 519, 530–31 (2008) (finding that when the legislature passed “Chapter 109 in 1864 it intended to remove this common law disqualification”).

41. 1864 Md. Laws 136, 138; Prout v. State, 311 Md. 348, 359, 535 A.2d 445, 450 (1988).

42. Prout, 311 Md. at 558–59, 535 A.2d at 450.

43. MD. CODE ANN., CTS. & JUD. PROC. § 10-905(a) (LexisNexis 2013).

44. *Id.*

45. Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. (2018)).

46. FED. R. EVID. 609.

The Rule states, in relevant part,

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

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

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

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

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

*Id.*

47. State v. Westpoint, 404 Md. 455, 476, 947 A.2d 519, 532 (2008). Rule 1-502 superseded Annotated Code of Maryland, Courts and Judicial Proceedings Article, section 10-905 because Maryland rules usually apply even where a prior statute is inconsistent. Beales v. State, 329 Md.

clarify the State's rules on evidence, Title 5 of the Maryland Rules of Practice and Procedure became the governing rules of evidence for Maryland state courts.<sup>48</sup> As part of this new collection of laws, Maryland Rule 5-609 replaced rule 1-502.<sup>49</sup>

### *B. The Purpose of Maryland Rule 5-609*

The Maryland Rules of Evidence were designed with the goals of determining the truth and ensuring proceedings are conducted in a just manner.<sup>50</sup> Witness impeachment by use of a prior conviction is designed to help the factfinder gauge the credibility of the witness.<sup>51</sup> However, Maryland Rule 5-609 was designed to limit the factfinder's prejudice to the witness by narrowing the circumstances in which a past conviction could be used for impeachment.<sup>52</sup> Essentially, rule 5-609 serves as a safeguard against a factfinder disregarding the witness's testimony because of the witness's past criminal acts, or because they think the witness is generally a bad person.<sup>53</sup>

### *C. The Eligible Universe of Crimes: A Complicated Universe to Navigate*

In order to admit a prior conviction for impeachment under rule 5-609, a court must first determine if the conviction falls within the "eligible universe."<sup>54</sup> Rule 5-609 delineates two categories of convictions that are eligible for impeachment.<sup>55</sup> Convictions are eligible for impeachment only if the crime is (1) "an infamous crime" or (2) an "other crime relevant to the

---

263, 273, 619 A.2d 105, 110 (1993) (citing *Johnson v. Swann*, 314 Md. 285, 289, 550 A.2d 703 (1988)).

48. *Walker v. State*, 107 Md. App. 502, 516, 668 A.2d 990, 997 (1995), *aff'd*, 345 Md. 293, 691 A.2d 1341 (1997); Alan D. Hornstein, *The New Maryland Rules of Evidence: Survey, Analysis and Critique*, 54 MD. L. REV. 1032, 1032-34 (1995) (explaining that prior to the adoption of Title 5 "Maryland evidence law consisted of a grab bag of statutory provisions, rules of practice and, primarily, common-law precedent").

49. *Westpoint*, 404 Md. at 478, 947 A.2d at 533. Rules 5-609 and 1-502 are nearly identical in their language and function. There are four minor differences between rules 1-502 and 5-609. The first difference is rule 5-609(a) included the phrase "during examination" while rule 1-502(a) read "on cross-examination." LYNN MCLAIN, MARYLAND RULES OF EVIDENCE 153 (1994). The second difference is that section (a) was divided into clauses (1) and (2) to show "that section (a)'s balancing test applies to both categories of prior convictions." *Id.* The third difference is the final sentence of rule 1-502(a)'s Committee note is omitted because it is "inconsistent with Rule 5-607." *Id.* The final difference is the addition of the second sentence "to the Committee note following section(a)." *Id.*

50. *Brown v. State*, 373 Md. 234, 258, 817 A.2d 241, 255 (2003) (Wilner, J., dissenting).

51. *Ricketts v. State*, 291 Md. 701, 703, 436 A.2d 906, 907 (1981).

52. *Id.* at 703, 436 A.2d at 907.

53. *Westpoint*, 404 Md. at 478, 947 A.2d at 533.

54. MD. R. 5-609(a); *Cure v. State*, 421 Md. 300, 324, 26 A.3d 899, 913 (2011).

55. MD. R. 5-609(a) (noting that "infamous crime[s]" and "other crime[s] relevant to the witness's credibility" are proper for impeachment).



witness's credibility."<sup>56</sup> Infamous crimes include treason, common law felonies,<sup>57</sup> and other relevant offenses generally classified as *crimen falsi*.<sup>58</sup>

Since the enactment of Maryland Rule 1-502 and subsequently Maryland Rule 5-609, Maryland courts have struggled to define what qualifies as an "other crime relevant to the witness's credibility."<sup>59</sup> Crimes that fall into this category have to show, "the perpetrator 'lives a life of secrecy' and engages in 'dissembling in the course of [the crime], being prepared to say whatever is required by the demands of the moment, whether the truth or a lie.'"<sup>60</sup> In other words, to qualify under the "other crime relevant to a witness's credibility" category, the conviction must question whether the witness's testimony should be believed.<sup>61</sup> Absent this tendency to show untruthfulness, the conviction should not be admitted.<sup>62</sup>

Maryland courts have not been able to consistently delineate which crimes are relevant to a witness's credibility under Maryland Rule 5-609. In practice, the construction of rule 5-609 requires the Court of Appeals to grant certiorari to a case which presents a previously unexplored conviction for impeachment.<sup>63</sup> This construction has left trial courts, and the intermediate appellate court, vulnerable to reversible error subject to the Court of Appeals decision regarding the novel conviction.<sup>64</sup>

Some firm categories of eligible convictions have been established. Crimes of violence, "which may result from a short temper, a combative nature, extreme provocation, or other causes generally have little or no direct bearing on honesty or veracity" and thus, are not eligible for witness

---

56. *Id.*

57. Common law felonies include "murder, manslaughter, robbery, rape, burglary, larceny, arson, sodomy and mayhem." *Robinson v. State*, 4 Md. App. 515, 523 n.3, 243 A.2d 879, 884 n.3 (1968)(citing HOCHHEIMER'S CRIMINAL LAW § 6 (1st ed.)).

58. Crimes traditionally "classified as *crimen falsi* include crimes in the nature of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense involving some element of deceitfulness, untruthfulness, or falsification bearing on the witness's propensity to testify truthfully." *Beales v. State*, 329 Md. 263, 269–70, 619 A.2d 105, 108 (1993).

59. MD. R. 5-609(a); *see also* *State v. Westpoint*, 404 Md. 455, 476, 947 A.2d 519, 531 (2008) (recognizing "it is difficult to draw distinct lines on what crimes may be used to impeach").

60. *Anderson v. State*, 227 Md. App. 329, 339, 133 A.3d 1266, 1271–72 (2016) (alteration in original) (quoting *Washington v. State*, 191 Md. App 48, 82 990 A.2d 549, 569 (2010)).

61. MD. R. 5-609(a); *Ricketts v. State*, 291 Md. 701, 707, 436 A.3d 906, 909–10 (1981).

62. *Westpoint*, 404 Md. at 476, 947 A.2d at 531.

63. *State v. Giddens*, 335 Md. 205, 216 n.8, 642 A.2d 870, 875 n.8 (1994).

64. *See* *King v. State*, 407 Md. 682, 706–08, 967 A.2d 790, 804–05 (2009) (reversing the Court of Special Appeals affirmance of the trial court's exclusion of a previous possession with intent to distribute marijuana conviction); *Westpoint*, 404 Md. at 495, 947 A.2d at 543 (affirming the Court of Special Appeals reversal of the trial court's admission of a third-degree sexual offense under rule 5-609); *Giddens*, 335 Md. at 222, 642 A.2d at 878 (reversing the Court of Special Appeals ruling that distribution of cocaine was not an impeachable offense under rule 5-609); *State v. Duckett*, 306 Md. 503, 512, 510 A.2d 253, 258 (1986) (affirming the Court of Special Appeals reversal of the trial court's admission of a previous assault and battery conviction).

impeachment.<sup>65</sup> Generally, Maryland courts have found that simple possession of a controlled substance does not bear on a witness's credibility.<sup>66</sup> In contrast, a conviction for possession with intent to distribute has been held to be relevant to a witness's veracity because the crime inherently involves deceit.<sup>67</sup> Likewise, convictions for crimes involving theft and robbery have been held admissible for impeachment purposes under rule 5-609.<sup>68</sup>

*D. No Conviction Left Behind: The Facial Approach of Maryland Rule 5-609*

When determining whether a conviction is eligible under Maryland Rule 5-609, Maryland judges look at the elements required for conviction, and not the underlying facts of the case. This approach resembles a facial analysis. Trial courts are not to “conduct a mini-trial” by looking at the individual circumstances of a witness's prior conviction.<sup>69</sup> In order for a prior conviction to be admitted for impeachment, the elements of the conviction must “describe[] with sufficient specificity the conduct reflecting on the defendant's credibility.”<sup>70</sup> If the conviction does not, by its elements, clearly state conduct bearing on a witness's credibility, then it should be excluded.<sup>71</sup> Secrecy alone is not sufficient to make a prior conviction eligible for impeachment.<sup>72</sup>

The Reporter's Notes for rule 1-502 state that the subcommittee unequivocally felt that trial courts should not examine the underlying facts of a conviction.<sup>73</sup> The subcommittee found that, “[t]he marginal gain in probative value on the question of credibility in a particular case [is] likely to

---

65. *Duckett*, 306 Md. at 512, 510 A.2d at 257–58 (quoting *Gordon v. United States*, 383 F.2d 936, 940 (D.C. Cir. 1967), *cert denied*, 390 U.S. 1029 (1968)); *see also* *Fulp v. State*, 130 Md. App. 157, 745 A.2d 438 (2000) (ruling that a conviction for assault with intent to murder is not sufficient under rule 5-609).

66. *See* *Morales v. State*, 325 Md. 330, 330, 600 A.2d 851, 851 (1992) (holding possession of cocaine was not an impeachable offense); *see also* *Lowery v. State*, 292 Md. 2, 2, 437 A.2d 193, 193 (1981) (finding that possession of barbiturates was not proper for impeachment under rule 5-609).

67. *See* *Giddens*, 335 Md. at 205, 642 A.2d at 870 (finding possession of cocaine with intent to distribute to be a proper crime for impeachment); *see also* *King*, 407 Md. at 706–07, 967 A.3d at 804 (holding possession with intent to distribute marijuana to be an impeachable offense).

68. *See* *Jackson v. State*, 340 Md. 705, 668 A.2d 8 (1995) (holding that theft was an impeachable offense). *But see* *Morales*, 325 Md. at 339, 600 A.2d at 855 (holding that assault and battery was not a proper conviction for impeachment).

69. *Giddens*, 335 Md. at 222, 642 A.2d at 878; *see also* *Westpoint*, 404 Md. at 480, 947 A.2d at 534.

70. *Ricketts v. State*, 291 Md. 701, 713, 436 A.2d 906, 913 (1981).

71. *See id.* at 714–15 (holding that indecent exposure was not a proper crime for impeachment under rule 5-609); *see also* *State v. Duckett*, 306 Md. 503, 509, 510 A.2d 253, 256 (1986) (holding that assault and battery were not sufficiently specific to qualify under rule 5-609).

72. *Westpoint*, 404 Md. at 486, 947 A.2d at 537.

73. *Giddens*, 335 Md. at 222, 642 A.2d at 878.

be substantially outweighed by the expenditure of judicial resources necessary to examine the facts underlying prior convictions in every case.”<sup>74</sup> Under rule 5-609, a witness can only be questioned about the name and date of the conviction as well as the sentence imposed.<sup>75</sup> Due to the restrictive nature of the facial approach, Maryland courts have struggled to identify if a crime’s elements *specifically* identify conduct that bears on the witness’s credibility, and thus, is admissible under rule 5-609.

The facial approach dilemma is highlighted in *Giddens v. State*.<sup>76</sup> In *Giddens*, a divided Court of Special Appeals<sup>77</sup> held that distribution of cocaine does not, by its elements, state conduct bearing on the witness’s credibility.<sup>78</sup> The court reasoned that the crime could be committed in a multitude of ways ranging from “selling a ton of cocaine to sub-dealers throughout a community as well as by giving a friend a marijuana cigarette.”<sup>79</sup> The Court of Special Appeals ruled that even though the behavior is certainly criminal, it is not inherently dishonest.<sup>80</sup> The concurrence was troubled by the fact that under a facial approach, convictions for the distribution of narcotics would never be admissible because courts cannot evaluate the manner in which the crime was committed.<sup>81</sup>

The Court of Appeals<sup>82</sup> reversed, and held that distribution of cocaine is inherently dishonest, despite the range of potential circumstances of conviction.<sup>83</sup> The Court of Appeals stated, “in theory, some activity that falls within the definition of drug distribution would not be probative of an individual’s lack of veracity, [however] the vast majority of convictions for cocaine distribution are relevant to credibility.”<sup>84</sup> Thus, the Court of Appeals concluded that cocaine distribution was not so “ill-defined” as to warrant exclusion.<sup>85</sup>

---

74. *Id.* (alteration in original) (quoting RULES ORDER, 1-502 cmt. (1992)).

75. *Giddens*, 335 Md. at 222, 642 A.2d at 878.

76. 97 Md. App. 582, 631 A.2d 499 (1993), *rev’d*, 335 Md. 205, 642 A.2d 870 (1994).

77. The appeal generated a majority, concurring, and dissenting opinion. *Giddens*, 97 Md. App. at 582–83, 631 A.2d at 499.

78. *Id.* at 592, 631 A.2d at 504.

79. *Id.* at 591, 631 A.2d at 503.

80. *Id.*

81. *Id.* at 593, 631 A.2d at 504 (Mozt, J., concurring).

82. This opinion generated a five-judge majority opinion and a two-judge dissenting opinion. *Giddens*, 335 Md. at 205, 642 A.2d at 870. The dissent endorsed the majority opinion of the Court of Special Appeals. *Id.* at 223, 642 A.2d at 878.

83. *Id.* at 222, 642 A.2d at 878.

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

85. *Id.*

*E. Insult to Injury: The Required Balancing Test Under Maryland Rule 5-609*

One of the distinct features of rule 5-609 is that every conviction is subject to a balancing test to determine if “the probative value of admitting [the] evidence outweighs the danger of unfair prejudice to the witness or the objecting party.”<sup>86</sup> Due to this balancing test, rule 5-609 does not have any “per se” admissible convictions.<sup>87</sup> The Maryland Senate Rules Committee notes on rule 1-502 indicate “the Committee’s preference for a broadly-applied balancing test” and recognize that “the then-existing law of impeachment [was] ‘dangerously inflexible in its mandate.’”<sup>88</sup> The balancing test is a matter of judicial discretion.<sup>89</sup> The Court of Appeals has not given any firm rules or strict guidelines for trial courts to follow when conducting the balancing test.<sup>90</sup> Instead, the court has expressed its support of trial judges retaining wide discretion in making witness impeachment decisions.<sup>91</sup>

The Court of Appeals has designated certain factors it believes will be valuable to trial courts tasked with conducting the balancing test.<sup>92</sup> These factors include: “(1) the impeachment value of the prior crime; (2) the point in time of the conviction and the defendant’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and (5) the centrality of the defendant’s credibility.”<sup>93</sup> Maryland courts, in applying these factors, need not do so “mechanically or exclusively.”<sup>94</sup>

### III. THE COURT’S REASONING

Writing for a unanimous court,<sup>95</sup> Judge Getty of the Court of Appeals affirmed in part and reversed in part the Court of Special Appeals decision. The Court of Appeals held: (a) Mr. Hernandez-Melendez’s “convictions for

---

86. MD. R. 5-609(a)(2).

87. *Id.*

88. *Beales v. State*, 329 Md. 263, 271–72, 619 A.2d 105, 109 (1993) (quoting STANDING COMM. ON RULES OF PRACTICE & PROCEDURE, MEETING MINUTES (Sept. 1990)).

89. *Prout v. State*, 311 Md. 348, 364, 535 A.2d 445, 452 (1988).

90. *Id.* at 364, 535 A.2d at 452.

91. *Id.* (finding that a narrow test “would be contrary to our suggestion that the trial judge exercise a sound discretion in each case where the issue arises”).

92. *Jackson v. State*, 340 Md. 705, 717, 668 A.2d 8, 14 (1995).

93. *Id.* (citing *United States v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976)). Importantly, under rule 5-609, the same or similar crimes are not automatically excluded. *Id.* at 711, 668 A.2d at 11. Further, the risk of prejudice is reduced when a non-defendant witness is to be impeached. *King v. State*, 407 Md. 682, 704, 967 A.2d 790, 803 (2009).

94. *Jackson*, 340 Md. at 717, 668 A.2d at 14.

95. The Court of Appeals is comprised of seven judges who all participate in every case before the court. MD. COURT OF APPEALS, <https://www.courts.state.md.us/coappeals> (last visited Mar. 18, 2020).

conspiracy to commit assault with a dangerous weapon in aid of racketeering and threatening to commit a crime of violence in aid of racketeering” in violation of Title 18, section 1959 of the United States Code were admissible under Maryland Rule 5-609 for witness impeachment, and (b) the circuit court committed harmless error in ruling Mr. Hernandez-Melendez’s convictions were not impeachable.<sup>96</sup> As a result, the Court of Appeals reversed the trial court’s exclusion of the conviction, but found that Mr. Rosales was not entitled to a new trial.<sup>97</sup>

*A. Mr. Hernandez-Melendez’s Convictions Under 18 U.S.C. § 1959  
Were Admissible Under Maryland Rule 5-609*

The court ruled that based on the elements<sup>98</sup> required, a VICAR conviction was a proper impeachable offense under Maryland Rule 5-609(a)(1).<sup>99</sup> The court reasoned that convictions under section 1959 require “extraordinary dishonesty” which require “great pains to conceal.”<sup>100</sup> Specifically, the court found that in order to be convicted under section 1959, an individual must commit the underlying crime with the intention of benefitting either the criminal organization or the perpetrator’s standing in the organization.<sup>101</sup> In the court’s view, a VICAR conviction inherently suggests that a witness would be willing to lie under oath, just as they were willing to deceive society to benefit or increase standing in the criminal organization.<sup>102</sup>

The Court of Appeals rejected the lower court’s opinion that VICAR convictions are ordinary crimes of violence.<sup>103</sup> Rather, in VICAR trials, “[t]he government must prove elements concerning both the enterprise and the defendant beyond a reasonable doubt to successfully” convict.<sup>104</sup> The court reasoned that the intent to cover up racketeering, and not the underlying

---

96. *Rosales v. State*, 463 Md. 552, 552, 206 A.3d 916, 916 (2019). The court also decided whether appellate time-filing violations were jurisdictional in nature. *Id.* at 552, 206 A.3d at 919. In deciding this issue, the court ruled that appellate time-filing violations trigger claims-processing rules and, thus, are not jurisdictional in nature. *Id.* at 568, 206 A.3d at 925. The court’s decision tracked the recent United States Supreme Court decision *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). In *Hamer*, the Court ruled Federal Rule of Appellate Procedure 4(a)(5)(C)’s limitation on appellate time filing had no statutory basis and, thus, is a mandatory claim-processing rule. *Id.* at 16–17. For a further discussion of the appellate time-filing dilemma, see, Mathew H. Frederick et. al., *United States Supreme Court Update*, 30 APP. ADVOC. 259, 259 (2017).

97. *Rosales*, 463 Md. at 557, 206 A.3d at 918–19.

98. For a discussion of the elements, see *infra* Section IV.A.1.

99. *Rosales*, 463 Md. at 579, 206 A.3d at 931–32.

100. *Id.* at 574, 206 A.3d at 928 (quoting *State v. Giddens*, 335 Md. 205, 217, 642 A.2d 870, 876 (1994)).

101. *Id.* at 577, 206 A.3d at 930.

102. *Id.* at 572, 206 A.3d at 927.

103. *Id.* at 578, 206 A.3d at 931 (explaining “the requisite mens rea is unlike that of typical acts of violence”).

104. *Id.* at 577, 206 A.3d at 930.

violent offenses, are what “make[] VICAR convictions inherently deceitful.”<sup>105</sup> Much of the conduct required for a VICAR conviction “requires secrecy and tears at the fabric of society.”<sup>106</sup> The court concluded that a VICAR conviction, by its elements, clearly identified prior conduct that tended to show the perpetrator was unworthy of belief.<sup>107</sup> To support its reasoning, the court noted “the great majority of enumerated offenses [under section 1959] meet [the] criteria” under Maryland Rule 5-609(a)(1).<sup>108</sup> Thus, because the elements of the crime suggest the perpetrator must be “prepared to say whatever is required by the demands of the moment” and because “the great majority” of enumerated crimes would qualify, the Court of Appeals ruled Mr. Hernandez-Melendez’s prior convictions fell within the “eligible universe” for impeachment under Maryland Rule 5-609.<sup>109</sup>

*B. The Circuit Court’s Omission of Mr. Hernandez-Melendez’s Convictions Constituted Harmless Error*

The court ruled that not allowing the defense counsel to impeach Mr. Hernandez-Melendez under Maryland Rule 5-609 was harmless error.<sup>110</sup> At trial, Mr. Hernandez-Melendez testified that he engaged in criminal activity as an MS-13 gang member.<sup>111</sup> Further, Mr. Hernandez-Melendez testified that he had been incarcerated for approximately four years.<sup>112</sup> Throughout the trial, the defense counsel also referred to Mr. Hernandez-Melendez as “a convicted felon” and “a gangster.”<sup>113</sup> The court reasoned that through these references, the jury had the opportunity to make a determination as to Mr. Hernandez-Melendez’s credibility.<sup>114</sup> Allowing impeachment of Mr. Hernandez-Melendez’s convictions, “would add little value to the jury’s consideration of the witness’ credibility.”<sup>115</sup> As a result, the court concluded the testimony presented

---

105. *Id.* at 579, 206 A.3d at 931.

106. *Id.*; *accord* State v. Giddens, 335 Md. 205, 217, 642 A.2d 870, 876 (1994) (finding that cocaine distribution similarly burdens society).

107. *Rosales*, 463 Md. at 579, 206 A.3d at 931–32.

108. *Id.* at 579, 206 A.3d at 932; *see also* Pamela Bucy Pierson, *RICO Trends: From Gangsters to Class Actions*, 65 S.C. L. REV. 213, 221 (2013) (finding that gang and drug distribution operations make up a significant portion of prosecuted racketeering activity).

109. *Rosales*, 463 Md. at 578–80, 206 A.3d at 931–32 (quoting *Giddens*, 335 Md. at 217, 642 A.2d at 876 (1994)).

110. *Id.* at 583, 206 A.3d at 934.

111. *Id.* at 582, 206 A.3d at 933.

112. *Id.* Mr. Hernandez-Melendez “also stated that he was on probation both at the time of the attack and during his current testimony.” *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

was sufficient for the jury to evaluate Mr. Hernandez-Melendez's credibility.<sup>116</sup>

#### IV. ANALYSIS

In *Rosales v. State*, the Court of Appeals held that a prior conviction for committing a violent crime in aid of racketeering<sup>117</sup> was a crime relevant to credibility under Maryland Rule 5-609.<sup>118</sup> The court erred by concluding that the elements required for a VICAR conviction require deceit. *Rosales* demonstrates the need to reform Maryland Rule 5-609 to provide trial judges with a workable standard for determining whether a prior conviction is proper for witness impeachment.<sup>119</sup> This Part proceeds in two sections. Section IV.A. discusses witness impeachment for a prior VICAR conviction.<sup>120</sup> Section IV.B. addresses the need to rethink Maryland Rule 5-609.<sup>121</sup>

##### *A. Witness Impeachment by Prior VICAR Conviction*

In *Rosales*, the court ruled that a VICAR conviction, by its elements, describes the conduct impacting a witness's credibility with sufficient specificity.<sup>122</sup> This Section lays out how the court over-extended Maryland Rule 5-609 by applying it to VICAR convictions, and further, how Maryland precedent regarding witness impeachment is flawed. Specifically, Section IV.A.1 discusses the underlying VICAR statute and its broad reach.<sup>123</sup> Section IV.A.2 discusses how the *Rosales* court erred by relying on the logic of *State v. Giddens*.<sup>124</sup>

##### *1. The Underlying Statute: The Broad Net of 18 U.S.C. § 1959*

Title 18, section 1959 of the United States Code criminalizes violent crimes committed in aid of racketeering activity. Unlike robbery, treason, or theft, a defendant can be convicted of a VICAR offense under a multitude of circumstances.<sup>125</sup> The wide array of potential crimes eligible for conviction under section 1959 renders it ill-suited to be considered as an "other crime relevant to credibility" under Maryland Rule 5-609. A VICAR conviction requires that the government show:

---

116. *Id.* at 583, 206 A.3d at 934. *But see* Devincentz v. State, 460 Md. 518, 562, 191 A.3d 373, 399 (2018) (ruling the exclusion of the victim's stepbrother's "testimony was not harmless" error because the "errors affected the jury's ability to assess [the victim's] credibility").

117. Violent Crimes in Aid of Racketeering Activity, 18 U.S.C. § 1959 (2018).

118. *Rosales*, 463 Md. at 583, 206 A.3d at 934; *see also supra* Section III.A.

119. *See infra* Section IV.A.2.

120. *See infra* Section IV.A.

121. *See infra* Section IV.B.

122. *Rosales*, 463 Md. at 583, 206 A.3d at 934.

123. *See infra* Section IV.A.1.

124. 335 Md. 205, 642 A.2d 870 (1994); *see infra* Section IV.A.2.

125. 18 U.S.C. § 195(a)(1–6) (2018).

- (1) that the [o]rganization was a RICO enterprise, (2) that the enterprise was engaged in racketeering activity as defined in RICO, (3) that the defendant in question had a position in the enterprise, (4) that the defendant committed the alleged crime of violence, and (5) that [their] general purpose in so doing was to maintain or increase [their] position in the enterprise.<sup>126</sup>

Section 1959 specifically enumerates a variety of violent crimes; such as, murder, assault with a dangerous weapon, and kidnapping as predicate underlying felonies necessary for conviction.<sup>127</sup>

The broad range of circumstances possible for a section 1959 conviction renders it inappropriate for impeachment under Maryland Rule 5-609. In order to accomplish its intended purposes, section 1959 should be interpreted liberally.<sup>128</sup> To satisfy this liberal end, courts have ruled that the criminal enterprise need only have “a de minimis interstate commerce connection.”<sup>129</sup> Courts have consistently rejected facial challenges alleging that section 1959 exceeds Congress’s Commerce Clause authority.<sup>130</sup> Instead, courts have found this connection to interstate commerce in a vast array of circumstances.<sup>131</sup> Further, courts have generally rejected a test requiring the

126. *United States v. Odum*, 878 F.3d 508, 516 (6th Cir. 2017) (quoting *United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992)), *rev’d on other grounds sub nom. Frazier v. United States*, 139 S. Ct. 319 (2018). Under section 1959, an “enterprise” includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.” 18 U.S.C. § 1959(b)(2).

127. 18 U.S.C. § 1959(a). The statute also includes maiming, and “threaten[ing] to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempt[ing] or conspir[ing] to do so” as predicate felonies. *Id.*

128. *United States v. Mapp*, 170 F.3d 328, 335–36 (2d Cir. 1999) (ruling that a murder committed unintentionally can fulfill the purpose requirement of section 1959).

129. *United States v. Mills*, 378 F. Supp. 3d 563, 571–73 (E.D. Mich. 2019) (quoting *United States v. Riddle*, 249 F.3d 529, 538 (6th Cir. 2001)); *see, e.g., id.* (noting that “[i]nsofar as it concerns VICAR in particular, a court must decide ‘whether Congress could rationally have concluded that intrastate acts of violence . . . committed for the purpose of maintaining or increasing one’s status in an interstate racketeering enterprise, would substantially affect the interstate activities of that enterprise’” (quoting *United States v. Umana*, 750 F.3d 320, 336 (4th Cir. 2014))); *United States v. Gray*, 137 F.3d 765, 773 (4th Cir. 1998) (finding that although the evidence presented to prove an “interstate commerce connection [was] not copious,” it was sufficient).

130. U.S. DEP’T OF JUSTICE, VIOLENT CRIMES IN AID OF RACKETEERING 18 U.S.C. § 1959: A MANUAL FOR FEDERAL PROSECUTORS 13 (2006), <https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/vcar.pdf>; *see United States v. Crenshaw*, 359 F.3d 977, 983–87 (8th Cir. 2004) (finding “that the activity regulated by § 1959 substantially affects interstate commerce”); *United States v. Marino*, 277 F.3d 11, 28, 34 (1st Cir. 2002) (finding that a jury instruction requiring that a defendant’s actions had “some effect on interstate commerce” was sufficient to meet the requirements for a VICAR conviction).

131. *See United States v. Nascimento*, 491 F.3d 25, 45 (1st Cir. 2007) (finding that the purchase and subsequent transportation of firearms over state lines was sufficient to establish a de minimis connection to interstate commerce); *Crenshaw*, 359 F.3d at 992 (finding that the “Rolling 60s Crips” were an organization engaged in interstate commerce by virtue of their smuggling and distribution of up to ten kilograms of cocaine per month from Louisiana and California to Minnesota); *Riddle*, 249 F.3d at 537 (finding that even though the enterprise was not engaged in interstate commerce, it



underlying crime of violence be directly connected to interstate commerce to qualify as a VICAR crime.<sup>132</sup>

The connection between the violent crime and the racketeering enterprise does not need to be strong to convict an individual under section 1959. Section 1959(a) explains that the violent crime must be committed for something of “pecuniary value” or to increase status within the organization “engaged in racketeering activity”.<sup>133</sup> This is known as the “purpose” requirement of the VICAR statute.<sup>134</sup> The notable feature of the “purpose” requirement is that the organizational component does not have to be the primary motive of the defendant.<sup>135</sup> In *United States v. Gardner*,<sup>136</sup> the court found that the prosecution had satisfied the purpose requirement by proving nothing more than a defendant’s membership in an organization engaged in racketeering activity.<sup>137</sup> Further, in *United States v. Zelaya*,<sup>138</sup> the court found a defendant had satisfied the purpose requirement when he committed a murder with knowledge that the victim was in a rival gang and subsequently bragged about the murder to elevate his position in MS-13.<sup>139</sup> Finally, in *United States v. Tse*,<sup>140</sup> the court found, “[i]f [a defendant] possessed the requisite intent when he entered into the conspiracy then all foreseeable crimes committed by the conspiracy can be attributed to that intent.”<sup>141</sup> Moreover, a crime of violence committed for personal reasons can still fall within the reach of section 1959.<sup>142</sup> Further, to be convicted under section

---

affected interstate commerce by purchasing out-of-state lottery tickets to cover in-state gambling losses).

132. *Riddle*, 249 F.3d at 538; *Mills*, 378 F. Supp. 3d at 571. *But see* *United States v. Garcia*, 68 F. Supp. 2d 802, 810–12 (E.D. Mich. 1999) (ruling that the violent crime itself, and not simply the connected enterprise, need to be involved in interstate commerce to qualify under section 1959).

133. 18 U.S.C. § 1959(a) (2018).

134. *United States v. Zelaya*, 908 F.3d 920, 927 (4th Cir. 2018); *United States v. Gardner*, 417 F. Supp. 2d 703, 713 (D. Md. 2006).

135. *Zelaya*, 908 F.3d at 927; *Gardner*, 417 F. Supp. 2d at 713 (finding “[n]owhere does the statute or its legislative history indicate that the government must prove that the crime was *solely* motivated by a desire to maintain or increase a particular position within the enterprise” (alteration in original) (citing *United States v. Tse*, 135 F.3d 200, 206 (1st Cir. 1998))).

136. 417 F. Supp. 2d 703 (D. Md. 2006).

137. *Id.* at 713 (noting that “[i]f [defendant] joined a conspiracy within the framework of the ‘Mitchell Organization’ to murder a particular person, he did so not only for personal gain, but for the gain of the ‘Mitchell Organization’”). The *Gardner* court also noted that “[t]he case law makes it plain that the judicial gloss placed on the ‘purpose’ element of the VICAR conspiracy offense sweeps within its compass a broader range of intentionality and purposefulness than that borne by a plain reading of the statute.” *Id.*

138. 908 F.3d 920 (4th Cir. 2018).

139. *Id.* at 927 (finding that although the crime was primarily committed because the victims threatened the defendant’s friend, the crime was committed for a gang purpose because the victims were members of a rival gang).

140. 135 F.3d 200 (1st Cir. 1998).

141. *Id.* at 207.

142. *See* U.S. DEP’T OF JUSTICE, *supra* note 130, at 100; *see also* *United States v. Kamaele*, 748 F.3d 984, 1008–09 (10th Cir. 2014) (finding that the purpose element was satisfied when the evidence established a variety of personal purposes, but also allowed for a reasonable inference that

1959, the government does not even have to prove that the defendant was a member of the racketeering enterprise.<sup>143</sup> Some federal circuits have explicitly found that “[i]t would make little sense” to strictly interpret the purpose requirement “to provide a safe-harbor from VICAR for gang members who can offer a plausible alternative motivation for their acts.”<sup>144</sup>

The wide net of permitted circumstances for conviction and range of permissible inferences make VICAR convictions unsuitable for impeachment under Maryland Rule 5-609.<sup>145</sup> The first step in determining whether a conviction is within the reach of rule 5-609 is to determine whether the conviction falls within “the eligible universe.”<sup>146</sup> A conviction falls within the “eligible universe” when its elements clearly state the conduct bearing on the witness’s credibility.<sup>147</sup> When looking at the wide array of enumerated predicate offenses under section 1959, it becomes clear that VICAR convictions “cause[] the factfinder to speculate as to what conduct is impacting on the defendant’s credibility.”<sup>148</sup> By the Court of Appeals’s own admission, “*some racketeering activity . . . may not qualify* as an infamous crime or be otherwise relevant to a witness’ credibility.”<sup>149</sup> Maryland precedent makes clear that if the conduct bearing on a witness’s credibility is not clear from the elements of the offense, then the conviction must be excluded under rule 5-609.<sup>150</sup> The wide range of predicate felonies, combined with the liberal interpretations of the commerce connection and purpose element makes it so factfinders cannot determine, by the elements of section 1959 alone, the conduct bearing on the witness’s credibility.

## 2. *The Rosales Court’s Reliance on State v. Giddens is Flawed*

In *Rosales*, the Court of Appeals improperly relied on *State v. Giddens*<sup>151</sup> in deciding that VICAR convictions are proper for impeachment

---

the assault was carried out with the purpose of promoting the organization or advancing the defendant’s position in the organization).

143. *United States v. Concepcion*, 983 F.2d 369, 384 (2d Cir. 1992) (finding that independent contractors who receive something of “pecuniary value” can be prosecuted under section 1959).

144. *United States v. Banks*, 506 F.3d 756, 761–64 (9th Cir. 2007) (adopting the view of five sister circuits which “have concluded that VICAR’s purpose element is satisfied even if the maintenance or enhancement of [their] position in the criminal enterprise was not the defendant’s sole or principal purpose”).

145. *See United States v. Bergrin*, 650 F.3d 257, 267 (3d Cir. 2011) (finding that racketeering statutes cast a “wide net”); *see also Concepcion*, 983 F.2d at 381 (finding that VICAR statutes, like RICO statutes, should be construed liberally).

146. *Jackson v. State*, 340 Md. 705, 712, 668 A.2d 8, 12 (1995).

147. *Ricketts v. State*, 291 Md. 701, 713, 436 A.3d 906, 913 (1981); *see also supra* Section II.C.

148. *See Ricketts*, 291 Md. at 713, 436 A.3d at 913 (holding that indecent exposure is not a proper crime for impeachment under rule 5-609 because indecent exposure is so ill-defined that it could be committed in an infinite amount of ways).

149. *Rosales v. State*, 463 Md. 552, 579, 206 A.3d 916, 932 (2019) (emphasis added).

150. *See supra* Section II.D.

151. 335 Md. 205, 642 A.2d 870 (1994).

under Maryland Rule 5-609. The *Rosales* court noted that *Giddens*, “is the seminal Maryland case” on witness impeachment by prior conviction.<sup>152</sup> In *Giddens*, the court considered whether a conviction for distribution of cocaine may be used to impeach a witness’s credibility.<sup>153</sup> The *Giddens* court held that distribution of cocaine was an impeachable offense because “an individual convicted of cocaine distribution would be willing to lie under oath.”<sup>154</sup> The court in *Giddens* reasoned “[a] narcotics trafficker 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.”<sup>155</sup>

The court’s analysis in *Giddens* ignores the facial approach required under Maryland Rule 5-609.<sup>156</sup> The court in *Giddens* noted, “the vast majority of convictions for cocaine distribution are relevant to credibility.”<sup>157</sup> While the “vast majority of convictions” might qualify, cocaine distribution does not, “by its elements, . . . clearly identify the prior conduct of the witness that tends to show that he is unworthy of belief.”<sup>158</sup> The court further noted, “[w]e share the belief that a person will rarely be convicted of cocaine distribution if that person merely gives a small quantity to a friend at a party.”<sup>159</sup> While this might *rarely* happen, the fact that it is *possible* indicates that cocaine distribution does not by its elements specifically state the conduct that will bear on credibility.

*Giddens* generated a dissenting opinion<sup>160</sup> that endorsed the Court of Special Appeals majority opinion.<sup>161</sup> The intermediate appellate court noted that Maryland’s distribution and possession with intent to distribute statute,<sup>162</sup> “lists over 200 substances that it defines as controlled dangerous ones and adds to that list as well salts, isomers, derivatives, and compounds of or containing those substances.”<sup>163</sup> The court pointed out that one can be convicted under this statute for handing a small quantity of narcotics to a friend, as well as by operating a large narcotics distribution network.<sup>164</sup> Thus,

---

152. *Rosales*, 463 Md. at 573, 206 A.3d at 928.

153. *Giddens*, 355 Md. at 212–13, 642 A.2d at 873.

154. *Id.* at 217, 642 A.2d at 876.

155. *Id.* (quoting *United States v. Ortiz* 553 F.2d 782, 784 (2d Cir. 1977), *cert. denied*, 434 U.S. 897 (1977)).

156. *See supra* section II.D.

157. *Giddens*, 355 Md. at 218, 642 A.2d at 876.

158. *Giddens*, 355 Md. at 218, 642 A.2d at 876; *State v. Westpoint*, 404 Md. 455, 480–81, 947 A.2d 519, 534 (2008) (ruling that a prior conviction for third-degree sexual offense is not admissible under Maryland Rule 5-609).

159. *Giddens*, 355 Md. at 218, 642 A.2d at 877.

160. *Id.* at 223, 642 A.2d at 878–79 (Eldridge, J., dissenting).

161. 97 Md. App. 582, 631 A.2d 499 (1993).

162. MD. ANN. CODE art. 27, § 286(a) (1987) (recodified at MD. CODE ANN., CRIM. LAW § 5-602 (LexisNexis 2017)).

163. *Giddens*, 97 Md. App. at 590, 631 A.2d at 503.

164. *Id.* at 590–91, 631 A.2d at 503.

“[t]he behavior is criminal, to be sure, but it is not necessarily dishonest.”<sup>165</sup> The Court of Special Appeals concluded by noting that this large net rendered the statute inappropriate for impeachment.<sup>166</sup> This opinion is consistent with the facial approach required when interpreting crimes under rule 5-609.<sup>167</sup>

In *Rosales*, the court found that *Giddens* provided a close factual match.<sup>168</sup> As such, the court determined that a crime of violence that is done for the purpose of aiding a criminal enterprise engaged in racketeering qualifies as an “other crime relevant to the witness’s credibility” under Maryland Rule 5-609(a).<sup>169</sup> Quoting *Giddens*, the court noted that “one who aids a racketeering enterprise will be living ‘a life of secrecy and dissembling,’ ‘being prepared to say whatever is required by the demands of the moment,’ and ‘pos[ing] [a] grave danger to the fabric of society.’”<sup>170</sup> The court noted that many of the predicate racketeering offenses, by their elements, would qualify under rule 5-609; however, the court conceded that there are some racketeering offenses that may not qualify.<sup>171</sup> The court makes a critical distinction here. While *most* predicate offenses qualify, the court conceded that there are *some* predicate offenses that do not qualify as an infamous crime or other crime relevant to a witness’s credibility. The court did not endeavor to say which predicate crimes would and would not qualify under Maryland Rule 5-609. This begs the question, if someone can be convicted of VICAR with a predicate offense that would not otherwise qualify, can it be said that a VICAR conviction, by its elements, specifically states the conduct that bears on the witness’s credibility? If the answer is no, then the crime should *never* be admissible under Maryland Rule 5-609.

While the Court of Special Appeals erred in *Rosales* by evaluating the substantive acts underlying the VICAR conviction, the court correctly concluded that by its elements, the VICAR statute does not sufficiently explain the conduct that would call into question the truthfulness of the witness.<sup>172</sup> The Court of Special Appeals in *Rosales* held that while many of the predicate offenses under the VICAR statute are admissible, other predicate offenses are pure crimes of violence, and are thus, not admissible.<sup>173</sup> The Court of Special Appeals found that, “the actual conduct

---

165. *Id.* at 591, 632 A.2d at 503.

166. *Id.*

167. *See supra* Section II.D.

168. *Rosales v. State*, 463 Md. 552, 578, 206 A.3d 916, 931 (2019).

169. *Id.* at 557, 206 A.3d at 918.

170. *Id.* at 578, 206 A.3d at 931 (quoting *State v. Giddens*, 335 Md. 205, 217, 642 A.2d 870 (1994) (alterations in original)).

171. *Id.* at 579, 206 A.3d 916, 932 (finding that “some racketeering activity . . . may not qualify as an infamous crime or be otherwise relevant to a witness’ credibility”).

172. *Rosales v. State*, No. 2659, 2017 WL 6312861 (Md. Ct. Spec. App. Dec. 11, 2017), *aff’d in part, rev’d in part*, 463 Md. 552, 206 A.3d 916 (2019).

173. *Id.* at \*8. Specifically, the Court of Special Appeals found that predicate crimes that are fraud or narcotics trafficking related would qualify but pure crimes of violence such as, murder or kidnapping would be excluded. *Id.*

involved is a crime of violence, which is not impeachable, and the purpose of committing the crime is not to deceive, but to advance in an enterprise that might, or might not, be engaged in deceitful acts.”<sup>174</sup>

The Court of Appeals in *Rosales* erred by making the same mistake as the majority in *Giddens*. By venturing away from the strict facial approach prescribed by previous case law, the court greatly expands the reach of Maryland Rule 5-609.<sup>175</sup> Allowing convictions that do not bear on veracity could have a devastating effect on the justice system.<sup>176</sup> If admitted, erroneous convictions could significantly sway a jury’s impression of a witness and, further, could result in flawed convictions or acquittals.<sup>177</sup> VICAR, like drug distribution, can be accomplished in a variety of ways with an infinite amount of potential circumstances ranging from pure acts of violence to more calculated and malevolent acts in furtherance of an illegal enterprise.<sup>178</sup> As such, the elements required for a VICAR conviction do not clearly highlight the conduct that weighs on the witness’s propensity to tell the truth and thus, must be excluded under Maryland Rule 5-609.<sup>179</sup>

#### *B. Time for Change: Maryland Rule 5-609 and Its Unworkable Formula*

Since 1994, Maryland Rule 5-609’s indiscernible construction has continuously frustrated trial judges. While Judge Paul Grimm of the United States District Court for the District of Maryland has written that Maryland “Rule 5-609 is a perfect example of how the three general concepts of evidence law—relevance, economy, and fairness—are applied.”<sup>180</sup> Other commenters have been frustrated by the lack of guidance given by the Court of Appeals.<sup>181</sup> For the last twenty-five years, trial judges and lawyers have

---

174. *Id.*

175. By expanding the reach of the crimes allowed for impeachment under the Rule, the court narrows the indicia of untruthfulness by “caus[ing] the fact finder to speculate as to what conduct is impacting on the witness’s credibility.” *State v. Giddens*, 335 Md. 205, 218–19, 642 A.2d 870, 876 (1994) (citing *State v. Ricketts*, 291 Md. 701, 713–14, 436 A.2d 906, 913 (1981)).

176. Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977, 1992–01 (2016).

177. *Id.* at 2001–04.

178. *United States v. Jones*, 873 F.3d 482, 490 (5th Cir. 2017) (noting that “[t]he term ‘racketeering activity’ encompasses a wide range of state and federal offenses, including murder, robbery, extortion, and drug-dealing”).

179. *See supra* Section III.A.

180. Paul W. Grimm, *Impeachment and Rehabilitation Under the Maryland Rules of Evidence: An Attorney’s Guide*, 24 U. BALT. L. REV. 95, 125 (1994) (finding that the critical distinction for admission “is whether there is any logical connection between the nature of the crime and the honesty of the person”).

181. Marion K. Goldberg, *Maryland Rule 1-502: A Required Balancing Test Before Impeachment by Prior Criminal Conviction*, 53 MD. L. REV. 844, 858 (1994) (finding that “the Court of Appeals gave little guidance to future trial courts regarding factors they should consider in conducting the requisite balancing”); James Protin, *What is a “Crime Relevant to Credibility”?*, 54 MD. L. REV. 1125, 1137 (1995) (commenting that the court has not issued any “rules to guide trial judges”).

faced uncertainty about which crimes should be admitted under Maryland Rule 5-609.<sup>182</sup>

Maryland Rule 5-609 has set up “a piecemeal list of crimes relevant to credibility”<sup>183</sup> because crimes can only be added if the Court of Appeals grants certiorari, and subsequently decides that the crime is “infamous” or is otherwise relevant to a witness’s credibility.<sup>184</sup> Rule 5-609’s weakness arises when a previously unexplored crime is proffered to challenge a witness’s credibility.<sup>185</sup> Specifically, the weakness arises because the Court of Appeals has not given trial judges any strict guidelines to follow, thus, trial judges and the intermediate appellate court are making in-the-dark determinations and subsequently having to wait for the Court of Appeals to grant certiorari and decide if the crime is relevant to a witness’s credibility.<sup>186</sup>

One year after Maryland Rule 5-609 passed, Commenter James Protin wrote, “[t]he Maryland Rule did not . . . 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.”<sup>187</sup> Twenty-five years of litigation have proven this prophecy correct, and the time for reform has come. Federal Rule of Evidence 609, Alabama Rule of Evidence 609 and Indiana Rule of Evidence 609 all provide workable replacements to Maryland Rule 5-609. Section IV.B.1 examines Maryland Rule 5-609’s federal counterpart—Federal Rule of Evidence 609. Section IV.B.2 examines state evidence rules that could serve as replacements to Maryland Rule 5-609.

### *1. Federal Rule 609: A Clearer Standard*

The purpose of Federal Rule of Evidence 609 is to encourage witnesses to testify, while still giving the jury an accurate picture of the witness’s

---

182. Protin, *supra* note 181, at 1137 (reporting that at a public meeting on Maryland Rule 5-609, “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.’” (alterations in original)); Goldberg, *supra* note 181, at 860 (commenting that “the lack of guidance left defendants open to needless and costly appeals that may unnecessarily clog the courts with litigation aimed at ascertaining a standard”).

183. Protin, *supra* note 181, at 1137.

184. *See State v. Giddens*, 335 Md. 205, 216 n.8, 642 A.2d 870, 875 n.8 (1994) (confirming that the Court of Appeals anticipated having to grant certiorari in a wide range of cases to decide if the underlying convictions are eligible for impeachment under rule 5-609); *see also* Goldberg, *supra* note 181.

185. *See Giddens*, 335 Md. 205, 642 A.2d 870 (reversing the Court of Special Appeals and holding that the previously unexplored crime of possession with intent to distribute narcotics was a crime relevant to a witness’s credibility); *see also* *Ricketts v. State*, 291 Md. 701, 436 A.2d 906 (1981) (reversing the Court of Special Appeals’ admission of the previously unexplored crime of indecent exposure).

186. Protin, *supra* note 181, at 1137.

187. *Id.* at 1133.

background.<sup>188</sup> The final rule was “a compromise between the need to admit prior conviction evidence to impeach a witness and the accused’s right to a fair trial.”<sup>189</sup> Maryland Rule 5-609 differs from Federal Rule of Evidence 609 in that it does not delineate any per se admissible categories of convictions, and further, on its face, seems to have more restrictive language as to which crimes are admissible.<sup>190</sup> There are some significant differences between Maryland Rule 5-609 and Federal Rule 609. Notably, the Federal Rule mandates admission, meaning no balancing test is required, of crimes that involve false statements.<sup>191</sup> Additionally, the Federal Rule allows admission of felony convictions, provided they survive a balancing test.<sup>192</sup> Comparatively, Maryland Rule 5-609 has a cloudy “eligible universe” and requires a balancing test for all crimes.<sup>193</sup>

Additionally, the Federal Rule establishes different balancing tests depending on the date of conviction, and the type of witness testifying.<sup>194</sup> On the contrary, rule 5-609 provides only one balancing test and mandates that it be applied regardless of the type of witness testifying or type of conviction.<sup>195</sup> Finally, the Federal Rule establishes a ten-year window for prior convictions to be eligible for impeachment, while rule 5-609 establishes a fifteen-year timeframe.<sup>196</sup>

---

188. Jean F. Rydstrom, Annotation, *Construction and Application of Rule 609(a) of the Federal Rules of Evidence Permitting Impeachment of Witness by Evidence of Prior Conviction of Crime*, 39 A.L.R. Fed. 570, § 3 (1978).

189. Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1, 10 (1999). However, “those favoring greater admission of prior conviction evidence got the better end of the compromise.” *Id.*

190. Protin, *supra* note 181, at 1131.

191. McLain, *supra* note 49, at 154.

192. *Id.* A felony is defined as, “[a] serious crime usu. punishable by imprisonment for more than one year or by death.” *Felony*, Black’s Law Dictionary (11th ed. 2019).

193. *Jackson v. State*, 340 Md. 705, 712, 668 A.2d 8, 12 (1995); *see supra* Sections II.C; II.E.

194. If the conviction is more than 10 years old, Evidence of the conviction is admissible only if:

- (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
- (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

FED. R. EVID. 609(b)(1)–(2). The federal rule provides that “in a criminal case in which the witness is [the] defendant, . . . the probative value of the evidence [must] outweigh[] its prejudicial effect to that defendant.” FED R. EVID. 609(a)(1)(B). This is a higher threshold than if the witness is not the accused. FED R. EVID. 609(a)(1)(A).

195. MCLAIN, *supra* note 49, at 154–55 (emphasis added); *see also* Goldberg, *supra* note 181, at 844–45 (noting that the application of the balancing test to all convictions “significantly changed trial practice in Maryland’s state courts”).

196. Compare FED. R. EVID. 609(b) (creating a ten-year admissibility timeframe for prior convictions) with MD. R. 5-609(b) (establishing a fifteen-year admissibility timeframe for prior convictions). Some Maryland judges have suggested that the more recent the conviction, the more probative it is to the witness’s credibility. *Jackson v. State*, 340 Md. 705, 717, 668 A.2d 8, 14 (1995). Thus, by extending the timeframe by five years, Maryland courts are increasing the number

Although Maryland Rule 5-609 appears on its face to be more restrictive than Federal Rule 609, depending on the underlying conviction, it can act more leniently.<sup>197</sup> Under the Federal Rule, pure crimes of violence are admissible, whereas Maryland courts have specifically excluded these convictions.<sup>198</sup> However, the Federal Rule excludes more crimes that involve dishonesty or false statements than Maryland Rule 5-609.<sup>199</sup> For example, rule 609 rejects possession with intent to distribute as a crime bearing on a witness's credibility.<sup>200</sup> Further, rule 609 excludes crimes such as, theft<sup>201</sup> and shoplifting<sup>202</sup> from its per se admissible "dishonest act or false statement" prong, all of which would likely be permitted under rule 5-609.<sup>203</sup> However, it is possible that these crimes *could* be admitted if they meet the qualifications of rule 609(a)(1)'s felony requirements.<sup>204</sup>

The major advantage of Federal Rule 609 is the definitive language establishing different categories of per se impeachable crimes.<sup>205</sup> Under the Federal Rule, crimes that require "dishonesty or false statement," or are felonies punishable by more than one year are per se admissible, meaning

---

of convictions eligible and increasing the possibility that a crime that does not bear on a witness's credibility will be admitted. *Id.* at 715, 668 A.2d at 13.

197. Goldberg, *supra* note 181, at 857; *see also supra* note 190 and accompanying text.

198. *See* United States v. Smalls, 752 F.3d 1227, 1239–40 (10th Cir. 2014) (finding the district court did not abuse its discretion by admitting, for impeachment purposes, a conviction for aggravated battery with a deadly weapon); United States v. Commanche, 577 F.3d 1261, 1270–71 (10th Cir. 2009) (finding the fact of an aggravated assault conviction, but not the facts underlying the conviction, proper for impeachment under rule 609(a)); United States v. Causey, 9 F.3d 1341, 1343, 1344 (7th Cir. 1993) (allowing impeachment for a felon in possession of a sawed-off shotgun conviction). *But see* State v. Duckett, 306 Md. 503, 510 A.2d 253 (1986) (holding that battery is non-impeachable); Jones v. State, 217 Md. App. 676, 703–06, 94 A.3d 813 (2014) (holding that attempted second-degree murder is a non-impeachable offense).

199. Compare FED R. EVID. 609(a)(2) (mandating admission of any conviction that "the court can readily determine . . . the elements of the crime required . . . a dishonest act of false statement") with MD. R. 5-609(a) (permitting, but not mandating, impeachment if the crime "was an infamous crime or other crime relevant to the witness's credibility"); *see also* Lynn McLain, *Federal Law: Types of Convictions Admissible*, MD. PRAC. SERIES § 609:6 (2019) ("The legislative history of FED. R. EVID. 609 makes clear Congress's intent that FED. R. EVID. 609(a)(2) be construed narrowly, in that 'dishonest or false statement' is intended to mean 'deceit, untruthfulness, or falsification,' . . . [and] encompasses only crimes that necessarily involve falsehood or misrepresentation.").

200. *See* United States v. Lewis, 626 F.2d 940, 946 (D.C. Cir. 1990) (ruling that possession with intent to distribute does not involve the type of dishonesty that Congress intended to exclude).

201. *See* United States v. Johnson, 388 F.3d 96 (3d Cir. 2004) (finding that theft is not a per se admissible offense under Federal Rule of Evidence 609(a)(2)).

202. *See* United States v. Amaechi, 991 F.2d 374, 378–79 (7th Cir. 1993) (finding that the district court correctly barred a shoplifting conviction under Federal Rule of Evidence 609).

203. FED. R. EVID. 609(a)(2); *see* United States v. Estrada, 430 F.3d 606, 614 (2d Cir. 2005) (finding the "quantum of stealth" does not necessarily equal dishonesty on the witness stand). *But see* Jackson v. State, 340 Md. 705, 719, 668 A.2d 8, 12 (1995) (ruling that theft is an impeachable offense under Maryland Rule 5-609).

204. FED. R. EVID. 609(a)(1); *see Johnson*, 388 F.3d at 101 (finding that if the lower court had engaged in the requisite balancing, it is possible that a theft conviction could have been admitted).

205. FED. R. EVID. 609(a)(2); United States v. Lipscomb, 702 F.2d 1049, 1056–57 (D.C. Cir. 1983).



they require no balancing test.<sup>206</sup> Although federal courts still have to decide (1) whether the crime involves dishonesty or false statement and (2) if the crime does not, and the witness is a defendant, whether the probative value outweighs its prejudicial effect to the defendant, the majority of crimes do not require any balancing to be performed.<sup>207</sup>

The ambiguity in Maryland's Rule is two-fold. The first ambiguous step in the analysis is to determine whether the raised conviction is either an "infamous crime" or "other crime relevant to a witness's credibility."<sup>208</sup> By drafting the Rule to say "other crime relevant to a witness's credibility," instead of a more definite class of crimes, such as felonies, Maryland trial judges have to make informed guesses as to whether the conviction qualifies under this category.<sup>209</sup> Federal courts also allow trial judges to look to the facts of the conviction when determining whether or not a crime can be used for impeachment, eliminating the facial approach mandated in Maryland.<sup>210</sup>

The second ambiguity is in rule 5-609(a)(2)'s requirement that all convictions be weighed to determine whether "the probative value of admitting th[e] evidence outweighs the danger of unfair prejudice."<sup>211</sup> This balancing creates ambiguity because the Court of Appeals has not issued any hard-and-fast rules for trial judges to apply when conducting the balancing test.<sup>212</sup> The Federal Rule only requires balancing for the narrow class of crimes where a defendant witness is being impeached for a felony that was punishable by more than one year.<sup>213</sup> Through a clearer construction and nearly fifty years of federal litigation, Federal Rule of Evidence 609 provides a sound alternative to Maryland Rule 5-609 due to its per se admissible categories of eligible convictions that can be easily interpreted by trial judges.

## *2. A Clearer Future: State Evidence Law Solutions to Maryland Rule 5-609*

Many states have crafted witness impeachment by use of a prior conviction rules that could serve as a workable alternative to Maryland Rule 5-609.<sup>214</sup> Most states have adopted rules that resemble Federal Rule of

---

206. *Lipscomb*, 702 F.2d at 1056–57 (finding that the phrase "shall be admitted" gives a linguistic inference that all felonies should be admitted).

207. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989).

208. MD. R. 5-609(a)(1).

209. *Id.*

210. *See Lipscomb*, 702 F.2d at 1067 (suggesting that "specific facts will . . . prove relevant to the rule 609(a)(1) balancing").

211. MD. R. 5-609(a)(2).

212. Goldberg, *supra* note 181, at 860.

213. FED. R. EVID. 609(a)(1)(B).

214. *See Dodson*, *supra* note 189, at 22 n.201.

Evidence 609.<sup>215</sup> California and Missouri depart from rule 609 and allow any conviction to be used to impeach a witness.<sup>216</sup> On the opposite side of the spectrum, Montana does not allow any conviction to be used for the purposes of witness impeachment.<sup>217</sup> This Section will propose two state evidence rule alternatives to replace Maryland Rule 5-609. Section IV.2.A will discuss Alabama Rule of Evidence 609 and its benefits, while Section IV.2.B. will explore Indiana Rule of Evidence 609 and its benefits.

*a. Alabama Rule of Evidence 609*

Alabama Rule of Evidence 609 provides trial judges with a workable framework to determine which convictions should be admitted.<sup>218</sup> This Rule establishes the nature of the offense and the type of witness (accused vs. non-accused) as determinative factors in deciding the admissibility of a prior conviction.<sup>219</sup> The Rule employs a more stringent balancing test for admission of an accused witness's prior conviction and a less stringent test for admission of a non-accused witness's prior conviction.<sup>220</sup> This is a significant distinction that Maryland Rule 5-609 does not make.<sup>221</sup>

---

215. *See id.* at 14; D.C. CODE § 14-305 (2001); NEB. REV. STAT. § 27-609 (West 1975); OKLA. STAT. ANN. tit. 12 § 27-2609 (West 2004); ARK. R. EVID. 609; MICH. R. EVID. 609; N.M. R. EVID. 11-609; S.C. R. EVID. 609; VT. R. EVID. 609; WASH. R. EVID. 609; WYO. R. EVID. 609.

216. *See* CAL. EVID. CODE § 788 (West 1967); MO. ANN. STAT. § 491.050 (West 2011).

217. MONT. R. EVID. 609. Montana courts, however, “have not allowed witnesses to bolster their credibility by making false statements about past convictions.” Dodson, *supra* note 189, at 21.

218. The Rule states in relevant part:

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

(1)(A) 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

(1)(B) 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.

ALA. R. EVID. 609.

219. Daniel R. Tilly, *Victims Under Attack: North Carolina's Flawed Rule 609*, 97 N.C. L. REV. 1553, 1575 (2019).

220. Under the Alabama Rule, the evidence is per se admissible if it was punishable by more than one year of imprisonment for a non-accused witness; however, if the witness is the accused then, the court must determine if “the probative value of admitting [the] evidence outweighs its prejudicial effect to the accused.” ALA. R. EVID. 609(a)(1)(B).

221. *Compare* ALA. R. EVID. 609(a)(1)(A) (announcing that “evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403 . . . ), and ALA. R. EVID. 609(a)(1)(B) (announcing that “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”), with MD. R. 5-609(a)(2) (mandating that “the court determines that the probative value of admitting this evidence outweighs the danger of unfair prejudice to the witness”).

Further, the Rule mandates admission of convictions that “involve[] dishonesty or false statement, regardless of the punishment.”<sup>222</sup> Alabama courts interpret “dishonesty” broadly.<sup>223</sup> So long as the crimes “involve ‘dishonesty (meaning breach of honesty or trust, as lying, deceiving, cheating, stealing or defrauding) and bear[] directly on the capacity of a witness . . . to testify truthfully at trial’” the crimes are admissible.<sup>224</sup> Importantly, if a balancing test is required, Alabama trial judges are permitted to inquire into the facts of a witness’s prior conviction to determine if the conviction would bear on a witness’s veracity.<sup>225</sup> By delineating felonies and specifically defining what is meant by “dishonesty or false statement,” Alabama courts have given trial judges an adequate framework to determine which convictions are eligible.<sup>226</sup>

The Alabama approach allows for a broader range of impeachable convictions while still focusing on the elements of dishonesty and untruthfulness. Alabama’s test is a substantive departure from the *crimen falsi* approach defined under the Federal Rule.<sup>227</sup> By expanding the scope of per se admissible crimes, and limiting the number of crimes that require a balancing test, Alabama has eliminated much of the current ambiguity surrounding Maryland Rule 5-609.<sup>228</sup> Specifically, by adopting Alabama’s Rule, Maryland would eliminate discretion from trial court judges and give litigants a clearer picture of which convictions are impeachable, while still protecting an accused-witness.

222. ALA. R. EVID. 609(a)(2).

223. *Ex Parte Byner*, 270 So. 3d 1162, 1166 (Ala. 2018) (citing C. GAMBLE & R. GOODWIN, MCELROY’S ALABAMA EVIDENCE § 145.01(7)(c–d), at 871–72 (6th ed. 2009)).

224. *Id.* The court notes that examples of this category of crime include “burglary, robbery and larceny.” *Id.*

225. *See, e.g., Snyder v. State*, 893 So. 2d 488, 541 (Ala. Crim. App. 2003) (finding that “[t]he record shows that the trial court and both attorneys had copies of the case action summary sheets relating to the prior conviction and appeared to be aware of the specifics concerning the conviction”); *Maxwell v. State*, 387 So. 2d 328, 332 (Ala. Crim. App. 1980) (agreeing that shoplifting may be a crime relevant to credibility depending on the circumstances of the conviction).

226. *See Huffman v. State*, 706 So. 2d 808, 808 (Ala. Crim. App. 1987) (affirming the trial court’s admission of a previous theft conviction); *Morris v. Morris*, 144 So. 3d 328, 335 (Ala. Crim. App. 2013) (affirming the trial court’s denial of a shoplifting conviction).

227. *Ex Parte Byner*, 270 So. 3d at 1168–69. In deviating from the Federal Rule, the Alabama Supreme Court determined that while its rules of evidence are modeled on the federal rules, Alabama can choose to “not follow[] the federal majority view on this issue where to do so would change the state’s substantive law.” *Huffman*, 706 So. 2d at 813. *Crimen falsi* is a much narrower test that requires that the “very nature [of the crimes] permit the impeachment of a witness.” *Ex Parte Byner*, 270 So. 3d at 1167. Under Alabama’s approach, a crime “involves dishonesty or false statement” as long as the crime “bears directly on the capacity of a witness convicted of that offense to testify truthfully at trial.” *Huffman*, 706 So. 2d at 813–14.

228. *See Ex Parte Byner*, 270 So. 3d at 1164, 1170 (finding that robbery is per se admissible under Alabama Rule of Evidence 609 as well as “embezzlement, perjury, subordination of perjury, false statement, criminal fraud, false pretense, forgery, worthless check violations, failure to file tax returns, counterfeiting and bribery” (citing C. GAMBLE, MCELROY’S ALABAMA RULE OF EVIDENCE §145.01(9), at 675–76 (5th ed 1996))); *see also Huffman*, 706 So. 2d at 814 (noting that theft is a per se admissible crime).

*b. Indiana Rule of Evidence 609*

Indiana Rule of Evidence 609<sup>229</sup> also provides a workable alternative to Maryland Rule 5-609. This Rule deviates from Federal Rule 609 by mandating admission of qualifying convictions.<sup>230</sup> This deviation was no accident. Indiana specifically intended to eliminate the balancing portion of the Federal Rule.<sup>231</sup> By mandating admission of convictions that fall within the scope of the Rule, Indiana has eliminated all discretion from trial judges, thus creating certainty as to which crimes will and will not be admitted.<sup>232</sup> Indiana has taken this novel approach “to prevent the jury from inferring that the witness must be a liar merely because [they] ha[ve] done bad things.”<sup>233</sup> Further, to guarantee that only crimes that bear on a witness’s credibility are admitted, Indiana courts allow for trial judges to examine the underlying facts of conviction when evaluating crimes that involve “dishonesty or false statement.”<sup>234</sup> The Indiana case law, or lack thereof, suggests that Indiana Rule 609(a)’s hard-and-fast requirements have been successful; however, interestingly, rule 609(b)’s provision which requires trial courts to balance

---

229. This Rule states in relevant part:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or an attempt of a crime must be admitted but only if the crime committed or attempted is (1) murder, treason, rape, robbery, kidnapping, burglary, arson, or criminal confinement; or (2) a crime involving dishonesty or false statement, including perjury.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than ten (10) years have passed since the witness’s conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

IND. R. EVID. 609(a)–(b).

230. See *Britt v. State*, 937 N.E.2d 914, 916 (Ind. 2010) (finding that the language of Indiana Rule of Evidence 609 is mandatory).

231. See *Jenkins v. State*, 677 N.E.2d 624, 627 (Ind. Ct. App. 1997) (finding that “Indiana has specifically rejected this part of the federal rule with the intention of preserving prior Indiana law in this area”); see also *Ashton v. Anderson*, 279 N.E.2d 210, 213 (Ind. 1972) (finding that it is clear that any person convicted “for the crimes of treason, murder, rape, arson, burglary, robbery, kidnapping, forgery and willful and corrupt perjury” are eligible to be impeached via their record of convictions).

232. *Anderson*, 279 N.E.2d at 216 (finding that “we see little wisdom in permitting the exclusion of such evidence to rest in the sound discretion of the trial court. Simply stated, either the particular criminal conviction reflects on the witness’ credibility for truth and veracity, or it does not”); *Jenkins*, 677 N.E.2d at 626–27.

233. *Pierce v. State*, 640 N.E.2d 730, 732 (Ind. Ct. App. 1994).

234. See *Fletcher v. State*, 340 N.E.2d 771, 774–75 (Ind. 1976) (finding that for convictions like theft, attorneys should make the facts of conviction known to trial judges in pre-trial motions *in limine*).

convictions outside of the ten-year timeframe has attracted more litigation.<sup>235</sup> By eliminating Maryland Rule 5-609's mandatory balancing test and designating specific crimes as per se admissible, Indiana Rule 609 paints a clear picture as to which prior convictions are eligible for impeachment, which in turn, enables trial judges to make consistent rulings, and further results in litigants having a clear idea as to which convictions will be subject to impeachment.

#### V. CONCLUSION

In *Rosales v. State*, the Court of Appeals improperly held that VICAR convictions qualified as "other crime[s] relevant to the witness's credibility" under Maryland Rule 5-609.<sup>236</sup> In admitting VICAR convictions, the court severely blurred the line as to the impeachability of past convictions under the Rule.<sup>237</sup> The *Rosales* decision highlights why the framework of Maryland Rule 5-609 is unworkable for trial judges and the intermediate appellate court.<sup>238</sup> To cure this defect, the legislature should consider adopting a new rule that would provide trial judges with a more workable framework for determining which convictions can and cannot be used for impeachment.<sup>239</sup> While no rule is necessarily perfect, Federal Rule of Evidence 609, as well as Alabama and Indiana Rules of Evidence 609, would provide trial judges with a sturdier platform to analyze admissible prior convictions for witness impeachment.<sup>240</sup>

---

235. See *Whiteside v. State*, 853 N.E.2d 1021, 1029–30 (Ind. Ct. App. 2006) (finding that the trial court erred in admitting defendant's prior auto theft conviction because the state did not comply with Indiana Rule of Evidence 609(b)'s notice requirement); *Scalissi v. State*, 759 N.E.2d 618, 625 (Ind. 2001) (finding "that the trial court abused its discretion when it admitted stale convictions without an analysis of the facts and circumstances surrounding the convictions"); *Dowdy v. State*, 672 N.E.2d 948, 952 (Ind. 1996) (finding that the probative value of defendant's previous conviction did overcome Indiana Rule of Evidence 609(b)'s presumption of inadmissibility).

236. See *supra* Part III.

237. See *supra* Section IV.A.2.

238. See *supra* Section IV.A.2.

239. See *supra* Section IV.B.

240. See *supra* Section IV.B.