

# A QUICK REFERENCE TO THE USE OF PRIOR CONVICTIONS

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This article provides a quick guide to what prior convictions may be used for impeachment purposes, a review of what factors the court must consider in determining whether a prior conviction may be used for impeachment purposes, and discusses selected issues in appellate decisions relevant to Maryland Rule 5-609.

In *State v. Westpoint*, 404 Md. 455, 473-79 (2008), the Court of Appeals (COA) highlighted some of the issues presented when the question before the trial court is related to the proper use of prior convictions noting that in *Prout v. State*, 311 Md. 348, 358-63 (1988), it observed that it is difficult to draw distinct lines on what crimes may be used to impeach. The Maryland law on this subject may be generally summarized as holding that to be admissible for impeachment purposes a conviction must be either a felony at common law or a *crimen falsi* and thus infamous, or a lesser crime bearing upon the witness's credibility. Stated another way, crimes, other than those that are infamous, whether misdemeanors or statutory felonies, fall into the class of lesser crimes and may or may not reflect on one's tendency to be truthful. If the crime being offered to impeach says nothing about the likelihood of the witness's propensity to be truthful under oath, it is irrelevant on that issue and should not be admitted. If the prior conviction passes this relevancy test, then the trial court must determine if its probative value outweighs its prejudicial effect. In other words, because evidence is legally admissible does not necessarily require its admission. Only if the trial judge, in the exercise of his/her discretion, feels that the prior conviction rationally

carries probative value on the issue of truth and veracity of the witness, should the evidence be admitted.

In *Jackson v. State*, 340 Md. 7-5, 712-13 (1995), the COA noted the three-part test analysis that is applicable under Rule 5-609.

First, a conviction must fall within the eligible universe to be admissible. This universe consists of two categories: (1) infamous crimes, and (2) other crimes relevant to the witness's credibility. Md. Rule 5-609(a).

Second, if the crime falls within one of these two categories, the proponent must establish that the conviction is less than fifteen years old. Md. Rule 5-609(b).

Finally, the trial court must weigh the probative value of the impeaching evidence against the danger of unfair prejudice to the defendant. Md. Rule 5-609(c).

The COA continued that with respect to impeachment, it has said that impeachment with a prior conviction can be used "to assist the fact finder in measuring the credibility of the defendant," *Ricketts v. State*, 291 Md. 701, 703 (1981), at the same time preventing "a jury from convicting a defendant based on his past criminal record, or because the jury thinks the defendant is a bad person." *Jackson*, 340 Md. at 715. The COA further reminded that it has imposed limitations on the use of past convictions "in an effort to discriminate between the informative use of past convictions to test credibility, and the pretextual use of past convictions where the convictions are not probative of credibility but instead merely create a negative impression of the defendant," because:

The danger in admitting prior convictions as evidence to impeach the defendant stems from the risk of prejudice. The jury may improperly infer that the defendant has a history

of criminal activity and therefore is not entitled to a favorable verdict. Such evidence may detract from careful attention to the facts, despite instructions from the court, influencing the jury to conclude that if the defendant is wrongfully found guilty no real harm is done. Where the crime for which the defendant is on trial is identical or similar to the crime for which he has been previously convicted the danger is greater, as the jury may conclude that because he did it before he most likely has done it again. The net effect of such evidence is often to discourage the defendant from taking the stand.

Thus, the role of the trial judge takes on added importance. It becomes his function to admit only those prior convictions which will assist the jury in assessing the credibility of the defendant. The trial judge must weigh the probative value of the convictions against the prejudice to the defendant in asserting his defense.

*Id.* at 715-16, quoting *Ricketts v. State*, 291 Md. 701, 703-04 (1981).

To begin the discussion, we must first identify those offenses that fall into the universe of offense that may be impeachable. The following Guide provides a quick index as to which offenses pass Step One as to the first test of impeachment admissibility.

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## STEP ONE: Is it an Impeachable Offense?

### A QUICK REFERENCE GUIDE TO IMPEACHABLE OFFENSES

Arson	Yes	<i>Cure v. State</i> , 421 Md. 300, 324 (2011) *common law felony
Assault	No	<i>State v. Duckett</i> , 306 Md. 503, 512 (1986)
Assault on a Police Officer	No	<i>Thurman v. State</i> , 211 Md.App. 455 (2013)
Assault with Intent to Murder	No	<i>Thurman v. State</i> , 211 Md.App. 455 (2013) <i>Fulp v. State</i> , 130 Md.App. 157 (2000)
Burglary	Yes	<i>Cure v. State</i> , 421 Md. 300, 324 (2011) *common law felony
Conspiracy to Distribute Drugs	No	<i>Wallach v. Bd. Of Ed.</i> , 99 Md. App. 386, 391-92 (1994)
Disorderly Conduct	No	<i>Morales v. State</i> , 325 Md. 330, 339 (1992)
Drug Distribution (and PWID)	Yes	<i>Summers v. State</i> , 152 Md.App. 362, <i>cert. denied</i> , 378 Md. 619 (2003) <i>State v. Giddens</i> , 335 Md. 205, 217 (1994)
Drug Manufacturing	Yes	<i>Carter v. State</i> , 80 Md.App. 686, 693 (1989)
Drug Possession	No	<i>Morales v. State</i> , 325 Md. 330, 339 (1992) <i>Lowery v. State</i> , 292 Md. 2, 2 (1981) <i>Cason v. State</i> , 66 Md.App. 757, 774 (1986)
Embezzlement	Yes	<i>Garitee v. Bond</i> , 102 Md. 379 (1905) <i>Fulp v. State</i> , 130 Md.App. 157 (2000) <i>Prout v. State</i> , 311 Md. 348, 360 (1988)
Failure to Register as a Sex Offender	No	<i>Correll v. State</i> , 215 Md. App. 483 (2013)
False Pretense	Yes	<i>Garitee v. Bond</i> , 102 Md. 379 (1905) <i>Fulp v. State</i> , 130 Md.App. 157 (2000) <i>Prout v. State</i> , 311 Md. 348, 360 (1988)
False Statement	Yes	<i>Garitee v. Bond</i> , 102 Md. 379 (1905) <i>Fulp v. State</i> , 130 Md.App. 157 (2000) <i>Prout v. State</i> , 311 Md. 348, 360 (1988)
Fleeing from a Police Officer	No	<i>Thurman v. State</i> , 211 Md.App. 455 (2013)
Fraud	Yes	<i>Garitee v. Bond</i> , 102 Md. 379 (1905) <i>Fulp v. State</i> , 130 Md.App. 157 (2000) <i>Prout v. State</i> , 311 Md. 348, 360 (1988)
Forgery	Yes	<i>Garitee v. Bond</i> , 102 Md. 379 (1905) <i>Fulp v. State</i> , 130 Md.App. 157 (2000) <i>Prout v. State</i> , 311 Md. 348, 360 (1988)

Indecent Exposure	No	<i>Ricketts v. State</i> , 291 Md. 701 (1981)
Manslaughter	Yes	<i>Cure v. State</i> , 421 Md. 300, 324 (2011) *common law felony
Mayhem	Yes	<i>Cure v. State</i> , 421 Md. 300, 324 (2011) *common law felony
Murder	Yes	<i>Cure v. State</i> , 421 Md. 300, 324 (2011) *common law felony
Obstruction of Justice	Yes	<i>Garitee v. Bond</i> , 102 Md. 379 (1905) <i>Fulp v. State</i> , 130 Md.App. 157 (2000) <i>Prout v. State</i> , 311 Md. 348, 360 (1988)
Perjury	Yes	<i>Garitee v. Bond</i> , 102 Md. 379 (1905) <i>Fulp v. State</i> , 130 Md.App. 157 (2000) <i>Prout v. State</i> , 311 Md. 348, 360 (1988)
Prostitution	No	<i>Mathews v. State</i> , 68 Md.App. 282 (1986)
Rape	Yes	<i>Cure v. State</i> , 421 Md. 300, 324 (2011) *common law felony
Resisting Arrest	No	<i>Banks v. State</i> , 213 Md.App. 195 (2013)
Robbery	Yes	<i>Facon v. State</i> , 144 Md. App. 1, <i>reconsideration denied, cert. granted and reversed</i> , 375 Md. 435 (2002) <i>Cure v. State</i> , 421 Md. 300, 324 (2011) *common law felony
Sex Offense 3 <sup>rd</sup> Degree	No	<i>State v. Westpoint</i> , 404 Md. 455 (2008)
Sodomy	Yes	<i>Cure v. State</i> , 421 Md. 300, 324 (2011) *common law felony
Theft	Yes	<i>Cure v. State</i> , 421 Md. 300, 324 (2011) *common law felony
Traffic Offenses	No	<i>Morales v. State</i> , 325 Md. 330, 339 (1992)
Treason	Yes	<i>State v. Duckett</i> , 306 Md. 503, 512 (1986) <i>Garitee v. Bond</i> , 102 Md. 379 (1905) <i>Fulp v. State</i> , 130 Md.App. 157 (2000) <i>Prout v. State</i> , 311 Md. 348, 360 (1988)

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## What is a “conviction” and what may the jury learn about the conviction

A conviction includes:

- A plea of nolo contendere followed by a sentence, whether or not the sentence is suspended
- Evidence of juvenile adjudication may be admissible under the Confrontation Clause to show bias, *see Davis v. Alaska*, 415 U.S. 308 (1974) and Courts Article § 3-8A-23

The jury may hear about the conviction only as to:

- The name of the crime
- The time and place of conviction
- The sentence received

The jury may not be told the underlying details of the prior conviction. *State v. Giddens*, 335 Md. 205, 222 (1994)

## **STEP TWO: Additional Prerequisites to the Admissibility of an Impeachable Conviction**

Rule 5-609 provides threshold bars to the admissibility of a prior conviction. A prior conviction is NOT admissible if it is:

- More than 15 years old
- Pending an appeal (or the time for noting an appeal or filing an application for leave to appeal has not expired)
- Reversed on appeal
- Pardoned
- Stricken and a probation before judgment is entered (*See Molter v. State*, 201 Md.App. 155 (2011))

## **STEP THREE: The Probative Value of the Prior Impeachable Conviction Must Outweigh the Danger of Unfair Prejudice to the Witness or Objecting Party**

Rule 5-609 does not provide a *per se* ground for admissibility simply because the prior conviction is within the category of potentially admissible convictions. Even in those instances where the prior conviction passes Steps One and Two, the trial court must still conduct a balancing test to determine whether the probative value of the prior impeachable conviction is outweighed by its potential unfair prejudice

to the defendant or a witness. In addressing how the trial court conducts this weighing process, the COA identified five factors for trial judges to consider when weighing the probative value of a past conviction against its prejudicial effects:

- 1) The impeachment value of the prior crime;
- 2) The length of time since the conviction and the witness's subsequent history;
- 3) The similarity between the past crime and the charged crime (the similarity between the prior conviction and the crime for which a defendant is being tried does not *per se* preclude impeachment with that conviction. *Facon v. State*, 144 Md.App. 1, 47, 48, 796 A.2d 101 (2002), *rev'd on other grounds*, 375 Md. 435, 825 A.2d 1096 (2003)).
- 4) The importance of the witness's testimony to the case, and the relative need for the evidence relevant to the witness's credibility; and
- 5) The risk of unfair prejudice, which is particularly high if the witness sought to be impeached is the accused, *King v. State*, 407 Md. 682, 704-06 (2009), and the prior conviction is for a crime similar to that for which the accused is on trial.

*See Prout v. State*, 311 Md. 348, 364 (1998), *Jackson v. State*, 340 Md. 705, 717 (1995), *Cure v. State*, 421 Md. 300, 329-31 (2011).

An example of an instance when the trial court failed to properly conduct such a weighing occurred in *Beales v. State*, 329 Md. 263, 273-75 (1993) wherein the COA concluded that the trial court did not adequately conduct a balancing of a 14-year-old theft conviction in terms of the light it might shed on the witness's truthfulness against its potentially unfair prejudice to Beales' defense. It noted that the trial court's elliptical remarks did not sufficiently demonstrate that it assessed the relative weights of probative value and prejudicial danger. First, the trial court focused largely on the proper form of the impeaching question, rather

than on its possible impact. Second, the trial court insisted that the State had a “right” to inform the jury of the witness' conviction, a word that suggests obligatory admissibility of the evidence, rather than discretionary admissibility based on the balancing test. Third, the trial court admitted the evidence knowing only that the witness had been convicted of theft, but not knowing when he had been convicted. The witness testified that his conviction was fourteen years old only at the very end of the exchange, after the trial court had ruled. The remoteness of a prior conviction is a critical factor to be weighed in the balance. Here it was not.

As the COA noted as even more compelling, the Rule places a cap of fifteen years on prior convictions used to impeach. Had the witness's conviction been sixteen years old, it would have been barred altogether by the Rule. The trial court's failure to ascertain the vintage of the conviction before deciding the question indicates strongly that it adhered to the former law of impeachment permitting *per se* use of convictions of infamous crimes no matter how remote. The COA was concerned as the trial court let in the evidence solely because the witness had been convicted of theft, a *crimen falsi* and an infamous crime, as was proper under the old impeachment statute. The record thus demonstrated that the trial court did not appropriately apply the Rule. At the trial, the prosecution and the defense presented dramatically different accounts of the incident leading to Beales' arrest. The relative validity of those accounts depended largely on the credibility of the witnesses. The witness was a primary defense eye-witness, the observer closest to the scene of the altercation. His credibility was tainted, to a degree that the COA noted it could not specify without speculating, by evidence that he was a convicted thief. The State in its closing argument reminded the jury of that fact by saying: “Judge [the witness]. He told you he was convicted of theft. Why is that important? Not because he did it, but because he's been [Beales's] friend for ten years and maybe he's not telling the truth.” Reviewing the record before it, the COA held that it could not say,

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beyond a reasonable doubt that evidence of the [witness'] theft conviction did not sway the jury that found Beales guilty of battery.

## A REMINDER WHEN THE CONVICTION COMES IN

While criminal law practitioners understand the limitation the law provides concerning the use that may be properly made of prior convictions, the jury needs to be instructed (assuming as we all are told we must, that limiting instructions have a real effect in the real world) that the conviction may be considered only with regard to the witness' credibility.

The Maryland Pattern Criminal Jury Instructions provide a pattern instruction as to this issue.

## MPJI-Cr 3:22 -Impeachment by Prior Conviction

### A. Defendant

You have heard evidence that the defendant has been convicted of a crime. You may consider this evidence in deciding whether the defendant is telling the truth, but for no other purpose. You must not consider the conviction as evidence that the defendant committed the crime charged in this case.

### B. Witness

You have heard evidence that [defendant] has been convicted of a crime. You may consider this evidence in deciding whether the witness is telling the truth, but you cannot consider this evidence for any other purpose.

## PRESERVATION OF THE PRIOR CONVICTION ISSUES

**Does the election not to testify fail to preserve a ruling that a prior conviction is admissible?** In *Brown v. State*, 373 Md. 234, 243 (2003), the COA held that when a defendant elects to testify and, in doing so, testifies affirmatively on direct examination to the existence of a prior conviction in order to "draw the sting out" of that conviction, he or she waives his or her right to appellate review of the merits of the trial judge's prior *in limine* determination that the prosecution may use the conviction for impeachment purposes.

The holding was revisited by the COA in *Cure v. State*, 421 Md. 300, 321-23 (2011), in which the COA held that when a defendant elects to testify and, in doing so, testifies affirmatively on direct examination as to the existence of a prior conviction in order to "draw the sting out" of that conviction, he or she does not waive necessarily his or her right to appellate review of the merits of the trial judge's prior *in limine* determination that the prosecution may use the conviction for impeachment purposes.

The limited setting as to when this applies occurs where (1) the State makes clear that it intends to offer the conviction if the defendant testifies, (2) the defendant makes a clear objection to the evidence, (3) the court makes a definitive ruling, intended to be final, that the evidence will be admitted, and (4) the defendant testifies and, to blunt the force of the conviction, reveals it on direct examination.

Here the prosecutor stated explicitly that "[t]he State would like to bring that up" (referring to the arson conviction), satisfying the first prong. As to the second prong, defense counsel made a clear objection during argument on the motion *in limine*, stating "Yes, Your Honor, and certainly we would object" to the trial judge's ruling "I'd let [the prior arson conviction] in." Fulfilling the third prong, the court made an unequivocal and definitive ruling allowing the use of the prior arson conviction for impeachment, but not the prior attempted murder conviction, offering nothing that would lead a reasonable person to believe that the trial judge would reconsider his decision on the motion. Moreover, when defense counsel advised Cure, before he elected to testify, that his prior conviction would be admissible for impeachment purposes, the trial court made no attempt to revisit the issue. Finally, satisfying the fourth prong, Cure testified to the conviction under direct examination in the defense case-in-chief in an obvious attempt to blunt its force. Thus, the COA concluded that Cure did not waive the opportunity to seek appellate review of the admissibility of his prior arson conviction for impeachment purposes.

An example of where *Cure* may not be applicable occurred in *Dallas v. State*, 413 Md. 569, 573-76 (2010). The COA instructed that there are the times when a trial court can and, therefore, should decide a motion *in limine* involving a Rule 5-609 issue before the defendant makes the election. For example, when it is clear that a prior conviction is ineligible for impeachment under Rule 5-609, the court need not hear the defendant's testimony to know how to rule on a motion to exclude that proposed impeachment evidence. Similarly, the trial court certainly can recognize when the risk of unfair prejudice of the proposed impeachment evidence far outweighs its probative value, no matter how the defendant might testify. Moreover, the court may be satisfied that it has a sufficient basis upon which to make an *in limine* ruling without hearing the defendant's direct testimony if the court has learned, through other means, how the defendant is likely to testify. For example, a court may hear admissions that the defense makes during the defense's opening statement, or the court may accept a proffer of the defendant's direct testimony. In any of these circumstances, fairness to the defendant argues in favor of the trial court's ruling on the motion before the defendant elects to testify or remain silent.

However, in *Dallas*, the COA indicated that it remained for it to decide whether the trial court abused its discretion in deferring its ruling on his motion *in limine* seeking to prohibit the State from impeaching him with evidence of his prior felony drug convictions.

During the lengthy discussion on the subject, the trial court explained that, in light of the similarity between the pending charges and the prior convictions, it was necessary to await Dallas' testimony before deciding whether the probative value of the proposed impeachment evidence outweighed the danger of unfair prejudice. To be sure, the trial court was aware that the defense to the felony charge was to

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concede the possession of the cocaine and marijuana the police found on Dallas but deny that the cocaine was for distribution. Yet, the court could not be certain what Dallas's testimony would be until the court heard it. The COA noted that the trial court, not unreasonably, envisioned that, had Dallas taken the stand, he might not have confined his testimony (consistent with counsel's opening statement) to a denial of an intent to distribute the drugs found in his possession; he might instead have testified that he had never before distributed illegal drugs. Had his testimony been consistent with defense counsel's opening statement, then the trial court might have decided that evidence of the prior convictions carried a risk of unfair prejudice. Had Dallas testified more expansively, the trial court might have decided that the State should be permitted to impeach him with the prior convictions. Given the plausibility of either scenario, the court was not required

to rule on the motion without first hearing Dallas' direct testimony.

## CONCLUSION

Whether seeking to use a prior conviction to challenge the credibility of a witness or defendant or whether seek to bar the use of a prior conviction, not only is it critical to be prepared to address the various factors, but the specific factual framework of the issues and defenses in the case are likely to determine the trial court's determination as to the admissibility and use of a prior conviction.

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