Serial: **155190**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99002-SCT

IN RE: MISSISSIPPI RULES OF EVIDENCE

ORDER

This matter is before the Court en banc on the Motion to Amend Certain Rules of the Mississippi Rules of Evidence filed by the Supreme Court Advisory Committee on Rules. After due consideration, the Court finds that the amendment of Rule 609 and the Comment as set forth in Exhibit "A" will promote the fair and efficient administration of justice.

IT IS THEREFORE ORDERED that the petition is hereby granted to the extent that Rule 609 and Comment of the Mississippi Rules of Evidence is amended as set forth in Exhibit "A" hereto. This amendment is effective on July 1, 2009.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forward a true certified copy to West Publishing Company for publication as soon as practical in the advance sheets of *Southern Reporter, Third Series (Mississippi Edition)* and in the next edition of *Mississippi Rules of Court*.

SO ORDERED, this the 22nd day of May, 2009.

/s/ George C. Carlson, Jr.

GEORGE C. CARLSON, JR., PRESIDING JUSTICE

TO DENY: DICKINSON, RANDOLPH AND CHANDLER, JJ.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General Rule. For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(1) evidence that (A) a nonparty witness 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 (B) a party 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 party; and

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

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

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

(d) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is

satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

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

[Amended effective May 2, 2002; July 1, 2009.]

Comment

Under Rule 609(a) crimes are divided into two categories for purposes of impeachment. 609(a)(1) deals with felony convictions and under the original version treated convictions of all witnesses the same. The second category, 609(a)(2), originally addressed crimes involving dishonesty or false statement, whether felonies or misdemeanors.

Rule 609(a)(1) was amended in 2002 to incorporate the rationale of decisions by the Mississippi Supreme Court which recognized the difference in the highly prejudicial effect of showing the convictions when the witness is the accused and the little prejudicial effect from such impeachment of other witnesses. It was reasoned that when the impeachment by convictions is of a witness other than the accused in a criminal case there is little or no unfair prejudice which can be caused to a party. Thus, the probative value on the credibility of the witness will almost always outweigh any prejudice. In *White v. State*, 785 So.2d 1059 (Miss.2001) it was held that the accused had the right, bolstered by his right of confrontation, to impeach a state's witness with his felony drug conviction. In *Moore v. State*, 787 So.2d 1282 (Miss.2001) the court held that the state was properly permitted to impeach a defense witness with his five prior convictions, noting that there was no prejudice against the accused.

The amendments here refer to parties instead of the accused to clearly apply to civil cases, as did the original rule. Under this amended rule, convictions offered under 609(a)(1) to impeach a party must be analyzed under the guidelines set forth in *Peterson v. State*, 518 So.2d 632 (Miss.1987) to determine if the probative value is great enough to overcome the presumed prejudicial effect to that party, and findings should be made on the record by the judge. Convictions offered to impeach any other witness are admissible unless the court is persuaded by the opponent that the probative

value is substantially outweighed by negative factors included in Rule 403. A record of the findings on the issue is not required in that case. See *Moore*, above.

Convictions from any state or federal jurisdiction may be considered for admission under the rule.

The phrase "dishonesty or false statement" in 609(a)(2) means crimes such as perjury or subornation of perjury, false statement, fraud, forgery, embezzlement, false pretense or other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the witness' propensity to testify truthfully. Such convictions are peculiarly probative of credibility and are always to be admitted, not subject to the discretionary balancing by the judge.

Rule 609(a)(2) requires that the proponent have ready proof that the crime was in the nature of *crimen falsi*. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the statute and the face of the judgment -- as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly -- a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States*, 110 S.Ct. 2143 (1990) (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States*, 125 S.Ct. 1254 (2005) (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the rule does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi*.

The reference in former 609(a) to proving a conviction during cross-examination is eliminated because the conviction may have to be proved in rebuttal if the witness refuses to admit the prior conviction on cross-examination.

The first sentence of 609(a) uses the term "character for truthfulness" instead of the prior term "credibility," because the limitations of Rule 609 are not applicable if a

conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g.*, *United States v. Lopez*, 979 F.2d 1024 (5th Cir. 1992) (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

Subsection (b) imposes a time limitation on prior convictions. If the conviction occurred more than ten years earlier, it may not be used as impeachment evidence. The rationale underlying subsection (b) is based on fairness. A person's past should not be able to haunt the person ~~him~~ for ~~the duration of his~~ life. The judge may grant an exception in instances where the probativeness of the conviction substantially outweighs the prejudice. But, before the judge makes such a decision, the proponent must give the adversary sufficient notice so that the adversary may challenge the decision.

Prior to the rules Mississippi had no time limitation regarding prior convictions. The courts held only that the prior conviction should not be too remote in time from the case at bar. That principle obviously left a great deal of discretion with the trial judge in determining remoteness. Thus, the appellate court often upheld the use of prior convictions for impeachment which were far in excess of the ten-year limitation of Rule 609(b).

Subsection (c) expresses the public policy that a person who has been rehabilitated or whose conviction has been nullified based on a later finding of his innocence should not be tainted by this conviction. Subsection (c) does not apply to pardons which simply restore a person's civil rights. Rather, it is implicitly limited to cases in which rehabilitation has occurred or in which it can be shown that the person was innocent.

Subsection (d) prohibits impeachment based on juvenile adjudications. Reasons for this rule include the wish to free an adult from bearing the burden of a youthful mistake, the informality of youth court proceedings, and the confidential nature of those proceedings. *See* FRE 609, Advisory Committee's Notes.

In pre-rule Mississippi practice, the use of juvenile adjudications for impeachment purposes has been governed by M.C.A. § 43-21-561 which provides that no adjudication against a child shall be deemed a criminal conviction. Indeed, the juvenile offender is permitted by statute to deny the fact of the prior adjudication. However, the statute permits cross-examination by either the state or the defendant in

a criminal action or the respondent in a juvenile adjudication proceeding regarding prior juvenile offenses for the limited purpose of showing bias and interest. In short, the evidence could be used in these limited circumstances but not to attack the general credibility of the witness.

Under Rule 609(d) the court has the discretion to allow impeachment of a witness, other than a criminal defendant, by a prior juvenile adjudication if the judge determines that it is necessary. The court's discretion extends only to witnesses other than the accused in a criminal case.

Subsection (e) reflects the presumption that exists in favor of a trial court's decision. Until overturned, that decision is deemed to be the correct decision. Once the prior conviction has been introduced, the adversary can present evidence that an appeal of that conviction is pending. In theory, this gives a sense of balance to the use of the prior conviction. However, in practice, evidence of a pending appeal has insufficient weight to balance the use of the prior conviction.

[Comment amended effective March 1, 1989; May 2, 2002; July 1, 2009.]