

Serial: 154538

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 804 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 804 and its Comment of the Mississippi Rules of Evidence are 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 20th day of April, 2009.

/s/ George C. Carlson, Jr.

GEORGE C. CARLSON, JR., PRESIDING JUSTICE  
FOR THE COURT

TO GRANT: ALL JUSTICES.

Exhibit A

**Rule 804. Hearsay Exceptions;  
Declarant Unavailable**

\* \* \* \* \*

**(b) Hearsay Exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

\* \* \* \* \*

(6) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

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[Amended effective March 27, 1991; amended effective July 1, 2009 to add subsection (6)]

**Comment**

**(a)** In defining unavailability, the rule lists six situations in which unavailability exists:

(1) When the witness exercises a privilege, the witness ~~he~~ is deemed to be unavailable as to the portion of the witness's ~~his~~ testimony which is covered by the claimed privilege. The trial court, however, may first make a preliminary determination that the witness has the right to claim the privilege asserted.

(2) When a witness refuses to testify, despite being ordered to do so by the court, the witness ~~he~~ is deemed unavailable.

(3) If the witness testifies that the witness ~~he~~ has a lack of memory as to the subject matter under inquiry, the witness ~~he~~ is deemed to be unavailable.

(4) Death and sickness render a witness unavailable. *See Paulk v. Housing Authority of Tupelo*, 228 So. 2d 871 (Miss. 1969), and *Home Ins. Co. v. Gerlach*, 220 Miss. 732, 71 So.2d 787 (1954).

(5) Absence of the witness from the hearing accompanied by an inability of the proponent of the evidence to compel the witness's presence is within the

definition of unavailability. Nothing in Rule 804 contained herein, however, shall affect the admissibility of depositions otherwise admissible under M.R.C.P. 32 (a)(3)(B).

(6) The rationale for this definition of unavailability is based on the recognition of child trauma. ~~If the exception in Rule 804(b)(1) were to be applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990); *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed. 666 (1990); *Coy v. Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988).~~

A finding of unavailability and *indicia* of reliability should be made on the record.

If, however, the proponent of the evidence is responsible for the existence of any of the aforementioned conditions, the condition of unavailability for the purposes of Rule 804 is not satisfied.

~~Rule 804 gives a more expanded definition of unavailability than existed under M.C.A. § 13-1-111 (repealed effective July 1, 1991) which provided for unavailability only in the case of physical or mental incapacity.~~

~~(b)(1) *Former Testimony*. The former testimony exception is recognized at common law. *McMasters v. State*, 83 Miss. 1, 35 So. 302 (1903). An essential ingredient of the former testimony exception has always been the unavailability of the declarant. See Ellis & Williams, *Mississippi Evidence*, § 8-19.~~

~~M.C.A. § 13-1-111 (repealed effective July 1, 1991) formerly provided for the use of former testimony in civil actions. In addition, the Mississippi court used the common law exception to admit testimony given in a prior criminal action. *Smith v. State*, 247 So.2d 705 (Miss. 1971); *Lee v. State*, 124 Miss. 398, 86 So. 856 (1921).~~

Rule 804(b)(1) permits the prior testimony to be offered (1) against the party *against* whom it was previously offered or (2) against the party who offered it previously. Thus, the rule equates the direct and redirect examination of one's own witness with the cross-examination of an adversarial witness.

It is not required that the former testimony be in an earlier proceeding of the same case. It is only essential that the party against whom it is directed had a similar

motive and an opportunity to develop the testimony on the previous occasion. The rule does not speak in terms of identity of issues. Identity of issues is only important because it bears on motive. Thus, the rule deletes the law common phrase "identity of issues" and substitutes "motive" and "opportunity."

**(b)(2) *Statement Under Belief of Impending Death.*** ~~This rule is broader than the common law dying declaration exception formerly observed in Mississippi practice. The rule allows for the dying declaration to be used in homicide cases and in civil actions, but it is not available in non-homicide criminal actions. Mississippi practice has permitted dying declarations only in cases of homicide.~~

**(b)(3) *Statement Against Interest.*** Rule 804(b)(3) expands the common law exception of declaration against interest. Traditionally, courts have recognized two declarations against interest, pecuniary and proprietary. The rule extends the exception to declarations against penal interest on the theory that such declarations are reliable. No reasonable person would make such a statement and invite subject himself to possible criminal prosecution liability if the statement were not true.

The second sentence of the rule is concerned with hearsay which inculpates the declarant but exculpates the criminal defendant. Unless such a statement can be corroborated as reliable, it will be excluded.

**(b)(4) *Statement of Personal or Family History.*** This rule is similar to Rule 803(19). The distinguishing feature is that the statements under Rule 804(b)(4) are statements made by unavailable declarants concerning their own personal and family history or that of a family member or intimate associate. Rule 803(19) focuses more on reputation.

**(b) (5)** This rule is identical to Rule 803(24) in both language and intent.

**(b)(6) *Forfeiture by Wrongdoing.*** Rule 804(b)(6) provides that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." [United States v. Mastrangelo, 693 F.2d 269, 273 \(2d Cir.1982\)](#), cert. denied, 104 S.Ct. 2385 (1984). *Davis v. Washington*, 126 S. Ct. 2266, 2280 (2006) ("While defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system."). Likewise, a party forfeits rights under the Confrontation

Clause when misconduct attributable to a party causes a witness's absence. *U.S. v. Carson*, 455 F.3d 336 (C.A.D.C. 2006) (wrongdoing by co-conspirators). The wrongdoing need not consist of a criminal act and the rule applies to all parties, including the government.

When any of the hearsay exceptions in Rule 804 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. *Crawford v. Washington* 124 S.Ct. 1354 (2004) (The confrontation clause forbids “admission of testimonial statements of a witness who did not appear at trial unless [the witness is] unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”); *Davis v. Washington*, 126 S.Ct. 2266 (2006) (Among other things, prior testimony, depositions, affidavits, and confessions are testimonial, as are other statements to police if “the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.”). See also *Rubenstein v. State* 941 So. 2d 735 (Miss. 2006) (applying Rule 804(b)(5) in light of *Crawford* and finding statements nontestimonial); *Bell v. State*, 928 So. 2d 951 (Miss. Ct. App. 2006) (applying Rules 804(a)(6) and 803(2) in light of *Crawford* and finding statements testimonial).

[Comment amended effective March 1, 1989; March 27, 1991; amended March 20, 1995; amended effective July 1, 2009 to update citations and add subsection (b)(6)]