

Serial: 155178

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 the Comment to Rule 803 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 the Comment to Rule 803 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 GRANT: ALL JUSTICES.

Exhibit A

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

Comment

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(25) Tender Years Exception. Some factors that the court should examine to determine if there is sufficient indicia of reliability are (1) whether there is an apparent motive on declarant's part to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declarations; (6) the relationship between the declarant and the witness; (7) the possibility of the declarant's faulty recollection is remote; (8) certainty that the statements were made; (9) the credibility of the person testifying about the statements; (10) the age or maturity of the declarant; (11) whether suggestive techniques were used in eliciting the statement; and (12) whether the declarant's age, knowledge, and experience make it unlikely that the declarant fabricated. Corroborating evidence may not be used as an indicia of reliability. *Idaho v. Wright*, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). *Smith v. State*, 925 So.2d 825, 837 (Miss. 2006); *Hennington v. State*, 702 So.2d 403, 415 (Miss. 1997). A finding that there is a substantial indicia of reliability should be made on the record.

Mississippi's pre-rule tender years exception did not define "tender years." *See Williams v. State*, 427 So.2d 100 (Miss. 1983). Many jurisdictions limit their analogous exceptions to declarants under the age of fourteen years. However, the exception should not be necessarily limited to a specific chronological age. In appropriate cases, the exception might apply when the declarant is chronologically older than fourteen years, but the declarant has a mental age less than fourteen years.

Corroboration required for admissibility under M.R.E. 803(25)(b)(2) need not be eyewitness testimony or physical evidence, but may include confessions, doctors' reports, inappropriate conduct by the child, and other appropriate expert testimony.

If this exception is applied in a criminal case, When any of the hearsay exceptions in Rule 803 are applied in a criminal case, the rights of the defendant under the Confrontations Clauses of Federal and State Constitutions must be respected. See Idaho v. Wright, 497 U.S. 804, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990). 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 *Osborne v. State*, 942 So.2d 193 (Miss. Ct. App. 2006) (applying Rule 803(25) in light of *Crawford* and finding video of child’s statements produced at the direction of the district attorney testimonial but no confrontation clause violation because child testified and was subject to cross-examination); *Bell v. State* 928 So.2d 951 (Miss. 2006) (child’s statements to police testimonial and therefore improperly admitted under 803(2)); *Hobgood v. State*, 926 So.2d 847 (Miss. 2006) (applying Rule 803(25) in light of *Crawford* and finding statements by children to family members and health care providers not testimonial but similar statements to police testimonial); *Foley v. State*, 914 So.2d 677 (Miss. 2005) (statements made as part of “neutral medical evaluations” not testimonial and properly admitted under 803(4) and 803(25)).

[Comment amended effective March 1, 1989; March 27, 1991; March 20, 1995; July 1, 1997; July 1, 2009.]