

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, SS.-NORTH

OCTOBER TERM, 2008

STATE OF NEW HAMPSHIRE

V.

MICHAEL ADDISON

No. 07-S-0254

Motion In Limine To Confirm Admissibility Of Prior Convictions  
Of State Witnesses During Cross-Examination

The accused, Michael Addison, and his Public Defenders respectfully request that the court confirm that defense may impeach the following State witnesses with convictions of prior felonies or crimes of dishonesty, as provided in Rule of Evidence 609.

1. The State has indicted Michael Addison on the charge of Capital Murder of Officer Briggs and has filed a Notice of Intent to Seek the Death Penalty. Opening statements are to begin on 10/20/08.
2. The State has provided the defense with a witness list for the upcoming trial in this case.
3. The State has also provided criminal record checks on its lay witnesses, as required by Superior Court Rule 98.
4. According to the criminal record check provided by the State, certain of their witnesses have been convicted of crimes which may be used to impeach their credibility pursuant to Rule of Evidence 609.
5. Rule 609 provides:
  - (a) *General rule.* 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 cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he or she was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the 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 specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 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.

A witness's conviction of a felony within the last ten years offered pursuant to Rule 609(a)(1) is admissible without consideration of Rule of Evidence 403 and without consideration of any prejudicial effect towards the State. As noted by our Supreme Court:

We reviewed the relationship between Rule 609(a) and Rule 403 in Zola v. Kelley, 149 N.H. at 654. There, we stated that Rule 403 is an exclusionary rule that "cuts across the rules of evidence" and was "designed as a guide for the handling of situations for which no specific rules have been formulated." Id. We interpreted Rule 609(a)(1) as carving out an exception to the general balancing test of Rule 403 by providing a more exclusionary rule than Rule 403 for the impeachment of witnesses by prior conviction in criminal cases. Id. Because Rule 609(a)(1) contains a specific exclusionary rule, when Rule 609(a)(1) applies, Rule 403 does not. See id. at 655 (interpreting reporter's note to Rule 609(a) as suggesting that "the less exclusionary balancing test of Rule 403 applies in situations when the balancing test set forth in Rule 609(a)(1) does not").

The plain language of Rule 609(a) states that the purpose of the rule is for "attacking the credibility of a witness." The Rule does not limit the definition of the term "witness" to exclude a witness for the State. The operation of Rule 609(a)(1) is clear from its wording: when impeaching a witness with a prior conviction punishable by death or imprisonment in excess of one year, the evidence of the conviction shall be admitted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the defendant.

In the instant case, Rule 609(a)(1) applied. The defendant attempted to impeach the State's witness with a prior conviction of a crime that was punishable by death or

imprisonment for more than one year. The trial court thus erred in applying Rule 403 because Rule 609(a)(1) applied. The trial court was required to admit evidence of the prior conviction if its probative value outweighed its prejudicial effect to the defendant. See In the Matter of Bazemore & Jack, 153 N.H. 351, 354, 899 A.2d 225, 228 (2006) (stating the general rule of statutory construction that "shall" requires mandatory action and "may" is permissive). Accordingly, we conclude that the trial court's application of Rule 403's balancing test constituted an unsustainable exercise of discretion. . . . we reverse and remand.

State v. McGill, 153 N.H. 813, 816 (2006)

6. Similarly, convictions for crimes of dishonesty which fall within the scope of Rule 609 must be admitted automatically.

[T]he admission of prior convictions involving dishonesty and false statement is not within the discretion of the [district] court." Id.; e.g., United States v. Morrow, 977 F.2d 222, 228 (6th Cir. 1992) ("Rule 609(a)(2) . . . clearly limits the discretion of the court by mandating the admission of crimes involving dishonesty or false statements."), cert. denied, 113 S. Ct. 2969, 125 L. Ed. 2d 668 (1993); United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981) ("Evidence offered under Rule 609(a)(2) is not subject to the general balancing provision of Rule 403.").

United States v. Tracy, 36 F.3d 187, 192 (1st Cir. 1994).

7. The defense is aware of the provisions of Superior Court Rule 68. However, as to almost all of the State's witnesses, the defense only recently received the criminal record checks and has not had an opportunity to obtain certified copies of the records. The State, through the same prosecutors in the case, was actually present and a party to the most recent felony convictions of Teresia Shipley, Angela Swist and Jeffrey Hayes. Moreover, the State, through the same prosecutors in this case, was an actual party to written agreements regarding the recent guilty pleas of Swist, Shipley and Hayes. The defense will provide other records as soon as they are obtained if the State does not agree to stipulate that the prior convictions actually occurred.

8. With the foregoing principles in mind, the defense requests that the court rule that the following convictions are admissible to impeach pursuant to Rule 609.

Angela Swist

Conspiracy, a felony, September 19, 2007

Criminal Liability to Armed Robbery, a felony, September 19, 2007

Teresia Shipley

Conspiracy, a felony, May 1, 2007

Criminal Liability to Armed Robbery, a felony, May 1, 2007

Paul Birely

Receiving Stolen Property, a class A misdemeanor, April 7, 2005

Issuing Bad Checks, a class B misdemeanor, April 5, 2005

Kenyon Brown

Receiving Stolen Property, a class A misdemeanor, September 4, 2001 (NH)

Receiving A Stolen Motor Vehicle, level unknown as of yet, October 28, 2002 (MA)

Assault and Battery, level unknown as of yet, April 15, 2005 (MA)

Possession of a class C Drug with Intent to Sell, a felony, June 21, 2006

Ruth Shulz (Ruth Schulz)

Conspiracy To Possess/Distribute Cocaine, a felony, October 4, 1999

Rebecca Ayers

Fraud, level unknown as of yet, in federal district court, December 19, 2006

Jeffrey Hayes

Theft of lost or mislaid property, a class A misdemeanor, 3/17/1998

Robbery, a felony, February 15, 2008

Conspiracy To Commit Robbery, a felony, February 15, 2008

Non-Support, violations between 1/1/04-7/31/06, a felony, July 2, 2008

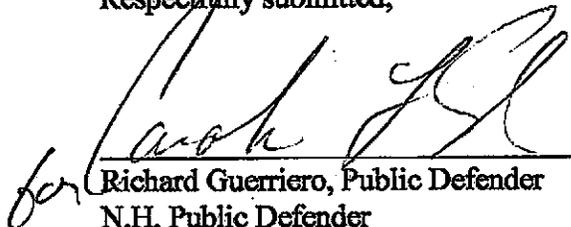
Jennifer Roman

Forgery, a felony, June 3, 2008

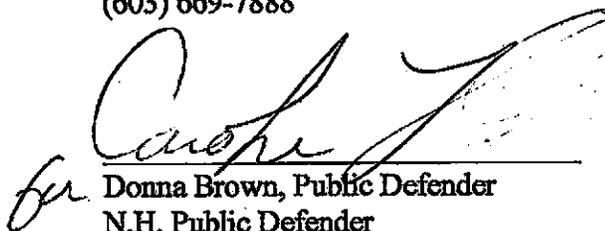
Forgery, a felony, June 3, 2008

WHEREFORE, Michael Addison respectfully requests that this Honorable Court allow the defense to impeach foregoing witnesses with their convictions as provided in Rule 609.

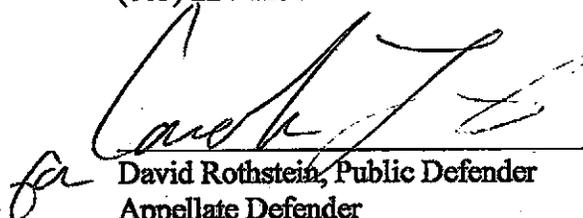
Respectfully submitted,

*for* 

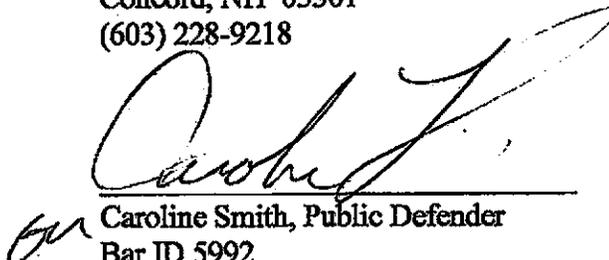
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Motion has been forwarded this 17<sup>th</sup> day of October, 2008, to the Office of the Attorney General.

  
Richard Guerriero, Public Defender

WILSBOROUGH COUNTY

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