

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 DONALD J. ROSATO : NO. 98-343-01

**MEMORANDUM AND ORDER**

HUTTON, J.

January 26, 1999

Presently before this Court are the Defendant's Motion in Limine to Preclude the Government's Use of Felony Convictions More Than 10 Years Old for Impeachment (Docket No. 13), the Government's response thereto (Docket No. 14) and the Defendant's reply thereto (Docket No. 15). For the foregoing reasons, the Defendant's Motion is **GRANTED**.

**I. BACKGROUND**

On July 30, 1998, the Government filed a "Notice of its Intention to Use a Prior Felony Conviction More Than 10-years Old for Impeachment if Defendant Testifies pursuant to Federal Rule of Evidence 609(b)" (the "Notice"). Almost twenty-four years ago, on March 21, 1975, Donald J. Rosato ("Defendant" or "Dr. Rosato") pleaded guilty to filing false statements for payments under the Social Security States in violation of 18 U.S.C. § 1001 and 42 U.S.C. § 1395nn. Dr. Rosato was sentenced to a 45-day period of

imprisonment, fined \$10,000 and ordered to serve three years on probation.

On December 24, 1998, the Defendant filed the instant motion seeking to preclude this evidence. On, December 30, 1998, the Government filed a Response to the Defendant's Motion. On January 8, 1999, the Defendant filed a Reply to the Government's Response.

## **II. DISCUSSION**

Federal Rule of Evidence 609 states in pertinent part:

(a) General rule. For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused 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 evidence that an accused 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 accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it 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.

Fed. R. Evid. 609(a). Here, it is not disputed that Dr. Rosato's conviction for filing false statements passes muster under subdivision 2 of Rule 609(a). See United States v. Eaddy, 1996 WL 153657, No. 95-0681-01, at \*1 (E.D. Pa. Apr. 1, 1996) ("crimes involving "dishonesty or false statement" include those for "perjury or subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully") (citing Gov't of the V.I. v. Toto, 529 F.2d 278, 282 (3d Cir. 1976)(emphasis added) (quoting The Report of the House and Senate Conferees regarding Rule 609(a))). The Defendant argues in the alternative, however, that the probative value does not substantially outweigh the prejudicial effect. In fact, the Defendant asserts that "the probative value of this stale conviction is so light that admitting it will serve no purpose other than to inflame and mislead the jury." (Def.'s Mem. at 2.)

Generally, "[i]f the prior conviction involved dishonesty or false statements, the conviction is automatically admissible insofar as the district court is without discretion to weigh the prejudicial effect of the proffered evidence against its probative value." Walden v. Georgia-Pacific Corp., 126 F.3d 506, 523 (3d Cir. 1997), cert. denied, 118 S. Ct. 1516 (1998) (citing Cree v.

Hatcher, 969 F.2d 34, 37 (3d Cir. 1992); United States v. Wong, 703 F.2d 65, 68 (3d Cir. 1983). Because the Defendant's conviction is more than ten years old, however, this case falls out of the automatically admissible category of Rule 609(a) and falls within the heightened standard of review required by Rule 609(b). See Eaddy, 1996 WL 153657, at \*2 n.5; Pepe v. Jayne, 761 F. Supp. 338, 342 (D.N.J. 1991).

Under Rule 609(b), convictions over ten years old are presumptively inadmissible as impeachment evidence. See United States v. Privett, 68 F.3d. 101, 105 (5th Cir. 1995). Whether the presumption against admission of such evidence has been overcome is a determination committed to the discretion of the district court. United States v. Reeves, 730 F.2d 1189, 1196 (8th Cir. 1984).

The Senate Report cautioned that because such evidence "generally [does] not have much probative value," it should be admitted infrequently:

It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact.

S.Rep. No. 93-1227 (1974), reprinted in 1974 U.S.C.C.A.NA 7051, 7062. Several circuit courts have echoed the sentiment of the Senate Judiciary Committee that "'convictions over ten years old

generally do not have much probative value'" and that they therefore should be "'admitted very rarely and only in exceptional circumstances.'" See, e.g., United States v. Bibbs, 564 F.2d 1165, 1170 (5th Cir 1977) ("Congress intended trial judges be extremely cautious in admitting evidence of remote convictions.") (citing S.Rep. No. 93-1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7062), cert. denied, 435 U.S. 1007 (1978); United States v. Cavender, 578 F. 2d 528, 530 (4th Cir. 1978) ("Senate Report on this subdivision made it crystalline that the District Court was only to depart from the prohibition against the use for impeachment purposes of convictions more than ten years old 'very rarely and only in exceptional circumstances.>"). This Court does not perceive, and the Government fails to cite, any exceptional circumstances in this case.

The Government argues that Dr. Rosato's conviction is admissible because its probative value substantially outweighs any prejudicial effect. (Gov't's Mem. at 3.) The Government contends that Dr. Rosato's conviction in 1975 of making false statements will "assist the jury in its assessment of the witnesses' testimony in the case and the credibility of the defendant." (Id.) If the Defendant is unable to secure an expert witness to testify that Defendant's conduct was lawful, the Government argues that the only testimony that could be offered by the Defendant that his conduct was lawful would be his own. Therefore, the Government concludes

that the credibility of the Defendant is a "critical issue." (Id. at 4.)

A defendant who testifies is invariably the centerpiece of any criminal defense, and the defendant's credibility is always at issue. In this case, involving Dr. Rosato's medical practices, his testimony will be particularly critical to his ability to mount a viable defense. Nonetheless, despite the importance of the Defendant's testimony and the centrality of his credibility, the probative value of his conviction can not overcome the presumption of inadmissibility. Dr. Rosato's prior conviction is nearly twenty-four years old. He is entitled to benefit from Rule 609(b)'s presumption that a person's character for truthfulness can improve over time. Accordingly, the Court finds that the Government fails to articulate sufficient facts and circumstances to demonstrate that the probative value of Dr. Rosato's conviction substantially outweighs its prejudicial effect.

An appropriate Order follows.

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O R D E R

AND NOW, this 26th day of January, 1999, upon consideration of the Defendant's Motion in Limine to Preclude the Government's Use of Felony Convictions More Than 10 Years Old for Impeachment (Docket No. 13), the Government's response thereto (Docket No. 14) and the Defendant's reply thereto (Docket No. 15), IT IS HEREBY ORDERED that the Defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED that the Government SHALL BE PRECLUDED from offering evidence of the Defendant's 1975 conviction of filing false statements for payments under the Social Security States in violation of 18 U.S.C. § 1001 and 42 U.S.C. § 1395nn.

BY THE COURT:

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HERBERT J. HUTTON, J.