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## Mississippi Criminal Procedure: Proposed Rules and Comments

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# MISSISSIPPI CRIMINAL PROCEDURE: PROPOSED RULES AND COMMENTS

## INTRODUCTION

*Professor Matthew Steffey*

These proposed Mississippi Rules of Criminal Procedure are the culmination of a process of study, drafting, and revision that took more than five years. At present, and unlike the vast majority of other jurisdictions, Mississippi rules are neither uniform nor comprehensive. Rules governing criminal cases vary from court to court and from district to district. Moreover, present rules—now contained as part of the Uniform Rules of Circuit and County Court Practice—typically address various topics on an ad-hoc or interstitial basis. And numerous areas presently covered by existing rules are in need of update or significant revision.

The project began at the direction of then Chief Justice James W. Smith, Jr., of the Mississippi Supreme Court, who created the Uniform Criminal Rules Study Committee and charged its members with drafting a body of court rules to govern criminal cases. The Committee consisted of twelve judges, prosecutors, and members of the criminal defense bar: Co-chair Judge R. I. Prichard, III, Circuit Court District 15; Co-chair Judge Larry E. Roberts, at first of Circuit Court District 10, then of the Mississippi Court of Appeals; Judge L. Joseph Lee, Mississippi Court of Appeals; Judge Kent McDaniel, Rankin County Court; Judge Michael W. McPhail, Forrest County Court; Claiborne “Buddy” McDonald, District Attorney, Circuit Court District 15, replaced on retirement as District Attorney by Ronnie Harper, District Attorney, Circuit Court District 6; John R. Young, District Attorney, Circuit Court District 1; Tom Fortner, Hinds County Public Defender, then later Jim Lappan, Mississippi Office of Capital Defense Counsel; Ed Snyder, Office of the Attorney General; Joe Sam Owen, Owen & Galloway PLLC; John Colette, Colette & Associates; and Thomas E. Royals, Royals & Mayfield. The Committee held its first meeting on September 24, 2004. I joined the Committee as reporter beginning in early 2005, to support the research and rule-drafting functions of the Committee by researching the law of other jurisdictions, comparing practice elsewhere with current Mississippi law, and drafting Rules and Comments. The Committee met monthly until the draft body of proposed Rules was submitted to the Mississippi Supreme Court in April 2010.

A comprehensive body of Comments followed. The Comments were submitted in stages. Comments to the first group of Rules were submitted in April 2011, and the rest followed in April 2012.

The goal was to develop a set of Rules of Criminal Procedure to govern practice and procedure in criminal cases and be uniform from district to district and from court to court, including Justice Court, Municipal Court,

County Court, and Circuit Court. In addition, the Rules strive to be comprehensive, and thereby govern criminal practice and procedure from arrest through post-trial motions in each of these courts. Moreover, the Committee perceived a pointed need to bring criminal practice in Mississippi courts into conformity with the practices of other jurisdictions. To this end, the Committee:

- Researched and examined the law governing criminal procedure in other jurisdictions (in particular, the Committee found the models contained in Alabama and Arizona, as well as the federal system, especially helpful);
- Reviewed and considered applicable statutes, decisions of the Mississippi Supreme Court and Mississippi Court of Appeals, and provisions of the Mississippi and United States Constitutions;
- Researched and compared present Mississippi practice with procedures employed elsewhere; and
- Drafted a modern, comprehensive body of Rules for Mississippi criminal practice.

In many instances, the Rules confirm existing law. But because a law reform project must embrace change, in other areas the proposed Rules differ significantly from current practice. For example:

- Rule 3.1(b) gives courts, in most cases, discretion to issue a summons in lieu of an arrest warrant.
- Rule 4.2(b) provides that supplemental statements in support of search warrants must be recorded or otherwise preserved.
- Rule 4.3 provides for warrants upon remote communication.
- Rule 5.1(b) allows an arresting officer, in cases of a warrantless arrest, to release an arrestee on written notice of appearance.
- Rule 7.4 establishes standards for appointed counsel in death penalty cases.
- Rule 8.2 establishes a bond schedule, and Rules 5.1(b) and (c) provide for bond in the minimum amount when a bond is not timely set.
- Rule 13.8 deems a prosecution abandoned in cases not presented to the grand jury in a timely manner.
- Rules 13.8 and 15.3 abolish common law terms.
- Rule 14.3 expands circumstances under which multiple offenses may be charged in a single indictment.
- Rules 15.3(d) and 26.7(b)(4) permit conditional guilty pleas.
- Rule 17.4 provides for depositions in limited circumstances.
- Rule 18.4 alters the process for selecting and designating alternate jurors.
- Rule 20 replaces directed verdict with judgment of acquittal.
- Rules 20(e) and 24.3 provides that certain motions are denied by operation of law.

- Rule 27.6(d) clarifies when counsel should be appointed in revocation proceedings.
- Rule 29.3 eliminates the need to post an appearance bond when incarceration is not imposed.
- Rule 33 provides a comprehensive process for contempt.

The work of the Committee was characterized by consensus, and by a desire on the part of all members of the Committee to improve the law. While, naturally, not all members agreed with the final version of all provisions (a result, by definition, not attainable in a group of twelve lawyers and judges representing differing constituencies) the Committee was united by a desire to improve the process for prosecutors, defense counsel, judges, victims, defendants, witnesses, and all others who are drawn into the criminal justice system.

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## RULE 1 - GENERAL PROVISIONS

Rule 1.1 - Scope.

These are the Mississippi Rules of Criminal Procedure and shall govern the procedure in all criminal proceedings in all courts within the State of Mississippi, except traffic violations in justice and municipal courts. They may be cited as “MRCrP \_\_\_\_.”

*Comment*

The Mississippi Rules of Criminal Procedure are designed to provide comprehensive and uniform practice and procedure for the conduct of criminal proceedings in all Mississippi courts, including justice and municipal courts, except as otherwise provided. They replace practice under formerly applicable provisions of the URCCC.

Rule 1.2 - Purpose and Construction.

These Rules are to be interpreted to provide for the just and speedy determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, to eliminate unjustifiable delay and expense, and to protect the fundamental rights of the individual while preserving the public welfare.

*Comment*

Rule 1.2 provides a general policy statement by which problems of construction may be resolved.

Rule 1.3 - Computation and Enlargement of Time.

**(a) Computation.** In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the courthouse or the clerk’s office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk’s office is in fact closed. In the event any legal holiday falls on a Sunday, the next following day shall be a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

**(b) Enlargement.** When by these Rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

(1) with or without motion or notice order the period enlarged if a request therefore is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period permit the act to be done where failure to act was the result of excusable neglect.

But a court may not, except as provided elsewhere in these Rules, extend the time for making a motion for a new trial, for taking an appeal, or for making a motion for a judgment of acquittal.

**(c) Unaffected by Expiration of Term.** The doing of any act or the taking of any proceeding permitted by these Rules is not affected or limited by the existence or expiration of a term of court.

**(d) Motions.** A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof must be served not later than 5 days before the time fixed for the hearing, unless a different period is fixed by these Rules or by order of the court. Such an order may, for cause shown, be made on *ex parte* application. Except as otherwise provided in these Rules or permitted by the court, opposing affidavits must be served not later than 1 day before the hearing.

**(e) Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper and the notice or paper is served by mail, 3 days shall be added to the prescribed period.

### *Comment*

Rule 1.3 is taken from MRCP 6. The purpose of Rule 1.3 is to provide reasonably flexible, general guidelines for the measurement of time periods under these Rules. Section (a) computes time by excluding weekends or legal holidays from being the last day of a time period, and excluding intermediate Saturdays, Sundays, and legal holidays from the computation when the total time period is less than 7 days. It is not uncommon for clerks' offices and courthouses to be closed occasionally during what are normal working periods, whether by local custom or for a special purpose, such as attendance at a funeral. Section (a) was drafted to obviate any

harsh result that may otherwise ensue when an attorney, faced with an important filing deadline, discovers that the courthouse or the clerk's office is unexpectedly closed.

Section (b) provides the court with wide discretion to enlarge various time periods both before and after the actual termination of the allotted time, with the notable exceptions of motions for new trial (Rule 24) or judgment of acquittal (Rule 20), or appeals (Rules 29 and 30). Importantly, such enlargement is to be made only for cause shown. If the application for additional time is made before the period expires, the request may be made *ex parte*; if it is made after the expiration of the period, notice of the motion must be given to other parties and the only cause for which extra time can be allowed is "excusable neglect."

Section (c) does not abolish court terms. Rather, section (c) merely provides greater flexibility to the courts in attending the myriad functions they must perform, many of which were previously possible only during term time. Section (c) is also consistent with other provisions in these Rules that prescribe a specific number of days for taking certain actions rather than linking time expirations to the opening day, or final day, or any other day of a term of court. *See Presley v. State*, 792 So.2d 950 (Miss. 2001) (recognizing time limits provided by Rules govern over conflicting limits tied to terms of court).

#### Rule 1.4 - Definitions.

Unless otherwise defined in a particular Rule, whenever they appear in these Rules, the terms below shall have the following meanings:

- (a) "Charge" means a complaint, indictment, or bill of information.
- (b) "Complaint" includes criminal affidavit.
- (c) "Indictment" includes a true bill from the grand jury or a bill of information in lieu thereof.
- (d) "Law Enforcement Officer" means a law enforcement officer certified pursuant to MISS. CODE ANN. § 45-6-11, or any other officer, employee or agent of the State of Mississippi or any political subdivision thereof who is required by law to:
  - (1) maintain public order;
  - (2) make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses; or
  - (3) investigate the commission or suspected commission of offenses.
- (e) "Offense" means conduct for which a sentence to a term of imprisonment, or the death penalty, or for which a fine is provided by any law of this State or by any law or ordinance of a political subdivision of this State.



(f) “Person” means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a similar legal entity, a government, or a governmental instrumentality.

(g) “Prosecuting Attorney” means any municipal or county attorney, district attorney, attorney general, and others acting under their specific direction and authority, or such other person appointed or charged by law with the responsibility for prosecuting an offense.

(h) “Sentencing Court” includes the court which imposed or imposes sentence and any court to which jurisdiction has been transferred.

(i) “Supervising officer” includes those acting under the specific direction and authority of a public or private supervisor or supervising agency.

#### *Comment*

Rule 1.4 defines certain terms used throughout these Rules. Terms are defined functionally whenever feasible.

#### Rule 1.5 - Information on Each Pleading and Motion.

All pleadings, motions, or other applications to the court shall bear the name, address, and office phone number of the attorney who will try the case and, if different from the attorney who will try the case, the name, address, and office phone number of the attorney who will be prepared to argue the pleading, motion or other application.

#### *Comment*

Rule 1.5 continues practice under formerly applicable provisions of URCCC 1.05.

#### Rule 1.6 - Size of Paper.

All pleadings and other papers filed in any proceeding governed by these Rules shall be on paper measuring 8 ½ inches x 11 inches. Notwithstanding the foregoing, exhibits or attachments to pleadings may be folded and fastened to pages of the specified size. An exhibit or attachment not in compliance with the foregoing provisions may be filed only if it appears that compliance is not reasonably practicable.

#### *Comment*

Rule 1.6 tracks Ariz. R. Crim. P. 1.5.

Rule 1.7 - Service of Copies and Certificate of Service.

Unless otherwise ordered by the court, all pleadings, motions, or applications to the court, except the initial pleading or indictment, must be served by any form of service authorized by Rule 5 of the Mississippi Rules of Civil Procedure on all attorneys of record for the parties, or on the parties when not represented by an attorney, and the person filing the same shall also file an original certificate of service certifying that a correct copy has been provided to the attorneys or to the parties, the manner of service, and to whom it was served. Except as allowed by this Rule or allowed by the court for good cause shown, the clerk may not accept for filing any document which is not accompanied by a certificate of service.

*Comment*

Rule 1.7 carries forward formerly applicable provisions of URCCC 2.06.

Rule 1.8 - Interactive Audiovisual Devices.

**(a) General Provisions.** When the appearance of a defendant or counsel is required in any court, subject to the provisions of this Rule, the appearance may be made by the use of an interactive audiovisual device, including video conferencing equipment. An interactive audiovisual device shall at a minimum operate so as to enable the court and all parties to view and converse with each other simultaneously.

**(b) Requirements.** In using an interactive audiovisual device the following are required:

- (1) a full record of the proceedings shall be made as provided in applicable statutes and rules;
- (2) the court shall determine that the defendant knowingly, intelligently, and voluntarily agrees to appear at the proceeding by an interactive audiovisual device; and
- (3) provisions shall be made to allow for confidential communications between the defendant and counsel before and during the proceeding.

**(c) Proceedings.** Appearance by interactive audiovisual device, including video conferencing, may be permitted in the discretion of the court at any proceeding except that:

- (1) written stipulation of the parties is required in all proceedings before the commencement of the proceeding, except in initial appearance and not guilty arraignment;
- (2) this Rule 1.8 shall not apply to any trial, evidentiary hearing, or probation violation hearing; and

(3) this Rule 1.8 shall not apply to any felony sentencing.

*Comment*

Rule 1.8 is adapted from Ariz. R. Crim. P. 1.6. Section (a) requires that, at a minimum, video conferencing or other interactive audiovisual devices allow the court and all parties to view and converse with each other simultaneously. Section (b) provides that a full record must be made as required by statute or rule, and protects a defendant's right to consult in confidence with counsel. Section (b) also preserves a defendant's right to be present personally under Rule 10.1(a), by providing that a defendant must consent to appear by interactive audiovisual device. While section (c) generally puts the use of such technology in the discretion of the court, Rule 1.8 is inapplicable to trials, evidentiary hearings, probation violation hearings, and felony sentencing.

Rule 1.9 - Local Court Rules.

**(a) When Permissible.** Any court by action of a majority of the judges thereof may hereafter make local rules and amendments thereto concerning practice in their respective courts not inconsistent with these Rules. In the event there is no majority, the senior judge shall have an additional vote.

**(b) Procedure for Approval.** All such local rules adopted before being effective must be submitted to the Supreme Court of Mississippi for approval. Upon receipt of such proposed rules and before any approval of the same, the Supreme Court may submit them to the Supreme Court Advisory Committee on Rules for advice as to whether any such rules are consistent or in conflict with these Rules or any other rules adopted by the Supreme Court.

**(c) Publication.** All local rules hereinafter approved by the Supreme Court shall be submitted for publication on the court's website and in the Southern Reporter (Mississippi cases).

*Comment*

Rule 1.9 tracks MRCP 83. Rule 1.9 guarantees the right of trial judges to prescribe local rules of court, not inconsistent with the Mississippi Rules of Criminal Procedure. All local rules must be filed with the Supreme Court of Mississippi. No local rules are effective until approved by the Supreme Court.

## RULE 2 - COMMENCEMENT OF CRIMINAL PROCEEDINGS

Rule 2.1 - Commencement of Criminal Proceedings.

**(a) Commencement.** All criminal proceedings shall be commenced either by complaint or by indictment.

**(b) Complaint.** A complaint is a written statement made upon oath before a judge, clerk of the court, or other officer authorized by law to administer oaths, setting forth essential underlying facts and circumstances constituting an offense and alleging that the defendant committed the offense.

*Comment*

Under Rule 2.1(a), the procedure for commencing a criminal proceeding is either by complaint or by indictment. By definition, "complaint" includes "affidavit," and "indictment" includes "information in lieu thereof." See Rules 1.4(b) and (c). This is in accord with Article 2, Section 27, of the Mississippi Constitution of 1890, and consistent with MISS. CODE ANN. § 99-1-7. While the usual procedure for commencing a criminal action is by complaint, the grand jury also may act on matters presented to it without there being a complaint, and thus the initial charging instrument commencing the action is the indictment.

Rule 2.2 - Duty of Judge upon Making of a Complaint.

**(a) Probable Cause Determination.** If it appears from the complaint and the evidence, if any, submitted that there is probable cause to believe that the offense complained of has been committed and that there is probable cause to believe that the defendant committed it, the judge shall proceed under Rule 3.1. Before ruling on a request for a warrant, the judge may examine under oath the complainant and any witnesses the complainant may produce.

**(b) Evidence.** The finding of probable cause must be based upon evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

*Comment*

Rule 2.2(a) requires the judge to determine from the complaint and any evidence submitted therewith whether there is probable cause to believe that an offense has been committed and whether there is probable cause to believe that the defendant committed it. Rule 2.2(b) allows the probable cause determination to be made in whole or in part based on

credible hearsay, and allows the judge to examine under oath the complainant and any witnesses the complainant may produce.

The purposes served by Rule 2.2 are in accord with Mississippi law and the mandates of the Fourth Amendment to the United States Constitution. As the United States Supreme Court stated in *Giordenello v. U.S.*, 357 U.S. 480, 486 (1958):

The purpose of the complaint, then, is to enable the [judge] . . . to determine whether the ‘probable cause’ required to support a warrant exists. The [judge] must judge for himself the persuasiveness of the facts relied on by a complaint[ant] to show probable cause. [The judge] should not accept without question the complainant’s mere conclusion that the person whose arrest is sought has committed a crime.

These Rules, including Rule 2.2, do not disturb the special procedures established by MISS. CODE ANN. § 99-3-28, regarding “Warrants against teachers, jail officers or counselors at adolescent offender programs,” which provides in part:

[B]efore an arrest warrant shall be issued against any teacher who is a licensed public school employee as defined in Section 37-9-1, a certified jail officer as defined in Section 45-4-9, a counselor at an adolescent offender program created under Section 43-27-201 et seq., or a sworn law enforcement officer within this state as defined in Section 45-6-3 for a criminal act, whether misdemeanor or felony, which is alleged to have occurred while the teacher, jail officer, counselor at an adolescent offender program or law enforcement officer was in the performance of official duties, a probable cause hearing shall be held before a circuit court judge. The purpose of the hearing shall be to determine if adequate probable cause exists for the issuance of a warrant. All parties testifying in these proceedings shall do so under oath. The accused shall have the right to enter an appearance at the hearing, represented by legal counsel at his own expense, to hear the accusations and evidence against him; he may present evidence or testify in his own behalf.

RULE 3 - ARREST WARRANT OR SUMMONS UPON COMMENCEMENT OF  
CRIMINAL PROCEEDINGS

Rule 3.1 - Issuance of Arrest Warrant or Summons.

**(a) Issuance.** Upon a finding of probable cause made pursuant to Rule 2.2, or upon a finding that such a determination has previously been made, the judge shall immediately cause to be issued a summons or an arrest warrant. More than one summons or warrant may issue on the same complaint.

**(b) Summons; Subsequent Issuance of Arrest Warrant**

*(1) Summons.* If the defendant is not in custody, if the offense charged is bailable as a matter of right, and if there is no reason to believe that the defendant will not respond to the summons, a summons may be issued, at the sole discretion of the issuing judge.

*(2) Subsequent Issuance of Arrest Warrant.* If a defendant who has been duly summoned fails to appear, or if after issuance of a summons there is reasonable cause to believe that the defendant will fail to appear, or if for any reason the summons cannot be served or delivered, an arrest warrant shall issue.

**(c) Docketing Case.** A case shall be docketed upon service of a summons or upon the defendant's arrest.

**(d) Traffic Citations Unaffected.** The use of tickets, citations, or affidavits for traffic violations shall be as otherwise provided by law.

*Comment*

Rule 3.1(a) provides that, upon a finding of probable cause pursuant to Rule 2.2, the judge shall cause to be issued a summons or an arrest warrant. Rule 3.1(a) also contemplates that a summons or warrant shall issue upon a finding that a probable cause determination has previously been made, for example by a competent court of another jurisdiction. *See* MISS. CODE ANN. § 99-21-1 ("Any conservator of the peace, upon complaint on oath made before him, or on other satisfactory evidence, that any person within this state has committed treason, felony, or other crime in some other state or territory, and has fled from justice may issue a warrant for the arrest of such person as if the offense had been committed in this state.") Rule 3.1(a) further recognizes that it is within the power of the court to issue more than one summons or arrest warrant in a particular case, as needed, based upon a single complaint.

Rule 3.1(b) gives the judge discretion to cause a summons to be issued if three criteria are met: if the defendant is not in custody; if the offense is

bailable as a matter of right; and if there is no reason to believe the defendant will not respond to a summons. Hence the judge is permitted to cause a summons to be issued in those cases in which an arrest warrant is not necessary to secure the presence of the defendant and there is little apprehension that the defendant will flee. Rule 3.1(b) makes no distinction between felony and misdemeanor cases.

There are many reasons to use a summons in lieu of an arrest warrant in appropriate cases. The use of a summons reduces the burden that the criminal justice system places on those accused of crime. Moreover, while in custody, a defendant represents a heavy financial burden on the judicial system. All indications from other jurisdictions and the federal system are that the use of a summons in lieu of an arrest warrant has been operationally successful, and its use is recommended where indicated. The approach taken here is consistent with the release standards favoring recognizance bonds set out in Rule 8.

While there is no specific sanction imposed against one who fails to respond to a summons, Rule 3.1(b)(2) makes it clear that should the defendant fail to respond, or if there later arises a reasonable likelihood that the defendant will not respond, or if the summons cannot be served, an arrest warrant shall issue.

Rule 3.1(c) facilitates the tracking and management of cases by providing that a case shall be docketed upon the service of a summons or upon the defendant's arrest on the basis of the warrant.

Rule 3.1(d) provides that these rules do not affect the use of tickets, citations, or affidavits for traffic violations. Traffic violations are governed by statute, including the Uniform Traffic Ticket Law, MISS. CODE ANN. § 63-9-21, and not, for example, by Rules 3.1 and 3.2 herein.

### Rule 3.2 - Contents of Arrest Warrant or Summons; Execution, Return; Arrest without a Warrant.

**(a) Arrest Warrant.** An arrest warrant issued upon a complaint must be signed by the issuing judge. The arrest warrant must contain the complete name of the defendant, or if the name is unknown, any name or description by which the defendant can be identified with reasonable certainty; it must contain the location of the defendant, if known; it must state the offense with which the defendant is charged; and it must command that the defendant be arrested and brought before the issuing judge, or, if the issuing judge is unavailable, before the nearest or most accessible judge having jurisdiction. If the defendant is bailable as a matter of right, the arrest warrant may state the conditions of the defendant's release on recognizance or an amount of an appearance bond or a secured appearance bond predetermined by the court.

**(b) Summons.** The summons must be in the same form as the arrest warrant, except that it must summon the defendant to appear at a stated time and place within a reasonable time from the date of issuance. At the discretion of the issuing judge, the summons may command the defendant to report to a designated place to be photographed and fingerprinted before appearance in response to the summons. Failure to so report for photographing or fingerprinting shall result in the issuance of a warrant for the defendant's arrest unless good cause for such failure is shown. If, upon the defendant's appearance, the defendant has not been photographed and fingerprinted, the issuing judge shall direct that the defendant be promptly photographed and fingerprinted.

**(c) Execution of Arrest Warrant, Return.**

(1) *By Whom.* The arrest warrant shall be directed to and may be executed by any officer authorized by law within the State of Mississippi.

(2) *Manner of Execution.* An arrest warrant shall be executed by arrest of the defendant.

(3) *Return.* The officer executing an arrest warrant must endorse thereon the manner and date of execution, must subscribe the officer's name, and must promptly return the arrest warrant to the clerk of the court specified in the arrest warrant.

**(d) Service of Summons.** The summons may be served by any officer authorized by law in the same manner as a summons in a civil action, except that service may not be by publication. In addition, at the officer's discretion, a summons may be served by certified mail, requiring a signed receipt or some equivalent thereof. In the event the summons is served by certified mail, return of the receipt signed by the defendant shall be prima facie evidence of service. The officer serving the summons must make return of the summons in the same manner as provided in Rule 3.2(c)(3) for making return of an arrest warrant.

**(e) Defective Arrest Warrant.** An arrest warrant shall not be invalidated nor shall any person in custody thereon be discharged because of a defect in form. The arrest warrant may be amended by the court to remedy such defect.

**(f) Cancellation.** At the request of the prosecuting attorney, any unexecuted warrant must be returned to the judge by whom it was issued who shall cancel it if the judge finds the interests of justice would be served.

**(g) Reissuance.** At the request of the prosecuting attorney made at any time while the complaint is pending, a warrant



returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the judge to any authorized person for execution or service. **(h) Arrest without a Warrant.** A law enforcement officer or private person may arrest a person without a warrant as provided by law. In all cases of arrests without a warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when the accused is in the actual commission of the offense, or is arrested on pursuit. A private person making an arrest shall deliver the person arrested without unnecessary delay to a judge or law enforcement officer. If the person arrested is taken to a law enforcement officer, the officer shall proceed as provided in Rule 5.1.

### *Comment*

Rule 3.2(a) provides that an arrest warrant based on a complaint must be signed by the issuing judge, on a finding of probable cause; must contain the complete name of the defendant or some description by which the defendant can be identified with reasonable certainty; must state the offense with which the defendant is charged; and must command the defendant be arrested and brought before the issuing judge, if available, or otherwise before the nearest or most accessible judge having jurisdiction. The name and description are matters of form, which may be amended as provided in Rule 3.2(e).

Where circumstances dictate issuance of an arrest warrant rather than a summons, yet there is reason for use of recognizance release, Rule 3.2(a) gives the issuing judge the flexibility of allowing a personal recognizance release on certain conditions as contemplated in Rule 8. The release of an arrested defendant on recognizance would not preclude the defendant's having to appear at the initial hearing, but might preclude the defendant's spending the night in jail unnecessarily. Alternatively, the issuing judge has discretion to set an appearance bond or secured appearance bond in the warrant, if the defendant is bailable as a matter of right.

Rule 3.2(b) specifies that the defendant shall be required to report at a specified time and place within a reasonable time from the issuance of the summons. The issuing judge has discretion to order that the defendant be fingerprinted and photographed prior to appearance; if the summons does direct the defendant to so appear, the rule makes clear that failure to comply will result in the issuance of a warrant for the defendant's arrest, unless "good cause" is shown. Otherwise, the judge shall direct that the defendant be promptly photographed and fingerprinted on the defendant's appearance.

Rule 3.2(c)(1) states that an arrest warrant be directed to and executed by “any officer authorized by law within the State of Mississippi.” Presently, Mississippi Law authorizes a broad range of officers to make arrests. *See* MISS. CODE ANN. § 99-3-1(1) (“Arrests for crimes and offenses may be made by the sheriff or his deputy or by any constable or conservator of the peace within his county, or by any marshal or policeman of a city, town or village within the same, or by any United States Marshal or Deputy United States Marshal, or, when in cooperation with local law enforcement officers, by any other federal law enforcement officer who is employed by the United States government, authorized to effect an arrest for a violation of the United States Code, and authorized to carry a firearm in the performance of his duties.”); § 99-3-2 (federal law enforcement officers’ authority to make arrests). Rule 3.2(c)(2) provides that an arrest warrant is executed by arrest of the defendant and Rule 3.2(c)(3) requires that an executed arrest warrant be endorsed, subscribed, and returned *promptly* to the specified clerk of court.

Rule 3.2(d) is designed to make service of the summons as easy and expeditious as possible. The function of the summons is solely to apprise the defendant of the charges and to notify the defendant to appear; accordingly, the rule provides that service may be made in the same manner as in a civil action, except that service by publication is prohibited. The person serving the summons should be guided by considerations of convenience and economy, as well as the likelihood that the defendant will personally receive the notification.

Under Rule 3.2(e), a mere defect in form will not invalidate an arrest warrant. Normally, aliases, fictitious names, and descriptions are matters of form and may be amended if shown to be incorrect.

Rule 3.2(f) provides that an unexecuted warrant shall be returned to and cancelled by the issuing judge at the request of the prosecuting attorney. Similarly, Rule 3.2(g) provides that at the request of the prosecuting attorney made while the complaint is pending, a warrant returned unexecuted and not cancelled, or a summons returned unserved, (or a duplicate of either), may be delivered by the judge for execution or service.

Rule 3.2(h) states that a law enforcement officer or private person may make warrantless arrests as provided by law. MISS. CODE ANN. § 99-3-7(1) provides that:

An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested.

Warrantless arrests are also authorized by Miss. Code. Ann. § 99-3-7(2) (“Any law enforcement officer may arrest any person on a misdemeanor charge without having a warrant in his possession when a warrant is in fact outstanding for that person’s arrest and the officer has knowledge through official channels that the warrant is outstanding for that person’s arrest.”); MISS. CODE ANN. § 99-3-7(3) (warrantless arrests by law enforcement officers for acts of domestic violence and related matters); MISS. CODE ANN. § 99-3-7(2)(a) and (4)(a) (“Any person authorized by a court of law to supervise or monitor a convicted offender who is under an intensive supervision program may arrest the offender when the offender is in violation of the terms or conditions of the intensive supervision program, without having a warrant” on the conditions required therein.); MISS. CODE ANN. § 99-3-15 (warrantless arrest of escaped offender).

In all cases of arrests without a warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when the accused is in the actual commission of the offense or is arrested on pursuit. Because Mississippi law authorizes private persons to make warrantless arrests, it is important to note that Rule 3.2(h) requires a private person making an arrest to deliver the person arrested *directly* to a judge or law enforcement officer; if the person arrested is taken to a law enforcement officer, the officer shall proceed as provided in Rule 5.1.

## RULE 4 - SEARCH WARRANTS

### Rule 4.1 - Issuance of Search Warrants.

**(a) Definition of Search Warrant.** A search warrant is a written order, in the name of the State, county, or municipality, signed by a judge authorized by law to issue search warrants, directed to any law enforcement officer as defined by Rule 1.4(d), commanding the officer to search for and seize a person or property. “Property” includes documents, books, papers, any other tangible objects, and information.

**(b) Persons or Property Subject to Search and Seizure.** A search warrant authorized by this Rule may be issued for any of the following:

- (1) evidence of a crime;
- (2) contraband, fruits of crime, or other things criminally possessed;
- (3) property designed for use, intended for use, or which is being or has been used in committing a crime; and
- (4) a person to be arrested, or who is unlawfully restrained.

*Comment*

Rule 4.1 is based on Ala. R. Crim. P. 3.6 and Fed. R. Crim. P. 41(c). Generally, Rule 4 protects the rights guaranteed by Art. III, § 23, of the Mississippi Constitution (“The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.”). Rule 4.1 applies to judges “authorized by law,” and therefore does not enlarge, restrict, or affect in any way the authority of a judge to issue a search warrant. Rule 4 is broad enough to embrace the issuance of anticipatory search warrants; a warrant to search for property that is not within the jurisdiction when the warrant is issued, but that is expected to be within the jurisdiction when the search is conducted, is valid if it otherwise complies with Rule 4. *See U.S. v. Grubbs*, 547 U.S. 90 (2006).

Section (b) describes the property or persons that may be seized with a lawfully issued search warrant. Issuance of a search warrant to search for items of solely evidential value is authorized. *See Warden v. Haden*, 387 U.S. 294 (1967). Section (b)(4) permits issuance of a warrant to search for a person under two circumstances: when there is probable cause to arrest that person; or when that person is being unlawfully restrained. There may be instances in which a search warrant would be required to conduct a search in either of these circumstances. Even when a search warrant would not be required to enter a place to search for a person, a procedure for obtaining a warrant should be available so that law enforcement officers will be encouraged to resort to the preferred alternative of acquiring “an objective predetermination of probable cause” *Katz v. United States*, 389 U.S. 347 (1967), in this instance, that the person sought is at the place to be searched. *See also* ALI Model Code of Pre-Arrest Procedure § 210.3(1)(d) (Proposed Official Draft, 1975).

Rule 4.2 - Warrant on Affidavit.

**(a) In General.** A warrant other than under Rule 4.3 shall issue on sworn affidavit presented to the issuing judge authorized by law to issue search warrants, establishing grounds for issuing the warrant.

**(b) Examination.** Before ruling on a request for a warrant, the judge may further examine, under oath, the affiant and any witnesses the affiant may produce. Such additional sworn examination shall be recorded by a court reporter, by recording equipment, or preserved by other means, and shall be considered part of the affidavit for purposes of those proceedings; provided, however, that in reproducing any additional sworn testimony, the confidentiality of confidential informants shall be preserved.

**(c) Issuance.** If the judge is satisfied that probable cause to believe that grounds for the application exist, the judge shall issue a warrant naming or describing the person or property to be seized, and naming or describing the person or place to be searched.

### *Comment*

Rule 4.2 is adapted from Ala. R. Crim. P. 3.9(a) and N. D. R. Crim. P. 41(c). Section (a) generally requires that a sworn affidavit be presented to the judge, establishing grounds for issuing the warrant.

The provision in section (b) for examination of the affiant before the judge is intended to assure the judge an opportunity to make a careful decision as to whether there is probable cause based on legally obtained evidence. The requirement that the testimony be recorded verbatim (by court reporter, recording equipment, or other means) is to ensure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if a motion to suppress is later filed. If only a small amount of additional testimony is required, or if no court reporter or recording equipment is available, the additional examination can be typed or written in longhand. Section (c) provides that the confidentiality of informants is not to be jeopardized by the method of reproducing additional examination. For example, the judge could decide to examine the confidential informant under oath before issuing the warrant and preserve the examination by recording it. If any part of that examination is made available in a subsequent proceeding, it should be made in such a manner that the identity of the informer is not revealed. If the defendant might recognize the informant's voice on the recording, a transcript could be used instead.

Under section (c), probable cause for the issuance of a search warrant should be assessed under the totality-of-circumstances test. *See Illinois v. Gates*, 462 U.S. 213 (1983); *Flake v. State*, 948 So.2d 493 (Miss. Ct. App. 2007).

### Rule 4.3 - Warrant Upon Remote Communication.

**(a) General Rule.** When reasonable under the circumstances, a judge may issue a warrant based upon sworn testimony communicated by telephone or other reliable electronic means. The finding of probable cause for a warrant upon such testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

**(b) Recording and Certification of Testimony.**

(1) *Oath.* When a telephone caller informs the judge that the purpose of the telephone call is to request a warrant, the judge shall immediately place under oath

each person whose testimony forms a basis of the application and each person applying for the warrant.

*(2) Preparation of the Record.*

(A) If a voice-recording device is available, the judge must record by means of such device all of the call after the caller informs the judge that the purpose of the call is to request a warrant.

(B) Otherwise, an accurate and complete record must be made by other means.

(C) If a voice-recording device is used or a stenographic record made, the judge must have the record transcribed, must certify the accuracy of the transcription, and must file a copy of the original record and the transcription with the court.

(D) If a record is made by other means, the judge must file a signed copy with the court.

**(c) Application.** The person who is requesting the warrant shall prepare a document to be known as a duplicate original warrant and must read or otherwise transmit the contents of such duplicate original warrant verbatim to the issuing judge. If the applicant reads the contents of the proposed duplicate original warrant, the judge must enter what is so read on a document to be known as the original warrant. If the applicant transmits the contents by reliable electronic means, the transmission may serve as the original warrant.

**(d) Modification.** The issuing judge may modify the original warrant. The judge must transmit any modified warrant to the applicant by reliable electronic means or direct the applicant to modify the proposed duplicate original warrant accordingly.

**(e) Issuance.** If the judge is satisfied that there is probable cause to believe that the grounds for the application exist, the judge shall order the issuance of a warrant and immediately sign the original warrant, enter on its face the exact date and time it is issued, and transmit it by reliable electronic means to the applicant or direct the person requesting the warrant to sign the judge's name on the duplicate original warrant.

**(f) Contents.** The contents of a warrant upon remote communication shall be the same as the contents of a warrant upon affidavit.

**(g) Additional Rule for Execution.** The person who executes the warrant must enter the exact time of execution on the face of the duplicate original warrant.

**(h) Motion to Suppress Precluded.** Absent a finding of bad faith, evidence obtained pursuant to a warrant issued under this Rule 4.3 is not subject to a motion to suppress on the ground that the circumstances were not such as to make it reasonable to dispense with a written affidavit.

### *Comment*

Rule 4.3 is based on N. D. R. Crim. P. 41(c)(2). Rule 4.3 authorizes the issuance of a search warrant on remote communication, similar to practice under Fed. R. Crim. P. 4.1. *See also* ABA, Criminal Justice Section, *Guidelines for the Issuance of Search Warrants* § 73–76 (1990). The Rule establishes a procedure for the issuance of a search warrant when it is not reasonably practical for the person obtaining the warrant to present a written affidavit to a judge under Rule 4.2. Rule 4.3 recognizes that modern technology has improved access to judicial officers, thereby reducing the necessity of government action without prior judicial approval. Moreover, Rule 4.3 will minimize the need of law enforcement officers to engage in other practices which may threaten to a greater extent those values protected by the warrant requirement, for example having an officer in the field relay information by radio or telephone to another officer who has more ready access to a judge and who would act as the affiant.

Under Rule 4.3, a warrant may therefore be issued on the basis of a sworn statement of a person not in the physical presence of a judge. Telephone, facsimile, radio, email, and other electronic methods of transmission and communication are contemplated by section (a). As a threshold matter, the judge must determine that the circumstances of time and place make it reasonable to issue a warrant on such a basis. This requirement recognizes the inherent limitations of this procedure, including the lack of demeanor evidence (when oral testimony is involved) and the lack of a written record for the judge to consider before issuing the warrant. Circumstances making it reasonable to dispense with a written affidavit exist if delay might result in the destruction or disappearance of the property; or because of the time when the warrant is sought, or the distance between the judge and the person seeking the warrant, or both.

This is a change in Mississippi practice. *See White v. State*, 842 So.2d 565 (Miss. 2003). *But see* MISS. CODE ANN. § 41-29-513 (wiretaps) (not affected by Rule 4.3). Section (b)(1) requires that the judge immediately place an applicant under oath over the telephone, and permits the judge to examine the applicant. Section (b)(2) proscribes procedures to ensure an accurate record. Under section (c), when electronic means are used to issue a warrant, the judge retains the original warrant.

Rule 4.4 - Contents of Search Warrants; Time of Execution; Incidental Authority.

**(a) Contents of Search Warrant.** The search warrant shall be directed to and served by a law enforcement officer. It shall command such officer (or such officer's designees) to search, within a specified time not to exceed 10 days, the person or place named for the person or property specified and to bring an inventory thereof before the court. The warrant shall designate the court to which the warrant and an inventory of the property seized shall be returned. The judge shall endorse the warrant, showing the hour, date, and the name of the law enforcement officer to whom the warrant was delivered for execution. A copy of such warrant and the endorsement thereon shall be admissible in evidence in the courts.

**(b) Time of Execution.** A search warrant must be executed in the daytime unless the issuing judge states in the warrant, according to the character of the application, that it may be executed any time of the day or night.

**(c) Authority to Break and Enter.** To execute the warrant, the law enforcement officer may break into any house, dwelling, vehicle, or structure, or any part thereof, or anything therein, if:

- (1) after notice of the officer's authority and purpose, the officer receives no response within a reasonable time;
- (2) after notice of the officer's authority and purpose, the officer is refused admittance; or
- (3) the particular circumstances and the objective articulable facts are such that a reasonable officer would believe that giving notice of the officer's authority and purpose before entering would endanger the safety of any person or result in the destruction of evidence.

**(d) Incidental Seizure of other Property.** A law enforcement officer executing a search warrant may seize any property discovered in the course of the execution of the warrant if the officer has reasonable cause to believe that the item is subject to seizure under subsection 4.1(b) of this Rule, even if the property is not enumerated in the warrant.

**(e) Photographs, etc.** A law enforcement officer executing a search warrant may make or cause to be made photographs, measurements, impressions or scientific tests.

**(f) Incidental Search of a Person.** A law enforcement officer executing a search warrant directing a search of any



premises or vehicle may search any person present on the premises or in the vehicle if either of the following applies:

- (1) it is reasonably necessary to protect the officer or others from the use of any weapon that may be concealed upon the person; or
- (2) it reasonably appears that property or items enumerated in the search warrant may be concealed upon the person.

### *Comment*

Rule 4.4 is based on Ala. R. Crim. P. 3.10 and 3.12, and N. D. R. Crim. P. 41. Section (a) prescribes generally the contents of a warrant. A warrant must be directed to and served by a law enforcement officer (defined by Rule 1.4(d)), and is returnable to court. A warrant is valid for a specified time not to exceed 10 days. *See Taylor v. State*, 102 So. 267 (Miss. 1924). Section (b) provides that the warrant must be executed in the daytime, unless the judge states otherwise in the warrant. Section (c) grants authority to break and enter to execute a warrant, either when the officer is not admitted after announcing the officer's authority and purpose, or when the circumstances indicate that such an announcement risks injury or destruction of evidence. Section (d) authorizes the incidental seizure of property not enumerated in the warrant under limited circumstances. Section (e) allows the officer executing the warrant to make photographs and the like. Section (f) allows incidental seizure of a person who may be concealing evidence or a weapon.

### Rule 4.5 - Execution and Return with Inventory; Custody of Property; Return of Papers to Court.

**(a) Receipt and Inventory.** The law enforcement officer taking property or items under the search warrant shall give to the person from whom or from whose premises the property was taken, or shall leave at the place from which the property was taken, a copy of the search warrant endorsed with a copy of an inventory of the property taken. The inventory shall be made in the presence of the person from whose possession or premises the property was taken, if that person is present, and shall be verified by the law enforcement officer executing the search warrant.

**(b) Return of Papers to Court.** The law enforcement officer executing the search warrant must promptly return the search warrant, along with any inventory of property seized, to the court specified in the search warrant, who must forward the documents to the appropriate clerk for retention.

Unexecuted search warrants must be returned to and may be destroyed by the court.

**(c) Custody of Property.** All property or things taken pursuant to a warrant shall be retained in the custody of the seizing officer or agency, subject to the order of the court in which the warrant was issued, or any other court in which such property or things is sought to be used as evidence.

#### *Comment*

Rule 4.5 is based on Ala. R. Crim. P. 3.11 and 3.14, N. D. R. Crim. P. 41, and Fed. R. Crim. P. 41(f)(1). Section (a) is intended to make clear that a copy of the warrant and an inventory receipt for property taken must be left at the premises at the time of the search or with the person, if present, from whose premises the property is taken. Section (b) requires prompt return of the executed warrant and inventory. *See Brown v. State*, 534 So.2d 1019 (Miss. 1988) (describing return as ministerial act and noting improper return does not invalidate search). Under section (b), unexecuted search warrants should be sealed for confidentiality.

#### Rule 4.6 - Unlawfully Seized Property; Disposition of Seized Property.

**(a) Motion for Return of Unlawfully Seized Property.** A person aggrieved by an unlawful search and seizure may move the court for the return of the property seized on the ground that the person is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted, the property shall be restored. If a motion for return of property is made or comes on for hearing after an indictment or information is filed, it may be treated also as a motion to suppress evidence.

**(b) Motion to Suppress.** A motion to suppress may be made after indictment. However, any evidence that is seized pursuant to a search warrant shall not be suppressed as a result of a violation of these Rules except as required by the United States Constitution or the Constitution of the State of Mississippi.

**(c) Disposition of Seized Property.**

*(1) Generally.* When property is seized pursuant to a search warrant, it shall be retained under the direction of the judge. If seized property is not to be used as evidence, or is no longer needed as evidence, it shall be disposed of as follows.

*(2) Property Governed by Statute.* If there is a specific statute concerning disposition of the seized property,

disposal of the property shall be in accordance therewith.

(3) *Procedure in Absence of Statutory Provisions.* If there is no specific statute concerning disposition of the seized property, the seized property shall be returned to the owner, unless:

(A) a statute declares the property to be contraband, in which event the court shall order the property destroyed, if the court determines that destruction is in the public interest; otherwise

(B) if the court does not order destruction of contraband property, or if the owner of non-contraband property does not claim it within 6 months after it is no longer needed as evidence, the court shall order:

(i) sale of the property at a public sale or auction, if the court concludes that such will probably result in a bid greater than the costs of the sale. The proceeds of the sale shall be administered by the court; or

(ii) if the court concludes that the cost of a public sale would probably exceed the highest bid, the court may order the property transferred to a public or a nonprofit institution or destroyed, or may otherwise order such disposition as it deems appropriate.

(4) *Motions; Ex Parte Orders.* The court may, on its own motion or the motion of any interested person, render an *ex parte* order for the disposition of property as herein provided. Otherwise, the court, in its discretion, may require a motion from the apparent owner or the person in possession of the property at the time of the seizure.

(5) *Destruction of Controlled Substances.* Unless otherwise provided by law, an official laboratory may destroy any controlled substance, controlled substance paraphernalia, or both, in its possession without an order of court after a period of 5 years from the date of seizure. Any laboratory intending to destroy a controlled substance, controlled substance paraphernalia, or both, pursuant to this subsection shall give the seizing agency and the district attorney 30 days written notice filed with the clerk before such destruction. If the seizing agency or the district attorney objects to such destruction, no destruction shall occur.

*Comment*

Rule 4.6 governs motions for return of unlawfully seized property and disposition of seized property generally. Sections (a) and (b) are based on Ala. R. Crim. P. 3.13, N. D. R. Crim. P. 41(e) and (f), and Fed. R. Crim. P. 41(g) and (h). Section (a) provides for a return of the property if: the person is entitled to lawful possession, and the seizure is illegal. However, contraband property does not have to be returned even if seized illegally. The last sentence of section (a) provides that a motion for return of property, made after indictment or information, may be treated as a motion to suppress under Rule 16; the purpose of this provision is to have a series of pretrial motions disposed of in a single appearance, rather than in a series of pretrial motions made on different dates causing undue delay. Section (b) makes clear that Rule 4 is not intended to modify the substantive exclusionary rules of evidence. The provisions in section (c) are adapted from La. Code Crim. Pro. § 15:41. The procedures set forth in section (c)(3) apply only in the absence of a specific statutory directive. *See, e.g.*, Miss. CODE ANN. § 41-29-181.

**RULE 5 - ARREST AND INITIAL APPEARANCE****Rule 5.1 - Procedure upon Arrest.**

**(a) Telephone Call.** Any person under arrest must be afforded a reasonable opportunity to make a telephone call to, or otherwise make effective communication with, any person the accused may choose, without undue delay.

**(b) On Arrest without a Warrant.** A person arrested without a warrant:

(1) may, unless prohibited by law, be notified in writing by a law enforcement officer to appear either at a specified time and place or at a time and place set forth in a subsequent notice and may be released;

(2) shall be released by a law enforcement officer upon execution of an appearance bond set according to Rule 8, unless the charge upon which the person was arrested is not a bailable offense, and directed to appear either at a specified time and place or at a time and place set forth in a subsequent notice;

(3) if not released pursuant to subsections (b)(1) or (b)(2) above, the accused must be taken without undue delay, except in no event later than 48 hours after arrest, before a judge who shall proceed as provided in Rule 5.2 for initial appearances. If the person arrested is not taken before a judge as so required, then, unless the offense for which the person was arrested is not a

bailable offense, the person must be released upon execution of an appearance bond in the amount of the minimum bond set in Rule 8, and shall be directed to appear either at a specified time and place or at a time and place set forth in a subsequent notice; or

(4) in the event the defendant is released on the minimum bond amount provided in the bail schedule, the prosecuting attorney may file a motion with the court to reconsider the bond amount and the conditions of release, and the procedures thereafter shall be in accordance with Rule 8.

If a person arrested without a warrant has been released and directed to appear without having been taken before a judge for a probable cause determination, the officer or private person who made the arrest shall without undue delay make a complaint before a judge as provided in Rule 2.1. If the judge finds probable cause, the complaint shall be served on the defendant in the manner provided in Rule 3.2 for service of summons, or shall be delivered to the defendant at the time of the defendant's appearance. If no complaint is filed, or if the judge does not find probable cause, the proceedings shall be terminated and the person arrested shall promptly be notified and advised that an appearance will not be required. Notification shall be made by the judge or clerk of the court by mail directed to the defendant at the defendant's last known address.

**(c) On Arrest with a Warrant.**

(1) If provision therefore has been made by the judge issuing the arrest warrant, a person arrested with a warrant shall be released on an appearance bond in the amount set in accordance with Rule 8 and directed to appear either at a specified time and place or at a time and place set forth in a subsequent notice.

(2) If the person arrested cannot meet the conditions of release provided in the warrant, or if no such conditions are prescribed:

(A) if such person was arrested pursuant to a warrant issued on a complaint, the accused must be taken without undue delay, except in no event later than 72 hours after arrest, before a judge, who shall proceed as provided in Rule 5.2. If the person arrested has not been taken before a judge as required herein, unless the charge upon which the person was arrested is not a bailable offense, such person shall be released upon execution of an appearance bond in the amount of the minimum

bond set forth in Rule 8 and shall be directed to appear either at a specified time and place or at a time and place set forth in a subsequent notice; or (B) if such person was arrested pursuant to a warrant issued upon an indictment, the accused must be taken without undue delay before a circuit judge, who shall proceed as provided in Rule 8.

- (3) Upon request, the defendant shall be given a copy of the charges.

### *Comment*

Rule 5.1(a) gives official sanction to common existing practice. The opportunity to make a telephone call represents the minimum requirement, and should therefore not be read to deny the appropriate use of additional means of communication, electronic or otherwise. Fundamental fairness dictates that a person who has been taken into custody be allowed to communicate to another that the accused is being held by the police and charged with a crime. Rule 5.1(a) thus serves to protect an accused's state and federal constitutional rights to bail, counsel, and due process.

Rule 5.1(b) lists the options available to law enforcement officers in the case of warrantless arrests. An officer may: (1) release the offender on personal recognizance and issue a notice requiring the person to appear at a specified or subsequently scheduled time and place; or (2) release the offender on execution of an appearance bond set according to Rule 8 and direct the person to appear at a specified or subsequently scheduled time and place; or (3) take the offender into custody and provide the person with an opportunity to make bail. A person may not be released on recognizance where prohibited by law, such as Miss. CODE ANN. § 99-5-37 ("Mandatory appearance in domestic violence cases. In any arrest for a misdemeanor which is an act of domestic violence, as defined in § 97-3-7, no bail shall be granted until the person arrested has appeared before a judge of the court of competent jurisdiction. The defendant shall be brought before a judge at the first reasonable opportunity, not to exceed 24 hours from the time of the arrest. In calculating the 24 hours, weekends and holidays shall be included. The appearance may be by telephone.").

Under Rule 5.1(b)(3), if a person is taken into custody, the person shall be taken without undue delay, and in no event later than 48 hours after arrest, before a judge who shall proceed with an initial appearance as provided in Rule 5.2. If the person arrested is not taken before a judge within 48 hours as so required, the person detained must be released on execution of an appearance bond in the minimum amount set pursuant to Rule 8 and directed to appear at a specified or subsequently scheduled time and place. Rule 5.1(b)(3) conforms to the United States Supreme Court's holdings in *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *Riverside v. McLaughlin*, 500 U.S. 44 (1991).

Pursuant to Rule 5.1(b)(4), if a person arrested without a warrant has been released and directed to appear without having first been taken before a judge, the officer or private person who made the arrest must “without undue delay” make a complaint before a judge as provided in Rule 2.1. If the judge finds probable cause, the complaint may be given to the defendant at the defendant’s first appearance or may be served on the defendant as provided in Rule 3.2. Under this procedure, many, if not most, defendants charged with a felony will make their first court appearance at arraignment, or perhaps even at trial if arraignment is waived. In the event no complaint is filed or probable cause for the warrantless arrest is not found, the proceedings shall be terminated and the judge or court clerk must promptly notify the person by mail that appearance in court will not be required.

Under Rule 5.1(c), a person arrested pursuant to a warrant is in a different situation. If the warrant is issued on a complaint or an indictment, there has been an *ex parte* probable cause determination by a judge or grand jury. The issuing judge will also usually have set conditions of release. Even so, if the person cannot meet the conditions of release, or if no such conditions are prescribed, a person arrested pursuant to a warrant issued on a complaint is entitled to go before a judge within 72 hours after arrest for an initial appearance; if the person so arrested is not taken before a judge within 72 hours, the person must be released on execution of an appearance bond in the minimum amount set pursuant to Rule 8 and directed to appear at a specified or subsequently scheduled time and place. If a person is arrested pursuant to a warrant issued on an indictment, the authority to review release conditions is reserved to the circuit court, which must proceed without undue delay.

### Rule 5.2 - Initial Appearance.

**(a) Generally.** Every person in custody and not under indictment shall be taken, without unnecessary delay and in accordance with Rule 5.1, before a judge for an initial appearance. At the defendant’s initial appearance, the judge shall:

- (1) ascertain the defendant’s true name and address, and amend the formal charge if necessary to reflect this information, instructing the defendant to notify the court promptly of any change of address;
- (2) inform the defendant of the charges and provide the defendant with a copy of the complaint; and
- (3) if the arrest has been made without a warrant, determine whether probable cause exists to believe that the defendant committed the charged offense, in accordance with the procedures for making a probable cause determination provided in Rule 2.2(a). If the judge

finds there is probable cause, a complaint shall promptly be prepared, filed, and served on the defendant. If the judge finds no probable cause for the warrantless arrest, or if the judge fails to make a probable cause determination, the defendant must be released.

**(b) Further Requirements.** At the defendant's initial appearance, the judge shall also advise the defendant of the following:

- (1) that the defendant has the right to remain silent and that any statements made may be used against the defendant;
- (2) if the defendant is unrepresented, that the defendant has the right to assistance of an attorney, and that if the defendant is unable to afford an attorney, an attorney will be appointed as required by law;
- (3) that the defendant has the right to communicate with an attorney, family or friends, and that reasonable means will be provided to enable the defendant to do so; and
- (4) the conditions under which the defendant may obtain release, if any.

**(c) Felony Cases.** When a defendant is charged by complaint with commission of a felony, the judge shall also:

- (1) inform the defendant of the right to demand a preliminary hearing and the procedure by which that right may be exercised; and
- (2) if so demanded, set the time for a preliminary hearing in accordance with Rule 6.1.

**(d) Initial Appearance Not Required.** In all cases where the defendant is released from custody, or has been indicted by a grand jury, the defendant shall not be entitled to an initial appearance.

### *Comment*

The purpose of Rule 5.2 is to insert the judicial process between the police and the defendant at the earliest practicable time in order to minimize the effects of carelessness, abuse of power, or unavoidable error in the police function. Rule 5.2 insures procedural compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), as well as provides for the prompt determination of the conditions for release. This continues the policy contained in MISS. CODE ANN. § 99-3-17 and prior URCCC 6.03. Rule 5.2(a) dispenses with this procedure where the defendant has already been released or has been indicted. *See also* Rule 5.2(d). This likewise continues the rule previously contained in URCCC 6.05.



Subsection (a)(1) assures the formal accuracy of the defendant's name and address in the official records. Subsection (a)(2) assures that the defendant is properly advised of the charges, which can be accomplished by giving the defendant a copy of the complaint. Subsection (a)(3) provides for a probable cause determination in cases of arrest without a warrant employing the procedures provided in Rule 2.2. If probable cause is found, a complaint shall promptly be prepared, filed, and served on the defendant. If no probable cause is found, or if no probable cause determination is made, the defendant shall be released.

Rule 5.2(b)(1) requires the judge to advise the defendant of the right to remain silent. Under subsection (b)(2), the judge must give notice to the defendant of the right to counsel and of the right to appointed counsel under Rule 7.1. It is neither intended nor expected that a determination of the defendant's right to appointed counsel would be made or counsel appointed at the initial appearance. Under subsection (b)(4), the judge is required to determine the conditions of release. The range of possible conditions and the standards and procedures are set forth in Rule 8.

Rule 5.2(c)(4) imposes the additional burden at the initial appearance of informing a defendant charged with a felony but not yet indicted of the right to demand a preliminary hearing and, if demanded, of setting a time for the hearing in accordance with Rule 6.1. Under Rule 5.2(a)(4), if the defendant has been released from custody, or has been indicted, there is no right to a preliminary hearing. See Rule 6.1(a).

Pursuant to Rule 1.8, with the defendant's consent, initial appearances may be held via interactive audiovisual devices. See also MISS. CODE ANN. § 99-1-23. Specifically the statute provides that "[w]hen the physical appearance in person in court is required of any person who is represented by counsel and held in a place of custody or confinement operated by the state or any of its political subdivisions, upon waiver of any right such person may have to be physically present, such personal appearance may be made by means of closed circuit television from the place of custody or confinement."

Rule 5.2(d) also underscores that a defendant who has been released from custody, or who has been indicted, is not entitled to an initial appearance.

## RULE 6 - PRELIMINARY HEARING

### Rule 6.1 - Right to a Preliminary Hearing; Waiver; Postponement.

#### **(a) Right to a Preliminary Hearing.**

*(1) Generally.* A defendant who has been released from custody, or who has been indicted by a grand jury, shall not be entitled to a preliminary hearing. Otherwise, a defendant charged by complaint with the commission of a felony and in custody may demand a preliminary hearing.

(2) *When Commenced.* If demanded, the preliminary hearing shall commence within 30 days following the demand for preliminary hearing unless:

- (A) the complaint has been dismissed;
- (B) the hearing is subsequently waived;
- (C) the hearing is postponed as provided in subsection (d); or
- (D) before commencement of the hearing, the defendant is released from custody or an indictment charging the same offense has been returned by the grand jury.

**(b) Waiver.** A preliminary hearing, once demanded, may be subsequently waived in open court or by written waiver, signed by the defendant and defendant's counsel, if any.

**(c) Delay.**

(1) *Release on Recognizance.* If a preliminary hearing has not been commenced within 30 days as required by subsection (a), unless postponed as provided in subsection (d), the defendant shall be released on recognizance.

(2) *Non-bailable Offenses; Notice to Circuit Court.* However, if the defendant is charged with a non-bailable offense, or if release is prohibited by Article 3, § 29, paragraph (2), of the Mississippi Constitution of 1890, the court shall immediately notify a judge of that circuit of the delay and the reasons therefore. The circuit judge may thereupon order the hearing be set for a specified time.

**(d) Postponement.** Upon motion of any party, or upon the judge's own initiative, the preliminary hearing may be postponed beyond the time limits specified in subsection (a), upon a finding that circumstances exist that justify delay, and in that event the court shall enter a written order detailing the reasons for the finding and shall give the parties prompt notice thereof.

### *Comment*

Rule 6.1(a) grants an accused held in custody and charged with a felony (and not under indictment) the right to a preliminary hearing. However, Rule 6.1(a)(2)(d) provides that, where the defendant is released from custody or an indictment is returned prior to commencement of the hearing, the accused is no longer entitled to the preliminary hearing.

Rule 6.1(c) states that if a preliminary hearing is not commenced within 30 days as required by subsection (a), and is not postponed as allowed by subsection (d), the defendant shall be released on recognizance, unless the offense is non-bailable or, importantly, unless release is prohibited by Article 3, § 29, paragraph (2), of the Mississippi Constitution of 1890, which provides:

If a person charged with committing any offense that is punishable by death, life imprisonment or imprisonment for one (1) year or more in the penitentiary or any other state correctional facility is granted bail and (a) if that person is indicted for a felony committed while on bail; or (b) if the court, upon hearing, finds probable cause that the person has committed a felony while on bail, then the court shall revoke bail and shall order that the person be detained, without further bail, pending trial of the charge for which bail was revoked. For the purposes of this subsection (2) only, the term “felony” means any offense punishable by death, life imprisonment or imprisonment for more than five (5) years under the laws of the jurisdiction in which the crime is committed. In addition, grand larceny shall be considered a felony for the purposes of this subsection.

Under Rule 6.1(d), postponement is readily allowed for any reasons that “justify delay.”

### Rule 6.2 - Proceedings at Preliminary Hearing.

**(a) Procedure.** At a preliminary hearing the judge shall determine probable cause and the conditions for release, if any. All parties shall have the right to cross-examine the witnesses testifying and, subject to the provisions herein, introduce evidence. Only evidence that is relevant to these questions shall be admitted.

At the close of the prosecution’s case, including cross-examination of prosecution witnesses by the defendant, the judge shall determine and state for the record or state in open court whether the prosecution’s case establishes probable cause. The defendant may then make a specific offer of proof, including the names of witnesses who would testify or produce the evidence offered. The judge shall allow the defendant to present the offered evidence, unless the judge determines that it would be insufficient to rebut the finding of probable cause.

**(b) Process.** Unless otherwise ordered by the court for good cause shown, process shall issue to secure the attendance of witnesses requested by the defendant, the prosecuting attorney, or the court.

**(c) Hearsay Evidence.** The findings by the court shall be based on substantial evidence, which may be hearsay, in whole or in part.

**(d) Suppression Motions Inapplicable.** Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary hearing.

**(e) Amendment of Complaint.** The complaint may be amended at any time to conform to the evidence, unless substantial rights of the defendant would be prejudiced.

**(f) Presenting the Case to the Grand Jury.** If, from the evidence, it appears that there is probable cause to believe that a felony has been committed, and that the defendant committed it, the judge shall bind the defendant over to await action of the grand jury.

**(g) Discharge of the Defendant.** If, from the evidence, it appears that there is no probable cause to believe that a felony has been committed or that the defendant committed it, the defendant shall be discharged from custody. The discharge of the defendant shall not preclude the state from presenting the same offense to a grand jury.

### *Comment*

Rule 6.2(a) limits the issues at a preliminary hearing to probable cause and the conditions of release. A defendant is permitted to cross-examine witnesses and, on a proper showing of relevance, present testimony and evidence. Rule 6.2(b) complements these rights by providing defendants with process to secure the attendance of witnesses, unless otherwise ordered by the court on a showing of good cause.

Rule 6.2(a) strives to serve judicial economy by requiring the judge, at the close of the prosecution's case, to determine whether the prosecution has established probable cause. If so, the defendant may then make a specific offer of proof. The judge must allow the defendant to present the offered evidence, unless the judge determines that it would be insufficient to rebut the existing probable cause finding.

Rule 6.2(c) notes the admissibility of hearsay, which is in accord with MRE 1101(b)(3) (except for rules pertaining to privileges, rules of evidence inapplicable in probable cause hearings in criminal cases). There is no constitutional requirement that hearsay evidence be excluded from a probable cause hearing. *See* Rule 5.1(a), Fed. R. Crim. P.; *Coleman v. Burnett*, 477 F.2d 1187, 1203 n. 89 (D.C. Cir. 1973); *Costello v. U.S.*, 350 U.S.

359 (1956) (upholding a grand jury indictment based solely on hearsay testimony). See also *Hurtado v. California*, 110 U.S. 516 (1884). Allowing hearsay at preliminary hearings is in keeping with the diminished role assigned such hearings.

Rule 6.2(f) provides that if probable cause is found, the judge shall bind the defendant over to the grand jury. In making a determination of probable cause, the United States Supreme Court has adopted the "totality of the circumstances" approach. See *Illinois v. Gates*, 462 U.S. 213 (1983); *Massachusetts v. Upton*, 466 U.S. 727 (1984). Subsection (g) requires the defendant to be discharged if probable cause is not found, without prejudice to the state from presenting the same offense to a grand jury.

## RULE 7 - COUNSEL

### Rule 7.1 - Right to Counsel; Waiver.

**(a) Right to be Represented by Counsel.** A defendant shall be entitled to be represented by counsel in any criminal proceeding, except in those petty offenses such as traffic violations where there is no prospect of imprisonment or confinement after a judgment of guilty. The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefore.

**(b) Right to Appointed Counsel.** An indigent defendant shall be entitled to have an attorney appointed in any criminal proceeding which may result in punishment by loss of liberty, in any other criminal proceeding in which the court concludes that the interests of justice so require, or as required by law.

**(c) Waiver of Right to Counsel.** A defendant may waive the right to counsel in writing or on the record, after the court has ascertained that the defendant knowingly, intelligently, and voluntarily desires to forego that right. At the time of accepting a defendant's waiver of the right to counsel, the court shall inform the defendant that the waiver may be withdrawn and counsel appointed or retained at any stage of the proceedings. When a defendant waives the right to counsel, the court may appoint an attorney to advise the defendant during any stage of the proceedings. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

**(d) Unreasonable Delay in Retaining Counsel.** If a non-indigent defendant appears without counsel at any proceeding after having been given a reasonable time to retain counsel,

the cause shall proceed. If an indigent defendant who has refused appointed counsel in order to obtain private counsel appears without counsel at any proceeding after having been given a reasonable time to retain counsel, the court shall appoint counsel unless the indigent defendant waives the right under this Rule. If the indigent defendant continues to refuse appointed counsel, the cause shall proceed.

**(e) Withdrawal of Waiver.** A defendant may withdraw a waiver of the right to counsel at any time but will not be entitled to repeat any proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel.

### *Comment*

Rule 7.1 establishes guidelines for the representation of both indigent and non-indigent criminal defendants. The basis of Rule 7.1 is the right of an accused to be represented by counsel in all criminal prosecutions under the Sixth Amendment to the United States Constitution and Art. 3, Sec. 26, of the Mississippi Constitution of 1890.

For the purposes of subsection (a), the term “criminal proceeding” includes any stage of the criminal process, from accusation through appeal, and in collateral proceedings arising from the initiation of a criminal action against the defendant, such as post-conviction proceedings and appeals therefrom, extradition proceedings, probation revocation proceedings, and other like proceedings which are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal, and without regard to whether a “criminal proceeding” has or has not been commenced under Rule 2.1. The provision that a defendant may consult with the attorney’s agent is added for the convenience of the attorney.

Rule 7.1(b) is adopted from *Gideon v. Wainwright*, 372 U.S. 335 (1963), on remand 153 So.2d 299 (Fla. 1963); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); MISS. CODE ANN. § 99-15-15; and ABA, Standards for Criminal Justice, *Providing Defense Services* § 4.1 (Approved Draft, 1968). Counsel may be appointed at any point in the proceedings.

Under subsection (b), there are two facets to the question of when counsel is to be appointed to represent an indigent defendant. The first is whether the right to appointed counsel arises at all. In *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), the Supreme Court held that counsel must be appointed in any criminal prosecution, “whether classified as petty, misdemeanor, or felony, . . . that actually leads to imprisonment even for a brief period.” While under *Scott v. Illinois*, 440 U.S. 367 (1979), counsel need not be appointed in misdemeanor cases when the defendant is merely fined, pursuant to *Alabama v. Shelton*, 535 U.S. 654 (2002), a suspended sentence that may “end up in the actual deprivation of a person’s liberty” may not

be imposed unless the defendant was accorded “the guiding hand of counsel.” Necessarily, this will require that the judge determine before trial that, regardless of the evidence presented, the maximum punishment will not include incarceration or a suspended sentence of imprisonment. This already occurs in traffic cases where the judge knows in advance that upon conviction the punishment will not be imprisonment and that the custom and practice is to fine, even when imprisonment is a legal alternative.

The second is that, if the defendant is entitled to appointed counsel, at what point in the process is counsel to be appointed. Under the Sixth Amendment, there is clearly a right to counsel at trial. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Prior to trial the right exists at arraignment and at a preliminary hearing. Following the “critical stage” test, the United States Supreme Court has also held that an indigent is entitled to appointed counsel at a pre-trial, post-indictment lineup, *U.S. v. Wade*, 388 U.S. 218 (1967), but not at a pre-indictment lineup, *Kirby v. Illinois*, 406 U.S. 682 (1972). Using a different test, namely whether the proceeding is a “trial-like adversary confrontation” between the defendant and government, the Court has held there is no right to have appointed counsel present at a photographic display. *U.S. v. Ash*, 413 U.S. 300 (1973). Under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), presence of counsel is required, if requested, during pre-indictment questioning if information so obtained is to be admitted as evidence at trial. At the other end of the criminal prosecution, an indigent has a right to appointed counsel at sentencing, *Mempa v. Rhay*, 389 U.S. 128 (1967), and in a first appeal granted as a matter of right from a criminal conviction, *Douglas v. California*, 372 U.S. 353 (1963).

Mississippi Law is more expansive. As the Mississippi Supreme Court stated in *Ormond v. State*, 599 So.2d 951, 956 (Miss. 1992):

[T]he right to counsel [under Mississippi law] attaches earlier than does the sixth amendment right. *Williamson*, 512 So.2d at 876; *Page v. State*, 495 So.2d 436, 439 (Miss. 1986). This right attaches “once the proceedings against the defendant reach the accusatory stage.” *Williamson*, 512 So.2d at 876; *Page*, 495 So.2d at 439. The “accusatory stage” is defined by Mississippi law to occur when a warrant is issued or, “by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit.” MISS. CODE ANN. § 99-1-7 (1972). This right to counsel [also] “attaches at the point in time when ‘the initial appearance ought to have been held’” *Veal*, 585 So.2d at 699 (emphasis added).

(Under Rule 5.1(b)(3), an initial appearance is to be held within 48 hours when the defendant is arrested without a warrant and held in custody.)

In this vein, under Mississippi law, a participant in a lineup is entitled to have a lawyer present if the lineup is held after proceedings have reached the accusatory stage. *Wilson v. State*, 574 So.2d 1324 (Miss. 1990); *Magee v. State*, 542 So.2d 228 (Miss. 1989).

Rule 7.1(c) provides the standards for waiver of the rights to counsel, applicable throughout these rules. It adopts the constitutional standard set down in *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Von Moltke v. Gillies*, 332 U.S. 708 (1948); *Miranda v. Arizona*, 384 U.S. 436 (1966), *reh'g den.* 385 U.S. 890; and *Argersinger v. Hamlin*, 407 U.S. 25 (1972); and followed in *Conn v. State*, 170 So.2d 20 (Miss. 1964). Generally, a defendant must be advised of the charges; of the possible maximum sentence; whether, if convicted, the defendant is likely to be sentenced to a term of imprisonment; and of the rights to be represented by counsel and to have counsel appointed if the defendant is indigent. *Edwards v. Arizona*, 451 U.S. 477 (1981), established that, once the right to counsel has been invoked, a waiver (no matter how voluntary) is invalid if made in response to further police questioning.

Subsection (c) also allows but does not require the court to appoint advisory or standby counsel. Although a criminal defendant has an absolute right to defend *pro se* under the Sixth Amendment, *Faretta v. California*, 422 U.S. 806 (1975), there may be instances where a court will deem the appointment of standby counsel advisable and in the defendant's best interest. See *Faretta, supra*; *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (reasonable actions by standby counsel did not violate Sixth Amendment rights even though the defendant objected to the appointment of standby counsel); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *U.S. v. Theriault*, 474 F.2d 359 (5th Cir.) *cert. denied*, 411 U.S. 984 (1973); ABA, Standards for Criminal Justice, *Special Functions of the Trial Judge* § 6-3.7 (2d ed. 1986). The court is required to inform the defendant that the waiver may be withdrawn, as under subsection (e) the defendant has the burden of requesting counsel if the defendant later decides to withdraw the waiver.

Rule 7.1(d) protects the court against dilatory tactics by the defendant in retaining counsel while at the same time preserving the defendant's right to counsel. It allows an indigent defendant the opportunity to make a good faith, though unsuccessful, effort to obtain counsel, even though as a result the proceeding will be delayed. See *Cleveland v. U.S.*, 322 F.2d 401 (D.C. Cir.), *cert. denied*, 375 U.S. 884 (1963); *McConnell v. U.S.*, 375 F.2d 905 (5th Cir.1967). The procedure may have the salutary effect of allowing an otherwise indigent defendant an opportunity to raise funds to employ counsel of the defendant's choosing and thus reduce the burden on the appointed counsel system.

Under Rule 7.1(e), the defendant can decide at any time that it was a mistake to waive counsel; the court should encourage an unrepresented defendant, at all stages, to obtain counsel. The defendant's right to withdraw a waiver of counsel is unlimited; however, a defendant is not allowed to use late appointment or retention of counsel to disrupt orderly and



timely processing of the case. Thus, a defendant cannot delay a scheduled proceeding, nor repeat one already held, solely because of a change of heart concerning the need for counsel.

Rule 7.2 - Procedure for Appointment of Counsel for Indigent Defendants; Appearance; Withdrawal.

**(a) Procedure for Appointment of Counsel for Indigent Defendants.**

(1) *Generally.* A procedure shall be established in each Circuit for appointment of counsel by the Circuit Court, or by limited jurisdiction courts, for each indigent person entitled thereto.

(2) *Appointment of Two Attorneys; Death Penalty Cases.* In all trial proceedings, the court may appoint 2 attorneys. In all death penalty trial proceedings, the court shall appoint 2 attorneys pursuant to the standards in Rule 7.4. At the time of the appointment and subject to the approval of the court, lead counsel may select co-counsel so long as co-counsel is willing to accept the appointment and, in death penalty cases, meets all of the requirements of Rule 7.4. If lead counsel does not name co-counsel upon accepting an appointment, the court shall select co-counsel.

**(b) Notice of Appearance.** Before or at a first appearance in any court on behalf of a defendant, an attorney, whether privately retained or appointed by the court, shall file a notice of appearance or, in lieu thereof, the court shall note the attorney's appearance on the record.

**(c) Duty of Continuing Representation.** Counsel representing a defendant at any stage following indictment shall continue to represent that defendant in all further proceedings in the trial court, including filing of notice of appeal, unless counsel withdraws for good cause as approved by the court.

**(d) Withdrawal.** Counsel may be permitted to withdraw for good cause shown; however, no attorney shall be permitted to withdraw after a case has been set for trial except upon written motion stating the attorney's reasons therefore.

*Comment*

The purpose of Rule 7.2 is to define minimum standards for the representation of criminal defendants. Rule 7.2(a) requires that each circuit shall establish governing local procedures for the appointment of counsel for indigent defendants. Local court rules are promulgated pursuant to MRCP 83.

Rule (a)(2) recognizes the court's authority to appoint two attorneys in any appropriate case, and the court's duty to do so in all death penalty proceedings. A "death penalty" proceeding is one in which the death penalty is a possible sentence. In this way, the term is synonymous with "capital crime." See *Campbell v. State*, 749 So.2d 1208 (Miss. Ct. App. 1999) ("Capital" crimes are those in which death or life imprisonment are each a possible sentence.) See MISS. CODE ANN. §§ 99-15-15 & 17.

Rule 7.2(b) insures that defendants are in fact represented by requiring counsel to file a notice of appearance either at or before counsel's first appearance or, instead, by requiring that the court note the attorney's appearance on the record.

Rule 7.2(c) contemplates that the usual procedure will be that counsel retained privately or appointed at any stage following indictment will continue to represent the defendant through all stages of the trial proceedings, including filing notice of appeal. In addition to being familiar with the case, continued representation guarantees that a defendant's right of appeal is not lost in the period between termination of trial counsel's responsibilities and retention or appointment of appellate counsel.

Rule 7.2(d) provides that once a case has been set for trial, counsel may move to withdraw only by means of a written motion. Withdrawal will be permitted only on order in response to such motion. Normally, appointed counsel will not be permitted to withdraw prior to appeal. Of course, if the court allows counsel to withdraw, the court must see that new counsel is retained or appointed, unless the right to counsel has been properly waived pursuant to Rule 7.1(c). In this way, subsection (d) seeks to maintain the integrity of the trial date while also protecting the interests of the defendant and aiding the trial court in providing continuity in legal representation.

Nothing in Rules 7.2(c) or (d) limits the ability of a court to employ a local procedure whereby an attorney is appointed to represent a defendant for a limited purpose or time, after which another attorney is appointed or retained to represent the defendant for subsequent proceedings.

### Rule 7.3 - Determination of Indigency; Appointment of Counsel; Compensation.

**(a) Standard for Indigency.** The term "indigent" as used in these Rules means a person who is not financially able to employ counsel.

**(b) Affidavit of Substantial Hardship.** A defendant desiring to proceed as an indigent shall complete under oath an affidavit concerning that defendant's financial resources, on a form approved by the court. The defendant may be examined under oath regarding defendant's financial resources by the judge responsible for determining indigency;

the defendant shall, before said questioning, be advised of the penalties for perjury as provided by law.

**(c) Reconsideration.** After a determination of indigency or non-indigency has been made, if there has been a material change in circumstances, either the defendant, the appointed attorney, or the prosecutor may move for reconsideration.

**(d) Order of Appointment.** Whenever counsel is appointed, the court shall enter an order to that effect, a copy of which shall be given or sent to the defendant, the attorney appointed, and the prosecutor.

**(e) Appointment of Public Defender.** In counties which have a public defender, the public defender shall represent all persons entitled to appointed counsel whenever authorized by law and able in fact to do so.

**(f) Other Appointments.** If the public defender is not appointed, a private attorney shall be appointed to the case. All criminal appointments shall be made in a manner fair and equitable to the members of the bar, taking into account the skill likely to be required in handling a particular case.

**(g) Requests for Representation Before Indictment.** A request for appointment of counsel under Rule 7.1 shall be made and processed as if proceedings had already commenced in Circuit Court.

**(h) Appointment of Counsel During Appeal.** The trial or appellate court shall appoint new counsel for a defendant legally entitled to such representation on appeal, when prior counsel is permitted to withdraw.

**(i) Compensation.** A private attorney appointed to represent an indigent is entitled to compensation for services rendered as provided by law. A private attorney so appointed shall be entitled to compensation for services rendered whether or not a criminal case reaches circuit court. Otherwise, no appointed counsel may request or accept any payment or promise of payment for assisting in the representation of a defendant.

**(j) Expenses.** As used herein the term "compensation for services" shall include any reasonable expenses necessarily incurred by appointed counsel in defense of an indigent client, including fees and expenses of expert or professional persons, provided that the incurring of such expenses has been approved in advance by, and in the sound discretion of, the court.

*Comment*

Rule 7.3 establishes a procedure for the determination of indigency. Under Rule 7.3(a), a defendant is indigent if financially unable to employ counsel. In making a determination of indigency, the court should consider factors such as the defendant's income and sources of income; employment status; real or personal property owned; outstanding obligations; and the number and ages of any dependants. The court should not consider the fact that the defendant has been released on bond, or consider the financial ability of friends or relatives not legally responsible for the defendant. The ability to post bond should not be a preclusive factor because it would place the defendant in the dilemma of choosing between the constitutional right to legal representation and the constitutional right to liberty pending trial. Moreover, as the defendant's liberty prior to trial may be essential to defense preparations, placing the defendant in such a dilemma may deny the right to an effective defense.

Rule 7.3(b) permits the court to make the determination of indigency based solely on the affidavit submitted by the defendant. The court may, but need not, examine the defendant under oath regarding the defendant's financial resources. Prior to any such questioning, the defendant shall be advised of the penalties for perjury as provided by law.

Rule 7.3(c) allows the court to reconsider the question of a defendant's indigency if there has been a material change in circumstances. A motion for redetermination of indigency may be made at any stage of the proceedings. The ability to reconsider indigency insures both that indigent defendants receive representation and that scarce judicial resources are conserved.

Rule 7.3(d) insures that adequate records of appointment and service of counsel are maintained by all courts and that the persons involved are properly notified.

Rule 7.3(e) establishes a preference for appointment of public defenders over private counsel in counties that have a public defender's office. When the public defender's office cannot represent an indigent defendant, as when there is a conflict of interest or when the public defender is unable to provide prompt and adequate representation, private counsel shall be appointed.

Rule 7.3(g) provides that a request for appointment of counsel under Rule 7.1 is to be treated as if proceedings had already commenced in Circuit Court, because under Rule 7.1 the right to appointed counsel can exist even before such proceedings have commenced. Under Rule 7.1(b), the right to appointed counsel attaches "once the proceedings against the defendant reach the accusatory stage." *Williamson v. State*, 512 So.2d 868, 876 (Miss. 1987); *Page v. State*, 495 So.2d 436, 439 (Miss. 1986). The "accusatory stage" occurs when a warrant is issued or, "by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." MISS. CODE ANN. § 99-1-7 (1972). This right to

counsel [also] “attaches at the point in time when ‘the initial appearance. . . ought to have been held. . . .’” *Veal v. State*, 585 So.2d 693, 699 (Miss. 1991) (emphasis added). Under Rule 5.2, an initial appearance is to be held within 48 hours when the defendant is arrested without a warrant and held in custody. Moreover, under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), presence of counsel is required, if requested, during pre-indictment questioning if information so obtained is to be admitted as evidence at trial.

Rule 7.3(h) provides for continuity of representation by requiring the trial or appellate court to appoint new counsel for a defendant legally entitled to such representation on appeal, when prior counsel is permitted to withdraw.

Rules 7.3(i) and (j) do not change existing law regarding the payment of appointed counsel. MISS. CODE ANN. § 99-15-17, “Compensation of counsel,” provides in part:

The compensation for counsel for indigents . . . in any one (1) case may not exceed one thousand dollars (\$1000.00). . . . Provided, however, in a capital case two (2) attorneys may be appointed, and the compensation may not exceed two thousand dollars (\$2,000.00) per case. If the case is appealed . . . the allowable fee for services on appeal shall not exceed one thousand dollars (\$1000.00) per case. In addition, the judge shall allow reimbursement of actual expenses.

*See also Hansen v. State*, 592 So.2d 114, 125 (Miss. 1991) (State must pay for non-legal experts on showing of “substantial need”); *Wilson v. State*, 574 So.2d 1338, 1341 (Miss. 1990) (“§99-15-17 will allow an attorney to receive \$1,000.00 in profit plus his or her actual expenses. A rebuttable presumption arises that the actual cost contemplated by the statute is the average of \$25.00 per hour.”)

#### Rule 7.4 - Standards for Appointment of Trial and Appellate Counsel in Death Penalty Cases.

**(a) In General.** To be eligible for appointment in a death penalty case, an attorney:

(1) shall have been a member in good standing of the State Bar of Mississippi for at least 5 years immediately preceding the appointment, or admitted *pro hac vice* pursuant to an order entered under MRAP 46 and be a member in good standing of that attorney’s home jurisdiction for a like period immediately preceding the appointment;

(2) shall have practiced in the area of state criminal litigation for 3 years immediately preceding the appointment;

(3) shall have in the 3 years before appointment completed 12 hours training or educational programs in the area of death penalty defense through a program accredited by the Mississippi Commission on Continuing Legal Education or by the American Bar Association; and

(4) shall have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to death penalty cases.

**(b) Lead Trial Counsel.** To be eligible for appointment as lead trial counsel, an attorney must meet the qualifications set forth in subsection (a) of this Rule and the following:

(1) shall have practiced in the area of state criminal litigation for 5 years immediately preceding the appointment;

(2) shall have been lead counsel in at least 5 felony jury trials that were tried to completion, including at least 1 death penalty murder jury trial that was tried to completion in which the attorney was lead or co-counsel; and

(3) shall be familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

**(c) Appellate Counsel.** To be eligible for appointment as appellate counsel on behalf of a defendant sentenced to death, an attorney must meet the qualifications set forth in section (a) of this Rule and, within 5 years immediately preceding the appointment, have been lead counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, as well as prior experience as lead counsel in the appeal of at least 3 felony convictions and at least 1 post-conviction proceeding. Alternatively, an attorney must have been lead counsel in the appeal of at least 6 felony convictions, at least 2 of which were appeals from murder convictions, and lead counsel in at least 2 post-conviction proceedings.

**(d) Exceptional Circumstances.** In exceptional circumstances enumerated by the trial judge on the record, an attorney may be appointed who does not meet the qualifications set forth in sections (a)(1)-(3), (b) and (c) of this Rule, providing that the attorney's experience, stature and record enable the court to conclude that the attorney's

ability significantly exceeds the standards set forth in this Rule.

### *Comment*

The purpose of Rule 7.4 is to establish standards for appointment of counsel for indigent defendants in the trial and appellate stages of capital litigation. The provisions of this rule generally parallel the qualifications set forth in MRAP 22 regarding qualifications for post-conviction counsel.

Section (b) establishes elevated standards for lead trial counsel. Section (c) sets out standards for sole or lead counsel in appellate proceedings. (Of course, MRAP 22, not Section (c), governs appointment of post conviction counsel.) Rule 7.2(a)(2) requires that co-counsel be appointed in all death penalty trial proceedings; co-counsel should ordinarily be appointed at the appellate stage as well.

Under Rule 7.4(d), in the court's discretion an attorney need not meet all of the stated requirements to be eligible for appointment. Section (d) is designed to allow appointment of an attorney who technically does not meet the requirements of Sections (a)(1) through (3), (b), or (c), but whose demonstrated ability and experience significantly exceeds the standards contemplated by the rule.

## RULE 8 - RELEASE

### Rule 8.1 - Definitions and Requirements.

**(a) Personal Recognizance.** A release on defendant's "personal recognizance" means release without any condition of an undertaking relating to, or a deposit of, security.

**(b) Unsecured Appearance Bond.** An "unsecured appearance bond" is an undertaking to pay a specified sum of money to the clerk of the circuit, county, justice, or municipal court, for the use of the State of Mississippi or the municipality, on the failure of a person released to comply with its conditions.

**(c) Secured Appearance Bond.** A "secured appearance bond" is an appearance bond secured by deposit with the clerk of security equal to the full amount thereof.

**(d) Cash Deposit Bond.** A "cash deposit bond" is an appearance bond secured by deposit with the clerk of security, in the form of a cash deposit or certified funds, in an amount set by the judge.

**(e) Security.** "Security" is cash, certified funds, or a surety's undertaking, deposited with the clerk to secure an appearance bond.

**(f) Surety.** A "surety" is someone (other than the person released) who executes an appearance bond and is therefore

bound to pay its amount, if the person released fails to appear for any proceeding as ordered by the court. A surety, except one governed by Miss. CODE ANN. § 89-39-1, shall file with an appearance bond a sworn affidavit or certification:

(1) stating that the surety is not an attorney, judicial official, or person authorized to take bail (or if the surety is an attorney, judicial official, or person authorized to take bail, then the affidavit or certification shall state the surety's relationship to the person released). An attorney, judicial official, or person authorized to accept an appearance bond shall not be precluded from being a surety for a member of the surety's immediate family. For purposes of this Rule, the term "immediate family" shall be limited to include only: a spouse, a sibling, a spouse's sibling, a lineal ancestor or descendant, a lineal ancestor or descendant of a spouse, a sibling, or a spouse's sibling or a minor or incompetent person dependent upon the surety for more than 1/2 of their support;

(2) stating that the surety owns property in this state, which property, when aggregated with that of other sureties, is worth the amount of the appearance bond (provided, that the property must be exclusive of property exempt from execution and its value equaling the amount of the appearance bond must be above and over all liabilities, including the amount of all other outstanding appearance bonds entered into by the surety) and specifying that property and the exemptions and liabilities thereon; and

(3) specifying the number and amount of other outstanding appearance bonds entered into by the surety.

**(g) Insurer.** The terms "insurer," "professional bail agent," "soliciting bail agent," "bail enforcement agent," and personal surety agent" shall be defined as in Miss. CODE ANN. § 83-39-1, *et seq.*

**(h) Compliance Required.** All agents and insurers shall comply fully with Miss. CODE ANN. § 83-39-1, *et seq.*, and § 99-5-1, *et seq.*, and all related statutes and regulations.

### *Comment*

Rule 8.1 provides definitions for use in Rule 8 and throughout these Rules. Rule 8 is based generally on Ala. R. Crim. P. 7, Fed. R. Crim. P. 46, and 18 U.S.C. 3142 *et seq.*, and supplants practice under former URCCC 6.02. With few exceptions, the statutory provisions currently governing



professional bail bond companies regulated by the Mississippi Commissioner of Insurance, as provided in MISS. CODE ANN. § 83-39-1 *et seq.*, are largely unaffected by Rule 8. Likewise, existing statutory provisions governing bail matters in the courts, as provided in MISS. CODE ANN. § 99-5-1 *et seq.*, remain mostly unchanged, and the forms required by MISS. CODE ANN. §§ 99-5-1 & 99-5-3 are unaffected.

Under section (a), “personal recognizance” means a release of the defendant without any condition of an undertaking relating to, or deposit of, security. Such release is distinguishable from release conditioned on the posting of bond or other security.

Section (b) describes a type of bond not currently used in state court practice, but used extensively in federal criminal cases pursuant to 18 U.S.C. 3142(b).

Sections (c) and (d) reflect current practice under MISS. CODE ANN. § 99-5-9. The form of a cash deposit bond previously prescribed by URCCC 6.02(C) is retained. The amount of the cash deposit is set by the judge, up to the full amount of the bond, but often less.

Section (f) tracks Ala. R. Crim. P. 7.1(e) and clarifies the procedure when a person is arrested and permitted to post an appearance bond secured by sureties who may own equity in real property.

Sections (g) and (h) make clear that the statutory requirements and procedures related to professional bond companies and their bail bonds continue in full force.

### Rule 8.2 - Right to Pretrial Release on One’s Own Personal Recognizance or on Bond.

**(a) Right to Release.** Any defendant charged with an offense bailable as a matter of right may be released pending or during trial on the defendant’s own personal recognizance or on an appearance bond unless the court before which the charge is filed or pending determines that such a release will not reasonably assure the defendant’s appearance as required, or that the defendant’s being at large will pose a real and present danger to others or to the public at large. If such a determination is made, the court may impose the least onerous condition or conditions contained in Rule 8.3 or 8.4 that will reasonably assure the defendant’s appearance or that will eliminate or minimize the risk of harm to others or to the public at large. In making such a determination, the court may take into account the following:

- (1) the age, background and family ties, relationships and circumstances of the defendant;
- (2) the defendant’s reputation, character, and health;

- (3) the defendant's prior criminal record, including prior releases on recognizance or on unsecured or secured appearance bonds, and other pending cases;
- (4) the identity of responsible members of the community who will vouch for the defendant's reliability;
- (5) violence or lack of violence in the alleged commission of the offense;
- (6) the nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance;
- (7) the type of weapon used, e.g., knife, pistol, shotgun, sawed-off shotgun, assault or automatic weapon, explosive device, etc;
- (8) threats made against victims or witnesses;
- (9) the value of property taken during the alleged commission of the offense;
- (10) whether the property allegedly taken was recovered or not; damage or lack of damage to property allegedly taken;
- (11) residence of the defendant, including consideration of real property ownership, and length of residence in the defendant's place of domicile;
- (12) in cases where the defendant is charged with a drug offense, evidence of selling or distribution activity that should indicate a substantial increase in the amount of bond;
- (13) consideration of the defendant's employment status and history, the location of defendant's employment, e.g., whether employed in the county where the alleged offense occurred, and the defendant's financial condition;
- (14) any enhancement statutes related to the charged offense; and
- (15) any other fact or circumstance bearing on the risk of nonappearance or on the danger to others or to the public.

**(b) Bond Schedule.** The following schedule is established as a general guide for circuit, county, justice, and municipal courts in setting bail for persons charged withailable offenses. Except in situations where release is required in the minimum scheduled amount pursuant to Rule 5.1(b) or (c), or any other Rule, courts may and should exercise discretion in setting bail above or below the scheduled amounts, as supported by consideration of the factors listed in Rule 8.2(a). When a statute limits a judge's bail authority, such

statutory limits shall apply to the extent any of the amounts listed below are in conflict therewith.

## SECURED OR UNSECURED APPEARANCE BOND SCHEDULE

### RECOMMENDED RANGE

#### FELONIES:

*Capital felony*: \$25,000 to No Bail Allowed

*Manslaughter* (or any other non-capital crime involving loss of human Life): \$10,000 to \$1,000,000

*Drug Distribution and Trafficking*: \$5,000 to \$1,000,000

*All other non-capital felonies*:

– punishable by maximum 20 years or more: \$20,000 to \$250,000

– punishable by maximum 10 years to 20 years: \$10,000 to \$100,000

– punishable by maximum up to 10 years: \$5,000 to \$50,000

#### MISDEMEANORS (not included elsewhere in the schedule):

– punishable by maximum 1 year: \$500 to \$2,000

– punishable by maximum 6 mos.: \$250 to \$1,000

– punishable by less than 6 mos.: \$100 to \$500

– punishable by fine only: \$50 to Max. Fine/Costs\*

*Municipal Ordinance Violations*: \$100 to \$1,000

*Traffic Related Offenses*:

Misdemeanor DUI and DWLS: \$500 to \$2,000

Reckless/careless driving: \$100 to \$300

Speeding: \$50 to Max. Fine/Costs\*

Other traffic violations: \$50 to Max. Fine/Costs\*

\*Maximum amount of fine(s), court costs, and statutory assessments which might be due upon conviction.

#### *Comment*

Rule 8.2 tracks Ala. R. Crim. P. 7.2(a), and embodies the guarantee against excessive bail provided by Article 3, § 29, of the Mississippi Constitution, within the limitations proscribed therein. Rule 8.2 is based on the presumption of innocence of the accused, the constitutional right of a defendant charged with a noncapital offense to be released on bail, and the policy that a defendant should be released pending trial whenever possible. Under section (a), a defendant charged with an offense that is bailable as a matter of right is eligible for a recognizance release unless the judge determines that the defendant's presence would not thereby be reasonably assured or that the defendant poses a real and present danger of harm to others. *See U.S. v. Salerno*, 481 U.S. 739 (1986) (upholding the constitutionality of pretrial detention based on dangerousness). Section (a) makes

it possible to release on bail indigent defendants on non-financial conditions that make it reasonably likely that the defendant will appear. See *Bandy v. U.S.*, 81 S. Ct. 197 (1960) (questioning constitutionality of holding indigent defendant in custody for no reason other than the inability to raise money for bond).

Sections (a)(1) – (15) provide detailed guidance for the judge setting bond as to the range of inquiries that might - and perhaps ought - be made prior to setting the conditions on, or the amount of, any recognizance or appearance bond. While no current rule or statute requires the inquiry described in section (a), such an inquiry has always been within the sound discretion and inherent power of a court setting terms of release. See *Lee v. Lawson*, 375 So. 2d 1019 (Miss. 1979) (suggesting similar inquiry); ABA, *Standards for Criminal Justice, Pretrial Release* (3d ed. 2002). Section (a) is intended to provide a helpful, non-exclusive list for any court making such an inquiry, and is written to ensure that a judge not give inordinate weight to the nature of the present charge.

Section (b) is new and tracks Ala. R. Crim. P. 7.2(b). A defendant who has been arrested, and is not promptly brought before a judge for determination of bail as required by Rule 5.1(b) and (c), must be released on a bond at the minimum end of the applicable range. While section (b) makes clear that otherwise the judge retains discretion to set any bond above or below the suggested range, the bond schedule set forth in section (b) should help reduce the disparities – often dramatic— between courts who now set bail without the guidance of a scheduled range. Although custodial arrest is not employed for most traffic offenses, these offenses are listed within recommended ranges to serve as a guide in instances where the defendant refuses to sign the promise-to-appear portion of the uniform traffic citation. See MISS. CODE ANN. § 63-9-21.

### Rule 8.3 - Release after Conviction and Sentencing.

**(a) No Release when Sentence Exceeds Twenty Years.** A defendant shall not be released pending appeal to the Supreme Court if the defendant has been convicted:

- (1) of felony child abuse;
- (2) of sexual battery of a minor; or
- (3) of any offense and who for that offense has been sentenced to punishment by death, by life imprisonment, or by imprisonment for a term in excess of 20 years.

**(b) Release.**

- (1) *When Filed.* A person convicted and sentenced for a felony, not enumerated in section (a), may file an application for release concurrently with the filing of a notice of appeal.

(2) *When Available.* Such person may be released from imprisonment on bail pending an appeal to the Supreme Court, within the discretion of the judge, if the defendant shows by clear and convincing evidence that:

- (A) release would not constitute a special danger to any other person or to the community;
- (B) that a condition or a combination of conditions may be placed on release that will reasonably assure the appearance of the defendant as required;
- (C) that the defendant has complied with MRAP 11(b) and will properly prosecute the appeal; and
- (D) only when the peculiar circumstances of the case render it proper.

### *Comment*

Rule 8.3 tracks Ala. R. Crim. P. 7.2(c) and MISS. CODE ANN. § 99-35-115. Section (a) reflects the existing prohibitions on post-conviction bail pending appeal of convictions for certain crimes found in MISS. CODE ANN. § 99-35-115(1). Section (b)(2) embodies the statutory requirement of clear and convincing evidence that the defendant's appearance will be reasonably assured and that the defendant's release would not pose a special danger to any member of the community. The defendant is assigned the burden establishing that grounds for release since the conviction justifies retention in custody in situations where doubt exists as to whether a defendant can be safely released. Section (b)(2)(C) ensures that release is available *only* on proof that the defendant will actually and properly prosecute an appeal by, among other things, complying with the requirement in MRAP 11(b) of prepaying the cost of the record on appeal.

### Rule 8.4 - Conditions of Release.

**(a) Mandatory Conditions.** Every order of release under this Rule shall contain the conditions that the defendant:

- (1) appear to answer and to submit to the orders and process of the court having jurisdiction of the case;
- (2) refrain from committing any criminal offense; and
- (3) promptly notify the court of any change of address.

**(b) Additional Conditions.** An order of release may include any one or more of the following conditions reasonably necessary to secure a defendant's appearance or to protect the public:

- (1) execution of an appearance bond in an amount specified by the court, either with or without requiring that the defendant

deposit with the clerk security in an amount as required by the court;

- (2) execution of a secured appearance bond;
- (3) placing the defendant in the custody of a designated person or organization agreeing to supervise the defendant;
- (4) restrictions on the defendant's travel, associations, or place of abode during the period of release;
- (5) restrictions on the defendant's direct or indirect contact with any specified person or persons;
- (6) return to custody after specified hours;
- (7) Participation in and successful completion of any drug, alcohol, anger management, mental health, or other treatment required by the court;
- (8) Participation in G.E.D. classes and testing or in any other educational activities required by the court; or
- (9) Any other conditions which the court deems reasonably necessary.

#### *Comment*

Rule 8.4 follows Ala. R. Crim. P. 7.3. Rule 8.4 further adds additional specific conditions of release drawn from portions of 18 U.S.C. 3142(c) and from current practice in various Mississippi courts in the exercise of their discretion and experience in such matters. Section (b)(9) vests the judge setting bond conditions with broad latitude to insure appearance of the defendant and protection of the public, and gives the judge flexibility in fashioning conditions of release.

#### Rule 8.5 - Procedure for Determination of Release Conditions

**(a) Initial Decision.** If a defendant has not been released from custody and is brought before a court for initial appearance, a determination of the conditions of release shall be made. The judge shall issue an order containing the conditions of release and shall inform the defendant of the conditions, the possible consequences of their violation, and that a warrant for the arrest of the defendant may be issued immediately upon report of a violation.

**(b) Amendment of Conditions.** If the defendant is in custody, the court may, for good cause shown, either on its own initiative or on application of either party, modify the conditions of release, after first giving the parties an adequate opportunity to respond to the proposed modification.

**(c) Review by Circuit Court.** No later than 7 days before the commencement of each term of court, the officials having custody of felony defendants who are being held in jail

pending trial or extradition shall provide the presiding judge, the district attorney, and the clerk of the circuit court for the county in which such defendant is being held, the names of all defendants in their custody, the charge or charges upon which they are being held, and the date they were most recently taken into custody. The circuit court or the court's designee shall review the conditions of release for every felony defendant who is eligible for bail and has been in jail for more than 90 days.

### *Comment*

Rule 8.5 is consistent with Ala. R. Crim. P. 7.4(a) - (c) and establishes a mechanism for setting bonds, and for periodically reviewing bonds which have been set but which for whatever reason have not been posted. The conditions of release will usually be set on the arrest warrant at the time of its issuance, pursuant to Rule 3.2(a). If not, or if the defendant cannot meet the conditions, the defendant will be afforded a release hearing at initial appearance as provided by Rules 5.1 and 5.2. Thereafter, under section (b), the conditions can be modified, to be made either more or less stringent, depending on the circumstances. Section (c) is particularly important in requiring that the court and other interested personnel in the judicial system receive notice prior to each court term of the identity of those being held in custody, either without bond or without the ability to post bond. Section (c) also requires a review of the detention or bond status of those who have remained in custody for more than 90 days. These notice and review requirements should enhance the procedure for insuring speedy trials or other dispositions of criminal cases, and should help avoid the possibility that a person in detention is forgotten or overlooked by those charged with the custody of that person.

### Rule 8.6 - Review of Conditions; Revocation

**(a) Issuance of Warrant.** Upon motion of the prosecuting attorney or on the court's own motion stating with particularity

- (1) the facts or circumstances constituting a material breach of the conditions of release;
- (2) that material misrepresentations or omissions of fact were made in securing the defendant's release; or
- (3) that revocation is otherwise required by law,

the court having jurisdiction over the defendant released may secure the defendant's presence in court by issuing an order to appear before the court to show cause or an arrest warrant under Rule 3.1 to secure the defendant's presence

in court. A copy of the motion shall be served with the order or warrant, and a hearing shall be held on the motion without undue delay, except in no event later than 72 hours after the arrest of the defendant released, as provided in Rule 5.1.

**(b) Hearing; Review of Conditions; Revocation of Release.**

If, after a hearing on the matters set forth in the motion, the court finds that the defendant released has not complied with or has violated the conditions of release, or that material misrepresentations or omissions of fact were made in securing the defendant's release, the court may modify the conditions or revoke the release. If a ground alleged for revocation of the release is that the defendant released has violated the condition under Rule 8.3(a)(2) by committing a criminal offense, or that there was a misrepresentation or omission concerning other charges pending against the defendant released, the court may modify the conditions of release or revoke the release, if the court finds that there is probable cause (or if there has already been a finding of probable cause) to believe that the defendant released committed the other offense or offenses charged.

**(c) Cases Governed by Article 3, Section 29(2).** In cases governed by Article 3, section 29(2) of the Mississippi Constitution of 1890, on motion of the prosecuting attorney or on the court's own motion, a court having jurisdiction over the defendant may revoke the defendant's bond by order and without further action by the court.

*Comment*

Rule 8.6 tracks closely provisions in Ala. R. Crim. P. 7.5 and Ariz. R. Crim. P. 7.5. Section (a) permits either a warrant or a summons to be issued to take the person into custody for bond review or revocation proceedings. Section (c) makes clear that Article 3, Section 29(2), of the Mississippi Constitution governs those situations where one previously admitted to bail for a felony has been charged with a new felony offense punishable by more than 5 years imprisonment. Upon finding probable cause for the new offense, either by the reviewing court or another court with jurisdiction (such as the court in which the new charge has been filed), this constitutional provision requires revocation of the prior bond and directs that the person will not be admitted to further bail. When the original charge and the new charge are pending in two different courts, either court may revoke the prior bond and decline to set a new bond. *See Dendy v. State*, 931 So.2d 608, 614-15 (Miss. Ct. App. 2005), *cert denied* 933 So.2d 303 (2006).



Rule 8.7 - Transfer and Disposition of Bond.

**(a) Transfer Upon Supervening Indictment.** An appearance bond or release order issued to assure the defendant's presence for proceedings following the filing of a complaint shall automatically be transferred to the same, related, or lesser charge prosecuted by indictment, even though the complaint is superseded by return of the indictment unless, following indictment, the judge presiding, for good cause, shall order revocation or modification of the conditions of release, as provided in Rule 8.6(a) and (b).

**(b) Filing and Custody of Appearance Bonds and Security.** Appearance bonds and security shall be filed with the clerk of the court in which the case is pending. Whenever the case is transferred to another court, any appearance bond and security shall be transferred also.

**(c) Surrender of Defendant by Surety.** At any time, a surety may surrender to the sheriff a defendant released, and the sheriff shall certify such surrender to the court. The defendant may then obtain other sureties under the same conditions of release. In municipal ordinance cases, surrender may be to the chief of police of the municipality, who shall certify to the court the defendant's surrender. In the event that a Professional Bail Agent, Soliciting Bail Agent, or Insurer has provided a surety bond or other form of bail for a defendant without first obtaining payment in full for the premium on the bond, that defendant may not be surrendered because the defendant, or anyone assuming financial responsibility on the defendant's behalf for the bond premium, has failed to make any agreed-upon payment to the surety following release.

**(d) Forfeiture.** If at any time it appears to the court that a defendant fails to appear, the court shall proceed as appropriate pursuant to MISS. CODE ANN. § 99-5-25 or § 21-23-8 and any related statutes or regulations which may apply.

**(e) Exoneration.** At any time that the court finds there is no further need for an appearance bond, the court shall exonerate the appearance bond and order the return of any security deposited with the clerk.

*Comment*

Rule 8.7 follows practice under Ala. R. Crim. P. 7.6 and Ariz. R. Crim. P. 7.6. Section (a) is consistent with current Mississippi practice regarding appearance bonds. The last sentence of section (c) addresses the situation where a bail bond company attempts to surrender the principal solely on

the basis of non-payment of the fee or commission, or any portion thereof, which was not collected at the time of issuance of the bond. MISS. CODE ANN. § 83-29-25 plainly directs that the professional bail agent “shall charge and collect” the premium, commission, or fee due. However, if the bail agent nevertheless elects to contract with the principal to issue bail on the payment of less than the full amount due, any subsequent collection effort is merely a contractual matter which must be resolved in civil court, not in criminal court by means of incarceration for non-payment. Involving criminal courts would improperly condone using criminal process to enforce a civil debt. In addition, doing so threatens to involve criminal courts in interminable civil disputes, thereby wasting precious judicial resources. The statutes governing bail permit wide latitude to the surety to surrender a person on bail; however, non-payment of a contractual obligation between the principal and professional bail agent is not, standing alone, a proper basis for surrender. Section (c) authorizes a court to whom bail is surrendered to inquire of the surety to insure that the criminal justice system is not co-opted by those who write corporate surety bonds as a mechanism for debt collection. Section (d) defers to the extensive statutory procedure governing forfeiture of bail bonds provided in MISS. CODE ANN. §§ 99-5-25 and 21-23-8. Section (e) provides for the return of any security deposit upon exoneration of the bond.

## RULE 9 - TRIAL SETTING

### Rule 9.1 - Trial Setting.

**(a) Trial Docket.** Within 60 days after arraignment (or waiver thereof), the case shall be set for trial. Trial shall be set for no later than 270 days after arraignment (or waiver thereof). A docket of cases ready for trial shall be maintained by the clerk or the court administrator. Cases set by the judge for hearing must be ready at the appointed time.

**(b) Priorities in Scheduling.** Insofar as is practicable, trials of criminal cases shall have priority over trials of civil cases. In determining priority among criminal cases, the court shall consider, among others, the following factors:

- (1) the right of a defendant to a speedy trial under the constitutions and laws of the United States and the State of Mississippi;
- (2) whether the defendant is in custody;
- (3) whether the defendant’s pretrial liberty may present unusual risks;
- (4) the relative gravity of the offense charged; and
- (5) the relative complexity of the case.

**(c) Duty of Prosecutor.** The prosecutor shall advise the court of facts relevant to determining the order of cases on the docket.

**(d) Motion for Continuance.** A continuance may be granted by written order of the court on its own motion, or on the motion of a party stating with specificity the reasons justifying the continuance and supported by affidavits as required by the court.

### *Comment*

Rule 9.1(a) continues the procedure set forth in prior URCCC 9.02. Rule 9.1 has three main purposes: (1) to effectuate the right of the accused to a speedy trial; (2) to further the interests of the public, including victims and witnesses, in the fair, accurate, and timely resolution of criminal cases; and (3) to ensure the effective use of resources. Preventing undue delay in the administration of criminal justice has become an object of increasing interest and concern. Historically, the right to a speedy trial has been thought of as a protection for the defendant. Obviously, delay can cause a hardship to a defendant who is in custody awaiting trial. Even if afforded the opportunity for pretrial release, a defendant nonetheless is likely to suffer anxiety during a period of unwanted delay, and runs the risk that the defendant's memory and the memory of defense witnesses may suffer as time goes on. Delay can also adversely affect the prosecution. Witnesses may lose interest or disappear, or their memories may fade thus making them more vulnerable to cross-examination. There is also a larger public interest in the prompt disposition of criminal cases, which may transcend the interest of the particular prosecutor, defense counsel, and defendant.

Section (b) is based on Fed. R. Crim. P. 50. Section (b) gives special priority to five classes of criminal cases, including those involving defendants whose pretrial liberty presents unusual risks. Thus, section (b) provides the community with the protection of a speedy trial for those who, though released on bond, still constitute a threat to the public, to witnesses, to evidence, or to anything else.

Section (c) is an explicit directive to the prosecutor to provide the court with appropriate information to determine the order of cases for the calendar.

Section (d) requires that a party's motion for a continuance state with specificity the reasons justifying the continuance. Such a motion must be supported by affidavits if the court so requires. The court may, but need not, order that supporting affidavits follow the prior practice set forth in MISS. CODE ANN. § 99-15-29, which required:

On all applications for a continuance the party shall set forth in his affidavit the facts which he expects to prove by his absent witness or documents that the court may judge of the materiality of such facts, the name and residence of the absent witness, that he has used due diligence to procure the absent documents, or presence of the absent witness, as the case may be, stating in what such diligence consists, and that the continuance is not sought for delay only, but that justice may be done. The court may

grant or deny a continuance, in its discretion, and may of its own motion cross-examine the party making the affidavit. The attorneys for the other side may also cross-examine and may introduce evidence by affidavit or otherwise for the purpose of showing to the court that a continuance should be denied.

*See also* MISS. CODE ANN. § 99-43-19 (“The victim shall have the right to a final disposition of the criminal proceeding free from unreasonable delay. To effectuate this right, the court, in determining whether to grant any continuance, should make every reasonable effort to consider whether granting such continuance shall be prejudicial to the victim.”)

## RULE 10 - PRESENCE OF DEFENDANT, WITNESSES, AND SPECTATORS

### Rule 10.1 - Right of Defendant to be Present; Waiver.

**(a) Right to Be Present.** The defendant has the right to be present at the arraignment and at every stage of the trial, including the selection of the jury, the giving of additional instructions pursuant to Rule 22.3, the return of the verdict, and sentencing.

**(b) Waiver of the Right to Be Present.**

(1) Except as provided in subsection (2), a defendant may waive the right to be present at any proceeding in the following manner:

(A) with the consent of the court, by an understanding and voluntary waiver in open court or by a written consent executed by the defendant and by the defendant’s attorney of record, filed in the case;

(B) by the defendant’s absence from any proceeding, upon the court’s finding that such absence was voluntary and constitutes an understanding and voluntary waiver of the right to be present. The court may infer that the absence was voluntary and constitutes an understanding and voluntary waiver if the defendant had notice of the time and place of the proceeding, had notice of the right to be present at it, and was warned that the proceeding would go forward in the defendant’s absence should the defendant fail to appear; or

(C) if the defendant was initially present at trial, or if the defendant pleaded guilty or *nolo contendere*, the defendant also waives the right to be present when the defendant is voluntarily absent after the plea was entered or after trial has begun, regardless of whether the court informed the defendant

of an obligation to remain during trial or sentencing.

- (2) A defendant may not waive the right to be present:
- (A) during the imposition of a sentence in a death penalty case; or
  - (B) if the defendant is not represented by counsel at the proceeding at which the defendant is absent, except:
    - (i) in minor misdemeanor cases;
    - (ii) in proceedings conducted after the defendant has been adjudicated guilty; or
    - (iii) when the defendant has waived the right to counsel.

**(c) Effect.** If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

**(d) Obtaining Presence of Unexcused Defendant.** If a defendant is not present at the trial, or at any stage thereof, or at any other proceeding, and the defendant's right to be present has not been waived or the absence has not been excused, the court, by order, may direct law enforcement officers to bring the defendant forthwith before the court for the trial or proceeding.

**(e) Appearance of a Corporation.** A corporation may appear by counsel for all purposes at any proceeding.

#### COMMENT

Rule 10.1 sets forth the right of the defendant to be present at every stage of the trial and provides for waiver of that right. Rule 10.1 is based on Fed. R. Crim. P. 43. Rule 10.1(a) states the right of a defendant to be present at all stages of the criminal prosecution. The right of the defendant to be present also protects various other rights of the accused. *See* Miss. Const. Art. III, § 26 ("In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both [and] to be confronted by the witnesses against him"); Fed. R. Crim. P. 43.

Section (b) allows a defendant to waive the right to be present, consistent with prior practice. The standards for waiver are those required for waiver of other constitutional rights. *See Johnson v. Zerbst*, 304 U.S. 458 (1938) ("an intentional relinquishment or abandonment of a known right or privilege").

The defendant may make an express waiver under section (b)(2)(i). In addition, under sections (b)(2)(ii) and (iii), the defendant may waive the right through voluntary absence from the proceeding. *See Taylor v. U.S.*, 414 U.S. 17 (1973). Under section (b)(2)(ii), the court may find a valid

waiver when the defendant had personal notice of the proceeding, had personal notice of the right to be present at it, and was warned that the proceeding would go forward in the defendant's absence should the defendant fail to appear. It is quite practical to add the warning required by section (b)(2)(ii) to the release order received by the defendant after the defendant posts bond or is released on recognizance. Under *Taylor*, it is not incumbent on the court to warn the defendant expressly of these three factors where the defendant has personally appeared at the commencement of trial and therefore it can reasonably be assumed that the defendant has knowledge of the right to be present. Thus, section (b)(2)(iii) allows the court to find an implied waiver when the defendant was present at the commencement of the trial and fails to appear at some later stage.

The presumption of voluntariness is rebuttable. A defendant deemed to have waived the right to be present pursuant to sections (b)(2)(ii) or (iii) might still be involuntarily absent and should be permitted to prove that fact in a subsequent or collateral proceeding.

Under section (b)(2), a defendant is prohibited from waiving the right to be present in two situations. One is during pronouncement of a sentence of death by the judge after the jury has returned its verdict. The other is when the defendant will not be represented by counsel, except that an unrepresented defendant may waive the right to be present: in minor misdemeanor cases; in proceedings conducted after the defendant has been adjudicated guilty; or when the defendant has waived the right to counsel. Fundamental fairness is violated if neither the defendant nor counsel for the defendant is present at trial. If a defendant who has waived counsel is subsequently absent during trial under circumstances from which the court may infer a waiver of the right to be present under Rule 10.1(b)(1)(ii) or (iii), the court may then appoint counsel to represent the defendant in the defendant's absence and resume trial unless the circumstances would require a mistrial or continuance in the interest of justice.

Pursuant to section (c), if the defendant waives the right to be present, the trial may proceed to completion during the defendant's absence. The decision to proceed in light of a voluntary waiver is discretionary, not mandatory, with the court. The court is in no instance required to proceed.

#### Rule 10.2 - Effect of Defendant's Disruptive Behavior.

**(a) Disruptive Conduct.** A defendant who engages in disruptive or disorderly conduct after having been warned by the court that such conduct will result in the defendant's expulsion from a proceeding shall forfeit the right to be present at that proceeding.

**(b) Re-acquisition of Right.** The court shall grant any defendant so excluded reasonable opportunities to return to the court upon the defendant's personal assurance of good behavior. Any subsequent disruptive conduct on the part of

the defendant may result in exclusion without additional warning.

**(c) Continuing Duty of Court.** The court shall employ every practicable means to enable a defendant removed from a proceeding under this Rule to hear, observe or be informed of the further course of the proceeding, and to consult with counsel at reasonable intervals.

### *Comment*

Rule 10.2 provides a procedure for dealing with disruptive and disorderly defendants. It is based upon *Illinois v. Allen*, 397 U.S. 337 (1970), *reh'g den.* 398 U.S. 915, and ABA, Standards for Criminal Justice, *Special Functions of the Trial Judge* § 6-3.8 (3d ed. 2000).

Under Rule 10.2(a), a defendant, by disruptive conduct, may forfeit the right to be present, even in circumstances where the right could not be waived under Rule 10.1(b)(1)(ii) or (iii). In such circumstances, the court would be on safer ground to appoint advisory counsel even if the defendant had refused to accept appointed counsel.

Section (c) directs the court to use every feasible means to permit the defendant to hear and observe the proceedings. The language is intended to encourage use of any practical audiovisual devices in communicating the progress of the trial to the defendant. The rule directs the court to employ means that will let the defendant hear and observe, not participate. No court is required to use impractical and expensive technology.

Of course, the court's contempt power is also applicable to such situations. *See* Rule 33.

### Rule 10.3 - Presence of Witnesses and Spectators.

**(a) Witnesses.** The court may, and at the request of either party shall, exclude prospective witnesses from the courtroom during opening statements and the testimony of other witnesses. The court shall also direct them not to communicate with each other concerning the case until all have testified. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, the person shall not be excluded from the courtroom. Once a witness has testified on direct examination and has been made available to all parties for cross-examination and excused by the court, the witness shall be allowed to remain in the courtroom unless the court finds, upon application of a party or witness, that the presence of the witness would be prejudicial to a fair trial.

**(b) Spectators.**

(1) *Proceedings to be Open.* All proceedings shall be open to the public unless the court finds, upon application of the defendant, that an open proceeding presents a clear and present danger to the defendant's right to a fair trial by an impartial jury.

(2) *Exception for Certain Crimes.* In prosecutions for rape, adultery, fornication, sodomy or crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

(3) *Victims.* Notwithstanding the foregoing, the victim has the right to be present throughout all criminal proceedings.

**(c) Removal.** Any or all individuals may be removed from the courtroom for engaging in disorderly, disruptive, or contemptuous conduct, or when their conduct or presence constitutes a threat or menace to the court, parties, attorneys, witnesses, jurors, officials, members of the public, or a fair trial.

**(d) Record of Closed Proceedings.** A complete record of any closed proceedings shall be kept and made available to the public following the completion of trial or disposition of the case without trial.

**(e) Investigator.** If an exclusion order is entered, both the defendant and the prosecutor shall nevertheless be entitled to the presence of one investigator at counsel table.

**(f) Electronic Coverage of Proceedings.** Electronic coverage of judicial proceedings shall be governed by the Rules for Electronic and Photographic Coverage of Judicial Proceedings.

### *Comment*

Rule 10.3(a) is consistent with, but expands on, MRE 615. The power to exclude and separate witnesses at trial has long been held to be an element of the trial court's discretionary power. The policy underlying the sequestration rule is that, by preventing a witness from hearing the testimony of another witness, the risk of fabrication, collusion, inaccuracy, and shaping of testimony is minimized. Section (a) permits witnesses to attend the trial after they have concluded their testimony on cross-examination. It also permits them, even before concluding their testimony on cross-examination, to be present at all phases of the trial except opening statements or other testimony. Because it is only at those phases where exclusion promotes the truth-finding process, prospective witnesses are permitted to attend during other phases, such as jury selection and legal argument. It is



believed that the rule harmonizes the interest of a fair trial with the interest of witnesses in being personally present at the trial. The trial court retains discretion to exclude witnesses from the courtroom in those rare cases where it can be demonstrated that a fair trial cannot be held without such exclusion.

Rule 10.3(b)(1) sets forth the right of a defendant to a public trial as guaranteed by Art. III, § 26, of the Mississippi Constitution, and section (b)(2) sets forth the exception for certain crimes contained therein. Rule 10.3(b)(3) embodies a victim's right to be present set forth in MISS. CODE ANN. § 99-43-21. MISS. CODE ANN. § 99-43-3(t) defines victim to mean "a person against whom the criminal offense has been committed, or if the person is deceased or incapacitated, the lawful representative." MISS. CODE ANN. § 99-43-3(h) defines criminal proceeding as "a hearing, argument or other matter scheduled by and held before a trial court but does not include a lineup, grand jury proceeding or other matter not held in the presence of the court."

Section (c) gives the judge clear authority to clear the courtroom of any and all persons whose conduct is disruptive of the proceedings or whose presence poses a threat to others or to the proceedings. Section (d) requires a complete record of any closed proceedings be kept and be made available to the public. Section (e) entitles both parties to the presence and advice of an investigator, to call attention to factual matters of which counsel may not be aware.

The Mississippi Supreme Court has promulgated an entirely separate body of "Rules for Electronic and Photographic Coverage of Judicial Proceedings."

## RULE 11 - CHANGE OF THE PLACE OF TRIAL

### Rule 11.1 - Change of Venue.

**(a) Grounds.** In any criminal case, any defendant shall be entitled to a change of venue, if a fair and impartial trial cannot be had for any reason.

**(b) Prejudicial Pretrial Publicity.** Whenever the grounds for change of venue are based on pretrial publicity, the defendant shall be required to prove that the dissemination of the prejudicial material will probably result in the defendant being deprived of a fair trial.

**(c) Time for Filing Motion.** A motion for change of venue shall be made at the earliest opportunity before empanelling the trial jury.

**(d) Waiver.** The defendant loses the right to challenge venue pursuant to this Rule when the defendant allows a proceeding to commence or continue without objection after learning of the cause for challenge.

**(e) Renewal.** When an action is remanded by an appellate court for a new trial on one or more offenses charged in the indictment or information, all rights to change of venue are renewed, and no event connected with the first trial shall constitute a waiver.

*Comment*

Rule 11.1(a) is in accord with Mississippi constitutional and statutory provisions. Art. III, § 26 of the Mississippi Constitution provides that “all prosecutions by indictment or information, [an accused shall have the right to] trial by an impartial jury of the county where the offense was committed.” *See also* MISS. CODE ANN. § 99-15-35. A change of venue must be ordered if a fair and impartial trial cannot be had for any reason. If the request for a change of venue is based on pretrial publicity, section (b) requires the defendant to prove that the dissemination of prejudicial materials will likely result in the deprivation of a fair trial. *See Skilling v. U.S.*, 130 S. Ct. 2896 (2010).

Rule 11.1(c) requires a motion for a change of venue be made at the earliest opportunity prior to empanelling the trial jury in the case. Similarly, section (d) provides for an implied waiver where a defendant, after learning of grounds for a change in place of trial, allows a proceeding to commence or to continue without objection. A defendant may not let a proceeding continue in the hope of prevailing but, upon losing, assert a challenge to the proceeding. Under Rule 11(e), an application for change of venue may be made when a new trial is granted by an appellate court, as early as practicable before the next trial.

Rule 11.2 - Transfer to another County.

**(a) Proceedings on Transfer.** The judge, if a change in venue is granted pursuant to Rule 11.1, shall direct that a certified copy of the order granting the change of venue be transmitted to the circuit clerk of the county to which the venue has been changed. The circuit clerk of the county to which the venue has been changed must file the certified order and designate a docket number for said case for future reference. Unless otherwise directed by the judge, all pleadings, motions, orders of the court, and other matters thereafter filed shall bear both the original number of the county of original venue and the assigned number of the county of changed venue and shall be filed with the circuit clerk of the county of original venue. The judge may hear or determine all pretrial and post-trial matters in the county to which venue has been changed or in any county of the judge’s district.

**(b) Place of Trial.** In all cases in which venue has been changed it shall be within the judge's discretion, after the jury has been selected, to conduct the trial in the county of original venue, or in the county to which venue has been transferred.

**(c) Costs.** All costs of a trial transferred from one county to another county, including the cost of transporting the jury from one county to another where the same is ordered, shall be borne by the county of original venue. The clerk of the county of original venue shall handle any appeal.

### *Comment*

Rule 11.2 continues verbatim the practice under prior URCCC 6.06. It is also essentially consistent with prior statutory practice, *see* Miss. Code. Ann. §§ 99-15-37 and 99-15-43.

## RULE 12 - INCOMPETENCY AND MENTAL EXAMINATIONS

### Rule 12.1 - Effect of Incompetency; Definition.

**(a) Effect of Incompetency.** A person shall not be tried, convicted, or sentenced for a criminal offense while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings or to assist in the person's defense.

**(b) Definition of Mental Illness, Defect, or Disability.** Mental illness, defect, or disability means a psychiatric or neurological disorder that is evidenced by behavioral or emotional symptoms, including congenital mental conditions, conditions resulting from injury or disease, and developmental disabilities. The presence of a mental illness, defect or disability alone is not grounds for finding a defendant incompetent to stand trial.

### *Comment*

Rule 12.1 tracks Ariz. R. Crim. P. 11.1. The central concept underlying Rule 12 is that no defendant may be prosecuted or sentenced if, because of mental incompetence, the defendant lacks the present ability to consult with counsel with a reasonable degree of rational comprehension or is unable to understand the nature of the proceedings. The Rule broadly applies to any psychiatric or neurological disorder, including mental retardation. Once reasonable grounds exist to doubt the defendant's competence to stand trial, the procedures in Rules 12.2 through 12.6 should be followed.

The rule tracks the definition of “incompetency” articulated in *Dusky v. U.S.*, 362 U.S. 402, 402-03 (1960):

[I]t is not enough . . . that ‘the defendant [is] oriented to time and place and [has] some recollection of events[;]’ . . . the ‘test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.’

Rule 12 conforms to both the ULC Unif. R. Crim. P. 463(a) and (b), National Conference of Commissioners of Uniform State Laws (1987), and the ABA, Standards for Criminal Justice, *Criminal Justice and Mental Health Standards* § 7-4.1(a), (b), and (c) (1989). It recognizes the distinction between the standard for determining competency to stand trial and the “mental disease or defect” standard by which criminal responsibility is determined. *Lyles v. U.S.*, 254 F.2d 725 (D.C. Cir. 1957). See *Caylor v. State*, 437 So.2d 444 (Miss. 1983); Thomas Grisso, *Evaluating Competencies*, p. 64 (“Questions of criminal responsibility . . . refer to mental state at the time of the offense, whereas competency to stand trial refers to a defendant’s current mental state and functional capacities as they relate to a pending trial process. A defendant may be competent to stand trial yet have good grounds for an insanity defense. Incompetency and insanity questions are often raised in the same case, but they are distinctly separate questions controlled by different legal standards.”)

### Rule 12.2 - Examination of Defendant’s Mental Condition.

**(a) Competency to Stand Trial or Be Sentenced.** If at any time before or after indictment, the court, on its own motion or the motion of any party, has reasonable grounds to believe that the defendant is incompetent as set forth in Rule 12.1, the court shall order the defendant to submit to a mental examination.

**(b) Insanity Defense.** If the defendant has timely raised a defense of insanity pursuant to Rule 17.3(b), the court, on its own motion or the motion of any party, may order the defendant to submit to a mental examination to investigate the defendant’s mental condition at the time of the offense.

**(c) Mental Retardation in Death Penalty Cases.** If at any time the court, on its own motion or the motion of any party, has reasonable grounds to believe that the defendant’s mental retardation may bar imposition of a sentence of death, the court, on its own motion or the motion of any party, may order the defendant examined to determine whether the defendant is mentally retarded.

**(d) Contents of Motion; Order.** The motion shall state the facts upon which the mental examination is sought. The mental examination shall be conducted by a competent psychiatrist or psychologist selected by the court in accordance with Miss. Code § 99-13-11.

**(e) Medical and Criminal History Records.** All available medical and criminal history records shall be provided to the examining mental health expert as and when ordered by the court.

### *Comment*

Rule 12.2 is consistent with Ala. R. Crim. P. 11.2 and Ariz. R. Crim. P. 11.2, and incorporates the standard of former URCCC 9.06. Rule 11.2 contemplates that a procedure to have the defendant's mental competency determined should be set in motion at the earliest practicable date, even before indictment. Although the issue of competency will generally be raised during pretrial proceedings, in some instances the question will arise in the midst of a trial or during the sentencing stage. Also implicit in the rule is the recognition that it is the duty of the prosecuting attorney and the trial judge to make appropriate inquiry concerning the mental responsibility of the accused and competency to waive and plead or to stand trial on the charges. The state must have the right to request an examination to determine competency, as the U. S. Supreme Court has held that the failure to make a determination of competency when reasonable grounds appear is fundamental constitutional error. *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162 (1975); *House v. State*, 754 So.2d 1147 (Miss. 1999). The motion is also available to a co-defendant, who might be interested in the determination of the defendant's mental condition. Ordering an examination pursuant to this rule is discretionary, and should be exercised only if the court has reasonable cause to believe the defendant may not be mentally competent. In exercising judicial discretion, the court is authorized to deny the motion if there is no reasonable basis shown for questioning or examining the defendant's competency. If ordered, the defendant is compelled to submit to the examination.

Sections (a) and (b) make clear that the determination of the defendant's competency to stand trial is separate and distinct from the determination of his sanity at the time of the offense. Indeed, a motion under section (b) may prompt an investigation into the defendant's mental condition at the time of the offense, whether or not the defendant's competency to stand trial is at issue. Still, there is no reason why an examination to investigate competency cannot be combined with an examination to investigate the defendant's sanity at the time of the offense, provided that the judicial order makes a clear distinction between the two purposes for evaluation to ensure that the correct legal criteria are applied. While the test for competency is distinct, as a matter of law, from the test for sanity at the

time of the offense, the reports prepared will necessarily contain information having a substantial bearing on both issues.

Section (c) extends this process to cases in which there are reasonable grounds to believe the defendant's mental retardation may preclude the imposition of a death sentence. See *Atkins v. Virginia*, 536 U.S. 304 (2002); *Chase v. State*, 873 So.2d 1013 (Miss. 2004).

Section (d) requires that the factual basis in support of the requested mental examination be included in the motions that are filed, and that the psychiatrist or psychologist be selected by the court in accordance with MISS. CODE ANN. § 99-13-11.

Under section (e), the medical and criminal history records are provided to the examining expert, and are not to be filed with the court. Rather, a certificate of compliance should be filed with court documenting that the records were submitted as ordered.

### Rule 12.3 - Appointment of Experts.

**(a) Grounds for Appointment.** If the court determines that reasonable grounds for an examination exist, it shall appoint a qualified psychiatrist or psychologist to examine the defendant and, if necessary, to testify regarding the defendant's mental condition. If necessary, the court may appoint more than one examiner.

**(b) Examination; Commitment.** The court may order that a defendant be examined in an appropriate mental health facility, and it may commit a defendant to the Mississippi State Hospital or other appropriate mental health facility for a reasonable period of time necessary to conduct the examination if:

- (1) the defendant cannot be examined on an outpatient basis;
- (2) examination in an out-patient setting is unavailable;
- or
- (3) commitment for examination is indispensable to a clinically valid diagnosis and report.

A court may not order a defendant committed for a time longer than that reasonably necessary to conduct the examination.

**(c) Reports.**

(1) *Opinion on Competency.* If the court so orders, a psychiatrist or psychologist appointed by the court pursuant to this Rule shall submit a report containing an opinion as to whether the defendant is incompetent as defined in Rule 12.1 and the basis therefore. The report

may also include additional findings and opinions concerning whether the defendant's mental condition creates a present danger to the defendant or to others.

(2) *Cause and Treatment of Incompetency.* If the opinion is that the defendant is incompetent as defined in Rule 12.1, the report shall also state the psychiatrist's or psychologist's opinion of:

(A) the condition causing the defendant's incompetency and the nature thereof;

(B) the treatment required for the defendant to attain competency;

(C) the most appropriate form and place of treatment, in view of the defendant's therapeutic needs and potential danger to the defendant or to others, and an explanation of appropriate treatment alternatives;

(D) the likelihood of the defendant's attaining competency under treatment and the probable duration of the treatment;

(E) the availability of the various types of acceptable treatment in the local geographic area, specifying the agencies or the settings in which the treatment might be obtained and whether the treatment would be available on an out-patient basis; and

(E) whether the treatment identified in Rule 12.3(c)(2)(B) is in the best medical interest of the defendant in light of the defendant's medical condition.

(3) *Mental Condition at Time of the Offense.* In addition, if the court so orders, the report shall contain a statement of the psychiatrist's or psychologist's opinion of the following:

(A) the mental condition of the defendant at the time of the alleged offense;

(B) if the psychiatrist's or psychologist's opinion is that at the time of the alleged offense the defendant suffered from a mental disease or defect, the relation, if any, of such disease or defect to the alleged offense, including:

(i) whether the defendant knew the nature and quality of the act the defendant was doing; and

(ii) if the defendant did know it, whether the defendant knew that what the defendant was doing was wrong; and

(C) such other matters as the court may deem appropriate.

(4) *Mental Retardation in Death Penalty Cases.* In addition, if the court so orders in a death penalty case, the report shall contain a statement of the psychiatrist's or psychologist's opinion as to whether the defendant is mentally retarded.

**(d) Additional Expert Assistance.** The court may, in its discretion, appoint additional experts and order the defendant to submit to physical, neurological, psychiatric, or psychological examinations, if necessary for an adequate determination of the defendant's mental condition.

**(e) Costs.** Reasonable fees and expenses incurred by persons appointed by the court, other than as employees of the State of Mississippi, may be assessed as part of the costs of the proceeding. If the defendant is indigent, any cost or expense incurred in connection with such examinations shall be paid by the county in which the action is pending.

### *Comment*

Rule 12.3 tracks Ala. R. Crim. P. 11.3. Rule 12.3(a) provides that where "reasonable grounds" exist, the court must appoint a psychiatrist or psychologist to examine the defendant and to testify regarding the defendant's mental condition. In *Drope v. Missouri*, 420 U.S. 162 (1975), the Supreme Court recognized the difficulties inherent in making the threshold decision as to what facts constitute "reasonable grounds." In *Pate v. Robinson*, 383 U.S. 375 (1966), the Court suggested that the judge should consider, among other things, the defendant's medical history, any evidence of irrational behavior, and the defendant's demeanor. The standard set by the Court in *Dusky v. U.S.*, 362 U.S. 402 (1960), probably means that competency requires only that the defendant be able to confer with counsel and have some appreciation of the proceedings against the defendant and the defendant's involvement in them. The *Dusky* standard is one of degree, and it recognizes that many defendants have mental or emotional problems that prevent them from functioning normally in society, but that the mere existence of an emotional disturbance is not equivalent to incompetency. Inevitably, determinations of competency or incompetency must be made on a case-by-case basis.

Section (b) ensures that a defendant will not be subjected to confinement in a mental institution, unless a less restrictive alternative (such as local out-patient services) is unavailable, and it ensures that any confinement will be for only the minimum time required to conduct necessary examinations. See 18 U.S.C. § 4244. A court can commit a defendant for only the minimum time required to conduct the necessary examinations. Commitment for a time longer than that reasonably required to conduct the



examinations can be ordered only if the same stringent standards for civil commitment are followed. *See Jackson v. Indiana*, 406 U.S. 715 (1972) (indefinite commitment based on incompetence to stand trial unconstitutional). Given the availability of outpatient services, a defendant may be committed for evaluation only if such confinement is determined to be indispensable to a clinically valid diagnosis and report. Once an examination is completed, the examiner's report shall be filed the court. Continued commitment of the defendant for restoration of competence is governed by Rule 12.5(e).

Section (c) states the contents of the psychologist's or psychiatrist's report and is patterned after ALI Unif. R. Crim. P. Rule 464(h), and ABA, Standards for Criminal Justice, *Criminal Justice Mental Health Standards* § 7-4.5 (2d ed. 1986). The examiner is required to provide an opinion on competency, and the basis therefore. If the psychiatrist's or psychologist's opinion is that the defendant is incompetent to stand trial, then the psychiatrist or psychologist is directed to report on several different items to aid the court in making the complex decisions required by Rules 12.5 and 12.6: the nature of the defendant's incompetence; the likelihood that the defendant may become competent; the professional's recommendations for treatment of the defendant's mental condition, in view of the defendant's therapeutic needs and potential dangerousness; and an explanation of alternative forms of treatment that would be acceptable and available for the defendant.

Because the Rule 12.3 examination is also intended to provide information concerning a possible insanity defense, the psychologist or psychiatrist may be required, pursuant to Rule 12.2(c)(3), to report on the mental status of the defendant at the time of the alleged offense and on the relationship, if any, of any mental defect or disease to the alleged criminal act. Rule 12.3(c)(3) was not intended to establish a new legal test for insanity. It was not intended to change the tests that were in use before these criminal rules were adopted. It merely requires the psychiatrist or psychologist to describe the defendant's mental condition in broad medical language. *See Roundtree v. State*, 568 So.2d 1173 (Miss. 1990). Whether a person is mentally ill is a medical judgment that a psychologist or psychiatrist should make; whether the defendant is sufficiently ill to be exonerated of criminal responsibility, *i.e.*, whether the defendant is legally insane, is a legal judgment for the jury or trier of fact to make after proper instructions. In some circumstances, either the psychiatrist or the psychologist or the circuit court may desire the assistance of other experts to carry out physical, neurological, or psychological tests. Section (c)(4) extends these procedures to the question of the defendant's possible mental retardation in death penalty cases.

Section (d) authorizes the court to appoint additional psychologists or psychiatrists and to order the defendant to undergo further examinations and tests. The reports of these psychiatrists or psychologists should include

the required information and should be submitted to the court along with those of the other appointed examiners.

Subsection (e) expressly provides for payment of the expenses of such professionals, within limits provided by law. *See* MISS. CODE ANN. § 99-13-11. The exclusion of reimbursement of fees and expenses of state employees acting as state employees, applicable in all cases, is not intended to be discriminatory, but rather presupposes that such services will be rendered as part of their job. It should be noted that the holding in *Ake v. Oklahoma*, 470 U.S. 68 (1985), that an indigent defendant is constitutionally entitled to a psychiatrist provided at state expense, is applicable only when the defendant demonstrates to the trial judge that the defendant's sanity (or insanity) at the time of the offense is to be a significant factor at trial or that the defendant's mental state is to be a significant factor. Where a defense consultant psychologist or psychiatrist is constitutionally required, such an expert may be appointed under Rule 12.3(a).

#### Rule 12.4 - Disclosure of Mental Health Evidence.

**(a) Reports of Appointed Experts.** The reports of experts made pursuant to Rule 12.3 shall be submitted to the court within 10 working days of the completion of the examination and be made available to all parties, except that any statements of the defendant (or summaries thereof) concerning the offense charged shall be made available only to the defendant. Upon receipt, the clerk shall copy and distribute the expert's report to the court and to defense counsel. Defense counsel is responsible for editing a copy for the state which is to be returned to the clerk within 72 hours of receipt and made available to the State. All original reports shall be filed with the clerk, under seal.

**(b) Reports of Other Experts.** At least 15 working days before any hearing, any party shall make available to any other party for examination and reproduction:

- (1) the names and addresses of mental health experts who have personally examined the defendant in connection with the case or examined any evidence in the case;
- (2) the data resulting from mental examinations, scientific tests, experiments, or comparisons in connection with the case; and
- (3) all written reports or statements made by mental health experts in connection with the case.

This provision does not limit the state's duty to disclose such information under other rules, or the duty to produce exculpatory evidence.

*Comment*

Under Rule 12.4, all expert reports produced pursuant to Rule 12 are to be disclosed to the court, to the defendant's attorney, and to the prosecuting attorney. This rule is in keeping with the general philosophy of the rules, which is to keep both sides apprised of what they are to be confronted with at a competency hearing or trial. This philosophy encourages the parties to stipulate or settle matters, and preserves valuable court time for the trial of genuinely contested issues. Only one item of the report is excepted—the defendant's statements concerning the actual offense, which will be given only to the defendant. Defense counsel has 72 hours to remove privileged information. The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (defendant's privilege against self-incrimination was violated when he was not advised of right to remain silent during court-ordered examination and prosecution introduced statements). If a defendant subsequently intends to pursue a defense of insanity pursuant to Rule 17.3(b), the redacted statements of the defendant concerning the offense must be disclosed to the prosecuting attorney. *See Buchanan v. Kentucky*, 483 U.S. 402 (1987).

Rule 12.5 - Hearing and Orders.

**(a) Hearing.** If after submission of the reports to the court, reasonable grounds to doubt the defendant's competency remain, the court shall promptly hold a hearing to determine the defendant's competency. The parties may introduce other evidence regarding the defendant's mental condition or, by written stipulation, submit the matter on the experts' reports.

**(b) Procedure.** Any time a competency hearing is held, the defendant shall be represented by counsel and, if the defendant is financially unable to obtain adequate representation, counsel shall be appointed for the defendant. The defendant shall also be afforded an opportunity to testify, to present evidence, to subpoena witnesses, and to confront and cross-examine witnesses who appear at the hearing.

**(c) Finding of Competence.** If the court finds that the defendant is competent to stand trial, then the court shall make the finding a matter of record and order the case to proceed to trial.

**(d) Finding of Incompetence; No Restoration.** If the court finds by a preponderance of the evidence that the defendant is incompetent to stand trial, but finds no substantial

probability that the defendant will be restored to competency within a reasonable period of time, it shall proceed pursuant to subsection (g) below.

**(e) Finding of Incompetence; Restoration.** If the court finds by a preponderance of the evidence that the defendant is incompetent to stand trial, but finds that there is a substantial probability that the defendant will be restored to competency within a reasonable period of time, it shall order competency restoration treatment, and may enter an order committing the defendant to the Mississippi State Hospital or other appropriate mental health facility. The competency restoration treatment order shall require that the defendant be examined, and a written report be furnished to the court, every 4 calendar months, stating:

- (1) whether there is a substantial probability that the defendant will become competent to stand trial within the foreseeable future; and
- (2) whether progress toward that goal is being made.

All such treatment orders shall further specify the place where treatment will occur; whether the treatment is inpatient or outpatient; transportation to the treatment site; length of treatment; and transportation after treatment. The treatment order shall also specify that the court shall be notified if the defendant regains competency before the expiration of the treatment order. Upon notice to the parties, the treatment order may be modified by the court.

**(f) Consent to Treatment.** The defendant's attorney, as the defendant's representative, shall not waive any hearing required by this Rule, but is authorized to consent, on behalf of the defendant, to necessary surgical, psychiatric, or medical treatment, and procedures.

**(g) Release from Commitment.** If within a reasonable time after entry of a treatment order pursuant to section (e) above, there is neither a determination that there is a substantial probability that the defendant will become competent to stand trial nor progress toward that goal, the court shall, on the request of any party or on the court's own motion:

- (1) order that civil proceedings as provided in Miss. CODE ANN. § 41-21-61 to 41-21-107 be instituted; or
- (2) release the defendant and dismiss the charges without prejudice.

In addition, the court may order appointment of a guardian as provided by law.

*Comment*

Rule 12.5 is modeled in part after Ariz. R. Crim. P. 11.5 and Ala. R. Crim. P. 11.6. In *Pate v. Robinson*, 383 U.S. 375 (1966), the United States Supreme Court held that if “sufficient doubt” exists as to the defendant’s present competency to stand trial, then the defendant is constitutionally entitled to a hearing on that question. Following *Pate*, the United States Supreme Court in *Drope v. Missouri*, 420 U.S. 162 (1975), further concluded that a competency hearing is not limited to pretrial procedures, but exists where the defendant’s present competency is brought into question during trial and reasonable grounds exist to doubt the defendant’s competency to stand trial. See *Sanders v. State* 9 So.3d 1132 (Miss. 2009). However, if after submission of the reports no reasonable grounds still exist to doubt the defendant’s competency, a hearing is not mandatory. This represents a departure from practice under former URCCC 9.06. See *Hearn v. State*, 3 So.3d 722 (Miss. 2008); *Sanders v. State*, 9 So.3d 1132 (Miss. 2009) (because URCCC 9.06 provides that the court “shall conduct a hearing,” the court must hear testimony and make record findings before or at trial). Rather, section (a) authorizes the court to make a preliminary determination that reasonable grounds exist to conduct a competency hearing. Authorizing the court to make this initial determination will avoid mandating a competency hearing when reasonable grounds no longer exist to doubt the defendant’s competency to stand trial, as evidenced by the reports of the examining psychologists or psychiatrists. While this procedure safeguards valuable court time and resources, it also ensures that the defendant’s right to a competency hearing before a judge will be preserved when reasonable grounds exist to doubt the defendant’s mental competency. Of course, the reports remain part of the record, whether a hearing is held or not, and section (a) permits the parties by written stipulation to submit the competency question to the court on the basis of solely the written reports.

Section (b) describes the hearing that a defendant must be afforded after the reports have been compiled and the court has made its preliminary review. The right to counsel is recognized in federal practice. See 18 U.S.C.A. 4247(d). One who has been adjudged incompetent and committed to a hospital or therapeutic program for even a short time is hardly capable of defending one’s own interests.

Under section (e), if the court finds the defendant to be incompetent, but not permanently so, it has a wide range of options. It can commit the defendant to a mental institution, if it finds that institutional treatment would be the most appropriate form of therapy. No order made under this section is to be effective for longer than 4 months, thereby insuring a frequent review of each incompetent’s status and progress. See *O’Connor v. Donaldson*, 422 U.S. 563 (1975). Section (e) largely continues the procedure applicable under former URCCC 9.06.

Section (g) has been drafted to comply explicitly with the *Jackson v. Indiana*, 406 U.S. 715 (1972), which held that the state’s power to commit an incompetent person accused of a criminal offense to a mental institution

is severely limited by the due process and equal protection clauses. If the court finds the condition of the defendant to be permanent, it can either order commitment proceedings be commenced pursuant to Miss. CODE ANN. § 41-21-61 *et. seq.*, or release the defendant outright. Moreover, while the Supreme Court in *Jackson* did not reach the question of the disposition of the charges against the defendant, it broadly implied that the sixth amendment right to a speedy trial may be applicable to such situations. *Jackson v. Indiana*, 406 U.S. at 740. See *Klopfner v. North Carolina*, 386 U.S. 213 (1967) (indefinite suspension of a prosecution violated the petitioner's constitutional right to a speedy trial).

### Rule 12.6 - Subsequent Hearings.

**(a) Grounds.** The court shall hold a hearing to redetermine the defendant's competency:

- (1) on receiving a report from an authorized treating official stating that in the official's opinion the defendant has become competent to stand trial;
- (2) on motion of the defendant, accompanied by the certificate of a mental health expert stating that in the expert's opinion the defendant is competent to stand trial;
- (3) at the expiration of competency restoration treatment ordered pursuant to Rule 12.5(d); or
- (4) on the court's motion at any time.

The parties may, by written stipulation, submit the matter on the experts' reports.

**(b) Finding of Competency.** If the court finds by a preponderance of the evidence that the defendant is competent, the regular proceedings shall recommence without delay. The defendant shall be entitled to repeat any proceeding if there are reasonable grounds to believe the defendant was prejudiced by the defendant's previous incompetency.

**(c) Finding of Continuing Incompetency.** If the court finds that the defendant is still incompetent, the court shall proceed in accordance with Rules 12.5(e) or (g).

### *Comment*

Rule 12.6 follows Ariz. R. Crim. P. 11.6. Section (a) is intended to insure that the mental condition of all defendants adjudicated incompetent will be thoroughly reviewed at reasonably frequent intervals. This is intended to obviate the very real danger that a defendant could be incarcerated for a number of months or years on minor charges when the condition would not justify civil commitment (*e.g.*, in any case where a defendant is incompetent but not a danger to one's self or others). Competency hearings

are normally considered to be a protective device for the defendant; it is an abuse of due process to try a person who is not able to defend. *See Pate v. Robinson*, 383 U.S. 375 (1966). In addition, the holding in *Jackson v. Indiana*, 406 U.S. 715 (1972), established the necessity for frequent review, by requiring that the continuing (as opposed to initial) commitment of the defendant must be justified by a showing of progress toward recovery of competency.

Section (c) directs the court upon finding that the defendant is still incompetent to reconsider the alternatives presented in Rule 12.5(e) and (g). *Jackson v. Indiana* held that the continuing commitment of a defendant must be justified by an appropriate showing by the state; therefore, the initial findings of the court are not relevant to its options at this point, which should be considered anew.

### Rule 12.7 - Privilege.

**(a) General Restriction.** No evidence of any kind obtained under this Rule 12 shall be admissible at any proceeding to determine guilt or innocence unless the defendant presents evidence intended to rebut the presumption of sanity.

**(b) Privileged Statements of Defendant.**

(1) *Charged Events.* No statement of the defendant obtained under this Rule 12, or evidence resulting therefrom, concerning the events which form the basis of the charges against the defendant shall be admissible at the trial of guilt or innocence, or at any subsequent proceeding to determine guilt or innocence, without the defendant's consent.

(2) *Other Events.* No statement of the defendant or evidence resulting therefrom obtained under this Rule 12, concerning any other events or transactions, shall be admissible at any proceeding to determine the defendant's guilt or innocence of criminal charges based on such events or transactions.

### *Comment*

Rule 12.7 tracks Ariz. R. Crim. P. 11.7. The Supreme Court has recognized that use of a defendant's statements during a court-ordered examination may compromise the defendant's right against self-incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981). Thus, the prosecution may not make use of evidence obtained by compulsory mental examination of the defendant unless the defendant offers, either directly or through cross-examination, evidence in support of the affirmative defense of insanity. *Powell v. Texas*, 492 U.S. 680, 683-84 (1989) (defendant waives the privilege if the defendant introduces expert testimony on mental condition); *Jordan v.*

*State*, 786 So.2d 897 (Miss. 2001). A defendant compelled to submit to a mental examination can self-incriminate in four ways. First, admissions and statements may implicate the defendant in the crime charged. Second, statements and admissions may implicate the defendant in other different crimes. Third, the evidence of the defendant's mental condition may help the state build its prima facie case by establishing the *mens rea* element (whether or not the defendant attempts an insanity defense). Finally, if the defendant raises the insanity defense, the compulsory examination has forced the defendant to provide the state with evidence, which might well defeat it. Rule 12.7(b)(1) privileges absolutely any statement made by the defendant during the course of the examination, which concerns the events from which the criminal charges stem, "unless the defendant presents evidence intended to rebut the presumption of sanity."

### RULE 13 - THE GRAND JURY

#### Rule 13.1 - Selection and Preparation of Grand Jurors.

**(a) Summons.** Grand jurors shall be summoned and empanelled as provided by law.

**(b) Service of Grand Jury.**

(1) *Generally.* Grand juries may serve both in term time and vacation and any circuit judge may empanel a grand jury (including an appropriate number of alternate grand jurors) in term time or vacation.

(2) *Number of Grand Jurors.* The grand jury shall consist of at least 15 persons, but not more than 20 persons, the exact number to be within the discretion of the judge empanelling the jury. If during the service of a grand jury the number of grand jurors, including alternates, able to serve on the grand jury shall become less than 15, then the circuit judge may have additional grand jurors summoned and empanelled.

(3) *Convening the Grand Jury; Adjournment.* Upon empanelment, a grand jury may be convened and reconvened by order of the court. The grand jury will continue to serve until the next grand jury is empanelled and it may return indictments to court in term or vacation notwithstanding intervening terms of court between the time the grand jury is empanelled and the time an indictment is returned. The court may adjourn the grand jury in its discretion.

**(c) Voir dire.**

(1) *Examination of Prospective Jurors.* The examination of prospective grand jurors shall include, but need not be limited to, inquiries to determine that a juror is



qualified according to law and that the juror will act impartially and without prejudice.

(2) *Empanelling Conclusive Evidence of Grand Jury Competency.* After the grand jurors have been sworn and empanelled, no objection shall be raised, by plea or otherwise, to the grand jury, but the empanelling of the grand jury shall be conclusive evidence of its competency and qualifications. However, any party interested may challenge or except to the array for fraud.

### *Comment*

Rule 13.1 follows former URCCC 7.01 and 7.02, and specifically incorporates the procedure for summoning and impaneling grand juries provided by statute, MISS. CODE ANN. § 13-5-1 *et. seq.*, as provided in Article 14, Section 254 of the Mississippi Constitution of 1890. Rule 13.1(b) permits regular and alternate grand jurors to be sworn and empanelled at the same time; when the grand jury is then convened, the alternate grand jurors may be dismissed until their service becomes necessary.

### Rule 13.2 - Instructions, Duties, and Powers of Grand Jury.

#### **(a) Charge to the Grand Jury.**

(1) *By Whom.* Only the circuit judge shall deliver the charge to the grand jury, except that the circuit clerk may read the charge as proposed by the circuit judge when the judge shall be unable to deliver the charge by reason of physical infirmity.

(2) *Charge.* The circuit judge shall charge the grand jury according to the matters required by law and other statutes as the judge deems fit and proper. In addition, the court shall inform the grand jurors of:

(A) their duty to be present at each session of the grand jury;

(B) their duty to inquire into every matter presented pursuant to law;

(C) their duty to return an indictment only if they are convinced that there is probable cause to believe that an offense has been committed and that the person under investigation committed it;

(D) their right to request the presentation of additional evidence by the prosecutor; and

(E) those grand jury matters which are confidential and the penalties for wrongful disclosure thereof.

**(b) Access to Papers, Records, Accounts, and Books of County Officers.** The grand jury shall have free access at all proper hours to the papers, records, accounts and books of all county officers, for all examinations which, in its discretion, it may see fit to make, and may make report to the court in relation thereto.

*Comment*

Rule 13.2(a) is derived from former URCCC 7.01 and 7.02 and Ariz. R. Crim. P. 12.1(d). Rule 13.2(b) incorporates Miss. CODE ANN. § 13-5-57.

Rule 13.3 - Grand Jury Foreperson.

**(a) Selection of Foreperson; Oath.**

*(1) Foreperson and Acting Foreperson.* The court shall appoint a foreperson of the grand jury, and an acting foreperson to act in the foreperson's absence, to whom the following oath shall be administered in open court, in the presence of the rest of the grand jurors:

You, as foreperson of this grand inquest, shall diligently inquire into, and true presentment make, of all such matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. The counsel of the state, your fellows, and your own you will keep secret. You shall not present any person through malice, hatred or ill will, nor shall you leave any person unrepresented through fear, favor or affection, or for any reward, hope or promise thereof, but in all your presentments, you shall present the truth, the whole truth, and nothing but the truth, to the best of your skill and understanding. So help you God.

*(2) Oath of Other Grand Jurors.* The following oath shall be administered to the other jurors:

The same oath that your foreperson has now taken before you on the foreperson's part, you, and each of you, shall well and truly observe, and keep on your respective parts. So help you God.

*(3) Replacement of Foreperson.* If a foreperson or acting foreperson becomes unable to continue service as a grand juror, the court shall appoint another member of the grand jury as replacement. The fact that the original foreperson or acting foreperson was replaced shall not be grounds for attacking the validity of the acts or indictments of the grand jury.

**(b) Powers of Foreperson.** The foreperson shall preside over the grand jury proceedings and act as the court's representative by maintaining order, administering oaths, excluding unauthorized persons and persons acting in an unauthorized manner, appointing such officers within the grand jury as are necessary for its orderly functioning, and performing such other duties as may be imposed on the foreperson by law or by order of the court.

**(c) Duties of Foreperson.** It is the duty of the foreperson to:

- (1) preside over the grand jury proceedings;
- (2) issue or cause to be issued subpoenas and subpoenas *duces tecum* for any witnesses whom the grand jury may require to give evidence, and if witnesses so summoned fail to appear, to endorse the returned subpoenas as defaulted;
- (3) perform the following functions with respect to witnesses appearing before the grand jury:
  - (A) swear witnesses before the grand jury or cause them to be sworn by the prosecutor; and
  - (B) maintain a list of all witnesses summoned and in attendance before the grand jury during each session; and
- (4) endorse any indictment returned by the grand jury a "True Bill" and sign the foreperson's name thereto; and
- (5) submit a written report of the proceedings of the grand jury to the court or clerk.

#### *Comment*

Rule 13.3 is modeled after URCCC 7.02, Ariz. R. Crim. P. 12.4, and Fed. R. Crim. P. 6. The oaths are taken from statute, *see* MISS. CODE ANN. § 13-5-35. The oaths may be administered to all grand jurors – including the foreperson and alternates – at the same time. The powers of the foreperson should be included in the charge to the grand jury.

#### Rule 13.4 - Recalcitrant Witnesses; Contempt.

**(a) Recalcitrant Witnesses.** When a witness under examination before the grand jury refuses to testify, to answer a question or to give evidence, the grand jury shall proceed with the witness in open court. The foreperson shall then distinctly state to the court the question or evidence requested and the refusal of the witness. If, after inquiry, the court decides that the witness is bound to testify, answer or give the evidence, the court shall so inform the witness. If the witness persists in refusing to answer the question, or

testify, or to give evidence, the court shall proceed with the witness as in cases of similar refusal in open court.

**(b) Request for Contempt Proceedings.** The foreperson may also request the court to initiate a contempt proceeding against any person whose conduct violates these Rules or disrupts the grand jury proceedings.

#### *Comment*

Rule 13.4(a) preserves prior URCCC 7.05. Rule 13.4(b), taken from Ariz. R. Crim. P. 12.4(b), authorizes the foreperson to request the court to employ its enforcement powers to secure compliance with these rules through a contempt proceeding under Rule 33.3.

#### Rule 13.5 - Persons Authorized to be Present During Sessions of the Grand Jury; Grand Jury Secrecy.

**(a) Persons Authorized to be Present.** No person other than the witness under examination, prosecutors authorized to present evidence to the grand jury, and the interpreter, if any, shall be present during sessions of the grand jury. No person other than the grand jurors shall be present during their deliberation and voting.

**(b) Grand Jury Secrecy.**

*(1) Generally.* A grand juror, except when called as a witness in court, shall keep secret the proceedings and actions taken in reference to matters brought before the grand jury for 6 months after final adjournment of the grand jury and the name and testimony of any witness appearing before the grand jury shall be kept secret.

*(2) Announcements Concerning Deliberations Prohibited.* No attorney general, district attorney, county attorney, or any other prosecuting attorney or any other officer of the court shall announce to any unauthorized person what the grand jury will consider in its deliberations. If such information is disclosed, the disclosing person may be found in contempt of court punishable by fine or imprisonment.

*(3) Disclosure of Indictments Prohibited.* No grand juror, witness, attorney general, district attorney, county attorney, other prosecuting attorney, clerk, sheriff or other officer of the court shall disclose to any unauthorized person that an indictment is being found or returned into court against a defendant or disclose any action or proceeding in relation to the indictment

before the finding of an indictment or within 6 months thereafter or before the defendant is arrested or gives bail or recognizance.

### *Comment*

Rule 13.5(a) embraces Ariz. R. Crim. P. 12.5. Rule 13.5(b) preserves prior URCCC 7.04. Rule 13.5(b)(2) authorizes the court to employ its contempt powers pursuant to Rule 33.3 to punish unauthorized disclosure of grand jury deliberations. *But see* MISS. CODE ANN. § 99-7-9 (permitting prosecuting attorney with knowledge of the status of a criminal charge to inform victim). While no provision provides for the recording of grand jury proceedings, Rule 13.5 does not prohibit recording of grand jury testimony by persons authorized to be present under section (a). When a recording is made, it must be disclosed: under Rule 17.2(a)(1) if the witness to whom the recording relates is to testify for the state at trial; under Rule 17.2(a)(8) if the recorded testimony is exculpatory; or on a showing of “substantial need” under Rule 17.2(f). This is consistent with prior practice. *See Addikson v. State*, 608 So.3d 304 (Miss. 1992) (disclosure of recorded statements of prosecution witness); *De La Beckwith v. State*, 707 So.2d 547 (Miss. 1997) (disclosure of recorded inconsistent statements of defense witness); *Kelly v. State*, 783 So.2d 744 (Miss. Ct. App. 2000) (defendant must show “particular need” for record of grand jury material other than statements of prosecution witnesses). As many jurisdictions require the recording of grand jury proceedings (*see, e.g.*, Ala. R. Crim. P. 12.6, Ariz. R. Crim. P. 12.8, and Fed. R. Crim. P. 6(e)), the law regarding disclosure of recorded grand jury testimony is well developed.

### Rule 13.6 - Grand Jury Proceedings.

**(a) Number of Grand Jurors Necessary to Indict; Grand Jury Not To Do Certain Things.** A grand jury has the power to indict any person upon affirmative vote of 12 or more grand jurors. The grand jury report should not accuse any person by name of an offense, malfeasance or misfeasance unless an indictment is returned. If accusations are included in a grand jury report, the comments may be expunged upon the motion of the individual, or on motion of the court.

**(b) Return of Indictment.** When an indictment is found, it must be endorsed “A True Bill,” and the indictment must be signed by the foreperson and one of the prosecuting attorneys.

**(c) Presentment of Indictments and Grand Jury Reports.** All indictments and grand jury reports must be presented to the clerk of the circuit court by the foreperson or the

foreperson's designee, must be endorsed with the foreperson's name, and must be accompanied by the foreperson's affidavit that all indictments were concurred in by 12 or more members of the grand jury and that at least 15 grand jurors were present during all deliberations. Indictments and reports must be marked "filed" and dated and signed by the clerk. Unless the party indicted is in custody or on bond or recognizance, entry of the indictment shall be by number only, and no publicity may be given to the existence of the indictment. An arrest warrant for the person indicted shall immediately issue and be served. After the arrest of the person indicted, and before arraignment, a copy of the indictment shall be served on such person.

**(d) Notice of Supervening Indictment.** If the defendant has previously been released on bond or on recognizance, or had an initial appearance under Rule 5.2, the court or the circuit clerk may prepare and send to the defendant, defendant's counsel, or defendant's bondsperson a notice of indictment in lieu of issuing a warrant or summons.

**(e) Failure to Return an Indictment.** If the defendant is in custody or has been conditionally released, and the charge has been presented to the grand jury and no indictment is returned, the foreperson shall promptly so report to the court in writing, and, unless the court shall order otherwise, the defendant held shall be released forthwith from custody or if the defendant has previously been conditionally released, the defendant shall be relieved of any obligation made in connection with such conditional release.

### *Comment*

Rule 13.6 generally follows Ala. R. Crim. P. 12.8. MISS. CODE ANN. § 99-7-11 requires the concurrence of 12 grand jurors to indict. Rule 13.6(b) requires the indictment be endorsed "A True Bill" and be signed by both the foreperson and a prosecuting attorney. Rule 13.6(c) embodies the statutory requirements contained in MISS. CODE ANN. § 99-7-9.

Section (d) tracks Ariz. R. Crim. P. 12.7, and is intended to conserve the time of the court and law enforcement personnel that would otherwise be spent issuing and serving a warrant or summons following return of an indictment in those cases in which an initial release decision has already been made.

Under section (e), it is the explicit duty of the foreperson to inform the court immediately of the inability of the grand jury to return an indictment. Section (e) provides that the defendant is entitled immediately to be released from custody or other condition—unless the court orders otherwise,

for instance when excusable delay prevents the collection of necessary lab results or other reports.

Rule 13.7 - Appearance of Persons Under Investigation; Immunity and Privilege.

**(a) Appearance.** A person under investigation by the grand jury may be invited to appear before the grand jury, or, upon that person's written request, may be permitted to appear before the grand jury. Unless immunity has been granted to the witness as provided in section (b) hereof, the witness shall be advised of the right to remain silent, that anything the witness says may be used against the witness in a court of law, that the witness has the right to consult in private with an attorney outside the grand jury room at reasonable intervals while giving testimony, that, if the witness is unable to employ counsel because of indigency as defined in Rule 7.3, the court will appoint an attorney to represent the witness, and that the witness can at any time stop giving testimony and refuse to answer further questions.

**(b) Immunity and Privilege.** In any investigation before a grand jury, the court, on written motion of the prosecuting attorney may, in writing, order that any material witness be granted immunity from prosecution for the offense or offenses under investigation and any related or lesser included offense or offenses thereof. In considering whether to grant immunity, the court shall take into consideration the possibility that the testimony of the witness may tend to incriminate the witness for another offense or offenses against the State of Mississippi, or for an offense or offenses over which the United States government, or another state or territory of the United States, or a foreign jurisdiction with which the United States has treaties of extradition has jurisdiction. In such case, the court shall grant immunity only if the prosecuting attorney has procured binding assurance from the appropriate officials that the witness shall be granted immunity from prosecution for such other offense or offenses and any related or lesser included offenses thereof. Immunity granted by court order pursuant to this rule may be pleaded in bar of any prosecution of the witness for any offense for which immunity was granted.

**(c) Compelling a Witness to Testify.** No witness granted immunity under section (b) above (other than a person under investigation) may refuse to testify on the ground that such testimony may self-incriminate. No person under investigation shall be compelled to testify.

*Comment*

Rule 13.7 is modeled after Ala. R. Crim. P. Rule 12.7. Rule 13.7 applies only to persons under investigation by the grand jury and does not reach persons called only as witnesses and not under suspicion.

Section (a) permits a person under investigation by the grand jury to appear before that body by written request. The rule is discretionary, and does not create an absolute right on the part of a person under investigation to appear before the grand jury. Federal courts have long held that a potential defendant has no absolute right to appear before a grand jury. *See, e.g., Duke v. U.S.*, 90 F.2d 840, 841 (4th Cir.), *cert. denied*, 302 U.S. 685 (1937). Still, the interests of justice are served by allowing the grand jury, in its discretion, to either permit or disallow the person under investigation to appear: “[t]he grand jury has in all ages stood between the accused and his unjust accusers.” While there is no right to cross-examine witnesses or to introduce evidence in rebuttal, “one accused of crime may often times, by himself testifying before the grand jury clear up the charges against him so that no indictment is returned.” *U.S. v. Levinson*, 405 F.2d 971, 980 (6th Cir.), *cert. denied*, 395 U.S. 958 (1968). Consistent with practice in federal courts, a person under investigation is given the right to consult with an attorney outside the grand jury room, as a means of safeguarding the right against self-incrimination.

Section (b) provides for a grant of transactional immunity to witnesses who are called to appear before the grand jury. The difficult part of a rule granting immunity is the scope of the immunity. On one hand, it is impermissible for the state to coerce testimony under a grant of immunity—which removes the protection of the Fifth Amendment—and then use information gained to prosecute for related offenses. Thus, the scope of the immunity to be granted takes into consideration incrimination for other offenses in Mississippi, the United States, other states, and United States territories and foreign jurisdictions with whom the United States has treaties providing for extradition. It should also be clear that a witness, who has been called to appear before a grand jury without a grant of immunity, may not waive the right to remain silent and still obtain immunity by testifying voluntarily. Similarly, a witness appearing under a specific grant of immunity may not voluntarily give incriminating testimony about offenses beyond the scope of the immunity granted and thereby extend the immunity into an area broader than intended by the court. *See Kastigar v. U.S.*, 406 U.S. 441 (1972). “Related” offenses under Rule 13.7(b) means those offenses that could be joined in the same indictment under Rule 14.3(a). *See Gause v. State*, 65 So.3d 295 (Miss. 2011).

Section (c) provides that a witness granted immunity may not refuse to testify based on the privilege against self-incrimination; enforcement of the witness’s duty would be pursuant to the court’s contempt powers under Rule 33. While a target of an investigation may be invited to testify before the grand jury, and may be offered immunity pursuant to section (b), section (c) provides that a person under investigation may not be compelled to



testify even if offered immunity. This is a departure from current practice. See *Wright v. McAdory*, 536 So.2d 897, 903-904 (Miss. 1988) (“Because an individual may not involuntarily be stripped of his privilege against self-incrimination, he may be compelled to testify before the grand jury only when the grant of immunity is coextensive with the protections he enjoys under the Constitution. Any immunity grant which affords the individual less protection than is otherwise available to him by law is by definition inadequate. . . . If the immunity to this extent is granted in writing, the witness enjoys an immunity coextensive with rights otherwise available to him under our law. There is thus no longer any possibility of self-incrimination that leads to prosecution. Under such circumstances, the witness may be called before the grand jury. He may be held in contempt if he refuses to answer the same as any other witness.”)

### Rule 13.8 - Challenge to Grand Jury Proceedings.

**(a) Grounds.** The grand jury proceedings may be challenged only by motion for a new finding of probable cause alleging that the defendant was denied a substantial procedural right, or that an insufficient number of qualified grand jurors concurred in the finding of the indictment.

**(b) Timeliness.** A motion under section (a) may be filed only after an indictment is returned and at or before arraignment or by such later date as may be set by the court; provided, however, that if counsel is appointed for the first time at arraignment, the court shall give counsel a reasonable time within which to file the motion.

#### *Comment*

Rule 13.8 governs challenges to the proceedings of the grand jury, and is modeled after Ariz. R. Crim. P. 12.9. The first ground for relief includes failure to comply with Rules 13.1 – 13.7, where that failure can be characterized as denying the defendant a substantial right. The second ground recognizes that, since the votes of individual grand jurors are not recorded, the presence of even one unqualified juror may constitute a ground for challenging the indictment; for example, if only 12 jurors concurred in the indictment, the state could not demonstrate that the unqualified juror was not in that number. Challenges to the legal sufficiency of an indictment are governed by Rule 14.5, which provides that an indictment may be dismissed based on challenges to the composition of the grand jury or venire, but “[n]o charge shall be deemed invalid . . . for any defect or imperfection in the charge that does not tend to prejudice the substantial rights of the defendant upon the merits.”

Section (b) follows the procedure set forth in Ala. R. Crim. P. 12.9(b). Objection to commencement of the proceedings, including a grand jury

proceeding, must be made before trial. Thus the motion must be filed before a plea is entered under Rule 15.3, unless the court permits a later filing.

### Rule 13.9 - Dismissal.

**(a) By the Prosecutor.** The prosecuting attorney may, with leave of court having jurisdiction thereof, dismiss an indictment or complaint, or any count thereof.

**(b) Unnecessary Delay.** The court may dismiss an indictment or complaint, or any count thereof, if unnecessary delay occurs in bringing a defendant to trial.

**(c) Abandonment of Prosecution.** If no indictment has been returned by the grand jury within 6 months after the filing of the complaint, or before the discharge of the 2nd regularly scheduled grand jury in the County in which the complaint has been filed, whichever occurs later, the prosecution shall be deemed abandoned and the clerk shall enter a dismissal of the prosecution, unless the prosecuting attorney shows the court good cause why the complaint should not be dismissed.

**(d) Effect of Dismissal.** Dismissal of a prosecution shall be without prejudice to the commencement of another prosecution, unless the court orders that the interests of justice require that the dismissal be with prejudice. The former practice of “*nolle prosequi*,” remand, pass to the inactive file, and all similar practices, however named, are hereby abolished.

**(e) Release of Defendant; Discharge of Bond.** When a prosecution is dismissed or abandoned, the defendant shall be released from custody, unless the defendant is in custody on some other charge, and any bond shall be discharged or money deposited in lieu thereof shall be refunded.

### *Comment*

Rule 13.9(a) and (b) parallel Fed. R. Crim. P. 48. Rule 13.9(a) requires the prosecuting attorney to seek permission of the court to dismiss a prosecution, which is consistent with MISS. CODE ANN. § 99-15-53. Rule 13.9(b) recognizes the court retains some discretion in determining what constitutes unnecessary delay.

Section (c) addresses circumstances in which the grand jury has returned neither “a true bill” nor “no bill,” and instead has taken no action in a case (the provisions of section (c) are, of course, moot if an indictment is returned). Section (c) deems a prosecution abandoned in cases not presented to the grand jury in a timely manner. The rule thus prevents a

defendant from being bound over to the grand jury indefinitely. Instead, the clerk is directed to enter a dismissal of the prosecution when no indictment has been returned within *the greater of* 6 months or the discharge of the second regularly scheduled grand jury. Section (c) assumes that bindover documents will be delivered to the clerk, and presumes the prosecuting attorney will be kept apprised of the status of the case. If a dismissal is not entered by the clerk as required by section (c), a motion to enter a dismissal may be filed. "Good cause" for avoiding dismissal can include waiting on pending reports of laboratory or other scientific testing.

Rule 13.9 (d) and (e) are taken from Ariz. R. Crim. P. 16.6(d) and (e). Rule 13.9(d) specifically abolishes all other formal and informal means by which a prosecution is dismissed or abandoned, however named. While a dismissal of a complaint is without prejudice unless the court so specifies, the Rule does not contemplate that the complaint may simply be re-filed. See *Conwill v. State*, 2010-CP-00670-COA (Miss. Ct. App. 2011).

#### RULE 14 - INDICTMENT

##### Rule 14.1 - Scope of Rules Applicable to Felony Cases.

Rule series 14 and 15 of these Rules are mandatory in felony proceedings but apply at the discretion of the court in misdemeanor proceedings.

##### Rule 14.2 - Definition; Nature and Contents.

**(a) Definition of Indictment.** An indictment is a written statement charging the defendant or defendants named therein with the commission of an indictable offense, presented to the court by a grand jury, endorsed "A True Bill," and signed by the foreperson.

**(b) Contents Generally.**

(1) *Elements and Notice.* The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation. Formal and technical words are not necessary in an indictment, if the offense can be substantially described without them.

(2) *Other Matters.* An indictment shall also include the following:

- (A) the name of the accused;
- (B) the date on which the indictment was filed in court;
- (C) a statement that the prosecution is brought in the name and by the authority of the State of Mississippi;

- (D) the county and, in multi-district counties, the judicial district in which the indictment is brought;
- (E) the date and, if applicable, the time at which the offense was alleged to have been committed. Failure to state the correct date shall not render the indictment insufficient;
- (F) the signature of the foreperson of the grand jury issuing it; and
- (G) the words “against the peace and dignity of the state.”

(3) *Surplussage*. The court on motion of the defendant may strike from the indictment any surplussage, including unnecessary allegations or aliases.

**(c) Enhanced Punishment for Subsequent Offenses and Allegations Required to be Found by the Jury.**

(1) In cases involving enhanced punishment for subsequent offenses, the indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offenses constituting the previous convictions, the state or federal jurisdiction of any previous conviction, and the date of judgment.

(2) The indictment must include all allegations required to be found by a jury.

**(d) Charging the Offense.** The indictment shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated.

**(e) Incorporation by Reference.** A count may incorporate by reference facts alleged in another count.

**(f) Notice of Necessarily Included Offenses.** Specification of an offense in an indictment shall constitute a charge of that offense and of all offenses necessarily included therein.

**(g) Motion for a Bill of Particulars.** A motion for a Bill of Particulars may be made at any reasonable time before trial, which motion shall be granted for good cause shown.

*Comment*

Rule 14.2(b) continues former URCCC 7.06. The remaining sections of Rule 14.2 track Ala. R. Crim. P. 13.1(a) and 13.2, and are consistent with federal practice under Fed. R. Crim. P. 7. Generally speaking, the Rule is designed to simplify pleading in criminal cases, similar to the simplification of pleading in civil actions; for example, section (e) permits incorporation of facts by reference, as is routinely done in civil matters.

Section (c) builds on practice under former URCCC 11.03. As before, section (c)(1) requires the indictment to give notice that the defendant is charged as an habitual offender. Section (c)(2) covers all other facts that may be used to enhance sentence, which the Constitution requires to be found by a jury. *See Apprendi v. U.S.*, 530 U.S. 466 (2000) (“[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.”)

Section (d) requires the citation to any applicable statute, regulation, or the like, so the accused and counsel may know precisely what offense is charged. Section (f) provides that allegation of facts constituting an offense will encompass all lesser offenses necessarily included therein, without the need for an explicit statement to that effect. *See Downs v. State*, 962 So.2d 1255 (Miss. 2007); *Porter v. State*, 616 So.2d 899 (Miss. 1993).

Section (g) provides a necessary safeguard for the defendant. As in Fed. R. Crim. P. 7(f), and similar to a motion for a more definite statement in civil practice, a defendant can compel the government to submit additional details of the offense through the familiar vehicle of a “Bill of Particulars,” details not required to be set out in the body of the indictment. The “good cause” requirement ensures that such motions will not routinely be made or granted; rather, a defendant must identify what particular information is sought and why.

### Rule 14.3 - Joinder and Consolidation for Trial.

**(a) Joinder of Offenses.** The indictment may charge a defendant in separate counts with two or more offenses triable in the same court if the offenses charged – whether felonies or misdemeanors or both – are:

- (1) of the same or similar character;
- (2) based on the same act or transaction; or
- (3) connected with or constitute parts of a common scheme or plan.

**(b) Joinder of Defendants.** The indictment may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

**(c) Trial of Joined Offenses.**

- (1) Where 2 or more offenses are properly charged in separate counts of a single indictment, all such charges may be tried in a single proceeding.
- (2) The trier of fact shall return a separate verdict for each count of an indictment drawn under subsection (a) of this Rule.

**(d) Sentencing.** When a defendant is convicted of 2 or more offenses charged in separate counts of an indictment, the court shall impose separate sentences for each such conviction. Nothing contained in this Rule, however, shall be construed to prohibit the court from exercising its authority to suspend either the imposition or execution of any sentence or sentences imposed, nor to prohibit the court from exercising its discretion to impose such sentences to run either concurrently with or consecutively to each other or to any other sentence or sentences previously imposed upon the defendant.

**(e) Consolidation.** If offenses or defendants are charged in separate indictments, the court on its own initiative or on motion of any party may order that the charges be tried together or that the defendants be joined for the purposes of trial if the offenses or the defendants, as the case may be, could have been joined in a single indictment. Proceedings thereafter shall be the same as if initially under a single indictment. However, the court shall not order that the offenses or the defendants, as the case may be, be tried together without first providing the defendant or defendants and the prosecutor an opportunity to be heard. Any such order shall be made sufficiently before trial.

#### *Comment*

Rule 14.3 (a) through (d) largely continues prior practice under former URCCC 7.07.

Section (a)(1), based on Fed. R. Crim. P. 8(a), expands prior practice and now allows offenses of the “same or similar character” to be joined in a single indictment. *Compare Corely v. State*, 584 So.2d 769 (Miss. 1991). Section (a)(1) is inapplicable, however, if an indictment charges multiple defendants under section (b); section (a)(1) applies only to indictments charging a single defendant.

Section (e) allows consolidation of offenses where joinder would have been proper in the initial instance, taking into consideration the factors that would require severance under Rule 14.4. Section (e) enlarges prior practice by now permitting involuntary consolidation of trials. *See Ala. R. Crim. P. 13.3(c)*.

#### Rule 14.4 - Severance.

**(a) Relief From Prejudicial Joinder.** If it appears that a defendant or the prosecution is prejudiced by a joinder of offenses or of defendants, the court may order an election or separate trials of counts, grant a severance of defendants, or

provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the prosecuting attorney to deliver to the court for inspection, in camera, any statements or confessions made by the defendants that the prosecution intends to introduce in evidence at the trial. However, without a finding of prejudice, the court may, with the agreement of all the parties, order a severance of defendants or an election of separate trials of counts or charges.

**(b) Timeliness and Waiver.** A defendant's motion to sever offenses or defendants must be made not more than 7 days after arraignment or filing of a written plea of not guilty before trial, or, in the event the court has ordered charges or defendants to be tried jointly, pursuant to Rule 14.2, then within 7 days of the court's order, in any event, before trial. If, after the expiration of these time periods, a ground not previously known arises, or becomes known, either before or during trial, and that ground could not have been discovered previously through the exercise of due diligence, the defendant may move for severance of any or all counts, but must do so at the earliest opportunity. The right to move for severance is waived if a proper motion is not timely made.

**(c) Severance during Trial.** No severance of offenses or defendants may be ordered after trial has commenced unless the defendant consents or a mistrial has properly been declared as to such offense or defendant. Severance of offenses during trial, upon motion of the defendant or with the defendant's consent, shall not bar a subsequent trial of that defendant on the offenses severed.

### *Comment*

Rule 14.4 tracks Ala. R. Crim. P. 13.4 and the ABA Standards for Criminal Justice, *Joinder and Severance* § 13-3.1 and 13-3.2 (2d ed. 1986). Generally speaking, joinder is not prejudicial when: (1) "the evidence of each crime would be admissible in a separate trial for the other," even if a severance is granted, or (2) "the evidence of each crime is simple and distinct, even though such evidence might not be admissible in separate trials." *Drew v. U.S.*, 331 F.3d 85, 90-91 (D.C. Cir. 1964). See *Corley v. State*, 584 So.2d 769 (Miss. 1991); *Stribling v. State*, 2009-KA-10420-COA (Miss. Ct. App. 2011).

It is unnecessary under these Rules to renew a motion for severance at trial, or after the time at which the purported prejudice actually occurred, to preserve a claim of error from denial of such a motion.

Rule 14.5 - Amendment of Indictments; Defects in Indictments.

**(a) Amendment of Indictments.** All indictments may be amended as to form but not as to the substance of the offense charged. Indictments may also be amended to charge the defendant as an habitual offender or otherwise subject the defendant to enhanced punishment for prior convictions. Amendment shall be allowed only if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised.

**(b) Raising Defect in Charge.** Defects in the charging document shall be raised by proper motion.

**(c) Effect of Defect in Charge.**

(1) A motion to dismiss the indictment may be based upon objections to the composition of the grand jury, venire, the legal insufficiency of or defect in the indictment, or the failure of the indictment to charge an offense.

(2) No charge shall be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, arrested, or in any manner affected, for any defect or imperfection in the charge that does not tend to prejudice the substantial rights of the defendant upon the merits.

*Comment*

Rule 14.5(a) is consistent with practice under former URCCC 7.09. Sections (b) and (c) make clear that the proper means of challenging the legality or sufficiency of the indictment is by a motion to dismiss under Rule 16, replacing such prior practice as filing a demurrer. Rule Section (c)(2) provides a requirement that the defect be prejudicial to the defendant before it will be fatal to a conviction. Indictments may not be amended to charge the defendant as an habitual offender after the jury returns its verdict. See *Gowdy v. State*, 56 So.3d 540 (Miss. 2010); *Newberry v. State*, 2010-KA-01729-COA (Miss. Ct. App. 2011); *Hariston v. State*, 2010-KA-00422-COA (Miss. Ct. App. 2012).

## RULE 15 - ARRAIGNMENT AND PLEAS

Rule 15.1 - Necessity of Arraignment.

**(a) Service of Indictment.** Arraignment shall be held within 30 days after the filing of an indictment. When arraignment cannot be held within the time specified because the defendant has not yet been arrested or served, or is in custody



elsewhere, it shall be held as soon as possible. Before arraignment, a copy of the indictment must be served on the defendant.

**(b) In General.** An arraignment must be conducted in open court and must consist of:

- (1) ensuring that the defendant has a copy of the indictment;
- (2) reading the indictment to the defendant or stating to the defendant the substance of the charge; and then
- (3) asking the defendant to plead to the indictment;
- (4) determining whether the defendant is represented by counsel and, if not, appoint counsel if appropriate under Rule 7;
- (5) reviewing the bond previously set, if appropriate;
- (6) advising the defendant of the right to a jury trial, if applicable; and
- (7) advising the parties in attendance of any dates set for further proceedings and other important deadlines.

At arraignment or thereafter, the court may set reasonable deadlines for pretrial motions.

**(c) Waiving Reading of Indictment.** Reading of the indictment may be waived if the defendant is represented by counsel.

**(d) Waiving Appearance.** A defendant need not be present for the arraignment if the defendant, in a written waiver signed by both the defendant and the defendant's attorney, has waived appearance and has affirmed that the defendant received a copy of the indictment and that the plea is not guilty.

**(e) Video Conferencing.** Video conferencing may be used to arraign a defendant.

**(f) Codefendants.** Defendants who are jointly charged may be arraigned separately or jointly in the discretion of the court. If codefendants are arraigned jointly and charged with the same offense, the indictments need be read only once, with stated identification of each defendant.

**(g) Waiving Arraignment.** Arraignment is deemed waived where the defendant proceeds to trial without objection.

### *Comment*

Rule 15.1 is consistent with former URCCC 8.01 and 8.03, and similar to Ala. R. Crim. P. 14.1 and 14.2, Ariz. R. Crim. P. 14.2 and 14.3, and Fed. R. Crim. P. 10. Section (a) requires that, whenever possible, arraignment be held within 30 days after filing of the indictment. The date of the arraignment is an important point of reference for setting the date of trial

under Rule 9(a) which, as under former URCCC 8.01, provides that “[w]ithin 60 days after arraignment (or waiver thereof), the case shall be set for trial. Trial shall be set for no later than 270 days after arraignment (or waiver thereof).” The date of arraignment is also an important point of reference for the disclosures required by Rule 17. See Rule 17.2(b) and 17.3(d).

Section (b) is basically a checklist for court and counsel in conducting an arraignment. Many of the items traditionally covered at the arraignment are included in the initial appearance, Rule 5.2. They need not be repeated.

Section (d) permits the defendant to waive the right to appear at arraignment. It appears that the formal in-court taking of a plea of not guilty should not be required so long as the rights of the defendant are protected and an adequate record is made. Thus, the rule permits formal arraignment to be bypassed if the defendant is assisted by counsel and files a written waiver of arraignment and a plea of not guilty that also acknowledges receipt of a copy of the charge against the defendant. If the trial court has reason to believe that in a particular case the defendant should not be permitted to waive the right, the court may reject the waiver and require that the defendant actually appear in court. That might be particularly appropriate when the court wishes to discuss substantive or procedural matters in conjunction with the arraignment and the court believes that the defendant’s presence is important in resolving those matters. It might also be appropriate to reject a requested waiver where the prosecuting attorney presents reasons for requiring the defendant to appear personally. It is important to note that the amendment does not permit the defendant to waive the arraignment itself, which may be a triggering mechanism for other rules.

Section (d) does not permit a waiver of appearance when the defendant is entering a conditional plea under Rule 15.3(d), a no contest plea under Rule 15.3(c), or a guilty plea under Rule 15.3(a). Nor does the Rule permit waiver when the defendant is not represented by counsel. See Rule 10.1(b)(2)(B)(iii). In each of those instances, it is more appropriate for the defendant to appear personally before the court.

Section (e) permits the court to hold arraignment by video conferencing when the defendant is at a different location. Many courts face a high volume of criminal proceedings, and in some instances substantial delay and expense may be avoided by eliminating travel from one location to another. Unlike federal practice, the defendant need not consent to the use of video conferencing.

Failure to comply with arraignment requirements has been held not to be jurisdictional, but a mere technical irregularity not warranting a reversal of a conviction, if not raised before trial. See *Garland v. Washington*, 232 U.S. 642 (1914).

Rule 15.2 - Proceedings at Arraignment.

**(a) Pleas.** A defendant may plead not guilty, guilty, or (with the permission of the court) no contest.

**(b) Failure or Refusal to Plead.** If a defendant fails or refuses to plead, or if a guilty plea is not accepted, the court shall enter a plea of not guilty and set the case for trial.

**(c) Absence of Defendant.** If a defendant is not present at arraignment and has not waived appearance, the court may, in addition to forfeiture of bail, direct the clerk to issue a bench warrant to bring the defendant before the court.

*Comment*

Rule 15.2 tracks former URCCC 8.01(A) (1) and 8.03, Ala. R. Crim. P. 14.2, and Fed. R. Crim. P. 11(a).

Rule 15.3 - Entry of Plea of Guilty or No Contest.

**(a) Defendant's Presence at Plea.**

*(1) Defendants Generally.* A defendant charged with the commission of a felony, who wishes to plead guilty, is required to plead personally. The court may require the personal appearance of a defendant charged with a misdemeanor.

*(2) Organizational Defendants.* An organizational defendant need not be present if represented by counsel who is present.

**(b) Entry of Plea.** A person charged with a criminal offense in county or circuit court, who is represented by counsel, may appear before the court at any time the judge may fix, be arraigned, enter a plea of guilty (or, with the court's consent, no contest) to the offense charged, and be sentenced at that time or some future time set by the court.

**(c) No Contest Plea.** Before accepting a plea of no contest, the court must consider the parties' views and the public interest in the effective administration of justice.

**(d) Conditional Plea.** With the consent of the court and the prosecuting attorney, a defendant may enter a conditional plea of guilty or no contest, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

**(e) Colloquy with Defendant.** When the defendant wishes to plead guilty or no contest, it is the duty of the trial court

to address the defendant to inquire and determine the following on the record:

- (1) That the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea is not voluntary if induced by force, threats, or promises (other than promises in a plea agreement disclosed to the court).
- (2) That the defendant understands:
  - (A) the nature of the charge and the material elements of the offense to which the plea is offered;
  - (B) the mandatory minimum penalty, if any, and the maximum possible penalty provided by law, including any enhanced sentencing provisions;
  - (C) if applicable, the fact that the sentence may run consecutively to or concurrently with another sentence or sentences;
  - (D) the fact that the defendant has the right to plead not guilty, or not guilty by reason of insanity, and to persist in such a plea if it has already been made, or to plead guilty;
  - (E) the fact that the defendant has the right to remain silent and may not be compelled to testify or give evidence against the defendant, but has the right, if the defendant wishes to do so, to testify on the defendant's own behalf;
  - (F) the fact that, by entering a plea of guilty or no contest, the defendant waives the constitutional rights:
    - (i) of trial by jury;
    - (ii) to confront witnesses against the defendant;
    - (iii) to cross-examine witnesses or have them cross-examined in the defendant's presence;
    - (iv) to testify and present evidence and witnesses on the defendant's own behalf; and
    - (v) to have the aid of compulsory process in securing the attendance of witnesses;
  - (G) the fact that, if the defendant is not represented by counsel, the defendant has the right to an attorney at every stage of the proceedings and that one will be appointed to represent the defendant if the defendant is indigent;
  - (H) the fact that, if the plea of guilty is accepted by the court, there will not be a further trial on the issue of the defendant's guilt;

- (I) the fact that, except as provided in section (d) above, by pleading guilty or no contest the defendant waives the right to have the appellate courts review the proceedings by way of direct appeal, and may seek review only by filing a motion for post-conviction relief;
- (J) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath; and
- (K) that if the defendant is not a citizen of the United States, the plea may have immigration consequences. Specifically, the court shall state, "If you are not a citizen of the United States, pleading guilty or no contest to a crime may affect your immigration status. Admitting guilt may result in deportation even if the charge is later dismissed. Your plea or admission of guilt could result in your deportation or removal, could prevent you from ever being able to get legal status in the United States, or could prevent you from becoming a United States citizen." The court shall also give the advisement in this section before any admission of facts sufficient to warrant finding of guilt, or before any submission on the record. The defendant shall not be required to disclose the defendant's legal status in the United States to the court.
- (3) That the defendant has an opportunity to state any objections to defense counsel or to the manner in which defense counsel has conducted or is conducting the defense.

### *Comment*

Rule 15.3(a) and (b) continue former URCCC 8.03 and 8.04. They adopt the requirement that the court address an individual defendant personally in open court in the presence of counsel (unless counsel has been waived pursuant to Rule 7.1) and applies in all felony cases. *See McCarthy v. U.S.*, 394 U.S. 459, 466 (1969). The Rule allows an organizational defendant to plead guilty through counsel who is present in court, as in Fed. R. Crim. P. 43(b)(1). Section (c) embodies the requirements of Fed. R. Crim. P. 11(a)(3). The procedures embodied in Rule 15.3 embrace the use of "best interest" or *Alford* plea. *See North Carolina v. Alford*, 400 U.S. 25 (1970); *Reynolds v. State*, 521 So.2d 914 (Miss. 1988); *Elliott v. State*, 41 So.3d 701 (Miss. Ct. App. 2009) (Roberts, J., specially concurring).

Section (d) is new to Mississippi Practice, and is drawn from Fed. R. Crim. P. 11(a)(2). There are many defenses, objections, and requests which a defendant must ordinarily raise by pretrial motion under Rule 16(b). Should that motion be denied, interlocutory appeal of the ruling by the defendant is seldom permitted. See *Beckwith v. State*, 615 So.2d 1134 (Miss. 1992). Moreover, should the defendant thereafter plead guilty or no contest, this will usually foreclose later appeal with respect to denial of the pretrial motion. See MISS. CODE ANN. § 99-35-101; *Thompson v. State*, 23 So.3d 1100 (Miss. Ct. App. 2009). Though a no contest plea differs from a guilty plea in other respects, it is clear that it also constitutes a waiver of all non-jurisdictional defects in a manner equivalent to a guilty plea. See *Lott v. U.S.*, 367 U.S. 421 (1961).

As a consequence, a defendant who has lost one or more pretrial motions will often go through an entire trial simply to preserve the pretrial issues for later appellate review. The conditional plea procedure provided for in section (d) will serve to conserve prosecutorial and judicial resources and advance speedy trial objectives. Procedures which avoid the need for trials which are undertaken for the sole purpose of preserving pretrial objections has been consistently favored by the commentators. Experience has shown that the number of appeals has not increased substantially. See ABA, Standards for Criminal Justice, *Criminal Appeals* § 21-1.3(c) (2d ed. 1986); Model Code of Pre-Arrestment Procedure § 290.1(4)(b) (1975); Unif. R. Crim. P. 444(d); 1A Wright, Federal Practice and Procedure — Criminal §175; W. LaFare, 6 Search and Seizure §11.1 (4th ed.). The minimal added burden at the appellate level is certainly a small price to pay for avoiding otherwise unnecessary trials. Moreover, conditional guilty pleas serve a state interest in finality, by establishing admission of the defendant's factual guilt; the defendant stands guilty and the proceedings come to an end if the reserved issue is ultimately decided in the state's favor.

Importantly, section (d) allows a defendant to enter a conditional plea only "with the approval of the court and the consent of the prosecuting attorney." The requirement of approval by the court ensures, for example, that the defendant is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial. As for consent by the prosecuting attorney, it will ensure that conditional pleas will be allowed only when the decision of an appellate court will dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. Absent such circumstances, the conditional plea might only serve to postpone the trial and require the prosecution to try the case after substantial delay, during which time witnesses may be lost, memories dimmed, and the offense grown so stale as to lose jury appeal. The prosecuting attorney is in a unique position to determine whether the matter at issue would be case-dispositive, and, as a party to the litigation, should have an absolute right to refuse to consent to potentially prejudicial delay. The requirement that the conditional plea be made by the defendant "reserving in writing the right to appeal from the

adverse determination of any specified pretrial motion," will ensure careful attention to any conditional plea. It will document that a particular plea was in fact conditional, and will identify precisely what pretrial issues have been preserved for appellate review.

The Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty. *Menna v. New York*, 423 U.S. 61 (1975) (double jeopardy violation); *Blackledge v. Perry*, 417 U.S. 21 (1974) (due process violation by charge enhancement following defendant's exercise of right to trial *de novo*). Section (d) has no application to such situations, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application.

Section (e) incorporates Ala. R. Crim. P. 14.4, Fed. R. Crim. P. 11, and URCCC 8.04(3) and (4). Sections (e)(1) and (e)(2) make clear that before accepting a plea of guilty or no contest, the court must determine that the plea is made voluntarily with understanding of the nature of the charge; that is, that the defendant understands what the "plea connotes and . . . its consequence" as required by *Boykin v. Alabama*, 395 U.S. 238 (1969). See *Chase v. State*, 645 So.2d 829 (Miss.1994), *cert. denied*, 515 U.S. 1123 (1995), *reh'g denied*, 515 U.S. 1179 (1995); ABA, Standards for Criminal Justice, *Pleas of Guilty*, Comments to § 14-1.4(a) (2d ed. 1986). The court must also satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the prosecuting attorney, or some other means, that the conduct that the defendant admits constitutes the offense charged in the indictment or an offense included therein, to which the defendant has pleaded guilty. Such inquiry should, thereby, protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. See *In re Valle*, 110 N.W.2d 673 (1961); *Stinson v. U.S.*, 316 F.2d 554 (5th Cir. 1963). The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty. The record should affirmatively reflect the questions asked and the defendant's responses, thereby providing an adequate basis for review.

Section (e)(2) prescribes the advice that the court must give to the defendant as a prerequisite to the acceptance of a guilty plea. The Rule requires the court to determine that the defendant understands the sentencing implications of pleading guilty or no contest to the crime charged. Section (e)(2) also identifies the constitutional rights that the defendant waives by a plea of guilty or *nolo contendere*. These sections are designed to satisfy the requirements of understanding waiver set forth in *Boykin v. Alabama*, 395 U.S. 238 (1969) (defendant must be apprised that a person relinquishes certain constitutional rights by pleading guilty). Sections (e)(2)(D) and (E) are intended to require that the judge inform the defendant and determine that he understands that he waives his fifth amendment

rights. The rule takes the position that the defendant's right not to self-incriminate is best explained in terms of the right to plead not guilty and to persist in that plea if it has already been made.

Generally speaking, it is within the court's discretion as to whether and to what extent to advise the defendant of other or collateral consequences of a plea of guilty or no contest. Immigration consequences stand as an exception; under Rule 15.3(e)(2)(K), which follows Ariz. R. Crim. P. 17.2(f), disclosure of certain potential immigration consequences is mandatory. *See Padilla v. Kentucky*, \_\_ U.S. \_\_, 130 S.Ct. 1473 (2010).

Because a defendant is entitled to the effective assistance of counsel in plea negotiations, the Supreme Court in *Missouri v. Frye* suggested that the colloquy with the defendant required by section (e) could include measures to help moot untimely or false claims that ineffective assistance of counsel led to entry of a guilty plea:

The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. (citations omitted). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence.

*Missouri v. Frye*, No. 10-444, \_\_ U.S. \_\_, slip op. at 8 (2012) (citing Arizona practice with approval) (Noting that to show prejudice from ineffective assistance of counsel, a defendant must demonstrate a reasonable probability that the offer would have been accepted and that the plea would have been entered and accepted by the court). *See also Lafler v. Cooper*, No. 10-209, \_\_ U.S. \_\_ (2012) (defense counsel's incompetent advice allegedly caused defendant to reject more favorable plea offer and go to trial).

#### Rule 15.4 - Plea Negotiations and Agreements.

**(a) Entering into Plea Agreements.** The prosecutor and defendant's attorney, or defendant acting *pro se*, may engage in discussions with a view toward reaching an agreement that, upon the entry of a plea of guilty or no contest to a charged offense or to a lesser or related offense, the prosecutor either will move for dismissal of other charges or will



recommend (or will not oppose) the imposition or suspension of a particular sentence, or will do both.

**(b) Disclosure of Plea Agreement.** If a plea agreement has been reached by the parties, the court shall require the disclosure of the agreement in open court at or before the time a plea is offered. The court may accept or reject the agreement or may defer its decision as to acceptance or rejection until receipt of a presentence report.

**(c) Acceptance or Rejection of Plea Agreements.**

(1) If the court accepts the plea agreement, the court shall inform the parties that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(2) If the court rejects the plea agreement, the court shall:

(A) so inform the parties;

(B) advise the defendant and the prosecutor personally in open court that the court is not bound by the plea agreement;

(C) advise the defendant that if the defendant pleads guilty or no contest, the disposition of the case may be either more or less favorable to the defendant than that contemplated by the plea agreement;

(D) afford the defendant the opportunity to withdraw the defendant's offer to plead guilty or no contest;

(E) afford the prosecutor the opportunity to change the prosecutor's recommendations; and

(F) afford the parties the opportunity to submit further plea agreements.

**(d) Withdrawing a Guilty or No contest Plea.** A defendant may withdraw a plea of guilty or no contest:

(1) before the court accepts the plea, for any reason or no reason;

(2) after the court accepts the plea, but before it imposes sentence:

(A) if the court rejects a plea agreement made pursuant to section (a); or

(B) on a showing of manifest injustice.

**(e) Finality of Guilty or No Contest Plea.** After the court imposes sentence, the defendant may not withdraw a plea of guilty or no contest, and the plea may be set aside only on direct appeal, as provided in Rule 15.3(d), or on collateral review.

*Comment*

Rule 15.4 replaces former URCCC 8.04(B), and embraces the procedures embodied in Ala. R. Crim. P. 14.3. Rule 15.4 only applies in cases in which a defendant is to plead guilty or no contest pursuant to a plea agreement. *See also* MISS. CODE ANN. § 99-15-26 (governing guilty pleas involving non-adjudication).

Sections (a) through (c) provides a plea agreement procedure, and as such recognizes the propriety of plea discussions and agreements, provided they are disclosed in open court and subject to acceptance or rejection by the trial judge. An oft-cited estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases. ABA, Standards for Criminal Justice, *Pleas of Guilty* at pp. 1–2 (Approved Draft, 1968). *See also Missouri v. Frye*, No. 10-444, \_\_ U.S. \_\_ (2012) (noting 97% of federal convictions and 94% of State convictions are the result of guilty pleas). Rule 15.4 provides transparency, accountability, and fairness in this process. Properly implemented, a plea agreement procedure is consistent with both effective and just administration of the criminal law. *Santobello v. New York*, 404 U.S. 257 (1971). “Related” offenses under Rule 15.4(a) means those offenses that could be joined in the same indictment under Rule 14.3(a).

A defendant enjoys the right to effective assistance of counsel in plea negotiations. *See Missouri v. Frye*, No. 10-444, \_\_ U.S. \_\_ (2012) (defendant entered an open plea of guilty after a more favorable plea offer expired without being communicated by defense counsel); *Lafler v. Cooper*, No. 10-209, \_\_ U.S. \_\_ (2012) (defense counsel’s incompetent advice allegedly caused defendant to reject more favorable plea offer and go to trial). As the Court explained in *Missouri v. Frye*:

The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. (citations omitted). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence.

*Missouri v. Frye*, No. 10-444, \_\_\_ U.S. \_\_\_, slip op. at 8 (2012) (citing Arizona practice with approval) (Noting that to show prejudice from ineffective assistance of counsel, a defendant must demonstrate a reasonable probability that the offer would have been accepted and that the plea would have been entered and accepted by the court).

Section (c)(2) requires the court, if it rejects the plea agreement (whether at the time the plea is offered or after receipt of a presentence report), to inform the defendant of this fact and to advise the defendant personally, in open court, that the court is not bound by the plea agreement. The defendant must be afforded an opportunity to withdraw the plea and must be advised that if the defendant persists in entering a plea of guilty or no contest, the disposition of the case may be less favorable than that contemplated by the plea agreement. That the defendant should have the opportunity to withdraw a plea if the court rejects the plea agreement is the position taken in ABA, Standards for Criminal Justice, *Pleas of Guilty* §2.1(a)(ii)(5) (2d ed. 1986), and is consistent with the law in many jurisdictions. See Fed. R. Civ. P. 11(c)(5); Ariz. R. Crim. P. 17.4(e). This rule, taken together with Rule 15.3 regarding acceptance of guilty pleas, should reduce the number of collateral attacks by defendants who have pleaded guilty.

Sections (d) and (e) track Fed. R. Crim. P. 11(d) and (e). Under section (d), a defendant is permitted to withdraw entirely from a guilty plea, either before acceptance of the plea for any reason, or after acceptance of a plea but before imposition of sentence if the court rejects a plea agreement. As a result, the rule contemplates that a judge can and should accept a plea - but defer adjudication of guilt and imposition of sentence - until after receipt of an anticipated pre-sentence report under Rule 26.3. Section (d) does not generally apply when a court imposes conditions pursuant to an offered but unaccepted or unadjudicated guilty plea under Miss. CODE ANN. § 99-15-26. See *Brown v. State*, 533 So.2d 1118 (Miss. 1988).

## RULE 16 - PLEADINGS AND PRETRIAL MOTIONS

### Rule 16.1 - Generally.

- (a) Pleadings.** The pleadings in a criminal proceeding are the indictment, the information in lieu thereof, the complaint, and the pleas of not guilty, guilty, and no contest.
- (b) Form of Pretrial Motions.** Rule 35.1 applies to a pretrial motion.

### *Comment*

Rule 16.1 is modeled after Fed. R. Crim. P. 12(a), and is designed to simplify the procedure and avoid the technical distinctions that serve as traps for the unwary. In that way, it parallels the familiar simplification embodied in the Mississippi Rules of Civil Procedure.

Under this rule, the styling of the motion is not important, and substance governs over form. A motion need only “contain a concise statement of the precise relief requested and shall state the specific factual grounds and specific legal authority in support thereof,” as prescribed in Rule 35.1.

In a felony case, a complaint serves as a pleading, for example at a preliminary hearing under Rule 6, only until superseded by an indictment or information. Otherwise, a complaint is a pleading only in a misdemeanor case.

### Rule 16.2 - Time for Making Motions.

**(a) Motions That May Be Made Before Trial.** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

**(b) Motions That Must Be Made Before Trial.** Absent good cause shown, the following must be raised before trial:

- (1) a motion alleging a defect in instituting the prosecution;
- (2) a motion alleging a defect in the indictment—but at any time while the case is pending, the court may hear a claim that the indictment fails to invoke the court’s jurisdiction or to state an offense;
- (3) a motion to suppress evidence;
- (4) a motion to sever charges or defendants;
- (5) a motion for discovery; and
- (6) a motion for a change of venue.

**(c) Admissibility of Evidence.**

(1) *Generally.* On motion of either party or on its own motion, the court may order that the question of the admissibility of any specified evidence be submitted for pre-trial determination as if a motion to suppress had been filed by the party opposed to the introduction of the evidence.

(2) *Orders in Limine.* For good cause shown, the court may order that any party, witness, or attorney refrain from asking certain questions, giving certain answers, or in any manner directly or indirectly referring to or alluding to any otherwise inadmissible fact, matter, or circumstance during the course of trial in the presence of jurors or the venire.

**(d) Notice of the Prosecution’s Intent to Use Evidence.**

(1) *At the Discretion of the Prosecuting Attorney.* At the arraignment or upon the cause being set for trial, or

as soon thereafter as practicable, the prosecuting attorney may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 16.2(b)(3).

(2) *At the Defendant's Request.* At the arraignment or upon the cause being set for trial, whichever occurs first, or as soon thereafter as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 16.2(b)(3), request notice of the prosecuting attorney's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 17.2.

### *Comment*

Rule 16.2 follows the practice under Fed. R. Crim. P. 12(b) and Ala. R. Crim. P. 15.6(b) and (e).

Sections (a) and (b) classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 16.2. Rule 16.2(a) governs defenses and objections that *may* be raised by pretrial motion, failure to do so, however, does not constitute a waiver. Rule 16.2(b) identifies defenses and objections that *must* be raised by pretrial motion; failure timely to do so does constitute a waiver under Rule 16.3, unless excused by the court on a showing of good cause for making the motion at a later time. A claim that the indictment fails to state a crime, or falls outside the court's jurisdiction, may be raised at any time during the pendency of the case.

Section (a) includes all defenses and objections which are capable of determination without a trial of the general issue, such as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, denial of a speedy trial, defect in instituting the prosecution, defect in the charge, and the like. Rule 16.2(b) includes all defenses and objections that are based on defects in the institution of the prosecution or in the indictment, other than lack of jurisdiction or failure to charge an offense. Any or all such defenses and objections may be included in a single motion.

Section (b)(3) makes clear that objections to evidence on the ground that it was illegally obtained must be raised prior to trial. This includes evidence obtained as a result of an illegal search, the use of unconstitutional means to obtain a confession, and other instances in which the exclusionary rule may apply. *See* Wright, *Federal Practice and Procedure: Criminal* § 686 (4th ed.).

Section (c)(1) provides a method for dealing with the admissibility of evidence such as confessions and line-up identifications before trial. Section (c)(1) allows, but does not require, the court to order a question of

admissibility to be submitted for pretrial determination. In making its determination, the court shall proceed as if a motion to suppress the evidence had been filed by the party opposed to the introduction of the evidence. Therefore, section (c)(1) allows a party to ask the court to require the other party to challenge evidence before trial, or else waive the right to have the evidence excluded at trial. Thus, for example, the prosecuting attorney can move the court for an order submitting the question of the admissibility of a line-up identification for pre-trial determination; if the court in its discretion grants the order and defense counsel fails to challenge the line-up identification, the defendant cannot later make such a challenge at trial. This rule should thereby increase efficiency in the conduct of criminal trials, by providing the parties a means of determining, at a pre-trial hearing, the admissibility of evidence.

Section (c)(2) preserves the court's power on motions *in limine* to prevent parties, witnesses, or attorneys from bringing before the jury, by indication or otherwise, any inadmissible fact, matter, or circumstance. Although such motions generally are preferably made before trial, this rule in no way precludes, when appropriate, a motion *in limine* made after commencement of the trial. Thus, Rule 16.2 leaves with the court discretion either to determine such issues in advance of trial, or to defer them for determination at trial.

Section (d) provides a mechanism for insuring that a defendant knows of the prosecuting attorney's intention to use a particular item of evidence to which the defendant may want to object. On some occasions the resolution of the admissibility issue prior to trial may be advantageous to the prosecution. In these situations, the prosecuting attorney can make effective the defendant's obligation to make a motion to suppress prior to trial by giving the defendant notice of the prosecuting attorney's intention to use a particular item evidence. In cases in which the defendant wishes to know whether the prosecuting attorney intends to use a particular item of evidence, so that a motion to suppress may be made prior to trial, the defendant can request the prosecuting attorney give notice of the intention to use that particular item of evidence. Although the defendant is already entitled to discovery of such evidence prior to trial under rule 17, Rule 16.2(d) makes it possible to avoid the necessity of moving to suppress evidence that the prosecuting attorney does not intend to use.

### Rule 16.3 - Motion Deadline; Hearings and Rulings on Motions.

**(a) Motion Deadline.** The court may, at the arraignment or upon the cause being set for trial, or as soon thereafter as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing.

**(b) Ruling on a Motion Generally.** The court must decide every pretrial motion before trial unless it finds good cause

to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

**(c) Waiver of a Defense, Objection, or Request.** A party waives any Rule 16.2(b) defense, objection, or request not raised by the deadline the court sets under Rule 16.3(a) or by any extension the court provides. For good cause, the court may grant relief from the waiver.

### *Comment*

Rule 16.3 tracks Fed. R. Crim. P. 12(c) through (e). Section (a) provides that a time for the making of motions shall be fixed at the time of the arraignment or when the cause is set for trial, or as soon thereafter as practicable at the direction of the court. Rule 16 encourages the making of motions prior to trial, whenever possible, and Rule 16.3 facilitates resolution in a single hearing rather than in a series of hearings. This is the recommendation of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970); see especially §§5.2 and 5.3. It also is the procedure followed for an "omnibus hearing," as under former URCCC 9.08. While discretionary, a single pretrial hearing is to be encouraged and is made possible by Rule 16.

Section (a) provides that the motion date be set at "the arraignment or upon the cause being set for trial, or as soon thereafter as practicable." In order to obtain the advantage of an omnibus hearing, counsel may routinely plead not guilty at the initial arraignment on the indictment and then may indicate a desire to change the plea to guilty following the hearing. This practice builds a more adequate record in guilty plea cases.

Section (b) provides that the court shall rule on a pretrial motion before trial unless the court orders, on a showing of good cause, that it be decided at the trial of the general issue or after verdict. The court cannot defer its ruling if to do so will adversely affect a party's right to appeal. While section (b) confers general authority to defer the determination of any pretrial motion until after verdict, Rule 16.3 is designed to discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary.

Section (c) provides that a failure to raise the objections or make the requests specified in Rule 16.2 constitutes a waiver thereof, but the court is allowed to grant relief from the waiver if adequate cause is shown. *See C. Wright, Federal Practice and Procedure: Criminal* § 192. The amendment makes clear that the defendant and, where appropriate, the government have an obligation to raise the issue at the motion date set by the court pursuant to section (a).

Rule 16.4 - Effects of Rulings.**(a) Effect of Granting Motion Based on Defective Charge.**

If the court grants a motion to dismiss based on a defect in instituting the prosecution or in the charge, the court shall order the defendant released, or, on motion of the prosecuting attorney, may, pending the filing of a new charge, order the defendant's pre-trial release continued or may order the defendant held in custody for a reasonable specified time not to exceed 72 hours. This Rule does not affect any statutory period of limitations.

**(b) Motion to Suppress.** If a motion to suppress is granted, any suppressed property that was seized shall be restored to its owner or last possessor, unless otherwise subject to lawful detention.

**(c) Statutes of Limitations Tolloed.** The running of the time prescribed by an applicable statute of limitations shall be tolled by the issuance of the charging instrument until such time as the court grants a motion to dismiss based on a defect in the commencement of the proceedings or in the charge, unless the court in granting the motion finds that the state has not made a good faith effort to proceed properly and that the defendant has been prejudiced by any resulting delay.

*Comment*

Rule 16.4(a) is substantially similar to Ala. R. Crim. P. 15.5(a) and Fed. R. Crim. P. 12(g). If a motion to dismiss is granted due to some defect in the charge or in the institution of the prosecution, section (a) allows the court to ensure that the defendant will be available when the new charge is filed. However, a defendant may be held only on order of the court, and only for a specified time not to exceed 72 hours. A defendant should not automatically be continued in custody when such a motion is granted. In order to continue the defendant in custody, the court must not only determine that there is probable cause, but it must also determine, in effect, that there is good cause to have the defendant arrested.

Section (b) follows Ala. R. Crim. P. 15.6(d). Section (b) recognizes that property not lawfully seized must be returned, unless other basis for detention exists. *See* Rule 4.6.

Section (c), as with Ala. R. Crim. P. 15.5(c), exists to avoid penalizing the state for an inadvertent technical error which has not prejudiced the defendant. Thus, if a motion to dismiss is granted due to a defect in the charge or in the institution of the prosecution, the time period for which the charging instrument was in effect is also tolled. Of course, section (c) is just one aspect of the law governing the running and tolling of a statute of



limitations. See *Edmonson v. State*, 17 So.3d 591 (Miss. Ct. App. 2009) (recognizing tolling where defendant absconds or is absent from the state); *U.S. v. Swartzendruber*, No. 3:06-cr-136 (D. N. Dakota 2009) (tolling order).

## RULE 17 - DISCLOSURE

### Rule 17.1 - Scope of Rule 17.

Rule series 17 applies in felony cases and in trials of misdemeanor cases in circuit and county court.

### *Comment*

Rule 17 substantially expands practice under former URCCC 9.04 in two important aspects: disclosure is automatic, and is neither conditioned on nor triggered by a request from the defendant; and the scope of the disclosure required is significantly enlarged. Under prior practice, a defendant could choose to initiate reciprocal discovery by submitting a written request to the prosecuting attorney. Or the defendant could choose instead to opt out, and receive only disclosure required of the prosecuting attorney by *Brady v. Maryland*, 373 U.S. 83 (1963). See *Hentz v. State*, 489 So.2d 1386, 1388 (Miss. 1986) (“The Court now declares that as a matter of good practice and sound judgment in the trial of criminal cases, prosecuting attorneys should make available to attorneys for defendants all such material [i.e., tape recordings of CI and others] in their files and let the defense attorneys determine whether or not the material is useful in the defense of the case.”).

The federal government and an increasing number of states have provided for rather extensive discovery by those accused of criminal offenses. The movement toward more extensive disclosure is attributable to several factors: ever-increasing caseloads of the courts and the district attorneys’ offices; the practical necessity for negotiated pleas in a great majority of the cases disposed of by official action; and the recognition by judges and prosecuting attorneys that discovery has not served to free those accused of crime, but instead often serves to provide a rational basis for negotiated pleas. When the relevant evidence is before the court, the defense attorney, the prosecuting attorney, and the defendant the opportunity exists for reaching a settlement generally approved by all concerned.

The general purpose of discovery is to avoid trial by ambush, and Rule 17 places reciprocal obligations on the prosecuting attorney and defense. See Standard 11, ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* (3d ed. 1996). Courts recognize that a defendant’s right to a fair trial is violated when the state knowingly allows false evidence to be used against the defendant, *Miller v. Pate*, 386 U.S. 1 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959). Similarly, a defendant’s rights are violated if the state withholds favorable material evidence which the defendant has requested. *Brady v. Maryland*, 373 U.S. 83 (1963); *U.S. v. Bagley*, 473 U.S.

667 (1985). In *Brady*, the Court held due process was violated where, after the defendant's request, the state failed to reveal evidence that was material either to guilt or punishment. At least some discovery, therefore, is necessary to guarantee the accused a fair trial.

Under former URCCC 9.04, a defendant could choose to initiate reciprocal discovery by submitting a written request to the prosecuting attorney. While many jurisdictions followed the commendable practice of "open file" discovery (under which the prosecuting attorney allowed defense counsel access to, or a copy of, the case file), the practice remained less than fully uniform. See *Dotson v. State*, 593 So.2d 7, 11-12 (Miss. 1991).

Open file discovery is quite similar to the practice recommended by Rules 421 and 422, Uniform Rules of Criminal Procedure, (National Conference of Commissioners of Uniform State Laws (1987)). See also ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 11 (3d ed. 1996); *Expanded Discovery in Criminal Cases*, The Justice Project, Pew Trusts (2007) (discussing trends in criminal discovery and recommending an expanded version of open file disclosure).

While reciprocal disclosure is mandated by Rule 17, the parties can still agree to, or the court on motion can order, a different framework for the timetable and content of disclosure. See Rule 17.2(b). The parties could agree, for example, to follow the streamlined disclosure contemplated by the Uniform Rules.

Rule 17.1 makes clear that the disclosure rules apply to felony cases generally, and misdemeanor cases only when tried in circuit or county court.

### Rule 17.2 - Disclosure by the Prosecution.

**(a) Disclosure; Scope.** The prosecuting attorney shall make available to the defendant the following material and information within the prosecution's possession or control:

- (1) the names and addresses of all persons whom the prosecuting attorney intends to call as witnesses in the case-in-chief together with their written or recorded statements;
- (2) all statements of the defendant and of any person who will be tried with the defendant;
- (3) all original and supplemental reports prepared by a law enforcement agency in connection with the particular crime with which the defendant is charged;
- (4) the names and addresses of experts who have personally examined a defendant or any evidence in the particular case, together with the results of physical examinations and of scientific tests, experiments, or comparisons that have been completed;

- (5) a list of all papers, documents, photographs, or tangible objects (including electronic, magnetic, optical, or other recording or data compilation) which the prosecuting attorney intends to use at trial or which were obtained from or purportedly belong to the defendant;
- (6) a list of all prior convictions of the defendant;
- (7) a list of all prior acts of the defendant which the prosecuting attorney intends to use at trial to prove motive, intent, or knowledge, or otherwise use at trial;
- (8) all material or information which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce the defendant's punishment therefore;
- (9) whether there has been any electronic surveillance of any conversations to which the defendant was a party, or of the defendant's business or residence;
- (10) whether a search warrant has been executed in connection with the case;
- (11) whether the case has involved an informant, and, if so, the informant's identity, if the defendant is entitled to know either or both of these facts under Rule 17.5(b)(2); and
- (12) the time and place of the alleged offense, if not alleged in the indictment.

**(b) Time for Disclosure.** Unless otherwise ordered by the court, or agreed to by the parties, the prosecuting attorney shall make available the materials and information listed in Rule 17.2(a) not later than 30 days after arraignment or the cause being set for trial, whichever occurs first.

**(c) Prior Felony Convictions of Witnesses.**

- (1) In a felony case, at least 30 days before trial, or 30 days after a request from the defendant, whichever occurs first, the prosecuting attorney shall make available to the defendant a list of the prior felony convictions of witnesses whom the prosecuting attorney then intends to call at trial.
- (2) In a misdemeanor case in circuit or county court, at least 10 days before trial, the prosecuting attorney shall make available to the defendant a list of the prior felony convictions of witnesses whom the prosecuting attorney intends to call at trial.
- (3) In a felony case, at least 30 days before trial, or 30 days after a request from the defendant, whichever occurs first, the prosecuting attorney shall make available to the defendant a list of the prior felony convictions

that the prosecuting attorney intends to use to impeach a disclosed defense witness at trial.

(4) In a misdemeanor case in circuit or county court, at least 10 days before trial the prosecuting attorney shall make available to the defendant a list of the prior felony convictions that the prosecuting attorney intends to use to impeach a disclosed defense witness at trial.

**(d) Additional Disclosure upon Request and Specification.**

The prosecuting attorney shall, within 30 days of a written request, unless otherwise ordered by the court, make available to the defendant for examination, testing, and reproduction the following:

- (1) any specified items contained in the list submitted under Rule 17.2(a)(5);
- (2) any 911 calls existing at the time of the request that can reasonably be ascertained by the custodian of the record to be related to the case; and
- (3) any written reports, statements, and examination notes made by experts listed in subsections (a)(1) and (a)(4) of this Rule in connection with the particular case.

The prosecuting attorney may impose reasonable conditions (including an appropriate stipulation concerning chain of custody) to protect physical evidence produced under this section or to allow time to complete any examination or testing of such items.

**(e) Extent of Duty.** The prosecuting attorney's obligation under this Rule extends to material and information in the possession or control of any of the following:

- (1) the prosecuting attorney, or members of the prosecuting attorney's staff; and
- (2) any law enforcement agency or other agency or person who has participated in the investigation of the case, if the prosecuting attorney knew, or through reasonable diligence should have known, of the existence of the material or information.

**(f) Disclosure by Order of the Court.** Upon motion of the defendant showing that the defendant has substantial need in the preparation of the defendant's case for material or information not otherwise covered by Rule 17.2, and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means, the court in its discretion may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate, or modify the order if compliance would be unreasonable or oppressive.

**(g) Disclosure of Rebuttal Evidence.** Upon receipt of the notice of defenses required from the defendant under Rule 17.3(b), the prosecuting attorney shall timely disclose the names and addresses of all persons whom the prosecuting attorney intends to call as rebuttal witnesses together with their written or recorded statements. If the notice of defenses includes alibi, the disclosure shall also specify the names and addresses of all persons on whom the prosecuting attorney intends to rely to establish the defendant's presence at the scene of the alleged offense.

### *Comment*

Rule 17.2 is adapted from Ariz. R. Crim. P. 15.1. The list of material and information covered by Rule 17.2(a) tracks Ariz. R. Crim. P. 15.1(b), and is larger than that required by former URCCC 9.04 or Fed. R. Crim. P. 16(a). Sections (a)(1), (4), (5), (6), (8), (11), and (12) correspond to requirements under former practice; sections (a)(2), (3), (7), (9), and (10) are new. The "lists" of specified items under sections (5), (6), and (7), can be satisfied by simply identifying the necessary information in any reasonably clear and accessible way, as in section (a)(1); open file disclosure may well suffice in most routine and less complex cases.

Section (a)(2), as it relates to statement of co-defendants, expands Mississippi law. This section should be helpful in resolving questions of severance before trial. *See Bruton v. U.S.*, 391 U.S. 123 (1968); *Richardson v. Marsh*, 381 U.S. 200 (1987). As the purpose of this section is to avoid any prejudice at trial by the introduction of such statements to the jury, only such statements as the prosecuting attorney intends to introduce need be disclosed.

The disclosure requirements of sections (a)(3) and (4) are limited to material and information in existence at the time of disclosure pursuant to Rule 17.2(b). It is not required that all aspects of an investigation, such as forensic or laboratory analysis, be completed and disclosed within 30 days after arraignment or the cause being set for trial. Supplemental disclosure continues to be authorized and required in accordance with the provisions of Rule 17.7. Mental examinations and reports are not covered by this section. *See* Rule 12.4. The work product exception of Rule 17.5(b)(1) does not apply to the opinions, theories and conclusions of experts contained in reports to be disclosed under section (4).

Section (5) generally follows Fed. R. Crim. P. 16(a)(1)(E). The qualifier "purportedly" removes possible confusion concerning whether or not items actually belong to the accused. In order to conserve the time and resources, the prosecuting attorney is required only to prepare a list of all evidence discoverable under this section. Upon specification under Rule 15.1(d), the actual items must be made available.

Section (a)(6) follows Fed. R. Crim. P. 16(a)(1)(D). Section (a)(7) acknowledges that, in order to prepare the case, the defendant needs to know what prior acts, in addition to previous felony convictions, the prosecuting attorney will use against the defendant.

Section (a)(8) clarifies the prosecuting attorney's constitutional obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), making a change in law only as to the timing of such disclosures, requiring that they be made well before trial. The prosecuting attorney's duty to disclose prior felony convictions of its own witnesses is included as part of the Brady disclosure. See *Giglio v. U.S.*, 405 U.S. 150 (1972) (holding the prosecuting attorney obligated to disclose information which lessens the credibility of prosecution witnesses). See *Dotson v. State*, 593 So.2d 7 (Miss. 1991).

Sections (a)(9) and (10) follow Ariz. R. Crim. P. 15.1(b)(9) and (10). They are adapted from the ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 11-2.1(c) and (d) (3d ed. 1996).

Section (b) insures that attention to disclosure begin promptly. Under Rule 15.1(a), arraignment must generally be held within 30 days after filing of the indictment. Under Rule 17.2(b), the parties can agree to, or the court on motion can order, a different framework for the timetable and content of disclosure.

Section (c) acknowledges the duty to make prior conviction information available to the defense; however, it also recognizes that prior conviction information may not be important to the resolution of many cases. Therefore, the prosecuting attorney's obligation to disclose prior felony conviction information does not arise until a case is set for trial unless requested earlier by the defense. Section (c)(2) requires the prosecuting attorney to disclose any prior felony convictions of specified persons whom the defense may call as witnesses at trial. The prosecuting attorney's obligation is limited to prior convictions which are known and which are expected to be used at trial.

Section (d) requires, on written request and specification by the defense and absent a contrary order of the court, that the prosecuting attorney make items contained in the list submitted under Rule 17.2(a) (5) available to the defense for examination, testing and reproduction. In most cases, the prosecuting attorney will make the items available to the defense for inspection while continuing to maintain custody of the materials. Notwithstanding section (d), retention of evidence may sometimes be required by law, and its duplication prohibited. See MISS. CODE ANN. § 99-1-29 (prohibiting copying or otherwise reproducing evidence that constitutes child pornography as defined by statute, and providing that it "shall remain in the care, custody, and control of either the prosecution or the court"). Section (d) provides a 30-day time frame for compliance by the prosecuting attorney, and allows reasonable conditions to be imposed for the protection of evidence. Generally the Rule contemplates that the state will complete its own examination or testing of any item before making it available to the defense. The operational language "make available for examination,

testing, and reproduction” is used for most of the discovery obligations. This phrase incorporates the substance of ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 2.2(b) (3d ed. 1996), imposing the same duties on both parties. The disclosing party must notify the other parties that the material and information to be disclosed is ready for their inspection and may be examined and reproduced by them at a designated place during specified reasonable times. The disclosing party must make the material and information available at that location upon request and provide suitable facilities for reproducing it. However, the disclosing party is not required to make copies of documents at its expense, nor to deliver the materials to the other parties. Nor is the disclosing party required to supply the facilities or materials required to carry out tests of disclosed items. The parties may, by mutual consent, make any other or additional arrangements.

Section (e) limits the extent of the disclosure duties to those persons actually under the prosecuting attorney’s control. The term “staff” is intended to refer to his professional employees, not to secretaries, custodians or other employees below the rank of investigators. Disclosure obligations are limited to material and information within the prosecuting attorney’s possession or control to avoid being subjected to obligations and court orders which the prosecuting attorney is unauthorized to carry out. Section (e)(2) imposes an obligation to insure a flow of all discoverable information to the prosecuting attorney’s office from all local law enforcement agencies. *See* ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 2.2(c) (3d ed. 1996); *Giglio v. U.S.*, 405 U.S. 150 (1972). The prosecuting attorney is deemed responsible for obtaining and disclosing material and information held by state, county, and municipal law enforcement agencies that have participated in the investigation of the case. The prosecuting attorney is not generally deemed responsible for disclosure of information and material held by federal law enforcement agencies, crime victims, or other lay witnesses. These obligations are limited, however, to information and material known to the prosecuting attorney, or discoverable through reasonable diligence. The court may, however, under Rule 17.2(f) order the prosecuting attorney to obtain and disclose information and material covered by Rule 17.2(a) that is not within the state’s possession and control if (1) the state has better access to the information; (2) the defense shows that it has made a good faith effort to obtain the information without success; and (3) the information has been specifically requested by the defense.

Section (f) tracks Ariz. R. Crim. P. 15.1(g). It is substantially similar to MRCP 26(b)(3). Rule 17.2(g) embraces Ariz. R. Crim. P 15.1(h) and continues the prosecuting attorney’s obligations under former URCCC 9.05 regarding witnesses who will rebut an alibi defense.

Rule 17.3 - Disclosure by Defendant.

**(a) Physical Evidence.** At any time after the filing of an indictment, upon written request of the prosecuting attorney and not less than 72 hours notice to defense counsel, the defendant shall, in connection with the particular crime with which the defendant is charged:

- (1) appear in a line-up;
- (2) speak for identification by witnesses;
- (3) be fingerprinted, palm-printed, foot-printed, or voice printed;
- (4) pose for photographs not involving re-enactment of an event;
- (5) try on clothing;
- (6) permit the taking of samples of the defendant's hair, blood, saliva, urine, or other specified materials that involves no unreasonable intrusions of the defendant's body;
- (7) provide specimens of the defendant's handwriting; and
- (8) submit to a reasonable physical or medical inspection of the defendant's body, provided such inspection does not include psychiatric or psychological examination.

The defendant shall be entitled to the presence of counsel at the taking of such evidence. This Rule shall supplement and not limit any other procedures established by law.

**(b) Notice of Defenses.** Within the time specified in Rule 17.3(d), the defendant shall provide a written notice to the prosecuting attorney specifying all defenses as to which the defendant intends to introduce evidence at trial, including, but not limited to, alibi, insanity, self-defense, defense of others, entrapment, impotency, marriage, insufficiency of a prior conviction, mistaken identity, necessity and good character. The notice shall specify for each defense the persons, other than the defendant, whom the defendant intends to call as witnesses at trial in support thereof. If the notice of defenses includes alibi, the notice shall also specify each specific place the defendant claims to have been at the time of the alleged offense. It may be signed by either the defendant or defendant's counsel, and shall be filed with the court. For good cause, the court may grant an exception to any of the foregoing requirements. Evidence of an intention to rely on a defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or



criminal proceeding, admissible against the person who gave notice of the intention.

**(c) Disclosure by Defendant; Scope.** Simultaneously with the notice of defenses submitted under Rule 17.3(b), the defendant shall make available to the prosecuting attorney for examination and reproduction the following material and information known to the defendant to be in the possession or control of the defendant:

- (1) the names and addresses of all persons, other than that of the defendant, whom the defendant intends to call as witnesses at trial, together with their relevant written or recorded statements;
- (2) the names and addresses of experts whom the defendant intends to call at trial, together with the results of the defendant's physical examinations and of scientific tests, experiments, or comparisons that have been completed; and
- (3) a list of all papers, documents, photographs, and other tangible objects (including electronic, magnetic, optical, or other recording or data compilation) that the defendant intends to use at trial.

**(d) Time for Disclosure.** Unless otherwise ordered by the court, the defendant shall disclose the materials and information listed in Rules 17.3(b) and 17.3(c) not later than 20 days after the prosecuting attorney's disclosure pursuant to Rule 17.2(b).

**(e) Additional Disclosure upon Request and Specification.** Unless otherwise ordered by the court, the defendant, within 10 days of a written request, shall make available to the prosecuting attorney for examination, testing, and reproduction the following:

- (1) any specified items contained in the list submitted under Rule 17.3(c)(3); and
- (2) any completed written reports, statements, and examination notes made by experts listed in Rule 17.3(c)(1) and (2) of this Rule in connection with the particular case.

The defendant may impose reasonable conditions (including an appropriate stipulation concerning chain of custody) to protect the physical evidence produced under this section or to allow time to complete any examination or testing of such items.

**(f) Scope of Disclosure.** The defendant's obligation under this Rule extends to material and information within the possession or control of the defendant, the defendant's attorneys, staff, agents, investigators, or any other persons

who have participated in the investigation or evaluation of the case and who are under the defendant's direction or control.

**(g) Disclosure by Order of the Court.** Upon motion of the prosecuting attorney showing that the prosecuting attorney has substantial need in the preparation of its case for material or information not otherwise covered by Rule 17.3, that the prosecuting attorney is unable without undue hardship to obtain the substantial equivalent by other means, and that disclosure thereof will not violate the defendant's constitutional rights, the court in its discretion may order any person to make such material or information available to the prosecuting attorney. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.

#### *Comment*

Rule 17.3 tracks Ariz. R. Crim. P. 15.2. Section (a) serves to facilitate obtaining non-testimonial evidence after indictment. *See Davis v. Mississippi*, 394 U.S. 721 (1969); *Hayes v. Florida*, 470 U.S. 811 (1985). It does not limit obtaining non-testimonial evidence through other means. *See, e.g., U.S. v. Dionisio*, 410 U.S. 1 (1973)(subpoena to compel a person to appear before a grand jury and provide a voice exemplar permissible). *See generally* ALI, Model Code of Pre-Arrest Procedure (1975). Other, more intrusive procedures for obtaining specimens from the defendant require a court order. *See* ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 11-2.3 (3d ed. 1996). Rule 17.3(a) is qualified in two ways. The accused is entitled to the presence of counsel at any such proceeding. *See, e.g., United States v. Wade*, 388 U.S. 218 (1967); *Nicholson v. State*, 523 So.2d 68 (Miss. 1988). And the prosecutor may use the proceeding only to obtain evidence related to the charge for which the defendant already stands accused, not to investigate other crimes. The defendant's obligations under section (a) are triggered by written request of the prosecuting attorney and at least 72 hours notice to defense counsel.

Section (b) requires a notice of defenses which the defendant intends to introduce into evidence at trial. This intent is that which exists at the time of the notice, and is subject to the continuing duty to supplement disclosure under Rule 17.7. It is intended that the "notice of defenses" be a broad disclosure of the defendant's case, including rebuttal of the state's case as well as the defendant's own "case-in-chief." Section (b) is intended to require a meaningful list of defenses and witnesses so that responsive disclosure under Rule 17.2(g) may be made as early in the disclosure process as possible. The disclosure requirement goes considerably beyond notification of "affirmative defenses," yet is limited to matters as to which the defendant will introduce evidence. The limitation is designed to allow the

defendant to argue deficiencies in the state's case (not requiring the presentation of defense evidence) without prior warning, and to make the defendant's disclosure obligations sufficiently clear and predictable as to be enforceable. As under Ariz. R. Crim. P 15.4(c), the defendant is not required to raise at trial all defenses noted in the "notice," and section (b) flatly prohibits comment on the defendant's failure to do so. Indeed, section (b) broadly provides that any evidence "of an intention to rely on a defense, later withdrawn, or of a statement made in connection with that intention, is not, *in any civil or criminal proceeding*, admissible against the person who gave notice of the intention." The requirement of a detailed notification of defenses follows ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 3.3 (3d ed. 1996). While the notice required by section (b) includes matters which will be supported by the defendant's own testimony, disclosure of the defendant's own testimony is not required; rather, the defendant need disclose only the defense to be asserted or the element of the offense to be attacked, in sufficient detail as to notify the prosecutor of the essence of the defense's case. Rules requiring advance notice of affirmative defenses – for example, alibi and insanity – do not violate the privilege against self-incrimination, even when they would be established by the defendant's own testimony (and even when they require specification of the place at which the defendant claims to have been, the time at which the defendant was there, and the witnesses thereto). *Williams v. Florida*, 399 U.S. 78 (1970). See former URCC 9.05 and 9.07.

Section (c) closely parallels the prosecutor's disclosure obligations under Rules 17.2(a)(1), (a)(4) and (a)(5), except that it is limited to evidence which the defendant will offer at trial. The extent of the defendant's duty to make facilities available for review and copying of materials and information is the same as that of the prosecuting attorney. See Comment to Rule 17.2. The disclosure by the defendant pursuant to section (c) applies to then-existing statements and reports known to the defendant to be in the possession or control of the defendant. Rule 17.2(c)(2) further clarifies that disclosure of physical examinations and of scientific tests relate only to those that have been completed at the time of this required disclosure. The duty to supplement is governed by Rule 17.7.

Section (d) ties the time for the defendant's disclosures under sections (b) and (c) to 20 days after the disclosures of the prosecuting attorney unless otherwise ordered by the court (or agreed to by the parties pursuant to Rule 17.2(b)).

Section (e) directly parallels the corresponding disclosure requirement placed on the prosecuting attorney in Rule 17.2(d). The defendant's disclosures are due within 10 days of a written request. The defendant may impose the same reasonable conditions (including an appropriate stipulation regarding chain of custody) on release of items of evidence that Rule 17.2(d) allows the prosecuting attorney to attach, either to protect physical evidence or allow time to complete any examination or test.

Section (f) sets forth the extent of the defendant's duty to obtain evidence for disclosure. See Rule 17.2(e) for the prosecuting attorney's similar duty.

Section (g) gives the prosecuting attorney the same right to request additional discovery given to the defendant in Rule 17.2(f), with the additional warning that discretionary discovery from the defendant must also take account of the privilege against self-incrimination.

#### Rule 17.4 - Depositions.

**(a) Availability.** Upon motion of any party or a witness, the court may in exceptional circumstances order the examination of any person, except the defendant, upon oral deposition under the following circumstances:

- (1) a party shows that the person's testimony is material to the case and that there is a substantial likelihood that the person will not be available at the time of trial; or
- (2) a witness is incarcerated for failure to give satisfactory security that the witness will appear to testify at a trial or hearing.

**(b) Motion for Taking Deposition; Notice; Service.** A motion for deposition shall specify the time and place for taking the deposition and the name and address of each person to be examined, together with designated papers, documents, photographs, or other tangible objects, not privileged, to be produced at the same time and place. The court may change such terms and specify any additional conditions governing the conduct of the proceeding. The moving party shall notice the deposition in the manner provided for in civil actions and serve a subpoena upon the deponent, specifying the terms and conditions set forth in the court's order granting the deposition, and give notice of the deposition in writing to every other party to the action.

**(c) Manner of Taking.** Except as otherwise provided herein or by order of the court, depositions shall be taken in the manner provided in civil actions. With the consent of the parties, the court may order that a deposition be taken on written interrogatories in the manner provided in civil actions. Any statement of the witness being deposed which is in the possession of any party shall be made available for examination and use at the taking of the deposition to any party who would be entitled thereto at trial. A deposition may be recorded by other than a certified court reporter. If

a deposition is recorded by other than a certified court reporter, the party taking the deposition shall provide the opposing party with a copy of the recording within 14 days after the taking of the deposition or not less than 10 days before trial, whichever is earlier. The parties may stipulate, or the court may order, that a deposition be taken by telephone or similar audio or visual means.

**(d) Presence of Defendant.** A defendant shall have the right to be present at any examination. If a defendant is in custody, the officer having custody shall be notified by the moving party of the time and place set for the examination and shall, unless the defendant waives, in writing, the right to be present, produce the defendant at the examination and remain with the defendant during it.

**(e) Use.** Depositions may be used in the manner provided by law.

### *Comment*

Rule 17.4 is taken from Ariz. R. Crim. P. 15.3, and is similar to Fed. R. Crim. P. 15. See also ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 4.1 (3d ed. 1996). As with federal practice, taking a deposition requires a court order and a showing of "exceptional circumstances." Depositions may be ordered by the court only to preserve testimony, or to take the statement of a witness in order that the witness may be released from incarceration. See MISS. CODE ANN. § 99-15-7 (detention of material witness).

The court is given broad discretion in section (b) to regulate depositions; this could include setting restrictions on the defendant's participation if a witness fears intimidation or harassment. Under section (c), written interrogatories may be substituted for an oral proceeding; the defendant's consent is required because their use, in effect, eliminates the right of cross-examination. Section (c) further sets forth a number of procedural requirements and refers to the civil rules for further guidance, and permits the recording of a deposition by an audio recording device and, by stipulation of the parties or order of the court, the taking of a deposition by telephone. This language is similar to language found in MRCP 30(b). It is designed to reduce expense on the part of the state and the defense, and to provide the opportunity for reducing inconvenience to witnesses.

Section (d) gives the defendant a right to be present, as the purpose of the deposition is perpetuation of testimony for use at trial. A deposition cannot be used at trial without the defendant's consent if the defendant was not present at its taking and did not waive the right to be present in writing. See *Pointer v. Texas*, 380 U.S. 400 (1965).

Rule 17.5 - General Standards.

In all disclosure under this Rule the following shall apply:

**(a) Statements.**

(1) *Definition.* Whenever it appears in Rule 17 the term “statement” shall mean:

(A) a writing signed or otherwise adopted or approved by a person;

(B) a mechanical, electronic, or other recording of a person’s oral communications or a transcript thereof; and

(C) a writing containing a verbatim record or a summary of a person’s oral communications.

(2) *Superseded Notes.* Handwritten notes that have been substantially incorporated into a document or report within 20 working days of the notes being created, or that have been otherwise preserved electronically, mechanically or by verbatim dictation, shall no longer themselves be considered a statement.

**(b) Materials Not Subject to Disclosure.**

(1) *Work Product.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney, members of the prosecuting attorney’s legal or investigative staff or law enforcement officers, or of defense counsel or defense counsel’s legal or investigative staff.

(2) *Informants.* Disclosure of the existence of an informant or of the identity of an informant who will not be called to testify shall not be required where disclosure would result in substantial risk to the informant or to the informant’s operational effectiveness, provided the failure to disclose will not infringe the constitutional rights of the accused.

**(c) Use of Materials.** Any materials furnished to an attorney pursuant to this Rule shall not be disclosed to the public but only to others to the extent necessary for the proper conduct of the case.

**(d) Requests for Disclosure.** All requests for disclosure required by Rule 17 shall be made to the opposing party.

*Comment*

Rule 17.5 follows Ariz. R. Crim. P. 15.4. It is intended that an attorney’s actual trial notes, such as an outline of questions to ask a witness will

be encompassed within the work product exception of section (b)(1), even though they fall within the definition of statement. The exception for superseded notes in section (a)(2) exists to alleviate the bookkeeping problem of retaining every scrap of notes taken in a case, and to prevent cross-examination on “jottings” contained in a notebook. However, the rule does require the timely preservation of information contained in handwritten notes. If the information is not substantially incorporated into a written report within the time frame established in the rule, the information contained in the handwritten notes must be saved entirely, so that parties may have the opportunity to evaluate the information not otherwise preserved. This balances the need for accurate, reliable, contemporaneously gathered information, with the resource limits of witnesses and those required to gather and maintain that information.

Following the suggestion ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 2.6 (3d ed. 1996), and rejecting Fed. R. Crim. P. 16(a)(2) and (b)(2), section (b)(1) adopts a limited work product standard. See *Hickman v. Taylor*, 329 U.S. 495 (1947) (protecting documents only to the extent that they constitute legal research or the “theories, opinions and conclusions” of the parties and their agents).

Section (b)(2) incorporates the constitutional dimensions of the informant privilege, which requires disclosure only of a “material witness” to the events from which the criminal charges arise. *McCray v. Illinois*, 386 U.S. 300 (1967); *Roviaro v. United States*, 353 U.S. 53 (1957). Section (b)(2) will not affect the current requirement that where a defendant is entitled to know the existence or identity of an informant, the prosecuting attorney must dismiss the case if the required disclosure is not made. Section (b)(2) differs from § 2.6(b) of the ABA, Standards, only in that the prosecuting attorney need not notify the defendant of the existence of an informant unless the defendant is constitutionally entitled to know of his identity. This change was made to provide the prosecutor with more substantial protection for police informants, whose actual identity may be disclosed in some cases by mere notice of their existence.

Section (c) merely reminds counsel that discovery materials are to be considered confidential records provided for the limited use of conducting a particular criminal case.

#### Rule 17.6 - Excision and Protective Orders.

**(a) Discretion of the Court to Deny, Defer, or Regulate Disclosure.** Upon motion of any party showing good cause, the court may at any time order that disclosure of the identity of any witness be deferred for any reasonable period of time not to extend beyond 5 days before the date set for trial, or that any other disclosures required by this Rule be denied, deferred, or regulated when it finds:

- (1) that the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and
- (2) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

**(b) Discretion of the Court to Authorize Excision.** Whenever the court finds, on motion of any party, that only a portion of a document, material, or other information is subject to disclosure under these Rules, it may authorize the party disclosing it to excise that portion of the material that is not subject to disclosure and to disclose the remainder.

**(c) Protective and Excision Order Proceedings.** On motion of the party seeking a protective or excision order, or submitting to the court for a determination as to whether any document, material, or other information is subject to disclosure, the court may permit the party to present the material or information for inspection by the judge *in camera*. Counsel for all other parties shall be entitled to be present when such presentation is made.

**(d) Preservation of Record.** If the court enters an order that any material, or any portion thereof, is not subject to disclosure under this Rule, the entire text of the material shall be sealed and preserved in the record to be made available to the appellate court in the event of an appeal.

### *Comment*

Rule 17.6 is substantially identical to Ariz. R. Crim. P. 15.5. Section (a) gives the court broad discretion to limit discovery required by this rule whenever it is shown a risk of harm resulting from a specific disclosure. Such risks could include the potential for physical harm, intimidation, bribery, economic reprisals, harassment of a witness, extreme prejudice to a witness or party, or interference with or disruption of ongoing police investigations.

Section (c), as under ABA, Standards for Criminal Justice, *Discovery and Procedure Before Trial* § 4.6 (3d ed. 1996), and Fed. R. Crim. P. 16(d)(1), provides broad authority for *in camera* pretrial determinations of disclosure issues. For the constitutional dimensions of *in camera* discovery orders, see *Alderman v. United States*, 394 U.S. 165 (1969).

Section (d) preserves the right of the parties to appeal excision and protective orders.



Rule 17.7 - Continuing Duty to Disclose; Final Disclosure Deadline; Extension.

**(a) Continuing Duties.** The duties prescribed in this Rule shall be continuing duties and each party shall make additional timely disclosure whenever new or different information subject to disclosure is discovered.

**(b) Additional Disclosure.** Any party that determines additional disclosure may be forthcoming within 30 days of trial shall immediately notify the other parties of the circumstances and when the disclosure will be available.

**(c) Final Deadline for Disclosure.** Unless otherwise permitted, all disclosure required by this Rule shall be completed at least 7 days before trial.

**(d) Disclosure After the Final Deadline.** Absent agreement by the parties, a party seeking to use material or information not disclosed at least 7 days before trial shall obtain leave of court by motion, supported by affidavit or testimony under oath, to extend the time for disclosure and use the material or information. If the court finds that the material or information could not have been discovered or disclosed earlier even with due diligence and the material or information was disclosed immediately upon its discovery, the court shall grant a reasonable extension to complete the disclosure and grant leave to use the material or information. Absent such a finding, the court may either deny leave or grant a reasonable extension to complete the disclosure and leave to use the material or information, and if granted the court may impose any sanction listed in Rule 17.8 other than preclusion or dismissal.

**(e) Extension of Time for Scientific Evidence.** Upon a motion filed before the final deadline for disclosure in Rule 17.7(c), supported by affidavit from a crime laboratory representative or other scientific expert that additional time is needed to complete scientific or other testing, or reports based thereon, and specifying the additional time necessary, the Court shall, unless it finds that the request for extension resulted from dilatory conduct, neglect, or other improper reason on the part of the moving party or person listed in Rule 17.2(e) or 17.3(c), grant a reasonable extension in which to complete the disclosure. The period of time of the extension shall be excluded by the court from all time periods prescribed in Rules 17.2(b) 17.2(d), 17.3 (d), 17.3(e), 17.7(b), and 17.7(c).

*Comment*

Rule 17.7 is modeled after Ariz. R. Crim. P. 15.6. Under section (a), the parties have a duty to make continuing disclosures without specific request from any other party. The court should consider the imposition of appropriate sanctions for untimely disclosure as well as nondisclosure, for the entire structure of pretrial proceedings embodied in these rules depends on early and complete evidentiary disclosures.

Section (d) defines the standards that will govern a party seeking leave of court to offer evidence that had not previously been disclosed. The moving party must make certain threshold showings before seeking to admit certain evidence. The failure of the moving party to meet the burden set forth in this section will not result in automatic preclusion of the evidence whose admission is being sought. Instead, the court retains discretion to impose at least one of the Rule 17.8 sanctions, which include preclusion of the evidence. If, upon the failure of the moving party to meet its burden, the court grants an extension of time to complete the disclosure, the court may impose any Rule 17.8 sanction except preclusion or dismissal. A court determination that the newly disclosed evidence may be used at trial does not foreclose evidentiary objections against the use of the evidence at trial.

Section (e) provides standards for extending the date of disclosure in order to complete scientific testing and excluding that time from the time periods prescribed in Rule 17. In most cases, scientific evidence is anticipated to be ready for examination and disclosure within the time periods of Rule 17. However, there are circumstances in which the analysis and examination of scientific evidence cannot be completed within the prescribed time limits. These circumstances may arise due to the volume of cases handled by a forensic crime laboratory, the large number of pieces of evidence that must be analyzed by the laboratory in the individual case, and the large number of pieces of evidence that must be analyzed by the laboratory in total.

For example, a party or crime laboratory might reasonably find it necessary to triage cases and not immediately request or commence the examination of scientific evidence. This triage of cases, considering all of the circumstances, may be deemed appropriate and not dilatory conduct or neglect. Section (e) recognizes that forensic crime laboratories are constrained by external circumstances, such as budget, personnel and space limitations. The rule provides a mechanism to obtain a reasonable extension to complete scientific testing and disclosure.

Rule 17.8 - Sanctions.

**(a) Failure to Make Disclosure.** If a party fails to make a disclosure required by Rule 17, any other party may move to compel disclosure and for appropriate sanctions. The court shall order disclosure and shall impose any sanction it finds appropriate, unless the court finds that the failure to

comply was harmless or that the information could not have been disclosed earlier even with due diligence and the information was disclosed timely upon its discovery. All orders imposing sanctions shall take into account the significance of the information not timely disclosed, the impact of the sanction on the parties, the culpability of the party failing to make the disclosure, and the stage of the proceedings at which the disclosure is ultimately made. Available sanctions include, but are not limited to:

- (1) granting a continuance or declaring a mistrial when necessary in the interests of justice;
- (2) holding a witness, party, person acting under the direction or control of a party, or counsel in contempt;
- (3) imposing costs of continuing the proceedings;
- (4) in extraordinary circumstances, precluding or limiting the calling of a witness, use of evidence, or argument in support of or in opposition to a charge or defense;
- (5) in extraordinary circumstances, dismissing the case with or without prejudice; or
- (6) any other appropriate sanction.

**(b) Motion for Sanctions.** No motion brought under Rule 17.8(a) will be considered or scheduled unless a separate statement of moving counsel is attached certifying that, after personal consultation or good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

### *Comment*

Rule 17.8 is modeled after Ariz. R. Crim. P. 15.7. Section (a) provides that, upon motion, the court shall order disclosure and may impose any sanction it finds appropriate; ordering disclosure is not a prerequisite to the imposition of sanctions. Section (a) specifies factors that the court should consider in determining whether a sanction should be imposed, and, if so, which sanction is appropriate. The court may decline to impose a sanction if the failure to comply was harmless or the non-disclosing party has acted diligently and in good faith. In essence, the non-disclosing party must demonstrate that the evidence was either not in existence prior to the discovery deadline, or could not have been discovered through the exercise of due diligence prior to the deadline. The court's contempt power and authority to impose sanctions extend not just to the prosecuting attorney and defense counsel, but also extend to include all those governed by the duties prescribed by Rules 17.2(e) and 17.3(c).

Section (b) provides that the moving party must certify that the party has made a good faith attempt to resolve the matter without intervention of the court.

RULE 18 - TRIAL BY JURY; WAIVER; SELECTION AND  
PREPARATION OF PETIT JURY.

Rule 18.1 - Trial by Jury.

**(a) Generally.**

(1) *Number of Jurors; Qualifications.* The number of jurors required to try a case and render a verdict shall be as provided by law. Jurors shall have the qualifications required by law.

(2) *Misdemeanor Cases.* Misdemeanor cases may be tried before either a 6 or 12 person jury, in the discretion of the court. In cases where the maximum possible sentence is 6 months or less, the case may be tried without a jury, in the discretion of the court.

(3) *Alternate Jurors.* The court may in its discretion qualify such alternate jurors as it deems necessary.

**(b) Waiver.** The defendant may waive the right to trial by jury with consent of the prosecution and the court. In a death penalty case, the defendant may also waive the right to have a jury determine the penalty if the prosecution and the court concur.

(1) *Voluntariness.* Before accepting a waiver the court shall address the defendant personally, advise the defendant of the right to a jury trial, and ascertain that the waiver is knowing, voluntary, and intelligent.

(2) *Form of Waiver.* A waiver of jury trial under this Rule shall be made in writing or in open court on the record.

(3) *Withdrawal of Waiver.* With the permission of the court, the defendant may withdraw the waiver of jury trial or sentencing but no withdrawal shall be permitted after the court begins taking evidence.

*Comment*

Rule 18.1 parallels Ariz. R. Crim. P. 18.1 and 18.2. Article 3, § 31 of the Mississippi Constitution provides that the “right of trial by jury shall remain inviolate.” In felony cases, conviction requires the unanimous consent of twelve impartial jurors. See *Markham v. State*, 209 Miss. 135 (Miss. 1950). MISS. CODE ANN. § 13-5-1 sets forth the qualifications of competent jurors.

Because all felonies must be prosecuted on indictment by the grand jury, it is clear that the trial of all felonies must be by jury unless waived. Art. 3, § 27, of the Mississippi Constitution. See *Robinson v. State*, 345 So. 2d 1044 (Miss. 1977). Section (a)(2) continues the practice of former URCCC 10.01, in permitting misdemeanor cases to be tried before a 6 person jury.

The constitutional right to trial by jury does not apply unless the maximum possible sentence exceeds 6 months. See *Hinton v. State*, 222 So. 2d 690 (Miss. 1969). See also former URCCC 12.02(C). Accordingly, section (a)(2) provides that a jury trial is discretionary if a defendant's maximum possible sentence is 6 months or less.

The operation of section (a) is complicated by the second sentence of MISS. CODE ANN. § 99-33-9, which provides that "there shall be no jury trial" in justice court when the "potential for incarceration is less than six (6) months." Thus, when a misdemeanor statute provides (as many do) for punishment of "not more than 6 months," § 99-33-9 is inapplicable, and a defendant in justice court may seek a jury trial in the discretion of the court as authorized by section (a)(2).

Section (b) follows common practice. See Fed. R. Crim. P. 23(a), and ABA, Standards for Criminal Justice, *Trial by Jury* §§ 15-1.2 and 15-1.3 (2d ed. 1986). Section (b)(3) provides that the court can allow a withdrawal of waiver for good cause, but not after taking evidence begins. When considering a waiver on the eve of trial, the court should consider the convenience of witnesses, parties, and potential jurors.

### Rule 18.2 - Jury Information.

Before the *voir dire* examination, each party shall be furnished with a list of the names and addresses of the prospective jurors present and qualified to serve. Each party shall also be furnished with the employment status, occupation, employer, residency status, education level, prior jury duty experience, felony conviction status, and such other information as the court may require.

#### *Comment*

Rule 18.2 tracks Ariz. R. Crim. P. 18.3. Basic biographical information furnished to the parties will assist them in making a more intelligent exercise of challenges for cause or peremptory challenges. The basic information must include at least: names, addresses, occupation, residency status, extent of education, and previous service as a juror. See MISS. CODE ANN. 13-5-1 (jury questionnaires). Further information may be required by the court, at the request of parties or otherwise. See also Rule 18.4(c) (supplemental questions on jury questionnaires).

Rule 18.3 - Challenges.

**(a) Challenge to the Jury Panel.** Any party may challenge the panel on the ground that in its selection there has been a material departure from the requirements of law. Challenges to the panel shall be in writing or on the record, specifying the facts on which the challenge is based. They shall be made and decided before any individual juror is examined.

**(b) Challenge for Cause.** When there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative, or on motion of any party, shall excuse the juror from service in the case. A challenge for cause may be made at any time, but may be denied for failure of the party making it to exercise due diligence.

**(c) Peremptory Challenges.**

*(1) In General.* Both parties shall be allowed the following number of peremptory challenges for the selection of jurors:

- (A) if the offense charged is punishable by death or life imprisonment:
  - (i) 12, if no alternate jurors are to be impaneled,
  - (ii) 13, if 1 or 2 alternate jurors are to be impaneled,
  - (iii) 14, if 3 or 4 alternate jurors are to be impaneled, or
  - (iv) 15, if 5 or 6 alternate jurors are to be impaneled;
- (B) in all cases tried before a 12 person jury:
  - (i) 6, if no alternate jurors are to be impaneled,
  - (ii) 7, if 1 or 2 alternate jurors are to be impaneled,
  - (iii) 8, if 3 or 4 alternate jurors are to be impaneled, or
  - (iv) 9, if 5 or 6 alternate jurors are to be impaneled; and
- (C) in all cases tried before a 6 person jury:
  - (i) 3, if no alternate jurors are to be impaneled, or
  - (ii) 4, if 1 or 2 alternate jurors are to be impaneled.

(2) *Joint Trial of Several Defendants.* When two or more defendants are jointly tried, two additional challenges shall be allowed to the defense and to the prosecuting attorney for each additional defendant. When two or more defendants are jointly tried and cannot agree by whom the peremptory challenges shall be exercised, they shall be exercised in the manner prescribed by the court.

(3) *Agreement Among the Parties.* The parties may agree to exercise fewer than the allowable number of peremptory challenges.

### Comment

Rule 18.3(a) and (b) tracks Ariz. R. Crim. P. 18.4 (a) and (b). The requirement in section (a) that the challenger allege and prove a “material departure” from legal requirements is intended to require a showing of prejudice, and may be made by written motion or on the record.

Under section (b), “a juror who may be removed on challenge for cause is one against whom a cause for challenge exists that would likely [affect the juror’s competency or] impartiality at trial.” *Evans v. State*, 725 So.2d 613, 653 (Miss.1997), *cert. denied*, 525 U.S. 1133 (1999) (quoting *Bil-liot v. State*, 454 So.2d 445, 457 (Miss.1984), *cert. denied*, 469 U.S. 1230 (1985), *reh’g denied*, 470 U.S. 1089 (1985)); *Armstrong v. State*, 214 So.2d 589, 593 (Miss.1968), *cert. denied*, 395 U.S. 965 (1969) (“Those [jurors] who say that they could follow the evidence and the instructions of the court should be retained, and those who cannot follow the instructions of the court should be released”). Section (b) permits a challenge for cause to be made whenever the cause appears. The trial court may deny the challenge if not seasonably made, but there is no absolute time limitation imposed by rule. Once the trial has commenced the prosecutor may be unable, because of double jeopardy, to invoke the right to challenge, unless there are sufficient alternate jurors to enable the trial to continue with one less juror.

Section (c)(1) largely follows former URCCC 10.01. As under former URCCC 10.01, the rule language “implies the trial court has no discretion in the number of peremptory strikes given to each side.” *Jones v. State*, 951 So.2d 568 (Miss. Ct. App. 2006). It departs from prior practice in the number of additional challenges granted when alternate jurors are impaneled, and removes the prior practice of allocating a certain and separate number of challenges for regular jurors and a certain and separate number of challenges for alternate jurors. This change facilitates the practice in Rule 18.4(g) of not designating which jurors will serve as alternates until deliberations begin. Section (c)(2) expands on prior practice by providing 2 additional challenges to the defense collectively, and the prosecuting attorney, for each co-defendant. *Compare* Fed. R. Crim. P. 24(c)(4). Co-defendants who cannot agree on the allocation of preemptory challenges will exercise

them as directed by the court. Section (c)(3) allows the parties to agree to exercise a lesser number of peremptory challenges than provided by section (c)(1).

Rule 18.4 - Procedure for Selecting a Jury.

**(a) Oath.** All members of the panel shall swear or affirm that they will answer truthfully all questions concerning their qualifications.

**(b) Inquiry by the Court; Brief Opening Statements.** The court shall initiate the examination of jurors by identifying the parties and their counsel, briefly outlining the nature of the case, and explaining the purposes of the examination. The court shall ask any questions which it thinks necessary relating to the prospective jurors' qualifications to serve in the case on trial. The parties may, before *voir dire* and with the court's consent, present brief opening statements to the entire jury panel. On its own motion the court may require counsel to do so.

**(c) Voir dire Examination.** The court may permit the parties to conduct the examination of the prospective jurors or may itself conduct the examination. If the court conducts the examination, the parties shall be permitted to supplement the court's examination with further questions. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination. In addition, the court may terminate or limit *voir dire* for good cause. Nothing in this Rule shall preclude the use of written questionnaires to be completed by the prospective jurors, in addition to oral examination.

**(d) Scope of Examination.** The examination of prospective jurors shall be limited to inquiries directed to bases for challenge for cause or to information to enable the parties to exercise intelligently their peremptory challenges.

**(e) Challenge for Cause.** At any time that cause for disqualifying a juror appears, the court shall excuse the juror before the parties are called upon to exercise their peremptory challenges. Challenges for cause shall be made out of the hearing of the jurors, but shall be of record.

**(f) Exercise of Peremptory Challenges.** Following examination of the jurors, the parties shall exercise their peremptory challenges as follows:

- (1) the court shall consider all challenges for cause before the parties are required to exercise peremptory challenges;



- (2) next, the prosecuting attorney shall tender a full panel of accepted jurors (including a sufficient number of alternates as deemed necessary by the court) having considered the jury in the order in which they appear, having exercised any peremptory challenges desired;
- (3) next, the defendants shall go down the juror list accepted by the prosecuting attorney and exercise any peremptory challenges to that panel;
- (4) once the defendants exercise peremptory challenges to the panel tendered, the prosecuting attorney shall then be required to tender sufficient additional jurors to constitute a full panel of accepted jurors (including a sufficient number of alternates as deemed necessary by the court);
- (5) next, the defendants shall go down the list of the additional jurors tendered to create a full panel and exercise any additional peremptory challenges; then
- (6) the above procedure shall be repeated until a full panel of jurors has been accepted by all parties (including a sufficient number of alternates as deemed necessary by the court).

Constitutional challenges to the use of peremptory challenges shall be made at the time each panel is tendered. Peremptory challenges shall be made out of the hearing of the jurors, but shall be of record.

**(g) Selection of Jury.** Just before the jury retires to begin deliberations, the clerk shall, by lot, determine the juror or jurors to be designated as alternates. Alternates, upon being physically excused by the court, shall be instructed to continue to observe the admonitions to jurors until they are informed that a verdict has been returned or the jury discharged. If a deliberating juror is excused due to inability or disqualification to perform required duties, the court may substitute an alternate juror, choosing from among the alternates in the order previously designated, unless disqualified, to join in the deliberations. If an alternate joins the deliberations, the jury shall be instructed to begin deliberations anew.

### *Comment*

Rule 18.4 largely follows Ariz. R. Crim. P. 18.5. The rule allows the court to assume the primary responsibility for conducting the jury examination, or confer primary responsibility on the parties. While section (b) gives the court the authority to permit or require the parties to give brief opening statements to the entire jury panel before *voir dire*, such brief

opening statements are in addition to those provided by right to the parties under Rule 19.1. If the court primarily conducts the *voir dire* examination, section (c) gives the parties the right to supplement the court's examination with additional questions.

The rule is broad enough to permit the court to examine individual jurors privately in appropriate cases (e.g., ones which concern unusually sensitive subjects or which are surrounded by a great deal of publicity), when the prospective juror might be embarrassed to confess a true opinion before an audience or when one juror's statements concerning the case might color the entire jury's outlook. The use of this procedure in controversial cases is recommended by ABA, Standards for Criminal Justice, *Fair Trial and Free Press* § 3.4 (Approved Draft, 1968).

Section (d), and the court's ability to conduct *voir dire*, are intended to remove entirely the practice of some attorneys of "conditioning" the jury by means of questions and argument which amount to preliminary instructions on the law and facts of the case. Under section (d), the judge can control the length and content of the parties' *voir dire*. The court should instruct counsel that *voir dire* is permitted to enable counsel to propound questions seeking relevant information from and about the jurors, but not to ask questions intended to impart information or arguments to the jurors. *Cf. Ross v. State*, 954 So.2d 968, 990 (Miss. 2007) (collecting cases on use of hypothetical facts during *voir dire*). The court should be particularly sensitive to the prejudice which can arise from *voir dire* by an unrepresented defendant.

Under section (e), the jurors will not be removed from the courtroom each time counsel wishes to make a challenge for cause. Better practice will be for the parties to raise such challenges for cause at the end of *voir dire* but prior to exercising peremptory challenges. If raised during *voir dire*, the challenge will be out of the jury's hearing, to minimize any resentment which might be caused by the challenge or argument upon it. All challenges and rulings must be on the record.

Sections (e) and (f) contemplate that all of the jury panel members will participate in *voir dire* examination by the judge and counsel. Although the judge may excuse jurors for cause in the presence of the panel, challenges for cause are best handled, as described above, after examination of the panel has been completed and a recess taken. Following disposition of the for cause challenges, the prosecuting attorney tenders a full panel of jurors (including alternates), taking the jurors in the order in which they appear and exercising any desired peremptory challenges. The defendants then exercise peremptory challenges to the panel, and the process continues in like fashion. All issues under *Batson v. Kentucky*, 476 U.S. 79 (1986) must be raised each time a panel is tendered. Regarding constitutional challenges to the use of peremptory strikes see *Johnson v. State*, 875 So.2d 208 (Miss. 2004); *Berry v. State*, 802 So.2d 1033 (Miss. 2001).

Section (g) establishes a new procedure for seating, substituting, and discharging alternates. No distinction between jurors and alternates is

made until the deliberations are to begin; then a drawing of lots determines which are jurors and which are alternates. This method provides maximum assurance that alternates will follow the proceedings with the attention of potential jurors. *Compare* MISS. CODE ANN. § 13-5-67 (superseded by these Rules) (Alternate jurors are designated as such throughout the trial. Alternates are discharged at the time the jury retires, and may not be substituted for regular jurors after deliberations begin).

#### Rule 18.5 - Oath and Preliminary Instruction.

**(a) Oath.** The court shall, on the record of each trial, give the jurors the following oath, or remind the jurors that they are still under the following oath:

Do you solemnly swear (or affirm) that you will well and truly try all issues that may be submitted to you, or left to your decision by the court, during the present term, and true verdicts give according to the evidence and the law. So help you God.

**(b) Preliminary Instructions.** Immediately after the jury is sworn, the court may instruct the jury concerning its duties, its conduct, the order of proceedings, and the elementary legal principles that will govern the proceeding.

#### *Comment*

Rule 18.5 largely follows Ariz. R. Crim. P. 18.6. The oath in section (a) is taken from MISS. CODE ANN. § 13-5-71. Section (b) is based on ABA, Standards for Criminal Justice, *Trial by Jury* § 15-3.6(e) (2d ed. 1986), which reads: "Before the taking of evidence, the court may give preliminary instructions to the jury deemed appropriate for their guidance in hearing the case."

#### Rule 18.6 - Note Taking by Jurors.

**(a) Note Taking Permitted in the Discretion of the Court.**

The court may, in its discretion, permit jurors to take written notes concerning testimony and other evidence. If the court permits jurors to take written notes, jurors shall have access to their notes during deliberations. Immediately after the jury has rendered its verdict, all notes shall be collected by the bailiff or clerk and destroyed. In a death penalty case, jurors shall have access to their notes from the trial and all phases of the sentencing proceedings until the jury renders a penalty verdict or is dismissed.

**(b) Instructions.** The court shall instruct the jury as to whether note taking will be permitted. If the court permits

jurors to take written notes, the trial judge shall give both a preliminary instruction and an instruction at the close of all the evidence on the appropriate use of juror notes. These instructions shall be given in the following manner:

(1) Preliminary Instruction: Note Taking Forbidden.

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying. Further, in a group the size of yours, certain persons will take better notes than others will, and there is a risk that jurors who do not take good notes will depend on jurors who do. The jury system depends upon all jurors paying close attention and arriving at a decision. I believe that the jury system works better when the jurors do not take notes.

You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(2) Preliminary Instruction: Note Taking Permitted.

If you would like to do so, you may take notes during the course of the trial. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this. If you decide to take notes, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings.

Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. An individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors.

You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(3) Use of Notes During Deliberations.

Jury Instruction:

Members of the Jury, shortly after you were selected I informed you that you could take notes and I instructed you as to the appropriate use of any notes that you might take. Most importantly, an individual juror's

notes may be used by that juror only and may not be shown to or shared with other jurors. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you took notes or not, each of you must form and express your own opinion as to the facts of this case. Be aware that during the course of your deliberations there might be the temptation to allow notes to cause certain portions of the evidence to receive undue emphasis and receive attention out of proportion to the entire evidence. But a juror's memory or impression is entitled to no greater weight just because he or she took notes, and you should not be influenced by the notes of other jurors.

Thus, during your deliberations, do not assume simply because something appears in your notes that it necessarily took place in court.

#### *Comment*

Rule 18.6 continues practice under URCCC 3.14. *Cf. Vardaman v. State*, 966 So. 2d 885, 893 (Miss. Ct. App. 2007).

#### Rule 18.7 - Jury Sequestration.

**(a) Death Penalty Cases.** In a death penalty case, the jury shall be sequestered during the entire trial.

**(b) Other Cases.** In all other cases, the jury may be sequestered on request of either the defendant or the prosecuting attorney made at least 48 hours in advance of the trial. The court may, in its discretion, either grant or refuse the request to sequester the jury. The court may, on its own initiative, sequester a jury at any stage of a trial.

**(c) Admonitions to Jurors.** In all cases, the court, among other matters it deems proper, shall admonish the jurors that they are not to:

(1) discuss among themselves any subject connected with the trial until the case is submitted to them for deliberation;

(2) converse with anyone else on any subject connected with the trial, until they are discharged as jurors in the case;

- (3) permit themselves to be exposed to outside comments or news accounts of the proceedings, until they are discharged as jurors in the case; or
- (4) form or express any opinion on the case until it is submitted to them for deliberation.

If the jurors are permitted to separate, they may also be admonished not to view the place where the offense was allegedly committed.

#### *Comment*

Rule 18.7(a) and (b) preserves practice under former URCCC 10.02. Sequestration is mandatory in death penalty cases, *see Simmons v. State*, 805 So.2d 452 (Miss. 2001), and discretionary in other cases, *see Baldwin v. State*, 732 So.2d 236 (Miss. 1999). Section (c) essentially incorporates URCCC 3.11. The court is free to supplement the admonitions in section (c) in any manner it deems proper.

### RULE 19 - TRIAL

#### Rule 19.1 - Proceedings at Trial.

- (a) Order of Proceedings.** The trial shall proceed in the following order unless otherwise directed by the court:
- (1) The indictment or complaint shall be read or summarized, and the plea of the defendant stated.
  - (2) The prosecuting attorney may make an opening statement.
  - (3) The defendant may then make an opening statement or may defer such opening statement until the close of the prosecution's evidence. If there are 2 or more defendants, they shall proceed in the order of the filing of their respective charges or, if they are charged in the same instrument, they shall proceed in the order they appear therein, unless they have agreed to a different order.
  - (4) The prosecuting attorney shall offer the evidence in support of the charge.
  - (5) The defendant may then make an opening statement if it was deferred, and offer evidence in defense.
  - (6) The prosecuting attorney shall then be allowed to offer evidence in rebuttal.
  - (7) If the court on a showing of good cause allows a case-in-chief to be reopened, and if either party is allowed to present further evidence, the other party may present evidence in response thereto.
  - (8) The judge shall then charge the jury.

(9) The prosecuting attorney may then make a closing argument to the jury. The defendant may then make a closing argument to the jury. Failure of the prosecuting attorney to make a closing argument shall not deprive the defendant of the right to argue. The prosecuting attorney may then make a rebuttal argument, but not to exceed 1/2 of the prosecuting attorney's allotted time. If after the prosecuting attorney's initial closing argument a defendant declines to make a closing argument, the prosecuting attorney shall make no further argument.

With the permission of court, the parties may agree to any other method of proceeding.

**(b) Enhanced Punishment for Subsequent Offenses, etc.** In cases involving enhanced punishment for subsequent offenses, or involving non-capital sentencing allegations required to be found by a jury, the trial shall proceed as follows.

(1) *Reading of the Charges.* When the indictment or complaint is read or summarized, all references to prior convictions or sentencing allegations shall be omitted.

(2) *Separate Trials Required.* The trial shall proceed initially as though the prior convictions were not alleged or the sentencing allegations made. In the trial on the principal charge, neither the previous convictions nor the sentencing allegations shall be mentioned by the prosecution or the court except as provided by the Mississippi Rules of Evidence.

(3) *Trial of Sentencing Allegations.* The trial court without a jury shall determine allegations of previous convictions. Any issue of non-capital sentencing allegations required to be found by the jury shall be tried, unless the defendant has admitted to the allegations.

#### *Comment*

Rule 19.1(a) follows Ariz. R. Crim. P. 19.1. Section (a) provides a presumptive method of proceeding at trial. The court will generally give final instructions to the jury before closing arguments of counsel instead of after, in order to enhance jurors' ability to apply the applicable law to the facts; the court may wish, however, to withhold giving the necessary procedural and housekeeping instructions until after closing arguments. *See* Rules 21(f), 22.1(a), and 22.3(a). The last sentence of section (a) permits the parties, with the permission of the court, to stipulate to any other convenient method of proceeding. This should be construed broadly to permit the parties to have the case determined by the court on the basis of stipulated

facts; it thus legitimizes a practice which preserves the defendant's right, for example, to appeal a previously denied suppression motion without wasting the time of the court and counsel in a full trial of an otherwise simple case. Compare Rule 15.3(d) (appeal from a guilty plea for a similar purpose).

Section (b) continues the practice under former URCCC 11.03 of bifurcated trial when enhanced punishment for subsequent offenses is sought. A jury resolves the underlying charge, and the court determines whether the defendant satisfies the requirements for enhanced sentencing as an habitual offender. See *Frazier v. State*, 907 So.2d 985 (Miss. 2005). Sentencing allegations other than prior convictions must be tried to a jury. See *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

### Rule 19.2 - Bifurcated Trials.

**(a) Death Penalty Cases.** In a death penalty case, the trial shall be conducted in accordance with §§ 99-19-101 and 99-19-103 of the Mississippi Code of 1972, as amended, and applicable court decisions.

**(b) Cases Where the Jury May Impose Life.**

(1) In all cases not involving the death penalty, where the jury may impose a life sentence, the court may conduct a bifurcated trial. If the defendant is found guilty, a sentencing trial shall be held before the same jury, if possible; if the defendant pleads guilty, a sentencing trial shall be held before a jury.

(2) At the sentencing hearing:

(A) the prosecution may introduce evidence of aggravation of the offense of which the defendant has been adjudged guilty;

(B) the defendant may introduce any evidence of extenuation or mitigation;

(B) the prosecution may introduce evidence in rebuttal of the evidence of the defendant; and

(C) a record shall be made of the above proceeding and shall be maintained in the office of the clerk of the trial court as a part of the record.

### *Comment*

Rule 19.2 continues former URCCC 10.04(A) and (B). See *Taggart v. State*, 957 So.2d 981 (Miss. 2007) (discussing procedure in non-death penalty cases).



Rule 19.3 - Additional Duties of Court Reporters.

**(a) Felony Cases.** In all felony cases, the court reporter shall fully record the *voir dire* and selection of the jury, opening statements, and closing arguments, whether or not such is ordered by the judge or requested by a party. This duty may not be abrogated by the judge or waived by the defendant, and is in addition to all other duties.

**(b) Other Cases.** In all other cases in courts of record, the court reporter shall fully record the *voir dire* and selection of the jury, opening statements, and closing arguments, if directed to do so by the judge.

*Comment*

Rule 19.3 tracks Ala. R. Crim. P. 19.4. Section (a) places duties on court reporters that may not be abrogated by the judge or waived by the defendant, and which are in addition to all other duties imposed by law or the court. See *Davis v. State*, 684 So.2d 643,651 (Miss. 1996); *Walker v. State*, 671 So.2d 581 (Miss. 1995). The duties of section (b) apply only if the judge so orders.

## RULE 20 - MOTION FOR A JUDGMENT OF ACQUITTAL

**(a) Before Submission to the Jury.** After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own motion consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the prosecution's evidence, the defendant may offer evidence without waiving opposition thereto.

**(b) Reserving Decision.** The court may reserve a decision on the motion, proceed with the trial (when the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

**(c) After Jury Verdict or Discharge.**

(1) *Time for a Motion.* A defendant may move for a judgment of acquittal, or renew such a motion, within 10 days after entry of judgment of conviction. When

the jury is discharged without returning a verdict, the motion shall be made within 10 days after discharge; if a new trial is scheduled to begin within the 10 days, the motion shall be made at a time set by the court before the new trial begins.

(2) *Ruling on the Motion.* If the jury has returned a guilty verdict, the court may set aside the verdict, dispose of a motion for a new trial, and enter a judgment of acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal. The state may appeal when the court sets aside a verdict of guilty and enters a judgment of acquittal.

(3) *No Prior Motion Required.* A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

**(d) Conditional Ruling on a Motion for a New Trial.**

(1) *Motion for a New Trial.* If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) *Finality.* The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) *Appeal.*

(A) *Grant of a Motion for a New Trial.* If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) *Denial of a Motion for a New Trial.* If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

**(e) Denial by Operation of Law.** A motion for a judgment of acquittal pending 30 days after entry of judgment of conviction shall be deemed denied as of the 30th day. However, the parties may agree in writing, or the court may order, that the motion be continued past the 30th day to a date certain within 90 days; any motion still pending on the date to which it is continued shall be deemed denied as of

that date. The motion may be continued from time to time as provided in this Rule.

### *Comment*

Rule 20 is based on Fed. R. Crim. P. 29. In Mississippi, it replaces the practice of seeking directed verdict or JNOV for the single practice of judgment of acquittal. *See State v. Russell*, 358 So.2d 409 (Miss. 1978) (observing that a motion for a JNOV is simply a renewal of a motion for directed verdict made at the conclusion of the presentation of evidence at trial). Fed. R. Crim. P. 29 has likewise abolished the motion for directed verdict in criminal cases and substituted for it the motion for judgment of acquittal. A motion for judgment of acquittal tests the sufficiency of the evidence to support a conviction. For the double jeopardy implications of a judgment of acquittal, *see Burks v. United States*, 437 U.S. 1 (1978), and *Hudson v. Louisiana*, 450 U.S. 40 (1981). The language "any offense" in section (a) permits the court to enter a judgment of acquittal for the charged offense and any lesser included or attempt offense. *See* Rule 23.2(d). For example, assume a defendant is indicted for burglarizing a home and stealing jewelry, but at the close of the prosecution's evidence the court determines that the highest offense the prosecution has proved is willful trespass; the judge may enter a judgment of acquittal as to burglary and larceny. After such a judgment, the jury can decide only the question of guilt of willful trespass. Lesser and attempt offenses are also governed by Rule 14.3(a)(indictments) and Rule 23.2(d) (instructing the jury).

The last sentence of section (a) provides that, on denial of a motion for a judgment of acquittal at the close of the prosecution's case, "the defendant may offer evidence without waiving opposition thereto." This is a change in Mississippi practice. *See Kelly v. State*, 778 So.2d 149 (Miss. Ct. App. 2000) (holding that, after denial of a motion for a directed verdict, when the defendant "proceeded to put on his own witnesses, the denial of that specific motion was waived as an appellate issue"). Under section (a), therefore, the defendant may offer evidence without waiving appellate review of an erroneous denial of a motion for acquittal made at the close of the prosecution's case; instead, an appellate court would consider the issue, based solely on the prosecution's evidence submitted at the time of the motion.

Section (b) permits the reservation of a ruling on a motion for a judgment of acquittal made at the close of the prosecution's case in the same manner as motions made at the close of all of the evidence. Rule 20 permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the prosecution in proceeding to a verdict. Reserving a ruling on a motion made at the end of the prosecution's case does pose problems, however, where the defense decides to present evidence and run the risk that such evidence will support the prosecution's case. To address that problem, section (b) provides that the trial

court is to consider only the evidence submitted at the time of the motion in making its ruling, whenever made. And in reviewing a trial court's ruling, the appellate court would be similarly limited. This is a departure from current practice. See *Smith v. State*, 646 So.2d 538 (Miss. 1994).

Section (c) allows the motion to be made at any time within 10 days after the date a judgment of conviction is entered. In a jury trial, if the jury is discharged without having returned a verdict, the defendant has 10 days in which to file the motion, or a shorter time if a new trial is to begin within the 10 days. Under section (c)(3), a motion for judgment of acquittal may be made after discharge of the jury, whether or not a motion was made before submission to the jury. No legitimate interest of the prosecution is intended to be prejudiced by permitting the court to direct an acquittal on a post-verdict motion. Under MRAP 4(e), a defendant must file a notice of appeal within 30 days after the later of the date of the denial of any motion for a judgment of acquittal or the date of imposition of sentence.

Section (c)(2) recognizes the state's right to appeal in the event a verdict of guilty is returned, but is then set aside by the granting of a judgment of acquittal. Under the double jeopardy clause, the prosecution may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial; namely, only where the jury has returned a verdict of guilty. See *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). Thus, the prosecution's right to appeal a Rule 20 motion exists only when judgment of acquittal is entered after a verdict of guilty is returned. See also Miss. Code Ann § 99-35-103 (permitting the state to appeal "a judgment actually acquitting the defendant where a question of law has been decided adversely to the state or municipality; but in such case the appeal shall not subject the defendant to further prosecution, nor shall the judgment of acquittal be reversed.").

Motions for new trial are covered in Rule 24. Under section (d), a motion for judgment of acquittal does not give the court power to order a new trial if the defendant does not wish a new trial and has not asked for one.

Section (e) is new to Mississippi practice and is based on Ala. R. Crim. P. 20(f), and tracks Rule 24.3 regarding denial of motions for a new trial by operation of law. Section (e) promotes finality by providing that a motion for a judgment of acquittal shall not remain pending in the trial court for more than 30 days. This Rule thereby addresses the problem of when a timely post-trial motion is filed but is not decided or is not even noticed for a hearing. Such a case is then essentially in limbo, as the pending post-trial motion indefinitely postpones the running of the period for filing a notice of appeal and indefinitely delays finality in the case. This deadline may be extended by written agreement of the parties, or court order, to a date certain within 90 days. Multiple extensions of the deadline, which should be rare, are nevertheless permitted by section (e).

## RULE 21 - JURY INSTRUCTIONS

Rule 21 – Jury Instructions.

**(a) Procedural Instructions.** At the commencement of and during the course of a trial, the court may orally give the jury cautionary and other instructions of law relating to trial procedure and the duty and function of the jury, and may acquaint the jury generally with the nature of the case. Every oral instruction shall be recorded by the court reporter as it is delivered to the jury. All other instructions shall be in writing.

**(b) Substantive Instructions.**

(1) *By the Parties.* At least 24 hours before trial, or at such other time during the trial as the court directs, each party must file with the clerk and deliver to all counsel jury instructions on the forms of verdict and the substantive law of the case. Except for good cause shown, the court shall not entertain a request for instructions which have not been pre-filed. At the conclusion of testimony, each party must present to the judge up to 6 pre-filed substantive instructions. The court, for good cause shown, may allow more than 6 instructions to be presented.

(2) *By the Court.* The court may also instruct the jury. The court's instructions must be in writing and must be submitted to the parties, who, in accordance with section (e) below, must make their specific objections on the record. The court shall not express an opinion on the evidence.

**(c) Identification.**

(1) *Caption.* All instructions shall be captioned at the top of the page "Jury Instruction #" in order to allow the court to number the instructions given in such sequence as it deems proper.

(2) *Identifying Submitted Instructions.* All instructions submitted shall be identified with letters and numerals placed in the bottom right corner of each page. The state's instructions shall be numbered and prefixed with the letter S. A defendant's instructions shall be numbered and prefixed with the letter D. In actions with multiple defendants, Roman numerals shall be used to identify the proposed instructions of each defendant; the Roman numerals shall be placed after the alphabetical designation D, and shall conform to the sequential listing of defendants as stated in the indictment or complaint. Instructions shall not otherwise be identified

with a party. The court's written instructions shall be numbered and prefixed with the letter C. All letters and numerals identifying an instruction with a party or the court, as required by this section (c)(2), shall be redacted from the copy of given instructions carried by the jury into the jury room.

**(d) Objections.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court on the record of the specific objection and the grounds for the objection before the instructions are presented to the jury. An opportunity must be given to object out of the jury's hearing. Failure to object in accordance with this Rule precludes appellate review.

**(e) Rulings on Instructions.** The court shall confer with the parties and inform them before closing arguments how it intends to rule on the requested instructions. The court shall mark each request "given" or "refused," and the request shall thereby become a part of the record.

**(f) When Read.** Instructions shall be read by the court to the jury before closing arguments. Instructions will not be given after closing arguments have begun, except when justice so requires, in which case all parties shall have an opportunity to submit other instructions. All given instructions shall be available to the parties for use during closing arguments, and will be carried by the jury into the jury room when the jury retires to consider its verdict.

### *Comment*

Rule 21 follows the practice established by prior URCCC 3.07 and Miss. R. Civ. P. 51.

Section (a) incorporates MRCP 51(a) regarding procedural instructions. It further provides that oral procedural instructions shall be recorded by the court reporter as delivered to the jury, and that all other instructions must be in writing.

Section (b) is based on former URCCC 3.07 and Ariz. R. Crim. P. 21.2. Presumptively, section (b)(1) requires that all substantive instructions be pre-filed with the court at least 24 hours prior to the commencement of trial, unless the court directs that instructions be filed at a specified time during the trial. At the conclusion of testimony, each party must present 6 or fewer pre-filed instructions on the substantive law of the case; for good cause, the court may enlarge the number of substantive instructions to be presented. Under section (b)(2), the court retains the authority to issue written substantive instructions, but may not comment on the evidence.

Section (c) tracks prior URCCC 3.07 and MRCP 51(b)(2). Section (c) adds to former URCCC 3.07 the requirement that all letters and numerals

identifying an instruction with a party or the court be redacted from the copy of the instructions carried to the jury room, to ensure that all of the court's substantive instructions enjoy equal status with the jury.

Section (d) tracks Fed. R. Crim. P. 30(d) and clarifies what, if anything, counsel must do to preserve a claim of error regarding an instruction or failure to instruct. The rule requires a contemporaneous and specific objection on the record (before the instructions are presented to the jury). While, read literally, section (d) could be construed to bar any appellate review absent a timely objection, Rule 21 does not disturb an appellate court's authority to conduct a limited review under a plain error standard. *Mapp v. State*, 162 So.2d 642 (Miss. 1964); *Pollard v. State*, 932 So.2d 82 (Miss. Ct. App. 2006). See also *Jones v. United States*, 527 U.S. 373 (1999) (interpreting Fed. R. Crim. P. 30). Section (e) facilitates appellate review of the court's rulings, as well as preparation of closing arguments by counsel.

Section (f) requires the court to instruct the jury before arguments of counsel, in order to give the parties an opportunity to argue to the jury in light of the exact language used by the court. Section (f) does permit the court, when justice so requires, to instruct the jury both before and after arguments, which assures that the court retains power to remedy omissions in pre-argument instructions or to add instructions necessitated by the arguments; in this regard, section (f) gives the court more latitude than former URCCC 3.07, which permitted post-argument instructions only to correct "extreme cases of injustice." Section (f) continues the practice under former URCCC 3.07 in making instructions available to the parties for use during closing arguments and to the jury in the jury room for use during deliberations.

## RULE 22 - DELIBERATIONS

### Rule 22.1 - Retirement of Jurors.

**(a) Retirement.** After closing arguments, the court may instruct the jury on the selection of a foreperson. The jurors shall then retire in the custody of a court officer and consider their verdict.

**(b) Permitting the Jury to Disperse.** Except in cases in which the jury has been sequestered, the court may permit the jurors to disperse after their deliberations have commenced, instructing them when to reassemble, and giving the admonitions of Rule 18.7.

### *Comment*

Rule 22.1 substantially incorporates Ariz. R. Crim. P. 22.1. Jury sequestration is governed by Rule 18.7. Section (a) protects jury privacy, as the judge neither appoints a foreperson nor suggests who the foreperson

should be. Nothing in these Rules requires automatic sequestration of a jury during deliberation, but leaves that decision to the discretion of the court.

#### Rule 22.2 - Materials used During Deliberation.

Upon retiring for deliberation the jurors shall take with them:

- (a) forms of verdict approved by the court, which shall not indicate in any manner whether the offense described therein is a felony or misdemeanor unless the statute upon which the charge is based directs that the jury make this determination;
- (b) a copy of the written instructions;
- (c) their notes (if any); and
- (d) such tangible evidence and equipment as the court in its discretion shall direct.

#### *Comment*

Rule 22.2 tracks Ariz. R. Crim. P. 22.2 and incorporates portions of URCCC 3.10. Section (a) is broad enough to permit the court to provide either a separate “form of verdict” document or an instruction on the form of the verdict, or both. Either way, section (a) prohibits any indication on the verdict form or instruction of the class of the offense. Sections (a) through (c) are mandatory, and require that all verdict forms, written instructions, and any juror notes be taken to the jury room. Only section (d), regarding tangible evidence and equipment, is discretionary; discretion is vested in the court to determine whether to permit a jury to take back to the jury room exhibits which are, for example, contraband, dangerous, prone to destruction or theft, or excessively voluminous. *See Holloway v. State*, 809 So.2d 598 (Miss. 2000); *Pettit v. State*, 569 So.2d 678 (Miss. 1990). *See also Wood v. State*, 275 So.2d 87 (Miss. 1973) (reading MISS. CODE ANN. § 99-17-37 to permit jury to take a copy of the indictment to the jury room as a “papers read in evidence”).

#### Rule 22.3 - Additional Instructions and Further Review of Evidence.

**(a) Additional Instructions.** After the jurors have retired to consider their verdict, if they request additional instructions, the court may recall them to the courtroom and give appropriate additional instructions. The court may also give other instructions, so as not to give undue prominence to the instructions requested. Such instructions may be given only after the parties have been given notice and an opportunity to state any objections thereto on the record.



**(b) Further Review of Evidence.** After the jurors have retired to consider their verdict, if they desire to have any testimony repeated, the court may recall them to the courtroom and order the testimony read or played back. The court may also order other testimony read or played back, so as not to give undue prominence to the particular testimony. Such testimony may be read or played back only after the parties have been given notice and an opportunity to state any objections thereto on the record.

### *Comment*

Rule 22.3 largely follows Ariz. R. Crim. P. 22.3 and ABA, Standards for Criminal Justice, *Trial by Jury* § 15-4.3 (2d ed. 1986). This rule covers the right of the jury to request (usually by way of a note to the judge) additional instructions or a review of the evidence after deliberations have begun. Section (a) allows the court to give additional instruction to provide for cases in which a fundamental error has previously escaped detection. Additional instructions should not be given if the request concerns matters not in evidence or questions of law not pertinent to the case, or calls on the judge to express an opinion on a factual matter. The court may simply review the original instructions unless they are inadequate. The court may also go beyond the bare requested additional instruction and repeat other instructions, if doing so avoids placing undue emphasis on a particular instruction. Of course, even without a request, the court may recall the jury and give additional instructions if doing so is necessary to correct an erroneous instruction, to clarify an ambiguous instruction, or to inform the jury on an overlooked point of law. Section (b) is designed to strike a balance between the desire to have a jury reach a decision in a fair and prompt manner and a desire to assist jurors who cannot recall evidence adduced at trial.

### Rule 22.4 - Assisting Jurors at Impasse.

If the court determines that the jury has reached an impasse in its deliberations, the court may, in the presence of counsel, inquire of the jurors to determine whether and how the court and counsel can assist them in their deliberative process. After receiving the jurors' response, if any, the judge may direct that further proceedings occur as appropriate.

### *Comment*

Rule 22.4 largely follows Ariz. R. Crim. P. 22.4 and URCCC 3.10. Many juries, after reporting to the judge that they have reached an impasse in their deliberations, are needlessly discharged very soon thereafter and a mistrial declared when it would be appropriate and might be helpful for the

judge to offer some assistance in hopes of improving the chances of a verdict. The judge's offer would be designed and intended to address the issues that divide the jurors, if it is legally and practically possible to do so. The invitation to dialogue should not be coercive, suggestive or unduly intrusive.

The judge's response to the jurors' report of impasse could take the following form:

I know that it is possible for honest men and women to have honest different opinions about the facts of a case, but, if it is possible to reconcile your differences of opinion and decide this case, then you should do so.

Accordingly, I remind you that the court originally instructed you that the verdict of the jury must represent the considered judgment of each juror. It is your duty as jurors to consult with one another and to deliberate in view of reaching agreement if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if you are convinced it is erroneous, but do not surrender your honest convictions as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict. Please continue your deliberations.

*Sharplin v. State*, 330 So.2d 591 (Miss. 1976) (rejecting the various forms of the so-called *Allen* charge, per *Allen v. U.S.*, 154 U.S. 492 (1896)). If the jury identifies one or more issues that divide them, the court, with the help of the attorneys, can decide whether and how the issues can be addressed. Among the obvious options are the following: giving additional instructions; clarifying earlier instructions; directing the attorneys to make additional closing argument; reopening the evidence for limited purposes; or a combination of these measures. Of course, the court might decide that it is not legally or practically possible to respond to the jury's concerns.

#### Rule 22.5 - Discharge.

**(a) Discharge.** The court shall discharge the jurors:

- (1) upon expiration of such time as the court deems proper, if it appears that there is no reasonable probability that the jurors can agree upon a verdict; or
- (2) when a manifest necessity exists for their discharge.

**(b) Mistrial Entered.** In all cases in which the jury is discharged without a verdict being returned, a mistrial shall be ordered and the reason therefore given.

### *Comment*

Rule 22.5 is based on Ala. R. Crim. P. 22.3, Ariz. R. Crim. P. 22.5, and is similar in practice to former provisions of URCCC 3.10 and 3.12. The rule follows the policy established ABA, Standards for Criminal Justice, *Trial by Jury* § 5.4(c) (2d ed. 1986). Under section (a)(3), manifest necessity, which can permit retrial despite double jeopardy concerns, may properly be found to exist based on: the failure of a jury to reach a verdict; biased jurors; an otherwise tainted jury; improper separation of the jury; and when jurors demonstrate their unwillingness to abide by the instructions of the court. *See Jenkins v. State*, 759 So.2d 1229 (Miss. 2000).

Section (b) continues prior practice under URCCC 3.12 of directing the court to enter a mistrial when the jury is discharged because there is no reasonable probability that the jurors can reach a verdict.

## RULE 23 - VERDICT

### Rule 23.1 - Time and Form of Verdict.

The verdict of the jury shall be unanimous, shall be in writing, and shall be returned in open court. The verdict need not be signed. The clerk or the court shall then read the verdict in open court in the presence of the jury. If neither any party nor the court desires to poll the jury, or when a poll of the jury reveals the verdict is unanimous, and if the verdict is in the form required by Rule 23.3, the court shall order the verdict filed and entered of record. The court shall then discharge the jurors, unless a bifurcated hearing is necessary.

### *Comment*

Rule 23.1 is based on Ala. R. Crim. P. 23.1 and former provisions of URCCC 3.10. The Rule requires the verdict be in writing and returned in open court. Polling the jury is governed by Rule 23.5. *See State v. Taylor*, 544 So.2d 1387 (Miss. 1989) (suggesting that a trial court take these steps in receiving a verdict: assemble the jurors in open court and inquire if a verdict has been reached; inquire if the verdict is unanimous; receive the verdict and examine it as to form; have the verdict read in open court; inquire whether either party desires a poll of the jury; poll the jury, if required; order the verdict filed.)

### Rule 23.2 - Types of Verdict.

**(a) General Verdicts.** Except as otherwise specified by this Rule, the jury shall in all cases render a verdict finding the defendant either guilty or not guilty.

**(b) Insanity Verdicts.** When the jury determines that a defendant is not guilty by reason of insanity, the verdict shall so state.

**(c) Different Offenses.** If the jury is instructed on different counts, offenses, or degrees of offenses, the verdict shall specify each count, offense, or degree of which the defendant has been found guilty or not guilty.

**(d) Lesser Offense or Attempt.** The jury may be instructed on any of the following:

- (1) an offense necessarily included in the offense charged; or
- (2) an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense.

### *Comment*

Rule 23.2 is generally based on Ala. R. Crim. P. 23.2 and Fed. R. Crim. P. 31(c), and is consistent with prior provisions of URCCC 3.10. Rule 23.2 specifies the type of verdicts the jury may return. General verdicts are required by Rule 23.2(a). The general verdict gives the jury discretion over the disposition of the case which it would not have if restricted to finding particular facts in special verdicts.

Section (b) provides for a verdict of not guilty by reason of insanity, which is an exception to the general verdict rule; this is a unique verdict triggering complex post-trial proceedings under Rule 25. Under Rule 17.3(b), not guilty by reason of insanity must be specially raised as a defense to a crime. *See* MISS. CODE ANN. §§ 99-13-7 (insanity) and 99-13-9 (intellectual disability).

Section (c) requires the jury to specify the particular counts and degrees of the offense or offenses of which it finds the defendant guilty. These provisions insure that the verdict will be clear and unambiguous. The jury shall find the defendant either guilty or not guilty on each count, as required by section (a).

Section (d) tracks Fed. R. Crim. P. 31(c) and Ariz. R. Crim. P. 23.3, and permits the jury to find the defendant guilty of any offense necessarily included in the offense charged, including an attempt to commit the offense if such an attempt is a crime. The rule places the responsibility for deciding what verdicts the jury may return on the court, restricting the jury to returning verdicts for which forms have been submitted to it under Rule 23.3. Under Rule 14.2(f), the indictment gives notice to the defendant that the trial will concern all necessarily included offenses as well as the offense specified. *See Thomas v. State*, 48 So.3d 460 (Miss. 2010). Rules 14.2(f) and 23.2(d) make clear that the prosecuting attorney, as well as the defendant, is entitled to an instruction on any offense set forth in section (d) for which there is evidentiary support and for which a verdict form is submitted to the jury.

Section (d) represents a substantial departure from prior Mississippi law and practice under URCCC 3.10 (which permitted instructions “as to

related or lesser offenses”). Specifically, a jury may no longer be instructed on a so-called “lesser related” or “less non-included” offense (a lesser offense which does not meet the criteria for a lesser *included* offense instruction). This is consistent with the majority of state jurisdictions and with federal law. See *Hopkins v. Reeves*, 524 U.S. 88 (1998) (federal practice); *State v. Corliss*, 721 A.2d 438 (Vt. 1998) (noting majority rule). The Rule thus returns to the practice that prevailed prior to *Griffin v. State*, 533 So.2d 444 (Miss. 1988), and its progeny. The inquiry under section (d), whether all the elements of the lesser offense are also elements of the greater offense, is a more precise and manageable inquiry than whether the lesser offense arises out of a common nucleus of operative facts. Compare *Porter v. State*, 616 So.2d 899 (Miss. 1993) (Hawkins, C.J., specially concurring) (discussing elements test) with *Gangl v. State*, 539 So.2d 132 (Miss. 1989) (deciding whether “lesser offense arises out of a nucleus of operative fact common with the factual scenario giving rise to the charge laid in the indictment”). See also *McDonald v. State*, 784 So.2d 261 (Miss. Ct. App. 2001) (Southwick, J., concurring). The approach of section (d) avoids the difficulties inherent when a defendant seeks to place an uncharged, non-included offense before the jury, thereby diminishing the prosecuting attorney’s traditional and exclusive discretion over charging decisions. Section (d) also restores symmetry, as both the prosecution and the defense may seek an instruction on a lesser included offense, while the Constitution forbids a prosecuting attorney from receiving an instruction on a lesser offense whose elements are not included in the indictment. See *Schmuck v. U.S.*, 489 U.S. 705, 718 (1989).

### Rule 23.3 - Necessity for Forms of Verdict.

Forms of verdicts shall be submitted to the jury for each offense charged and, where warranted by the evidence, for all lesser included or attempt offenses as provided in Rule 23.2(d). The defendant may not be found guilty of any offense for which no form of verdict has been submitted to the jury. If the verdict returned is not fully responsive, the court shall direct the jury to retire for further deliberations. The court may correct or complete the verdict, as to form merely, in open court in the presence of the parties and the jury.

### *Comment*

Rule 23.3 is based on Ala. R. Crim. P. 23.3 and is consistent with prior provision of URCCC 3.10. This rule permits the jury to find the defendant guilty of the offense charged; an offense necessarily included in each offense charged; or of an attempt to commit the offense charged or an offense necessarily included therein, if the attempt is an offense. The Rule places on the court the responsibility of deciding what verdicts the jury may return, restricting the jury to returning verdicts for which verdict forms have been submitted to it. The last sentence of the Rule allows the judge

to correct a verdict that is erroneous in form, in open court in the presence of the jury.

#### Rule 23.4 - Partial Verdicts and Mistrial.

**(a) Multiple Defendants.** If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed.

**(b) Multiple Counts.** If the jury cannot agree on all counts as to any defendant, the jury may return a verdict on those counts on which it has agreed.

**(c) Mistrial.** If the jury cannot agree on a verdict on one or more defendants or counts, the court may declare a mistrial as to those defendants or counts.

#### *Comment*

Rule 23.4 is based on Fed. R. Crim. P. 31(b). The Rule provides that a jury may return partial verdicts, either as to multiple defendants or multiple counts, or both. Former provisions of URCCC 3.10 permitted partial verdicts in cases of multiple defendants. Retrial following mistrial on some counts and acquittal on others does not offend double jeopardy. *See Richardson v. U.S.*, 468 U.S. 317 (1984). *See Blueford v. Arkansas*, 2011 Ark. 8 (Ark. 2011), *cert. granted*, No. 10-1320 (2011) (whether, after a jury deadlocks on a lesser included offense, double jeopardy bars reprosecution of a greater offense after a jury announces that it has voted against guilty on the greater offense).

#### Rule 23.5 - Jury Poll.

After a verdict is returned but before the jury is discharged, the court shall on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court shall direct the jury to retire and deliberate further.

#### *Comment*

Rule 23.5 tracks Ala. R. Crim. P. 23.5, Ariz. R. Crim. P. 23.4, Fed. R. Crim. P. 32(d), and former provisions of URCCC 3.10. Rule 23.5 recognized the "undoubted right" of the parties and the court to have the jury polled. A jury poll is mandatory on the request of either party. Its purpose is to determine with certainty that "each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Humphries v. District of Columbia*, 174 U.S. 190, 194 (1899). Failure to poll the jury at the request of the defendant is reversible error. *McLarty v. State*, 842 So.2d 590 (2003); *State v. Taylor*, 544 So.2d 1387 (Miss. 1989) (poll must be conducted before verdict is filed). The Rule follows ABA, Standards for Criminal Justice, *Trial by*

*Jury* § 15-4.5 (2d ed. 1986), in requiring the jurors to be polled individually; the Rule thereby discourages post-trial efforts to challenge the verdict on allegations of coercion on the part of some of the jurors.

#### RULE 24 - POST-TRIAL MOTIONS

##### Rule 24.1 - Motion for a New Trial.

**(a) Motion by Defendant; Grounds.** The court on written motion of the defendant may vacate any judgment and grant a new trial. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

**(b) Grounds.** The court may grant a new trial for any of the following reasons:

- (1) if required in the interests of justice;
- (2) if the verdict is contrary to law or the weight of the evidence;
- (3) when new and material evidence is recently discovered which would probably produce a different result at a new trial, and such evidence could not have been discovered sooner, by reasonable diligence;
- (4) if the jury has received any evidence, papers or documents, not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony;
- (5) if the jurors, after retiring to deliberate on the verdict, separated without leave of court;
- (6) if the court has misdirected the jury in a material matter of law, or has failed to instruct the jury on all questions of law necessary for their guidance; or
- (7) if for any other reason the defendant has not received a fair and impartial trial.

**(c) Timeliness.** A motion for a new trial shall be made within 10 days after entry of judgment and sentence.

**(d) Court's Own Motion.** The court may, on its own motion and with the consent of the defendant and notice to the prosecuting attorney, order a new trial before the entry of judgment and sentence.

#### *Comment*

Rule 24.1 preserves practice under former URCCC 10.05, with a few modifications and additions. Section (a) now confirms that the trial judge, in a case tried without a jury, may take additional testimony and enter a new judgment. Section (b) clarifies the former rule by explicitly adding that a new trial may be granted for any reason if the defendant has not

received a fair and impartial trial. See Ala. R. Crim. P. 24.1(c)(2); Ariz. R. Crim. P. 24.1(c)(5). Section (c) clarifies that the time to make a motion for a new trial begins to run after entry of judgment *and* sentence. Under section (d), the court may order a new trial before the entry of judgment and sentence, only with the consent of the defendant and notice to the prosecuting attorney. Problems of double jeopardy arise when the court acts on its own motion without the consent of the defendant. See *U.S. v. Smith*, 331 U.S. 469 (1947). Under Miss. R. App. P. 4(e), a defendant must file a notice of appeal within 30 days after the date of the denial of any motion for a new trial or the date of imposition of sentence, whichever is later.

### Rule 24.2 - Motion in Arrest of Judgment.

**(a) Power of the Court.** The court, on written motion of the defendant or on its own motion, shall arrest judgment if the charging instrument does not charge an offense, or if the court was without jurisdiction.

**(b) Timeliness.** A motion in arrest of judgment shall be filed within 10 days after entry of judgment and sentence. The court may act on its own motion in arresting judgment only during the period in which a motion in arrest of judgment would be timely.

#### *Comment*

Rule 24.2 is modeled on Ala. R. Crim. P. 24.2, is similar to Fed. R. Crim. P. 34, and essentially continues practice under former URCCC 10.05. Section (a) makes clear that the court may act either pursuant to a written motion of the defendant or on its own initiative. The motion may be made on one of two grounds that traditionally can be raised at any time: that the charging instrument does not charge an offense, or that the court was without jurisdiction. See *Jefferson v. State*, 556 So.2d 1016 (Miss. 1989). The motion in arrest of judgment replaces the former motion to vacate and dismiss under prior URCCC 10.05.

The deadline established by section (b) tracks the deadline for a motion for a new trial under Rule 24.1. However, a motion in arrest of judgment (unlike a motion for judgment of acquittal or a new trial) does not toll the time for filing a notice of appeal under MRAP 4(e). Therefore, when a motion under Rule 24.2 has been filed but not decided at the time an appeal has been perfected, both trial and appellate courts will have jurisdiction of the case; if the trial court then grants the Rule 24.2 motion, the appeal may be mooted. Cf. *Gardner v. State*, 547 So.2d 806 (Miss. 1989); *Wilson v. State*, 461 So.2d 728 (Miss. 1984). For this reason, jurisdictions typically provide that a motion in arrest of judgment, as with a motion for



judgment of acquittal or a new trial, tolls the time for filing a notice of appeal. *See* Fed. R. App. P. 4(b)(3)(A)(iii); Ala. R. App. P. 4(b)(1).

### Rule 24.3 - Denial by Operation of Law.

A motion for a new trial or in arrest of judgment pending 30 days after entry of judgment and sentence shall be deemed denied as of the 30th day. However, the parties may agree in writing, or the court may order, that the motion be continued past the 30th day to a date certain within 90 days; any motion still pending after the date to which it is continued shall be deemed denied as of that date. The motion may be continued from time to time as provided in this Rule.

#### *Comment*

Rule 24.3, is new to Mississippi practice, and is based on Ala. R. Crim. P. 24.4, and tracks Rule 20(e), regarding denial of motions for a judgment of acquittal. The Rule promotes finality by providing that a motion for a new trial or in arrest of judgment shall not remain pending in the trial court for more than 30 days. This Rule thereby addresses the problem of when a timely post-trial motion is filed but is not decided or is not even noticed for a hearing. Such a case is then essentially in limbo, as the pending post-trial motion indefinitely postpones the running of the period for filing a notice of appeal and indefinitely delays finality in the case. This deadline may be extended by written agreement of the parties, or court order, to a date certain within 90 days. Multiple extensions of the deadline, which should be rare, are nonetheless permitted by Rule 24.3.

### Rule 24.4 - Clerical and Technical Errors.

After giving any notice it considers appropriate, the court may correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission, or correct a sentence that resulted from arithmetical, technical, or other clear error.

#### *Comment*

Rule 24.4 is based on Fed. R. Crim. P. 36 and Ariz. R. Crim. P. 24.4, and is similar to MRCP 60(a). It provides an efficient method for correcting clerical and technical errors appearing in judgments, orders, sentences, or other parts of the record. *See Shinn v. State*, 74 So.3d 901 (Miss. Ct. App. 2011) (recognizing authority for correction of scrivener's or clerical error at any time). A motion to correct simple clerical mistakes may be made at any time.

RULE 25 - PROCEDURE AFTER VERDICT OR FINDING OF  
NOT GUILTY BY REASON OF INSANITY

Rule 25 – Procedure after Verdict or Finding of Not Guilty by Reason  
of Insanity.

When any person is indicted for an offense and acquitted on the ground of insanity at the time of the offense charged, and the court certifies that the person is still insane and dangerous, the court shall:

- (a) immediately give notice of the case to the chancellor or clerk of the chancery court;
- (b) order institution of civil proceedings as provided in Miss. Code Ann. § 41-21-61 to 41-21-107; and
- (c) remand the person to custody to await the action of the chancery court.

*Comment*

Rule 25 is adapted from Ariz. R. Crim. P. 25. Rule 25 sets forth the procedures to be followed after a finding or verdict of not guilty by reason of insanity. When a defendant has been found not guilty by reason of insanity, the threshold question under Rule 25 is whether the person is still insane and dangerous. If not, the person is to be released forthwith. If so, the Rule requires the person to be remanded to custody to await the action of the chancery court. At the same time, the Rule mandates that the court give notice to the chancellor or clerk of chancery court, and order that civil commitment proceedings be instituted. It has been held that it is not a violation of equal protection to impose different release standards on persons committed after being found not guilty of a criminal offense by reason of insanity as compared to release standards for persons committed involuntarily in civil proceedings, as the prior criminal conduct can be a sufficient legal basis for the different treatment. *See U.S. v. Ecker*, 479 F.2d 1206 (D.C.Cir.1973). *See* Miss. Code. Ann. § 99-13-7.

{*Reporter's Note: After the committee drafted proposed Rule 25, Miss. CODE ANN. § 99-13-7 was substantially amended, in both its procedural and substantive aspects. The intent of proposed Rule 25 was to track existing law. Accordingly, the Court may wish to conform the Rule to the newly amended statute.*}

RULE 26 - JUDGMENT

Rule 26.1 - Definitions; Scope.

**(a) Judgment.** The term “judgment” means the adjudication of the court based on the verdict of the jury, on the plea of the defendant, or on its own finding following a non-jury trial, that the defendant is guilty or not guilty.

**(b) Sentence.** The term “sentence” means the pronouncement by the court of the penalty imposed upon the defendant after a judgment of guilty.

**(c) Determination of Guilt.** The term “determination of guilt” means a verdict of guilty by a jury, a finding of guilt by a court following a non-jury trial, or the acceptance by the court of a plea of guilty or no contest.

**(d) Scope.** Rule 26 shall not apply to misdemeanor offenses and shall apply to death penalty cases only to the extent that the procedure is not otherwise provided by law.

### *Comment*

Rule 26.1 is based in Ariz. R. Crim. P. 26.1, and consistent with ABA, Standards for Criminal Justice, *Sentencing Procedures and Alternatives* (2d ed. 1986). Rule 26 is intended to create a comprehensive procedure which will provide the sentencing judge with the information and flexibility necessary for making dispositional decisions which will promote the goals of sentencing and protect the welfare of society. The term “sentence” as defined in section (b) includes any form of punishment or required action by the defendant that is ordered by the judge or required by law by virtue of the conviction, including probation under Rule 27, even when imposition of sentence must be suspended in order to place a person on probation. A formal “determination of guilt” under section (c) provides a clear reference point from which the time limits in this Rule run, and generally facilitates the operation of Rule 26. Section (d) applies the full sentencing procedures and safeguards to felony cases, but not to misdemeanor offenses and non-record courts. Section (d) also recognizes that sentencing in death penalty cases is generally governed by other provisions of law.

### Rule 26.2 - Judgment; Time.

**(a) On Acquittal.** When a defendant is acquitted of any charge, or of any count of any charge, judgment pertaining to that count or to that charge shall be pronounced and entered immediately.

**(b) On Conviction.**

(1) On a determination of guilt on any charge, or on any count of any charge, judgment pertaining to that count or to that charge shall be pronounced and entered together with the sentence. Pronouncement of judgment may be delayed if necessary until such time as sentence can be pronounced.

(2) On a determination of guilt for any felony offense, the court shall, after receipt of the presentence report, unless a presentence report is not required, conduct a

sentence hearing and pronounce sentence, or shall set a date for a sentence hearing and pronouncement of sentence.

(3) Sentence shall be imposed without unreasonable delay.

### *Comment*

Rule 26.2 is based on Ala. R. Crim. P. 26.2 and replaces portions of former URCCC 11.01. Section (a) specifies that judgment must be rendered immediately upon a partial acquittal as well as a full acquittal, in order to provide grounds for a motion by the defendant to set or reconsider conditions for release.

When the defendant has been convicted, section (b) follows common practice of pronouncing judgment at sentencing. Because often there will be a period of delay between adjudication of guilt and determination of sentence, pronouncement of judgment of conviction and sentence will be delayed until sentencing procedures have been completed. As under former URCCC 11.01, section (b)(3) requires sentence be imposed “without unreasonable delay.”

### Rule 26.3 - Presentence Report.

**(a) When Available.** On written motion of either party, or on the court’s own motion, the court may require a written report of a presentence investigation in any case in which it has either discretion over the penalty to be imposed or authority to suspend execution of the sentence. Such report must be presented to and considered by the court before imposition of sentence or other disposition.

**(b) Content.** The presentence report may contain, but is not limited to, the following information:

- (1) a description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;
- (2) a statement of the defendant’s criminal and juvenile record, if any;
- (3) a statement considering the economic, physical, and psychological impact of the offense on the victim and the victim’s immediate family;
- (4) the defendant’s financial condition;
- (5) the defendant’s educational background;
- (6) a description of the defendant’s employment background, including any military record and present employment status and capabilities;

(7) the social history of the defendant, including family relationships, marital status, residence history, and alcohol or drug use;

(8) information about environments to which the defendant might return or to which the defendant could be sent should probation be granted;

(9) information about special resources which might be available to assist the defendant, such as treatment centers, rehabilitative programs, or vocational training centers;

(10) a physical and mental examination of the defendant, if ordered by the court; and

(11) any other information required by the court.

**(c) Excluded Content.** The report shall not include:

(1) sources of information obtained on a promise of confidentiality; or

(2) information which would disrupt an existing police investigation.

**(d) Notice of Objections.** Before the day of the sentence hearing, each party shall notify the court and all other parties of any objection it has to the contents of any report.

**(e) Special Duty of the Prosecuting Attorney.** The prosecuting attorney shall disclose to the defendant any information within the prosecuting attorney's possession or control, not already disclosed, which would tend to reduce the punishment to be imposed.

**(f) Corrections to Presentence Report.** If the court sustains any objections to the contents of a presentence report, the court may take such action as it deems appropriate under the circumstances, including, but not limited to:

(1) excision of objectionable language or sections of the report;

(2) ordering a new presentence report with specific instructions and directions; and

(3) ordering the original (objectionable) presentence report sealed.

### *Comment*

Rule 26.3 largely follows Ala. R. Crim. P. 26.3 and Ariz. R. Crim. P. 26.8, and governs the availability, contents, and use of presentence investigation reports. The Rule recognizes that a "rational and consistent sentencing decision cannot be achieved without a reliable information base that provides the sentencing court with both an accurate and a relative uniform volume of information." ABA, *Standards for Criminal Justice, Sentencing Alternatives and Procedures* § 18-5.1, Comment (2d ed. 1986). Section (a)

authorizes, on the court's motion or the motion of any party, a presentence report in all cases in which the court has discretion over the penalty to be imposed. While preparation of a presentence report is in the discretion of the trial court, if a report is prepared it must be presented to, and considered by, the court before sentencing. *See* Rule 26.6(a). Generally, a report should be prepared only after the determination of guilt, so as to avoid, insofar as possible, placing the defendant in a position of disclosing facts and versions of the offense that the defendant does not intend to disclose at trial. In the event that a new trial is ordered or a plea withdrawn after preparation of the presentence report, neither the report nor any statement made in connection with its preparation may be introduced at trial. *See* Rule 26.5(c)(2); ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 4.2(b)(ii) (2d ed. 1986).

Section (b) sets forth the information the presentence report should ordinarily contain and embraces former URCCC 11.02, with two additions. Section (b)(3) now provides for a statement about the impact of the offense on the victim and the victim's immediate family. *See* Ala. R. Crim. P. 26.3(b)(7). Section (b)(7) now provides for the report to include information about the defendant's alcohol or drug use.

Section (c) excludes certain content, namely sources of information obtained on a promise of confidentiality, and information that would disrupt an ongoing police investigation. *See* Fed. R. Crim. P. 32(d)(3); Ariz. R. Crim. P. 26.6(c).

Section (d) though (f) track Ariz. R. Crim. P. 26.8. Section (d) requires the parties to notify the court of any objections to the report, prior to the day of the sentencing hearing. The prosecuting attorney is required by section (e) to disclose any mitigating information within the prosecuting attorney's possession or control, which is not already contained in the report. Section (f) authorizes the court to take any necessary corrective measures, including ordering a new report and sealing an objectionable report.

#### Rule 26.4 - Diagnostic Evaluation and Mental Health Examination.

At any time before sentence is pronounced, the court may order the defendant to undergo a physical or mental examination, including diagnostic evaluation. Reports under this Rule shall be due at the same time as the presentence report, unless the court orders otherwise. The cost of such examination or evaluation shall be assessed as part of the court costs.

#### *Comment*

Rule 26.4 tracks Ala. R. Crim. P. 26.4 and Ariz. R. Crim. P. 26.5. Rule 26.4 provides the court with the discretion to order mental examinations after trial in appropriate cases. The purpose of the Rule is to give the sentencing judge as much information as possible about the defendant's mental, emotional, and physical condition to aid the judge in determining sentence. The sentencing decision is complex and much is at stake, both to the defendant and to society. When there are alternatives to incarceration,

the court should know how best to prescribe a sentence that will not only punish but will also aid in rehabilitation of the defendant. See ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 18-5.6 (2d ed. 1986), and Comments thereto. The court is not required to use resources that are not reasonably available. The court may rely on a competent local physician, a local or regional mental health center, or whatever other source is available. If the need for a mental health examination or evaluation is not revealed until after the presentence report is prepared, the court may delay sentencing after the determination of guilt.

Rule 26.5 - Disclosure of the Presentence, Diagnostic, and Mental Health Reports.

**(a) Disclosure to the Parties.** A copy of all presentence, diagnostic, and mental health reports shall be furnished to the prosecuting attorney and the defendant. A portion of any report not made available to one party shall not be made available to any other.

**(b) Date of Disclosure.** Reports ordered under Rules 26.3 and 26.4 shall be made available to the parties at least 2 days before the date set for sentencing.

**(c) Disclosure After Sentencing.**

(1) After sentencing, all diagnostic, mental health, and presentence reports shall be furnished to persons having direct responsibility for the custody, rehabilitation, treatment, and release of the defendant.

(2) Neither a presentence report nor any statement made in connection with its preparation shall be admissible as evidence in any proceeding bearing on the issue of guilt of the defendant.

**(d) No Public Disclosure.** Reports prepared under Rules 26.3, 26.4, and 26.5 are not matters of public record, but shall be filed under seal.

*Comment*

Rule 26.5 is patterned after Ala. R. Crim. P. 26.5 and Ariz. R. Crim. P. 26.6. Section (a) is based upon ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 18-5.4 (2d ed. 1986). Section (a) not only permits the parties to inspect the reports, but also provides the parties copies of the presentence reports and any physical or mental health and diagnostic reports. Section (b) requires disclosure at least 2 days before the date set for sentencing. Disclosure to all parties at a reasonable time before sentencing facilitates resolution of any factual questions raised about the contents of the report.

Section (c)(1) provides for disclosure of the presentence, physical or mental health, and diagnostic reports to certain persons other than the parties. While the basic purpose of these reports is to assist the court in making the sentencing decision, the information contained therein will usually be quite helpful to those persons who will thereafter have responsibility for the defendant and therefore should be disclosed to them to avoid duplication of effort. The report should thus be furnished to the department of corrections and to any public or private agency that is treating the defendant for physical or emotional problems. In order to encourage the defendant to be completely candid with the person preparing the report, section (c)(2) ensures that, when a defendant is tried after a presentence report has been prepared, the presentence, physical or mental health or diagnostic reports, and any statement made in connection with their preparation, are admissible only on the question of the sentence to be imposed.

Section (d) is based on ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 18-5.3 (2d ed. 1986). While there appears to be no affirmative reason for making the reports public, as section (c) provides for disclosure to all those who would require the information contained therein, a very substantial possibility of detriment to the defendant exists. There is no need to thus invade the defendant's privacy by exposing such information to the public.

#### Rule 26.6 - Sentence Hearing.

**(a) Generally.** If the court has either discretion as to the penalty to be imposed or power to suspend execution of the sentence, the court shall conduct a sentence hearing in all felony cases, unless waived by the parties with consent of the court. The sentence hearing may commence immediately after a determination of guilt or may be continued to a later date. If a presentence report is required, the sentence hearing shall not be conducted until copies thereof have been furnished or made available to the court and the parties, as provided by Rule 26.5.

**(b) Prior Convictions; Enhanced Punishment.**

(1) If a hearing is necessary in order to establish an alleged prior conviction or convictions in the record, the court, on its own motion or the motion of either party, after a determination of guilt, shall hold a hearing.

(2) At a reasonable time before the hearing, the defendant shall be given notice of the prior conviction or convictions upon which the prosecution intends to proceed.



(3) The prosecution must establish the defendant's prior convictions beyond a reasonable doubt. If the defendant disputes any conviction presented by the prosecution, the court may allow the prosecution to present additional evidence of the disputed conviction, either by way of rebuttal or at a future time to be set by the court. If the prosecution fails to meet its burden of proof to establish one or more prior convictions, the defendant shall not be sentenced as an habitual or enhanced offender.

**(c) Evidence.** Other disputed facts shall be determined by the preponderance of evidence. Evidence may be presented by both the prosecuting attorney and the defendant as to any matter that the court deems probative on the issue of sentence. Such matters may include, but are not limited to: the nature and circumstances of the offense, the defendant's character, background, mental and physical condition, and history, the gain derived by the defendant or the loss suffered by the victim as a result of defendant's commission of the offense, and any other facts in aggravation or in mitigation of the penalty.

#### *Comment*

Rule 26.6 largely follows Ala. R. Crim. P. 26.6. Under section (a), after conviction the judge holds a hearing (unless waived with consent of the court) for the purpose of receiving evidence bearing on the length and terms of the sentence and whether to grant probation, unless the statute gives no discretion as to either term of sentence or probation. The hearing may commence immediately after a determination of guilt, or sentencing may be reserved for a later date; however, if a presentence report has been ordered, the hearing must await receipt of the report. Under Rule 10.1, the defendant has the right to be present at the sentencing hearing under Rule 26.6 and at the pronouncement of sentence under Rule 26.7.

When a hearing is necessary to establish a prior conviction in the record, section (b) provides that, after reasonable notice to the defendant, the prosecution must prove any disputed prior conviction beyond a reasonable doubt, or the defendant cannot be sentenced as an habitual or enhanced offender. Section (c) provides that disputed facts not governed by section (b) are determined by the court by a preponderance of the evidence.

#### Rule 26.7 - Pronouncement of Judgment and Sentence.

**(a) Pronouncement of Judgment.** Judgment shall be pronounced in open court. A judgment of conviction shall set

forth the plea, the verdict, the findings, if any, and the adjudication. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

**(b) Pronouncement of Sentence.** In pronouncing sentence, the court shall:

- (1) afford the defendant an opportunity, personally or through the defendant's attorney, to make a statement in the defendant's behalf before imposing sentence;
- (2) state that a credit will be allowed on the sentence, as provided by law, for time during which the defendant has been incarcerated on the present charge;
- (3) explain to the defendant the terms of the sentence;
- (4) inform the defendant as to the defendant's right to appeal; provided, however, in cases in which the defendant has entered a plea of guilty, the court shall advise the defendant of the right to appeal only in those cases in which the defendant:

(A) has entered a plea of guilty, but before entering the plea of guilty has expressly reserved the right to appeal with respect to a particular issue or issues; or

(B) has timely filed a motion to withdraw the plea of guilty and the motion has been denied, either by order of the court or by operation of law.

When informing the defendant of the right to appeal, the court shall also advise the defendant that if the defendant is indigent as provided in Rule 7.3, counsel will be appointed to represent the defendant on appeal and that a copy of the record and the reporter's transcript will be provided at no cost to the defendant for purposes of appeal to the Mississippi Supreme Court.

#### *Comment*

Rule 26.7 is taken from Ala. R. Crim. P. 26.9 (a) and (b) and is consistent with the ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* (2d ed. 1986). Section (a) continues provisions in former URCCC 11.01 (sentence pronounced in open court in the presence of the defendant). Section (b)(1) preserves the defendant's right to be present at sentencing, also recognized by Rule 10.1, unless waived under Rule 10.1(b). Section (b)(2) follows the ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 18-6.6 (2d ed. 1986), and requires the court, at the time of sentencing, to make sure the record accurately reflects the time already spent in custody. See § MISS. CODE ANN. 99-19-23. The explanation of the sentence under section (b)(3) should include the terms of

probation, the length and order of sentences if there are more than one, and whether the new sentence is to be served concurrently with or consecutively to a sentence that the defendant is then serving. Section (a)(4) requires the court to inform the defendant of the right to appeal. Under ABA, Standards for Criminal Justice, *Criminal Appeals* 21-2.1(b) (2d ed. 1986), the court imposing sentence assumes the burden of advising the defendant of the right of appellate review and that the right must be exercised within a specified time. Section (a)(4) also requires the court to advise the defendant that, in case of indigency, appellate counsel will be appointed, and that a copy of the record and reporter's transcript will be provided at no cost for purposes of appeal.

Rule 26.8 - Fine, Restitution, or Other Monetary Obligation following Adjudication of Guilt.

**(a) Method of Payment; Installments.** When the defendant is sentenced to pay a fine, restitution, or other monetary obligation, the court may permit payment to be made within a specified period of time or in specified installments. Restitution shall be payable as promptly as possible in light of the defendant's ability to pay.

**(b) Method of Payment; To Whom.** Unless the court expressly directs otherwise:

- (1) the payment of a fine, restitution, or other monetary obligation shall be made to the clerk of court; and
- (2) monies received from the defendant shall be applied as follows:

(A) first, to pay any court costs assessed against the defendant;

(B) second, to pay any restitution the defendant has been ordered to make;

(C) third, to pay any fines imposed against the defendant; and

(D) fourth, to pay any assignment of the sum made by the defendant to the defendant's attorney.

The clerk shall, as promptly as practicable, forward restitution payments to the victim.

**(c) Failure to Pay a Fine, Restitution, Other Monetary Obligation, or to Comply with Court Orders; Notice; Time Limits.**

- (1) *For Defendants Not under the Supervision of the Court or an Agency.* If a defendant fails to pay a fine, restitution, or other monetary obligation, or is known by the court to have failed to comply with a term or condition of sentence within the prescribed time, the

court shall, within 5 days, notify the prosecuting attorney.

(2) *For Defendants under the Supervision of the Court or an Agency.* If a defendant under the supervision of the court or an agency fails to pay a fine, restitution, or other monetary obligation, or is known by the court to have failed to comply with any other term or condition of probation within the prescribed time, the court shall give notice of such failure to the defendant's supervising officer within the time limits set under sections (c)(1) and (3).

(3) *Time Limits; Restitution and Non-Monetary Obligations.* If the payment or performance of an obligation does not involve the court, delinquency times shall run from the date on which the court or the supervising agency becomes aware of failure to pay or comply.

**(d) Court Action upon Failure of Defendant to Pay Fine, Restitution, or Other Monetary Obligation, or to Comply with Court Orders.** Upon the defendant's failure to pay a fine, restitution, or other monetary obligation, or failure to comply with court orders, the court may require the defendant to show cause why said defendant should not be held in contempt of court and may issue a summons or warrant for the defendant's arrest, and may:

- (1) inquire and cause an investigation to be made into the reasons for nonpayment, including whether nonpayment was willful or due to indigency;
- (2) reduce the obligation to an amount the defendant is able to pay, or release the defendant from the obligation;
- (3) continue or modify the schedule of payments;
- (4) direct the clerk to issue execution for any portion remaining unpaid;
- (5) if the order is a result of a traffic violation, suspend the defendant's privilege to operate a motor vehicle; and
- (6) direct that the defendant be incarcerated until the unpaid obligation is paid, subject, however, to section (e) of this Rule.

**(e) Incarceration for Nonpayment of Fine, Restitution, or other Monetary Obligation.**

- (1) Incarceration shall not automatically follow the nonpayment of a fine, restitution, or other monetary obligation. Incarceration may be employed only after the court has examined the reasons for nonpayment

and finds, on the record, that the defendant could have satisfied payment but refused to do so.

(2) After consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of any incarceration, subject to the limitations set forth in MISS. CODE ANN. §§ 99-19-20 and 99-37-9.

(3) If, at the time the fine, restitution or other monetary obligation was ordered, a sentence of incarceration was also imposed, the aggregate of the period of incarceration imposed pursuant to this rule and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense.

### *Comment*

Rule 26.8 is based on Ariz. R. Crim. P. 26.12 and replaces former URCCC 11.04. It is consistent with ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 12.7 (2d ed. 1986); Model Penal Code § 301.1(1). Rule 26.8 applies only following an adjudication of guilt, and therefore has no applicability to pretrial diversion, non-adjudication, drug court, and the like.

Section (a) tracks Ariz. R. Crim. P. 26.12 and mirrors practice under former URCCC 11.04 and MISS. CODE ANN. § 99-19-20(1), and recognizes that not everyone assessed a fine or restitution will be able to make full payment on the day of assessment.

Section (b) provides that, unless the court expressly orders otherwise, payments shall be made to the clerk and allocated as provided in section (b)(2). Section (b) also tracks Ariz. R. Crim. P. 26.12(b) in requiring restitution payments be forwarded to the victim as promptly as practicable, as opposed to accumulating payments before remitting them to the victim.

In the event of a defendant's default on a monetary obligation or non-compliance with a condition of sentence, section (c) prescribes time limits and requires notice be made to the prosecuting attorney or the supervising officer, as the case may be. Section (c)(3) clarifies that, for matters outside the involvement of the court, delinquency of any obligation is calculated as beginning when the court or agency has actual notice. Section (d) outlines the court's authority to inquire into and address non-payment or non-compliance, through contempt and other means, and provides reasonable alternatives to automatic incarceration. Nothing in Rule 26.8 precludes, in an appropriate case, proceeding pursuant to Rule 27.

Section (e) is taken from ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* 18-7.4(b) (2d ed. 1986). Section (e) governs incarceration for non-payment, and limits incarceration to instances in which the defendant could have satisfied payment but refused to

do so. A defendant should not be automatically imprisoned when alternative methods are available. *See Tate v. Short*, 401 U.S. 395 (1971) (denial of equal protection to limit punishment to payment of a fine for those who are able to pay, but to convert the fine to imprisonment for those who are unable to pay); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983). Section (e)(3) follows *Williams v. Illinois*, 399 U.S. 235 (1970), which forbids imprisonment of an indigent defendant for non-payment beyond the maximum sentence authorized for the offense. *See* Rule 27.6(f)(3) (revocation of probation for non-payment).

#### Rule 26.9 - Consecutive or Concurrent Sentences.

Unless otherwise prohibited by law, the court may direct that the sentence being imposed will be served concurrently with or consecutively to any other sentence previously or simultaneously imposed upon the defendant by any court of the State of Mississippi. When sentencing orders are silent, sentences shall run concurrently. A court shall not, however, order a defendant's sentence to run concurrently with a sentence imposed by a court of any foreign jurisdiction until having first determined which court has primary jurisdiction over the defendant and will accept custody of the defendant for service of the defendant's sentence.

#### *Comment*

Rule 26.9 is based generally on Ala. R. Crim. P. 26.12, Ariz. R. Crim. P. 26.13, and MISS. CODE ANN. § 99-19-21. The Rule is intended to encompass multiple charges arising from the same criminal episode, unrelated offenses for which sentence is imposed at one time, and a sentence imposed while the defendant is serving a sentence in Mississippi or elsewhere for another offense.

Unless the sentence order specifies otherwise, sentences shall run concurrently. *See* Rule 26.11. However, Rule 26.9 provides that, before a sentence may run concurrently with a sentence imposed by a federal court or a court of another state, the court must first determine which court will exercise primary jurisdiction and accept custody of the defendant. *Cf. Bell v. State*, 759 So.2d 1111 (Miss. 1999) (concurrent federal and Mississippi sentences); *Haynes v. State*, 944 So.2d 121 (Miss. Ct. App. 2006) (Mississippi sentence concurrent with sentence of another state).

#### Rule 26.10 - Re-Sentencing.

Where a judgment or sentence, or both, have been set aside by a post-trial motion, an appeal, or by collateral attack, the court may not impose a sentence for the same offense, or a different offense based on the same conduct, which is more severe than the prior sentence unless: (1) it concludes, on the basis of evidence concerning conduct by the defendant occurring after the original sentencing proceeding, that the prior sentence is inappropriate, or (2) the original sentence was unlawful and on remand it is corrected and a lawful sentence imposed, or (3) other circumstances exist

under which there is no reasonable likelihood that the increase in the sentence is the product of actual vindictiveness by the sentencing judge.

*Comment*

Rule 26.10 is based on Ariz. R. Crim. P. 26.14. The Rule reflects Constitutional limits on re-sentencing following a successful appeal. See *Alabama v. Smith*, 490 U.S. 794 (1989). Whenever a judge imposes a more severe sentence of a defendant after a new trial, the reasons for a more severe sentence, such as an intervening conviction, must “affirmatively appear.” *Wasman v. U.S.*, 468 U.S. 559 (1984); *North Carolina v. Pierce*, 395 U.S. 711 (1969) (resentencing after successful appeal); *Blackledge v. Perry*, 417 U.S. 21 (1974) (felony indictment after appeal *de novo* of misdemeanor conviction).

Rule 26.11 - Entry of Judgment of Conviction and Sentence; Warrant of Authority to Execute Sentence.

**(a) Entry of Judgment and Sentence.** The judgment of conviction and the sentence thereon are presumptively complete and valid as of the time of their oral pronouncement in open court.

**(b) Warrant of Authority.** The clerk shall forthwith enter the exact terms of the judgment and sentence in the court’s minutes. A certified copy, signed by the sentencing judge, shall be furnished to the appropriate officer or agency and no other authority shall be necessary to carry into execution any sentence entered therein.

If the sentence is for death or imprisonment, the appropriate officer or agency shall receive the defendant for execution of the sentence upon delivery of a signed, certified copy of the judgment of conviction and sentence.

*Comment*

Rule 26.11 is based on Ariz. R. Crim. P. 26.16. Rule 26.11 applies only to a judgment of conviction; Rule 26.2(a) governs judgment of acquittal.

Section (a) provides that a judgment of conviction and sentence are presumptively complete and valid on oral pronouncement. Rule 26.1(b) defines sentence as “pronouncement by the court” of the penalty following a judgment of conviction. Rule 26.7 requires pronouncement of judgment and sentence both be made in open court, and Rule 26.2(b) provides that a judgment of conviction shall be “pronounced and entered” together with the sentence.

Generally, time for taking further action under these Rules is the entry of judgment (Rule 20(c) for a motion for judgment of acquittal) or entry of

judgment and sentence (Rule 24.1(c) for a motion for a new trial and rule 24.3(b) for a motion in arrest of judgment).

Difficulty can arise when the oral pronouncement and written sentence differ. Section (a) embraces the majority rule that, presumptively, the oral pronouncement governs. *See U.S. v. De La Pena-Juarez*, 214 F.3d 594, 601 (5th Cir. 2000). This represents a change from existing practice. *See Temple v. State*, 671 So.2d 58 (Miss. 1996). Ambiguity between the two sentences, as opposed to true conflict, can be resolved by examination of the entire record, to determine the sentencing court's true intent. *See U.S. v. Warden*, 291 F.3d 363 (5th Cir. 2002); *U.S. v. Truscello*, 168 F.3d 61 (2d Cir. 1999) (written judgment simply clarified meaning of true sentence); *Boutwell v. State*, 847 So.2d 294 (Miss. Ct. App. 2003).

Section (b) requires the clerk to enter "forthwith" the exact terms of the judgment and sentence in the court's minutes. This is consistent with former URCCC 11.01 (which speaks of recording the judgment and sentence in the minutes of the court). This is a slightly different frame of reference from the Comment to MRAP 4(e), which speaks of entry of judgment by reference to the general docket, rather than the minutes of the court.

Section (b) further provides that a signed and certified copy be furnished to the appropriate entity for execution of the sentence, and that on receipt the appropriate officer or agency shall take custody of the defendant for execution of a sentence of imprisonment or death.

## RULE 27 - PROBATION

### Rule 27.1 - Granting Probation.

To the extent the sentencing court is given authority to suspend execution of sentence and to place an offender on probation, the court may impose such conditions and regulations as will promote the offender's rehabilitation and protect the public. Community service may be required. The supervising officer shall issue instructions consistent with the conditions and regulations imposed by the court and necessary for their implementation. All conditions of probation must be incorporated into a court's written order, and a copy thereof must be given to the offender. In addition, the court or supervising officer shall explain to the offender the purpose and scope of the imposed conditions and regulations and the consequence of violating those conditions and regulations.

### *Comment*

Rule 27.1 is patterned after Ala. R. Crim. P. 27.1. Section (a) is based on ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 18-2.3(c) (2d ed. 1986). Rule series 27 governs probation and, by the terms of Rule 27.7, termination of post-release supervision or imposition of a previously suspended sentence. Rule 27.1 is not intended to confer upon the court the power to grant probation - that power is determined



by statute - but only prescribes the procedure for granting probation in those cases where the court has lawful authority to do so. See MISS. CODE ANN. § 47-7-33 (granting circuit and county courts the authority to suspend sentence and impose probation in most cases). MISS. CODE ANN. § 47-7-35 gives the court broad authority initially to determine the conditions of probation to be imposed. Conditions of probation are not to be established by the supervising officer. However, the officer is vested with the authority to provide instructions consistent with court-imposed conditions in an effort to clarify or to expand upon general conditions and to assist in the guidance of the probationer. See ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 18-2.3, Comments (2d ed. 1986). Rule 27.1 is designed to reinforce the probationer's understanding of this new status and the expectations of the court. Conditions imposed on the probationer should reflect the correctional as opposed to the punishment goals of probation. Providing the probationer with both a written copy of imposed conditions and regulations, and an explanation thereof, should aid probationer's understanding and compliance. Rule 27.1 should alleviate supervisory burdens by eliminating some unnecessary violations claimed to be caused by the probationer's lack of understanding.

#### Rule 27.2 - Modification and Clarification of Conditions and Regulations.

The sentencing court, with or without a hearing, may modify or clarify any condition or regulation imposed by it and any instructions issued by a supervising officer. A supervising officer may modify or clarify any instructions which the officer has issued. An offender or supervising officer, at any time before absolute discharge, may request the sentencing court to modify or to clarify any condition or regulation. The sentencing court may, where appropriate, hold a hearing. A written copy of any order of modification or clarification shall be given to the offender, following which the offender shall have 10 days to request a hearing.

#### *Comment*

Rule 27.2 is based on Ala. R. Crim. P. 27.2. In providing a method for the modification and clarification of probation conditions, the Rule protects the probationer from arbitrary or unsupported changes by giving the probationer the right to request an explanation of standards which the court expects the probationer to meet. This right, in effect, balances the court's right to modify any condition of probation that it has legally imposed. Rule 27.2 also provides a formal means, short of violation and revocation proceedings, for the probationer to have ambiguous conditions or regulation clarified, and to provide a means for invoking the authority of the court when the probationer seems to be slipping toward revocation without risking the ultimate sanction. See ABA, Standards for Criminal Justice, *Probation* §3.3 (Approved Draft, 1970); ABA, Standards for Criminal Justice, *Sentencing Alternatives and Procedures* § 18-7.3 (2d ed. 1986).

Rule 27.3 - Extension of Term of Probation; Termination; Order of Discharge.

- (a) Extension of Term.** At any time during a term of probation the court, for good cause shown, may extend the term of probation up to the maximum period permitted by law.
- (b) Early Termination.** At any time during a term of probation and after notice to the prosecuting attorney, the sentencing court may, on motion of the offender, the supervising officer, or the court's own motion, terminate probation and discharge the offender absolutely.
- (c) Termination on Completion of Term.** Probation terminates automatically on successful completion of the term of probation set by the court.
- (d) Order of Discharge.** On completion or early termination of a term of probation, the court shall order the offender to be discharged absolutely, and the clerk of the court, upon request, shall furnish the offender with a certified copy of the order of discharge.

*Comment*

Rule 27.3 tracks Ala. R. Crim. P. 27.3. Section (a) recognizes the authority of the court, on a showing of good cause, to extend the term of probation to the lawful maximum. *See* MISS. CODE ANN. 47-7-37 (probation may be extended up to 5 years). Section (b) allows for early termination, on notice to the prosecuting attorney. The probationer who completes the full probation period under section (c) receives the benefits of an order of discharge, as provided by section (d). Such an order serves as a formal record of the probationer's freedom should any questions arise after discharge.

Rule 27.4 - Initiation of Revocation Proceedings; Securing the Offender's Presence; Arrest.

**(a) Initiation of Revocation Proceedings.**

*(1) Petition by Supervising Officer or Prosecuting Attorney.* If there is reasonable cause to believe that the offender has violated a condition or a regulation of probation or has acted contrary to the instructions issued by the supervising officer, the supervising officer or the prosecuting attorney may petition the sentencing court to revoke probation.

(2) *Initiation by the Court.* The sentencing court, on its own motion, may initiate proceedings to revoke probation by an order to show cause specifying the alleged violation of conditions, regulations, or instructions.

**(b) Securing the Offender's Presence.** Pursuant to a petition to revoke or an order to show cause, the sentencing court may, when appropriate, issue a warrant for the offender's arrest or issue a summons directing the offender to appear on a specified date for a revocation hearing.

**(c) Arrest by Supervising Officer.** The offender may be arrested without a warrant by the supervising officer responsible for the offender's supervision or by the officer's agent for violation of a condition of probation or regulation imposed or instructions issued.

### *Comment*

Rule 27.4 is taken from Ala. R. Crim. P. 27.4. MISS. CODE ANN. § 47-7-37 provides that any supervising officer, police officer, or other officer with the power of arrest may arrest the probationer without a warrant, if such arresting officer has been provided with a written statement of the supervising officer that probationer has violated the conditions of probation. Section (a) provides a mechanism for probation revocation that permits initiation of the proceeding by the court or by the supervising officer or by the prosecuting attorney. The court may issue an arrest warrant or a summons to compel the probationer's appearance or, if necessary, the supervising officer may take the probationer into custody. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

### Rule 27.5 - Initial Appearance After Arrest.

When an offender is arrested pursuant to Rule 27.4(b) or Rule 27.4(c), the supervising officer shall be notified immediately (unless the officer made the arrest), and the offender shall be taken without unnecessary delay before a court or agency authorized by law, who shall:

- (a) inform the offender of the alleged violation and furnish the offender with a written copy thereof;
- (b) inform the offender that any statement the offender makes before the hearing may be used against the offender;
- (c) advise the offender of the right to request counsel, and to have counsel appointed if the offender is indigent and the requirements of Rule 27.6(d) are met;
- (d) set the date of the revocation hearing, if not set previously; and
- (e) determine whether the offender is to be released pending the revocation hearing or is to be held without bond.

*Comment*

Rule 27.5 is taken from Ala. R. Crim. P. 27.5(a). Rule 27.5 supplements the release provisions of Rule 8, and grants the court discretion to release an offender or order the offender held without bond. This Rule embraces the requirements set forth in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

Rule 27.6 - Revocation of Probation.

**(a) Hearing.** A hearing to determine whether probation should be revoked shall be held before the sentencing court within a reasonable time after the offender's initial appearance under Rule 27.5.

**(b) Summary Disposition.** The offender may waive the hearing under Rule 27.6(a) and the sentencing court may make a final disposition of the issue, if:

- (1) the offender has been given sufficient prior notice of the charges and sufficient notice of the evidence to be relied upon; and
- (2) the offender admits, under the requirements of Rule 27.6(d), commission of the alleged violation.

**(c) Presence.** The offender is entitled to be present at the hearing.

**(d) Counsel.**

- (1) The offender may be represented by retained counsel.
- (2) Presumptively, counsel should be appointed to represent an indigent offender if the offender makes a timely and colorable claim that:

(A) the offender has not committed the alleged violation of the conditions or regulations of probation or the instructions issued by the supervising officer; or

(B) even when the violation is a matter of public record or is uncontested, there are substantial reasons that justify or mitigate the violation and make revocation inappropriate, and those reasons are complex or otherwise difficult to develop or present.

**(e) Admissions by the Offender.** Before accepting an admission by an offender that the offender has violated a condition or regulation of probation or an instruction issued by the supervising officer, the court shall determine that the offender understands the following:

- (1) the nature of the violation to which an admission is offered;

(2) the right to be represented by counsel as provided by Rule 27.6(d);

(3) the right to testify and to present witnesses and other evidence on the offender's own behalf and to cross-examine adverse witnesses under subsection (f)(1); and

(4) that, if the alleged violation involves a criminal offense for which the offender has not yet been tried, the offender may still be tried for that offense, and although the offender may not be required to testify, that any statement made by the offender at the present proceeding may be used against the offender at a subsequent proceeding or trial.

The court shall also determine that the offender waives these rights, that the admission is voluntary and not the result of force, threats, coercion, or promises, and that there is a factual basis for the admission.

**(f) Nature of the Hearing.**

(1) The judge must be reasonably satisfied from the evidence that a violation of the conditions or regulations of probation or the instructions occurred. Each party shall have the right to present evidence and the right to confront and to cross-examine adverse witnesses who appear and testify in person. The court may receive any reliable, relevant evidence not legally privileged, including hearsay.

(2) If the alleged violation involves a criminal offense for which the offender has not yet been tried, the offender shall be advised at the beginning of the revocation hearing that, regardless of the outcome of the revocation hearing, the offender may still be held for that offense and that any statement made by the offender at the hearing may be used against the offender at a subsequent proceeding or trial.

(3) In cases involving breach of a condition of probation because of nonpayment of a fine, restitution, or other monetary obligation, incarceration shall not automatically follow nonpayment. Incarceration may be employed only after the court has examined the reasons for nonpayment and finds, on the record, that the offender could have satisfied payment but refused to do so.

**(g) Disposition.** If the court finds that a violation of the conditions or regulations of probation or instructions occurred, it may revoke, modify, or continue probation.

**(h) Record.** The judge shall make a written statement or state for the record the evidence relied upon and the reasons for revoking probation.

### *Comment*

Rule 27.6 is adapted from Ala. R. Crim. P. 27.6. and is drafted to comply with the Constitutional requirements articulated in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Rules 27.5 and 27.6 together set up a two-hearing process specifically required by *Gagnon*. Rule 27.5 provides for an initial appearance before the judge who issued the warrant for the probationer's arrest, if the probationer is arrested pursuant to an arrest warrant, or, if the probationer is arrested without a warrant, before a court or agency authorized by law. Rule 27.6(a) then provides for the revocation hearing itself. Section (c) provides the offender's unqualified right to be present at the hearing.

Section (b) allows the probationer to waive a revocation hearing within carefully defined limits. Two hearings are not necessary if at the first hearing the probationer has received such sufficient notice of the charges and of the evidence of probation violation, and if the offender admits commission of the violation alleged consistent with section (e).

Section (d) provides a probationer may be represented by retained counsel. The right to appointed counsel for indigents is restricted to a case-by-case due process approach. Certain minimal guidelines were set forth, and section (d) tracks the language of the *Gagnon* decision. See *Riely v. State*, 562 So.2d 1206 (Miss. 1990). See also *Edwards v. Booker*, 796 So.2d 991 (2001).

The procedure for accepting an admission under section (e) applies at either the initial appearance or the revocation hearing. If there is no admission, the hearing is conducted pursuant to section (f). Section (f) is designed to prevent arbitrary actions by supervising officers seeking the aid of the court in revoking probation and to ensure compliance by probationer with regulations or conditions of probation or instructions pursuant to Rules 27.1 and 27.2.

Section (f) recognizes that a formal trial is not required, and that the court is not bound by the strict rules of evidence. Specific time limits are not imposed under this Rule. The probationer may request either an acceleration or postponement of the hearing date, depending on the particular circumstances. However, it is contemplated that a hearing will be held as soon as feasible and that a probationer will not be subjected to lengthy or unwarranted confinement prior to hearing. Section (f)(3) recognizes the Constitutional limits on revocation of probation for non-payment. As the Court explained in *Bearden v. Georgia*, 461 U.S. 660, 672 (1983):

[I]n revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for

the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority. If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment.

Section (h) is included to give a reviewing court a basis for evaluating the revocation hearing and decision. *Gagnon* requires that a written statement be made as to the evidence relied upon and the reasons for revoking probation. A written judgment entry would constitute a sufficient written statement.

#### Rule 27.7 - Other Proceedings.

The following proceedings shall also be conducted in accordance with this Rule 27:

- (a) to terminate a period of post-release supervision and recommit the offender; and
- (b) to impose any other previously suspended sentence.

#### *Comment*

Rule 27.7 extends the operation of Rule 27 to termination of post-release supervision and imposition of any other previously suspended sentence. See MISS. CODE ANN. §§ 47-7-34, 47-7-35, and 47-7-37 (post-release supervision); *Johnson v. State*, 925 So.2d 86 (Miss. 2006) (discussing imposition of suspended sentences).

#### RULE 28 - RETENTION OF RECORDS AND EVIDENCE

The clerk of the court shall receive and maintain all papers, documents, and records filed and all evidence admitted in criminal cases. All records and evidence of the proceedings shall be retained according to law.

#### *Comment*

Rule 28 is based on Ariz. R. Crim. P. 28.1(a). The Rule defines the basic duties of the clerk of court in criminal cases. On the retention of records as required by law, see MISS. CODE ANN. § 9-7-128.

## RULE 29 - APPEALS FROM JUSTICE OR MUNICIPAL COURT

Rule 29.1 - Notice of Appeal; Filing; Contents.

**(a) Notice of Appeal.** Any person convicted of an offense in a justice or municipal court, including a person convicted upon a plea of guilty or *nolo contendere*, may perfect an appeal to county court or, if no county court has jurisdiction, then to circuit court, by filing a written notice of appeal.

**(b) Filing; Time.** The notice of appeal shall be filed with the clerk of the circuit court within 30 days from the entry of the judgment or order appealed from.

**(c) Contents.** The notice of appeal shall specify:

- (1) the party or parties taking the appeal;
- (2) the current residence address and the current mailing address, if different, of each party taking the appeal;
- (3) the judgment or order from which the appeal is taken; and
- (4) that the appeal is taken for a trial *de novo*.

**(d) Defects in the Notice of Appeal; Dismissal.** If the defendant fails to comply substantially with the requirements of this Rule as to content of the notice of appeal, the county or circuit court, on its own motion or on motion of a party, may order the notice amended. If a defendant fails to amend the notice as required by the court, the court may dismiss the appeal with prejudice and with costs. The county or circuit court shall promptly notify the lower court of any such dismissal.

*Comment*

Rule 29.1 essentially carries forward practice under former URCCC 12.02, with a few modifications. Section (a) provides explicitly that an appeal may be taken from a plea of guilty or *nolo contendere* and, importantly, that an appeal is perfected by the timely filing of a notice of appeal. Prior practice conditioned perfection on the additional requirement of posting the necessary bonds. See former URCCC 12.02(A)(1) (“The clerk of the court shall not accept, file and docket the written notice of appeal without the accompanying cost bond and appearance bond or cash deposit, unless the court has allowed the defendant to proceed *in forma pauperis*.”) While Rules 29.2 and 29.3 still mandate a cost deposit or bond and an appearance bond, neither is a condition for perfecting an appeal. Rule 29 therefore conforms to common practice and clarifies that, after the filing of the notice of appeal, jurisdiction over the case is vested in the county or circuit court. See MISS. CODE ANN. § 99-35-1 (right to appeal justice or municipal court conviction to county or circuit court).



Section (b) requires the notice of appeal to be filed with the clerk of the *circuit* court within 30 days of entry of the judgment or order appealed from. See *Murray v. State*, 870 So.2d 1182 (Miss. 2004) (holding the 30 day deadline governs over conflicting statute). Under section (b), and unlike Miss. R. App. P. 4(e), pending post-trial motions do not extend the time for taking an appeal; nor is the time for filing a notice of appeal extended if the lower court judge stays execution of the judgment. Section (d) changes prior practice by providing that a defendant whose notice of appeal fails to comply substantially with the requirements of section (c) must first be given an opportunity to amend the notice before the appeal is dismissed. Section (d) further requires the lower court be promptly notified of any such dismissal, so that execution of its judgment may proceed. Dismissal of a defectively noticed appeal, while “with prejudice” as to that notice of appeal, does not necessarily preclude the filing of a subsequent timely and complete notice of appeal.

#### Rule 29.2 - Record; Costs.

**(a) Record.** Upon receiving the notice of appeal and upon defendant’s compliance with Rule 29.2(b), the clerk of the circuit court shall promptly notify the lower court and the appropriate prosecuting attorney. Within 10 days after receipt of such notice, the judge or clerk of the lower court shall deliver to the clerk of the circuit court a certified copy of the record and all original papers in the case. If, after such notice to the lower court and appropriate prosecuting attorney, the judge or clerk of the lower court fails to transmit the records to the clerk of the circuit court within the time prescribed, the prosecution thereof shall be deemed abandoned and the defendant shall stand discharged, with prejudice, and any bond shall be automatically terminated.

**(b) Bonds.**

(1) *Cost Deposit or Bond.* Simultaneously with the notice of appeal, a defendant shall post with the circuit clerk a cash deposit, or surety bond approved by the circuit clerk, for all estimated court costs incurred both in the appellate and lower courts (including but not limited to unpaid fees, court costs, and amounts imposed pursuant to statute). The amount of such cash deposit or bond shall be determined by the clerk of the circuit court in an amount of not less than \$100 nor more than \$2,500. Posting the cash deposit or bond shall stay the imposition of the judgment imposed by the lower court as it relates to fees, court costs, and amounts imposed pursuant to statute. Upon forfeiture,

the costs of lower court shall be recovered after the costs of the appellate court.

(2) *Appeals without Prepayment of Fees or Costs.* A defendant who desires to proceed without payment of a cash deposit or cost bond shall:

(A) file in the county or circuit court a motion for leave to so proceed; and

(B) if the defendant desires to proceed on appeal *in forma pauperis*, complete under oath an affidavit concerning that defendant's financial resources, on a form approved by the court. The defendant may be examined under oath regarding the defendant's financial resources by the county or circuit judge; the defendant shall, before said questioning, be advised of the penalties for perjury as provided by law.

If the motion is granted, the defendant may so proceed without prepayment of fees or costs in either court.

(3) *Dismissal for Noncompliance.* A defendant's failure to comply with this Rule 29.2(b) shall be grounds for the county or circuit court, on its own motion or on motion of a party, to dismiss the appeal with prejudice and with costs. The county or circuit court shall promptly notify the lower court of any such dismissal.

### *Comment*

Rule 29.2 replaces and amends practice under former URCCC 12.02. Section (a) governs transmission of the record. The judge or clerk of the lower court is required to transmit a certified copy of the record and all original papers, within 10 days after receipt of notice from the circuit court clerk that the defendant has properly taken an appeal. Failure to transmit the record within the prescribed time results in the prosecution being "deemed abandoned and the defendant . . . discharged." The notice by the circuit court clerk that the defendant has properly taken an appeal is triggered by the concurrence of two events: the filing of the notice of appeal, and compliance with the cost bond or cash deposit required by section (b). Importantly, the notice from the circuit court clerk is directed *both* to the lower court *and* to the attorney who prosecuted the case in the lower court; this guards against abandonment of the prosecution and discharge of the defendant without adequate notice to the prosecuting attorney.

Section (b)(1), as did former URCCC 12.02, requires the defendant to post a cost deposit or bond along with the notice of appeal, before the record is prepared and transmitted and the appeal can proceed. *See* Miss. CODE ANN. § 99-35-1 (requiring cost bond). Unlike prior practice, the clerk of the circuit court, not the judge of the lower court, sets the amount

of the deposit or bond within the range provided by section (b)(1); this is consistent with the provisions of section (a) that vest jurisdiction over the case in the appellate court upon the filing of the notice of appeal. The purpose of the cost bond is to cover all estimated *court costs*, broadly defined, in both the trial and appellate court. As before, posting the deposit or bond stays execution of the judgment imposed by the lower court as it relates to fees, court costs, and amounts imposed pursuant to statute. Section (b)(2) sets forth a procedure for defendants who desire to proceed without prepayment of costs or fees (on the basis of hardship or otherwise), including defendants who desire to proceed *in forma pauperis*. Section (b)(3) provides that failure to comply with section (b) is grounds for dismissal of the appeal with prejudice and costs. Section (b)(3) further provides that the lower court be promptly notified of the dismissal, so that execution of the judgment may proceed.

### Rule 29.3 - Appearance Bonds.

**(a) Appearance Bond.** If the defendant has been ordered incarcerated, the justice or municipal court may require the defendant to post an appearance bond in accordance with Rule 8 to assure the appearance of the defendant before the county or circuit court. An appearance bond originally posted with the justice or municipal court to assure the appearance of the defendant before that court shall serve to assure the appearance of the defendant before the county or circuit court on appeal. The approval and filing of the appearance bond shall stay the imposition of the judgment of incarceration imposed by the justice or municipal court. The clerk of the justice or municipal court shall transmit any appearance bond to the circuit clerk.

**(b) No Appearance Bond.** The failure of the defendant to post an appearance bond shall not prevent the county or circuit court from acquiring jurisdiction of the appeal. After acquiring jurisdiction of the appeal, the county or circuit court may modify the appearance bond. If the defendant remains in custody, the case shall be set for trial at the earliest practicable time.

**(c) Failure to Appear.** If the defendant fails to appear at the time and place set by the court, the county or circuit court may dismiss the appeal with prejudice and with costs, and order forfeiture of the appearance bond. The county or circuit court shall promptly notify the lower court of any such dismissal.

**(d) Time in Custody Credited.** All time the defendant has been in custody on the present charge shall be credited against any sentence imposed.

*Comment*

Rule 29.3 supplants former URCCC 12.02(B)(1). Section (a) permits the lower court to require a defendant who has been sentenced to incarceration to post an appearance bond in accordance with Rule 8 to assure the defendant's appearance before the county or circuit court. The filing and approval of an appearance bond stays imposition of the sentence of incarceration. *See* MISS. CODE ANN. § 99-35-3 (providing for appearance bonds). Under section (a), if the defendant has previously posted a bond to assure appearance before the lower court, that appearance bond is continued automatically and presumptively suffices to assure the defendant's appearance in county or circuit court.

Section (b) confirms that failure to post an appearance bond does not divest the county or circuit court of the jurisdiction it acquired upon the filing of the notice of appeal under Rule 29.1(a), and grants the county or circuit court the authority to modify a previously set appearance bond. If a defendant remains in custody pending an appeal, section (b) requires trial to be set at the earliest practicable time.

Sections (c) continues prior practice and adds that the lower court be promptly notified of any dismissal, so that execution of the judgment may proceed. Section (d), as before, states that a defendant's sentence include credit for time already spent in custody on the present charge. *See* rule 26.7(b)(2) and Rule 30.2.

29.4 - Proceedings.

The appeal shall be a trial *de novo*. In appeals from justice or municipal court when the maximum possible sentence is 6 months or less, the case may be tried without a jury at the court's discretion.

*Comment*

Rule 29.4 provides for a trial *de novo*, consistent with former URCCC 12.02(C) and Miss. CODE ANN. § 99-35-1. As under Rule 18.1(a)(2), a jury trial is discretionary if a defendant's maximum possible sentence is 6 months or less. *See Hinton v. State*, 222 So.2d 690 (Miss. 1969). Appeal of a conviction in county court is governed by Rule 30. Appeal of a conviction in circuit court is governed by Rule 31.

RULE 30 - APPEALS FROM COUNTY COURT

Rule 30.1 - Notice and Filing.

Any person adjudged guilty of a criminal offense by a county court, where the case was not a felony action transferred to that court from circuit court, may appeal to the circuit court having jurisdiction by filing written notice with the clerk of the county court within 30 days of the entry of judgment and sentence. The clerk, upon receiving written notice of appeal, shall immediately send notice to the prosecuting attorney.

Thereafter, appeals shall proceed as if in the Supreme Court and in accordance with the Mississippi Rules of Appellate Procedure. If a new trial is granted, the cause shall be remanded to the docket of the circuit court and a new trial held therein *de novo*.

### *Comment*

Rule 30.1 largely continues practice under former URCCC 12.03. Essentially, a defendant may appeal a conviction in county court to the circuit court that has jurisdiction by filing a written notice of appeal with the clerk of the county court within 30 days after entry of judgment and sentence. *See* MISS. CODE ANN. § 11-51-79. This includes both cases that originated in county court, and cases appealed to county court from justice or municipal court under Rule 29.1(a). Once the notice of appeal is filed, the case proceeds according to the MRAP. Appeal of a conviction in circuit court is to the Mississippi Supreme Court or Court of Appeals of the State of Mississippi under Rule 31, whether the case originated in county court, or in justice or municipal court. *See Jones v. City of Ridgeland*, 48 So.3d 530 (Miss. 2009) (interpreting MISS. CODE ANN. § 11-51-81).

Rule 30.1 does not apply to felony cases transferred by a circuit court to a county court for disposition. *See* MISS. CODE ANN. § 9-9-27. Transferred cases may be appealed directly to the Mississippi Supreme Court pursuant to Rule 31. *See* MISS. CODE ANN. § 11-51-79. Nor does Rule 30.1 apply to a case assigned to a county court judge pursuant to MISS. CODE ANN. § 9-9-35, which remains throughout a circuit court case.

### Rule 30.2 - Bond.

Defendants shall be entitled to release pursuant to Rule 8.3. All time that the defendant has been in custody on the present charge shall be credited against any sentence imposed.

### *Comment*

Rule 30.2 directs that Rule 8.3 governs release of defendants who appeal a conviction in county court to circuit court. As under prior URCCC 12.03(B), a defendant is entitled to credit for time in custody on the present charge against any sentence imposed. *See* rule 26.7(b)(2) and Rule 29.3(d).

## RULE 31 - APPEALS TO THE MISSISSIPPI SUPREME COURT AND COURT OF APPEALS

### Rule 31 - Appeals to the Mississippi Supreme Court and Court of Appeals.

All appeals to the Mississippi Supreme Court and Court of Appeals shall be taken in accordance with the Mississippi Rules of Appellate Procedure.

*Comment*

Rule 31 simply notes the applicability of the Miss. R. App. P. to appeals in criminal cases. *See* MRAP 1 (These rules govern procedure in appeals to the Supreme Court of Mississippi and the Court of Appeals of the State of Mississippi”); MISS. CODE ANN. § 99-35-101.

### RULE 32 - POST-CONVICTION COLLATERAL RELIEF

Applications for post-conviction collateral relief shall be governed by MISS. CODE ANN. §99-39-1 *et. seq.*

*Comment*

Rule 32 confirms that applications for post-conviction relief are governed by a comprehensive statutory process. *See* MISS. CODE ANN. § 99-39-2(1) (“The purpose of this article is to revise, streamline and clarify the rules and statutes pertaining to post-conviction collateral relief law and procedures.”).

### RULE 33 - CONTEMPT

#### Rule 33.1 - Applicability; Indirect and Direct Contempt Defined.

**(a) Applicability.** Rule 33 applies to both civil and criminal contempt.

**(b) Indirect Contempt.** “Indirect contempt,” also known as “constructive contempt,” means any contempt other than a direct contempt.

**(c) Direct Contempt.** “Direct contempt” means contempt committed:

- (1) in the presence of the judge presiding in court; or
- (2) so near to the judge as to interrupt the court’s proceedings.

**(d) Criminal Contempt.** “Criminal contempt” means either:

- (1) misconduct of a person that obstructs the administration of justice and that is committed either in the presence of the judge presiding in court or so near thereto as to interrupt its proceedings;
- (2) willful disobedience or resistance of any person to a court’s lawful writ, subpoena, process, order, rule, or command, where the primary purpose of the finding of contempt is to punish the contemnor; or
- (3) any other willfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court.

**(e) Civil Contempt.** “Civil contempt” means willful, continuing failure or refusal of any person to comply with a court’s

lawful writ, subpoena, process, order, rule or command that by its nature is still capable of being complied therewith.

### *Comment*

Rule 33 replaces formerly applicable provisions of URCCC 1.03. Section (a) provides that Rule 33 applies both to civil and criminal contempt proceedings, so long as they arise out of a criminal case. *See* Rule 1.1. Of course, Rule 33 could be made applicable to other proceedings, by appropriate provision of the Rules of Civil Procedure, Appellate Procedure, Uniform Rules of Circuit and County Court, or the Uniform Chancery Court Rules.

Sections (b) and (c) track Md. R. Ct. 15-202. The distinction between indirect (or constructive) contempt defined by section (b), and direct contempt defined by section (c), is drawn as a basis for procedural differences in applying a remedy. In those limited cases of direct contempt, where the contempt is within the judge's actual sight or hearing so that further or extrinsic evidence is not needed to show the judge what in fact occurred, the judge may dispose of the rule summarily under Rule 33.2. In all other instances the contempt is "indirect" and the procedure is different. *See* Rules 33.3 through 33.5. *See In re Smith*, 926 So.2d 878 (Miss. 2006); *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859 (Miss. 2004).

Sections (d) and (e) follow the definitions set forth in Ala. R. Crim. P. 33.1. The general distinction between criminal contempt defined by section (d) and civil contempt defined by section (e) is the purpose for which the sanctions are imposed, although the ultimate sanction in either case is incarceration. Where the sanction operates prospectively to ensure compliance with a lawful order of the court, the contempt is civil. The person being punished holds the keys to the jail and can gain release at any time by complying with the order. *See Shillitani v. U.S.*, 384 U.S. 364 (1966); *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911). On the other hand, a criminal contempt proceeding is intended to punish for past, not contemplated or ongoing, conduct. Its purpose is to vindicate the dignity of the court. Criminal contempt is a criminal offense for which a specific punishment is meted out, over which the defendant has no control. *See U.S. v. Barnett*, 376 U.S. 681 (1964); *In re Smith*, 926 So.2d 878 (Miss. 2006); *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859 (Miss. 2004). If the conduct is extreme, contempt can be a serious crime entitling a defendant to certain constitutional safeguards. *See Bloom v. Illinois*, 391 U.S. 194 (1968).

Rule 33.2 - Direct Contempt.

**(a) Summary Imposition of Sanctions.** The court against which a direct civil or criminal contempt has been committed may summarily impose sanctions on the person who committed it if:

- (1) the presiding judge has personally perceived the conduct constituting the contempt and has personal knowledge of the identity of the person committing it;
- (2) the contempt has interrupted the order of the court or interfered with the dignified conduct of the court's business; and
- (3) the punishment imposed does not exceed 30 days incarceration or a fine of \$100.

The court shall afford the alleged contemnor an opportunity, consistent with the circumstances then existing, to present exculpatory or mitigating information. If the court summarily finds and announces on the record that direct contempt has been committed, the court may defer imposition or execution of sanctions until the conclusion of the proceeding during which the contempt was committed.

**(b) Order of Contempt.** Either before sanctions are imposed, or promptly thereafter, the court shall issue a written order stating, or shall state on the record, that a direct contempt has been committed and specifying:

- (1) whether the contempt is civil or criminal;
- (2) the evidentiary facts known to the court from the judge's own personal knowledge as to the conduct constituting the contempt, and as to any relevant evidentiary facts not so known, the basis of the court's findings;
- (3) the sanction imposed for the contempt;
- (4) in the case of civil contempt, how the contempt may be purged; and
- (5) in the case of criminal contempt:
  - (A) if the sanction is incarceration, a determinate term; and
  - (B) any condition under which the sanction may be suspended, modified, revoked, or terminated.

**(c) Affidavits.** In a summary proceeding, affidavits may be offered for the record by the contemnor before or after sanctions have been imposed.

**(d) Review and Record.**

- (1) *Review.* The contemnor may seek review by writ of habeas corpus or by appeal to the Mississippi Supreme Court.



(2) *Record.* The appellate record in cases of direct contempt in which sanctions have been summarily imposed shall consist of:

- (A) the order of contempt;
- (B) if the proceeding during which the contempt occurred was recorded, a transcript of that part of the proceeding; and
- (C) any affidavits offered or evidence admitted in the proceeding.

**(e) No Summary Imposition of Sanctions.** In any proceeding involving a direct contempt for which the court determines not to impose sanctions summarily, the judge, reasonably promptly after the conduct, shall issue a written order specifying the evidentiary facts within the personal knowledge of the judge as to the conduct constituting the contempt and the identity of the contemnor. Thereafter, the proceeding shall be conducted pursuant to Rule 33.3 or Rule 33.4, whichever is applicable, and Rule 33.5 in the same manner as a indirect contempt.

#### *Comment*

Rule 33.2 tracks Md. R. Ct. § 15-203. Under section (a), sanctions may be imposed immediately upon a finding of direct contempt or, in the court's discretion, may be deferred to a later time in the proceeding. A delay between citation for contempt and the imposition of sanctions can provide a cooling-off period in the relations between the judge and the contemnor, and is particularly relevant in those circumstances when the contemnor is a lawyer representing a client on trial. Delay gives all parties a chance to reacquire their objectivity, and also allows the contemnor time to discuss the matter with an attorney and prepare a statement. Deferral of a sanction does not, however, affect its summary nature. *See Cooke v. U.S.*, 267 U.S. 517 (1925); *Offutt v. U.S.*, 348 U.S. 11 (1954). The sanction remains summary in nature in that no hearing is required; the court simply announces and imposes the sanction, albeit at the conclusion of the proceeding. By limiting the use in section (a) of summary disposition to those cases where the alleged contemptuous conduct was committed in the presence of the judge, section (a)(1) recognizes that the judge can determine the facts surrounding an allegation of contempt without a hearing only when the judge personally witnesses the contemptuous conduct. As to constitutional limitations on summary imposition of sanctions, including the right to jury trial and the right to counsel, *see Taylor v. Hayes*, 418 U.S. 488 (1974); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Bloom v. Illinois*, 391 U.S. 194, 202 (1968); *Duncan v. Louisiana*, 391 U.S. 145 (1968); and

*Cheff v. Schnackenberg*, 384 U.S. 373 (1966). Because of these limits, summary procedures are available only when necessary to preserve order (section (a)(2)), and only when the potential punishment does not exceed 30 days incarceration or a \$100 fine (section (a)(3)). This is consistent with Miss. CODE ANN. § 9-1-17 (summary punishment for direct contempt).

Section (a) does provide the contemnor with significant procedural rights, as section (a) requires the court to “find and announce on the record that direct contempt has been committed,” and permits the contemnor “consistent with the circumstances then existing, to present exculpatory or mitigating information.” Thus the contemnor must be given notice of the charges and an opportunity to present information in mitigation of punishment. It should be recognized that the power to punish summarily for contempt is to be used cautiously, and is not an appropriate device to control every act of courtroom disrespect. Section (a) is intended to authorize summary punishment only for disruptive conduct that is willfully contemptuous and that has been preceded by a prior warning in all but the most flagrant violations. See ABA, Standards for Criminal Justice, *Special Functions of the Trial Judge* § 7.2, Comment at 93 (2d ed. 1986); *U.S. v. Wilson*, 421 U.S. 309 (1975). As stated in the ABA, Standards for Criminal Justice, *Special Functions of the Trial Judge* § 7.4, Comment at 95 (2d ed. 1986):

Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry*, 9 S.Ct. 77, 128 U.S. 289, 32 L.Ed. 405 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness, and is likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course.

Section (b) outlines the procedures to be followed in a summary adjudication of contempt. The court must state in writing or on the record: the nature of the contempt (whether civil or criminal); the evidentiary basis for the finding of contempt including, if applicable, witnesses who confirm the judge’s findings; the sanction; and, where applicable, how the contempt may be purged or otherwise mitigated. Section (c) allows the contemnor to offer affidavits for the record, both before and after any sanctions are imposed. Section (d) establishes methods of review for direct contempts when sanctions are imposed summarily. See Miss. CODE ANN. § 11-51-11.

Section (e) limits the applicability of Rule 33.2 to direct contempts where sanctions are summarily imposed. Otherwise, the judge is required to issue a written order specifying the facts known to the judge to constitute the contempt, and the matter proceeds in the manner provided for indirect contempts under rules 33.3 through 33.5.

Rule 33.3 - Indirect Criminal Contempt; Commencement; Prosecution.

**(a) Nature of the Proceedings.** All criminal contempts not adjudicated pursuant to Rule 33.2 shall be prosecuted by means of complaint, unless the prosecuting attorney elects to proceed by indictment. Except as otherwise provided by these Rules, the case shall proceed as a criminal case in the court in which the contempt is alleged to have been committed.

**(b) Disqualification of the Judge.** The contempt charges shall be heard by a judge other than the trial judge whenever the nature of the alleged contemptuous conduct is such as is likely to affect the trial judge's impartiality.

*Comment*

Rule 33.3 tracks Md. R. Ct. § 15-204. Section (a) provides that criminal contempts that are not or cannot be tried summarily in accordance with Rule 33.2 must be tried pursuant to the provisions of Rule 33.3. Section (a) requires that all criminal contempts not disposed of summarily must proceed under the procedures established by these Rules for the trial of other criminal offenses. *See Dennis v. Dennis*, 824 So.2d 604 (Miss. 2002) (“A defendant in [indirect] contempt proceedings is entitled to notice and is entitled to be informed of the nature and cause of the accusation, of his rights to be heard, to counsel, to call witnesses, to an unbiased judge, to a jury trial, and against self-incrimination, and that he is presumed innocent until proven guilty beyond reasonable doubt.”). Under Mississippi law, criminal contempt requires a showing of willful and deliberate conduct. *See Premeaux v. Smith*, 569 So.2d 681 (Miss. 1990); *Masonite Corp. v. International Woodworkers of America, AFL-CIO*, 206 So.2d 171 (Miss. 1967). Section (a) permits contempt proceedings to be prosecuted by complaint (as in Rule 2), unless the prosecuting attorney chooses to seek an indictment. Section (b) requires a new judge hold a hearing to determine the guilt of the contemnor, as well as to impose punishment, whenever the nature of the contemptuous conduct is a personal attack on the judge or is otherwise “likely to affect the trial judge’s impartiality.” *See Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). Thus, whenever the trial judge must be disqualified under section (b), any adjudication of guilt made by that judge is void and the matter must be redetermined.

Rule 33.4 - Indirect Civil Contempt.

**(a) Commencement.** A civil contempt proceeding may be commenced by the filing of a complaint for contempt with the clerk of the court whose injunction, stipulation, order or judgment is claimed to have been violated. No filing fee

shall be required in connection with the filing of the complaint for civil contempt. The proceeding shall be considered part of the action out of which the contempt arose.

**(b) Contents of the Complaint.** The complaint for civil contempt shall:

- (1) contain a complete verbatim statement of the injunction, stipulation, order or judgment involved, or a copy thereof if available, and the name of the issuing judge where appropriate;
- (2) identify the court that issued the injunction, order or judgment, or in which the stipulation was filed;
- (3) contain the case caption and the docket number of the case in which the injunction, order or judgment was issued, or the stipulation was filed;
- (4) include a short, concise statement of the facts on which the asserted contempt is based;
- (5) include a request for the issuance of a summons as specified below;
- (6) be verified or supported by affidavits; and
- (7) otherwise comply with applicable provisions of the Rules of Civil Procedure.

**(c) Summons.** The summons shall issue only on a judge's order and shall direct the parties to appear before the court not later than 7 days after service thereof for the purpose or purposes specifically stated therein of:

- (1) scheduling a trial;
- (2) considering whether and when the filing of an answer is necessary;
- (3) considering whether discovery is necessary;
- (4) holding a hearing on the merits of the complaint; or
- (5) considering such other matters or performing such other acts as the court may deem appropriate.

**(d) Trial.** The complaint for contempt shall be tried to the court in accordance with MRCP 52(a) and judgment shall be entered pursuant to MRCP 58.

**(e) Service of the Summons and Complaint.** The following shall be served upon the contemnor in accordance with the provisions of Miss. R. Civ. P. 81, unless the court orders some other method of service or notice:

- (1) a copy of the summons;
- (2) a copy of the complaint for contempt;
- (3) a copy of any accompanying affidavits; and
- (4) if incarceration to compel compliance is sought, notice to the alleged contemnor in the following form:

**TO THE PERSON ALLEGED TO BE IN CONTEMPT OF COURT:**

1. It is alleged that you have disobeyed a court order, are in contempt of court, and should go to jail until you obey the court's order.
2. You have the right to have a lawyer. If you already have a lawyer, you should consult the lawyer at once. If you do not now have a lawyer, please note:

- (a) A lawyer can be helpful to you by:
  - (1) explaining the allegations against you;
  - (2) helping you determine and present any defense to those allegations;
  - (3) explaining to you the possible outcomes; and
  - (4) helping you at the hearing.
- (b) Even if you do not plan to contest that you are in contempt of court, a lawyer can be helpful.
- (c) If you want a lawyer but do not have the money to hire one, you may ask the court to appoint one for you.

**3. IF YOU DO NOT APPEAR FOR A SCHEDULED COURT HEARING BEFORE THE JUDGE, YOU WILL BE SUBJECT TO ARREST.***Comment*

Rule 33.4 tracks Mass. R. Civ. P. 65.3. Rule 33.4 applies to all proceedings to enforce compliance with injunctions, orders, judgments, and stipulations formalized by court order for the violation of which civil contempt is an appropriate remedy. Section (a) provides that indirect civil contempt proceedings are initiated by complaint (as in MRCP 3), and clarifies that they are treated as part of the action out of which the contempt arose. Consequently, no filing fee is required.

Sections (b)(1)-(7) prescribe what must be included in an indirect civil contempt complaint and, because of the serious nature of an allegation of civil contempt, requires verification or accompanying appropriate affidavits.

Section (c) endows the summons with unusual significance. Because of the expedited and grave nature of a civil contempt proceeding, the summons: "issues only on a judge's order"; must "direct the parties to appear before the court not later than 7 days" after issuance of the order; and must specifically state what will happen when the parties appear. Section (c) is constructed to meet two different goals. The first is to permit flexibility with respect to what occurs when the parties first appear in answer to the summons. Depending on the nature of the alleged contempt, a case may or may not benefit from the filing of an answer, expedited discovery, or an immediate hearing. Consequently, the rule gives wide discretion to the judge to determine what should happen when the parties appear: a "hearing on the merits," if it makes sense to have that quickly; scheduling a trial; considering dispensing with an answer; expediting discovery, if discovery is

necessary; requiring initial compliance by the defendant pending a hearing; considering other appropriate matters or requiring other appropriate acts to be performed. Under section (c)(3), a party must seek an order permitting discovery, unlike normal discovery provisions which permit parties, on their own, to initiate discovery. A party seeking discovery must particularize the need for, type, and timing of the discovery sought. In an unusual case, the court can order discovery in the initial summons or at the hearing that occurs when the parties respond to the summons.

The second goal of section (c) is to eliminate surprise, to the extent reasonably possible. The parties should know, for example, whether a trial will take place when they appear in response to the summons. The word “specifically” in “for the purpose or purposes specifically stated therein” is to emphasize the importance of informing the parties what to expect. To merely place in each summons a laundry list of everything which might happen or “whatever the court may deem appropriate” complies neither with the language nor with the spirit of this Rule.

Section (d) makes MRCP 52 (Findings by the Court) and 58 (Entry of Judgment) applicable to indirect civil contempt proceedings. Under Mississippi law, civil contempt requires a showing of willful and deliberate conduct. See *Stevison v. Woods*, 560 So. 2d 176, 180 (Miss. 1990); *Matter of Estate of Hollaway*, 631 So. 2d 127, 132 (Miss. 1993); *Cooper v. Keyes*, 510 So.2d 518 (Miss. 1987).

Section (e) provides for service of the summons and complaint, as well as any accompanying affidavits, in accordance with MRCP 81. If incarceration is sought, section (e) also requires service on the alleged contemnor of the notice in the form prescribed in Rule 33. Because of the seriousness of incarceration as a potential sanction, elevated notice, including notice of the right to counsel, is indicated.

### Rule 33.5 - Indirect Contempt; Further Proceedings.

**(a) Consolidation of Criminal and Civil Contempts.** If a person has been charged with more than one contempt pursuant to Rule 33.3, Rule 33.4, or both, the court may consolidate the proceedings for hearing and disposition.

**(b) When Judge Disqualified.** A judge who enters an order pursuant to 33.2(e) or who institutes an indirect contempt proceeding on the court’s own initiative pursuant to Rule 33.3 or Rule 33.4, and who reasonably expects to be called as a witness at any hearing on the matter, is disqualified from sitting at the hearing unless:

- (1) the alleged contemnor consents; or
- (2) the alleged contempt consists of a failure to obey a prior order or judgment.

**(c) Failure to Appear at Hearing.**

(1) *Generally.* If after proper notice the alleged contemnor fails to appear personally at the time and place set by the court, the court may enter an order directing the contemnor be taken into custody and brought before the court or judge designated in the order.

(2) *Civil Contempt.* If, after proof of proper notice, the alleged contemnor in a civil contempt proceeding fails to appear in person or by counsel at the time and place set by the court, the court may proceed *ex parte*.

**(d) Disposition.** When a court makes a finding of contempt, the court shall issue a written order that specifies the sanction imposed for the contempt. In the case of a civil contempt, the order shall specify how the contempt may be purged. In the case of a criminal contempt, if the sanction is incarceration, the order shall specify a determinate term and any condition under which the sanction may be suspended, modified, revoked, or terminated.

#### *Comment*

Rule 33.5 is based on Md. R. Ct. 15-207 (a) through (d). Section (a) permits consolidation of indirect contempt proceedings, when multiple charges have been made under Rule 33.3 or 33.4. Section (b) provides that a judge who expects to be a witness is disqualified from conducting an indirect contempt proceeding, unless the contemnor consents or the contempt is the result of a failure to observe a prior order of the court. Under section (c)(1), the judge may order the arrest of any contemnor who receives notice but fails to appear personally as required. While section (c)(2) permits the court to proceed *ex parte* to dispose of any civil contempt if the contemnor receives notice but fails to appear personally or through counsel, in a proceeding for criminal contempt the court may proceed in the defendant's absence only if the requirements of Rule 10.1 are met. On a finding of indirect contempt, the court must enter a written order under section (d) specifying: the sanction imposed; how any civil contempt may be purged; and how any conditional criminal contempt may be remedied or mitigated. *See* Rule 33.2(b) (similar requirements).

#### Rule 33.6 - Bail.

A contemnor committed for contempt is entitled to the same consideration with respect to bail pending appeal as a defendant convicted in a criminal proceeding.

#### *Comment*

Rule 33.6 makes the provisions of Rule 8.3 applicable to appeals of contempt proceedings when a contemnor has been incarcerated.

## RULE 34 - SUBPOENAS

**(a) Generally.** Except as set forth below, the procedures for subpoenas in criminal proceedings shall conform to Rule 45 of the Mississippi Rules of Civil Procedure. This Rule shall not apply to proceedings before a grand jury.

**(b) For Production of Documentary Evidence and of Objects at a Trial or Hearing.** In proceedings governed by these Rules, a subpoena may command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The subpoenaing party shall forthwith provide a copy of the subpoena on issuance to all attorneys of record for the parties, or to any party when not represented by an attorney. The court on motion made promptly, and in any event made at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that matters designated in the subpoena be produced before the court at a time before the trial or before the time when they are to be offered in evidence and upon their production may permit the matters or portions thereof to be inspected, photographed, and copied by the parties and their attorneys.

*Comment*

Rule 34(a) substantially modifies practice under formerly applicable URCCC 2.01, and is based on Rules 731(c), Uniform Rules of Criminal Procedure, (National Conference of Commissioners of Uniform State Laws (1987)). Section (a) provides generally that subpoenas in criminal cases conform to MRCP 45. Rule 34 is inapplicable to proceedings before the grand jury, and therefore does not interfere with or limit the use of grand jury subpoenas. *See* MISS. CODE ANN. § 13-5-63 and 13-7-21.

Rule 34(b), regarding subpoenas *duces tecum*, is based on Ala. R. Crim. P. 17.3. Section (b) is not intended to be a discovery device, as Rule 17 provides comprehensively for disclosure. Rather, section (b) is to be used to inspect evidence held by witnesses and to require its production at or prior to a trial or hearing. If a party seeks to have the evidence produced other than *at* a trial or hearing, the party must first obtain an order of the court; the subpoena is then returnable to the court. Section (b) requires that a copy of all subpoenas for production of tangible items to be provided forthwith to all attorneys of record and unrepresented parties. *See also* Rule 1.7 (regarding service of all motions and applications made to the court). The court may quash a subpoena if compliance would be unreasonable or oppressive, on a motion made promptly and before the time set for compliance with the subpoena. Section (b) further authorizes the court to direct that matters designated in the subpoena be produced before the court for inspection *in camera*.



## RULE 35 MOTIONS

Rule 35.1 - Motions: Form, Content, Rights of Reply, and Length.

**(a) In General.** A party applying to the court for an order must do so by motion.

**(b) Form and Content of a Motion.** A motion—except when made during a trial or hearing—must be in writing, unless the court permits the party to make the motion by other means. A motion shall contain a concise statement of the precise relief requested and shall state the specific factual grounds and specific legal authority in support thereof. A motion may be supported by affidavit. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion or if the matter is presented in an agreed order.

**(c) Rights of Reply.** Unless otherwise ordered by the court, each party may file and serve a response, and the moving party may file and serve a reply, which shall be directed only to matters raised in a response. Responses and replies shall be in the form required for motions. If no response is filed, the motion shall be deemed submitted on the record before the court.

*Comment*

Rule 35 is consistent with common practice as embodied in Fed. R. Crim. P. 47, Ala. R. Crim. P. 34, Ariz. R. Crim. P. 35, and MRCP 7(b). Rule 35.1 is intended to provide general standards governing the details of motion practice in criminal cases; the general standards will, of course, be inapplicable when a Rule specifies a different procedure. Sections (a) and (b) of Rule 35.1 are intended to produce concise, but precise pleadings. To this end, section (b) requires a statement of the specific factual grounds for the relief requested. With the broad pretrial disclosure provided by Rule 17, parties can be expected to go beyond mere conclusory allegations (such as, “the confession was involuntary,” or “the search violated defendant’s constitutional rights under the fourth and fourteenth amendments”). On the other hand, the factual specificity is not intended to limit the scope of an evidentiary hearing or the relief to be granted; the former is governed by traditional standards of relevance, the latter by principles of equity.

Section (b) eliminates the requirement of writing for motions made during a trial or hearing. The language “other means” in section (b) broadly permits the court to entertain motions through electronic or other reliable methods. The sentence in section (b) permitting a motion to be supported by affidavit is not intended to permit “speaking motions” (e.g., a motion to dismiss an indictment for insufficiency supported by affidavits),

but to authorize the use of affidavits when they are appropriate to establish a fact (e.g., authority to take a deposition or former jeopardy).

Unless otherwise ordered by the court, section (c) provides a right (but not a duty) to respond to all motions. Absent a response, the motion is submitted on the record before the court. Permitting a reply by the moving party to the response to the motion allows the moving party an opportunity to address new issues that the opposing party may have raised in the response.

#### Rule 35.2 - Hearing; Oral Argument.

Upon request of any party, or on its own initiative, the court may set any motion for hearing. The court may limit or deny oral argument on any motion. It is the duty of the movant, when a motion or other pleading is filed, including a motion for a new trial, to pursue the motion to hearing and decision. Failure to pursue a pretrial motion to hearing and decision before trial is deemed an abandonment of that motion; however, the motion may be heard after the commencement of trial in the discretion of the court.

#### *Comment*

Rule 35.2 is based on Ala. R. Crim. P. 34.2, Ariz. R. Crim. P. 35.2, and URCCC 2.04 (formerly applicable to criminal cases). The hearing and oral argument requirements are intended to give the court maximum discretion in deciding what procedures, in addition to the written motion and memoranda, will be most helpful to it in reaching a reasoned and expeditious decision on each issue. No party has an absolute right to oral argument on a motion. The last two sentences of Rule 35.2 incorporate formerly applicable provisions of URCCC 2.04.

#### Rule 35.3 - Waiver of Formal Requirements.

Upon request of a party, or on its own initiative, the court may waive a requirement specified in this Rule, or overlook a formal defect in a motion or request.

#### *Comment*

Rule 35.3 is based on Ala. R. Crim. P. 34.3 and Ariz. R. Crim. P. 35.4. This inherent power of the court is specifically included for purposes of clarity, and to allow its exercise informally. Rule 35.3 should be used primarily to allow handwritten documents to be submitted by indigents or persons without counsel; it should not be used to sanction deviations which effect an opposing party's substantial rights.

#### Rule 35.4 - Service and Filing.

Unless otherwise specified in these Rules, the manner and sufficiency of service and filing of motions, requests, petitions, applications, and all other

pleadings and documents shall be governed by Rule 5 of the Mississippi Rules of Civil Procedure.

*Comment*

Rule 35.4 tracks Ariz. R. Crim. P. 35.5. The provisions of the civil rules adequately provide standards concerning service and filing.

Rule 35.5 - Presentation of Orders to the Court.

With the exception of default or agreed orders and judgments, all proposed orders and judgments to be signed by the court shall be submitted directly to the court by an attorney and not through the clerk or through correspondence, unless otherwise permitted by the court. All orders or judgments presented to the court shall be signed by the attorney presenting the same.

*Comment*

Rule 35.5 continues practice under formerly applicable URCCC 1.11.

Rule 35.6 - Entry of Order and Duty of Clerk.

Immediately upon entry of an order or judgment of the court, the clerk of court shall make a diligent effort to assure that all attorneys of record have received notice of the entry of the order.

*Comment*

Rule 35.6 continues practice under former URCCC 11.05.