THE MISSISSIPPI JUDICIAL COLLEGE

presents the new

MISSISSIPPI RULES OF CRIMINAL PROCEDURE

An explanatory presentation to Mississippi Justice Court Judges by Justice Jim Kitchens, current Chair of the Criminal Rules Committee of the Mississippi Supreme Court, on April 6, 2017, at Choctaw, Mississippi.

FOREWORD

In December of 2016 the Mississippi Supreme Court unanimously approved a comprehensive set of procedural rules for criminal cases in Mississippi's municipal, justice, county, and circuit courts. These rules are the product of approximately fifteen years of study, research, and countless hours of meetings, first by a broad-based Criminal Rules Study Committee, then by the Supreme Court's Criminal Rules Committee, and finally by the careful consideration and vote of the entire Court. At several junctures public comment was sought, received, and pondered by the criminal rules committee.

Throughout, the rules committee, under the capable and conscientious leadership of now-retired Justice Ann H. Lamar, worked to produce our state's first-ever body of procedural rules for use in misdemeanor and felony cases in those of our trial courts that are charged with handling criminal matters. In this process, the rules committee did not undertake to "reinvent the wheel," but retained, insofar as possible, existing, familiar procedures. Where necessary, new procedures were crafted, in the hope that they would enhance judicial fairness while simplifying and streamlining the movement and resolution of criminal cases at the preliminary and trial levels.

The Criminal Rules Committee, and the Supreme Court as a whole, recognize that neither these, nor any other rules promulgated by humans, are perfect. Undoubtedly, refinements and adjustments will become necessary as shortcomings in the rules appear. The justices of the Mississippi Supreme Court,

and especially the Court's Criminal Rules Committee, welcome your suggestions, all of which will receive our open-minded and careful consideration.

This presentation is meant to assist Justice Court Judges in becoming acquainted with these new Mississippi Rules of Criminal Procedure, which will take effect on July 1, 2017. It will be immediately obvious that many of the rules do not apply to the work of the Justice Courts. Today's remarks will focus on the ones that do, especially those that represent a change from current practice.

Remember, these are rules of *procedure* adopted by and for the judicial branch of state government. The statutes that define crimes and prescribe penalties are enacted by the legislature and appear in the Mississippi Code. Many essential activities of Mississippi's criminal justice system, such as arrest and incarceration, are within the province of the executive branch of government and, accordingly, are not directly addressed in these rules. The constitutional doctrine of separation of powers among the three branches of government was scrupulously observed by the Supreme Court's Criminal Rules Committee as it crafted these procedural rules for Mississippi's trial courts, which labor in the vineyard of our judicial branch of government.

Justice Jim Kitchens
Jackson, Mississippi
April 2017

SOME THINGS JUSTICE COURT JUDGES NEED TO KNOW
by Justice James W. Kitchens

Rule 1 contains GENERAL PROVISIONS, such as:

Citation. The Mississippi Rules of Criminal Procedure should be cited as MRCrP. See MRCrP 1.1.

Existing rules REPLACED. These new rules *replace* practice under the criminal rules that appeared in the Uniform Rules of Procedure for Justice Court. The new criminal rules do not affect other provisions of the Uniform Rules of Procedure for Justice Court—only the criminal rules that previously existed in Justice Court. See the Comment to MRCrP 1.1. (The old justice court criminal rules will remain in effect through June 30, 2017.)

Definitions. MRCrP 1.4 contains some **basic definitions of legal terms that are found through the rules.** Most of these terms are old and you already know them. **One new thing** is the inclusion of the word *summons,* which is familiar to you from civil cases but is sort of new to criminal procedure. MRCrP 3.1(b)(1) explains when a court can issue a summons instead of a warrant for a criminal defendant. **This is brand new.**

Paper size. Size matters! For many years, going back to the Justice of the Peace days, half-page affidavits and warrants, as well as other kinds of court documents, were common. These fill-in-the-blank forms were provided in pad form. Legal-size (long!) paper also was common in the courts.

Nowadays, standard, letter-size paper is the norm in Mississippi courts; this came about with the advent of computers and the printers that accompany them. So, MRCrP 1.6 prescribes that court filings now appear on eight and one-half inch by eleven inch paper.

Recordation of court proceedings. MRCrP 1.10 provides that a lawyer or a *pro se* litigant may tape any court proceeding, or may bring a court reporter to make a record, as long as it's at the litigant's or the attorney's expense. (*Pro se* is pronounced PRO-say and in this context means a defendant who has no lawyer and is representing himself.) The judge should not and cannot attempt to prevent litigants from recording proceedings in justice court!

Rule 2, COMMENCEMENT OF CRIMINAL PROCEEDINGS, as its name indicates, is about getting cases started in Mississippi's criminal justice system.

Commencement of a criminal case in justice court is addressed in MRCrP 2, and there is not much of a change here. Charges in justice court are initiated by affidavit, the same as now. Note that, once there is a charging affidavit, it is *mandatory* that the clerk record the affidavit on the court's docket. MRCrP 2.1(b)(1).

Rule 3 is about the **issuance, by a court,** of an **ARREST WARRANT OR SUMMONS UPON COMMENCEMENT OF CRIMINAL PROCEEDINGS.**

NOW HEAR THIS! When someone lodges a charging affidavit in justice court, *even if it's a peace officer who brings the charge,* the judge does not automatically issue an arrest warrant (or a summons).

First the judge must find 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 accused person committed it. See MRCrP 2.2(a) and MRCrP 3.1. **No probable cause finding, no warrant!**

The use of **tickets, citations, or affidavits for misdemeanor traffic violations** are **not changed** by the rules. **MRCrP 3.1(c).**

A BRAND NEW THING is that, instead of an arrest warrant, **a summons** for the defendant may be issued by the court if the defendant isn't in custody, the offense charged is bailable as a matter

of right (and most are), and the judge has no reasonable cause to believe that the defendant will not obey the summons.[1] **MRCrP 3.1(b)(1).**

MRCrP 3.2 is about **arrest warrants** and **summonses.** This rule is very specific about the information these documents must contain, how they're to be executed or served, and the return to be made by the peace officer.

REMEMBER: warrants are *executed* and summonses are *served.* There's no such thing as "serving" a warrant, whether it's an arrest warrant or a search warrant.

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[1]The judge might think, "I'm not personally acquainted with a lot of the people who get charged with offenses, so often I don't know one way or the other whether there's reasonable cause to believe the defendant won't obey the summons." If you don't know, then you DO NOT have reasonable cause to believe he or she *won't* obey the summons; so, issue a summons. If a defendant who has been summoned doesn't show up, **THEN issue an arrest warrant as provided in MRCrP 3.1(b)(2).**

Rule 4 is about **SEARCH WARRANTS.** As with arrest warrants, the mere making of an affidavit for a search warrant does not necessarily mean that a search warrant will be issued by the judge. (And it should go without saying that the issuance of warrants is a *judicial* function; the *judge* has to do it, not the clerk.)

Search and seizure is a seminar subject unto itself. MRCrP 4 contains the fundamentals. This entire rule should be read and reread by all justice court judges.

MRCrP 4.4 is about the **execution of search warrants** (which, of course, the judge has *nothing* to do with; judges must *never* accompany peace officers who execute warrants of any kind!), **returns** that officers must make on executed search warrants, **inventories** of things seized, **the return by officers of unexecuted search warrants to the issuing court,** and the **custody of things seized.**

Rule 5 is about **ARRESTS AND INITIAL APPEARANCES.**

This rule focuses on three things:

1. Arrests made *without a warrant.* See MRCrP 5.1(b). Such an arrest might occur when a misdemeanor, such as a DUI, is committed in a peace officer's presence. It also can include felony arrests. For instance, an officer might arrest someone caught in the commission of a burglary. A warrantless arrest for a felony also could occur if an officer has probable cause to believe that a particular person committed a felony, yet no arrest warrant has been issued. For example, an officer might be informed by radio that the bank was just robbed and he/she sees someone running away from the bank with a revolver in one hand and a bank bag in the other. Of course, this officer does not have to go get a warrant before arresting the fleeing suspect. A person who is in custody following a warrantless arrest, whether for a misdemeanor or a felony, is entitled to an initial appearance before a judge *no later than* 48 hours after arrest.

2. Arrests made *with a warrant.* See MRCrP 5.1(c). You may be the judge who issued the arrest warrant, or a different judge may

have issued the warrant. In either event, a person arrested pursuant to a warrant is entitled to an initial appearance before a judge *no later than* 48 hours after his or her arrest. Bear in mind that 48 hours is the *maximum* length of time that should pass between arrest and initial (first) appearance before a judge. The rules contemplate, and provide, that an accused person will be taken before a judge for an initial appearance *without unnecessary delay* after arrest; the sooner, the better! Conscientious judges should be willing to make whatever scheduling accommodations are necessary to make compliance with this rule a reality, especially during weekends.[2]

3. The initial appearance. A *mandatory* list–things the judge MUST do–during the initial appearance is found in MRCrP 5.2(a). Everything on the list is important and has a purpose. Some of the highlights include:

- You must give the defendant a copy of the charging affidavit. If the arrest was made without a warrant (and thus no affidavit), the arresting officer usually will have signed a charging affidavit prior to the initial appearance.

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[2]If the accused is released from custody, on bail or otherwise (for instance, charges are dropped, or accused is released on recognizance), no initial appearance is required.

- If the arrest was made without a warrant, YOU MUST DETERMINE AT THE INITIAL APPEARANCE WHETHER THERE WAS PROBABLE CAUSE FOR THE ARREST and note the probable cause determination for the record. If you conclude there was no probable cause for the arrest, the defendant must be released.

- If the defendant has no attorney and wants one, you must advise him/her of the right to counsel and counsel must be appointed for the defendant if he/she is not financially able to hire a lawyer. Follow the steps in MRCrP 5.2(a)(4).

- Sometimes a defendant will be released before an initial appearance can practically occur; one might be released on recognizance shortly after arrest, and another could be released on bail soon after arriving at the jail. In such cases, when the accused has been released, he or she is NOT entitled to an initial appearance.

- An accused person who has been indicted by the grand jury is not entitled to an initial appearance. However, this does not mean that a person who is under indictment, say for grand larceny, then is picked up on a new charge of, for instance, aggravated assault, is not entitled to an initial appearance on the new charge. He/she IS entitled to an initial appearance on the new charge or charges.

- With the defendant's consent, the initial appearance may be conducted via interactive audiovisual devices in accordance with MRCrP 1.8.

- BAIL. The subject of bail is covered in MRCrP 8.

THIS IS NEW: Under MRCrP 5.2(b), if the arrestee is charged with a FELONY, at the initial appearance that judge must inform him/her of the **right to a preliminary hearing. If the accused asks at his/her initial appearance for a preliminary hearing, the judge must schedule it in accordance with MRCrP 6.1. This is regardless of whether the accused has made, or is about to make, bail.**

Rule 6 is about the **PRELIMINARY HEARING.**

Here are some special points of interest:

- Applies only to felonies, never to misdemeanors.

- The preliminary hearing shall be held within 14 days after defendant demands it. There are several exceptions to this. See MRCrP 6.1(a)(2) and 6.1(d).

- Once demanded by defendant, hearing cannot be waived unless waiver is in writing, signed by defendant and defendant's attorney, if any. MRCrP 6.1(b) is about waiver.

- At the hearing the judge determines (1) whether there is probable cause and (2) if so, the conditions of release, if the offense is bailable (and most are).

- Defendant (or defense attorney) can cross-examine the State's witnesses and the State (the prosecutor) can cross-examine the defendant's witnesses.

- Both the prosecution and the defense are entitled to subpoena witnesses to the preliminary hearing.

- The judge makes a determination of probable cause at close of prosecution's case.

- If the judge does find probable cause to believe (1) a crime has been committed and (2) the defendant probably committed it (or participated), defendant may then make a specific offer of proof, including the names of witnesses who would testify, OR the defendant may actually present

the evidence offered (how this is done is up to the defendant or, of course, the defense attorney).

- Hearsay evidence is admissible in preliminary hearings. Objections that evidence was obtained by improper means are not proper at preliminary hearings.

- As a general rule, the charging affidavit may be amended at any time.

- If probable cause is found, the judge shall bind the defendant over to await action of the grand jury. (To reiterate, **if the defendant has been indicted** on the charge in question, there is **NO PRELIMINARY HEARING**. If the hearing has been scheduled and the grand jury indicts before the hearing occurs, the hearing is CANCELLED!)

- If probable cause is NOT found, the judge must order the defendant discharged from custody. This will not preclude the State from presenting the same case to a grand jury.

- **A felony defendant IS NOT deemed to have waived his/her right to a preliminary hearing if released on bail or recognizance.** A person charged with a felony who is released while the charge is pending (unless indicted) is just as entitled to a preliminary hearing as one who is in jail. **This differs from current practice,** which is to effect that one waives his right to a preliminary hearing when he is released on bail.[3]

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[3]This is new, but not *brand* new. During most of Mississippi's judicial history, preliminary hearings in felony cases occurred, upon timely request by the accused, in all felony cases, except when a case was initiated by a grand jury indictment, or when an indictment was returned by a grand jury after a defendant had been charged in justice, municipal, or county court, but before a preliminary hearing had been conducted. An

Rule 7 is about an accused person's **RIGHT TO COUNSEL and WAIVER** of that right.

The basic rule—the "starting point"—is that **defendants in ALL criminal proceedings, both misdemeanor and felony, are entitled to be represented by one or more attorneys.** MRCrP 7.1(a) elaborates on the scope of this right. The right to counsel attaches ". . . without unnecessary delay, after a defendant is taken into custody. . . ." Defendants with the means to do so may engage private counsel, even in the most minor of cases in which the offense charged carries no possibility of jail time whatsoever. This is not true of indigent defendants.

An **indigent** defendant is one who is financially unable to employ counsel. MRCrP 7.3(a). An indigent defendant is entitled to have an attorney appointed to represent him/her in any criminal proceeding which may result in the loss of liberty (jail or prison time), when the court concludes that the interests of justice so require, or as required

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indictment is deemed to cancel the accused's right to a Rule 6-type preliminary hearing. In fairly recent years, some courts around the state took the position that a defendant's release on bail or recognizance constituted a waiver of his/her right to a preliminary hearing. That practice is not permitted under MRCrP 6.

by law. **This determination, and appointment, if an appointment is required, must occur during the indigent defendant's first appearance before a judge.**

Any defendant, including an indigent, may waive his right to counsel. In other words, a person has a right to represent himself. Do-it-yourself representation should be discouraged by the judge, and never encouraged. Waiver of counsel is addressed in MRCrP 7.1(c).

Procedure for appointment of counsel for indigents. MRCrP 7.2(a) says: "A procedure shall be established in each circuit, county, municipal, **and justice court** for the appointment of counsel for each indigent defendant entitled thereto." So, each justice court in Mississippi is required to establish such a procedure. This is likely to vary from county to county, depending, in large part, on whether a particular county has a full-time public defender's office, a system of part-time public defenders, or an *ad hoc,* or case-by-case, system of appointments.

If your county has some sort of public defender system, you may be able to utilize MRCrP 7.3(e) in most if not all cases:

> In counties. . .which have a public defender, the public defender shall represent all defendants entitled to appointed counsel whenever authorized by law and able to do so.

In the absence of a public defender system, MRCrP 7.3(f) may provide your best option:

> 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.

If an indigent defendant who appears before you is charged with a crime in which **the death penalty** may be imposed in circuit court, such as capital murder, special rules are found in MRCrP 7 requiring the appointment of TWO attorneys, both of whom must have particular qualifications above and beyond those of most criminal law practitioners. (See MRCrP 7.2(a)(2) and MRCrP 7.4.

HOWEVER, the rules contemplate that *these particular rules apply at the* ***trial*** *stage.* Since neither capital crimes, nor any other felony, can be *tried* in Justice Court, Mississippi's Rules of Criminal Procedure do not *require* the appointment of capital-qualified

attorneys, or the appointment of more than one attorney, for an indigent defendant in Justice Court.

NEVERTHELESS, Justice Court Judges always should strive to provide indigent defendants the best-qualified attorneys available, and this writer suggests that attorneys appointed in Justice Courts for indigent defendants in death-penalty cases at least meet the qualifications for "second-chair" death-penalty lawyers found in MRCrP 7.4(a). (The additional requirements for "first-chair" death-penalty counsel are found in MRCrP 7.4(b).)

IF NO LAWYER MEETING THESE QUALIFICATIONS IS AVAILABLE IN YOUR AREA, I suggest that the Justice Court Clerk telephone The Office of the State Public Defender, Capital Defense Division, for advice and/or assistance. The telephone number is 601-576-2316.

Rule 8, entitled RELEASE, is about getting out of jail.

Much of Rule 8 is familiar territory for Mississippi's Justice Court Judges. There's also **a lot of new material here.** Forms must be developed for most of the release procedures prescribed in Rule 8.[4]

What you and I have known as release on one's **"own recognizance"** (O. R.) is unchanged, except for its name. Now it's called release on **"personal recognizance."** See MRCrP 8.1(a) for the definition.

A brand-new thing is found in MRCrP 8.1(b) and is called an **"unsecured appearance bond."** This is an appearance bond in whatever amount you set—say, $1,000—that's not secured or guaranteed by any kind of collateral and isn't backed up by anyone else–just by the accused person, who's the only one, other than the official who approves it, who signs this piece of paper. In other words, this piece of paper will say that John Doe will be released from custody if he promises in writing that, in the event he doesn't show up

[4]The Comment that follows MRCrP 8.1 informs us that some of the statutory forms are unaffected. For Justice Court purposes, the basic form that will continue in use is found in Section 99-5-1 of the Mississippi Code of 1972.

for court when he's supposed to, he'll pay the county a thousand bucks. "This ain't gonna work!" you say. Well, think again: it's been working quite well in the federal courts for many years. This is sort of like when you buy a used car and a friend says, "Hey! I like your *new* car!" and you say, "Well, it's new to me." This is new to us in our state courts, but not to the feds, who have been "driving it around" for decades.

We'll still have the familiar old ***secured* appearance bonds,** which are defined in MRCrP 8.1 (c).

You've probably heard of the **cash deposit bond,** described in MRCrP 8.1(d). In this instance, the accused—if never before convicted of a felony—is allowed to deposit with the court some percentage of the bail that has been set. Usually, this is about 10%. Originally there was a statute that allowed this, but eventually it made its way into our circuit and county court rules. Now, it's also available in Justice Court and in municipal courts.

Rule provisions about **bail bonds that are secured by LAND** are, frankly, a little bit hard to find. Look at MRCrP 8.1(f)(1), entitled **"Surety"** for authority for this familiar type of bond.

Under MRCrP 8.1(f)(3) you'll find information about **people who cannot be sureties on bail bonds.** The main thing you need to know is that **YOU can't!** Others who can't sign bail bonds as sureties include lawyers, judges and other judicial officials (such as court clerks), and sheriffs (as well as other officials in counties and towns who are authorized to approve bail bonds). There is an "immediate family" exception that's explained in the rule; but **to be on the safe side** I'm pretty sure that I wouldn't do this, even though technically I could, if one of my children were arrested and needed a bail bond. Somebody other than Daddy would have to do that.

BAIL BOND COMPANIES and their many agents throughout the state are not left out of the new criminal rules. Provision is made for this familiar component of our criminal justice system in MRCrP 8.1(h) and MRCrP 8.1(i). These subsections reference certain sections of the Mississippi Code and regulations (regulations promulgated by

the Mississippi Insurance Commissioner). But **for your purposes,** the information you will need is to be found in Rule 8. For Justice Court Judges, MRCrP 8, as a whole, is *super important!*

The **Right to Pretrial Release on Personal Recognizance or on Bond is addressed in MRCrP 8.2.**

For *bailable offenses,* the things that you as a judge must take into account are listed in Rule 8.2(a). This 15-point list is made up of practical, common-sense considerations. Really, there is **nothing new here;**[5] but, nevertheless, you should familiarize yourselves with this rule and review it frequently throughout the years that you serve as a Justice Court Judge.

Section (a) of Rule 8 enables our state's courts to release a great many indigent defendants (as well as non-indigents) on non-financial conditions, something that has been required by the U. S. Supreme Court since 1960 when it decided the case of ***Bandy v. U. S.***[6]

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[5]This list is derived largely from an old Mississippi Supreme Court decision about bail: ***Lee v. Lawson,*** 375 So. 2d 1019, 1025 (Miss. 1979).

[6]The citation for the ***Bandy*** case is found in the Comment to Rule 8.

Rule 8(2) refers to **offenses that are "bailable as a matter of right."** For such offenses, whether felonies or misdemeanors, federal law and our state law strongly favor the setting of **reasonable** bail.

Of course, this suggests that **there are some crimes that are not bailable as a matter of right.** What are they?

Article 3, Section 29, of our Mississippi Constitution of 1890 (found in Volume 1 of your trusty Mississippi Code of 1972), tells us, among other things, that every crime is bailable *except* capital offenses "when the proof is evident or presumption great" *and* when the accused person was previously convicted of a capital offense or an offense punishable by imprisonment for a maximum of 20 years or more.

Capital crimes, for purposes of bail, aren't just those for which a person can be sentenced to death. Code Section 1-3-4 (also in Volume 1) tells us that the adjective *capital,* when applies to Mississippi crimes, also includes offenses that can carry a life sentence. So, in strong cases (proof evident, presumption great), offenses that may not be bailable can include rape, murder, armed

robbery, and kidnaping, plus capital murder and anything else that can carry a death penalty.

The rest of the time—which means *most* of the time—criminal offenses in Justice Court will require that you set reasonable bail. "Reasonable" may mean that it's reasonable for you to order the release of an accused person on his/her personal recognizance, or on a totally unsecured bond. Bear in mind that every accused person is presumed to be innocent. So, think of your job as making it *reasonable* for a presumptively *innocent person* to go home—and perhaps to work—while his or her case is pending in court.

AND NOW! Here's something that's *really new!* (Something, perhaps, that you've always wanted.)

BOND GUIDELINES

Rule 8(c) provides, courtesy of your Mississippi Supreme Court, a recommended range of bail amounts for judges to set in felony and misdemeanor cases.[7]

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[7]No, you don't *have* to set bail amounts in accordance with this suggested schedule. BUT, remember who's making the suggestion!

Judges will continue to have discretion in the matter of bail, but that discretion must be exercised in a reasonable manner. In future cases in which a judge's bail-setting reasonableness comes into question, that reasonableness, or the lack thereof, may be evaluated in light of the recommended ranges that have been provided to you in MRCrP 8(c).

Here are some things to keep in mind when setting bail:

1. You must presume that the accused person is innocent;

2. Excessive bail is prohibited by the Mississippi Constitution;

3. Release on personal recognizance often is appropriate;

4. Release on an unsecured bond often is appropriate;

5. Bail is not meant to be a means of punishing the accused;

6. If set, bail must be in an amount the accused—not his/her family and not his/her friends—is financially capable of making; and,

7. If an accused is such a great flight risk or is so dangerous that he/she needs to stay in jail, the way to achieve that is by *denying* bail, not by setting bail in some outrageously high amount.

BAIL PENDING APPEAL, or bail after conviction and sentencing, are addressed in MRCrP 8, **but not with respect to appeals from Justice Court.**

BONDS that pertain to appeals from Justice Court (and Municipal Court), are addressed in MRCrP 29. What follows is a basic summary of where to look in Rule 29 for provisions concerning bonds that apply when a person appeals a misdemeanor conviction from justice court into the county court or, if none, to circuit court:

1. When? Rule 29.1(a) provides that both a cost bond and an appearance bond (or cash deposit) must be posted at the same time as the defendant's written notice of appeal, and these must be filed with the circuit clerk within 30 days of the justice court judgment. This is what must be done by the defendant to perfect his/her appeal. This is *the defendant's responsibility,* not the justice court's.

2. Rule 29.3(a) provides details concerning the appealing defendant's posting of his/her **cost bond** with the county or circuit

court[8]. **The amount of the cost bond is set by the justice court judge.** The cost bond is payable to the State.

3. Rule 29.4(a) governs **appearance bonds** on appeals from justice court. **The justice court judge sets these appearance bonds.**

4. While an appeal from justice court is pending in a higher court **the proceedings in justice court are stayed,** in keeping with Rule 29.5. During this time, the justice court has *nothing* to do with the case, unless so directed by a higher court. This is the way things are now; this is nothing new.

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[8]Twenty-one Mississippi counties have county courts. In those counties, the elected circuit court clerk also serves as clerk of the county court.

NOW, BACK TO RULE 8

Remember, MRCrP 8 is about *release.* Mississippi courts can release people with or without bond. But regardless of how a defendant's release is structured, there always are **certain mandatory conditions of release that MUST be imposed by the releasing court.** These are found in Rule 8.4(a), and there are four of them:

1. Appear in court, when required, and comply with all orders of the court;
2. Commit no crime;
3. Promptly notify the court of any change of address; and,
4. Meet with your public defender or retained attorney, as directed.

Don't forget that these four conditions are **MANDATORY!**

In some cases it may be prudent to add one or more of the **ADDITIONAL CONDITIONS** of release which are listed, in general terms, in Rule 8.4(b). Suffice to say that these discretionary add-ons must be found by you to be reasonably necessary to do one or both of the following things:

1. To secure a defendant's appearance; and/or,
2. To protect the public.

The first one of the ten additional conditions authorized by the rules may surprise you. It signals **a sharp departure from the customary practice** of just about always requiring the posting of some form of bail. The new rules strongly suggest that such a requirement should be *the exception* and not the norm. **Rule 8.4(b)(1) is to the effect that a judge who finds it reasonably necessary to secure a defendant's appearance or to protect the public may require "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."**

The second one of the "additional conditions"—a discretionary, sometimes condition and not a mandatory, all-the-time condition—is that **if a judges finds it reasonably necessary to do either of those two things (secure a defendant's appearance or protect the public) the judge may require "execution of a *secured* appearance bond." (Rule 8.4(b)(1))** You will quickly recognize that this is what usually is done now. But no more!

Beginning on July 1, 2017, your first option, in the case of bailable offenses, is *not to require any sort of bond at all* when you are about the business of releasing people who are supposed to come back at some time in the future.

MRCrP 8.4(b) contains some more discretionary conditions that you can impose when you find, from the credible information that is developed in the courtroom—not in the back room, not from news reports, and not from rumors—that such additional conditions of release are **reasonably necessary,** *to do what?* Number 1, to secure a defendant's appearance, or, Number 2, to protect the public.

I didn't make this up. It's in the rules. See for yourself.

Rule 8.5 prescribes the procedure you *must* follow in determining conditions of release. In the first instance, this occurs at the initial appearance (within 48 hours of the defendant's arrest).

Everything about the defendant's release—all the conditions of release—must go into **a written order, signed by the judge.** You also have to explain to the defendant, face-to-face and verbally, all of the release conditions, the possible consequences of their violation,

and that a warrant for his/her arrest may be issued immediately upon report of a violation.

MRCrP 8.5 also provides, in Subsection (b), that **for good cause shown the justice court can modify the conditions of release.** This means that you can relax the conditions or you can make them more stringent. BUT you cannot change the conditions without first giving the State and the defendant an adequate opportunity to respond to whatever modification is under consideration.

Rule 8.6 is mainly about revocation of bail and may occur in response to a motion by the prosecuting attorney or on the court's own motion. The motion must be detailed, and its required contents are described in Rule 8.6(a)(1-3).

Of course, the motion must be heard and ruled upon in open court, and only after a motion hearing in accordance with Rule 8.6(b).

Rule 8.6(c) addresses surrender of a defendant—obviously, a defendant who is free on bail—by his/her surety. This is a longstanding right of sureties (those who have "stood" for someone else's bail, whether it's a bonding company or an individual). In

common language, this means that one who has chosen to "get on" a defendant's bail has a right to "get off" by physically bringing the defendant in and saying something to the effect of, "Here he is; I want off this dude's bond!" If that happens, the surety is discharged from any further obligation under the bond and the defendant goes to jail and stays there unless and until someone else "goes his bail," **OR** the judge orders some other way the defendant can be released, such as personal recognizance, an unsecured bond, or one of the other means of gaining release from custody found in Rule 8.[9]

It goes without saying that the *ultimate* way the obligation of a bail bond can be satisfied for all concerned—defendant and sureties—is for the defendant to be found **NOT GUILTY** by a jury, or by the judge, sitting without a jury.[10] Obviously, at that point, the bond goes away and the judge should enter a written order that

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[9]As noted in the **Comment** at the end of Rule 8, a bail agent's failure to collect all that is owed him or her from the accused is NOT a proper basis for the agent to surrender the accused and thereby relieve the agent or the agent's company from further obligation under the bond. This is a contractual issue between the company and the accused, not an issue between the accused and the Court.

[10]In addition to an acquittal of the accused, the bond also "goes away" if the State dismisses the charge(s).

discharges the defendant and his surety or sureties from any further obligation under whatever form of release the defendant may have utilized for that particular charge. **See Rule 8.7(d), which addresses Cancellation of Bond.**

If an accused person has been released in some fashion by the justice court—whether on bond or some other type of release order—**and then is indicted by the grand jury,** the bail bond or other means of release is **TRANSFERRED** automatically to the indicted charge in circuit court. This is covered in **MRCrP 8.7(a).**

All appearance bonds and security must be filed with the justice court clerk. If the case is transferred to another court, the bail bond or other documents related to the defendant's release (such as your court order ordering release on personal recognizance, or ordering some other type of release) must also be transferred to the other court. **See Rule 8.7(b).**

Now let's talk about people who jump bail. See Rule 8.7(d), which is discussed below. This part of Rule 8 is entitled FORFEITURE.

What do you, as a Justice Court Judge, do if a defendant who's free on a secured bail bond doesn't show up and you're satisfied that it's not a mere misunderstanding on his part, his lawyer's part, the prosecutor's part, the clerk's part, your part, etc.?

The forfeiture procedures, which at present are STATUTORY (laws enacted by the Legislature), are *not changed or superseded* by the new rules.[11]

The new rules do mention bond forfeiture in MRCrP 8.7(d). That rule refers the reader to two statutes. One of them, **Code Section 21-23-8, applies only in municipal courts.**

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[11]It is likely that, in the not-too-distant future, the Supreme Court's Criminal Rules Committee will give some close attention to Mississippi's bail bond forfeiture procedures with a view toward clarifying those procedures by way of an amendment to MRCrP 8. At present, the committee is not aware of specific problems that need attention, apart from a possible need to provide for the courts, by way of the Mississippi Rules of Criminal Procedure, a simple, step-by-step version of the somewhat complicated procedures now in use. As always, the committee will welcome commentary and suggestions from Bench and Bar, and from the public at large.

The other statute cited, which is **Code Section 99-5-25,** sets out the detailed and rather complex procedure for the accomplishment of bail bond forfeitures in circuit and, where applicable, in county court and justice court.[12]

Another statute that STILL APPLIES IN JUSTICE COURT is Code Section 99-5-11.

The bottom line is that the Justice Courts are to continue handling bond **forfeitures** the same way they're handling them now.

When there no longer is a need for an appearance bond—say, the defendant has been found not guilty, or the defendant has been found guilty (or has pled guilty) and been sentenced (and there is no appeal), or the charge has been dismissed—the justice court judge should enter a written order cancelling the bond and, if any money or other security has been deposited with the clerk, ordering its return. Such **bond cancellations** are covered in MRCrP 8.7(e).

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[12]I respectfully suggest that you think long and hard before cranking up the complicated and time-consuming forfeiture process. A cautious judge should not take this leap unless he or she is pretty darn sure that a genuine case of bond jumping has occurred.

Some of **Rule 9**, entitled **TRIAL SETTING,** has no application in Justice Court. I will briefly address the parts that do.

MRCrP 9(b) confirms the longstanding principle that, "Insofar as is practicable, trials of criminal cases shall have priority over trials of civil cases." This is self explanatory and requires no commentary from me.

MRCrP 9(c) is about continuances (putting off until a later time a trial or a hearing that has been scheduled). It provides, simply, that this can be done "for good cause shown." This can be requested by a party (either the State or a defendant), and the motion for a continuance must state, with specificity, the reasons for the continuance. The judge's decision on the motion should be memorialized in a written order. Continuances also can be granted on the judge's own motion. This also must be "for good cause shown."

Rule 10 is entitled **PRESENCE OF DEFENDANT, WITNESSES, AND SPECTATORS.**

First, defendants:

- **Defendant has a right to be present** at every stage of the proceedings. MRCrP 10.1(a).
- **Defendant may waive the right to be present.** See MRCrP 10.1(b) for details.
- **Defendant's absence.** Absence may be deemed a valid waiver of the defendant's right to be present *if* the court finds the absence was voluntary and constitutes a knowing and intelligent waiver of the right to be present. See MRCrP 10(b)(1)(B).
- **When the defendant MAY NOT waive the right to be present:** If the defendant is not represented by a lawyer EXCEPT in minor misdemeanor cases in which the potential punishment is a fine only and carries no potential for the loss of liberty. MRCrP 10.1(b)(2)(B).
- **Effect of the defendant's absence:** When the defendant has waived his/her right to be present in accordance with Rule 10, the trial may proceed to completion. MRCrP 10.1(c).
- **Unexcused defendant.** If the defendant doesn't show up for trial, without a valid waiver, and if his/her absence has not been excused by the court, the court may issue a written order for officers to bring him/her before the court. MRCrP 10.1(d).
- **Disruptive conduct by defendant.** He/she can be removed from the courtroom and, if so, he/she forfeits the right to be present at that proceeding. MRCrP 10.2(a).
- **Restoration of right to be present.** If the defendant promises to be nice (good behavior), and any other [reasonable] conditions the judge may require. MRCrP 10.2(b).
- **Continuing duty of the judge.** If feasible, the court shall employ reasonable means to enable a defendant removed from a proceeding to hear, observe, or be informed of the further course of the proceeding, and to consult with his/her attorney at reasonable intervals. MRCrP 10.2(c).

Continuing with Rule 10—

And now, **witnesses and spectators:**

- **Invoking "The Rule."** (The rule for sequestration of witnesses.) Either side can "invoke the rule" at the beginning of a trial or hearing. This means that only one witness can be in the courtroom at the time: the one who is testifying. Others have to wait their turn, outside and out of hearing of the courtroom. There are some exceptions to this rule, but the one you're most likely to encounter concerns expert witnesses (for instance, a physician who's going to give an opinion about the cause of an injury). Usually, experts aren't kicked out and can sit in the courtroom while others are testifying. MRCrP 10.3(a).
- **Spectators.** I often explain to people who are surprised to learn that they can come and watch court proceedings, "There's nothing more public than court." An exception would occur if a defendant can convince the judge that an open proceeding presents a danger to his/her right to a fair trial by an impartial jury. MRCrP 10.3(b)(1).
- Spectators who engage in disorderly, disruptive, or contemptuous conduct, and those whose conduct or presence constitutes a threat or menace to the court, parties, attorneys, witnesses, jurors, officials, the public, or to a fair trial, **may be removed** from the courtroom. MRCrP 10.3(c).

Rule 11 is entitled **CHANGE OF THE PLACE OF TRIAL.**

This rule deals with changes of venue, from one county to another, in high-profile trials (almost always felonies) in Circuit Court and does not apply to Justice Court.

Rule 12 is entitled **MENTAL EXAMINATIONS** and deals with mental competency to stand trial and the insanity defense in Circuit Court. While Justice Court Judges do encounter defendants of questionable mental competency and/or sanity, including those charged with felonies who may be bound over to await grand jury action, MRCrP 12 is not tailored for application in Justice Court.

Rule 13 is entitled **THE GRAND JURY** and has no direct application in Justice Court.

Rule 14 is entitled **INDICTMENT** and has no direct application in Justice Court.

Rule 15 is entitled **ARRAIGNMENT AND PLEAS.** Much of the criminal procedure that is prescribed in this rule is applicable only in Circuit Court. The portions of the rule that also are relevant to Justice Court are mentioned below.

Plea agreements. Prosecuting attorneys are encouraged to try to resolve cases by engaging in discussions with defense attorneys; and, in the case of an unrepresented defendant, the prosecutor may talk directly with the defendant, if agreeable to the defendant. **The trial judge SHALL NOT participate in plea discussions.** The rules concerning plea bargaining are easy to understand and Justice Court Judges should become intimately familiar with them, since the vast majority of misdemeanor cases in Justice Courts are "worked out." **The plea bargaining rule, and all its subparts, may be found in MRCrP 15.4.**

Even though the resolution of cases by agreement of the State and the defendant is desirable and efficient, judges always should be willing to devote whatever time is necessary to the **trial** of cases in which the parties cannot come to a consensus that the judge finds to be lawful, fair, and just.

Rule 16 is entitled **PRETRIAL MOTIONS.** Although the provisions of this rule will apply most often in circuit and county court, the rule's application in justice court is addressed below.

It is nigh-on to impossible to foresee or to list *every* type of motion that might be filed by the State or by the defense in a Mississippi Justice Court. *A few* that occur to this writer include:

- **Motion for trial by jury in certain cases.** See MRCrP 18.1(a)(3).
- **Motion for discovery or for reciprocal discovery.** See MRCrP 17.10.
- **Motion for the judge to recuse.**
- **Motion to disqualify an attorney.**
- **Motion to dismiss the charge(s).**
- **Motion for leave to amend the charging affidavit.**
- **Motion for a continuance.**
- **Motion for leave to withdraw a guilty plea.**
- **Motion to set bail.**
- **Motion to release defendant on personal recognizance.**
- **Motion to revoke or modify bail.**
- **Motion to transfer to Youth Court.**
- **Motion to reduce a charge to a lesser charge.**
- **Motion of an indigent defendant for appointment of an attorney.**
- **Motion for a preliminary hearing.** See MRCrP 6.1.
- **Motion for postponement of a preliminary hearing.** See MRCrP 6.1(d).
- **Motion for return of firearm (or other personal property).**[13]

The judge *must* rule on EVERY pretrial motion BEFORE TRIAL unless good cause to defer a ruling is found by the judge. MRCrP 16.1(b).

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[13]No firearm may be returned to a convicted felon. MRCrP 16.2(b).

Rule 17 is entitled **DISCOVERY AND DISCLOSURE.** This is a biggie! **Brand new** to Justice Courts (and Municipal Courts) is the provision for limited discovery and disclosure that is enumerated in MRCrP 17.10. Only this part of the rule applies in Justice Court.

The word ***discovery*** pertains to information and material about a case that the defendant is entitled to obtain from the prosecution. ***Reciprocal discovery*** is about the prosecution's right to receive the same sort of information and material from the defendant.

A defendant's right to discovery is triggered by written request to the State made prior to trial, which can be done by letter or e-mail. No judicial action is required. Careful attorneys will handle this in a way that will enable them to *prove* they actually made the request, and when they did it, should the need arise.

The prosecution's right to reciprocal discovery is triggered by its having provided discovery to the defendant. If the defendant asks for and receives discovery from the State, the defendant is obligated to respond in kind. **A list** of what must be provided appears in MRCrP 17.10(a).

The short title of **Rule 18** is **TRIAL BY JURY.** The full title, as it appears in the actual rule, is *Trial by Jury; Selection and Preparation of Petit Jury.* Much of Rule 18 is about felony trials in Circuit Court. Some of it pertains to death penalty trials. These references, which obviously have no direct application in Justice Court, will be apparent to you as you read through Rule 18. The following comments will highlight some of the Rule 18 provisions that apply in Justice Courts.

On occasion you will impanel *petit* juries in Justice Court—never a *grand* jury. *Petit* (pronounced *petty*) means *small.* In Mississippi's court system, petit juries are comprised either of six or twelve persons, not counting alternates. In Justice Court, the number of petit jurors is six. It is not required that alternate jurors be impaneled; this is discretionary with the judge. Circumstances may arise that lead a Justice Court Judge to believe it would be wise to impanel an alternate juror. If this is done, it is hard to imagine why there ever would be a need for more than one alternate juror in Justice Court, since the trials almost always are concluded in one day or less.

Of course, there are no grand juries in Justice Court. Mississippi grand juries—always impaneled in Circuit Court—may have as few as fifteen or as many as twenty-five members. The word *grand,* in this context, simply signifies *large.*

Rule 18.1(a)(3) provides you some essential information about jury trials, which, in Justice Court, always will be for misdemeanors and never for felonies. The bottom line is that a person charged in Justice Court with a misdemeanor who demands a jury trial in a timely motion is entitled to have one **except** in cases in which the *potential* sentence is six months or more in jail.[14]

Jury verdicts in Justice Court misdemeanor trials must be unanimous. In other words, for a verdict to be valid **all six jurors must have voted *not guilty* or *guilty.*** Anything less, if it appears to the judge that there is no reasonable probability of the jury's agreement on a verdict, will result in a **mistrial.** See **Rule 23.5, MRCrP.**[15]

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[14]This means the potential sentence specified in the applicable statute, not the sentence you think you might impose if the defendant is found guilty.

[15]In the event of a mistrial, the State may choose to retry the defendant on the same charge at a later time, with a different jury that is chosen from a new group of

Where does the Justice Court get these jurors, and how?

The answer is easy: the Justice Court Clerk should notify the Circuit Court Clerk of your county, who will summon a sufficient number of persons[16] to the Justice Court for jury duty. See **Rule 1.16** in the General Rules portion of Mississippi's Uniform Rules of Procedure for Justice Court. The summonsing of Justice Court jurors is the same in criminal and civil cases.

In fact, much of the procedural aspect of Justice Court jury trials is unchanged by the new Mississippi Rules of Criminal Procedure and continues to be governed by the existing Uniform Rules of Procedure for Justice Court.

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people who are summoned to Justice Court by the Circuit Clerk.

[16]Jurors in all Mississippi jury trials, both criminal and civil, must be at least twenty-one years of age.

Rule 19 is entitled TRIAL. Much of Rule 19 does not apply in Justice Court.

What does apply, in a Justice Court jury trial, includes the step-by-step list entitled **Order of Proceedings** that appears in **Rule 19.1(a).** Nothing else in Rule 19 applies in Justice Court.

AN IMPORTANT REMINDER

In a criminal trial, regardless of whether it's a bench trial (judge only) or a jury trial, **the defendant does not have to testify!** Neither the judge nor anyone else at the trial can, in any way, directly or indirectly, call on the defendant to testify. No one can even imply that he or she should testify.

For example, nobody—not even the judge—can say anything like, "Now it's your turn to tell your side of it."

The defendant has an absolute right to keep his mouth shut. In addition, whether the defendant calls any witnesses is up to the defendant.

Rule 20 is entitled DUTIES OF COURT REPORTERS. In Justice Court, this is a very short list. In fact, there's no list at all, because there are no *official* court reporters in Justice Court as there are in Circuit, Chancery, and County Courts.

HOWEVER, there *can* be a court reporter in Justice Court—just not an official one, meaning that the court reporters who come to Justice Court aren't public employees and they're not there because they're required by law to be there. Attorneys and *pro se* litigants are perfectly within their rights to bring *privately employed* court reporters to Mississippi Justice Courts. Sound familiar? This is the second time I've said this, but I think it bears repeating:

> **Recordation of court proceedings.** MRCrP 1.10 provides that a lawyer or a *pro se* litigant may tape any court proceeding, or may bring a court report to make a record, as long as it's at the litigant or attorney's expense. (*Pro se* is pronounced PRO-say and in this context means a defendant who has no lawyer and is representing himself.)
>
> The judge should not and cannot attempt to prevent litigants from recording proceedings in justice court!

The judge should see that reasonable accommodations are made for the court reporter.

Rule 21 is entitled MOTIONS FOR DIRECTED VERDICT.

This rule applies both in non-jury and jury trials in Justice Court.

Of course, the State always has to present its case first. This is because the prosecution has the burden of proof; the defendant doesn't have to prove anything.

The prosecution's presentation of its evidence, through its witnesses and any exhibits that may be received into evidence, is called the prosecution's "case-in-chief. When the prosecuting attorney has completed that process, he or she will announce, "Your Honor, the State rests."

At that point, the defense attorney (or a *pro se* defendant) can make a motion[17] for a directed verdict of not guilty—in other words, for the judge to "throw the case out" because the evidence is not sufficient to prove the defendant guilty beyond a reasonable doubt. After the defense attorney has presented an argument in support of

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[17]Or, the judge can do this on the court's own motion.

the motion, the prosecutor may make an argument opposing the motion.

If the judge agrees with the defendant that the evidence is not sufficient, as explained in MRCrP 21(a), he/she simply sustains the motion (grants it). The judge does not literally direct the jury (if any) to go out and render a not guilty verdict; what happens here really is a finding by the judge that the evidence is insufficient, following which the judge adjudicates the defendant not guilty, then signs an order to that effect. Of course, if judge's ruling is that the accused person is not guilty, the jury is discharged; there's nothing left for the jury to do.

But, if the judge believes that a reasonable jury could find the defendant guilty on the evidence the State has presented, the judge simply says "overruled," or "denied," and the trial proceeds. (In a non-jury trial, at this point the judge could mentally ask himself or herself the same question: "Could a reasonable jury find the defendant guilty on the evidence I've just heard?")

The defendant then has the option of calling witnesses, perhaps testifying himself (or not), and offering evidence. Or, without doing

any of this, the defendant or the defendant's attorney may simply say, "Your Honor, the defendant rests."

If the defendant HAS testified and/or put on additional witnesses, at the conclusion of that process the announcement, "Your Honor, the defendant rests," is made.

After that, the prosecuting attorney has the option of calling rebuttal witnesses. Of course, if the defendant has not put on a case and simply has rested immediately following the prosecution's "resting" announcement, there's nothing for the State to rebut.

What we're working toward here is the point at which both sides have fully and finally rested, the point at which all the testimony there's going to be has been concluded. This point is "the close of the evidence," which is the second part of MRCrP 21(b).

The defendant may, and usually will, renew the motion for a directed verdict at the close of the evidence. Both sides can argue this motion, after which the judge either grants or denies it. If it's granted, the case is over; the defendant is adjudicated not guilty. If not, the

judge lets the jury, if any, decide whether the evidence is sufficient for a conviction. If there's no jury, the question of guilt is left to the judge.

In jury trials, both of these motions should be heard and considered by the judge **OUTSIDE THE PRESENCE AND OUTSIDE THE HEARING OF THE JURY.** The best practice would be for the judge to direct the bailiff to take the jury out of the courtroom "while the court and the attorneys take up some technical matters," or words to that effect. It would be improper for the jurors to hear either of these motions, the arguments of the attorneys, or the rulings of the judge.

Of course, **if the judge GRANTS either of these defense motions,** the jury, if there is a jury, should be brought back into the courtroom for the judge to inform them that the court, as a matter of law, has found the evidence of guilt to be insufficient and the defendant has, therefore, been adjudicated not guilty. The judge at that point may, if the judge wishes to do so, thank the jurors for their service.[18] The jurors then should be released.

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[18]Attorneys are not permitted to thank the jurors.

Rule 22 is entitled JURY INSTRUCTIONS. This rule applies to jury trials in Justice Court, County Court, and Circuit Court. The main function of jury instructions in criminal trials is to inform the jurors of the law which they are to apply in deciding whether to find the accused guilty or not guilty. The instructions which fulfill this function are the *substantive* instructions, and they are described in MRCrP 22(b). These substantive instructions provide "the yardstick" against which the jurors are to measure the facts presented to them by the prosecution and the defense (if the defense chooses to present testimony).

Jurors have great discretion in interpreting *facts*. Jurors have ZERO discretion concerning the law, which is given to them in the form of substantive instructions from the judge. Said another way, jurors are the judges of the facts; the judge is the judge of the law.[19]

The substantive instructions must be in writing. After both sides have rested, and if the defendant made a motion for directed verdict that the judge overruled, THEN the judge says words to the

[19]Here, we are talking only about JURY TRIALS. There is no need for jury instructions in a BENCH trial in which the judge decides both the law and the facts.

effect of, "Ladies and Gentlemen of the jury, please listen as I read to you the court's instructions on the law that you are to follow in reaching your verdict. In a few minutes these written instructions will be taken into the jury room with you when you retire to deliberate."

Then, the judge reads the instructions to the jury; and, of course, they are taken into the jury room by the jurors, along with any exhibits that were received into evidence during the trial.

Right now, you may be asking yourself, "Where did I get these written jury instructions?" Easy answer: the lawyers prepared them for you.[20] **Rule 22(b)(1)** addresses this. As the rule states, these proposed instructions from the parties must be filed at least twenty-four hours in advance of the trial. So, you can review them ahead of time. Before you mark each one "Granted" or "Refused," you and the lawyers will have an instructions conference, outside the presence of the jurors. The lawyers will argue about them. See **MRCrP 22(d),**

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[20]Let us hope and pray that both sides actually will have lawyers. Your job is made more difficult if they don't. The State will have one. If the defendant is indigent, you will have appointed a lawyer for him/her. BUT, the defendant has a right to represent himself. If that happens, then the defendant himself is supposed to prepare his proposed jury instructions, the same as a lawyer would do.

which is about the objections each side can make. Each side will try to persuade you to grant his and deny the other lawyer's instructions. In the end, the judge must decide which ones to grant and which ones to deny. See **MRCrP 22(e),** which is about the judge's rulings on the instructions.

Now, the instructions we've been talking about, up to now, are those prepared by *the parties.* (Hopefully, by the parties' attorneys.) The next subsection, MRCrP 22(b)(2), addresses a type of substantive instruction called ***court's instructions.*** These are provided the jury at the judge's option. They aren't "sponsored" by either party. They are meant to be additional instructions about the law that applies in a particular case. These are common in Circuit Court and also in County Court. Usually, they are quite comprehensive, rather generic, and cover many of the legal bases that are important in all criminal cases.[21]

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[21]These bases that need covering include things such as: the verdict of the jury must be unanimous; the jury cannot convict unless they believe, from the evidence, beyond a reasonable doubt, that the defendant has been proven guilty; the form of the verdict ("We, the jury, find the defendant guilty." OR, "We, the jury, find the defendant not guilty."); the jury's verdict must be written on a separate sheet of paper and need not be signed; the jurors are the sole judges of the weight of the evidence and the credibility of the witnesses; venue

Most, if not all, of the essentials may be addressed in the instructions submitted by the State. But it occurs to me that it could prove to be very helpful if the Judicial College were to develop some boiler-plate, bases-covering court's instructions and make them available to the Justice Court Judges for their use, mainly in jury trials in which the defendant does not have a lawyer. This would not provide a cure-all, do-all solution; but I think it could be a good step in the direction of conveying a correct understanding of the applicable law to Justice Court jurors.

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must be established by the evidence—this is simple—the jury must believe, beyond a reasonable doubt, that the crime charged occurred in Whatever County, State of Mississippi.

Rule 23 is entitled DELIBERATIONS.

The jurors, not the judge, may select one of the jury members as foreperson. They do this in the jury room, not the courtroom. But before they retire to the jury room the judge may, but does not have to, admonish the jurors that they are not to discuss anything in the jury room other than the trial. See **MRCrP 23.1(a).**

Usually, Justice Court jurors have no need to disperse (to separate from each other) from the time they retire to deliberate until they return to the courtroom to announce their verdict. Sequestration[22] of a jury would be unusual in Justice Court, though extreme circumstances could, possibly, make it necessary. The issue jurors must resolve in misdemeanor trials ordinarily are decided rather quickly.

During the deliberations of a Justice Court jury the judge has very broad discretion concerning their dispersement, as indicated in **MRCrP 23.1(b).** See also **MRCrP 18.7, Admonitions to Jurors.**

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[22]In the context of jury trials, *sequestration* means keeping the jurors together and not allowing them to split up (such as going their separate ways for lunch) until they have completed their work and are discharged. In my 50-year legal career, I've never heard of a Justice Court jury that was sequestered, though I can't say it's never happened.

Rule 23.2 provides a short **list of the items that should accompany the jury into the room in which it deliberates.**

The subject of **mistrials** is addressed in **MRCrP 23.5.** There are several ways in which a mistrial can occur, and they are not complicated; the short list is provided in Rule 23.5. Usually, but not always, when a mistrial has occurred the State has the option of trying the case again.

Rule 24 is entitled VERDICT. Ah, the goal line!

There is no required or expected length of time that the jurors must deliberate. But when they have completed their deliberations and have reached a unanimous verdict, someone—maybe the foreperson, or maybe some other juror—writes the verdict on a blank sheet of paper. Then, one of the jurors knocks on the door to signal the bailiff[23] (who's close by) that they've reached a verdict.

The bailiff closes the door and goes to inform the judge that the jury is ready. The judge instructs the bailiff to bring them in. When that occurs, the judge asks whether the jury has reached a verdict to which all six agree. If not, the judge sends them back to the jury room to resume their deliberations. If so, the judge tells the person who's holding the verdict to hand it to the clerk. The clerk hands the verdict to the judge for his/her examination. If the verdict is not in

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[23]The judge should make sure that all persons who serve as jury bailiffs fully understand that they will not communicate about the case with the jurors in any manner. It's okay for the bailiff to direct jurors to restrooms, chit-chat about the weather or last night's ball game, their grandchildren, or the price of tea in China—just about anything EXCEPT the case. Giving the jurors advice or suggestions about whom they should believe or not believe, what kind of sentence the defendant might get—anything remotely connected with the jurors' deliberations and what decision they will make—is OFF LIMITS for bailiffs.

order—something's wrong with it—the judge sends the jury back into the jury room to write its verdict in one of the forms directed by the jury instructions.

If the verdict is in the proper form, the judge hands it back to the clerk and directs him/her to read it. The clerk will read the verdict aloud, in open court, in the presence of the jury, the defendant, the judge, the lawyers for both sides—all concerned. This is the way a jury's verdict is PUBLISHED. In other words, it's made public. Remember: there's nothing more public than court.

If the judge wants to, he/she can poll the jury. If either party asks that the jury be polled, the judge complies. One by one, the judge points a finger at each juror, asking, "Is this your verdict?" This same question is asked to each of them. If they all answer YES, the judge says something to the effect of, "Very well. The verdict is unanimous." If one or more answers negatively, the judge sends them back for further deliberations, as they HAVE NOT reached a verdict.

What I have described gives you the gist of the portions of **Rule 24** that apply in Justice Court.

Rule 25 is entitled POST-TRIAL MOTIONS. When the trial's over, the defendant has gone home—or maybe to jail—and the lights have been turned off in the courtroom, aren't you through with the case? Well, not necessarily.

We talked about pre-trial motions in Rule 16. It might be said that those, for the most part, are "do" motions (a party is asking the court to *do* or *not do* a certain thing), while the post-trial motions mostly about are about things a party wants the court to "undo." Usually the latter—the *undo* type of motions in criminal cases—would relate to a conviction and/or a sentence.

Post-trial motions—and basically there are just two—are much more common in county court and circuit court than in justice court; in those higher courts, some of the motions, such as motions for new trial, are necessary to set the appeal process in motion. At this time that is not the case in justice court; but, nevertheless, such motions can be made and must be ruled upon in justice court.

The **motion for a new trial,** found in Rule 25.1, always is a defense motion—never a prosecution motion—and, as with most

motions, it has to be in writing. The possible grounds for such a motion are listed in the rule. It must be filed within ten days of judgment (conviction *and* sentence).

A convicted defendant, in some circumstances, may file a **motion to vacate judgment** (Rule 25.2) if it turns out that the charging affidavit was insufficient to charge a crime (not properly worded), or if it is found that the court was without jurisdiction (for instance, the events that generated the charge occurred in some other county or state, or the case should have been in Youth Court, or the offense for which the defendant was convicted in Justice Court actually was a felony). The court can consider such matters on its own motion.

If the court is confronted with a motion to vacate judgment and learns, during the motion hearing, that the charging affidavit didn't actually charge a crime or that the court lacked jurisdiction in the first place, the proper remedy is for the judge to vacate the judgment and

dismiss the case without prejudice.[24] This motion also must be filed within ten days of judgment, the same as a motion for new trial.

As with all judicial business, **the judge should rule promptly.** The judge's decisions must be put in writing, in the form of signed orders, which, of course, immediately become matters of public record in the Justice Court Clerk's office.

But what if something happens and **the judge doesn't rule on a motion and sign an order promptly?** Maybe there's a hurricane or an ice storm. Perhaps there's a fire, a flood, or a heart attack. Or, somehow this one just slips through the cracks.

Whatever the cause of a judge's failure to rule on a post-trial motion in a timely manner, **Rule 25.3** is triggered thirty days after the motion is filed; a motion for a new trial or a motion to vacate judgment "**shall be deemed denied** as of the thirtieth (30th) day."

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[24]In this context the term *dismissed without prejudice* means that the case isn't necessarily over. It may be possible for it to be refiled in the same court, or in some other court.

After a judge has signed and filed a judgment or an order, it cannot be altered, except for ***clerical and technical errors***, and after ***notice*** **to the State and defendant. MRCrP 25.4**.

Rule 26, entitled JUDGMENT, has a lot of meat in it. Some of the "meat" isn't for consumption in Justice Court. For instance, portions of this rule refer to death penalty cases, and you ain't Judge Roy Bean![25]

Determination of Guilt—Rule 26.1(a)—and **JUDGMENT**—Rule 26.1(b)—are closely related and are summarized as follows:

1. One way for a defendant to be "determined guilty" is for a jury to find him or her guilty (unanimously, of course). The judge ADJUDICATES him/her guilty, based on the verdict. The formal adjudication by the judge is a judgment of guilt.

2. At the end of a Bench trial (trial by a judge without a jury), after hearing all the evidence and argument of counsel, if the judge believes the accused to have been proven guilty, by the evidence, beyond a reasonable doubt, and says, "I find you guilty," that a determination of guilt and, since the judge is the one doing it, it's an ADJUDICATION of guilt, and thus a judgment.

3. If an accused person stands before a judge and pleads guilty, voluntarily and intelligently, and the judge accepts that plea, the judge proceeds to ADJUDICATE him or her guilty. So, that's a determination of guilt and a judgment.

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[25]You can't shoot or hang people.

4. If an accused person stands before a judge and pleads *nolo contendere*[26] and that plea is accepted by the judge, then he/she proceeds to ADJUDICATE the accused guilty, the same as if the accused actually had pled guilty or had been found guilty by a jury. So, this is a judgment by the judge, and the accused has been convicted and is in a position to be sentenced within the bounds prescribed by the legislature in the applicable statute. The word *sentence,* in its criminal law context, is defined in MRCrP 26.1(c).

Rule 26.2 informs us about the *timing* of judgments. If the accused is found NOT GUILTY of a crime, judgment pertaining to that charge shall be pronounced and entered ***immediately.***

If the accused is CONVICTED, judgment pertaining to that charge shall be pronounced and entered together with the sentence. (The determination of guilt and the sentence—both of which are components of the ultimate judgment of the court—may not occur on the same day.) Rule 26.2 also provides, specifically in MRCrP 26.2(b)(3), "Sentence shall be imposed without unreasonable delay."

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[26]*Nolo contendere* is a no-contest plea. "I ain't saying I did, and I ain't saying I didn't. I just ain't gonna fight it." Justice Court judges do not take pleas of any kind in felony cases, but it will interest you to know that *nolo contendere* is not a permissible plea in Mississippi felony proceedings—only in misdemeanor cases. (How times can I say *ain't* and get away with it?)

Rule 26.4(a) requires **formal sentencing hearings** in most felony cases. So, this rule has **no application in Justice Court,** where *felony* sentencing never occurs. **However,** in some instances a brief sentencing hearing may be helpful to the court and the parties in misdemeanor cases. You are not prohibited from conducting such a hearing, and you certainly have the discretion to do so.

ENHANCED PUNISHMENT HEARINGS IN JUSTICE COURT

Rule 26.4(b) prescribes the procedure to be followed in giving the State opportunity to establish alleged **prior offenses** to determine the accused person's status—or lack thereof—as an habitual or enhanced offender. Mississippi's *habitual* offender sentencing statutes apply only in Circuit Court. The state's many *enhanced* offender statutes have application in all of our criminal courts, including Justice Court.

A familiar **example of statutory enhancements** is found in our state's Implied Consent Law (drunk driving law), which addresses first, second, third, fourth and subsequent DUIs. **See Code Section 63-11-30, as amended.**

If a Justice Court **defendant is charged with a second offense DUI** and does not stipulate (agree with the State) that he/she has a prior DUI conviction, under MRCrP 26.4(b) the Justice Court Judge **must conduct—after giving notice to both sides—a hearing** at which the State is given opportunity to establish the defendant's alleged prior DUI conviction beyond a reasonable doubt. Of course, the defendant has a right to contest this and all aspects of the charge against him/her. If a Justice Court defendant is **charged with a third, fourth, or subsequent DUI offense, the judge must conduct a hearing** (in the absence of a stipulation by the parties that the allegation of prior convictions is correct) to determine whether the defendant does, indeed, have two or more prior DUI convictions. If the State is successful in establishing the prior convictions, beyond a reasonable doubt, this means that the present charge is a felony that is subject to being bound over to the grand jury. In such event, this triggers the defendant's right to a preliminary hearing, if he/she demands one. Other kinds of charges, such as shoplifting, may require such hearings.

Pronouncement of Judgment and Sentence are governed by **Rule 26.5.** Its major provisions are summarized as follows:

1. Judgment must be pronounced in open court.

2. Judgment must be pronounced in defendant's presence.

3. Defendant may waive his/her right to be present, but only as prescribed in MRCrP 10.1(b).

4. Judgment must be recorded in the court's minutes.

5. If the defendant is found not guilty or for any other reason is entitled to be discharged (turned loose), judgement shall be entered accordingly.

6. Before sentencing the court shall give the defendant an opportunity, personally and/or through his/her attorney, to make a statement on the defendant's behalf.

7. The judge must tell that defendant that the law provides that he/she will be given credit for time served (number of days that he/she was locked up) on that particular charge.

8. The judge must explain to the defendant the terms of the sentence.

Rule 26.6 tells us about **fines, restitution and court costs.** This includes **paying on the installment plan** and also **restitution.** This portion of the rules will be part of your life every day that you're a Justice Court Judge and can either keep you out of trouble or get

you into trouble, depending on how well you understand and obey them. Rather than my trying to summarize them, it behooves every Justice Court Judge and Justice Court Clerk to become intimately familiar with them through careful, personal study. Of course, there also are very strict statutes that govern the handling and disposition of public funds.

Judges can and should order the payment of fines, court costs, and restitution. But the judges themselves should not handle the money, which is the clerk's job.

I didn't make this up. **Rule 26.6(c)(1)** says, **"the payment of a fine, restitution, and/or court costs shall be made to the clerk of court."**

MRCrP 26.6(c)(2) provides the pecking order for the **disbursement of funds paid by defendants—first, court costs; second, restitution; third, fine.**

"But what if they don't pay?" you ask. The required procedure is found is **Paragraphs (d) and (e) of Rule 26.6.** This involves a **CONTEMPT** process, and it's not just a matter of "haulin' 'em in and shakin' 'em down." Far from it. Here are the highlights:

1. This requires a court **order** that is personally served, along with a **summons,** on the non-paying, or slow-paying, defendant.

2. The order is called a "show-cause" order and it directs the defendant to come into court on a certain day at a certain time and show cause, if any he can, why he should not be held in contempt of court for his failure to pay whatever it was he was supposed to pay at whatever time he was supposed to pay it.

3. The summons also must state the time, date, and location that the defendant is commanded to appear.

4. If the defendant fails to appear, the judge may cause a warrant to issue for his arrest.

5. At the hearing the judge needs to find out why the defendant hasn't paid, and determine whether it was wilful on his part or because he simply could not pay.

6. The rule goes on the explain the judge's options, and these options are governed mainly by whether the court has found that the defendant could have paid and didn't, as opposed to his being indigent and thus financially unable to pay. Incarceration should be the last resort.

7. The judge's findings must be stated in his ultimate order.

NOW HEAR THIS!

If, after careful consideration of all the relevant facts, the judge finds that the defendant's failure to pay was due to his or her present financial inability to pay, the judge absolutely shall not incarcerate the defendant for the nonpayment.

Both the state and federal constitutions, and many controlling court decisions, forbid imprisonment (incarceration) for debt.

Rule 26.7 addresses whether **two or more sentences** of incarceration may be ordered by the judge to run **consecutively** or **concurrently.** This is within the judge's discretion. If the judge doesn't say, one way or the other, and imposes two or more sentences on a defendant, the sentences automatically will run consecutively, meaning, one after the other. If the judge specifies that they will run consecutively, that's how they'll run. If the judge specifies that they will run concurrently, they will run together, meaning that, while the defendant is serving one, he'll be serving all. If one of more of the concurrent sentences is longer than the others, the defendant's total time in jail will be for the length of the longest of his sentences.

Rule 26.8 provides that a judgment is complete and valid when it has been entered on the court's minutes. MRCrP 26.8(a).

It is the Justice Court Clerk's responsibility to assure that all attorneys of record receive notice of the entry of the order or judgment, and this is to be done immediately. MRCrP 26.8(b).[27]

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[27]Although not specifically required by this rule, it is my belief that the committee inadvertently failed to add that, in the case of an unrepresented defendant, the clerk also should provide him/her a copy of the judgment or order. There is a strong likelihood that such a provision will be added to Rule 26.8(b) in the future. In the interest of fairness, it is suggested by this writer that Justice Court clerks embrace this practice immediately.

Rule 27, entitled **PROBATION,** has limited application in Justice Court, but it does have some.

Nothing approaching the probation system available to the state's Circuit Courts, equipped with a large, statewide staff of trained, full-time probation officers, has been provided for the Justice Courts.

Of significance to Justice Court Judges is the reference in **Rule 27.4 to "Other Proceedings,"** which, as described in that brief and concluding sentence of Rule 27, include **"any other suspended sentence or period of post-release supervision."** Revocations and modifications in such matters "shall be conducted in accordance with Rule 27."

Code Section 99-19-25 provides, in pertinent part, "The justice courts, in misdemeanor cases, are hereby authorized to suspend sentence and to suspend the execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court."

So, as Justice Court Judges **you have statutory authority for the conditional suspension of sentences**. The statute goes on to say, "Subsequent to original sentencing, the justice courts, in

misdemeanor cases, are hereby authorized to suspend sentence and to suspend execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court if (a) the judge or his or her predecessor was authorized to order such suspension when the sentence was originally imposed; and (b) such conviction (I) has not been appealed; or (ii) has been appealed and the appeal has been voluntarily dismissed." Such suspensions can't be revoked after the passage of two years.

BOTTOM LINE: Justice Court Judges can suspend sentences and they can suspend the execution (carrying out) of sentences in misdemeanor cases under such conditions as they wish to impose.[28] If the prosecuting attorney, in accordance with Rule 27.1(a), petitions the sentencing court for revocation or modification, Rule 27.4 mandates that Rule 27's prescribed procedures must be followed by the Justice Court Judge and all others concerned.

Of course, this is **NEW.**

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[28]I hasten to add that, as with just about everything else in the legal world, the conditions the judge imposes must be *reasonable and lawful* conditions. For an absurd example, you could not make one of the conditions that the defendant paint your house before dark today–or EVER! That would be neither reasonable nor lawful.

Rule 28 addresses something that almost goes without saying with regard to **RETENTION OF RECORDS AND EVIDENCE.** There are no subparts to this rule. It's two sentences long:

> 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.

This same rule applies across the board, in circuit court, county court, and justice court.

To find out what "according to law" means, as that phrase relates to MRCrP 28, look at Code Section 9-7-128, entitled **Disposal and destruction of certain case files and loose records; electronic storage of certain files, records and documents.**

Every time you sign an order—and you will be doing that frequently—immediately hand it to the clerk. It becomes one of the very important records that's subject to this rule and this statute.

This seems like a good place to tell you something you've probably noticed. **Under these rules, Justice Court Judges are going to be signing a lot more orders.** In many instances you can direct one of the attorneys to prepare and present a proposed order to

you—usually the attorney who won in whatever type of hearing or trial you were conducting. Lawyers are accustomed to doing this in other courts in which they practice, state and federal.

If you're dealing with a *pro se* defendant in a misdemeanor case, the county prosecutor probably will be involved, or should be. Even if the man or woman without a lawyer gets a favorable ruling from you, you still can ask the prosecutor to draft an order for you.

In every instance when someone drafts an order for your signature, it's still *your* order. The judge is the one who's ultimately responsible for its content. So, if something's wrong with it, ask the drafter to correct it and don't sign it unless and until it's been done correctly.

In some instances the Justice Court Clerk, a deputy clerk, or the Court Administrator will prepare orders for your signature.

Or, you may choose to prepare your own orders.

Rule 29 addresses **APPEALS FROM JUSTICE OR MUNICIPAL COURT.**

These procedures have not changed and are more within the bailiwick of the attorneys and the clerk than of the judge. Nevertheless, you, as a Justice Court Judge, should acquaint yourself with these procedures and observe how they're being practiced by the clerical personnel in the court over which you preside. You're at the top of that "food chain," and, ultimately, most of the bucks stop with you.

Rule 30 is concerned solely with **APPEALS FROM COUNTY COURT.**

Rule 31, entitled **POST-CONVICTION COLLATERAL RELIEF,** has no application in Justice Court.

Rule 32 is entitled **CONTEMPT.** I recommend that all judges, including supreme court justices, read this rule again and again. The rule is multi-faceted by necessity; this is not an uncomplicated subject; contempt of court is not a one-headed creature.

I have been wrestling with this subject, off and on, for more than fifty years, and am thankful that, at long last, Mississippi judges, lawyers, and the public have been provided a relatively short summary of contempt-of-court guidelines for our criminal trial courts. Until now, the laborious reading of countless Mississippi Supreme Court decisions was the only way that one could come to any sort of understanding of the applicable ground rules.

Although Rule 32 may seem long and complicated, it really is rather concise, compared to what we had (or *didn't have)* before. I recommend that you study it often, and I also suggest that you read the comments, which I think you will find enlightening if not illuminating.

Rule 32.1 begins by making it clear that **both civil and criminal contempt can arise during the course of a criminal case.**

MRCrP 32.1 then proceeds to list four different members of the contempt family, defining each: **indirect contempt, direct contempt, criminal contempt, and civil contempt.** Even though just one of these Contempt quadruplets is named *Criminal,* each of them is capable of showing up in a criminal case.

Let's try to get this bedrock principle into our heads at the outset: **DIRECT contempt occurs within the sight and/or hearing of the judge. INDIRECT contempt does not. Every kind of contempt that is not DIRECT contempt is INDIRECT contempt, whether it's labeled *civil* or *criminal.***[29]

MRCrP 32.1(b) notes that *indirect contempt* is the same thing as *constructive contempt.*

Direct Contempt (which I like to call "on-the-spot" contempt) is defined in Rule 32.2(a).

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[29]When you get your very own copy of the new Mississippi Rules of Criminal Procedure, I strongly advise that you study the Comment that immediately follows MRCrP 32.1, which I think is especially helpful. The Comments that appear throughout these rules consist, in large part, of very short excerpts from decisions of the Mississippi Supreme Court and the United States Supreme Court. Much of the "backup," or authority, for these court rules comes from, or is supported by, decisions of these two courts.

What, exactly, is direct contempt? First, it must be something the judge "perceives" through his or her senses. Most often, it's something the judge *sees* and/or *hears.* I've never witnessed such a thing (and hope I never do); but I suppose it also could be something the judge *smells.* Maybe somebody sets off a stink bomb in the courtroom. Crazier things have happened. Direct contempt is misconduct that occurs in the presence of the judge, or close enough to the judge that he or she is immediately aware of it and the court is negatively affected by it, right then and there. It's something that has *interrupted the order*[30] *of the court OR has interfered with the dignified conduct of the court's business.*[31]

What can the judge do about direct contempt? You can do one of two things:[32] incarcerate the contemnor for some period of time

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[30]*Orderliness* may have been a better word than *order* in this context.

[31]It isn't hard to imagine some types of conduct that would fit into this definition that are far beyond the pale of contempt and actually amount to crimes. From my district attorney days I remember an instance when, during the course of a trial, the defendant committed an assault, in the courtroom, on the sheriff. He soon became a defendant again—for simple assault on a law enforcement officer, which, of course, is a felony.

[32]You can't do *both* things, because the rule says *or,* not *and,* and not *and/or.*

that does not exceed thirty days **OR** fine the contemnor up to a hundred bucks. MRCrP 32.2(a((3).

The judge must afford the person an opportunity, "consistent with the circumstances then existing," to present exculpatory or mitigating evidence.

Once the judge has found, and announces on the record (or announces publicly, in open court, if there's no court reporter present), that the person has committed direct contempt of court, the judge can impose a penalty right then, or "defer imposition or execution of sanctions until the conclusion of the proceeding during which the contempt was committed."

In other words, the judge's adjudication of contempt must occur in very close proximity to the event itself; but you can wait until the hearing or trial is over to impose the penalty or execute (carry out) the sanctions (penalty). This means *right at the end of that particular proceeding*, the same day.[33] One practical aspect of this is that you

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[33]I suggest that, if there is a jury present, you deal with all the contempt issues with the jurors out of the courtroom, so as avoid their being influenced by something other than the facts of the case and the applicable law.

wouldn't have to disrupt—or maybe abort—the trial by instantly jailing the contemnor, who may be the defendant, the defendant's lawyer, the prosecutor, an essential witness, or some other person who is indispensable to the hearing or trial. You could wait until the proceeding is over to do that.

This is another time that **you must sign a written order. See Rule 32.2(b).** This portion of the rule has five subparts that tell you what that order must contain. This must be done in a very timely manner: **"Either before sanctions are imposed, or promptly thereafter. . . ."**

Naturally, the contemnor has the right to appeal from your finding of direct contempt and/or your imposition of a penalty. He/she can do this in one of two ways: by seeking a writ of *habeas corpus* (if in jail) or by a traditional appeal (if fined).

You, as the judge, usually would not have to do anything while the contemnor is in the process of pursuing his/her appeal, except that you must have gotten your order written, signed, and filed in a very prompt manner. In some such cases, the Mississippi Supreme

Court has called upon the sentencing judge to file a written response to the contemnor's allegations on appeal. So, as in all things judicial, it behooves you to have your proverbial ducks in a row by having scrupulously followed the applicable rules. Oh! *These are* the applicable rules!

A little more about DIRECT contempt—

So, what happens if someone acts up in the courtroom over which you preside and you, patient judge that you are, don't call him on it at the time and later, after the proceeding is over and you've gone home you keep thinking about it, you get your rule book out and ponder these particular rules after the heat of the battle has passed, and you think, "Good grief! That guy committed direct criminal contempt today, and I should have done something about it! I think I dropped the ball." ***What, if anything, can you do at that point?***

This is covered in **Rule 32.2(d),** when the court has "not imposed sanctions summarily."

This requires another **written order,** one that specifies the evidentiary facts that are within your personal knowledge concerning

the conduct that constituted contempt, and also the name of the person who did it. Then, the matter must proceed in accordance with **Rule 32.3** (for direct criminal contempt). MRCrP 32.3(a) requires a written motion[34]. In effect, what could have been handled "on-the-spot" as direct criminal contempt now must proceed, under Rule 32.3, as indirect criminal contempt.

It is important—essential!—to note that the judge in whose presence the event transpired MUST RECUSE, whether asked to do so or not. That judge now is a WITNESS and cannot preside over the contempt hearing. MRCrP 32.3(b).

Here's another friendly **NOW HEAR THIS!** It would be highly improper for these two judges to talk with each other about the matter. To do so could have extremely serious consequences for both judges.

Now we turn to **Indirect Civil Contempt** under MRCrP 32.4. This is begun by the filing of a motion for contempt. Where? With the clerk of the court whose order or judgment is claimed to have been

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[34]The rule is silent with respect to *whose* motion this may be, and then says "or on the court's own initiative."

violated. So, this is about alleged conduct, or lack of conduct, that occurred *away from the courthouse.* There's no new filing fee required, because this motion is part of the case from which the alleged contempt arose. Perhaps the most common way for this sort of thing to arise in Justice Court would be in the event someone convicted of a misdemeanor failed to pay a fine and/or restitution, or perhaps has fallen behind on installment payments. Such a motion likely would be filed by the county prosecuting attorney.

A list of the required contents of the **motion** is found in MRCrP 32.4(b), and this section also provides, "The motion for civil contempt shall be verified or supported by affidavits."

MRCrP 32.4(c) informs us that the **summons** shall issue only on a judge's order and shall direct the parties (State and defendant) to appear before the court at a date and time certain for any of several purposes that are listed in this subsection.

MRCdrP 32.4(d) provides for **service** (meaning, *delivery)* of the summons, copy of the motion and affidavits on the alleged contemnor.

If INCARCERATION is sought in the motion as a means of compelling payment (or some other form of compliance with the court's prior order), a prescribed **notice** also is required. It must be served upon the alleged contemnor, along with the summons, motion, and affidavits. This is **mandatory,** and **A FORM IS PROVIDED** in the rule.

Even though the alleged contemnor can be jailed, **this is regarded as CIVIL, NOT CRIMINAL CONTEMPT,** because **the jailed person "has the keys to the jailhouse,"** meaning that he or she can bring about his/her own release by complying with the court order that he or she is in jail for having violated. Under numerous state and federal judicial decisions, this type of incarceration is not considered imprisonment for debt.

Rule 32.5, FURTHER PROCEEDINGS, provides that if an individual has both civil and criminal contempt proceedings pending in the same court, they can be consolidated (handled together by the court). MRCrP 32.5(a).

MRCrP 32.5(b) makes clear that a judge who enters an order pursuant to Rule 32.2(d), or one who initiates an indirect contempt proceeding on the court's own initiative pursuant to Rule 32.3 or Rule 32.4, or a judge who reasonably expects to be called as a witness at any hearing on the matter, **is disqualified and must recuse.**

MRCrP 32.5(c) provides that if an alleged contemnor who has been given proper notice **fails to appear** as directed the judge may **enter an order**—not just tell some officer—directing that he/she be **taken into custody and brought to court.** This same portion of Rule 32.5 provides that, in the case of an alleged civil contemnor who **fails to appear in person or by counsel, the court may proceed in his/her absence.** He/she **must** have been served with proper notice.

MRCrP 32.5(d) states the means of the judge's **DISPOSITION** of a contempt matter, which **requires a written order. For civil contempt, the order must specify how the contempt may be purged. If incarceration is ordered, it must specify a determinate term.**

MRCrP 32.6 provides **jailed contemnors are entitled to BAIL.**

Rule 33 is about SUBPOENAS.

As a practical matter, I don't think much has changed here for the Justice Courts; so, at the risk of omitting something important (and since I'm finishing this up on a Sunday night and I'd LOVE to go home!—it's due tomorrow morning), let me try to sum this up.

Basically, there are two kinds of subpoenas: (1) subpoenas for witnesses, and, (2) subpoenas for things.

Rule 33(a) provides that witness subpoenas (when all that's expected of the witness is oral testimony) conform to Rule 45 of the Mississippi Rules of Civil Procedure. This is a long and complex rule. Read it—IF you're suffering from a bad case of insomnia! It's Sominex on paper.

Suffice to say that every Justice Court subpoena for testimonial witnesses I've ever seen looked just fine to me, and they seem to be working all right. So, I suggest that you keep on doing what you're doing, unless you want your clerk's office to do something that's even *easier.*

You may be doing it already. Let the LAWYERS fill in their own witness subpoenas. They do that in just about every other court; why not yours?

That will work just fine, **as long as THE JUSTICE COURT CLERK IS THE ONE WHO *ISSUES* AND *SIGNS* THE SUBPOENAS. The court's SEAL also must be on each subpoena.**

As a matter of fact, Rule 45 of the Mississippi Rules of Civil Procedure contemplates this, and it's much simpler, and far less trouble, than the old-fashioned way that many of our Justice Courts continue to handle this. **Here's what Rule 45 says:**

> **The clerk shall issue a subpoena signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service.**

What could be easier than that?

The other kind of subpoena—for *things*—is called a subpoena *duces tecum* (pronounced DOO-seas-TEE-come). The clerk can't issue this kind of subpoena unless the judge signs an order authorizing it. Of course, before you sign such an order, the person wanting the subpoena *duces tecum* is going to have to file a motion asking for the

order, and you're going to have to have a hearing. Again, the lawyers must do all the paperwork.

One important thing to remember is that items that are subpoenaed in this manner must be brought to **court,** not to somebody's private office, or anywhere other than court.

Now that our Justice Courts have discovery procedures in criminal cases, pursuant to MRCrP 17, subpoenas *duces tecum* are not likely to be requested on a frequent basis.

So much for subpoenas.

Rule 34 is about MOTIONS IN CRIMINAL CASES.

Motions by parties—usually made by attorneys—in which a court is asked TO DO SOMETHING or NOT TO DO SOMETHING must be in writing. Rule 34(b) does provide that a court can allow a party to make a motion "by other means," which I suppose would include making a motion orally, maybe by Morse Code, or perhaps by smoke signal. The obvious problem with some of these "other means" is that Rule 1.7 requires that motions be served on the lawyer or party on the other side of the case, and filed with the clerk. Trying to file smoke signals presents difficult challenges. Just ask any good clerk.

So, the most likely "other means" that would be acceptable would be for a lawyer or an unrepresented party simply to state a motion aloud, in open court, when the other party and/or that party's lawyer is present. In fact, MRCrP 34(b) says that motions don't have to be in writing if they're made during a trial or hearing.

All that said, Rule 34 also tells us that motions can be (but don't always have to be) supported by affidavit. And if the parties (the State

and the defendant) present to the judge an agreed order, no motion is necessary.

When a motion is filed, the other party has ten days in which to file a response. The other party has five days to reply to the response.

Parties have a responsibility to call their motions to the court's attention. Either party can request the setting of a hearing on a pending motion, or the court can set the hearing on its own. If a party doesn't pursue a pretrial motion that party has filed, whether State or defendant, that motion is deemed to have been abandoned.

After there's been a ruling on a motion and the court's order has been entered, the Justice Court Clerk shall make a diligent effort to ensure that all attorneys of record have received notice of the entry of the order. As I said in an earlier part of this commentary, the Clerk also should make a diligent effort to get a copy of the court's order to any unrepresented party.