MANUAL FOR

MISSISSIPPI JUSTICE COURTS

2021

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(Updated July 1, 2021)

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UNIVERSITY OF MISSISSIPPI SCHOOL OF LAW

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DIRECTOR

Randy Pierce

ADDRESS

Mississippi Judicial College
Post Office Box 1848
University, MS 38677

TELEPHONE AND FACSIMILE

Telephone: (662) 915-5955
Fax: (662) 915-7845

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USER'S GUIDE TO
THE MANUAL FOR MISSISSIPPI JUSTICE COURTS

Your manual is easy to use.

- The Contents page lists the specific chapters.
- Each topic within a chapter has its own section number.
- Each section number is linked to the text.
- Some topics include subheadings.

Section numbers identify both the chapter and the sequential order of the topic.

For example:

> ***1412 INITIAL APPEARANCES***
>
> The "14" is Chapter 14, while the "12" is the sequential order of the topic "Initial appearances."

Some topics will include subheadings and applicable rule or statutory provisions.

Please note that only those portions of a rule or statute that pertain to the subheading are actually quoted in the text. Lastly, some common abbreviations used throughout the text include:

"RJC" means the Rules of Justice Court.
"MRCrP" means the Mississippi Rules of Criminal Procedure.
"MRE" means the Mississippi Rules of Evidence.
"URCCC" means the Uniform Rules of Circuit and County Court.
"U.R.Y.C.P." means the Uniform Rules of Youth Court Practice.
"Canon" means a Canon of the Code of Judicial Conduct.

Any suggestions that you may have to further improve the style, format, or content of the manual should be addressed to:

E-mail: charlton@olemiss.edu
FAX: 662-915-7845
Telephone (with voice mail): 662-915-1249

This manual is intended as a reference to the law rather than as a substitute for the actual materials cited. To ensure lawful compliance of the law always refer to the most recent publications of rules, statutes, cases, etc.

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CHAPTER 1

RESOURCES

100 MISSISSIPPI LAWS

Mississippi Code of 1972
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Mississippi Code of 1972:

The Mississippi Code of 1972 contains:

- United States Constitution,
- Mississippi Constitution,
- Mississippi statutes, and
- indexes and statutory tables.

The statutes are organized into titles (major subject areas), chapters (specific subjects), and sections (actual language of statute). For example, in § 9-11-7: 9 is the title "Courts", -11 is the chapter "Justice Courts", and -7 is the section "Oath and bond."

Mississippi Rules of Court:

The Mississippi Rules of Court contains rules governing judicial procedures and conduct, such as:

- Rules of Justice Court
- Mississippi Rules of Criminal Procedure
- Rules of Evidence
- Code of Judicial Conduct
- Rules and Regulations for Mandatory Continuing Judicial Education.

Case law:

The Mississippi Supreme Court and the Mississippi Court of Appeals decide cases appealed to them from lower courts. Published opinions of these cases are precedent in interpreting the constitutionality, application and language of the Rules and statutes. *See* Rules of Appellate Procedure, Rule 35-A and 35-B (written opinions and entry of judgment).

101 WEBSITES

Mississippi Attorney General: http://www.ago.state.ms.us/

Mississippi Bar: http://www.msbar.org/

Mississippi Department of Archives and History: https://www.mdah.ms.gov/

Mississippi Judicial College: http://mjc.olemiss.edu/

Mississippi Judiciary: http://courts.ms.gov/

Mississippi Legislature: http://www.legislature.ms.gov/

CHAPTER 2

JUSTICE COURT JUDGE

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200 QUALIFICATIONS, OATH, AND BOND

Art. 6 § 171 Qualifications:

A competent number of justice court judges and constables shall be chosen in each county in the manner provided by law, but not less than two (2) such judges in any county, who shall hold their office for the term of four (4) years. Each justice court judge shall have resided two (2) years in the county next preceding his selection and shall be high school graduate or have a general equivalency diploma unless he shall have served as a [justice court judge] or been elected to the office of [justice court judge] prior to January 1, 1976. All persons elected to the office of [justice court judge] in November, 1975, shall take office in January, 1976, as justice court judges.

See also Miss. Code Ann. § 9-11-2 (Number of justice court judges).

Art. 6 § 155 Oath of office:

The judges of the several courts of this state shall, before they proceed to execute the duties of their respective offices, take the following oath or affirmation, to-wit: "I, _____, solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ according to the best of my ability and understanding, agreeably to the Constitution of the United States and the Constitution and laws of the state of Mississippi. So help me God."

§ 9-11-7 Judge to give bond:

Every person elected a justice court judge shall, before he enters on the duties of the office, take the oath of office prescribed by Section 155 of the Constitution, and give bond, with sufficient surety, to be payable, conditioned and approved as provided by law and in the same manner as other county officers, in a penalty not less than Fifty Thousand Dollars ($50,000.00); and any party interested may proceed on such bond in a summary way, by motion in any court having jurisdiction of the same, against the principal and surety, upon giving five (5) days' previous notice.

§ 11-1-1 Judge may take oaths:

A judge of any court of record, clerk of such court, . . . justice court judge, . . . may administer oaths and take and certify affidavits whenever the same may be necessary or proper in a proceeding in any court or under any law of this state, or for the purpose of taking depositions of any party of interest, or witnesses of any suit pending before any such court, or for the perpetuation of testimony, as provided in Section 13-1-57, Mississippi Code of 1972.

201 TRAINING AND EDUCATIONAL REQUIREMENTS

§ 9-11-3 Required training and examination:

(1) Except as otherwise provided herein, no justice court judge elected for a full term of office commencing on or after January 1, 2012, shall exercise the judicial functions of his office or be eligible to take the oath of office until he has filed in the office of the chancery clerk the following two (2) certifications: (a) a certificate of completion of a course of training and education conducted by the Mississippi Judicial College of the University of Mississippi Law Center; and (b) a certificate of successful completion of a minimum competency examination administered by the Mississippi Judicial College of the University of Mississippi Law Center within six (6) months of the beginning of the term for which such justice is elected. A justice court judge who has completed the course of training and education, passed the minimum competency examination, and has satisfied his annual continuing education course requirements, and who is then elected for a succeeding term of office subsequent to the initial term for which he completed the training course, shall not be required to repeat the basic training and education course upon reelection but shall be subject to the continuing education requirements.
(2) In addition to meeting the requirements of subsection (1) of this section, after taking office, each justice court judge shall be required to file annually in the office of the chancery clerk a certificate of completion of a course of continuing education conducted by the Mississippi Judicial College.
(3) The requirements for obtaining each of the certificates in subsections (1) and (2) of this section shall be as provided in Section 9-11-4.

§ 9-11-3 Penalty for noncompliance:

(4) Upon the failure of any justice court judge to file with the chancery clerk the certificates of completion as provided in subsections (1) and (2) of this section, such justice court judge shall, in addition to any other fine or punishment provided by law for such conduct, not be entitled to compensation for the period of time during which such certificates remain unfiled. If a justice court judge has not filed the required certifications within eight (8) months of the inception of the term, that justice court judge shall forfeit his office, his position shall be declared vacant, and the resulting vacancy shall be filled as provided by Section 23-15-839.

§ 9-11-3 Examination exclusion:

(5) The competency examination requirements in Sections 9-11-3 and 9-11-4 shall not apply to any sitting justice court judges as of July 24, 2008.

§ 9-11-4 Basic and continuing education courses:

(1)(a) The Mississippi Judicial College of the University of Mississippi Law Center shall prepare and conduct courses of training for basic and continuing education for justice court judges of this state. The basic course of training shall be known as the "Justice Court Judge Training Course" and shall consist of eighty (80) hours of training. The continuing education course shall be known as the "Continuing Education Course for Justice Court Judges," and shall consist of twenty-four (24) hours of training. The content of the basic and continuing education courses and when and where such courses are to be conducted shall be determined by the Judicial College. The Judicial College shall issue certificates of completion to those justice court judges who complete such courses.

§ 9-11-4 Minimum competency examination:

(1)(b) The Mississippi Judicial College of the University of Mississippi Law Center shall prepare and administer a minimum competency examination, as approved by the Mississippi Supreme Court, upon completion of the required basic course of training for justice court judges. If an elected justice court judge fails to complete the examination or fails the examination, there shall be a remedial twenty-four-hour course to be followed by a second opportunity for the justice court judge to achieve a passing score on the minimum competency examination.

. . .

(3) The competency examination requirements in Sections 9-11-3 and 9-11-4 shall not apply to any sitting justice court judge as of July 24, 2008.

202 JUDGE LEAVING OFFICE OR DYING

§ 23-15-839 Filling a vacancy:

(1) When a vacancy shall occur in any county or county district office, the same shall be filled by appointment by the board of supervisors of the county, by order entered upon its minutes, where the vacancy occurs, or by appointment of the president of the board of supervisors, by and with the consent of the majority of the board of supervisors, if such vacancy occurs when said board is not in session, and the clerk of the board shall certify to the Secretary of State the fact of the appointment, and the person so appointed shall be commissioned by the Governor; and if the unexpired term be longer than six (6) months, such appointee shall serve until a successor is elected as hereinafter provided, unless the regular special election day on which the vacancy should be filled occurs in a year in which an election would normally be held for that office as provided by law, in which case the person so appointed shall serve the unexpired portion of the term. Such vacancies shall be filled for the unexpired term by the qualified electors at the next regular special election day occurring more than ninety (90) days after the occurrence of

the vacancy. The board of supervisors of the county shall, within ten (10) days after the happening of the vacancy, make an order, in writing, directed to the commissioners of election, commanding an election to be held on the next regular special election day to fill the vacancy. The election commissioners shall require each candidate to qualify at least sixty (60) days before the date of the election, and shall give a certificate of election to the person elected, and shall return to the Secretary of State a copy of the order of holding the election, showing the results thereof, certified by the clerk of the board of supervisors. The person elected shall be commissioned by the Governor.
(2) In any election ordered pursuant to this section where only one (1) person shall have qualified with the commissioners of election to be a candidate within the time provided by law, the commissioners of election shall certify to the board of supervisors that there is but one (1) candidate. Thereupon, the board of supervisors shall dispense with the election and shall appoint the candidate so certified to fill the unexpired term. The clerk of the board shall certify to the Secretary of State the candidate so appointed to serve in said office and that candidate shall be commissioned by the Governor. In the event that no person shall have qualified by 5:00 p.m. sixty (60) days prior to the date of the election, the commissioners of election shall certify that fact to the board of supervisors which shall dispense with the election and fill the vacancy by appointment. The clerk of the board of supervisors shall certify to the Secretary of State the fact of the appointment, and the person so appointed shall be commissioned by the Governor.

Mississippi Attorney General's opinions:

Filling vacancy when justice court judge resigns.
"[When] a justice court judge resigns, the vacancy should be filled in accordance with Mississippi Code Annotated Section 23-15-839 (Supp. 1996). Mississippi Code annotated Section 9-11-31 is to be used only when the justice court judge's office is temporarily vacant due to suspension or disability." Op. Atty. Gen. Sherard, Jan. 17, 1997).

§ 9-11-25 Case record and papers delivered to clerk:

Every justice court judge whose term of office expires, or who resigns, removes from the county, or otherwise goes out of office, and the legal representative and next of kin of every justice court judge who dies, shall, within ten (10) days thereafter, deliver his case record, with all process and papers and books of statutes relating to his office, to the clerk of the justice court of the county.

203 IF UNABLE TO SERVE BECAUSE OF SUSPENSION OR SICKNESS

§ 9-11-31 Board to appoint another judge:

(1) When any justice court judge is unable, by reason of being under any suspension by the Commission on Judicial Performance or the Mississippi Supreme Court, or by reason of sickness or other disability, to attend and hold court at the time and place required by law to do so for a period of time in excess of thirty (30) consecutive days, and due to such inability to attend and hold court there is no judge to hold court in such county, the board of supervisors of the county in which such judge serves shall appoint another justice court judge of the county or an adjoining county or a municipal court judge to attend and hold said court and perform all the duties of such judge during such suspension or disability.

§ 9-11-31 Compensating appointed judge:

(2) Any presently sitting justice court judge appointed pursuant to subsection (1) of this section shall receive no additional compensation for his or her service. Any other person so appointed shall, for the period of his service, receive compensation from the county for each day's service a sum equal to 1/260 ths of the current salary in effect for justice court judges.

Mississippi Attorney General's opinions:

Appointment of temporary justice court judge.
"As explained in your letter, Claiborne County is divided into two districts and, therefore, has two justice court judges. However, the Justice Court Judge presently sitting in the other district of the county is unavailable to hold court during the weeks set on the court calendar for the temporarily absent judge. Consequently, it is the opinion of this office that, as a result of the lack of availability of the remaining sitting judge, the Claiborne County Board of Supervisors may appoint a justice court judge of an adjoining county or a municipal court judge to attend and hold court during the time the absent judge is on medical leave." Op. Atty. Gen. Blackmon, January 11, 2019.

Compensation to be paid.
"The statute is very specific that the compensation for each day's service (days or parts of days worked) is equal to 1/260th of the current salary being paid justice court judges in Alcorn County. The statute does not authorize payment for "being available". The appointed judge must do some court related activity (service) in order to be paid for the day's service." Op. Atty. Gen. Krohn, November 28, 2011.

Art. 6 § 171 No affinity or consanguinity to parties:

[N]o justice court judge shall preside at the trial of any cause where he may be interested, or the parties or either of them shall be connected with him by affinity or consanguinity, except by the consent of the justice court judge and of the parties.

§ 9-11-9 No pecuniary interest in outcome:

The justice court judges shall have no pecuniary interest in the outcome of any action once suit has been filed.

Canon 3E When disqualification is proper:

(1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:
(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
(c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or member of the judge's family residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding;
(2) Recusal of Judges from Lawsuits Involving Major Donors. A party may file a motion to recuse a judge based on the fact that an opposing party or counsel of record for that party is a major donor to the election campaign of such judge. Such motions will be filed, considered and subject to appellate review as provided for other motions for recusal.

See also Banana v. State, 635 So. 2d 851, 853 (Miss. 1994) ("As indicated in the transcript, Banana was given the opportunity to object to Judge Montgomery sitting as his judge, but instead conferred with his defense counsel and specifically waived any objections. Banana also waived this issue by entering his voluntary plea of guilty. Banana has failed to advance any reasoning in support of the position that this issue cannot be

waived."); McDonald v. State, 784 So. 2d 261, 265 (Miss Ct. App. 2001) ("This Court finds that waiver to have been effective under Banana v. State, 635 So.2d 851, 852 (Miss.1994). However, this Court believes that the better reasoned approach would have been to recuse and avoid even the appearance of conflict.").

Canon 3F Remitting a disqualification:

A judge who may be disqualified by the terms of Section 3E may disclose on the record the basis of the judge's possible disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

RJC 7 Recusal of judges:

(a) Disqualified judge to enter a written order of recusal. Any justice court judge who is disqualified under Canon 3E of the Mississippi Code of Judicial Conduct from participating in a case shall enter a written order of recusal. Parties and their attorneys may waive a judge's disqualification pursuant to Canon 3F of the Mississippi Code of Judicial Conduct.

(b) Reassigning case. If a judge is disqualified from participating in a case, the justice court clerk shall assign the action to another justice court judge of the county to hear the case. If no justice court judge is able to serve because of recusals, or is otherwise unable to serve, then a circuit court judge of the district may appoint any justice court judge from another county to hear the case.

(c) Reimbursement of expenses. Any justice court judge assigned or appointed to participate in a case under subdivision (b) of this rule shall be entitled to reimbursement of expenses pursuant to section 25-3-41 of the Mississippi Code and as otherwise allowed by law.

§ 25-3-41

(1) Subject to the provisions of subsection (10) of this section, when any officer or employee of the State of Mississippi, or any department, agency or institution thereof, after first being duly authorized, is required to travel in the performance of his official duties, the officer or employee shall receive as expenses for each mile actually and necessarily traveled, when the travel is done by a privately owned automobile or other privately owned motor vehicle, the mileage reimbursement rate allowable to federal employees for the use of a privately owned vehicle while on official travel.
(2) When any officer or employee of any county or municipality, or of any agency, board

or commission thereof, after first being duly authorized, is required to travel in the performance of his official duties, the officer or employee shall receive as expenses Twenty Cents (20¢) for each mile actually and necessarily traveled, when the travel is done by a privately owned motor vehicle; provided, however, that the governing authorities of a county or municipality may, in their discretion, authorize an increase in the mileage reimbursement of officers and employees of the county or municipality, or of any agency, board or commission thereof, in an amount not to exceed the mileage reimbursement rate authorized for officers and employees of the State of Mississippi in subsection (1) of this section.

(3) Where two (2) or more officers or employees travel in one (1) privately owned motor vehicle, only one (1) travel expense allowance at the authorized rate per mile shall be allowed for any one (1) trip. When the travel is done by means of a public carrier or other means not involving a privately owned motor vehicle, then the officer or employee shall receive as travel expense the actual fare or other expenses incurred in such travel.

(4) In addition to the foregoing, a public officer or employee shall be reimbursed for other actual expenses such as meals, lodging and other necessary expenses incurred in the course of the travel, subject to limitations placed on meals for intrastate and interstate official travel by the Department of Finance and Administration, provided, that the Legislative Budget Office shall place any limitations for expenditures made on matters under the jurisdiction of the Legislature. The Department of Finance and Administration shall set a maximum daily expenditure annually for such meals and shall notify officers and employees of changes to these allowances immediately upon approval of the changes. Travel by airline shall be at the tourist rate unless that space was unavailable. The officer or employee shall certify that tourist accommodations were not available if travel is performed in first class airline accommodations. Itemized expense accounts shall be submitted by those officers or employees in such number as the department, agency or institution may require; but in any case one (1) copy shall be furnished by state departments, agencies or institutions to the Department of Finance and Administration for preaudit or postaudit. The Department of Finance and Administration shall promulgate and adopt reasonable rules and regulations which it deems necessary and requisite to effectuate economies for all expenses authorized and paid pursuant to this section. Requisitions shall be made on the State Fiscal Officer who shall issue his warrant on the State Treasurer. Provided, however, that the provisions of this section shall not include agencies financed entirely by federal funds and audited by federal auditors.

(5) Any officer or employee of a county or municipality, or any department, board or commission thereof, who is required to travel in the performance of his official duties, may receive funds before the travel, in the discretion of the administrative head of the county or municipal department, board or commission involved, for the purpose of paying necessary expenses incurred during the travel. Upon return from the travel, the officer or employee shall provide receipts of transportation, lodging, meals, fees and any other expenses incurred during the travel. Any portion of the funds advanced which is not expended during the travel shall be returned by the officer or employee. The Department of Audit shall adopt rules and regulations regarding advance payment of travel expenses and submission of receipts to ensure proper control and strict accountability for those payments and expenses.

(6) No state or federal funds received from any source by any arm or agency of the state shall be expended in traveling outside of the continental limits of the United States until the governing body or head of the agency makes a finding and determination that the travel would be extremely beneficial to the state agency and obtains a written concurrence thereof from the Governor, or his designee, and the Department of Finance and Administration. However, employees of state institutions of higher learning may expend funds for travel outside of the continental limits of the United States upon a written finding by the president or head of the institution that the travel would be extremely beneficial to the institution.
(7) Where any officer or employee of the State of Mississippi, or any department, agency or institution thereof, or of any county or municipality, or of any agency, board or commission thereof, is authorized to receive travel reimbursement under any other provision of law, the reimbursement may be paid under the provisions of this section or the other section, but not under both.
. . .

Mississippi Attorney General's opinions:

Reimbursement allowable.
"[A] justice court judge who is appointed to hear a case in a surrounding county is only entitled to receive reimbursement for mileage, meals and room accommodations from the county for which the judge is hearing the case." Op. Atty. Gen. Carter, September 14, 1998.

205 SEPARATION OF POWERS

Art. 1 § 1 Powers of government:

The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Art. 1 § 2 Encroachment of power:

No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

Violations:

A justice court judge is a member of the judicial branch of government and, therefore, would be prohibited from serving as:

- a municipal code enforcement officer. *See* Op. Atty. Gen. O'Reilly-Evans, December 27, 2011 ("[A]n individual serving as the Municipal Code Enforcement Officer, Zoning Administrator and Building and Permit Official, would, by operation of law, vacate those positions upon taking the oath of office of justice court judge.").

- a police department investigator. *See* Op. Atty. Gen. Yarborough, July 20, 2011 ("If the [police department] investigator is elected to the office of justice court judge and takes the oath of office he, by operation of law, vacates his position of investigator.").

- an alderwoman. *See* Op. Atty. Gen. Sandifer, March 21, 2011 ("A person may not serve simultaneously as an alderwoman, which is in the legislative branch and as a justice court judge which is in the judicial branch.").

- a commission member within the executive branch of government. *See* Op. Atty. Gen. Belk, June 30, 2006 ("[A] Municipal Court Judge would be violating the separation of powers doctrine by serving on the Indianola Historic Preservation Commission.").

- a county prosecutor. *See* Op. Atty. Gen. Ready, August 8, 2005 ("It would be a violation of the separation of powers doctrine . . . for a county prosecuting attorney to simultaneously serve as a municipal court judge, ...").

- a youth court prosecutor. *See* Op. Atty. Gen. Littleton, March 14, 2003 ("[A] municipal court judge is in the judicial branch of government and a youth court prosecutor is in the executive branch of government, thereby making the holding of both offices simultaneously a violation of the separation of powers doctrine.").

- a state representative or senator. *See* Op. Atty. Gen. Reeves, Jan. 18, 1989 ("Art. 1, Section 2 of the Mississippi Constitution of 1890 would prohibit an individual serving in the Mississippi Legislature as a Representative or Senator from serving as a . . . Municipal Court Judge.").

- a county attorney. *See* Op. Atty. Gen. McLean, Nov. 3, 1987 ("[H]olding [the] positions of municipal court judge and county attorney simultaneously . . . is prohibited by the separation of powers doctrine.").

Mississippi recognizes the doctrine of judicial immunity:

> For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.

Bradley v. Fisher, 80 U.S. 335, 347 (1871).

See also, Loyacono v. Ellis, 571 So. 2d 237, 238 (Miss. 1990) ("This Court fully recognizes that the best interests of the people and public order require that judges be immune from civil liability."); Dewitt v. Thompson, 7 So. 2d 529, 531 (Miss. 1942) (citing Bradley with approval).

The key factor in determining whether judicial immunity exists is "whether at the time [the judge] took the challenged action he had jurisdiction over the subject matter before him." *See* Stump v. Sparkman, 435 U.S. 349, 356 (1978); Wheeler v. Stewart, 798 So. 2d 386, 392 (Miss. 2001).

In other words,

> The rule makes the liability depend upon the jurisdiction, using the latter word not as applicable to a case of mistaken exercise of a doubtful jurisdiction, but when under the pleadings and admitted or clearly proven facts there could be no possible jurisdiction.

Kitchens v. Barlow, 164 So. 2d 745, 750 (Miss. 1964).

But other remedies are available:

> If someone believes a judge has acted either contrary to or in excess of her authority, the primary remedy is to file a complaint with the Mississippi Commission on Judicial Performance.

Mississippi Commission of Judicial Performance v. Russell, 691 So. 2d 929, 947 (Miss.1997); Vinson v. Prather, 879 So. 2d 1053, 1057 (Miss. Ct. App. 2004).

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CHAPTER 3

JUSTICE COURT CLERK

311 DISCLOSURE OF PERSONAL INFORMATION OF SECTION 501(C) ENTITY

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300 APPOINTMENT AND BOND

§ 9-11-27 Board to appoint clerk and deputy clerks:

(1) The board of supervisors of each county shall, at its own expense, appoint one (1) person to serve as clerk of the justice court system of the county, and may appoint such other employees for the justice court of the county as it deems necessary, including a person or persons to serve as deputy clerk or deputy clerks. The board of supervisors of each county with two (2) judicial districts may, at its own expense, appoint two (2) persons to serve as clerks of the justice court system of the county, one (1) for each judicial district, and may appoint such other employees for the justice court system of the county as it deems necessary including persons to serve as deputy clerks.

Art. 14 § 268 Oath of office:

All officers elected or appointed to any office in this state, except judges and members of the legislature, shall, before entering upon the discharge of the duties thereof, take and subscribe the following oath: "I, _____, do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and the Constitution of the State of Mississippi, and obey the laws thereof; that I am not disqualified from holding the office of _____; that I will faithfully discharge the duties of the office upon which I am about to enter. So help me God."

§ 9-11-29 Clerk and deputy clerks to give bond:

(2) Every person appointed as clerk and deputy clerk of the justice court shall, before entering into the duties of the position, give bond, with sufficient surety, to be payable, conditioned and approved as provided by law and in the same manner as other county officers, in a penalty equal to Fifty Thousand Dollars ($50,000.00); and any party interested may proceed on such bond in a summary way, by motion in any court having jurisdiction of the same, against the principal and sureties, upon giving five (5) days' previous notice. The cost of the bond shall be paid by the county.

Mississippi Attorney General's opinions:

Bond required for clerk and all deputy clerks.
"[T]he justice court clerk and all justice court deputy clerks must give bond prior to assuming the duties of the clerk. There is no distinction between deputy clerks that handle money and those that do not handle money." Op. Atty. Gen. Goodman, October 19, 2001.

§ 25-1-37 Validity of official acts

The official acts of any person in possession of a public office and exercising the functions thereof shall be valid and binding as official acts in regard to all persons interested or affected thereby, whether such person be lawfully entitled to hold the office or not and whether such person be lawfully qualified or not; but such person shall be liable to all the penalties imposed by law for usurping or unlawfully holding office, or for exercising the functions thereof without lawful right or without being qualified according to law.

See also Oliver v. State, 2019 WL 192339 (Miss. Ct. App. 2019) ("Here, Officer Moak was sworn in by a justice court judge to fulfill the duties of a justice court deputy clerk in June 2015. "One who holds office under the color of appointment and discharges the purported duties of officer in full view of public, without being an intruder or usurper, is at least a de facto official." Amerson v. State, 648 So.2d 58, 61 (Miss. 1994). Accordingly, we find that Deputy Moak was acting as a de facto officer and possessed the requisite authority to administer the oath and swear to the charging affidavit. Therefore, any defects that may have existed in the appointment of Deputy Moak did not negate that Deputy Moak was acting under the color of appointment at the time he issued Oliver's affidavit.").

§ 9-11-23 Liability on bond:

When any clerk of the justice court shall have collected in his official capacity any money, fines or penalties, and shall fail to pay or account for the same to the person or official entitled to receive the same, he shall be liable to be proceeded against on his official bond in a summary way by motion in any court having jurisdiction of the amount collected and withheld, of which motion five (5) days' notice shall be served on the clerk of the justice court and the sureties on his bond, or such of them as may be found; and judgment for the amount illegally withheld by the clerk of the justice court and ten percent (10%) thereon, and all costs, shall be rendered against the clerk of the justice court and his sureties, or such of them as have been served with notice.

301 TRAINING AND EDUCATIONAL REQUIREMENTS

§ 9-11-29 Required training and education:

(1) Within ninety (90) days after appointment, every person appointed as clerk of the justice court under the provisions of Section 9-11-27, or a deputy clerk designated to receive training under Section 9-11-27, shall file annually in the office of the circuit clerk a certificate of completion of a course of training and education conducted by the Mississippi Judicial College of the University of Mississippi Law Center. The training course shall be known as the "Justice Court Clerks Training Course" and shall consist of

at least twelve (12) hours of instruction. The contents of the courses and when and where the courses are to be conducted shall be determined by the judicial college. The judicial college shall issue a certificate of completion to the clerks and deputy clerks who complete a course.

. . .

(3) Upon the failure of any person appointed as clerk of the justice court to file the certificates of completion as provided in subsection (1) of this section, that person shall not be allowed to carry out any of the duties of the office of clerk of the justice court, and shall not be entitled to compensation for the period of time during which the required certificates remain unfiled.

§ 9-11-27 When deputy clerk may receive training:

A deputy clerk who works in an office separate from the clerk and who is the head deputy clerk of the separate office may be designated to be trained as a clerk as provided in Section 9-11-29.

302 POWERS OF CLERK AND DEPUTY CLERKS

§ 9-11-27 Statutory powers:

The clerk and deputy clerks shall be empowered
to file and record actions and pleadings,
to receive and receipt for monies,
to acknowledge affidavits,
to issue warrants in criminal cases upon direction by a justice court judge in the county,
to approve the sufficiency of bonds in civil and criminal cases,
to certify and issue copies of all records, documents and pleadings filed in the justice court and
to issue all process necessary for the operation of the justice court.

MRCrP 28 Retention of records and evidence in criminal cases:

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.

§ 11-1-1 Authority to administer oaths and certify affidavits:

A judge of any court of record, clerk of such court, court reporter of such court, master, member of the board of supervisors, justice court judge, notary public, mayor, or police justice of a city, town or village, clerk of a municipality, and any officer of any other state, or of the United States, authorized by the law thereof to administer oaths, the judge

of any court of record, or the mayor or chief magistrate of any city, borough or corporation of a foreign country; may administer oaths and take and certify affidavits whenever the same may be necessary or proper in a proceeding in any court or under any law of this state, or for the purpose of taking depositions of any party of interest, or witnesses of any suit pending before any such court, or for the perpetuation of testimony, as provided in Section 13-1-57, Mississippi Code of 1972.

§ 9-11-27 Orders from judge to clerk to be written:

All orders from the justice court judge to the clerk of the justice court shall be written.

RJC 6 Correction of clerical errors:

Upon the motion of any party, or upon the judge's own initiative, the judge may correct clerical errors in any judgments, orders, or other parts of the record after notice to all parties in the case, up until the time a certified copy of the record in the case is transmitted by the clerk to the higher court on appeal.

§ 11-46-9 Exemptions from liability under the Mississippi Torts Claims Act:

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
(a) Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;
(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;

Case law:

Spencer v. City of Jackson, 511 F. Supp.2d 671, 673 (S.D. Miss. 2007) ("Any suit alleging state law tort claims against the defendants in their individual capacity is subject to the [Mississippi Tort Claims Act] and no recovery may be had against employees individually if they were acting within the course and scope of their employment when the alleged events giving rise to the cause of action occurred.").

DeSoto Cty. v. T.D., 160 So. 3d 1154, 1156 (Miss. 2015) ("Section 11-46-9 grants immunity to DeSoto County if: (1) its justice court clerk was "acting within the course and scope of [her] employment or duties" (there is no dispute that she was), and (2) the claim arises "out of a . . . judicial action or inaction, or administrative action or inaction of a . . . judicial nature. . . ." We find that the Legislature could not have chosen language that more precisely and clearly provides immunity to the clerk. The statute uses no words of limitation. It provides immunity for all claims that arise from any "judicial action or inaction, or administrative . . . inaction of a . . . judicial nature . . . .").

Simpson v. City of Pickens, 761 So. 2d 855, 858 (Miss. 2000) ("The [Mississippi Tort Claims Act] provides the exclusive civil remedy against a governmental entity or its employees for acts or omissions which give rise to a suit.").

Smith v. City of Saltillo, 44 So. 3d 438, 441 (Miss. Ct. App. 2010) ("The failure of the municipal court clerk to send Smith's abstract to the Department of Public Safety was an 'administrative action or inaction of a legislative or judicial nature.'").

303 ASSIGNING CIVIL ACTIONS AND CRIMINAL CASES

§ 9-11-10 All legally required court costs to be paid:

No [justice court] shall have jurisdiction over any civil suit attempted to be filed therein unless and until all legally required court costs, as set out, but not restricted to, sections 25-7-25 and 25-7-27, Mississippi Code of 1972, are deposited with the court. The [justice court] shall not file, docket, issue process, or otherwise assume jurisdiction until such costs shall have been paid.

§ 9-11-27 Clerk to assign cases:

All cases, civil and criminal, shall be assigned by the clerk to the justice court judges of the county in the manner provided in Section 11-9-105 and Section 99-33-2.

§ 11-9-105 Civil actions assigned on a rotating basis:

Anyone desiring to sue in the justice court shall lodge with the clerk of the justice court the evidence of debt, statement of account, or other written statement of the cause of action. The clerk shall record all filings and shall, as far as practicable, assign the cases to each justice court judge in the county on a rotating basis to insure equal distribution of the cases among the judges of the county; however, in all counties in which the courtrooms provided by the county for use of the justice court judges are located in more than one (1) place in the county, the clerk, in addition to assigning cases to the judges on a rotating basis, may also assign a courtroom for each case, such assignment may be made based upon the proximity of the courtroom to the defendant's residence or place of business.

§ 99-33-2 Criminal cases assigned on a rotating basis:

(1) Anyone bringing a criminal matter in the justice court shall lodge the affidavit with the judge or clerk of the justice court. The clerk shall record all affidavits and shall, as far as practicable, assign criminal cases to the justice court judges in the county on a rotating basis to ensure equal distribution of the cases among the judges of the county; however,

in all counties in which the courtrooms provided by the county for use of the justice court judges are located in more than one (1) place in the county, the clerk, in addition to assigning cases to the judges on a rotating basis, may also assign a courtroom for each case, such assignment may be made based upon the proximity of the courtroom to the defendant's residence or place of business.

Mississippi Attorney General's opinion:

Counties with two judicial districts.

See Op. Atty. Gen. Ruffin (February 22, 2008), which states:

> "In counties with two judicial districts, the judges should be rotated between cases in both districts of the county. This would require the judges to travel to each of the districts to hear cases. Sections 11-9-105 (3) and 99-33-2 of the Mississippi code provide that cases should be assigned to each justice court judge in the county on a rotating basis to insure equal distribution of the cases among the judges of the county.
>
> It is the opinion of this office that since a defendant in a criminal matter must be tried only in the judicial district in which the crime is alleged to have been committed [See MS AG Op., Ross (April 16, 1991)] that the board of supervisors should establish an office in each judicial district of the county with court to be held in each district. It is discretionary with the board in counties with two judicial districts as to whether they appoint two persons to serve as clerks, one for each judicial district. See Section 9-11-27 of the Mississippi Code."

304 SERVICE OF PROCESS

See CHAPTER 4 "CIVIL ACTIONS."

305 FURNISHING CERTIFIED COPIES OF DOCUMENTS

§ 11-9-105 Documents forwarded to judge in civil actions:

When the case has been recorded and assigned and process issued, the clerk shall, within two (2) working days, forward certified copies of all documents pertaining to the case to the justice court judge to which the case is assigned for further processing.

§ 99-33-2 Documents forwarded to judge in criminal cases:

(2) When the case has been recorded and assigned and all necessary process issued, the clerk shall, within two (2) working days, forward certified copies of all documents pertaining to the case to the justice court judge to which the case is assigned for further processing.

§ 9-11-11 Documents to be furnished to parties:

It shall be the duty of a justice court, when required, to furnish to either party a certified copy of all proceedings, and of all papers and process relating thereto, in any action before it.

306 MAINTAINING THE DOCKET AND UNIFORM CASE RECORD

RJC 5 Court records and docket:

(a) Clerk's duty to keep papers. No original record, or any part of a file, record, or court papers, shall be taken from the clerk's custody without the permission of the clerk of the court.

(b) Docket. The docket of the court shall at all times remain in the office of the justice court clerk. The clerk shall retain custody of the docket, make all entries thereon, keep it safe, and provide it to the court for examination in the office. The docket may be maintained by computer. Failure of a judge to sign the docket shall not invalidate the actions of the court contained therein.

Mississippi Attorney General's opinions:

Requiring signed receipts for records.
"[A] justice court clerk has the authority to ask any individual, including an auditor, who is seeking to remove records from the justice court clerk's office to sign a receipt to account for those records." Op. Atty. Gen. Erby, July 16, 2004).

Judge to sign docket book for fines on traffic tickets paid in advance.
"[A] justice court clerk has the authority to collect a fine on a traffic ticket in advance and in lieu of the defendant attending court. The judge should sign the docket book if he makes a determination that the fine was properly paid." Op. Atty. Gen. Spencer, Aug. 2, 1996).

§ 9-11-11 When closed files may be destroyed:

Closed civil and criminal files may be destroyed after seven and one-half (7 1/2) years

with written approval from the Director of the Department of Archives and History.

§ 9-11-21 If complainant is an entity of government:

[W]here the party filing the complaint is an entity of government, the clerk shall not be required to receive a prepayment of costs nor issue a receipt, but the clerk shall enter a notation on the docket wherein said complaint is recorded indicating that the party is exempt from payment of costs.

§ 11-9-139 Docket entry when stay of execution is sought:

If the party against whom judgment is given, shall, within ten days thereafter, procure some responsible person to appear before the justice, and in writing, to be entered on the docket of the justice and signed by such person, consent to become surety therefor, the justice shall grant a stay of execution for thirty days from the date of the judgment on all sums not exceeding fifty dollars and for sixty days on all sums over fifty dollars. In case the money be not paid at the expiration of such stay, execution shall issue against the principal and sureties, or either of them, for the principal, interest, and costs.

See also Miss. Code Ann. § 11-9-141 ("A party obtaining a stay of execution shall thereby waive all errors in the judgment and abandon the right of appeal and certiorari.").

RJC 5 Uniform case record:

(c) Uniform case record. The judge shall sign the uniform case record of each case pursuant to section 9-11-11 of the Mississippi Code.

§ 9-11-11

It shall be the duty of the justice court to keep a uniform case record developed by the Attorney General on each case, civil and criminal, brought before it. Upon disposition, each record shall be signed by the justice court judge.

RJC 5 Signing bonds prohibited:

(d) Signing bonds prohibited. No officer of the court shall sign any bond of any kind in or to any court of this state. Bonds are controlled by statutory procedures.

§ 9-1-46 Semiannual reports to the AOC:

(1) Semiannually, the circuit clerks of each county, the municipal court clerks of each municipality, and the justice court clerks of each county shall report to the Administrative Office of Courts the following information:
(a) Individual misdemeanor and felony case records by offense, from the circuit clerk for all circuit and county court criminal proceedings, and from the municipal and justice

court clerks for all misdemeanors, electronically when available, containing the date on which the criminal charges were filed, charge code and name of indicted offenses, count number of indicted offenses, whether counsel was appointed, the disposition of the charges, date disposed, date sentenced, charge code and name of sentenced offenses, and sentence length.
(b) Data should be kept individually by case number and misdemeanor charges or indicted felony offense, and include, for criminal docket purposes, demographic information necessary for tracking individuals across multiple databases should be collected, including date of birth, city and state of residence, race, and gender.
(2) The Administrative Office of Courts shall be empowered to establish a uniform reporting format for all court clerks described in subsection (1) of this section. Such reporting format shall emphasize the need for reporting information in a sortable, electronic format. All clerks who submit required information in other formats shall report to the Administrative Office of Courts a schedule for conversion to technology to enable the reporting of all required data in a sortable, electronic format.
(3) Semiannual reports shall be made to the Administrative Office of Courts by December 31, 2014, or as soon thereafter as practicable, and every year thereafter, and on June 30, 2015, or as soon thereafter as practicable, and every year thereafter. On August 1, 2015, and each year thereafter, the Administrative Office of Courts shall provide to PEER and the Office of State Public Defender sortable, electronic copies of all reports required by this section.
(4) The Administrative Office of Courts shall share the information required under this section with the Oversight Task Force.

§ 9-11-27 Termination for failure to comply with AOC reporting requirements:

(2) By August 1, 2015, and each year thereafter, the Administrative Office of Courts shall report the names of all justice court clerks who have failed to comply with the reporting requirements of Section 9-1-46 to the boards of supervisors that selected them. Each clerk shall be given three (3) months from the date on which the board was given notice to come into compliance with the requirements of Section 9-1-46. The Administrative Office of Courts shall notify the board of supervisors of any justice court clerk who fails to come into compliance after the three-month notice required in this subsection. Any noncompliant clerks shall be terminated for failure to comply with Section 9-1-46 reporting requirement.

307 RECEIVING PAYMENTS

§ 9-11-21 Clerk to give uniform receipt for any monies received:

The clerk of the justice court is required in all cases to give to any person paying him any fees, costs or other money a uniform receipt, the form of which is to be prepared by the attorney general. Such receipt shall contain the particulars of such fees, costs or other

money, the amount of such fees, costs or other money and such other information as the attorney general shall deem necessary. The county shall have printed such receipts at county expense and distribute them to the clerk of the justice court of the county. Provided, however, that where the party filing the complaint is an entity of government, the clerk shall not be required to receive a prepayment of costs nor issue a receipt, but the clerk shall enter a notation on the docket wherein said complaint is recorded indicating that the party is exempt from payment of costs.

§ 9-11-27 Clerk may refuse personal checks:

The clerk or deputy clerks may refuse to accept a personal check in payment of any fine or cost or to satisfy any other payment required to be made to the justice court.

308 REPORTING MONIES RECEIVED

§ 9-11-19 Clerk to report all fees, costs, fines, and penalties collected:

(1) It shall be the duty of every clerk of the justice court to receive and account for all fees, costs, fines and penalties charged and collected in the justice court, and, monthly to report in writing under oath, to the clerk of the board of supervisors who shall upon receipt submit such report to the board of supervisors of all such fees, costs, fines and penalties received, including cash bonds and other monies which have been forfeited in criminal cases and at least semiannually any delinquent fines and penalties, giving the date, amount, and names of persons from whom such monies were received, and to pay so much thereof as shall have been received to the clerk of the board of supervisors for deposit into the general fund of the county. Any clerk of the justice court who shall fail to make such report or to pay the money so received shall, in addition to any other fine or punishment provided by law for such conduct, not be entitled to compensation for the period of time during which such report or money is outstanding.

§ 9-11-19 Monies excluded from reporting requirement:

(2) The provisions of [Section 9-11-19(1)] shall not, except as to cash bonds and other monies which have been forfeited in criminal cases, apply to monies required to be deposited in the justice court clerk clearing account as provided in Section 9-11-18, Mississippi Code of 1972.

§ 25-3-36 Depositing monies received:

(4) From and after January 1, 1984, all fees, costs, fines and penalties charged and collected in the justice court shall be paid to the clerk of the justice court for deposit, along with monies from cash bonds and other monies which have been forfeited in criminal cases, into the general fund of the county as provided in Section 9-11-19; and the

clerk of the board of supervisors shall be authorized and empowered, upon approval by the board of supervisors, to make disbursements and withdrawals from the general fund of the county in order to pay any reasonable and necessary expenses incurred in complying with this section, including payment of the salaries of justice court judges as provided by subsection (1) of this section. The provisions of this subsection shall not, except as to cash bonds and other monies which have been forfeited in criminal cases, apply to monies required to be deposited in the justice court clerk clearing account as provided in Section 9-11-18, Mississippi Code of 1972.

309 JUSTICE COURT CLERK CLEARING ACCOUNT

§ 9-11-18 Monies to be deposited into the clearing account:

(1) There is hereby created in the county depository of each county a clearing account to be designated as the "Justice Court Clerk Clearing Account," in which shall be deposited
(a) all such monies as the clerk of the justice court shall receive from any person complying with any writ of garnishment, attachment, execution or other like process authorized by law for the enforcement of a judgment;
(b) all such monies as are received in criminal cases in the justice court pursuant to any order requiring payment as restitution to the victims of criminal offenses;
(c) all cash bonds as shall be deposited with the court;
(d) any portion of any fees required by law to be collected in civil cases which are to pay for the service of process or writs in another county as provided by Section 9-11-20; and
(e) any other money as shall be deposited with the court, except fees paid for the services of a constable, which by its nature is not at the time of its deposit public monies, but which is to be held by the court in a trust or custodial capacity in a case or proceeding before the court.
The clerk of the justice court shall account for all monies deposited in and disbursed from such account and shall be authorized and empowered to draw and issue checks on such account at such times, in such amounts and to such persons as shall be proper and in accordance with law;

§ 9-11-18 Monies to be reported for deposit into the general fund:

[S]uch monies as are forfeited in criminal cases shall be paid by the clerk of the justice court to the clerk of the board of supervisors for deposit in the general fund of the county in the same manner as provided in Section 9-11-19 for fees, costs, fines and penalties charged and collected in the justice court.
(2) Any monies deposited with the court in civil cases, which are fees paid for the services of a constable, shall be reported by the clerk of the court in the same manner as provided by Section 9-11-19 and shall be considered as being fees within the meaning of such section. It shall be the duty of the clerk of the board of supervisors to disburse such fees monthly, upon approval of the board of supervisors, to the constables entitled

thereto.
(3) The justice court clearing account may bear interest and the clerk of the justice court shall account for all interest earned on such account and pay such interest to the clerk of the board of supervisors for deposit in the general fund of the county in the same manner as provided in Section 9-11-19 for fees, costs, fines and penalties charged and collected in the justice court.

310 PUBLIC RECORDS ACCESS

Administrative order:

The Mississippi Supreme Court adopted by Administrative Order on August 27, 2008 a "Statement of Policy Regarding Openness and Availability of Public Records." This administrative order can be accessed on the State of Mississippi Judiciary website at https://courts.ms.gov/publicrecords_policy.pdf

§ 25-61-1 Short title:

This chapter shall be known and may be cited as the "Mississippi Public Records Act of 1983." It is the policy of the Legislature that public records must be available for inspection by any person unless otherwise provided by this act [Laws 1996, Ch. 453]. Furthermore, providing access to public records is a duty of each public body and automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained, subject to the rules of records retention.

See also Estate of Cole v. Ferrell, 163 So. 3d 921, 925 (Miss. 2012) ("Court filings are considered to be public records, unless otherwise exempted by statute.").

§ 25-61-2 Policy:

It is the policy of this state that public records shall be available for inspection by any person unless otherwise provided by this chapter; furthermore, providing access to public records is a duty of each public body and automation of public records must not erode the right of access to those records. As each public body increases its use of, and dependence on, electronic record keeping, each public body must ensure reasonable access to records electronically maintained, subject to records retention.

§ 25-61-3 "Public body" and "public records" defined:

The following words shall have the meanings ascribed herein unless the context clearly requires otherwise:

(a) “Public body” shall mean any department, bureau, division, council, commission, committee, subcommittee, board, agency and any other entity of the state or a political subdivision thereof, and any municipal corporation and any other entity created by the Constitution or by law, executive order, ordinance or resolution. The term “public body” includes the governing board of a charter school authorized by the Mississippi Charter School Authorizer Board. Within the meaning of this chapter, the term “entity” shall not be construed to include individuals employed by a public body or any appointed or elected public official.
(b) “Public records” shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body. “Public records” shall not mean “personal information” as defined in Section 25-62-1.

§ 25-61-5 Adopting reasonable written procedures:

(1)(a) Except as otherwise provided by Sections 25-61-9, 25-61-11, and 25–61–11.2, all public records are hereby declared to be public property, and any person shall have the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body in accordance with reasonable written procedures adopted by the public body concerning the cost, time, place and method of access, and public notice of the procedures shall be given by the public body, or, if a public body has not adopted written procedures, the right to inspect, copy or mechanically reproduce or obtain a reproduction of a public record of the public body shall be provided within one (1) working day after a written request for a public record is made. No public body shall adopt procedures which will authorize the public body to produce or deny production of a public record later than seven (7) working days from the date of the receipt of the request for the production of the record.

§ 25-61-5 When a written explanation is required:

(1)(b) If a public body is unable to produce a public record by the seventh working day after the request is made, the public body must provide a written explanation to the person making the request stating that the record requested will be produced and specifying with particularity why the records cannot be produced within the seven-day period. Unless there is mutual agreement of the parties, or the information requested is part of ongoing negotiations related to a request for competitive sealed proposals, in no event shall the date for the public body's production of the requested records be any later than fourteen (14) working days from the receipt by the public body of the original request. Production of competitive sealed proposals in accordance with requests made pursuant to this section shall be no later than seven (7) working days after the notice of intent to award is issued to the winning proposer. Persons making a request for production of competitive sealed proposals after the notice of intent to award is issued by

the public body shall have a reasonable amount of time, but in no event less than seven (7) working days after the production of the competitive sealed proposals, to protest the procurement or intended award prior to contract execution. However, in any instance where a person has filed for a protective order for a competitive sealed proposal and the court has not ruled on the protective order within ninety (90) days of filing, then the public body may proceed with awarding the contract without production of competitive sealed proposals and the contract may be protested after execution.

§ 25-61-5 Redaction of exempt materials:

(2) If any public record contains material which is not exempted under this chapter, the public agency shall redact the exempted and make the nonexempted material available for examination. Such public agency shall be entitled to charge a reasonable fee for the redaction of any exempted material, not to exceed the agency's actual cost.

§ 25-61-5 Denials to be kept on file:

(3) Denial by a public body of a request for access to or copies of public records under this chapter shall be in writing and shall contain a statement of the specific exemption relied upon by the public body for the denial. Each public body shall maintain a file of all denials of requests for public records. Public bodies shall be required to preserve such denials on file for not less than three (3) years from the date such denials are made. This file shall be made available for inspection or copying or both during regular office hours to any person upon written request.

§ 25-61-7 Fees on providing records:

(1) Except as provided in subsection (2) of this section, each public body may establish and collect fees reasonably calculated to reimburse it for, and in no case to exceed, the actual cost of searching, reviewing and/or duplicating and, if applicable, mailing copies of public records. Any staff time or contractual services included in actual cost shall be at the pay scale of the lowest level employee or contractor competent to respond to the request. Such fees shall be collected by the public body in advance of complying with the request.

(2) A public body may establish a standard fee scale to reimburse it for the costs of creating, acquiring and maintaining a geographic information system or multipurpose cadastre as authorized and defined under Section 25-61-1 et seq., or any other electronically accessible data. Such fees must be reasonably related to the costs of creating, acquiring and maintaining the geographic information system, multipurpose cadastre or other electronically accessible data, for the data or information contained therein or taken therefrom and for any records, papers, accounts, maps, photographs, films, cards, tapes, recordings or other materials, data or information relating thereto, whether in printed, digital or other format. In determining the fees or charges under this subsection, the public body may consider the type of information requested, the purpose or purposes for which the information has been requested and the commercial value of

the information.

§ 25-61-9 Confidential commercial or financial information:

(1) Records furnished to public bodies by third parties which contain trade secrets or confidential commercial or financial information shall not be subject to inspection, examination, copying or reproduction under this chapter until notice to said third parties has been given, but such records shall be released no later than twenty-one (21) days from the date the third parties are given notice by the public body unless the third parties have filed in chancery court a petition seeking a protective order on or before the expiration of the twenty-one-day time period. Any party seeking the protective order shall give notice to the party requesting the information in accordance with the Mississippi Rules of Civil Procedure.

§ 25-61-10 Use of sensitive software:

(1) Except as otherwise provided in Section 25–61–11.2, any public body that uses sensitive software, as defined in Section 25-61-9, or proprietary software must not thereby diminish the right of the public to inspect and copy a public record. A public body that uses sensitive software, as defined in Section 25-61-9, or proprietary software to store, manipulate, or retrieve a public record will not be deemed to have diminished the right of the public if it either: (a) If [if] legally obtainable, makes a copy of the software available to the public for application to the public records stored, manipulated, or retrieved by the software; or (b) ensures that the software has the capacity to create an electronic copy of each public record stored, manipulated, or retrieved by the software in some common format such as, but not limited to, the American Standard Code for Information Interchange.
(2) A public body shall provide a copy of the record in the format requested if the public body maintains the record in that format, and the public body may charge a fee which must be in accordance with Section 25-61-7.
(3) Before a public body acquires or makes a major modification to any information technology system, equipment, or software used to store, retrieve, or manipulate a public record, the public body shall adequately plan for the provision of public access and redaction of exempt or confidential information by the proposed system, equipment or software.
(4) A public body may not enter into a contract for the creation or maintenance of a public records data base if that contract impairs the ability of the public to inspect or copy the public records of that agency, including public records that are on-line or stored in an information technology system used by the public body.

See also Miss. Code Ann. § 25–61–11.2, which sets forth information technology (IT) records exempted from the Mississippi Public Records Act of 1983).

§ 25-61-11 Exempted or privileged records:

The provisions of this chapter shall not be construed to conflict with, amend, repeal or supersede any constitutional law, state or federal statutory law, or decision of a court of this state or the United States which at the time of this chapter is effective or thereafter specifically declares a public record to be confidential or privileged, or provides that a public record shall be exempt from the provisions of this chapter.

Confidential or privileged records exempt from public access:

- Judicial records in the possession of a public body developed among judges and their aides. *See* Miss. Code Ann. § 9-1-38.

- Jury records in the possession of a public body developed among juries concerning judicial decisions. *See* Miss. Code Ann. § 13-5-97.

- Personnel files such as personnel records, applications for employment, test questions and answers used in employment examinations, letters of recommendation, and documents relating to contract authorization. *See* Miss. Code Ann. § 25-1-100.

- Attorney's work products which includes all attorney-client communications. *See* Miss. Code Ann. § 25-1-102.

- Personal information of law enforcement or court personnel and officers. *See* Miss. Code Ann. § 25-61-12(1).

- Investigative reports when in the possession of a law enforcement agency, however a law enforcement agency may choose to make public all or any part of any investigative report. *See* Miss. Code Ann. §§ 25-61-3(f), -12(2).

- Personal information of victims, including victim impact statements and letters of support on behalf of victims that are contained in records on file with the Mississippi Department of Corrections and State Parole Board. *See* Miss. Code Ann. § 25-61-12(2)(d) and (3).

- Youth court records may not be disclosed except in limited instances. *See* U.R.Y.C.P. 5; Miss. Code Ann. § 43-21-261.

Mississippi Attorney General's opinions:

Records exempt from disclosure.
"[U]nless authorized or required by statute, information such as dates of birth, complete social security numbers, partial social security numbers, home addresses and driver's license numbers should not be made public by the Justice Court Clerk. Likewise, . . .

prior to publishing documents online that contain such information, the Justice Court Clerk should redact the information." Op. Atty. Gen. Neyman, January 31, 2014.

On satisfying a legitimate request for the verification of a social security number.
"It is a matter of common knowledge that social security numbers and birth dates are used for the purpose of committing identity theft, which is a felony under Section 97-19-85. Oftentimes, a legitimate request seeking a record for the purpose of determining or confirming a social security number, which has previously been provided to the requestor by an individual, can be satisfied by redacting the first five or six digits and leaving only the last few digits visible." Op. Atty. Gen. Berryman, March 22, 2013.

When affidavit and arrest warrants constitute public records.
"Generally the affidavit and [arrest] warrant are not public documents until such time as the warrant has been served." Op. Atty. Gen. Miller, July 30, 2010.

§ 25-61-11.1 Exempted information regarding persons with a weapons permit:

The name, home address, any telephone number or other private information of any person who possesses a weapon permit issued under Section 45-9-101 or Section 97-37-7 shall be exempt from the Mississippi Public Records Act of 1983.

§ 25-61-12 Exemption of court personnel information; victim information:

(1) The home address, any telephone number of a privately paid account or other private information of any law enforcement officer, criminal investigator, judge or district attorney or the spouse or child of the law enforcement officer, criminal investigator, judge or district attorney shall be exempt from the Mississippi Public Records Act of 1983. This exemption does not apply to any court transcript or recording if given under oath and not otherwise excluded by law.
. . .
(3) Personal information of victims, including victim impact statements and letters of support on behalf of victims that are contained in records on file with the Mississippi Department of Corrections and State Parole Board, shall be exempt from the provisions of this chapter.

§ 25-61-13 Proceedings to compel public access:

The Mississippi Ethics Commission shall have the authority to enforce the provisions of this chapter upon a complaint filed by any person denied the right granted under Section 25–61–5 to inspect or copy public records. Upon receiving a complaint, the commission shall forward a copy of the complaint to the head of the public body involved. The public body shall have fourteen (14) days from receipt of the complaint to file a response with the commission. After receiving the response to the complaint or, if no response is received after fourteen (14) days, the commission, in its discretion, may dismiss the complaint or proceed by setting a hearing in accordance with rules and regulations

promulgated by the Ethics Commission. The Ethics Commission may order the public body and any individual employees or officials of the public body to produce records or take other reasonable measures necessary, if any, to comply with this chapter. The Ethics Commission may also impose penalties as authorized in this chapter. The Ethics Commission may order a public body to produce records for private review by the commission, its staff or designee. The Ethics Commission shall complete its private review of the records within thirty (30) days after receipt of the records from the public body. Records produced to the commission for private review shall remain exempt from disclosure under this chapter while in the custody of the commission.

Nothing in this chapter shall be construed to prohibit the Ethics Commission from mediating or otherwise resolving disputes arising under this chapter, from issuing an order based on a complaint and response where no facts are in dispute, or from entering orders agreed to by the parties. In carrying out its responsibilities under this section, the Ethics Commission shall have all the powers and authority granted to it in Title 25, Chapter 4, Mississippi Code of 1972, including the authority to promulgate rules and regulations in furtherance of this chapter.

Any party may petition the chancery court of the county in which the public body is located to enforce or appeal any order of the Ethics Commission issued pursuant to this chapter. In any such appeal the chancery court shall conduct a de novo review. Nothing in this chapter shall be construed to prohibit any party from filing a complaint in any chancery court having jurisdiction, nor shall a party be obligated to exhaust administrative remedies before filing a complaint. However, any party filing such a complaint in chancery court shall serve written notice upon the Ethics Commission at the time of filing the complaint. The written notice is for information only and does not make the Ethics Commission a party to the case.

§ 25-61-15 Penalties for wrongful denial:

Any person who shall deny to any person access to any public record which is not exempt from the provisions of this chapter or who charges an unreasonable fee for providing a public record may be liable civilly in his personal capacity in a sum not to exceed One Hundred Dollars ($100.00) per violation, plus all reasonable expenses incurred by such person bringing the proceeding.

311 DISCLOSURE OF PERSONAL INFORMATION OF SECTION 501(C) ENTITY

§ 25-62-1 Definitions:

As used in this chapter, the following words and phrases shall have the meanings as defined in this section unless the context clearly indicates otherwise:

(a) “Personal information” means any list, record, register, registry, roll, roster or other compilation of data of any kind that directly or indirectly identifies a person as a member, supporter or volunteer of, or donor of financial or nonfinancial support to, any entity

organized under Section 501(c) of the Internal Revenue Code. Personal information does not include information reportable to the Secretary of State pursuant to Section 79-11-503(1)(b).
(b) "Public agency" means any state or local governmental unit, however designated, including, but not limited to, this state; any department, agency, office, commission, board, division or other entity of this state; any political subdivision of this state, including, but not limited to, a county, city, township, village, school district, community college district or any other local governmental unit, agency, authority, council, board or commission; or any state or local court, tribunal or other judicial or quasi-judicial body.

§ 25-62-3 Public agencies prohibited from requiring certain Section 501(c) entities to provide personal information:

(1) Notwithstanding any law to the contrary, and subject to subsection (3), a public agency shall not do any of the following:
(a) Require any entity organized under Section 501(c) of the Internal Revenue Code to provide the public agency with personal information.

§ 25-62-3 Public agencies prohibited from disclosing personal information in the possession of the agency:

(b) If in the possession of personal information, a public agency shall not release, publicize or otherwise disclose that personal information without the express written permission of every identified member, supporter, volunteer or donor of the Section 501(c) entity as well as the Section 501(c) entity that received their membership, support, volunteer time or donations.
(c) Request or require a current or prospective contractor with the public agency to provide the public agency with a list of entities organized under Section 501(c) of the Internal Revenue Code to which it has provided financial or nonfinancial support.

§ 25-62-3 Exemptions:

(2) Personal information shall be exempt from disclosure under the Mississippi Public Records Act.
(3) This chapter does not preclude either of the following:
(a) Any lawful warrant for personal information issued by a court of competent jurisdiction; or
(b) A lawful request for discovery of personal information in litigation if both of the following conditions are met:
(i) The requestor demonstrates a compelling need for the personal information by clear and convincing evidence; and
(ii) The requestor obtains a protective order barring disclosure of personal information to any person not directly involved in the litigation. As used in this subparagraph, "person" means an individual, partnership, corporation, association, governmental entity or other legal entity.

§ 25-62-5 Injunctive relief:

(1) A person alleging a violation of this chapter may bring a civil action for appropriate injunctive relief.
(2) A court, in rendering a judgment in an action brought under this section, shall award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate.

§ 25-62-7 Penalties:

A person who knowingly violates this chapter is guilty of a misdemeanor punishable by imprisonment of not more than ninety (90) days or a fine of not more than One Thousand Dollars ($1,000.00) or both.

§ 25-62-9 Relation to Mississippi Campaign Finance statutes:

The requirements of this chapter shall not affect any provisions of the Mississippi Campaign Finance statutes provided in Section 23-15-801 et seq.

See also 26 U.S.C. § 501(c) (List of exempt organizations).

CHAPTER 4

CIVIL ACTIONS

400 SCOPE OF RULES; FORM OF ACTION

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400 SCOPE OF RULES; FORM OF ACTION

RJC 1 Scope of rules:

(a) These are the Rules of Justice Court and may be cited as RJC: e.g., RJC 1. They shall govern procedures in justice courts. Rules 1-10 shall be applicable to all cases, whether civil or criminal in nature. Rules 11-27 shall only be applicable to civil cases. The Mississippi Rules of Criminal Procedure shall apply to all criminal cases before the justice courts and shall supersede any conflicting provision of these rules.

(b) No rule of procedure, local or otherwise, shall be adopted without the approval of the Mississippi Supreme Court. See MRCrP 1.9 (Local Court Rules).

(c) Any person who violates these rules may be subject to sanctions, contempt proceedings, or disciplinary action.

RJC 11 Form of action:

There shall be one form of action known as "civil action."

401 JURISDICTION

§ 11-9-101 Coextensive with its county:

(1) The jurisdiction of the justice court shall be coextensive with its county, and any process may be issued in matters within its jurisdiction, to be executed in any part of the county.

§ 9-11-9 Jurisdictional amount is $3,500.00:

Justice court judges shall have jurisdiction of all actions for the recovery of debts or damages or personal property, where the principal of the debt, the amount of the demand, or the value of the property sought to be recovered shall not exceed THREE THOUSAND FIVE HUNDRED DOLLARS ($3,500.00).

See also Miss. Const. art. 6, § 171 (“The maximum civil jurisdiction of the justice court shall extend to causes in which the principal amount in controversy is Five Hundred Dollars ($500.00) or such higher amount as may be prescribed by law.”).

Principal amount in controversy:

Principal amount in controversy *DOES NOT INCLUDE* interests or costs, but *DOES INCLUDE* attorney fees that are contractual or statutory. *See* Kucel v. Walter E. Heller &

Co., 813 F.2d 67, 73 (5th Cir. 1993) (attorney fees are substantive claims); James v. Williams Furniture Co., 137 So. 101, 102 (Miss. 1931) (costs are excluded from principal amount in controversy); Catchot v. Russell, 134 So. 140, 141 (Miss. 1931) (interest is excluded from principal amount in controversy). The amount demanded at the commencement of the suit fixes and determines the principle amount in controversy for both liquidated and unliquidated damages. *See* Travis & Son v. F. A. Hulett & Son, 141 So. 349, 349-50 (Miss. 1932). A plaintiff may not split a single civil action to come under the jurisdictional amount or be compelled to combine two or more distinct actions into one suit to confer jurisdiction to a higher court. *See* McClendon v. Pass, 5 So. 234, 235 (Miss. 1889). Rule 1.5 of the Rules of Professional Conduct and Section 9-1-41 provide considerations in determining reasonable attorney fees.

But, a litigant may not purposely reduce the demand to evade the constitutional and statutory limitations:

> [I]f the sum demanded is within the jurisdiction, the suit will not be defeated because a greater sum is found due, unless there was a purpose, by a reduction of the demand, to perpetrate a fraud on the court.
>
> Fenn v. Harrington, 54 Miss. 733, 738 (1877).

See also:

Simpson Cty. v. Furlow, 134 So. 146, 146 (1931) ("[I]n the absence of fraud, the pleadings filed showing the amount demanded in good faith, fixed the principal amount in controversy . . .").

Betts v. Falgo, 88 So. 636, 637 (1921) ("In suits instituted in the justice court the jurisdiction is determined by the amount demanded by the pleadings, unless there is a purpose to perpetrate a fraud upon the court and evade the constitutional limitations by purposely reducing the amount of the demand to confer jurisdiction.").

Askew v. Askew, 49 Miss. 301, 307 (1873) ("Where the claim of the plaintiff exceeds the jurisdiction of a [justice court], he cannot remit a portion of it with a view to give jurisdiction to a [justice court]; nor can he divide his account, though composed of various items, so as to bring it within that jurisdiction.").

Mississippi Attorney General's opinion:

Waiving an amount owed.
"[A] plaintiff may waive an amount of money owed to him and thereby come under the civil jurisdiction of the justice court. Of course, if he does so he will be permanently barred from suing in any court for any amount so waived." Op. Atty. Gen. Miller (March 17, 1993).

Court should secure a written waiver.
"[If a plaintiff waives an amount owed to him and thereby comes under the civil jurisdiction of the justice court], it is recommended that the Court secure a written waiver, signed by the plaintiff, of the remaining amount owed and being forgiven, to be placed in the court file." Op. Atty. Gen. Inman, March 14, 2014.

§ 9-11-10 All legally required court costs to be paid:

No [justice court] shall have jurisdiction over any civil suit attempted to be filed therein unless and until all legally required court costs, as set out, but not restricted to, sections 25-7-25 and 25-7-27, Mississippi Code of 1972, are deposited with the court. The [justice court] shall not file, docket, issue process, or otherwise assume jurisdiction until such costs shall have been paid.
Any violation shall constitute a misdemeanor wherein the county court, or in the absence of a county court, the circuit court shall have jurisdiction. Upon conviction the [justice court judge] shall be fined not less than one hundred dollars ($100.00) nor more than two hundred fifty dollars ($250.00).

Art. 6 § 159 No jurisdiction over chancery court matters:

The chancery court shall have full jurisdiction in the following matters and cases, viz.:
(a) All matters in equity;
(b) Divorce and alimony;
(c) Matters testamentary and of administration;
(d) Minor's business;
(e) Cases of idiocy, lunacy, and persons of unsound mind;
(f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation.

§ 9-11-15 Justice court is a court of record:

(1) . . . [Justice court] shall be a court of record, with all the power incident to a court of record, including power to fine in the amount of fine and length of imprisonment as is authorized for a municipal court in Section 21-23-7(11) for contempt of court.

402 VENUE

§ 11-9-101 Proper venue:

(1) The jurisdiction of the justice court shall be coextensive with its county, and any process may be issued in matters within its jurisdiction, to be executed in any part of the county. Every defendant may be sued only in the county in which he resides or where the cause of action arose and if a defendant does not reside in the State of Mississippi or has

no fixed place of residence, he shall be sued in the county where the cause of action arose. Whenever by reason of interest, relationship to one of the parties, or other like cause, any justice court judge shall be disqualified to preside in any case before him, the same shall be transferred to a justice court judge in the county, free from such objection, who shall hear and determine the same. Nothing herein contained shall be construed as authorizing or empowering the clerk of the justice court or any justice court judge to perform any official act outside of the territorial boundaries of their county.

§ 11-9-103 Multiple defendants:

In suits or proceedings against two (2) or more defendants, jointly or jointly and severally liable, it shall be lawful to bring the suit in the justice court of the county wherein either of the defendants reside or where the cause of action arose; and such justice court shall have power to issue a summons or other process to bring in all codefendants from any other county.

§ 11-11-17 Transferring action if court lacks proper venue:

Where an action is brought in any justice court of this state, of which the court in which it is brought has jurisdiction of the subject matter, but lacks venue jurisdiction, such action shall not be dismissed because of such lack of proper venue, but on objection on the part of the defendant shall, by the court, be transferred, together with all prepaid costs remaining after the court in which the action was originally brought has deducted the costs incurred in that court, to the venue to which it belongs.

See also Miss. Code Ann. § 11-35-49 (addressing transfer of venue to other counties where garnishee is not a resident of the county from which the writ of garnishment had issued).

403 COURT TERMS

§ 9-11-15 Regular terms of court:

(1) Justice court judges shall hold regular terms of their courts, at such times as they may appoint, not exceeding two (2) and not less than one (1) in every month, at the appropriate justice court courtroom established by the board of supervisors; and they may continue to hold their courts from day to day so long as business may require; and all process shall be returnable, and all trials shall take place at such regular terms, except where it is otherwise provided;

§ 9-11-15 Scheduling trials for non-resident defendants:

(1) . . . [W]here the defendant is a nonresident or transient person, and it shall be shown

by the oath of either party that a delay of the trial until the regular term will be of material injury to him, it shall be lawful for the judge to have the parties brought before him at any reasonable time and hear the evidence and give judgment or where the defendant is a nonresident or transient person and the judge and all parties agree, it shall be lawful for the judge to have the parties brought before him on the day a citation is made and hear the evidence and give judgment.

§ 11-53-25 Dismissal of stale case:

The clerk of any court shall move the court to dismiss any cause pending therein in which no step has been taken for the two terms preceding; and the court shall, unless good cause be shown to the contrary, dismiss the same at the costs of the plaintiff or complainant.

404 COURTROOM DECORUM AND SECURITY

RJC 2 Courtroom decorum and security:

The court shall be opened formally and conducted with dignity and decorum at all times. The judge shall wear a judicial robe at all times when presiding in open court. Each officer of the court shall be responsible for promotion of respect for the court. No one shall carry firearms or weapons of any description in the courtroom, except:

(1) the bailiffs;
(2) any necessary guards of a prisoner;
(3) other law enforcement or security authorized by the court to do so; or
(4) the judge if he/she has met the requirements set forth in section 97-37-7 of the Mississippi Code or as provided by applicable law.

In the interest of security, all persons entering the courtroom may be searched. Any or all individuals may be excluded or removed from the courtroom for engaging in disorderly, disruptive, or contemptuous conduct, or when their conduct or presence constitutes a threat or menace to the court, parties, attorneys, witnesses, jurors, officials, members of the public, or a fair trial.

§ 97-37–7

(2) It shall not be a violation of this or any other statute for pistols, firearms or other suitable and appropriate weapons to be carried . . . by judges of the . . . justice . . . courts. Before any person shall be authorized under this subsection to carry a weapon, he shall complete a weapons training course approved by the Board of Law Enforcement Officer Standards and Training.

§ 19-19-7 Constable to attend justice court:

It shall be the duty of the constable to attend the justices' courts of his district, and to obey their lawful orders. He shall execute all judgments of said courts in any criminal case before them.

Mississippi Attorney General's opinions:

Bailiff fees for constables.
"Based upon the applicable statutes, it is the opinion of this office that a constable is paid per day, or part thereof, for his or her service as a bailiff in civil cases, and separately, for his or her service as a bailiff in criminal cases. A constable who serves as a bailiff in civil case(s) only on a single day is entitled to receive a $55.00 fee pursuant to Sections 25-7-27(e) and 19-25-31. A constable who serves as a bailiff in criminal case(s) only on a single day is entitled to receive a $55.00 fee pursuant to Sections 19-19-8 and 19-25-31. A constable who serves as a bailiff in both a civil and criminal cases in one day would be entitled to a total fee of $110.00." Op. Atty. Gen. White, May 13, 2020.

Constables to be paid for serving as bailiffs.
[C]onstables continue to be required or authorized to serve as courtroom bailiffs, and counties are authorized to pay its constables for same, in accordance with Sections 25-7-27, 19-19-7, and 19-19-8. These duties are separate andapart from the duty of the sheriff to provide security for the courthouse pursuant to Section 19-25-69. Op. Atty. Gen. Mueller, August 15, 2008.

When the constable is to serve as bailiff in justice court.
"Section 19-19-7 states that it is the duty of the constables to attend justice court and follow the orders of the judge. [But] the constable should only serve as bailiff for justice court if ordered to do so by the justice court judge. Justice court judges may choose whom they wish to serve as bailiff of their court, which may include a constable from another district within the county or a deputy sheriff if the sheriff, with permission of the judge, assigns such a deputy to bailiff duty. We find no authority for a municipal police officer to serve as bailiff of the justice court, since this is not a proper municipal function." Op. Atty. Gen. McCormack, November 6, 1998.

Attendance requirement.
"[A] constable still has an obligation to attend Justice Court even if he is not serving as bailiff." Op. Atty. Gen. Aldridge, December 18, 1998.

§ 9-11–5 All trials to be held in courtroom provided by county:

(1) The justice court judges shall be provided courtrooms by the county and all trials shall be held therein. Such courtrooms shall be in the county courthouse, county office building or any other building within the county deemed appropriate by the board of supervisors.

(2) The county shall provide office space and furnish each justice court office and provide necessary office supplies.
(3) The board of supervisors of each county may secure insurance coverage to protect the office of the justice court clerk against losses due to theft or robbery.

What are adequate court facilities?

> While adequate facilities do not encompass luxurious surroundings by any means, they do at a minimum also include the following: they must enable a judge to conduct court with dignity, they must be comfortable, and as noted, quiet. There must be sanitary restrooms. No participant in court should be required to endure physical discomfort. The courtroom must be properly ventilated, properly heated in cold weather, and properly cooled in hot weather. The chairs must be of sufficient comfort so that lawyers, parties, courtroom personnel and jurors, who are required to sit for long periods, can do so without physical unease. Since court proceedings are public, there must also be sufficient space and chairs or benches provided for spectators and press.

Hosford v. State, 525 So.2d 789, 797 n.4 (Miss. 1988).

Mississippi Attorney General's opinions:

If board of supervisors fail to provide a courtroom or office space.
"[I]f the board of supervisors fails to provide a courtroom or office space for the justice court, a writ of mandamus may be sought in circuit court requiring the board of supervisors to fulfill their statutory duties." Op. Atty. Gen. Smith, August 1, 1997.

§ 19-25-69 Charge of the courthouse:

The sheriff shall have charge of the courthouse and jail of his county, of the premises belonging thereto, and of the prisoners in said jail. He shall preserve the said premises and prisoners from mob violence, from any injuries or attacks by mobs or otherwise, and from trespasses and intruders. He shall keep the courthouse, jail, and premises belonging thereto, in a clean and comfortable condition, and it shall be his duty to prosecute all persons who are guilty of injuring or defacing same. . . .

Mississippi Attorney General's opinions:

Sheriff's duty in providing courthouse security.
"[I]t is the duty of the sheriff to provide courthouse security which is separate and apart from the duty of the bailiff to assist the court relating to courtroom procedures including the seating of witnesses and activities of jurors." Op. Atty. Gen. Thompson, August 3, 2012.

Sheriff to provide security.
"[A]lthough the justice court judge may, by order, appoint the constable as bailiff, it remains the duty of the sheriff to provide security for the courtroom." Op. Atty. Gen. Thompson, January 17, 2012.

Providing security separate apart from the constable acting as bailiff.
"The sheriff is responsible for the security of the courthouse at all times, including the courtroom, pursuant to Section 19-25-69, regardless of whether a constable is serving as bailiff in the courtroom." Op. Atty. Gen. Mueller, August 15, 2008.

405 USE OF CAMERAS, RECORDING AND BROADCASTING EQUIPMENT

RJC 3 Use of cameras, recording and broadcasting equipment:

Any attorney of record or self-represented litigant may record or have recorded any justice court proceeding by audiovisual-recording device or stenographically consistent with section 9-13-32 of the Mississippi Code. Any other use of cameras, recording devices, or broadcasting equipment shall be governed by Canon 3B(12) of the Mississippi Code of Judicial Conduct or other applicable rules.

Canon 3B

(12) Except as may be authorized by rule or order of the Supreme Court, a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
(i) the means of recording will not distract participants or impair the dignity of the proceedings;
(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Mississippi Attorney General's opinions:

MREPCP not applicable to justice court.
"The Mississippi Rules for Electronic and Photographic coverage of Judicial Proceedings (MREPCP) do not apply to Justice Court. Therefore, cameras are not allowed in a Justice Courtroom unless the use is authorized by Canon 3B(12)." Op. Atty. Gen. Lyons, May 4, 2012.

§ 9-13-32 Recording court proceedings for impeachment purposes:

Any attorney of record or interested entity in any cause pending in a court, including justice court, which does not provide an official court reporter, may, in the discretion of the attorney or interested entity, record or have recorded any court proceeding in the cause by mechanical means or stenographically. Any expenses incident thereto shall be borne by the party or parties represented by the entity or attorney of record. The record of the court proceeding shall be used for impeachment purposes only. An interested entity includes, but is not limited to, the victim of a crime or a property owner on whose property a crime has been committed.

Mississippi Attorney General's opinions:

Recording proceedings under Section 9-13-32.
"[A]ny attorney of record in any cause pending in a court which does not provide an official court reporter, which would include municipal and justice courts, may make recordings of any type for impeachment purposes. The attorney may be the prosecutor or defense counsel." Op. Atty. Gen. Patch, June 10, 2011.

406 CONDUCT OF COUNSEL AND PARTIES

RJC 10

(a) Attendance. Prompt attendance is required by the attorneys and parties, the witnesses, and all other persons whose presence is required to conduct the business of the court.

(b) Civility in proceedings. The attorneys and parties must show professional courtesy and respect toward the judge, the jurors, the opposing attorneys and parties, the witnesses, and all other court personnel and participants within the courthouse. Any person engaging in behavior or tactics purposefully calculated to disrupt the proceedings or to irritate the judge, a party, an attorney, or a witness is subject to contempt.

(c) Objections. When addressing the court, the attorneys and parties must:

(1) stand unless excused for good cause by the court;

(2) give specific grounds on any objections to testimony; and
(3) make all objections to the judge, and not to opposing counsel.

(d) Jury panels. When addressing the jury panel, the attorneys and parties must stand unless excused for good cause by the court. Attorneys may directly address the jury panel only during voir dire, opening statements, and closing arguments.

(e) Witnesses. When examining witnesses, the attorneys and parties must:

(1) stand, except when excused for good cause by the court;
(2) limit themselves to asking questions; and
(3) refrain from making statements, quips, or side remarks.

Any examination of witnesses is to be conducted fairly and objectively, with the attorneys, parties, and witnesses showing courtesy and respect to one another. Attorneys and parties may not ask questions merely to embarrass or humiliate the witness.

(f) Opening statements / Closing arguments. When making an opening statement or closing argument, the attorneys and parties must:

(1) not denigrate or ridicule the opposing attorney;
(2) not call any juror by name;
(3) not have any personal contact with the jury whatsoever;
(4) not attempt to converse with or solicit audible answers from the jurors individually; and
(5) not thank the jury for acting as jurors.

The attorneys and parties are required to keep within proper bounds, and any attempt to inject an improper matter may be stopped by the court without the necessity of an objection. After the return of the verdict, the attorneys, the parties, and any spectators shall not express to the jury any congratulations, thanks, or condemnation for the verdict returned.

407 EX PARTE COMMUNICATIONS

RJC 4

The judge shall not allow any person:

(1) to discuss in his/her presence the law or facts or alleged facts of any case then pending in the court, or likely to be instituted therein, except as allowed by law in the orderly progress of proceedings under these rules, or

(2) to influence his/her decision in any manner that is prohibited by these rules or the Mississippi Code of Judicial Conduct.

408 COMMENCING A CIVIL ACTION

RJC 12 Commencement of civil action:

(a) A civil action is commenced by filing the complaint with the court. The complaint shall state the evidence of the debt, statement of account, or other basis for the civil action and make a specific demand for damages and/or other relief allowed by law. If a claim is founded on an account or other written instrument, a copy thereof should be attached to or filed with the complaint unless sufficient justification for its omission is stated in the complaint. The plaintiff may file a single complaint against multiple defendants if it is alleged that each of them is liable on the claim.

(b) Exceptions. The following civil actions require a sworn complaint:

(1) Evictions (Miss. Code Ann.§ 89-7-29);
(2) Replevin (Miss. Code Ann. § 11-37-101);
(3) Distress for rents (Miss. Code Ann. § 89-7-57);
(4) Unlawful entry and detainer (Miss. Code Ann.§ 11-25-5); and
(5) Any other civil action requiring a sworn complaint by statutory procedures.

§ 11-9-105 Action lodged with clerk:

Anyone desiring to sue in the justice court shall lodge with the clerk of the justice court the evidence of debt, statement of account, or other written statement of the cause of action.

§ 11-9-105 Civil actions assigned on a rotating basis:

The clerk shall record all filings and shall, as far as practicable, assign the cases to each justice court judge in the county on a rotating basis to insure equal distribution of the cases among the judges of the county; however, in all counties in which the courtrooms provided by the county for use of the justice court judges are located in more than one (1) place in the county, the clerk, in addition to assigning cases to the judges on a rotating basis, may also assign a courtroom for each case, such assignment may be made based upon the proximity of the courtroom to the defendant's residence or place of business.

§ 11-9-105 Certified copies of documents forwarded to judge:

When the case has been recorded and assigned and process issued, the clerk shall, within two (2) working days, forward certified copies of all documents pertaining to the case to

the justice court judge to which the case is assigned for further processing.

RJC 13 Computation of time:

In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the date of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or any other day that the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or clerk's office is closed. When the period oftime prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. The court, in its discretion, may grant an extension of time.

409 SERVICE OF PROCESS

RJC 14 Service of process:

(a) Service of process defined. Service of process for civil actions in justice court means serving a true copy of the summons and complaint upon the defendant in accordance with this rule.

(b) Issuance of summons and form. Summons shall be issued by the justice court clerk. Any summons issued under this rule shall name the court and the parties; be directed to the defendant; state the name and address of the plaintiffs attorney or, if unrepresented, of the plaintiff; state the date and time within which the defendant must appear and defend; notify the defendant that a failure to appear and defend may result in a default judgment against the defendant for the relief demanded in the complaint; be signed and dated by the justice court clerk; and bear the court's seal.

(c) SERVICE BY CONSTABLE. Upon the filing of the complaint, the justice court clerk shall promptly deliver a true copy of the summons and complaint to the constable of the county of the defendant's usual place of abode or, if the defendant is an entity, to the constable of the county of the entity's place of business, to serve process upon the defendant. Within ten (10) days thereafter, unless service has been waived, the constable shall file an affidavit showing proof of service, or of attempted service after diligent search and inquiry pursuant to section 25-7-27 of the Mississippi Code, with the justice court clerk.

(d) Manner of service upon an individual.

(1) *Personal service.* The constable shall deliver a true copy of the summons and

complaint to the defendant or to an agent authorized by appointment or by law to receive process. Service shall be deemed complete upon the date of service.

(2) *Service upon a family member.* If service under paragraph (d)(l) cannot be made with reasonable diligence, then the constable shall deliver a true copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen (16) years, and within three (3) days thereafter, mail a true copy of the summons and complaint, by first class mail, postage prepaid, to the defendant at the address where the true copy of the summons and complaint were properly delivered. Service shall be deemed complete on the 10th day after the mailing.

(3) *Service by posting.* If service under paragraphs (d)(l) and (d)(2) cannot be made with reasonable diligence, then the constable shall serve process by posting a true copy of the summons and complaint on a door of the defendant's usual place of abode that is reasonably calculated to provide notice of the action and, within three (3) days thereafter, by mailing a true copy of the summons and complaint, by first class mail, postage prepaid, to the defendant at the address where the true copy of the summons and complaint was posted. Service shall be deemed complete on the 10th day after the mailing.

(e) Manner of service upon all others. The constable shall serve process in the manner provided by Rule 4 of the Mississippi Rules of Civil Procedure for mentally incompetent persons or entities located in the state.

(f) SERVICE BY SHERIFF. When any process has not been returned by the constable as required by this rule, then the justice court clerk may direct the sheriff of the county of the defendant's usual place of abode or, if the defendant is an entity, to the sheriff of the county of the entity's place of business, to serve process upon the defendant in like manner as required of a constable under this rule.

(g) SERVICE BY PROCESS SERVER. When any process has not been returned by the constable as required by this rule, the plaintiff may make a written request for service by a process server. Upon receiving a written request, the justice court clerk shall promptly deliver a true copy of the summons and complaint to the plaintiff or the plaintiffs attorney for service of process by a process server in like manner as required of a constable under this rule. The process server must be at least eighteen (18) years of age and not be a party to the action.

(h) Service by certified mail, return receipt requested, upon persons or entities located outside the state. When the defendant is a person or entity located outside the state, the plaintiff may make a written request for service by certified mail, return receipt requested. Upon receiving a written request, the justice court clerk shall promptly deliver a true copy of the summons and complaint to the plaintiff or the plaintiffs attorney for service of process by certified mail, return receipt requested. Within twenty (20) days

thereafter, the sender shall file with the justice court clerk the return receipt or the return envelope marked "Refused." Where the defendant is a natural person, the envelope shall be marked "Restricted Delivery." Service of process by this method shall be deemed complete from the date of delivery as evidenced by the return receipt or the return envelope marked "Refused."

(i) Service upon multiple defendants. If there are multiple defendants, then a separate true copy of the summons and complaint shall be served on each defendant named in the action.

(j) Validity of service. Nothing in this rule shall invalidate any service of process for being made untimely or for an untimely filed return.

(k) Waiver. Any defendant who is not a mentally incompetent person may waive the service of process or enter an appearance, with the effect of being duly served with lawful process, in the manner provided under Rule 4(e) of the Mississippi Rules of Civil Procedure.

(1) Amendment. The justice court judge may allow any service of process or proof of service under this rule to be amended for good cause shown, unless it clearly appears that material prejudice would result to the substantial rights of the defendant.

(m) Time limit for service. The justice court judge may dismiss without prejudice any action where, without good cause, it appears from the court file that service of process has not been made upon the defendant within one hundred and twenty (120) days after the filing of the complaint. A party may file a motion for enlargement of time any time prior to a dismissal by the court.

(n) Fees for service of process.

(1) *By constable.* Service of process by the constable may be taxed as court costs for an amount not exceeding the statutory amount allowed by law. No fees for service shall be paid to a constable who has neither served nor attempted to serve process in substantial compliance to this rule.

(2) *By sheriff.* Service of process by the sheriff may be taxed as court costs for an amount not exceeding the statutory amount allowed by law. No fees for service shall be paid to a sheriff who has neither served nor attempted to serve process in substantial compliance to this rule.

(3) *By process server.* Service of process by a process server may be taxed as court costs for an amount not exceeding the statutory amount allowed by law to the constable for service of process.

(4) *By certified mail, return receipt requested.* Service of process by certified

mail, return receipt requested, on a person or entity located outside the state may be taxed as court costs for an amount not exceeding the amount of postage for the mailing.

§ 11-9-105 Returnable to next term of court:

The clerk shall issue a summons for the defendant, returnable to the next term of the court of the justice court judge to which the case is assigned, which shall be executed five (5) days before the return day; but if the process be executed less than five (5) days before the return day, the service shall be good to require the appearance of the defendant at the term next succeeding the one to which it is returnable. Any summons issued within five (5) days before a term of the court shall be made returnable to the next succeeding term, unless a shorter day be named, in pursuance of the provision for a trial without delay in the case of nonresident or transient defendants.

§ 11-9-109 Emergency exception for executing process:

In cases of emergency, and where a constable or sheriff or deputy sheriff cannot be had in time, the clerk of the justice court may appoint some reputable person to execute any process, the clerk to be liable on his bond for all damage which may result to a party to the cause or other person from his appointment of an insolvent or incompetent person.

§ 9-11-20 If process is to be served outside of the county:

In any civil case in the justice court in which any process or writ is to be served outside of the county where issued, the clerk of the justice court is hereby authorized and directed to forward, by United States mail, to the clerk of the justice court of the county where such writ or process is to be served, that portion of any fees required by law to be collected for the service of such process or writ along with the process or writ to be served. The clerk of the justice court of the county where the process or writ is to be served shall, upon receipt thereof, deliver such process or writ to a constable of the county for the service thereof and shall report and pay over such fees to the chancery clerk of the county at the time and in the manner provided in subsection (1) of section 9-11-19 for the report and payment of fees, costs, fines and penalties charged and collected in the justice court.

410 LONG-ARM STATUTES

Purpose of long-arm statutes:

Long-arm statutes allow persons to bring an action in the state of their residency without having to resort to the inconvenience or hostility of an outside jurisdiction. In Mississippi our courts acquire personal jurisdiction over a non-resident defendant if:

- Mississippi's long-arm statute applies, and
- its application to the particular case comports with the minimum due process requirements of the Due Process Clause of the Fourteenth Amendment.

See Sorrells v. R & R Custom Coach Works, 636 So. 2d 668, 671-75 (Miss. 1994).

Minimum contacts is satisfied if:

- the defendant has purposefully availed himself of the benefits and protections of the forum state by establishing minimum contacts with the forum state, and
- the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice.

Placing a product into the stream of commerce without more is insufficient. *See* Asahi Metal Inc. v. Superior Court, 480 U.S. 102, 112 (1987); Willow Creek Exploration Ltd, v. Tadlock Pipe & Equipment Inc., 186 F. Supp. 675, 680 (S.D. Miss. 2002); Kekko v. K & B Louisiana Corporation, 716 So. 2d 682, 683 (Miss. App. Ct. 1998).

§ 13-3-57 When nonresidents are subjected to Mississippi jurisdiction:

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the Constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi and shall thereby be subjected to the jurisdiction of the courts of this state. Service of summons and process upon the defendant shall be had or made as is provided by the Mississippi Rules of Civil Procedure.

RJC 14 Service upon persons or entities located outside the state:

(a) Service of process defined. Service of process for civil actions in justice court means serving a true copy of the summons and complaint upon the defendant in accordance with this rule.

. . .

(h) Service by certified mail, return receipt requested, upon persons or entities located

outside the state. When the defendant is a person or entity located outside the state, the plaintiff may make a written request for service by certified mail, return receipt requested. Upon receiving a written request, the justice court clerk shall promptly deliver a true copy of the summons and complaint to the plaintiff or the plaintiff's attorney for service of process by certified mail, return receipt requested. Within twenty (20) days thereafter, the sender shall file with the justice court clerk the return receipt or the return envelope marked "Refused." Where the defendant is a natural person, the envelope shall be marked "Restricted Delivery." Service of process by this method shall be deemed complete from the date of delivery as evidenced by the return receipt or the return envelope marked "Refused."

411 COUNTERCLAIMS AND SETOFFS

RJC 16 Counterclaims and setoffs:

Counterclaims and setoffs shall be liberally allowed by the court. Failure to assert any counterclaim or setoff shall not bar a subsequent civil action of those claims. The judge shall dismiss without prejudice any counterclaim that exceeds the jurisdictional limits of justice court.

Mississippi Attorney General's opinions:

If the defendant later files a separate action.
"[A] defendant in a civil action who had a judgment entered against him and fails to assert a counterclaim or setoff may later file a separate action upon such claims that he could have asserted by way of counterclaim or setoff. . . . The second case, being a new and separate case, would be subject to the provisions of Section 11-9-105 of the Mississippi Code which provides that the clerk shall as far as practicable assign the case to each judge on a rotating basis." Op. Atty. Gen. Turnage, January 11, 2013.

§ 11-9-125 When counterclaim is to be filed:

The defendant in any action shall, on or before the return day of the summons, and before the trial of the case, file with the justice court judge to whom the case is assigned the evidence of debt, statement of account, or other written statement of the claim, if any, which he may desire to and which lawfully may be set off against the demand of the plaintiff, and, in default thereof, he shall not be permitted to use it on the trial.

§ 11-9-127 Judgment entered on counterclaim if a balance is due:

On the return day of the summons, unless continued, the justice court judge shall hear and determine the cause if both parties appear; . . . [and] enter judgment in favor of the defendant where, in case of setoff, it shall appear that there is a balance due him, for the

amount of such balance, . . .

412 PLEADINGS AND MOTIONS

RJC 15 Pleadings and motions submitted to the court:

(a) Pleadings and motions to be signed. All pleadings, motions, or any other application to the court shall be signed by the party making the submission or, if represented by counsel, by the attorney of record.

(b) Information to be provided. All pleadings, motions, or any other application to the court shall bear the name, address, and telephone number of the party filing the same and, if any attorney is representing the party, the attorney's name, office address, and telephone number.

(c) Size of paper. All pleadings and other papers filed in any civil action governed by these rules shall be on paper measuring 8 112 inches x 11 inches. But exhibits or attachments to pleadings may be folded and fastened to pages of the specified size if compliance is not reasonably practicable.

(d) Electronic filing and storage. Pleadings, motions, or any other application to the court may be filed and stored by computer or electronic means pursuant to rules and policies established by the Mississippi Supreme Court and the Mississippi Administrative Office of Courts.

RJC 19 Withdrawal of counsel:

An attorney who has made an entry of appearance may not withdraw from the case except with the permission of the court upon a showing of good cause after notice of withdrawal has been served on the attorney's client and upon all parties. Permission to withdraw shall not be unreasonably denied.

RJC 17 Representation by guardian ad litem:

The judge may appoint a guardian ad litem who is an attorney to represent an infant or a vulnerable person as defined under section 43-47-5 of the Mississippi Code. The appointed guardian ad litem may sue or defend the civil action on behalf of such persons. Reasonable costs and fees of the guardian ad litem may be taxed as court costs.

413 SUBSTITUTION OF PARTIES

RJC 18

(a) If a party dies. If a party dies and the claim is not thereby extinguished, the successors or representatives of the deceased party may file, within ninety (90) days of the party's death, a motion for the substitution of parties. The judge may dismiss without prejudice the action if the motion for substitution of parties is not filed timely.
In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) If a party is a minor or vulnerable person. Upon the motion of any party, the judge may allow a civil action to be continued by or against a representative of a party who is a minor as defined under section 1-3-2 7 of the Mississippi Code or a vulnerable person as defined under section 4 3-4 7-5 of the Mississippi Code.

(c) If there is a transfer of interest. Upon the motion of any party, the judge may direct that the person to whom the interest was transferred be substituted for, or joined with, the original party in the civil action.

(d) If a party is a public officer who dies or resigns in office. A civil action shall not abate if a party is a public officer acting in his/her official capacity who dies, resigns, or otherwise ceases to hold office. Instead, the public officer's successor shall be substituted as a party. The judge may enter an order of substitution at any time in the course of the action, but its omission shall not affect the substitution.

414 CONSOLIDATION AND SEPARATION OF TRIALS

RJC 20

(a) Consolidating actions. When two or more civil actions with a common question oflaw or fact are pending before the court, the judge may:

(1) order a joint hearing or trial of any or all matters pertaining to the common question of law or fact;
(2) order all the actions consolidated for trial; or
(3) make such orders concerning proceedings on the action so as to avoid unnecessary costs or delay.

(b) Separate trials. The judge may order a separate trial of any claim in a civil action for reasons of:

(1) avoiding prejudice;
(2) expediting the resolution of claims in the action; or (3) economical considerations neutral to the litigation.

415 APPOINTING INTERPRETERS

See CHAPTER 29 "INTERPRETERS."

416 SUBPOENAS

RJC 21

(a) Generally. Subpoenas for a trial or hearing in justice court shall conform to Rule 45 of the Mississippi Rules of Civil Procedure.

(b) Requests. Every request for a subpoena of a witness in a civil action shall:

(1) be in writing;
(2) contain the mailing and physical addresses of the witness and other information so as to furnish a sure guide to the person serving the subpoena;
(3) be delivered to the justice court clerk in a reasonable time before the trial date; and
(4) be signed and dated by the party requesting the subpoena.

The justice court clerk shall preserve each written· request for subpoena within the court file.

(c) Issuance. Every subpoena in civil actions shall:

(1) be issued by the justice court clerk under the seal of the justice court;
(2) state the name and address of the court and the title of the action; and
(3) command each person to whom it is directed to attend and give testimony at a specified date, time, and place, and to bring to the hearing specified books, papers, documents, or other objects in the control and possession of the witness that are to be offered into evidence.

(d) Service. A subpoena in civil actions shall be served upon the witness personally by:

(1) the sheriff;
(2) the deputy sheriff;
(3) a constable; or
(4) any other person who is not a party and eighteen (18) years of age or older.

The endorsed return, or a written acknowledgment on the subpoena by the witness, shall be prima facie proof of service. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

(e) Enforcement. The judge may enforce a subpoena in civil actions by any means allowed by the Mississippi Code, including the issuance of an attachment pursuant to section 11-9-115 of the Mississippi Code, or these rules.

§ 11-9-115 Witness subpoenas:

The justice court judge before whom any cause is pending shall direct the clerk of the justice court to issue all subpoenas for witnesses which either of the parties may require, and such subpoenas shall be returnable on a day certain, giving reasonable time for attendance. If any witness, duly subpoenaed, shall fail to appear in pursuance of the subpoena, he shall forfeit the sum of ten dollars ($10,00), for the use of the party in whose behalf he was subpoenaed, for which the justice court judge may enter judgment nisi, which shall be made final in case the witness, on being duly subpoenaed to appear and show cause, shall fail to appear and show cause for such default. The justice court may issue an attachment for such witness, as a circuit court may do in like case.

417 TRIAL PROCEDURES

Burden of proof:

The burden of proof in ordinary civil cases is by a preponderance of the evidence. *See* James M. Burns Lumber Company, Inc. v. Dilworth, 676 So. 2d 892, 893 (Miss. 1985).

MRE 615 Excluding witnesses:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;
(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

The Comment to Rule 615 of the Mississippi Rules of Evidence provides in part: "This rule does not discuss sanctions for violation of the sequestration order. Under existing Mississippi law the court has the discretion to exclude the offending witness from testifying. *See* Johnson v. State, 346 So. 2d 927 (Miss. 1977). The trial judge should not permit a witness who has violated the rule to testify unless he has first determined that the adversary would not be prejudiced by the violation of the rule. Other available remedies might be to strike the testimony of a witness who violated the rule, cite the witness for contempt, or allow a 'full-bore' cross-examination. *See* Douglas v. State, 525 So. 2d 1312 (Miss. 1988)."

See also Brown v. State, 682 So. 2d 340, 347 (Miss. 1996) ("Often called 'the rule,' the witness exclusion rule serves to discourage a witness's tailoring his testimony to what he has heard from the stand and the rule serves to facilitate exposing false testimony.").

Order of trial:

The order of trial is set forth below.

Opening statements: An opening statement is not evidence, but rather a brief forecast intended to inform the jury what a party expects the evidence to show. *See* Crenshaw v. State, 513 So. 2d 898, 900 (Miss. 1987). The plaintiff makes its opening statement, then the defense follows with its own. A pro se defendant has a constitutional right to make an opening statement without being sworn or subject to cross examination. *See* Trunell v. State, 487 So. 2d 820, 826 (Miss. 1986).

Plaintiff presents its case: The plaintiff has the burden of proving its case by introducing evidence through the testimony of its witnesses. The defense is entitled to cross-examine these witnesses.

Defense presents its case: Once the plaintiff has finished presenting its case, the defense may choose to present its own case by introducing evidence through the testimony of its witnesses. The plaintiff is entitled to cross-examine these witnesses.

Rebuttal evidence: "Generally, the party who has the burden of proof must introduce all substantive evidence in his case-in-chief. However, where there is a doubt as to whether evidence is properly case-in-chief or rebuttal evidence, then the court should resolve the doubt in favor of reception into rebuttal if: (1) its reception will not consume so much additional time as to give an undue weight impractical probative force to the evidence so received in rebuttal, and (2) the opposite party would be substantially well prepared to meet it by surrebuttal as if the testimony had been offered in chief, and (3) the opposite party upon request therefor is given the opportunity to reply by surrebuttal." Powell v. State, 662 So. 2d 1095, 1098 (Miss. 1995).

Jury instructions: *See CHAPTER 26 "JURY TRIALS."*

Closing arguments: In closing arguments both sides try to convince the jury by putting forth their version of the case in light of the evidence presented at trial. Usually there is wide latitude given to each side in presenting their view, but the trial judge should intervene to prevent an unfair argument if counsel: departs entirely from the evidence, makes statements solely intended to excite passions or prejudices, or makes unsupported inflammatory and damaging statements.

See, e.g.:

Eckman v. Moore, 876 So. 2d 975, 994 (Miss. 2004) ("The standard of review that appellate courts must apply to lawyer misconduct during opening statements or closing arguments is whether the natural and probable effect of the improper argument is to create unjust prejudice ... so as to result in a decision influenced by the prejudice so created.");

Williams v. State, 288 So. 3d 412, 415 (Miss. Ct. App. 2020) ("During closing argument, a 'prosecutor may comment upon any facts introduced into evidence, and he may draw whatever deductions and inferences that seem proper to him from the facts.' Here, the prosecutor referred to Williams's failed field sobriety test and Williams's urine sample (containing cocaine and marijuana) to deduce that Williams was under the influence. Based on the facts that were introduced into evidence, we see no error in that deduction.").

Jury deliberations: *See CHAPTER 26 "JURY TRIALS."*

RJC 22 Mistrial:

(a) For misconduct by the defendant. Upon motion of the plaintiff, the judge shall declare a mistrial if there occurs during the trial misconduct by the defendant, the defendant's attorney, or a defendant's witness resulting in substantial and irreparable prejudice to the plaintiffs action. But if there are two or more defendants, the judge shall not declare a mistrial as to any defendant who is not an offending party and who requests that the trial continue.

(b) For misconduct by the plaintiff. Upon motion of the defendant, the judge shall declare a mistrial if there occurs during the trial misconduct by the plaintiff or a plaintiff's witness resulting in substantial and irreparable prejudice to the defense.

(c) Other reasons for declaring a mistrial. Upon motion of any party, or upon the judge's own initiative, the judge shall declare a mistrial if:

(1) the trial cannot proceed in conformity with law; or
(2) the jury is deadlocked and there is no reasonable probability of a verdict.

§ 11-9-137 Res judicata:

When any suit brought before [justice court] shall be finally decided on its merits by the justice, it shall be a bar to a recovery for the same cause of action or setoff in any other suit.

See also Hill v. Carroll County, 17 So. 3d 1081, 1084 (Miss. 2009) (discussing doctrine of res judicata).

418 JURY TRIALS

See CHAPTER 26 "JURY TRIALS."

419 DEFAULT JUDGMENTS AND DISMISSALS

RJC 23

(a) When the defendant fails to appear for trial. If the defendant has been given proper notice of the date and time of trial but fails to appear, and the plaintiff appears, then the judge may enter a default judgment against the defendant provided:

(1) there is a factual basis to support the claim; and
(2) the judgment is not different in kind from or does not exceed the amount of that demanded in the complaint.

(b) When the plaintiff fails to appear for trial. If the plaintiff has been given proper notice of the date and time of trial but fails to appear on the trial date, and the defendant appears, then the judge may dismiss the case without prejudice.

(c) When both the plaintiff and defendant fail to appear for trial. If both the plaintiff and the defendant fail to appear on the trial date, then the judge may dismiss the case without prejudice.

(d) When the plaintiff files a motion for dismissal. If the plaintiff files prior to any responsive pleading or trial a written motion for the dismissal of the case, then the judge may dismiss the case without prejudice unless objected to by the defendant. Plaintiff's costs shall not be assessed against the defendant.

(e) Setting aside a default judgment. Unless an appeal has been perfected pursuant to these rules, a party may request the court to set aside a default judgment. Thereupon, the judge may stay the execution of the default judgment pending a hearing on the motion.

After a hearing in which the parties to the action have been given notice and an opportunity to be heard, the judge may set aside the default judgment by written order as may be just and proper if he/she determines that good cause has been shown to support such order. In making this determination, the judge must weigh the following factors:

(1) the nature and legitimacy of the party's reasons for default,
(2) whether the party's claims or defenses have reasonable merit, and
(3) the nature and extent of prejudice that the opposing party would suffer if the default judgment is set aside.

420 JUSTICE COURT COSTS AND FEES AND STATE ASSESSMENTS

State Auditor's report:

A report of the State Auditor on state assessments and court costs and fees is distributed at the Justice Court Clerks Statewide Seminar each year. This report contains valuable information regarding collection amounts and procedures.

§ 11-53-79 Posting bill of fees:

It shall be the duty of the clerks of the circuit and chancery courts, and of the sheriff, to post in a conspicuous place in his office, and each justice of the peace at his place of holding court, a copy of the bill of fees which he is entitled to receive, and on failure to do so he shall not be entitled to receive or collect any fee for any service rendered during the time of such failure.

§ 25-7-25 Justice court fees:

(1) Costs and fees in the justice court shall be charged as follows and shall be paid in advance to the clerk of the justice court in accordance with the provisions of Section 9-11-10:
(a) A uniform total fee in all civil cases, whether contested or uncontested, which shall include all services in connection therewith, except as hereinafter stated, each. . . . $25.00
(b) For more than one (1) defendant, for service of process on each defendant 5.00
(c) After final judgment has been enrolled, further proceedings involving levy of execution on judgments, and attachment and garnishment proceedings 15.00
(d) or all services in connection with the issuance of a peace bond 25.00
(e) For celebrating a marriage, and certificate thereof. 10.00
(f) Commission to take depositions 5.00
(g) Appeal with proceedings and bond 5.00
(h) A clerk's fee to be collected in all criminal cases in which the defendant is convicted, as follows:
(i) For all violations in Title 63 other than driving under the influence of intoxicating

liquor or reckless driving 5.00
(ii) All other criminal cases 25.00
(2) The justice court shall have the power to impose a fee not to exceed Fifty Dollars ($50.00) for an expungement or dismissal of any criminal affidavit, complaint or charge.
(3) In addition to the salary provided for in subsection (1) of Section 25-3-36, each justice court judge may receive a fee of not more than Twenty-five Dollars ($25.00) for each marriage ceremony he performs in the courtroom or offices of the justice court at any time the courtroom or offices are open to the public. This fee shall be paid by the parties to the marriage. Each justice court judge may receive money or gratuities for marriage ceremonies performed outside of and away from the courtroom and the offices of the justice court, that the parties to the marriage request to have performed at any time the courtroom or offices of the justice court are closed. These monies or gratuities, in an amount agreed upon by the parties to the marriage, are not considered fees for the justice court and are not subject to the requirements set forth in the provisions of Section 9-11-10.

Mississippi Attorney General's opinions:

Marriage ceremonies under Section 93-1-17.
"[Section 93-1-17] authorizes a justice court judge to perform a marriage only between persons with a Mississippi license." Op. Atty. Gen. Russell, February 24, 2012. *See also* Miss. Code Ann. § 93-1-17, which provides in part: "Justice court judges . . . may likewise solemnize the rites of matrimony within their respective counties."

Regarding the filing of a notice of renewal of judgment.
"[T]here is no provision for the collection of a fee in justice court for the filing of a notice of renewal of judgment." Op. Atty. Gen. Boland, March 4, 2011.

Fees on dismissal of any criminal affidavit, complaint or charge.
"[On a dismissal of any criminal affidavit, complaint or charge,] the justice court is empowered to collect a fee not exceeding $50.00 from the individual filing the affidavit or bringing the charge. This fee is the only amount that may be collected from the individual filing the affidavit or bringing the charge. It is not assessed against the individual against whom the charges are brought." Op. Atty. Gen. Branch, September 19, 2008.

Fees for marriage ceremonies.
"[Section 25-7-25] provides for a fee of $10.00 to go to the justice court "for celebrating a marriage" and an additional $25.00 fee to go to the justice court judge that performs the marriage ceremony in the justice court offices or courtroom. It is the opinion of this office that such fees should be collected by the justice court clerk and settled to the county. These marriage fees earned by the justice court judge should be paid through the claims docket by the board of supervisors." Op. Atty. Gen. Carter, May 4, 2001.

§ 25-7-27 Payments to marshals and constables:

(1) Marshals and constables shall charge the following fees:
(a)(i) In all civil and criminal cases, for each service of process, summons, warrant, writ or other notice 45.00
(ii) In all cases where there is more than one (1) defendant residing at the same household, for service on each additional defendant . . . . . $ 5.00
(iii) For service of each process of every kind and nature issued from outside the county where it is to be served, the fees provided in subparagraphs (i) and (ii) of this paragraph, as applicable, shall be assessed.
(iv) When a complaining party has provided erroneous information to the clerk of the court relating to the service of process on the defendant or defendants and process cannot be served after diligent search and inquiry on oath thereof of the marshal or constable, as the case may be, charged with serving such process, the fees provided in subparagraphs (i) and (ii) of this paragraph, as applicable, shall be assessed.
(v) When process has been attempted in one (1) county but the defendant is not found, and process must be served on that defendant in another county, the clerk shall notify the complaining party that an additional fee or fees must be paid before the process can be delivered to the other county.
(b) After final judgment has been enrolled, further proceedings involving levy of execution on judgments, and attachment and garnishment proceedings shall be a new suit for which the marshal or constable shall be entitled to the following fee. . . . . $ 45.00
(c) For conveying a person charged with a crime to jail, mileage reimbursement in an amount not to exceed the rate established under Section 25-3-41(2).
To be paid out of the county treasury on the allowance of the board of supervisors, when the state fails in the prosecution, or the person is convicted but is not able to pay the costs.
(d) For other service, the same fees allowed sheriffs for similar services.
(e) For service as a bailiff in any court in a civil case, to be paid by the county on allowance of the court on issuance of a warrant therefor, an amount equal to the amount provided under Section 19-25-31 for each day, or part thereof, for which he serves as bailiff when the court is in session.
(f) For serving all warrants and other process and attending all trials in state cases in which the state fails in the prosecution, to be paid out of the county treasury on the allowance of the board of supervisors without itemization, subject, however, to the condition that the marshal or constable must not have overcharged in the collection of fees for costs, contrary to the provisions of this section, annually . . . . . $ 2,500.00
(2) Marshals and constables shall be paid all uncollected fees levied under subsection (1) of this section in full from the first proceeds received by the court from the guilty party or from any other source of payment in connection with the case.
(3) In addition to the fees authorized to be paid to a constable under subsection (1) of this section, a constable may receive payments for collecting delinquent criminal fines in justice court pursuant to the provisions of Section 19-3-41(3).

Mississippi Attorney General's opinions:

Bailiff fees.
"A constable is paid for each day, or part thereof, for civil and criminal cases, regardless of the number of judges he or she serves as bailiff for that day. Thus, a constable, serving as bailiff, may receive a fee of $55.00 for attending each day or portion of a day in a civil case and may receive a fee of $55.00 for attending each day or portion of a day for attending a criminal case on the same day for a combined total of $110.00 if serving as a bailiff in both a civil case and criminal case on the same day." Op. Atty. Gen. White, May 13, 2020.

Paid from first proceeds received.
"[A] constable is entitled to his fees from the first proceeds received by the court on each case." Op. Atty. Gen. Busby, July 23, 2004.

§ 45-1-29 Laboratory analysis fee:

(4) Upon every individual convicted of a felony or misdemeanor, every individual who is nonadjudicated on a felony or misdemeanor case under Section 99–15–26 or 63–11–30(14), and every individual who participates in a pretrial intervention program established under Section 99–15–101 et seq., in a case where the Forensics Laboratory provided forensic science or laboratory services in connection with the case, the court shall impose and collect a separate laboratory analysis fee of Three Hundred Dollars ($300.00), in addition to any other assessments and costs imposed by statutory authority, unless the court finds that undue hardship would result by imposing the fee. All fees collected under this section shall be deposited into the special fund of the Forensics Laboratory created in subsection (3) of this section.

CHAPTER 5

ENFORCING CIVIL JUDGMENTS

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§ 11-9-127 When judgment is to be rendered:

On the return day of the summons, unless continued, the justice court judge shall hear and determine the cause if both parties appear; . . .

§ 75-17-7 Rate of interest on judgments:

All judgments or decrees founded on any sale or contract shall bear interest at the same rate as the contract evidencing the debt on which the judgment or decree was rendered. All other judgments or decrees shall bear interest at a per annum rate set by the judge hearing the complaint from a date determined by such judge to be fair but in no event prior to the filing of the complaint.

Mississippi Attorney General's opinions:

Interest starts as of the date of the judgment.
"[T]he language in Section 75-17-7 plainly states a judgment rendered on a contract must include the interest rate specified in the contract. In that type of judgment the judge does not have discretion to change the interest rate as long as the rate charged is lawful. The interest starts as of the date of the judgment and ends when the judgment is paid." Op. Atty. Gen. Avila, September 26, 2008.

Rate of interests allowed under § 75-17-7.
"[A] judgment rendered on a contract automatically bears interest at the same rate evidenced by the contract. On all other judgments or on a judgment rendered on a contract that is silent as to an interest rate, the justice court judge has the authority to set a fair rate of interest to be earned on that judgment. However, if a judge does not set any interest to be earned by a judgment, it is implied that such a judgment does not earn any interest." Op. Atty. Gen. Aldridge, August 28, 1998.

§ 15-1-43 Judgment expires in 7 years unless properly renewed:

All actions founded on any judgment or decree rendered by any court of record in this state, shall be brought within seven (7) years next after the rendition of such judgment or decree, or last renewal of judgment or decree, whichever is later.
A judgment or decree can be renewed only if, at the time of renewal, the existing judgment or decree has not expired. A judgment or decree may be renewed by the filing with the clerk of the court that rendered such judgment or decree a Notice of Renewal of Judgment or Decree substantially in the following form:
NOTICE OF RENEWAL OF JUDGMENT OR DECREE
(a) Notice is given of renewal of judgment that was rendered and filed in this action as follows:
(i) Date that judgment was filed;

(ii) Case number of such judgment;
(iii) Judgment was taken against;
(iv) Judgment was taken in favor of;
(v) Current holder of such judgment;
(vi) Current amount owing of such judgment; and
(vii) Certification that at the time of the filing of the notice the judgment remains valid and has not been satisfied or barred.
(b) If applicable, that a Notice of Renewal of Judgment or Decree has been previously filed with the clerk of the court that rendered such judgment on:
The renewal of such judgment is effective as of the date of the filing of the Notice of Renewal with the clerk of the court that rendered such judgment. The renewal of judgment shall be treated in the same manner as the previously rendered judgment. The circuit clerk shall enroll the Notice of Renewal showing the date of the filing of the Notice of Renewal, and the lien of the renewal of such judgment continues from the date of the enrollment of the existing judgment. The right to renew a judgment in any other manner allowed by law instead of using the above Notice of Renewal remains unimpaired.
At the time of the filing of the Notice of Renewal of Judgment, the judgment creditor or his attorney shall make and file with the clerk of the court that rendered the judgment an affidavit setting forth the name and last-known post office address of the judgment debtor and the judgment creditor. Promptly upon the filing of the Notice of Renewal of Judgment, the clerk shall mail notice of the filing of the Notice of Renewal of Judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's attorney, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the Notice of Renewal of Judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the validity of the renewal of judgment if proof of mailing by the judgment creditor has been filed.

See also:

Quality Diesel Serv. v. Tiger Drilling Co., 190 So. 3d 860, 864 (Miss. 2016) ("We hold that where a party commences a garnishment proceeding at a time when the underlying judgment is still valid, the statute of limitations for actions on judgments is tolled as to that particular party as to funds—due to the judgment debtor—that actually were in the hands of the garnishee at the time the garnishment proceeding was initiated and at the time the underlying judgment was valid. A garnisher is not entitled to those funds, due to the judgment debtor, which came into the garnishee's hands only after the underlying judgment had lapsed.").

Grace v. Pierce, 90 So. 590, 592 (Miss. 1922) ("A valid judgment is essential to the validity of a garnishment proceeding, and when a judgment, upon which a writ of garnishment is founded is extinguished by the bar of the statute, the garnishment proceedings likewise fail. No effort was made to revive the judgments upon which these

garnishment proceedings were based, the garnishments proceedings were based, the garnishments had been allowed to lie dormant until the foundation upon which they rested had been swept away, and thereafter appellees had no valid claim to the funds in controversy.").

Young v. Hooker, 753 So. 2d 456, 460 (Miss. Ct. App. 1999) ("The running of the seven-year statute of limitations not only defeats and extinguishes any remedy of the judgment creditor, but also defeats and extinguishes the right itself, the debt in the present case. "The effective method to extend the judgment lien is by filing another suit upon the judgment before the expiration of [seven] years from the date of the rendition thereof." Kimbrough v. Wright, 231 Miss. 855, 857, 97 So.2d 362, 363 (1957).").

Mississippi Attorney General's opinions:

Renewal of judgments in justice courts.
"[T]he justice court clerk is not responsible for enrolling the Notice of Renewal with the circuit clerk. That, too, is the responsibility of the judgment creditor or his attorney." Op. Atty. Gen. Mullen, February 9, 2011.

§ 9-11-33 Setting aside any proceeding or judgment in a case:

A justice court judge may correct any errors or mistakes in any proceedings that are conducted before such judge or in the records of proceedings conducted before such judge. A justice court judge may set aside any proceeding or judgment in a case conducted before such judge upon a written order as may be just and proper after a proceeding in which the judge determines that good cause has been shown to support such order.

See also Levario v. State, 90 So. 3d 608, 612 (Miss. 2012) ("[Section] 9-11-33 does not impose filing deadlines or timing requirements.").

Mississippi Attorney General's opinions:

As deemed just and proper.
"[Under § 9-11-33], if the judge in the case, after a proceeding, determines that good cause exists to support a modification of the sentence he may enter a judgement that he deems is just and proper. The defendant would have the right to file a motion to modify the judgement." Op. Atty. Gen. Strait, December 5, 2008.

In a case conducted before such judge.
"While [§ 9-11-33] allows a justice court judge to set aside a judgment of a case heard before that same judge, there is no authority for a justice court judge to set aside a judgment in a case heard before another judge." Op. Atty. Gen. Cooper, July 3, 1997.

Good cause must be shown.
"[S]ection 9-11-33 of the Mississippi Code of 1972 applies to both civil and criminal judgments. Good cause must be shown the court before any judgment is set aside." Op. Atty. Gen. Bass, July 18, 1991.

501 POST-JUDGMENT ACTIONS

RJC 24 Post-judgment actions:

Unless authorized by law, no post-judgment action shall be instituted upon a judgment until expiration of ten (10) days after its entry.

§ 11-9-131 When execution is to issue:

An execution shall not issue on any judgment of a [justice court] until ten days after its rendition, unless the party recovering therein shall make and file an affidavit that he believes he will be in danger of losing his debt or demand by such delay, in which case execution shall issue immediately; but the opposite party shall not be deprived of his right of appeal within the time prescribed.

Mississippi Attorney General's opinions:

Exceptions to the ten day waiting period.
"[U]nless there is a statute that provides for execution without waiting the expiration of the 10 day period, you must wait until the expiration of ten days after the entry of judgment prior to the execution on the civil judgment including the issuance of a garnishment. However, Section 11-9-131 provides a method to abrogate the 10 day wait." Op. Atty. Gen. Beech, August 29, 2014.

§ 11-9-127 When judge is to issue execution:

[The justice court judge] when requested, [shall] issue execution against the goods and chattels, lands and tenements, of the party against whom judgment is rendered, for the amount of the judgment and costs, or costs alone, as the case may require, returnable to a day more than twenty (20) days after the rendition of the judgment, and not more than six (6) months after the issuance of the execution; and the execution may be directed to the proper officer of any county in this state.

§ 11-9-129 When judgment operates as lien:

Judgments rendered by [justice court judges] shall operate as a lien upon the property, real or personal, of the defendant or defendants therein, found or situated

in the county where rendered, or in any other county where the same may be, which is not exempt by law from execution, if an abstract of the judgment be filed with the clerk of the circuit court of the county wherein the property is situated, and entered upon the judgment roll, as in other cases of enrolled judgments. The lien shall commence from the date of enrollment, and the judgment may be enrolled and have the force and effect of a lien in all cases where an appeal is taken, as well as in other cases. And in the event of a reversal of the judgment of the justice's court, the clerk of the circuit court shall enter a memorandum to that effect on the judgment roll.

§ 13-3-111 When clerk is to issue execution:

The clerks of all courts of law or equity, after the adjournment of the court for the term shall, at the request and cost of the owner of the judgment or decree or his attorney, issue executions on all judgments and decrees rendered therein, and place the same in the hands of the sheriff of the county. The sheriff shall effectuate any execution on a judgment. If requested by such owner, they shall issue executions directed to the sheriff of any other county, and shall deliver the same to the owner or his attorney.

§ 13-3-113 Procedures for issuing writ:

Writs of execution shall bear date and be issued in the same manner as original process, and shall be made returnable on the first day of the next term of the court in which the judgment or decree was rendered, if there be fifteen days between the issuance and return thereof, and, if not, on the first day of the term next thereafter. Such execution may be directed to the sheriff or other proper officer of any county, who shall serve and execute the same, and make return thereof to the court in which the judgment or decree was rendered.

§ 13-3-115 When subsequent executions may issue:

If a first writ of execution shall not have been returned and shall not have been executed, the clerk may issue another execution at the cost of any party in whose favor the execution was issued, if such party shall desire to take out another execution.

§ 13-3-117 Issuing execution against several defendants:

When one judgment has been recovered against several defendants, execution shall issue thereon against all the defendants, and not otherwise.

§ 11-9-139 Stay of execution:

If the party against whom judgment is given, shall, within ten days thereafter,

procure some responsible person to appear before the justice, and in writing, to be entered on the docket of the justice and signed by such person, consent to become surety therefor, the justice shall grant a stay of execution for thirty days from the date of the judgment on all sums not exceeding fifty dollars and for sixty days on all sums over fifty dollars. In case the money be not paid at the expiration of such stay, execution shall issue against the principal and sureties, or either of them, for the principal, interest, and costs.

§ 11-9-141 Stay as waiver of errors:

A party obtaining a stay of execution shall thereby waive all errors in the judgment and abandon the right of appeal and certiorari.

502 EXAMINATION OF JUDGMENT DEBTOR

RJC 25 Enforcement of judgments:

(a) Statutory procedures to govern. Procedures to enforce a civil judgment shall be pursuant to the Mississippi Code and any applicable rules and policies of the Mississippi Supreme Court and the Administrative Office of Courts.

(b) Examining books, papers, and documents of judgment debtor. The judgment creditor may examine the judgment debtor and his/her books, papers, or documents pursuant to sections 13-1-261 through 13-1-271 of the Mississippi Code.

§ 13-1-261 How often examinations are allowed:

(1) To aid in the satisfaction of a judgment of more than One Hundred Dollars ($100.00), the judgment creditor may examine the judgment debtor, his books, papers or documents, upon any matter relating to his property as provided in Sections 13-1-261 through 13-1-271; except that no single judgment creditor may cause a judgment debtor to submit to examination under this section more than once in a period of six (6) months.

§ 13-1-261 Utilizing discovery procedures:

(2) In addition to the method of examination prescribed in subsection (1), the judgment creditor may, in the alternative, utilize the discovery procedures set forth in the Mississippi Rules of Civil Procedure for the purpose of examining the judgment debtor.

§ 13-1-263 Venue:

(1) Except as provided in subsection (2) of this section, the written motion for the examination of a judgment debtor shall be filed, and the proceedings conducted, in the court which rendered the judgment.
(2) If the judgment debtor is an individual who is domiciled in the state but not in the county where the judgment was rendered, or who has changed his domicile to another county after the institution of the suit, the written motion for his examination shall be filed, and the examination conducted, in a court of competent jurisdiction in the county of his then domicile. If the judgment debtor is a nonresident, the petition for his examination shall be filed, and the examination conducted, in a court of competent jurisdiction in any county where he may be found. In any case mentioned in this paragraph, a certified copy of the judgment shall be attached to the written motion for examination.

§ 13-1-265 Ordering judgment debtor to appear:

On ex parte written motion of the judgment creditor, personally or through his attorney, the court shall order the judgment debtor to appear in court for examination at a time fixed by the court, not less than five (5) days from the date of service on him of the motion and order, and to produce any books, papers, and other documents relating to his property described in the motion; provided, however, that satisfaction of the judgment shall discharge the judgment debtor from his responsibility to appear for the examination as ordered by the court.

§ 13-1-267 Judgment debtor to be sworn:

(1) The debtor shall be sworn to tell the truth in the same manner as a witness in a civil action.
(2) No testimony given by a debtor shall be used in any criminal proceeding against him, except for perjury committed at such examination.

§ 13-1-269 Assessing court costs:

Court costs in connection with the examination shall be taxed against the judgment debtor, except that if the court determines that the creditor invoked the remedy needlessly, the court may tax the costs against the creditor.

§ 13-1-271 Contempt for failure to comply:

If the motion and order have been served personally on the judgment debtor, and he refuses to appear for the examination or to produce his books, papers, or other documents when ordered to do so, or if he refuses to answer any question held pertinent by the court, he may be punished for contempt.

503 LEVY OF REAL AND PERSONAL PROPERTY

Governing laws:

Laws generally governing the levy of real and personal property include:

- Miss. Code Ann. § 13-3-123 (Levy of attachment on realty).
- Miss. Code Ann. § 13-3-125 (Levy upon personal property).
- Miss. Code Ann. § 13-3-127 (Levy on rights and credits).
- Miss. Code Ann. § 13-3-129 (Levy on corporate stock).
- Miss. Code Ann. § 13-3-131 (Levy on partner's interest).
- Miss. Code Ann. § 13-3-133 (Levy on judgments, money and similar interests).
- Miss. Code Ann. § 13-3-135 (Purchaser's ownership of defendant's interests).
- Miss. Code Ann. § 13-3-137 (Growing crop, levy prohibited).
- Miss. Code Ann. § 13-3-139 (Priority of execution lien).
- Miss. Code Ann. § 13-3-141 (Care of property by officer).
- Miss. Code Ann. § 13-3-143 (Manner of execution by executor).
- Miss. Code Ann. § 13-3-145 (Effect of death of one plaintiff).
- Miss. Code Ann. § 13-3-147 (Manner of execution by assignee).
- Miss. Code Ann. § 13-3-149 (Death of party after execution).
- Miss. Code Ann. § 13-3-151 (Execution against property of dead defendant).
- Miss. Code Ann. § 13-3-153 (Motion to revive judgment).
- Miss. Code Ann. § 13-3-155 (Execution on other court judgments).
- Miss. Code Ann. § 13-3-157 (Bond of indemnity may be required).
- Miss. Code Ann. § 13-3-159 (Remedy on indemnity bond).
- Miss. Code Ann. § 13-3-161 (Location of execution sales).
- Miss. Code Ann. § 13-3-163 (Advertizing sales of land).
- Miss. Code Ann. § 13-3-165 (Advertizing sale of personalty).
- Miss. Code Ann. § 13-3-167 (Time for perishable goods sales).
- Miss. Code Ann. § 13-3-169 (Mode of sale).
- Miss. Code Ann. § 13-3-171 (Land sold first in subdivision).
- Miss. Code Ann. § 13-3-173 (Adjournment of sale).
- Miss. Code Ann. § 13-3-175 (Writ of venditioni exponas).
- Miss. Code Ann. § 13-3-177 (Death of officer taking property).
- Miss. Code Ann. § 13-3-179 (Officer's representatives; refusal to deliver).
- Miss. Code Ann. § 13-3-181 (Examination of judgment-roll by officer).
- Miss. Code Ann. § 13-3-183 (Restoring money on execution injunction).
- Miss. Code Ann. § 13-3-185 (Discharge of liens, execution sale).
- Miss. Code Ann. § 13-3-187 (Conveyance of land, execution sale).
- Miss. Code Ann. § 13-3-189 (When title complete, justice's execution).
- Miss. Code Ann. § 19-25-37 (Executing and returning process).
- Miss. Code Ann. § 19-25-39 (Executing process, employment of power).
- Miss. Code Ann. § 19-25-41 (Failure to return execution).

See also Miss. Code Ann. § 1-3-41 ("Personal property" defined).

§ 13-3-151 Executing judgment if defendant dies:

After one year from the death of any defendant in a judgment for money, execution thereof may be had by leave of the court rendering the judgment, or of the judge thereof in vacation, upon cause shown, against any property on which such judgment was a lien at the time of the death of the defendant, and a sale of such property may be made in the same manner and with the same effect as if the defendant were living. In case of the death of the defendant in a judgment for the recovery of real or personal property, execution may be had without revival, in the same manner as if the defendant had not died.

§ 13-3-181 Determining priority of liens:

After the sale of any property by the sheriff or other officer on execution, before the money is paid over by him, he shall examine the judgment-roll to ascertain if there by any elder judgment or judgments, decree or decrees, enrolled against the defendant or defendants in execution, having a priority of lien. If there be, he shall apply the proceeds of the sale to the judgment or decree having the priority of lien, and return such application upon the execution. Should there by any dispute as to which judgment or decree has the priority of lien, the officer shall make a statement of the fact of the dispute, and return the same, with the execution and the money raised thereon, into the court to which the same is returnable, and the court shall, on motion and examination of the facts, determine to whom the money so raised on execution shall be paid.

504 GARNISHMENT

A process used to enforce a judgment:

"Garnishment is not a pure, independent action but instead is more in the nature of 'an ancillary or auxiliary proceeding, growing out of, and dependent on, another original or primary action or proceeding, . . .' Garnishment is a process which may be 'resorted to in aid of an execution for the enforcement of a judgment recovered in the principal action or proceeding, . . .'" First Mississippi Nat. Bank v. KLH Industries, Inc., 457 So. 2d 1333, 1337 (Miss. 1984).

§ 11-35-1 When clerk is to issue writ:

On the suggestion in writing by the plaintiff in a judgment or decree in any court upon which an execution may be issued, that any person, either natural or artificial, including the state, any county, municipality, school district, board or other political subdivision thereof, is indebted to the defendant therein, or has effects or property of the defendant in his, her or its possession, or knows of some

other person who is indebted to the defendant, or who has effects or property of the defendant in his, her or its possession, it shall be the duty of the clerk of such court to issue a writ of garnishment, directed to the sheriff or proper officer, commanding him to summon such person, the state, county, municipality, school district, board or other political subdivision thereof, as the case may be, as garnishee to appear at the term of court to which the writs of garnishment may be returnable, to answer accordingly.

§ 11-35-23 Writ to show amount of claim and court costs:

(2) The court issuing any writ of garnishment shall show thereon the amount of the claim of the plaintiff and the court costs in the proceedings and should at any time during the pendency of said proceedings in the court a judgment be rendered for a different amount, then the court shall notify the garnishee of the correct amount due by the defendant under said writ.

§ 11-35-9 Service of writ:

A writ of garnishment, . . . shall be served as a summons is required by law to be executed; but if the garnishee be not personally served, and make default, judgment nisi shall be rendered against him, and a scire facias awarded, returnable to the next term, unless the court be satisfied that the garnishee can be personally served at once, in which case it may be returnable instanter.

Mississippi Attorney General's opinions:

Service of garnishments on a corporation.
"It is our opinion that a defendant corporation may be served by serving any of the persons enumerated in Section 13-3-49, quoted above, i.e., the president or other head of the corporation, the cashier, secretary, treasurer, clerk, or agent of the corporation. A defendant (or garnishee) does not have the option of "refusing service". Refusing to accept service is equal to being served. Storey v. Ware, 35 Miss. 399 (1858). If a defendant (or garnishee) chooses to ignore such service he simply runs the risk of a default judgment being entered against him." Op. Atty. Gen. Pratt, July 27, 2007.

§ 11-35-11 Service upon government employees:

Service of writs of garnishment upon judgments against any officer or employee of the state, a county, a municipality, any state institution, board, commission or authority shall be effected as follows:
(1) In a case of garnishment against any employee of a state department, agency, board, commission, institution or other authority, the writ shall be served upon the department head, president of the institution or chairman or other presiding officer thereof. In case of a garnishment against a state officer, departmental head, president of an institution, director of a board or other head of any other agency or commission of the state

government, the writ shall be served upon the state auditor. In case of a garnishment against the state auditor, the writ shall be served upon the state treasurer, this being the only case in which the state treasurer is served with a writ of garnishment except where a garnishment is against an employee of the state treasurer.
(2) In case of a garnishment against any person who is now or may hereafter be a salaried officer or employee of a county, the writ shall be served upon the clerk of the chancery court of the county, except that in case of garnishment upon a judgment against such clerk the writ shall be served upon the sheriff of the county.
(3) In case of a garnishment against any person who is now or may hereafter be a salaried officer or employee of a county school district or a municipal separate school district, the writ shall be served upon the superintendent of the respective school district, except in the event the garnishment be against such superintendent the writ shall be served upon the president of the board of education or the board of trustees.
(4) In case of a garnishment against an officer or employee of a municipality, the writ shall be served upon the city, town or village clerk.

§ 11-35-13 Default judgment against state prohibited:

In no case shall judgment be rendered against the state, a county, a municipality or any state institution, board, commission or authority for default in failing to make answer to a writ served hereunder.

§ 11-35-23 What property is bound by writ:

(1)(a) Except for wages, salary or other compensation, all property in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall be bound by and subject to the lien of the judgment, decree or attachment on which the writ shall have been issued. If the garnishee shall surrender such property to the sheriff or other officer serving the writ, the officer shall receive the same and, in case the garnishment issued on a judgment or decree, shall make sale thereof as if levied on by virtue of an execution, and return the money arising therefrom to satisfy the judgment; and if the garnishment issued on an attachment, the officer shall dispose of the property as if it were levied upon by a writ of attachment. And any indebtedness of the garnishee to the defendant, except for wages, salary or other compensation, shall be bound from the time of the service of the writ of garnishment, and be appropriable to the satisfaction of the judgment or decree, or liable to be condemned in the attachment.
(b) If the garnishee is a bank or other financial institution and its indebtedness to the defendant consists of funds that the defendant has on deposit with the bank or other financial institution at the time of service of the writ of garnishment, then the garnishee shall be held to account for only such funds on deposit between the time of service of the writ of garnishment and the time of service of its answer to such writ, and the garnishee shall have no obligation to account for additional deposits accruing after the time of service of its answer. If the bank or other financial institution is not indebted to the defendant at the time of service of the writ of garnishment or does not have possession of property of the defendant at the time of service of such writ, then the bank or other

financial institution may serve its answer and thereafter shall not be held to account for any indebtedness that arises subsequent to service of its answer or property that may come into its hands subsequent to such service. The financial institution may submit its Answer of Indebtedness at any time within the thirty (30) days allowed for response.

§ 11-35-23 Wages and salary that are not bound:

(3)(a) Except for judgments, liens, attachments, fees or charges owed to the state or its political subdivisions; wages, salary or other compensation in the hands of the garnishee belonging to the defendant at the time of the service of the writ of garnishment shall not be bound by nor subject to the lien of the judgment . . . on which the writ shall have been issued when the writ of garnishment is issued on a judgment based upon a claim or debt that is less than One Hundred Dollars ($100.00), excluding court costs.

§ 11-35-23 Wages and salary that are bound:

(3)(b) If the garnishee be indebted or shall become indebted to the defendant for wages, salary or other compensation during the first thirty (30) days after service of a proper writ of garnishment, the garnishee shall pay over to the employee all of such indebtedness, and thereafter, the garnishee shall retain and the writ shall bind the nonexempt percentage of disposable earnings, as provided by Section 85-3-4, for such period of time as is necessary to accumulate a sum equal to the amount shown on the writ as due, even if such period of time extends beyond the return day of the writ. . . . .
. . .
(4) Wages, salaries or other compensation as used in this section shall mean wages, salaries, commissions, bonuses or other compensation paid for employment purposes only.

§ 11-35-23 If defendant's employment is terminated:

(3)(b) . . . Should the employment of the defendant for any reason be terminated with the garnishee, then the garnishee shall not later than fifteen (15) days after the termination of such employment, report such termination to the court and pay into the court all sums as have been withheld from the defendant's disposable earnings.

§ 11-35-23 Payments made to plaintiff or plaintiff's attorney:

(6) All payments made pursuant to a garnishment issued out of the justice court shall be made directly to the plaintiff or to the plaintiff's attorney as indicated by the plaintiff in his or her suggestion for writ of garnishment. The employer shall notify the court and the plaintiff or the plaintiff's attorney when a judgment is satisfied or when the employee is no longer employed by the employer.

§ 11-35-24 Multiple garnishments:

(1) Where more than one garnishment has been issued against an employee of a garnishee, such garnishee shall comply with the garnishment with which he was first served. In the event more than one (1) garnishment on an employee is received on the same day, the writ of garnishment which is the smallest amount shall be satisfied first. However, in every case, garnishments issued pursuant to court ordered child support shall have first priority, even if previous garnishments are in effect or pending.
(2) Any such conflicting or subsequent garnishments on an employee of the garnishee shall be returned to the court issuing such writ of garnishment with a statement by the garnishee that a previous garnishment is in effect. Such statement shall operate as a stay of the subsequent garnishment until satisfaction of any prior garnishments has been made.
(3) Upon satisfaction of the writ of garnishment in progress, the garnishee shall immediately begin collection of such writ of garnishment with next priority.
(4) Good faith compliance with this section shall release the garnishee from any liability for failure of compliance with this section.

§ 11-35-25 Garnishee's answer:

(1) Every person duly summoned as a garnishee shall answer on oath as to the following particulars, viz.:
(a) Whether he be indebted to the defendant or were so indebted at the time of the service of the writ on him, or have at any time since been so indebted; and, if so indebted, in what sum, whether due or not, and when due or to become due, and how the debt is evidenced, and what interest it bears;
(b) What effects of the defendant he has or had at the time of the service of the writ on him, or has had since, in his possession or under his control;
(c) Whether he knows or believes that any other person is indebted to the defendant; and, if so, whom, and in what amount, and where he resides; and
(d) Whether he knows or believes that any other person has effects of the defendant in his possession or under his control; and, if so, whom, and where he resides.
(2) In addition to answering as to the particulars in subsection (1) of this section, each person duly summoned as a garnishee in any case in which he be indebted to the defendant for wages, salary or other compensation shall answer on oath as to whether the defendant is an employee of the garnishee and, if so, the time interval between pay periods of the defendant including any specific day of a week or month on which such defendant is regularly paid.

§ 11-35-27 Time to file answer:

Except as otherwise provided in Section 11–35–23, garnishees shall, in all cases in the circuit or chancery court, answer on the first day of the return term, and, in the courts of

justices of the peace, they shall answer by noon on the return day of the writ, unless the court, for cause shown, shall grant further time; and, if upon the answer of any garnishee, it appear that there is any estate of the defendant in the hands of any person not summoned, an alias writ may at once be issued, to be levied on the property in the hands of such person, or he may be summoned as garnishee.

§ 11-35-29 If garnishee admits indebtedness:

If the garnishee admits indebtedness to or the possession of effects of the defendant, and he have not paid or delivered the same to the sheriff, judgment may be rendered against him in favor of the plaintiff for the amount of the debt admitted, or for the property, or the value thereof (to be assessed if necessary), admitted to be in his possession; but the judgment shall not be for a greater sum than the plaintiff's demand.

§ 11-35-31 If garnishee fails to answer summons or show cause:

If a garnishee, personally summoned, shall fail to answer as required by law, or if a scire facias on a judgment nisi be executed on him, and he fail to show cause for vacating it, the court shall enter a judgment against him for the amount of plaintiff's demand; and execution shall issue thereon, provided, however, that the garnishee may suspend the execution by filing a sworn declaration in said court showing the property and effects in his possession belonging to the debtor, and his indebtedness to the debtor, if any, or showing that there be none, if that be true; and by such act and upon a hearing thereon, the garnishee shall limit his liability to the extent of such property and effects in his hands, and such indebtedness due by him to the debtor, plus court costs and reasonable attorney's fees of the judgment creditor in said garnishment action.

§ 11-35-33 Claiming exemptions:

Any garnishee who answers admitting an indebtedness, or the possession of property due or belonging to the defendant, may show by his answer that he is advised and believes that the defendant does or will claim the debt or property, or some part thereof, as exempt from garnishment, levy, or sale. Upon the filing of such answer, the clerk or [justice court judge] shall issue a summons or make publication, if defendant be shown by oath to be absent from the state, for the defendant, notifying him of the garnishment and the answer, and requiring him to assert his right to the exemption. Proceedings against the garnishee shall be stayed until the question of the debtor's right to the exemption be determined. If the defendant fail to appear, judgment by default may be taken against him, adjudging that he is not entitled to the property or debt as exempt; but if he appear, the court shall, on his motion, cause an issue to be made up and tried between him and the plaintiff.

§ 11-35-35 If debt not yet due:

If a garnishee admit an indebtedness not then due, execution shall be stayed until its maturity; and if he admit the possession of goods or chattels of the defendant, such goods or chattels shall be delivered to the sheriff;

§ 11-35-37 Immunity of garnishee paying over:

If a garnishee shall pay over or deliver, in pursuance of the judgment or process of the court, any money or property belonging to the defendant, before notice of sale, assignment, or transfer thereof by the defendant to any other person, such garnishee shall not thereafter be liable for the debt or property to the vendee or assignee thereof.

§ 11-35-39 Pleading voidness of judgment:

The garnishee may plead that the judgment under which the writ of garnishment was issued is void, and if his plea be sustained, no judgment shall be rendered against him.

§ 11-35-41 Bringing in third party:

When a garnishee, by his answer or by affidavit at any time before final judgment against him, or after such judgment if he had no such notice before the judgment was rendered, shall show that he has been notified that another person claims title to or an interest in the debt or property, which has been admitted by him, or found on a trial to be due or to be in his possession, the court shall suspend all further proceedings, and cause a summons to issue or publication to be made for the person so claiming to appear and contest with the plaintiff the right to such money, debt, or property. In such case, if the answer admit an indebtedness, and the garnishee pay the money into court, he shall thereupon be discharged from liability to either party for the sum so paid. And whenever such garnishee shall by said answer or affidavit show that he has been notified that another person claims title to or interest in such debt or property, it shall be lawful for such third person of his own motion to come in and claim the debt or property, and the claim shall be tried as other claimant's issues are tried whether summons or publication has been made to bring him in or not.

§ 11-35-43 Trying third party claim:

If the claimant, being duly summoned, fail to appear, the court shall adjudge the money, debt, or property to the plaintiff. If he appear, he shall propound his claim to the money, debt, or property in writing under oath; and the plaintiff may take issue thereon, and the same shall be tried and determined as other issues. If the issue be found in favor of the plaintiff, judgment shall be rendered for him against the garnishee, and also for the costs of the interpleader against the claimant; but if the issue be found for the claimant,

judgment shall be rendered in his favor against the garnishee, and against the plaintiff for the costs. Where the garnishee has paid money into court, the judgment shall direct its payment to the party entitled thereto, and a judgment therefor shall not go against the garnishee.

§ 11-35-45 If plaintiff contests answer of garnishee:

If the plaintiff believe that the answer of the garnishee is untrue, or that it is not a full discovery as to the debt due by the garnishee, or as to the property in his possession belonging to the defendant, he shall, at the term when the answer is filed, unless the court grant further time, contest the same, in writing, specifying in what particular he believes the answer to be incorrect. Thereupon, the court shall try the issue at once, unless cause be shown for a continuance, as to the truth of the answer, and shall render judgment upon the facts found, when in plaintiff's favor, as if they had been admitted by the answer, but if the answer be found correct, the garnishee shall have judgment for costs against the plaintiff.

Mississippi Attorney General's opinions:

Method of notification of the contest on garnishee.
"[Section 11-35-45] is silent as to the method of notification of the contest on garnishee, but it is the responsibility of the plaintiff to provide notice in accordance with due process to the garnishee." Op. Atty. Gen. Carlisle, March 5, 2012.

§ 11-35-23 If garnishee's answer is deficient:

(3)(b) . . . If the plaintiff in garnishment contest the answer of the garnishee, as now provided by law in such cases, and proves to the court the deficiency or untruth of the garnishee's answer, then the court shall render judgment against the garnishee for such amount as would have been subject to the writ had the said sum not been released to the defendant; provided, however, any garnishee who files a timely and complete answer shall not be liable for any error made in good faith in determining or withholding the amount of wages, salary or other compensation of a defendant which are subject to the writ.

§ 11-35-47 If defendant contests answer of garnishee:

The defendant may contest, in writing, the answer of the garnishee, and may allege that the garnishee is indebted to him in a larger sum than he has admitted, or that he holds property of his not admitted by the answer, and shall specify in what particular the answer is untrue or defective. Thereupon an issue shall be made up and tried; but the plaintiff may take judgment for the sum admitted by the garnishee, or for the condemnation of the property admitted to be in his hands, notwithstanding the contest.

§ 11-35-49 Transfer to other counties:

Writs of garnishment, in all cases, may be issued to any county; but if the garnishee whose answer is contested, shall not be a resident of the county, then, upon an issue being made upon his answer, the venue of the trial of the issue may be changed, on his application, to the county of his residence. The court in which the issue is tried shall cause the facts found to be certified and returned with the issue to the court from which the writ issued, and judgment shall be entered thereupon as if the issue had there been tried.

§ 11-35-51 Judgment against garnishee:

If the issue in any case be found against the garnishee, judgment shall be rendered against him for the amount of the debt or money or property in his hands, which judgment shall be in favor of the plaintiff, if necessary to satisfy his judgment or claim against the defendant, or in favor of the defendant, if the judgment of the plaintiff have been satisfied, or for so much thereof as may remain after satisfying said judgment.

§ 11-35-55 Certain final judgments prohibited:

Final judgment upon a garnishment shall not go against a surety or accommodation indorser until judgment be rendered against the principal and the cosureties or prior indorsers who may be liable to judgment, if they be residents of the state.

§ 11-35-57 Executors and administrators:

Executors and administrators may be garnished for a debt due by their testator or intestate to the defendant; but judgment shall not be entered in such case against an executor or administrator until the lapse of six months after the grant of letters; and they may be garnished as having effects due to legatees or distributees; but judgment shall not be rendered against them in such case, except with their consent, until after a final settlement of the estate.

§ 11-35-59 If garnishee dies:

If the garnishee dies, like proceedings may be had as provided for in case of the death of a party to an action.

§ 11-35-61 Compensation allowed garnishee:

The garnishee shall be allowed for his attendance, out of the debts or effects in his possession, or against the plaintiff in attachment, judgment, or decree in case there be no debts or effects in his possession, provided he shall put in his answer within the time

prescribed by law, the pay and mileage of a juror, and, in exceptional cases rendering it proper, the court may allow the garnishee reasonable compensation additional to the foregoing and to be obtained in the same way.

505 EXEMPT PROPERTY

§ 85-3-1 Property exempt from execution:

There shall be exempt from seizure under execution or attachment:
(a) Tangible personal property of the following kinds selected by the debtor, not exceeding Ten Thousand Dollars ($10,000.00) in cumulative value:
(i) Household goods, wearing apparel, books, animals or crops;
(ii) Motor vehicles;
(iii) Implements, professional books or tools of the trade;
(iv) Cash on hand;
(v) Professionally prescribed health aids;
(vi) Any items of tangible personal property worth less than Two Hundred Dollars ($200.00) each.
Household goods, as used in this paragraph (a), means clothing, furniture, appliances, one (1) radio and one (1) television, one (1) firearm, one (1) lawnmower, linens, china, crockery, kitchenware, and personal effects (including wedding rings) of the debtor and his dependents; however, works of art, electronic entertainment equipment (except one (1) television and one (1) radio), jewelry (other than wedding rings), and items acquired as antiques are not included within the scope of the term "household goods." This paragraph (a) shall not apply to distress warrants issued for collection of taxes due the state or to wages described in Section 85-3-4.
(b)(i) The proceeds of insurance on property, real and personal, exempt from execution or attachment, and the proceeds of the sale of such property.
(ii) Income from disability insurance.
(c) All property in this state, real, personal and mixed, for the satisfaction of a judgment or claim in favor of another state or political subdivision of another state for failure to pay that state's or that political subdivision's income tax on benefits received from a pension or other retirement plan. As used in this paragraph (c), "pension or other retirement plan" includes:
(i) An annuity, pension, or profit-sharing or stock bonus or similar plan established to provide retirement benefits for an officer or employee of a public or private employer or for a self-employed individual;
(ii) An annuity, pension, or military retirement pay plan or other retirement plan administered by the United States; and
(iii) An individual retirement account.
(d) One (1) mobile home, trailer, manufactured housing, or similar type dwelling owned and occupied as the primary residence by the debtor, not exceeding a value

of Thirty Thousand Dollars ($30,000.00); in determining this value, existing encumbrances on the dwelling, including taxes and all other liens, shall first be deducted from the actual value of the dwelling. A debtor is not entitled to the exemption of a mobile home as personal property who claims a homestead exemption under Section 85-3-21, and the exemption shall not apply to collection of delinquent taxes under Sections 27-41-101 through 27-41-109.

(e) Assets held in, or monies payable to the participant or beneficiary from, whether vested or not, (i) a pension, profit-sharing, stock bonus or similar plan or contract established to provide retirement benefits for the participant or beneficiary and qualified under Section 401(a) [FN1], 403(a), or 403(b) [FN2] of the Internal Revenue Code (or corresponding provisions of any successor law), including a retirement plan for self-employed individuals qualified under one of such enumerated sections, (ii) an eligible deferred compensation plan described in Section 457(b) [FN3] of the Internal Revenue Code (or corresponding provisions of any successor law), or (iii) an individual retirement account or an individual retirement annuity within the meaning of Section 408 [FN4] of the Internal Revenue Code (or corresponding provisions of any successor law), including a simplified employee pension plan, or (iv) a Roth individual retirement account within the meaning of Section 408A of the Internal Revenue Code (or corresponding provisions of any successor law).

(f) Monies paid into or, to the extent payments out are applied to tuition or other qualified higher education expenses at eligible educational institutions, as defined in Section 529 [FN5] of the Internal Revenue Code or corresponding provisions of any successor law, monies paid out of the assets of and the income from any validly existing qualified tuition program authorized under Section 529 of the Internal Revenue Code or corresponding provisions of any successor law, including, but not limited to, the Mississippi Prepaid Affordable College Tuition (MPACT) Program established under Sections 37-155-1 through 37-155-27 and the Mississippi Affordable College Savings (MACS) Program established under Sections 37-155-101 through 37-155-125.

(g) The assets of a health savings account, including any interest accrued thereon, established pursuant to a health savings account program as provided in the Health Savings Accounts Act (Sections 83-62-1 through 83-62-9).

(h) In addition to all other exemptions listed in this section, there shall be an additional exemption of property having a value of Fifty Thousand Dollars ($50,000.00) of whatever type, whether real, personal or mixed, tangible or intangible, including deposits of money, available to any Mississippi resident who is seventy (70) years of age or older.

(i) An amount not to exceed Five Thousand Dollars ($5,000.00) of earned income tax credit proceeds.

(j) An amount not to exceed Five Thousand Dollars ($5,000.00) of federal tax refund proceeds.

(k) An amount not to exceed Five Thousand Dollars ($5,000.00) of state tax refund proceeds.

(l) Nothing in this section shall in any way affect the rights or remedies of the

holder or owner of a statutory lien or voluntary security interest.

§ 85-3-2 Federal exemptions that are prohibited:

In accordance with the provisions of Section 522(b) of the Bankruptcy Reform Act of 1978, as amended (11 U.S.C.S. 522(b)), residents of the State of Mississippi shall not be entitled to the federal exemptions provided in Section 522(d) of the Bankruptcy Reform Act of 1978, as amended (11 U.S.C.S. 522(d)). Nothing in this section shall affect the exemptions given to individuals of Mississippi by the Constitution and statutes of the State of Mississippi.

§ 85-3-3 Demand for selecting exempt property:

Where an officer shall be about to levy an execution or attachment on personal property, some of which shall be claimed as exempt, he shall demand of the defendant that he make selection of such property as is exempt to him and in reference to which he has the right of selection; and the defendant shall then and there make his selection, or, failing to do so, the officer shall make it for him, and any selection so made shall be conclusive on the defendant.

§ 85-3-4 Wages, salaries or other compensation:

(1) The wages, salaries or other compensation of laborers or employees, residents of this state, shall be exempt from seizure under attachment, execution or garnishment for a period of thirty (30) days from the date of service of any writ of attachment, execution or garnishment.
(2) After the passage of the period of thirty (30) days described in subsection (1) of this section, the maximum part of the aggregate disposable earnings (as defined by section 1672(b) of Title 15, United States Code Annotated) of an individual that may be levied by attachment, execution or garnishment shall be:
(a) In the case of earnings for any workweek, the lesser amount of either,
(i) Twenty-five percent (25%) of his disposable earnings for that week, or
(ii) The amount by which his disposable earnings for that week exceed thirty (30) times the federal minimum hourly wage (prescribed by section 206 (a)(1) of Title 29, United States Code Annotated) in effect at the time the earnings are payable; or
(b) In the case of earnings for any period other than a week, the amount by which his disposable earnings exceed the following “multiple” of the federal minimum hourly wage which is equivalent in effect to that set forth in subparagraph (a)(ii) of this subsection (2): The number of workweeks, or fractions thereof multiplied by thirty (30) multiplied by the applicable federal minimum wage.
(3)(a) The restrictions of subsection (1) and (2) of this section do not apply in the case of:
(i) Any order for the support of any person issued by a court of competent jurisdiction or in accordance with an administrative procedure, which is

established by state law, which affords substantial due process, and which is subject to judicial review.
(ii) Any debt due for any state or local tax.
(b) Except as provided in subparagraph (b)(iii) of this subsection (3), the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed:
(i) Where such individual is supporting his spouse or dependent child (other than a spouse or child with respect to whose support such order is used), fifty percent (50%) of such individual's disposable earnings for that week; and
(ii) Where such individual is not supporting such a spouse or dependent child described in subparagraph (b)(i) of this subsection (3), sixty percent (60%) of such individual's disposable earnings for that week;
(iii) With respect to the disposable earnings of any individual for that workweek, the fifty percent (50%) specified in subparagraph (b)(i) of this subsection (3) shall be deemed to be fifty-five percent (55%) and the sixty percent (60%) specified in subparagraph (b)(ii) of this subsection (3) shall be deemed to be sixty-five percent (65%), if and to the extent that such earnings are subject to garnishment to enforce a support order with respect to a period which is prior to the period of twelve (12) weeks which ends with the beginning of such workweek.

§ 85-3-5 Demand for security bond:

If any sheriff or other officer shall levy or be about to levy an execution . . . on any personal property claimed as exempt, and a doubt shall arise as to the liability of the property to be sold, he may demand of the plaintiff a bond, with sufficient sureties, payable to such officer, in a sufficient penalty, conditioned to indemnify and save harmless the officer against all damages which he may sustain in consequence of the seizure or sale of the property, and to pay the defendant all damages which he may sustain in consequence of the seizure or sale; and if such bond be not given, after reasonable notice, in writing, from the officer to the plaintiff, his agent or attorney, that it is required, the officer may refuse to levy, or, having levied, may dismiss the levy; but if the required bond be given, the officer shall seize and sell or dispose of the property according to the command of the process in his hands, and shall return the bond with the execution . . . . If an officer shall seize personal property exempt from execution, he shall be liable to an action at the suit of the owner for all damages sustained thereby, unless he have taken an indemnifying bond.

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CHAPTER 6

LANDLORD AND TENANT

600 RESIDENTIAL LANDLORD AND TENANT ACT

601 LANDLORD AND TENANT (TITLE 89, CHAPTER 7)

When Title 89, Chapter 7 is applicable for removal of tenant
Tenant holding over after notice to pay double the rent
Proceedings against holdover tenant
Oath or affirmation of facts authorizing removal
When judge is to issue summons
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602 SELF-HELP EVICTIONS

Self-help defined
When landlord may re-enter premises
Landlord may not seize property of defendant

§ 89-8-1 Statutory title:

This chapter shall be known and may be cited as the "Residential Landlord and Tenant Act."

§ 89-8-3 Applies to any rental agreement for a dwelling unit:

(1) [The Residential Landlord and Tenant Act] shall apply to, regulate and determine rights, obligations and remedies under any rental agreement entered into after July 1, 1991, wherever made, for a dwelling unit located within this state.

§ 89-8-3 In addition to other rights, obligations and remedies:

(1) The rights, obligations and remedies of [the Residential Landlord and Tenant Act] shall be in addition to all other rights, obligations and remedies provided by law and shall not alter or abridge the rights, obligations and remedies available to residential landlords and tenants pursuant to Sections 89-7-1 through 89-7-125.

§ 89-8-3 What arrangements are not governed:

(2) The following arrangements are not governed by [the Residential Landlord and Tenant Act]:
(a) Residence at an institution, public or private, if incidental to detention or the provision of medical, geriatric, educational, counseling, religious or similar service;
(b) Occupancy under a contract of sale of a dwelling unit or the property of which it is a part, if the occupant is the purchaser or a person who succeeds to his interest;
(c) Occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;
(d) Transient occupancy in a hotel, motel or lodgings;
(e) Occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative; or
(f) Occupancy under a rental agreement covering premises used by the occupant primarily for agricultural purposes or when the occupant is performing agricultural labor for the owner and such premises are rented for less than fair rental value.

§ 89-8-5 Waiver of rights, duties or remedies generally not allowed:

In any agreement, oral or written, for the rental of real property as a dwelling place, a landlord or tenant may not agree to waive or otherwise forego any of the rights, duties or remedies under [the Residential Landlord and Tenant Act], except

as otherwise provided by [the Residential Landlord and Tenant Act].

§ 89-8-5 Prohibited rental agreement provisions:

No rental agreement may provide that the tenant or the landlord:
(a) Authorizes any person to confess judgment on a claim arising out of the rental agreement; or
(b) Agrees to the exculpation or limitation of any liability of the landlord arising as a result of the landlord's willful misconduct or the costs connected therewith.

§ 89-8-7 Definitions:

(1) Subject to additional definitions contained in subsequent sections of [the Residential Landlord and Tenant Act] which apply to specific sections or parts thereof, and unless the context otherwise requires, in [the Residential Landlord and Tenant Act]:
(a) “Building and housing codes” includes any law, ordinance, or governmental regulation concerning fitness for habitation, construction, maintenance, operation, occupancy or use of any premises or dwelling unit;
(b) “Dwelling unit” means a structure or the part of a structure that is used as a home, residence or sleeping place by one (1) person who maintains a household or by two (2) or more persons who maintain a common household;
(c) “Good faith” means honesty in fact in the conduct of the transaction concerned and observation of reasonable community standards of fair dealing;
(d) “Landlord” means the owner, lessor or sublessor of the dwelling unit or the building of which it is a part, or the agent representing such owner, lessor or sublessor;
(e) “Organization” includes a corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership or association, two (2) or more persons having a joint or common interest, and any other legal or commercial entity;
(f) “Owner” means one or more persons, jointly or severally, in whom is vested (i) all or part of the legal title to property or (ii) all or part of the beneficial ownership and a right to present use and enjoyment of the premises, and the term includes a mortgagee in possession;
(g) “Premises” means a dwelling unit and the structure of which it is a part, facilities and appurtenances therein, and grounds, areas and facilities held out for the use of tenants generally or whose use is promised to the tenant;
(h) “Rent” means all payments to be made to the landlord under the rental agreement, including any late fees that are required to be paid under the rental agreement by a defaulting tenant;
(i) “Rental agreement” means all agreements, written or oral, except to the extent an agreement under this chapter or Chapter 7, Title 89, Mississippi Code of 1972, must be in writing, and valid rules and regulations adopted under Section 89–8–11 embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises;

(j) “Tenant” means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others;
(k) “Qualified tenant management organizations” means any organization incorporated under the Mississippi Nonprofit Corporation Act, a majority of the directors of which are tenants of the housing project to be managed under a contract authorized by this section and which is able to conform to standards set by the United States Department of Housing and Urban Development as capable of satisfactorily performing the operational and management functions delegated to it by the contract.

§ 89-8-7 Notice to landlord's agent:

(2) For purposes of giving any notice required under [the Residential Landlord and Tenant Act], notice given to the agent of the landlord is equivalent to giving notice to the landlord. The landlord may contract with an agent to assume all the rights and duties of the landlord under [the Residential Landlord and Tenant Act]; provided, however, that such a contract does not relieve the landlord of ultimate liability in regard to such rights and duties.

§ 89-8-9 Good faith obligation to perform duties:

Every duty under [the Residential Landlord and Tenant Act] and every act which must be performed as a condition precedent to the exercise of a right or remedy under [the Residential Landlord and Tenant Act], including the landlord's termination of a tenancy or nonrenewal of a lease, imposes an obligation of good faith in its performance or enforcement.

§ 89-8-11 When adopted rules and regulations are enforceable:

(1) A landlord may, from time to time, adopt rules or regulations, however described, concerning the tenant's use and occupancy of the premises. They are enforceable against the tenant only if:
(a) Their purpose is to promote the convenience, safety or welfare of the tenants in the premises, preserve the landlord's property from abuse, or make a fair distribution of services and facilities provided for the tenants generally;
(b) They are reasonably related to the purpose for which they are adopted;
(c) They apply to all tenants in the premises in a fair manner;
(d) They are sufficiently explicit in their prohibition, direction or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply;
(e) They are not for the purpose of evading the obligations of the landlord.

§ 89-8-11 Modifications of use and occupancy:

(2) A rule or regulation adopted or amended after the tenant enters into the rental agreement is enforceable against the tenant if reasonable notice of its adoption or amendment is given to the tenant and it does not work a substantial modification of the rental agreement.

§ 89-8-11 Tenant to comply with bylaws:

(3) If the dwelling unit is an apartment in a horizontal property regime, the tenant shall comply with the bylaws of the association of the apartment owners; and if the dwelling unit is an apartment in a cooperative housing corporation, the tenant shall comply with the bylaws of the corporation.

§ 89-8-11 To be occupied as a dwelling unit unless otherwise agreed:

(4) Unless otherwise agreed, the tenant shall occupy his dwelling unit only as a dwelling unit.

§ 89-8-13 When landlord may terminate the tenancy:

(1) If there is a material noncompliance by the tenant with the rental agreement or the obligations imposed by Section 89-8-25, the landlord may terminate the tenancy as set out in subsection (3) of this section or resort to any other remedy at law or in equity except as prohibited by [the Residential Landlord and Tenant Act].

§ 89-8-13 When tenant may terminate the tenancy:

(2) If there is a material noncompliance by the landlord with the rental agreement or the obligations imposed by Section 89-8-23, the tenant may terminate the tenancy as set out in subsection (3) of this section or resort to any other remedy at law or in equity except as prohibited by [the Residential Landlord and Tenant Act].

§ 89-8-13 Written notice to party in breach and effect:

(3) The nonbreaching party may deliver a notice to the party in breach in writing, or by email or text message if the breaching party has agreed in writing to be notified by email or text message, specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than fourteen (14) days after receipt of the notice if the breach is not remedied within a reasonable time not in excess of fourteen (14) days; and the rental agreement shall terminate and the tenant shall surrender possession as provided in the notice subject to the following:
(a) If the breach is remediable by repairs, the payment of damages, or otherwise, and the

breaching party adequately remedies the breach before the date specified in the notice, the rental agreement shall not terminate;
(b) In the absence of a showing of due care by the breaching party, if substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within six (6) months, the nonbreaching party may terminate the rental agreement upon at least fourteen (14) days' notice in writing, or by email or text message if the breaching party has agreed in writing to be notified by email or text message, specifying the breach and the date of termination of the rental agreement;
(c) Neither party may terminate for a condition caused by his own deliberate or negligent act or omission or that of a member of his family or other person on the premises with his consent.

§ 89-8-13 Landlord to return prepaid and unearned rent and security:

(4) If the rental agreement is terminated, the landlord shall return all prepaid and unearned rent and security recoverable by the tenant under Section 89-8-21.

§ 89-8-13 Other remedy for landlord on nonpayment of rent:

(5)(a) If the material noncompliance by the tenant is the nonpayment of rent pursuant to the rental agreement, the landlord shall not be required to deliver fourteen (14) days' notice as provided by subsection (3) of this section. In such event, the landlord may seek removal of the tenant from the premises in the manner and with the notice prescribed by Chapter 7, Title 89, Mississippi Code of 1972.
(b) Any justice court judge or other judge presiding over a hearing in which a landlord seeks to remove a tenant for the nonpayment of rent shall abide by the provisions of the rental agreement that was signed by the landlord and the defaulting tenant.

§ 89-8-13 Disposition of personal property:

(6) Disposition of personal property, including any manufactured home, of a tenant remaining on the landlord's premises after the tenant has been removed from the premises shall be governed by Section 89-7-35(2) or Section 89-7-41(2).

§ 89-8-15 When tenant entitled to be reimbursed for repairs:

(1) If, within thirty (30) days after written notice to the landlord of a specific and material defect which constitutes a breach of the terms of the rental agreement or of the obligation of the landlord under Section 89-8-23, the landlord fails to repair such defect, the tenant:
(a) May repair such defect himself; and
(b) Except as otherwise provided in subsection (2) of this section, shall be entitled to reimbursement of the expenses of such repairs within forty-five (45) days after submission to the landlord of receipted bills for such work, provided that:
(i) The tenant has fulfilled his affirmative obligations under Section 89-8-25;

(ii) The expenses incurred in making such repairs do not exceed an amount equal to one (1) month's rent;
(iii) The tenant has not exercised the remedy provided by this section in the six (6) months immediately preceding; and
(iv) The tenant is current in his rental payment.

§ 89-8-15 Reimbursement limits:

(2) A tenant shall not be entitled to be reimbursed for repairs made pursuant to this section in an amount greater than the usual and customary charge for such repairs.

§ 89-8-15 Repairs affecting more than one (1) dwelling unit:

(3) Before correcting a condition affecting facilities shared by more than one (1) dwelling unit, the tenant shall notify all other tenants sharing such facilities of his plans and shall so arrange the work as to create the least practicable inconvenience to the other tenants.

§ 89-8-15 Costs of repair may be offset against future rent:

(4) The cost of repairs made by a tenant pursuant to this section may be offset against future rent.

§ 89-8-15 Costs of repair not a lien against the real property:

(5) No provision of this section shall be construed to grant a lien against the real property.

§ 89-8-17 Rights of landlord upon expiration of rental agreement:

Notwithstanding the provisions of Section 89-8-13, the landlord may, at any time after the expiration of a rental agreement, recover possession of the dwelling unit, cause the tenant to quit the dwelling unit involuntarily, demand an increase in rent or decrease the services to which the tenant has been entitled in accordance with any other provisions of [the Residential Landlord and Tenant Act], if such actions by the landlord did not have the dominant purpose of retaliation against the tenant for his actions authorized under [the Residential Landlord and Tenant Act] and the landlord received written notice of each condition which was the subject of such actions of the tenant.

§ 89-8-19 Length of tenancy:

(1) Unless the rental agreement fixes a definite term a tenancy shall be week to week in case of a tenant who pays weekly rent, and in all other cases month to month.

§ 89-8-19 Terminating a week-to-week tenancy:

(2) The landlord or the tenant may terminate a week-to-week tenancy by written notice given to the other at least seven (7) days prior to the termination date.

§ 89-8-19 Terminating a month-to-month tenancy:

(3) The landlord or the tenant may terminate a month-to-month tenancy by a written notice given to the other at least thirty (30) days prior to the termination date.

§ 89-8-19 When there is a substantial health and safety violation:

(4) Notwithstanding the provisions of this section or any other provision of [the Residential Landlord and Tenant Act] to the contrary, notice to terminate a tenancy shall not be required to be given when the landlord or tenant has committed a substantial violation of the rental agreement or [the Residential Landlord and Tenant Act] that materially affects health and safety.

§ 89-8-21 What constitutes a security deposit:

(1) Any payment or deposit of money, the primary function of which is to secure the performance of a rental agreement or any part of such an agreement, other than a payment or deposit, including an advance payment of rent, made to secure the execution of a rental agreement shall be governed by the provisions of this section.

§ 89-8-21 Security deposit to be held by landlord for the tenant:

(2) Any such payment or deposit of money shall be held by the landlord for the tenant who is a party to such agreement. The claim of a tenant to such payment or deposit shall be governed by the provisions of this section. The claim of a tenant to such payment or deposit shall be prior to the claim of any creditor of the landlord.

§ 89-8-21 When landlord asserts a claim on security deposit:

(3) The landlord, by written notice delivered to the tenant, may claim of such payment or deposit only such amounts as are reasonably necessary
to remedy the tenant's defaults in the payment of rent,
to repair damages to the premises caused by the tenant, exclusive of ordinary wear and tear,
to clean such premises upon termination of the tenancy, or
for other reasonable and necessary expenses incurred as the result of the tenant's default, if the payment or deposit is made for any or all of those specific purposes. The written notice by which the landlord claims all or any portion of such payment or deposit shall itemize the amounts claimed by such landlord. Any remaining portion of such payment or deposit shall be returned to the tenant no later than forty-five (45) days after the termination of his tenancy, the delivery of possession and demand by the tenant.

§ 89-8-21 Damages for wrongful retention of security deposit:

(4) The retention by a landlord or transferee of a payment or deposit or any portion thereof, in violation of this section and with absence of good faith, may subject the landlord or his transferee to damages not to exceed Two Hundred Dollars ($200.00) in addition to any actual damages.

§ 89-8-23 Landlord's obligations:

(1) A landlord shall at all times during the tenancy:
(a) Comply with the requirements of applicable building and housing codes materially affecting health and safety;
(b) Maintain the dwelling unit, its plumbing, heating and/or cooling system, in substantially the same condition as at the inception of the lease, reasonable wear and tear excluded, unless the dwelling unit, its plumbing, heating and/or cooling system is damaged or impaired as a result of the deliberate or negligent actions of the tenant.

See also Sweatt v. Murphy, 733 So. 2d 207, 209 (Miss. 1999) ("This court has never interpreted the RLTA as constituting a basis for holding a landlord negligent per se for all housing code violations, and such an interpretation of the RLTA would lead to inequitable and extreme results."); Cappaert v. Junker, 413 So. 2d 378, 380 (Miss. 1982) ("In leases involving residential property leased to multiple tenants, the lessor, with respect to common areas, has the duty to use reasonable care to keep the common areas reasonably safe and is liable for damages for failure to perform the duty.").

§ 89-8-23 If defect is caused by tenant:

(2) No duty on the part of the landlord shall arise under this section in connection with a defect which is caused by the deliberate or negligent act of the tenant or persons on the premises with the tenant's permission.
. . .
(4) No duty on the part of the landlord shall arise under this section in connection with a defect which is caused by the tenant's affirmative act or failure to comply with his obligations under Section 89-8-25.

§ 89-8-23 Agreement to perform landlord's duties:

(3) Subject to the provisions of Section 89-8-5, the landlord and tenant may agree in writing that the tenant perform some or all of the landlord's duties under this section, but only if the transaction is entered into in good faith.

§ 89-8-25 Tenant’s obligations:

A tenant shall:
(a) Keep that part of the premises that he occupies and uses as clean and as safe as the condition of the premises permits;
(b) Dispose from his dwelling unit all ashes, rubbish, garbage and other waste in a clean and safe manner in compliance with community standards;
(c) Keep all plumbing fixtures in the dwelling unit used by the tenant as clean as their condition permits;
(d) Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air conditioning and other facilities and appliances, including elevators, in the premises;
(e) Not deliberately or negligently destroy, deface, damage, impair or remove any part of the premises or knowingly permit any other person to do so;
(f) Conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of their premises;
(g) Inform the landlord of any condition of which he has actual knowledge which may cause damage to the premises;
(h) To the extent of his legal obligation, maintain the dwelling unit in substantially the same condition, reasonable wear and tear excepted, and comply with the requirements of applicable building and housing codes materially affecting health and safety;
(i) Not engage in any illegal activity upon the leased premises as documented by a law enforcement agency.

§ 89-8-27 Housing authorities contracts:

Any county, municipality, regional housing authority or local housing authority in the state may make application to and contract with qualified tenant management organizations for the operation and management of housing projects of the authority as a means of reducing vacancies, reducing administrative costs and creating jobs from the establishment of maintenance teams. Such counties, municipalities, regional housing authorities or local housing authorities shall have the authority to sell public housing units to such tenant management organizations, provided that such sale is in compliance with any applicable federal laws and regulations and any applicable state laws and regulations.

§ 89-8-29 Termination of lease by co-signer on death of lessee:

(1) This section shall be known and may be cited as the "Derrick Beard Act."
(2) Any cosigner of a lease of a residential premises may terminate, and is presumed to have terminated, the lease before its expiration date upon the death of the lessee or, if there is more than one (1) lessee, upon the death of all lessees. The cosigner must provide notice to the lessor within thirty (30) days of the death of the lessee, or upon the death of all the lessees, if he or she chooses not to terminate the lease.
(3) The termination of a lease under this section shall not relieve the lessee's estate or lessee's cosigner from liability for:
(a) The payment of rent or other sums owed before the lessee's death or the death of all lessees;
(b) The payment of rent or other sums owed for the remainder of the month or other thirty-day period during which the death occurred; or
(c) The payment of amounts necessary to restore the premises to its condition at the commencement of the tenancy, ordinary wear and tear excepted.
(4) Any attempted waiver by a lessor and lessee or lessee's cosigner, by contract or otherwise, of the right of termination provided by this section shall be void and unenforceable.
(5) The provisions of this section shall apply to leases entered into or renewed from and after July 1, 2011.

When Title 89, Chapter 7 is applicable for removal of tenant:

The Residential Landlord and Tenant Act provides in part: "(5)(a) If the material noncompliance by the tenant is the nonpayment of rent pursuant to the rental agreement, the landlord shall not be required to deliver fourteen (14) days' notice as provided by subsection (3) of this section. In such event, the landlord may seek removal of the tenant from the premises in the manner and with the notice prescribed by Chapter 7, Title 89, Mississippi Code of 1972." *See* Miss. Code Ann. § 89-8-13; Wilson v. Wood, 36 So. 609 (Miss. 1904) ("One invoking this harsh and summary statutory proceeding must strictly comply with every provision of law applicable thereto.").

§ 89-7-25 Tenant holding over after notice to pay double the rent:

When a tenant, being lawfully notified by his landlord, shall fail or refuse to quit the demised premises and deliver up the same as required by the notice, or when a tenant shall give notice of his intention to quit the premises at a time specified, and shall not deliver up the premises at the time appointed, he shall, in either case, thenceforward pay to the landlord double the rent which he should otherwise have paid, to be levied, sued for, and recovered as the single rent before the giving of notice could be; and double rent shall continue to be paid during all the time the tenant shall so continue in possession.

See also Murphree v. Aberdeen-Monroe County Hospital, 671 So. 2d 1300, 1303-04 (Miss. 1996) ("[An action against a hold over tenant is separate and distinct from an action based on the lease agreement."); Mississippi State Department of Public Welfare v. Howie, 449 So. 2d 772, 778 (Miss. 1984) ("We now hold that § 89-7-25 was intended by the legislature to provide the sole action for damages as the result of a tenant's holdover."); Crechale & Polles, Inc. v. Smith, 295 So. 2d 275, 278 (Miss. 1974) ("[O]nce a landlord elects to treat a tenant as a trespasser and refuses to extend the lease on a month-to-month basis, but fails to pursue his remedy of ejecting the tenant, and accepts monthly checks for rent due, he in effect agrees to an extension of the lease on a month-to-month basis.").

§ 89-7-27 Proceedings against holdover tenant:

A tenant or lessee at will or at sufferance, or for part of a year, or for one or more years, of any houses, lands, or tenements, and the assigns, undertenants, or legal representatives of such tenant or lessee, shall be removed from the premises by the judge of the county court, any justice of the peace of the county, or by the mayor or police justice of any city, town, or village where the premises, or some part thereof, are situated, in the following cases, to wit:
First. Where such tenant shall hold over and continue in possession of the demised premises, or any part thereof, after the expiration of his term, without the permission of

the landlord.
Second. After any default in the payment of the rent pursuant to the agreement under which such premises are held, and when complete satisfaction of the rent and any late fees due cannot be obtained by distress of goods, and three (3) days' notice, in writing, requiring the payment of such rent or the possession of the premises, shall have been served by the person entitled to the rent on the person who owes the rent.
Third. If a written agreement between the landlord and tenant exists, any event calling for eviction in the agreement may trigger the eviction process under this section. Notice of default by email or text message is proper if the party has agreed in writing to be notified by that means.

Mississippi Attorney General's opinion:

Removal of mobile home.
When a plaintiff rents a lot to a mobile home owner and needs to have the mobile home removed along with the owner, can that be filed in Justice Court? If so, what is the procedure? In response, Title 89, Chapter 7 of the Mississippi Code of 1972 provides for the procedures to be used to remove a tenant who has rented property and placed a mobile home on that property. Specifically, Sections 89-7-23 through 89-7-41 provide for the removal of a tenant is such a situation. Section 89-7-27 provides that an action to remove the tenant and his mobile home may be filed in the justice court of the county in which the property is located. Op. Atty. Gen. Parker, October 10, 2003.

§ 89-7-29 Oath or affirmation of facts authorizing removal:

The landlord or lessor, his legal representatives, agents, or assigns, in order to have the benefit of such proceedings, shall present to the court a sworn affidavit that contains the facts which, according to Section 89–7–27, require the removal of the tenant, describing in the affidavit the premises claimed and the amount of rent and any late fees due and when payable, and that the necessary notice has been given to terminate such tenancy. These facts shall be based on the rental agreement signed or agreed to by the landlord or lessor, his legal representatives, agents, or assigns, and the tenant. Upon receipt of the sworn affidavit, the court shall initiate the removal of the tenant for the nonpayment of rent or other event of default contained in any written agreement between the parties, as specified in the affidavit.

Mississippi Attorney General's opinions:

Complaint on the amount of rent due.
"[T]he complaint must include the amount of rent past due and may include a claim for rent not due on the date of filing that will have accrued as of the date of the judgment rendered by the court. . . . [T]he judgment cannot include damages for rent that accrue after the date of judgment." Op. Atty. Gen. Anderson, July 27, 2012.

§ 89-7-31 When judge is to issue summons:

(1) On receiving the affidavit, the county judge, justice court judge, municipal judge, or other officer shall issue a summons, directed to the sheriff or any constable of the county, or the marshal of the municipality in which the premises, or some part thereof, are situated, describing the premises, and commanding him to require the person in possession of the same or claiming the possession thereof, immediately to remove from the premises, or to show cause before the justice court judge or other officer, on a day to be named in the summons, why possession of the premises should not be delivered to the applicant.
(2) In addition to other information required for the summons, the summons shall state: "At the hearing, a judge will determine if the landlord is granted exclusive possession of the premises. If the judge grants possession of the premises to the landlord and you do not remove your personal property, including any manufactured home, from the premises before the date and time ordered by the judge, then the landlord may dispose of your personal property without any further legal action."

§ 89-7-33 How summons is to be served:

Such summons shall be served as a summons is served in other cases, if the tenant can be found; if not, then by putting up a copy in some conspicuous place on the premises where the tenant last or usually resided.

§ 89-7-35 When judge is to issue removal warrant:

(1) If, at the time appointed, it appears that the summons has been duly served, and if a judgment of eviction is granted, the magistrate shall issue a warrant to the sheriff or any constable of the county, or to a marshal of the municipality in which the premises, or some part thereof, are situated, immediately upon request, except when prohibited or otherwise provided under Section 89–7–45, commanding him to remove all persons from the premises, and to put the applicant into full possession thereof.
(2) If the summons complied with the requirements of Section 89-7-31(2) and if the tenant has failed to remove any of tenant's personal property, including any manufactured home, from the premises, then, if the judge has not made some other finding regarding the disposition of any personal property in the vacated premises, the personal property shall be deemed abandoned and may be disposed of by the landlord without further notice or obligation to the tenant.

§ 89-7-37 Defenses:

The person in possession of such premises, or any person claiming possession thereof, may, at or before the time appointed in the summons for showing cause, file an affidavit with the magistrate who issued the same, denying the facts upon which the summons was issued; and the matters thus controverted may be tried by the magistrate.

§ 89-7-39 Adjournments, subpoenas and attachments:

The court may, at the request of either party, adjourn the hearing from time to time, a single adjournment not to exceed ten (10) days, except by consent, and may issue subpoenas and attachments to compel the attendance of witnesses. However, in hearings for eviction, no adjournment shall extend the entire hearing beyond forty-five (45) days from the date the eviction action was filed.

§ 89-7-41 If judgment for landlord:

(1) If the decision is in favor of the landlord or other person claiming the possession of the premises, the magistrate shall issue a warrant to the sheriff, constable, or other officer immediately upon request, except when prohibited or otherwise provided under Section 89–7–45, commanding him immediately to put the landlord or other person into possession of the premises, and to levy the costs of the proceedings of the goods and chattels, lands and tenements, of the tenant or person in possession of the premises who shall have controverted the right of the landlord or other person.
(2) If the summons complied with the requirements of Section 89-7-31(2) and if the tenant has failed to remove any of tenant's personal property, including any manufactured home, from the premises, then, if the judge has not made some other finding regarding the disposition of any personal property in the vacated premises, the personal property shall be deemed abandoned and may be disposed of by the landlord without further notice or obligation to the tenant.

§ 89-7-43 If judgment for tenant:

If the decision be in favor of the tenant, he shall recover costs of the applicant, and the magistrate shall issue execution therefor.

§ 89-7-45 Stay of proceedings:

When warrant for removal may issue in cases of nonpayment of rent. If a judgment of eviction is founded solely upon the nonpayment of rent and, at the time of the request for the warrant for removal the full and complete amount of rent due, including any late fees as provided in the rental agreement that have accrued as of the date of judgment, and the costs of the proceedings, have been paid to the person entitled to the rent, the magistrate shall not issue a warrant for removal. If the rent, late fees and costs have not been paid in full at the time of the request for the warrant for removal, the magistrate must immediately issue the warrant for removal unless the judge determines that, for good cause shown, a stay not to exceed three (3) days would best serve the interests of justice and equity. If it is shown that a stay is likely to result in material injury to the property of the person entitled to the rent, no stay shall be granted.

§ 89-7-47 Records and appeals:

The magistrate before whom proceedings shall be had against a tenant holding over, shall keep a full record of his proceedings, and shall carefully preserve all papers in the cause, and the same costs shall be taxed and paid as are allowed for similar service in cases of unlawful entry and detainer, and the right of appeal shall exist as in such cases.

See also RJC 27 (Civil appeals from justice court); Miss. Code Ann. § 11-51-83 (Appeal from case of unlawful entry).

602 SELF-HELP EVICTIONS

Self-help defined:

According to *Black's Law Dictionary* "self-help" is: "An attempt to redress a perceived wrong by one's own action rather than through the normal legal process."

When landlord may re-enter premises:

The Mississippi Supreme Court in addressing self-help held:

Where the landlord is entitled to possession which is unlawfully withheld by his tenant, and the lease contract provides, as it does in effect in the present case, that the landlord may re-enter without legal proceedings, such a contract is binding to the extent that the landlord may re-enter, provided he does so without breaking doors, windows, or other passages of ingress, and neither uses nor threatens personal violence towards the tenant or those holding possession for him.

Clark v. Service Auto Company, 108 So. 704, 707 (Miss.1926).

Landlord may not seize property of defendant:

Mississippi's landlord lien statute does not authorize a landlord to use self-help to seize property of the tenant:

The lease between the landlord and tenant in the case sub judice had no provision which would have allowed the landlord to regain possession without notice and hearing. Since there was no such provision, the landlord should have used the statutory process and not resorted to a self-help procedure.

Bender v. North Meridian Mobile Home Park, 636 So. 2d 385, 389 (Miss. 1994).

CHAPTER 7

PROTECTION FROM DOMESTIC ABUSE

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§ 93-21-3 "Abuse" and other terms defined:

As used in this chapter, unless the context otherwise requires:
(a) "Abuse" means the occurrence of one or more of the following acts between spouses, former spouses, persons living as spouses or who formerly lived as spouses, persons having a child or children in common, other individuals related by consanguinity or affinity who reside together or who formerly resided together or between individuals who have a current or former dating relationship:
(i) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury or serious bodily injury with or without a deadly weapon;
(ii) Placing, by physical menace or threat, another in fear of imminent serious bodily injury;
(iii) Criminal sexual conduct committed against a minor within the meaning of Section 97-5-23;
(iv) Stalking within the meaning of Section 97-3-107;
(v) Cyberstalking within the meaning of Section 97-45-15; or
(vi) Sexual offenses within the meaning of Section 97-3-65 or 97-3-95.
"Abuse" does not include any act of self-defense.
(b) "Adult" means any person eighteen (18) years of age or older, or any person under eighteen (18) years of age who has been emancipated by marriage.
(c) "Court" means the chancery court, justice court, municipal court or county court.
(d) "Dating relationship" means a social relationship of a romantic or intimate nature between two (2) individuals; it does not include a casual relationship or ordinary fraternization between two (2) individuals in a business or social context. Whether a relationship is a "dating relationship" shall be determined by examining the following factors:
(i) The length of the relationship;
(ii) The type of relationship; and
(iii) The frequency of interaction between the two (2) individuals involved in the relationship.
(e) "Mutual protection order" means a protection order that includes provisions in favor of both the individual seeking relief and the respondent.

§ 93-21-5 Courts with jurisdiction to hear domestic abuse cases:

(1) The municipal, justice, county or chancery court, or a state military court as defined in Section 33-13-151, shall have jurisdiction over proceedings under this chapter as provided in this chapter.

§ 93-21-5 Right to relief not affected by leaving to avoid further abuse:

(1) . . . The petitioner's right to relief under this chapter shall not be affected by his leaving the residence or household to avoid further abuse.

§ 93-21-5 Proper venue:

(2) Venue shall be proper in any county or municipality where the respondent resides or in any county or municipality where the alleged abusive act or acts occurred. Any action that originates in state military court as defined in Section 33-13-151 alleged against a member of the Mississippi National Guard and brought in a state military court proceeding as defined in Section 33-13-151 shall be the sole province of the Mississippi National Guard, and venue shall only be proper for such action before a state military court as defined in Section 33-13-151, and shall be subject to all the applicable laws, procedures, rules and/or regulations as set forth in Title 33. The provisions of this subsection shall not prohibit any person from bringing the same or similar action in municipal, justice, county or chancery court.

§ 93-21-5 Transfer if court lacks proper venue:

(3) If a petition for an order for protection from domestic abuse is filed in a court lacking proper venue, the court, upon objection of the respondent, shall transfer the action to the appropriate venue pursuant to other applicable law.

§ 93-21-5 Record to be made of proceedings:

(4) A record shall be made of any proceeding in justice or municipal court that involves domestic abuse.

Mississippi Attorney General's opinions:

Records in domestic abuse protection cases.
"Section 93-21-5 of the Mississippi Code is amended to require that a record be made of any proceedings involving a domestic abuse protection order in justice or municipal court. What type of record is sufficient to satisfy this provision? . . . The filings, pleadings and orders in a particular matter comprise the record for purposes of Miss. Code Ann. Section 93-21-5." Op. Atty. Gen. Bradley, July 13, 2009.

702 FILING A PETITION ALLEGING DOMESTIC ABUSE

§ 93-21-7 Who may file:

(1) Any person may seek a domestic abuse protection order for himself by filing a petition alleging abuse by the respondent. Any parent, adult household member, or next friend of the abused person may seek a domestic abuse protection order on behalf of any minor children or any person alleged to be incompetent by filing a petition with the court alleging abuse by the respondent.

§ 93-21-7 Proceedings expedited:

(1) . . . Cases seeking relief under this chapter shall be priority cases on the court's docket and the judge shall be immediately notified when a case is filed in order to provide for expedited proceedings.

§ 93-21-7 Where petition may be filed:

(2) A petition seeking a domestic abuse protection order may be filed in any of the following courts: municipal, justice, county or chancery, or a state military court as defined in Section 33-13-151.

§ 93-21-7 When emergency relief may be filed in chancery court:

(2) . . . A chancery court shall not prohibit the filing of a petition which does not seek emergency relief on the basis that the petitioner did not first seek or obtain temporary relief in another court. A petition requesting emergency relief pending a hearing shall not be filed in chancery court unless specifically permitted by the chancellor under the circumstances or as a separate pleading in an ongoing chancery action between the parties. Nothing in this section shall:
(a) Be construed to require consideration of emergency relief by a chancery court; or
(b) Preclude a chancery court from entering an order of emergency relief.

§ 93-21-7 Assessing costs:

(3) The petitioner in any action brought pursuant to this chapter shall not bear the costs associated with its filing or the costs associated with the issuance or service of any notice of a hearing to the respondent, issuance or service of an order of protection on the respondent, or issuance or service of a warrant or witness subpoena. If the court finds that the petitioner is entitled to an order protecting the petitioner from abuse, the court shall be authorized to assess all costs including attorney's fees of the proceedings to the respondent. The court may assess costs including attorney's fees to the petitioner only if the allegations of abuse are determined to be without merit and the court finds that the petitioner is not a victim of abuse as defined by Section 93-21-3.

§ 93-21-9 What the petition is to state:

(1) A petition filed under the provisions of this chapter shall state:
(a) Except as otherwise provided in this section, the name, address and county of residence of each petitioner and of each individual alleged to have committed abuse;
(b) The facts and circumstances concerning the alleged abuse;
(c) The relationships between the petitioners and the individuals alleged to have committed abuse; and
(d) A request for one or more domestic abuse protection orders.

§ 93-21-9 If a spouse is the alleged abuser:

(2) If a petition requests a domestic abuse protection order for a spouse and alleges that the other spouse has committed abuse, the petition shall state whether or not a suit for divorce of the spouses is pending and, if so, in what jurisdiction.

§ 93-21-9 If a former spouse is the alleged abuser:

(4) If a petitioner is a former spouse of an individual alleged to have committed abuse:
(a) A copy of the decree of divorce shall be attached to the petition; or
(b) The petition shall state the decree is currently unavailable to the petitioner and that a copy of the decree will be filed with the court before the time for the hearing on the petition.

§ 93-21-9 If a child is the alleged abused or abuser:

(5) If a petition requests a domestic abuse protection order for a child who is subject to the continuing jurisdiction of a youth court . . . or a chancery court, or alleges that a child who is subject to the continuing jurisdiction of a youth court . . . or chancery court has committed abuse:
(a) A copy of the court orders affecting the custody or guardianship, possession and support of or access to the child shall be filed with the petition; or
(b) The petition shall state that the orders affecting the child are currently unavailable to the petitioner and that a copy of the orders will be filed with the court before the hearing on the petition.

§ 93-21-9 If emergency relief is requested:

(6) If the petition includes a request for emergency relief pending a hearing, the petition shall contain a general description of the facts and circumstances concerning the abuse and the need for immediate protection.

§ 93-21-9 When petitioner's address may be omitted:

(7) If the petition states that the disclosure of the petitioner's address would risk abuse of the petitioner or any member of the petitioner's family or household, or would reveal the confidential address of a shelter for domestic violence victims, the petitioner's address may be omitted from the petition. If a petitioner's address has been omitted from the petition pursuant to this subsection and the address of the petitioner is necessary to determine jurisdiction or venue, the disclosure of such address shall be made orally and in camera. A nonpublic record containing the address and contact information of a petitioner shall be maintained by the court to be utilized for court purposes only.

Mississippi Attorney General's opinion:

Maintaining non-public records of address and contact information.
"Section 93-21-9(7) of the Mississippi Code, which addresses petitions seeking protection from domestic abuse, is amended to require the court to maintain a non-public record of address and contact information of the victim in situations where the victim is not required, for safety reasons, to include this information in the petition. How should the courts maintain this non-public record, and for what purposes may this information be disclosed? . . . A separate confidential file shall be maintained by the court clerk in which the non-public address and contact information of victims of domestic violence is to be kept. The information shall not be made available to the general public." Op. Atty. Gen. Bradley, July 13, 2009.

§ 93-21-9 Petition to be signed under oath:

(8) Every petition shall be signed by the petitioner under oath that the facts and circumstances contained in the petition are true to the best knowledge and belief of the petitioner.

§ 93-21-11 When hearing is to be conducted:

(1) Within ten (10) days of the filing of a petition under the provisions of this chapter, the court shall hold a hearing, at which time the petitioner must prove the allegation of abuse by a preponderance of the evidence.

§ 93-21-11 Personal service of process required:

(2) The respondent shall be given notice of the filing of any petition and of the date, time and place set for the hearing by personal service of process. A court may conduct a hearing in the absence of the respondent after first ascertaining that the respondent was properly noticed of the hearing date, time and place.

Mississippi Attorney General's opinion:

On conducting hearing by interactive audio-visual device.
While the court may be able to consider petitions for emergency relief provided in Section 93-21-13 electronically, it is the opinion of this office that it would be a rather rare situation in which a court would be able to effectively have an entire hearing prescribed in Section 93-21-11 telephonically or remotely. Rule 611(a)(3) of the Mississippi Rules of Evidence states that the court must exercise reasonable control to protect witnesses from harassment or undue embarrassment. There are many things to consider when determining whether or not to conduct the court's business via electronic means, including the veracity of witness testimony, credibility of evidence, and the opportunity for interference or coercive behavior. Op. Atty. Gen. Adams, October 16, 2019.

703 REQUEST FOR EMERGENCY RELIEF

§ 93-21-13 Request to be expedited:

(1)(a) The court in which a petition seeking emergency relief pending a hearing is filed must consider all such requests in an expedited manner and shall not refer or direct the matter to be sent to another court. The court may issue an emergency domestic abuse protection order without prior notice to the respondent upon good cause shown by the petitioner. Immediate and present danger of abuse to the petitioner, any minor children or any person alleged to be incompetent shall constitute good cause for issuance of an emergency domestic abuse protection order. The respondent shall be provided with notice of the entry of any emergency domestic abuse protection order issued by the court by personal service of process.
. . .
(4) An emergency domestic abuse protection order issued under this section is effective in this state, in all other states, and in United States territories and tribal lands. A court shall not limit the scope of a protection order to the boundaries of the State of Mississippi or to the boundaries of a municipality or county within the State of Mississippi.

§ 93-21-13 Emergency relief that may be granted:

(1)(b) A court granting an emergency domestic abuse protection order may grant relief as provided in Section 93-21-15(1)(a).

§ 93-21-13 Duration of the order:

(1)(c) An emergency domestic abuse protection order shall be effective for ten (10) days, or until a hearing may be held, whichever occurs first. If a hearing under this subsection (1) is continued, the court may grant or extend the emergency order as it deems necessary

for the protection of the abused person. A continuance under this subsection (1)(c) shall be valid for no longer than twenty (20) days.

§ 93-21-13 Standardized forms for emergency protection orders:

(2) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop standardized forms for emergency domestic abuse protection orders. Use of the standardized forms in protection order proceedings pursuant to this chapter shall be fully implemented by all courts no later than July 1, 2015. However, in any criminal prosecution or contempt proceeding for a violation of a domestic abuse protection order, it shall not be a defense that the order was not issued on the standardized form.

§ 93-21-13 Orders to be entered in the Mississippi Protection Order Registry:

(3) Upon issuance of any protection order by the court, the order shall be entered in the Mississippi Protection Order Registry by the clerk of the court pursuant to Section 93–21–25, and a copy shall be provided to the sheriff's department in the county of the court of issuance.

§ 93-21-17 Other relief provided by law not precluded:

(1) The granting of any relief authorized under this chapter shall not preclude any other relief provided by law.

See also Miss. Code Ann. § 93-21-29 ("Any proceeding under this chapter shall be in addition to other available civil or criminal remedies.").

§ 93-21-17 Title to real property not affected:

(3) No order or agreement under this chapter shall in any manner affect title to any real property.

704 REQUEST FOR TEMPORARY RELIEF

§ 93-21-15 Temporary relief that may be granted:

(1)(a) After a hearing is held as provided in Section 93-21-11 for which notice and opportunity to be heard has been granted to the respondent, and upon a finding that the petitioner has proved the existence of abuse by a preponderance of the evidence, the municipal and justice courts shall be empowered to grant a temporary domestic abuse protection order to bring about a cessation of abuse of the petitioner, any minor children, or any person alleged to be incompetent. The relief the court may provide includes, but is

not limited to, the following:
(i) Directing the respondent to refrain from abusing the petitioner, any minor children, or any person alleged to be incompetent;
(ii) Prohibiting or limiting respondent's physical proximity to the abused or other household members as designated by the court, including residence and place of work;
(iii) Prohibiting or limiting contact by the respondent with the abused or other household members designated by the court, whether in person, by telephone or by other electronic communication;
(iv) Granting possession to the petitioner of the residence or household to the exclusion of the respondent by evicting the respondent or restoring possession to the petitioner, or both; or
(v) Prohibiting the transferring, encumbering or otherwise disposing of property mutually owned or leased by the parties, except when in the ordinary course of business.

See also Waite v. Adkisson, 282 So. 3d 744, 747 n.1 (Miss. Ct. App. 2019) ("Subsection (1) of Mississippi Code Annotated section 93-21-15 authorizes a justice or municipal court to grant a temporary domestic abuse protection order after the respondent is afforded notice and an opportunity to be heard. A decision by a justice court or municipal court granting or denying a temporary order is subject to de novo review by a chancery court or county court. Miss. Code Ann. § 93-21-15(1)(c).").

§ 93-21-15 Terms of the protection order to be specific:

(3) Every domestic abuse protection order issued pursuant to this section shall set forth the reasons for its issuance, shall contain specific findings of fact regarding the existence of abuse, shall be specific in its terms and shall describe in reasonable detail the act or acts to be prohibited. No mutual protection order shall be issued unless that order is supported by an independent petition by each party requesting relief pursuant to this chapter, and the order contains specific findings of fact regarding the existence of abuse by each party as principal aggressor, and a finding that neither party acted in self defense.

§ 93-21-15 Duration of the protection order:

(1)(b) The duration of any temporary domestic abuse protection order issued by a municipal or justice court shall not exceed thirty (30) days. However, if the party to be protected and the respondent do not have minor children in common, the duration of the temporary domestic abuse protection order may exceed thirty (30) days but shall not exceed one (1) year.

§ 93-21-15 Standardized forms for temporary protection orders:

(4) The Attorney General, in cooperation with the Mississippi Supreme Court and the Mississippi Judicial College, shall develop standardized forms for temporary and final domestic abuse protection orders. The use of standardized forms in protection order proceedings pursuant to this chapter shall be fully implemented by all courts no later than

July 1, 2015. However, in any criminal prosecution or contempt proceeding for a violation of a domestic abuse protection order, it shall not be a defense that the order was not issued on the standardized form.

§ 93-21-15 Orders to be entered in the Mississippi Protection Order Registry:

(5) Upon issuance of any protection order by the court, the order shall be entered in the Mississippi Protection Order Registry by the clerk of the court pursuant to Section 93–21–25, and a copy shall be provided to the sheriff's department in the county of the court of issuance.

§ 93-21-15 Modifying, amending, or dissolving a protection order:

(6) Upon subsequent petition by either party and following a hearing of which both parties have received notice and an opportunity to be heard, the court may modify, amend, or dissolve a domestic abuse protection order previously issued by that court.

See also Miss. Code Ann. § 93-21-17(2) ("The court may amend its order or agreement at any time upon subsequent petition filed by either party. Protective orders issued under the provisions of this chapter may only be amended by approval of the court.").

§ 93-21-15 Scope of a protection order:

(7) A domestic abuse protection order issued under this section is effective in this state, in all other states, and in United States territories and tribal lands. A court shall not limit the scope of a protection order to the boundaries of the State of Mississippi or to the boundaries of a municipality or county within the State of Mississippi.

§ 93-21-15 De novo appeal:

(1)(c) Procedures for an appeal of the issuance of a temporary domestic abuse protection order are set forth in Section 93–21–15.1.

§ 93-21-15.1

(1)(a) De novo appeal. Any party aggrieved by the decision of a municipal or justice court judge to issue a temporary domestic abuse protection order has the right of a trial de novo on appeal in the chancery court having jurisdiction. The trial de novo shall be held within ten (10) days of the filing of a notice of appeal. All such appeals shall be priority cases and the judge must be immediately notified when an appeal is filed in order to provide for expedited proceedings. The appeal will proceed as if a petition for an order of protection from domestic abuse had been filed in the chancery court. Following the trial de novo, if the petitioner has proved the existence of abuse by a preponderance of the evidence, the chancery court may grant a final domestic abuse protection order. In granting a final domestic abuse protection order, the chancery court may provide for relief that includes,

but is not limited to, the relief set out in Section 93–21–15(2).
(b) Notice of appeal. The party desiring to appeal a decision from municipal or justice court must file a written notice of appeal with the chancery court clerk within ten (10) days of the issuance of a domestic abuse protection order. In all de novo appeals, the notice of appeal and payment of costs must be simultaneously filed and paid with the chancery clerk. Costs for an appeal by trial de novo shall be calculated as specified in subsection (4) of this section. The written notice of appeal must specify the party or parties taking the appeal and must designate the judgment or order from which the appeal is taken. A copy of the notice of appeal must be provided to all parties or their attorneys of record and to the clerk of the court from which the appeal is taken. A certificate of service must accompany the written notice of appeal. Upon receipt by the municipal or justice court of the notice of appeal, the clerk of the lower court shall immediately provide the entire court file to the chancery clerk.
. . .
(3) Supersedeas. The perfecting of an appeal, whether on the record or by trial de novo, does not act as a supersedeas. Any domestic abuse protection order issued by a municipal, justice or county court shall remain in full force and effect for the duration of the appeal, unless the domestic abuse protection order otherwise expires due to the passage of time.
(4) Cost bond. In all appeals under this section, unless the court allows an appeal in forma pauperis or the appellant otherwise qualifies for exemption as specified in this subsection (4), the appellant shall pay all court costs incurred below and likely to be incurred on appeal as estimated by the chancery clerk. In all cases where the appellant is appealing the denial of an order of protection from domestic abuse by a county court, the appellant shall not be required to pay any costs associated with the appeal, including service of process fees, nor shall the appellant be required to appeal in forma pauperis. In such circumstances, the court may assess costs of the appeal to the appellant if the court finds that the allegations of abuse are without merit and the appellant is not a victim of abuse. Where the issuance of a mutual protection order is the basis of the appeal, the appellant may be entitled to reimbursement of appellate costs paid to the court as a matter of equity if the chancery court finds that the mutual order was issued by the lower court without regard to the requirements of Section 93–21–15(3).
(5) The appellate procedures set forth in this section for appeals from justice, municipal and county courts shall control if there is a conflict with another statute or rule.
(6) Any party aggrieved by the issuance or denial of a final order of protection by a chancery court shall be entitled to appeal the decision. The appeal shall be governed by the Mississippi Rules of Appellate Procedure and any other applicable rules or statutes.

§ 93-21-17 Other relief provided by law not precluded:

(1) The granting of any relief authorized under this chapter shall not preclude any other relief provided by law.

See also Miss. Code Ann. § 93-21-29 (“Any proceeding under this chapter shall be in addition to other available civil or criminal remedies.”).

§ 93-21-17 Title to real property not affected:

(3) No order or agreement under this chapter shall in any manner affect title to any real property.

§ 93-21-9 Divorce decree may supercede protection order:

(3) Any temporary or permanent decree issued in a divorce proceeding subsequent to an order issued pursuant to this chapter may, in the discretion of the chancellor hearing the divorce proceeding, supersede in whole or in part the order issued pursuant to this chapter.

705 EVIDENTIARY MATTERS

MRE 504 Exceptions to spousal privilege:

(d) Exceptions. The privilege does not apply:
(1) in a civil case between the spouses; or
(2) in a criminal case when one spouse is charged with a crime against:
(A) the person of a minor child; or
(B) the person or property of:
(i) the other spouse;
(ii) a resident of either spouse's household; or
(iii) a third person when committed during a crime against any person described in paragraphs (d)(1) and (2).

§ 93-21-19 No spousal disqualification:

There shall be no restrictions concerning a spouse testifying against his spouse in any hearing under the provisions of this chapter.

706 PROTECTION ORDERS FROM ANOTHER JURISDICTION

Protection order defined:

The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act defines "protection order" as: "[A]n injunction or other order, issued by a tribunal under the domestic violence laws, family violence laws or anti-stalking laws of the issuing state, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to another individual." *See* Miss. Code Ann. § 93-22-3(e).

§ 93-21-16 Full faith and credit:

(1) A protective order from another jurisdiction issued to protect the applicant from abuse as defined in Section 93-21-3, or a protection order as defined in Section 93-22-3, issued by a tribunal of another state shall be accorded full faith and credit by the courts of this state and enforced in this state as provided for in the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act.

. . .

(3) For purposes of judicial enforcement of a protective order issued in another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, an order is presumed valid if it meets the requirements of Section 93-22-5(4). It is an affirmative defense in any action seeking enforcement of a protective order issued in another jurisdiction, or a protection order as defined in Section 93-22-3 and issued by a tribunal of another state, that any criteria for the validity of the order is absent.

707 PENALTIES FOR VIOLATING A PROTECTION ORDER

§ 93-21-21 Knowing violation is a misdemeanor:

(1) Upon a knowing violation of (a) a protection order or court-approved consent agreement issued pursuant to this chapter, (b) a similar order issued by a foreign court of competent jurisdiction for the purpose of protecting a person from domestic abuse, or a similar order by a state military court as defined in Section 33-13-151, or (c) a bond condition imposed pursuant to Section 99–5–37, the person violating the order or condition commits a misdemeanor punishable by imprisonment in the county jail for not more than six (6) months or a fine of not more than One Thousand Dollars ($1,000.00), or both.

§ 93-21-21 Alternatively, a knowing violation is contempt:

(2) Alternatively, upon a knowing violation of a protection order or court-approved consent agreement issued pursuant to this chapter or a bond condition issued pursuant to Section 99–5–37, the issuing court may hold the person violating the order or bond condition in contempt, the contempt to be punishable as otherwise provided by applicable law. A person shall not be both convicted of a misdemeanor and held in contempt for the same violation of an order or bond condition.

§ 93-21-21 Officers to utilize uniform offense report:

(3) When investigating allegations of a violation under subsection (1) of this section, law enforcement officers shall utilize the uniform offense report prescribed for this purpose by the Office of the Attorney General in consultation with the sheriff's and police chief's

associations. However, failure of law enforcement to utilize the uniform offense report shall not be a defense to a crime charged under subsection (1) of this section.

§ 93-21-21 Court to enter disposition into uniform offense report:

(4) In any conviction for a violation of a domestic abuse protection order as described in subsection (1) of this section, the court shall enter the disposition of the matter into the corresponding uniform offense report.

§ 93-21-21 On construing bond condition violations:

(5) Nothing in this section shall be construed to interfere with the court's authority, if any, to address bond condition violations in a more restrictive manner.

708 REPORTING DOMESTIC ABUSE OR REQUESTING ASSISTANCE

§ 93-21-23 Immunity in reporting domestic abuse:

Any licensed doctor of medicine, licensed doctor of dentistry, intern, resident or registered nurse, psychologist, social worker, family protection worker, family protection specialist, preacher, teacher, attorney, law enforcement officer, or any other person or institution participating in the making of a report pursuant to this chapter or participating in judicial proceedings resulting therefrom shall be presumed to be acting in good faith, and if found to have acted in good faith shall be immune from any liability, civil or criminal, that might otherwise be incurred or imposed. The reporting of an abused person shall not constitute a breach of confidentiality.

§ 93-21-27 Law enforcement officer immunity:

A law enforcement officer shall not be held liable in any civil action for an arrest based on probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from an alleged domestic violence incident brought by any authorized party, or an arrest made in good faith pursuant to Section 99-3-7(3), or failure, in good faith, to make an arrest pursuant to Section 99-3-7(3).

§ 93-21-28 Request for local law enforcement assistance:

(1) A person who alleges that he or she or a minor child has been the victim of domestic violence may request the assistance of a local law enforcement agency. The local law enforcement agency shall respond to the request for assistance. The local law enforcement officer responding to the request for assistance shall take whatever steps are reasonably necessary to protect the complainant from harm and shall advise the

complainant of sources of shelter, medical care, counseling and other services. Upon request by the complainant and where feasible, the law enforcement officer shall transport the complainant to appropriate facilities such as hospitals or public or private facilities for shelter and accompany the complainant to his or her residence, within the jurisdiction in which the request for assistance was made, so that the complainant may remove food, clothing, medication and such other personal property as is reasonably necessary to enable the complainant and any minor children who are presently in the care of the complainant to remain elsewhere pending further proceedings.
(2) In providing the assistance authorized by subsection (1), no officer may be held criminally or civilly liable on account of reasonable measures taken under authority of subsection (1).

§ 93-21-29 Remedy supplemental:

Any proceeding under this chapter shall be in addition to other available civil or criminal remedies.

709 MISSISSIPPI PROTECTIVE ORDER REGISTRY

§ 93–21–25 Clerk to entered orders within 24 hours:

(1) In order to provide a statewide registry for protection orders and to aid law enforcement, prosecutors and courts in handling such matters, the Attorney General is authorized to create and administer a Mississippi Protection Order Registry. The Attorney General's office shall implement policies and procedures governing access to the registry by authorized users, which shall include provisions addressing the confidentiality of any information which may tend to reveal the location or identity of a victim of domestic abuse.
(2) All orders issued pursuant to Sections 93–21–1 through 93–21–29, 97–3–7(11), 97–3–65(6) or 97–3–101(5) will be maintained in the Mississippi Protection Order Registry. It shall be the duty of the clerk of the issuing court to enter all civil and criminal domestic abuse protection orders and all criminal sexual assault protection orders, including any modifications, amendments or dismissals of such orders, into the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays. A separate copy of any order shall be provided to the sheriff's department TAC officers of the county of the issuing court. The copy may be provided in electronic format. Each qualifying protection order submitted to the Mississippi Protection Order Registry shall be automatically transmitted to the National Criminal Information Center Protection Order File. Failure of the clerk to enter the order into the registry or to provide a copy of the order to law enforcement shall have no effect on the validity or enforcement of an otherwise valid protection order.
Any information regarding the registration or issuance of a civil or criminal domestic abuse protection order or a criminal sexual assault protection order, or the filing of a

petition for a civil domestic abuse protection order which is maintained in the Mississippi Protection Order Registry and would tend to reveal the identity or location of the protected person(s) shall not constitute a public record and shall be exempt from disclosure pursuant to the Mississippi Public Records Act of 1983. This information may be disclosed to appropriate law enforcement, prosecutors or courts for protection order enforcement purposes.

710 DOMESTIC VIOLENCE LEGAL FORMS

Domestic Violence Legal Forms may be accessed at the Official site of the Mississippi Attorney General's Office, which is http://www.ago.state.ms.us/. *See also* Miss. Code Ann. §§ 93-21-9; -13; -15.

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CHAPTER 8

REPLEVIN

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802 CASE LAW ON REPLEVIN

800 IF REQUESTING IMMEDIATE SEIZURE OF PROPERTY

§ 11-37-107 Venue:

The action of replevin may be instituted . . . in the justice court of a county in which the defendant, or one (1) of several defendants, or property, or some of the property, may be found, and all proper process may be issued to other counties.

§ 11-37-101 Commencement of action:

If any person, his agent or attorney, shall file a complaint under oath setting forth:
(a) A description of any personal property;
(b) The value thereof, giving the value of each separate article and the value of the total of all articles;
(c) The plaintiff is entitled to the immediate possession thereof, setting forth all facts and circumstances upon which the plaintiff relies for his claim, and exhibiting all contracts and documents evidencing his claim;
(d) That the property is in the possession of the defendant; and
(e) That the defendant wrongfully took and detains or wrongfully detains the same; and shall present such pleadings to . . . a justice court judge . . ., such . . . judge may issue an order directing the clerk of such court to issue a writ of replevin for the seizure of the property described in said complaint, upon the plaintiff posting a good and valid replevin bond in favor of the defendant, for double the value of the property as alleged in the complaint, conditioned to pay any damages which may arise from the wrongful seizure of said property by the plaintiff.

§ 11-37-101 Writ directed to sheriff or other lawful officer:

(e) . . . The said writ shall be directed to the sheriff or other lawful officer, returnable as a summons before the proper circuit or county court where the value of the property, as alleged in the complaint, exceeds the jurisdictional amount of the justice court, or to the circuit or county court or the proper justice court if the value shall not exceed such amount.

§ 11-37-101 Complaint, writ, and bond to be file with court:

(e) . . . The complaint along with the order of the court, the writ of replevin with the officer's return thereon, and the bond of the plaintiff shall be filed in the proper court at once. Writs of replevin may be made returnable to the proper court of another county where the property may be found.

§ 11-37-103 Judicial bond requirement:

Should the judge to whom such pleadings are presented determine that the

property in question is not properly valued, then he may, in his order, require a bond in an amount double the value of the property in question, as determined by such judge.

Bond form:

Miss. Code Ann. § 11-37-105 sets forth the form for the plaintiff's bond in replevin.

§ 11-37-109 Contents of writ:

The writ of replevin shall command the sheriff, or other lawful officer, to immediately seize and take possession of the property described in the writ and deliver it to the plaintiff after two (2) days, unless bonded by the defendant, and summon the defendant to appear before the court shown in the writ, in termtime or in vacation, and to answer to the action of the plaintiff.

Writ form:

Miss. Code Ann. § 11-37-111 sets forth the form for the writ of replevin.

§ 11-37-115 Restoration of property on bond:

If the defendant shall, within two (2) days from the seizure of the property, enter into bond, with sufficient sureties, to be approved by the officer or the court, payable to the plaintiff, in double the value of the property, conditioned that it shall be forthcoming to satisfy the judgment of the court, the property shall be restored to him pending final judgment.

Form of officer's return:

Miss. Code Ann. § 11-37-117 sets forth the form of the officer's return on the writ of replevin.

§ 11-37-119 Motion to contest sufficiency of bond taken:

If the defendant in a replevin suit shall at any time deem any bond taken to be insufficient, such defendant may, upon filing a motion in the court where the suit is pending, obtain a hearing to determine the sufficiency of such bond. The court shall, after hearing the evidence upon such motion determine the sufficiency or insufficiency of the bond.

§ 11-37-119 If bond given by plaintiff adjudged insufficient:

If the bond given by the plaintiff be adjudged insufficient, the plaintiff shall be required to give a new and sufficient bond, or restore the property to the defendant

within the time limited by the court; and, in default thereof, the defendant shall be entitled to proceed and enter judgment as in case the plaintiff had nonsuited or otherwise made default.

§ 11-37-121 Plaintiff's election to recover damages:

If the return of the officer on the writ shows a failure to take the goods and chattels, but the defendant has been summoned, the plaintiff may declare and prosecute the action for the recovery of the value of the property, and damages for the taking or detention of the property, as if he had thus commenced his action, and the plaintiff and his sureties shall, upon motion, be discharged on their bond.

§ 11-37-123 Duplicate writs:

The plaintiff shall be entitled to duplicate writs or process to other counties, and alias and pluries writs or process to take the property or to summon the defendant, as in other actions. When property shall be taken under the writ, but the defendant cannot be found, the defendant shall be notified by publication, as provided in case of attachment under like circumstances, as provided in section 11-33-37, Mississippi Code of 1972, except that said cause may be triable five (5) days after completion of publication.

See also Miss. Code Ann. § 11-33-37, which provides:

When any writ of attachment shall be executed and returned, if the defendant be not summoned, the clerk of the court shall cause a notice to be published once a week for three weeks in some newspaper published within the county, or in some convenient county, and having a circulation in the county in which the suit is pending, stating the issuance of such attachment, at whose suit, against whose estate, for what sum, and in what court the same is pending and that unless the defendant appear on the first day of the next succeeding term of court and plead to said action, judgment will be entered, and the estate attached will be sold. Such publication may be made before or after the return term of court, but in cases of attachment against persons residing out of this state, the creditor, his agent or attorney, shall file with the clerk his affidavit-if the affidavit for the attachment do not contain such statement-showing the post office of the defendant, or that he has made diligent inquiry to ascertain it without success; and if the post office shall be stated, the clerk shall send by mail to such defendant, at his post office, a copy of such notice, and shall make it appear to the court that he has done so, before judgment shall be rendered on publication of notice; and for a failure of duty in this respect, the clerk may be punished as for contempt.

§ 11-37-125 When triable:

All replevin actions, whether followed by writ of replevin as herein provided or by

summons, as hereinafter provided, shall be triable in termtime or in vacation, and the court or judge having jurisdiction shall proceed at such hearing to a final determination of the rights of the parties to possession, provided at least five (5) days process has been had upon the defendant.

§ 11-37-145 Priority of actions:

All replevin actions shall be treated by the court as preference cases and shall be heard on the merits at the earliest possible date, with the view of reaching an early determination as to the rights of the parties to the property in question.

§ 11-37-147 To be tried without jury unless written request is filed:

All replevin actions shall be tried by the court without a jury, unless one (1) of the parties thereto shall file a written request for a jury trial.

§ 11-37-127 If judgment for plaintiff:

If, upon a trial, the judgment shall be for the plaintiff, he shall retain possession of the property delivered to him under the writ of replevin, or if said property has not been found, then the plaintiff shall have a judgment for its value as determined by such hearing, or the value of the plaintiff's interest therein. Upon the entry of a judgment for the plaintiff in such replevin action, the plaintiff and the sureties on his bond shall be fully and finally discharged and said bond cancelled.

§ 11-37-127 If defendant has bonded the property after seizure:

If the defendant shall have bonded the property after seizure and the judgment shall be for the plaintiff, then such judgment shall be that the defendant shall immediately deliver up said property to the plaintiff, with the defendant and the sureties on his bond to be liable to the plaintiff for any damage to or depreciation in the value of such property from the date of its surrender to the defendant under his bond until the date of its surrender by the defendant in obedience to the judgment of the court, in addition to any other damage the plaintiff may have sustained by reason of the wrongful taking or detention of such property by the defendant, all as determined upon writ of inquiry; or that the plaintiff recover from the defendant and his sureties the value of said property at the date of its return to the defendant under bond.

§ 11-37-129 If judgment for defendant:

If the judgment be for the defendant, the plaintiff and the sureties on the plaintiff's bond shall restore to the defendant the property, if to be had, or pay to him the value thereof and any damages for the wrongful suing out of the writ, as assessed upon writ of inquiry. If the defendant shall have made bond for such property, he

and his sureties shall be fully discharged and he may recover any damages from the plaintiff and his sureties for the wrongful suing out of said writ.

§ 11-37-129 If plaintiff defaults in prosecuting replevin action:

In case the plaintiff make default in prosecuting the replevin action, or be nonsuited, after seizure under writ of replevin, the defendant may have a writ of inquiry to assess the value of the property, or the damages sustained by the wrongful suing out of the writ, or both, as the case may be; and like judgment shall be rendered upon the finding as upon an issue found for him.

§ 11-37-149 Intervention by third person:

If a third person, not a party to the action of replevin, shall claim to be the owner or entitled to the possession of goods or chattels involved in a replevin action, he shall not be allowed to institute another action of replevin while the former is pending, but may intervene in said action and present his claim under oath.

§ 11-37-151 Trial of third party claim:

After the trial of the action of replevin, an issue shall be made between the successful party and the claimant as to the validity of his claim, and a trial shall be had to determine the right of possession as between them and judgment entered accordingly.

§ 11-37-153 Death of party:

All the provisions of law in reference to the death of either party, and the revival of the cause in personal actions, and the death of any of the obligors in a bond given in a replevin action, and the proceedings thereon before and after judgment, shall apply in like case to the action of replevin, and to a claim of property in such action.

§ 11-37-155 When action not maintainable:

The action of replevin shall not be maintainable in any case of the seizure of property under execution or attachment when a remedy is given to claim the property by making claim to it in some mode prescribed by law, but the person claiming must resort to the specific mode prescribed in such case, and shall not resort to the action of replevin.

§ 11-37-157 Action cumulative:

The action created and established by this chapter shall be cumulative and in addition to all other actions presently available at law or in equity.

§ 11-9-135 Enforcement proceedings generally:

Proceedings in replevin . . . before [justice court judges], shall be, as far as practicable, according to those in the circuit courts, in all like cases.

801 IF NOT REQUESTING IMMEDIATE SEIZURE OF PROPERTY

§ 11-37-107 Venue:

The action of replevin may be instituted . . . in the justice court of a county in which the defendant, or one (1) of several defendants, or property, or some of the property, may be found, and all proper process may be issued to other counties.

§ 11-37-131 Commencement of action:

If any person, his agent or attorney, shall desire to institute an action of replevin without the necessity of posting bond, and without requesting the immediate seizure of the property in question, he shall file a declaration under oath setting forth those matters shown in subparagraphs (a) through (e) of section 11-37-101 and shall present such pleadings to . . . , a [justice court judge] . . . ,

§ 11-37-131 Judge to issue fiat directing clerk to issue summons:

[S]uch judge shall issue a fiat directing the clerk of such court, or a deputy clerk, to issue a summons to the defendant, to appear before a court or judge having jurisdiction, as determined by the value of the property as alleged in the declaration, and as outlined in section 11-37-101, with said process being returnable in termtime or in vacation, upon at least five (5) days' notice, summoning the defendant to appear for a final hearing to determine the rights of the parties as to possession, and upon such final hearing the court shall enter judgment accordingly.

See also Lacoste v. Sys. & Servs. Technologies, Inc., 126 So. 3d 111, 114 (Miss. Ct. App. 2013) ("As mentioned, Mississippi's replevin statute gives plaintiffs . . . two options when commencing a replevin—(1) seek immediate possession under section 11–37–101 or (2) wait until the court determines the plaintiff's right to possess under section 11–37–131. Only under the first "immediate-possession" option is a bond required.").

Summons form:

Miss. Code Ann. § 11-37-133 sets forth the form of summons.

§ 11-37-135 Execution of summons:

The summons in replevin shall be executed by summoning the defendant as in other civil cases, a copy of the declaration and exhibits being attached to said summons, directing the defendant to appear before the court shown in said summons, to answer the plaintiff's declaration under oath. The officer serving said process shall determine whether or not the defendant is then in possession of the property described in the declaration and shall so indicate on his return.

§ 11-37-137 Contempt for concealing property:

If the defendant be found to be in possession of the property in question at the time of the service of process upon him, and if he shall conceal said property or dispose of the same, or fail to have the same within the jurisdiction of the court for such final judgment as may be rendered by the court in said replevin action, upon the return day of process herein, he shall be subject to penalties of contempt, upon motion of the plaintiff or order of the court.

§ 11-37-139 When triable:

Where process in any replevin action is by way of a summons in replevin, said cause shall be triable on its merits upon at least five (5) days process upon the defendant, and said cause shall be triable in termtime or in vacation and at such place as the court may direct.

§ 11-37-145 Priority of actions:

All replevin actions shall be treated by the court as preference cases and shall be heard on the merits at the earliest possible date, with the view of reaching an early determination as to the rights of the parties to the property in question.

§ 11-37-147 To be tried without jury unless written request is filed:

All replevin actions shall be tried by the court without a jury, unless one (1) of the parties thereto shall file a written request for a jury trial.

§ 11-37-139 Order resetting action:

In the event it shall appear at the return day that there is secondary service of process, or less than five (5) days process upon the defendant, the court may enter an order resetting said matter for trial on a future date, so as to insure that said cause will not be tried on its merits except upon a resetting on secondary process or except upon at least five (5) days process upon the defendant. In the event of such order resetting said cause for such later date, it shall not be necessary that further process be served upon the defendant.

§ 11-37-141 If judgment for plaintiff:

Upon the trial of any replevin action in which the property has not previously been seized under writ of replevin, if the judgment be for the plaintiff, the court shall enter judgment awarding to the plaintiff the immediate possession of the property and such judgment shall order and direct the sheriff or other lawful officer to immediately seize the property in question, without further process upon the defendant, and deliver said property to the plaintiff, a certified copy of the final judgment rendered in such case being furnished to the sheriff as evidence of his authority to seize such property and deliver it to the plaintiff.

§ 11-37-143 If judgment for defendant:

In any replevin action in which the property has not been previously seized by writ of replevin, if the defendant be successful in such action, the judgment of the court shall be that the declaration of the plaintiff be dismissed and court costs assessed against the plaintiff.

§ 11-37-149 Intervention by third person:

If a third person, not a party to the action of replevin, shall claim to be the owner or entitled to the possession of goods or chattels involved in a replevin action, he shall not be allowed to institute another action of replevin while the former is pending, but may intervene in said action and present his claim under oath.

§ 11-37-151 Trial of third party claim:

After the trial of the action of replevin, an issue shall be made between the successful party and the claimant as to the validity of his claim, and a trial shall be had to determine the right of possession as between them and judgment entered accordingly.

§ 11-37-153 Death of party:

All the provisions of law in reference to the death of either party, and the revival of the cause in personal actions, and the death of any of the obligors in a bond given in a replevin action, and the proceedings thereon before and after judgment, shall apply in like case to the action of replevin, and to a claim of property in such action.

See also RJC 18(a) (Substitution of parties).

§ 11-37-155 When action not maintainable:

The action of replevin shall not be maintainable in any case of the seizure of

property under execution or attachment when a remedy is given to claim the property by making claim to it in some mode prescribed by law, but the person claiming must resort to the specific mode prescribed in such case, and shall not resort to the action of replevin.

§ 11-37-157 Action cumulative:

The action created and established by this chapter shall be cumulative and in addition to all other actions presently available at law or in equity.

§ 11-9-135 Enforcement proceedings generally:

Proceedings in replevin . . . before [justice court judges], shall be, as far as practicable, according to those in the circuit courts, in all like cases.

See also Magee v. Covington County Bank, 119 So. 3d 1053, 1057 (Miss. Ct. App. 2012) ("Magee's property was not the subject of pre-seizure; therefore, the applicable code section is 11–37–131. The provisions allowing for a writ of inquiry under section 11–37–129 simply do not apply.").

802 CASE LAW ON REPLEVIN

Est. of Martin Luther King Jr., Inc. v. Ballou, 856 F. Supp. 2d 860, 863–64 (S.D. Miss. 2012) ("Replevin is an action for recovery of personal property wrongfully taken or withheld, [Mississippi's residual statute of limitations under Miss. Code Ann. § 15–1–49, which applies to replevin actions] begins to run when the property is wrongfully taken or withheld.").

Wyatt v. Cole, 710 F. Supp. 180, 182 (S.D. Miss. 1989) (Mississippi's former replevin statute found unconstitutional since judge was required to issue writ upon presentation of complaint).

Stratton v. McKey, 204 So. 3d 1245, 1250 (Miss. 2016) ("Because damages resulting from a replevin brought pursuant to Section 11–37–131 have not been authorized by statute and because Stratton failed to put forward any evidence of damages at trial, they may not be awarded in the case sub judice.").

Ivy v. Merchant, 666 So. 2d 445, 449 (Miss. 1995) ("It is clear from the pleadings, affidavits, and interrogatories that Ivy does not meet his burden under § 11-37-101. He has not produced any fact that would indicate the officers are in possession of the property or that they wrongfully took the same, as required by the replevin statute.").

A.V. Underwood v. Foremost Financial Services Corporation, 563 So. 2d 1387, 1389

(Miss. 1990) (redrafted replevin statute now meets minimum due process requirements);

Oates v. Mc Swain, 85 So. 2d 161, 163 (Miss. 1956) ("The word 'detain' means to hold in custody and possession.").

Cooley v. J.M. Smith Corp., 205 So. 3d 1167, 1170 (Miss. Ct. App. 2016) ("Replevin is a statutorily governed action.").

Lacoste v. Sys. & Servs. Techs., Inc., 126 So. 3d 111, 112–13 (Miss. Ct. App. 2013) ("Mississippi's replevin statute gives would-be possessors two procedural options—(1) request that the court issue a writ to seize the property from the defendant or (2) ask the court to summon the defendant for a hearing to determine who has the right to possess the property. Because, under the first option, the plaintiff gets the property based on his own *113 unchallenged allegations, the statute requires the plaintiff first post a bond before the writ is issued. But the second option does not require a bond, since the court does not award possession until after it considers each party's claims to the property."

CHAPTER 9

CIVIL TRESPASSES

900 UNLAWFULLY ENTERING ANOTHER'S PREMISES

Trespass defined
Distinctions between invitee, licensee, and trespasser

901 STATUTORY TRESPASSES

Disclaiming title and tendering amends for trespass on land
Cutting down or killing trees
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Opening, injuring or defacing structures
Fire damage to another's land
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902 STATEWIDE STOCK LAW

Owner must keep livestock in a safe enclosure
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900 UNLAWFULLY ENTERING ANOTHER'S PREMISES

Trespass defined:

A trespass is a direct infringement of another's right of property. *See* Blue v. Charles F. Hayes & Associates, 215 So. 2d 426, 429 (Miss. 1968). A trespass occurs when a person enters the premises of another without license, invitation, or other right. *See* Kelly v. Sportsmen's Speedway, Inc., 80 So. 2d 785, 791 (Miss. 1955). Every trespass gives the landowner a right to at least nominal damages. However, in order to recover more than nominal damages, actual damages must be shown. *See* Chevron Oil Company v. G. B. Snellgrove, 175 So. 2d 471, 474 (Miss. 1965). Punitive damages may be awarded if the trespass is wilful, grossly negligent or wanton. *See* R & S Development, Inc. v. Wilson, 534 So. 2d 1008, 1013 (Miss. 1988).

Distinctions between invitee, licensee, and trespasser:

Invitee: Enters the premises for mutual advantage having an express or implied invitation. Owner has a duty to keep the premises in a reasonably safe condition. *See* Hoffman v. Planter's Gin Company, Inc., 358 So. 2d 1008, 1012 (Miss. 1978).

Licensee: Enters the premises for own convenience, pleasure or benefit having a license or implied permission. Owner has a duty to refrain from willfully or wantonly injuring a licensee and to point out hidden dangers. *See* Vaughn v. Estate of Worrell, 828 So. 2d 780, 783-85 (Miss. 2002); Little v. Bell, 719 So 2d 757, 763 (Miss. 1998). However, if engaged in active negligence in the operation or control of a business, the owner has a duty to exercise reasonable care to a licensee whose presence is known. *See* Saucier v. Biloxi Regional Medical Center, 708 So. 2d 1351, 1355 (Miss. 1998).

Trespasser: Enters the premises without license, invitation or other right. Owner has a duty to refrain from willfully or wantonly injuring a trespasser. *See* Taylor v. Mississippian Railway, Inc., 826 So. 2d 742, 742-46 (Miss. 2002); Hughes v. Star Homes, Inc., 379 So. 2d 301, 304 (Miss. 1980); *see also* Miss. Code Ann. § 95-5-31 (setting forth statutory duty of possessor of real property to trespasser).

§ 11-7-73 Disclaiming title and tendering amends for trespass on land:

In actions in justice court for trespass on land, the defendant may plead that he disclaims any title or claim to the land in question, and that the trespass was involuntary or by negligence, and that he tendered or offered sufficient amends therefor before suit brought, and he shall thereupon bring the amount so tendered into court; and unless the plaintiff in such action shall recover more damage than the amount so tendered, he shall be adjudged to pay the costs of the action.

§ 95-5-10 Cutting down or killing trees:

(1) If any person shall cut down, deaden, destroy or take away any tree without the consent of the owner of such tree, such person shall pay to the owner of such tree a sum equal to double the fair market value of the tree cut down, deadened, destroyed or taken away, together with the reasonable cost of reforestation, which cost shall not exceed Two Hundred Fifty Dollars ($250.00) per acre. The liability for the damages established in this subsection shall be absolute and unconditional and the fact that a person cut down, deadened, destroyed or took away any tree in good faith or by honest mistake shall not be an exception or defense to liability. To establish a right of the owner prima facie to recover under the provisions of this subsection, the owner shall only be required to show that such timber belonged to such owner, and that such timber was cut down, deadened, destroyed or taken away by the defendant, his agents or employees, without the consent of such owner. The remedy provided for in this section shall be the exclusive remedy for the cutting down, deadening, destroying or taking away of trees and shall be in lieu of any other compensatory, punitive or exemplary damages for the cutting down, deadening, destroying or taking away of trees but shall not limit actions or awards for other damages caused by a person.
(2) If the cutting down, deadening, destruction or taking away of a tree without the consent of the owner of such tree be done willfully, or in reckless disregard for the rights of the owner of such tree, then in addition to the damages provided for in subsection (1) of this section, the person cutting down, deadening, destroying or taking away such tree shall pay to the owner as a penalty Fifty-five Dollars ($55.00) for every tree so cut down, deadened, destroyed or taken away if such tree is seven (7) inches or more in diameter at a height of eighteen (18) inches above ground level, or Ten Dollars ($10.00) for every such tree so cut down, deadened, destroyed or taken away if such tree is less than seven (7) inches in diameter at a height of eighteen (18) inches above ground level, as established by a preponderance of the evidence. To establish the right of the owner prima facie, to recover under the provisions of this subsection, it shall be required of the owner to show that the defendant or his agents or employees, acting under the command or consent of their principal, willfully and knowingly, in conscious disregard for the rights of the owner, cut down, deadened, destroyed or took away such trees.

(3) All reasonable expert witness fees and attorney's fees shall be assessed as court costs in the discretion of the court.

See also Miss. Code Ann. § 95-5-29 ("An action for the remedies and penalties provided by Section 95-5-10 may be prosecuted in any court of competent jurisdiction within twenty-four (24) months from the time the injury was committed and not after.").

§ 95-5-11 Loosening or removing water craft:

Every person who, without the consent of the owner or person in charge, shall loosen or take away any boat or water craft, shall pay to the owner thereof twenty dollars, over and above the expenses for bringing back such boat or water craft.

§ 95-5-21 If any dog kills or injures poultry or livestock:

If any dog shall kill or injure any poultry or any livestock, including cattle, horses, mules, jacks, jennets, sheep, goats and hogs, the owner of the dog shall pay to the owner of such poultry or livestock any loss suffered as a result of such injury and the value of the poultry or livestock killed and all costs of collection, including court costs and reasonable attorney's fees.

See also Miss. Code Ann. § 95-5-19 ("The owner, or the immediate family, employee or agent of the owner, of any poultry or livestock, including cattle, horses, mules, jacks, jennets, sheep, goats and hogs, may kill any dog in the act of chasing or killing any such poultry or livestock, and any such person shall not be liable therefor to the owner of the dog.").

§ 95-5-23 Opening, injuring or defacing structures:

If any person shall put down any fence or bars, or open any gate, not his own, and leave the same down or open, without the permission of the owner, or shall in any manner injure or deface any bridge, building, or other structure not his own, he shall pay to the owner twenty dollars for every such offense, and shall be liable for all damages that may have resulted from such act.

§ 95-5-25 Fire damage to another's land:

If any person shall set on fire any lands of another, or shall wantonly, negligently, or carelessly allow any fire to get into the lands of another, he shall be liable to the person injured thereby, not only for the injury to or destruction of buildings, fences, and the like, but for the burning and injury of trees, timber, and grass, and damage to the range as well; and shall moreover be liable to a penalty of one hundred and fifty dollars in favor of the owner.

§ 95-5-27 Injury to state land:

All the provisions of this chapter giving a penalty for cutting down, deadening, girdling, boxing, destroying, or taking away trees of any kind, herein mentioned, and regulating the remedy for enforcing the same, shall apply when the injury is committed on land belonging to the state, or which is held by the state in trust for any purpose.

§ 95-5-29 Limitations:

An action for the remedies and penalties provided by Section 95-5-10 may be prosecuted in any court of competent jurisdiction within twenty-four (24) months from the time the injury was committed and not after. All other actions for any specific penalty given by this chapter may be prosecuted in any court of competent jurisdiction within twelve (12) months from the time the injury was committed, and not after;

§ 95-5-29 Recovery of statutory penalty not a bar to other damages:

[A] recovery of any penalty herein given shall not be a bar to any action for further damages, or to any criminal prosecution for any such offense as herein enumerated.

§ 95-5-29 Party may elect to claim less than the statutory penalty:

A party, if he so elect, may, under any of the provisions of this chapter, claim less than the penalty given.

95-5-31 Duty of possessor of real property to trespasser:

(1) For the purposes of this section, the following words shall have the following meanings:
(a) "Possessor of real property" means any person with a fee, reversionary, or easement interest in real property, including an owner, lessee, or other lawful occupant.
(b) "Trespasser" means a person who enters upon the property of another without permission and without an invitation, express or implied, or other legal right.
(2) A possessor of real property owes no duty of care to a trespasser, except a duty to refrain from willfully or wantonly injuring such a person.
(3) Notwithstanding subsection (2) of this section, a possessor of real property may be subject to liability for injury to a trespasser if:
(a) The possessor discovers the trespasser in a position of peril on the property and fails to exercise reasonable care to prevent injury to that trespasser; or
(b) The trespasser is a child injured by an artificial condition on the possessor's property and all of the following apply:
(i) The place where the condition existed was one upon which the possessor knew or had

reason to know that a child would be likely to trespass;
(ii) The condition is one of which the possessor knew or had reason to know and which the possessor realized or should have realized would involve an unreasonable risk of death or serious bodily harm to a child;
(iii) The injured child because of his or her youth did not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it;
(iv) The utility to the possessor of maintaining the condition and the burden of eliminating the danger was slight as compared with the risk to the child; and
(v) The possessor failed to exercise reasonable care to eliminate the danger or otherwise to protect the child.
(4) This section does not create or increase the liability of any possessor of real property and does not affect any immunities from or defenses to civil liability established by another section of the Mississippi Code of 1972 or available at common law to which a possessor of real property may be entitled.

902 STATEWIDE STOCK LAW

§ 69-13-1 Owner must keep livestock in a safe enclosure:

There is declared, created and now in existence a statewide stock law which embraces all of the territory of the State of Mississippi and which is declared to be uniform throughout the state, except as hereinafter provided. Any person or persons owning or having under control any livestock such as cattle, horses, mules, jacks, jennets, sheep, goats and hogs, shall not permit such livestock to run at large upon the open or unfenced lands of another person, except as herein expressly provided, but shall keep such livestock confined in a safe inclosure or upon lands belonging to such person. However, upon the petition of twenty percent of the qualified electors of any county of this state, outside of the municipalities thereof, the board of supervisors of such county shall call an election to be held within sixty days after the filing of such petition for the purpose of permitting the qualified electors of such county, outside of the municipalities, to vote upon the question whether or not the provisions of the statewide stock law shall remain in force in such county, outside of the municipalities thereof; and if a majority of the qualified electors of such county, outside of the municipalities thereof, voting in said election, shall vote to sustain the statewide stock law, then it shall remain in full force and effect in said county, but should a majority of the qualified electors of said county, outside of said municipalities, voting in said election, vote against the statewide stock law, then sixty days after said election the provisions thereof shall not apply to or be in force in said county, outside of the municipalities thereof, except in its application to hogs or swine, which shall not be permitted in any event to run at large in any county of this state.

In the event a county has heretofore elected to come out from under the stock law, no less than five years after such election, upon the petition of twenty percent of the qualified electors of any such county outside the municipalities thereof, the board of supervisors shall call an election to be held within sixty days after the filing of such petition to vote upon the question of whether or not the provisions of the statewide stock law shall apply in that county outside the municipalities. If a majority of the qualified electors of such county, outside of the municipalities thereof, voting in said election, shall favor the statewide stock law, then sixty days after said election the provisions of the statewide stock law shall apply in that county outside the municipalities. If the majority of those voting in the election vote against the statewide stock law, the provisions of the statewide stock law shall continue to be inapplicable to such county outside municipalities. No election on the same question may be held more often than once every two years.

See Galloway v. Brown, 93 So. 2d 459, 462 (Miss. 1957) ("Where the state-wide stock law is in full force and effect, the owner of livestock is required to keep them under a safe enclosure of his own, without regard to whether or not other landowners in the stock law district have a sufficient fence, or any fence at all, around their crops of cotton, corn, oats or other such pasture crops; he must rely on the strength of his own fence and not depend upon the insufficiency of his neighbor's fence.").

§ 69-13-19 Owner responsible for damages:

Every owner of livestock referred to in section 69-13-1 shall be liable for damages for all injuries and trespasses committed by such animals by breaking and entering into or upon the lands, grounds, or premises of another person; and the person injured shall have a lien upon the animal, or animals, trespassing for all such damage. The damages for such trespass shall not be less than ten dollars ($10.00) for each horse, cow or hog, and five dollars ($5.00) for each of the other kinds of stock; and for every succeeding offense, after the owner has been notified of the first trespass or injury, double damages shall be recovered with costs. For breaking or entering into a pasture or waste ground, however, double damage shall not be recoverable, and the damages in such cases may be assessed as low as eight dollars ($8.00) for each horse, cow or hog and two dollars ($2.00) for each of the other kinds of livestock.

See Stephens v. Brock, 568 So. 2d 702, 705 (Miss. 1990) ("The state legislature, exercising practical knowledge and agricultural wisdom, must have realized the difficulty of proving damages to crops by livestock. . . . [The statutory guideline of Section 69-13-19] is not the maximum amount of damages allowed but it is the minimum.").

§ 69-13-21 Enforcement of lien:

The person taking up an animal trespassing, after two days may begin his action to recover damages and charges and to enforce his lien, by filing a bill of particulars of his damages, together with a description of the animal on which the lien is

claimed, with a [justice court judge], if his claim does not exceed two hundred dollars; and the justice shall issue a summons for the owner or person entitled to the custody, returnable instanter at such place as he shall designate; and if the animal be not in the custody of the plaintiff, the justice may issue a writ commanding the officer to seize the animal. The summons being executed and returned, the justice shall proceed as in other suits. If the justice finds in favor of the plaintiff, he will assess the damages and charges and enter judgment accordingly, and direct the animal to be sold to satisfy the judgment; and if the animal be not in custody of the plaintiff or officer the order for sale may embrace a command to levy upon it.

§ 69-13-25 To be filed in circuit court if claim exceeds $200.00:

If the amount claimed for the damages by animals trespassing exceed two hundred dollars, the plaintiff will proceed by petition in the circuit court, wherein the proceedings shall be according to the practice of that court; and the clerk shall perform the ministerial duties prescribed for justices of the peace in cases before them.

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CHAPTER 10

WARRANTS

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1000 GOVERNING LAW ON ARREST WARRANTS

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article 3 § 23 of the Mississippi Constitution:

The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

MRCrP 2.2 Duty of judge upon making of a charging affidavit:

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

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

See also Miss. Code Ann. § 99-15-5 ("Any conservator of the peace may, upon a finding of probable cause, by warrant issued under his hand, cause any person charged on affidavit with having committed, or with being suspected of, any offense against the law, to be arrested and brought before him, or before some other conservator of the peace in the proper county. On examination, the conservator of the peace shall commit the offender to jail if the offense be not bailable, and if it be bailable and the offender fail to find bail.").

Case law:

Payton v. N.Y., 445 U.S. 573 (1980) ("Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.").

Wilkinson v. Mayor and Alderman of City of Vicksburg, 2007 WL 1032353 (S.D. Miss.) ("Probable cause cannot be made out by affidavits which are purely conclusory, stating only the affiant's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based.").

Conerly v. State, 760 So. 2d 737, 741 (Miss. 2000) ("Suspicion alone does not meet the constitutional standard of probable cause.").

Strode v. State, 231 So. 2d 779, 782 (Miss. 1970) ("Probable cause is a practical, nontechnical concept, based upon the conventional considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.").

MRCrP 3.1 Issuance of arrest warrant or summons:

(a) Issuance. Upon a finding of probable cause made pursuant to Rule 2.2, or upon a finding that such a determination has previously been made, the judge shall immediately cause to be issued an arrest warrant or, where not prohibited by law, a summons. More than one (1) summons or warrant may issue on the same charging affidavit.

(b) Summons; Subsequent Issuance of Arrest Warrant.
(1) Summons. Unless otherwise prohibited by law, the judge may issue a summons if:

(A) the defendant is not in custody;
(B) the offense charged is bailable as a matter of right; and
(C) there is no reasonable cause to believe that the defendant will not obey the summons.

(2) Subsequent Issuance of Arrest Warrant. After the issuance of a summons, the judge shall issue an arrest warrant if:

(A) the defendant, having been duly summoned, fails to appear;
(B) there is reasonable cause to believe that the defendant will fail to appear; or
(C) the summons cannot be served or delivered for any reason.

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

See also Miss. Code Ann. § 99-33-3 ("On affidavit of the commission of any crime, of which the justice court has jurisdiction, lodged with the justice court, the clerk shall, upon direction by a justice court judge of the county, issue a warrant for the arrest of the offender returnable forthwith or on a certain day to be named.").

MRCrP 3.2 Contents of arrest warrant or summons; execution, return:

(a) Arrest Warrant. An arrest warrant issued upon a charging affidavit shall be signed by the issuing judge. The arrest warrant shall:

(1) contain the complete name of the defendant, or if the name is unknown, any name or description by which the defendant can be identified with reasonable certainty;
(2) contain the location of the defendant, if known;
(3) state the offense with which the defendant is charged; and
(4) command that the defendant be arrested and brought before the issuing judge, or, if the issuing judge is unavailable, before the nearest or most accessible judge having jurisdiction. If the defendant is bailable as a matter of right, the arrest warrant may state that the defendant shall be released on his personal recognizance, subject to the mandatory conditions of release in Rule 8.4(a), and directed to appear at a specified time and place, or be released via an appearance bond or a secured appearance bond in an amount predetermined by the court.

(b) Summons. The summons shall be in the same form as the arrest warrant, except that it shall summon the defendant to appear at a stated time and place within a reasonable time from the date of issuance.

(c) Execution of Arrest Warrant, Return.

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

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

(3) Return. After execution, the officer returning an arrest warrant shall write thereon the manner and date of execution, shall print and sign the officer's name and state the officer's badge number, and shall promptly return the arrest warrant to the clerk of the court specified in the arrest warrant.

(d) Service of Summons. The summons may be served by personally delivering a copy of the summons to the defendant by any officer authorized by law to execute arrest warrants or by delivering a copy of the summons by U.S. mail, addressed to the defendant at the defendant's usual residence, business or post office address. The officer serving the summons shall make return of the summons in the same manner as provided in Rule 3.2(c)(3) for making return of an arrest warrant.

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

See also Comment to Rule 3.2(d) ("A defendant's failure to respond to a mailed summons does not provide valid grounds for the issuance of a contempt-based arrest warrant."); DeSoto Cty. v. T.D., 160 So. 3d 1154, 1156-57 (Miss. 2015) ("Once the parties appeared, the justice court judge should not have left the arrest warrant outstanding. Then, after the parties complied with the judge's instructions and he remanded the charges, the clerk should have notified the local sheriff's office that the warrants were cancelled. So the authority to cancel the warrant lay with the judge.").

MRE 1101 When the Mississippi Rules of Evidence do not apply:

(a) To Courts and Proceedings. These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b).

(b) Exceptions. These rules--except for those on privilege--do not apply to the following:
. . .
(4) these miscellaneous proceedings:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- probable cause hearings in criminal cases and youth court cases;
- sentencing;
- disposition hearings;
- granting or revoking probation; and
- considering whether to release on bail or otherwise.

Mississippi statutes on arrest warrants applicable to justice courts include: Miss. Code Ann. §§ 45-27-9, 97-19-75, 97-19-79, 99-3-28, and 99-25-5.

§ 99-3-28 Warrants against teachers, jail officers, counselor at an adolescent opportunity program, and law enforcement officers:

(1)(a)(i) Except as provided in subsection (2) of this section, before an arrest warrant shall be issued against any teacher who is a licensed public school employee as defined in Section 37-9-1, a certified jail officer as defined in Section 45-4-9, a counselor at an adolescent opportunity program created under Section 43-27-201 et seq., or a sworn law enforcement officer within this state as defined in Section 45-6-3 for a criminal act, whether misdemeanor or felony, which is alleged to have occurred while the teacher, jail officer, counselor at an adolescent opportunity program or law enforcement officer was in the performance of official duties, a probable cause hearing shall be held before a circuit court judge. The purpose of the hearing shall be to determine if adequate probable cause exists for the issuance of a warrant. All parties testifying in these proceedings shall do so under oath. The accused shall have the right to enter an appearance at the hearing, represented by legal counsel at his own expense, to hear the accusations and evidence against him; he may present evidence or testify in his own behalf.
(ii) The authority receiving any such charge or complaint against a teacher, jail officer,

counselor at an adolescent offender program or law enforcement officer shall immediately present same to the county prosecuting attorney having jurisdiction who shall immediately present the charge or complaint to a circuit judge in the judicial district where the action arose for disposition pursuant to this section.

(b) For any person not covered under paragraph (a) of this subsection, before an arrest warrant based on the criminal complaint of a person who is not a law enforcement officer acting in the officer's official capacity may be issued against the person for an alleged criminal act, whether misdemeanor or felony, the appropriate judge must make a determination, with or without a hearing, as to whether the affidavit clearly identifies probable cause to believe that the offense alleged has been committed, at the discretion of the court. If the judge elects to hold a probable cause hearing, parties testifying shall do so under oath and the accused shall have the right to enter an appearance, be represented by legal counsel at his own expense, to hear the accusations and evidence against him, and may present evidence or testify in his own behalf.

(2) Nothing in this section shall prohibit the issuance of an arrest warrant by a circuit court judge upon presentation of probable cause, without the holding of a probable cause hearing, if adequate evidence is presented to satisfy the court that there is a significant risk that the accused will flee the court's jurisdiction or that the accused poses a threat to the safety or wellbeing of the public.

(3) Nothing in this section shall prohibit a law enforcement officer from arresting any person under circumstances in which the law enforcement officer would not be required to seek a warrant from a court.

See also:

State v. Delaney, 52 So. 3d 348, 351 (Miss. 2011) ("[T]he procedural requirements of Section 99-3-28 are inapplicable once an indictment has been returned by a Mississippi grand jury.").

Jackson v. State, 299 So. 3d 823, 832 (Miss. Ct. App. 2020) ("The plain language of the statute mandates a probable cause hearing before an arrest warrant is issued against a licensed public school teacher if engaged in a criminal act while in the performance of his official duties. K.B. was not Jackson's student. Jackson happened to work at the same school K.B. attended. Jackson never taught K.B. Jackson never supervised K.B. In fact, all of the alleged criminal activities by Jackson against K.B. occurred off campus, outside of school hours. Consequently, Jackson cannot avail himself of the procedures provided in this section.").

Mississippi Attorney General's opinions:

If charge or complaint filed against a law enforcement officer.
"The statute provides the guidelines to be followed when a charge or complaint (usually

by affidavit) is filed in Justice Court against a law enforcement officer who is charged with the commission of a crime while in the performance of his duties." Op. Atty. Gen. Thomas, August 8, 2008.

Laws pertaining to children:

§ 43-21-301

(1) No court other than the youth court shall issue an arrest warrant or custody order for a child in a matter in which the youth court has exclusive original jurisdiction but shall refer the matter to the youth court.
(2) Except as otherwise provided, no child in a matter in which the youth court has exclusive original jurisdiction shall be taken into custody by a law enforcement officer, the Department of Human Services, the Department of Child Protection Services, or any other person unless the judge or his designee has issued a custody order to take the child into custody.

U.R.Y.C.P. 11

Comments & Procedures to 11(a)(1):

Justice and municipal courts may not issue an order to take a child into custody, or an arrest warrant, for any child within the exclusive original jurisdiction of the youth court. Such is not applicable to offenses outside the exclusive original jurisdiction of the youth court, e.g., hunting, fishing or traffic violations. *See* White v. Walker, 950 F.2d 972, 979 (5th Cir. 1991). However, in those instances, the custody of the child must comply with all state and federal laws pertaining to the detention of juveniles. *See* U.R.Y.C.P. 19(c). When a child is convicted of a misdemeanor offense by a criminal court having original jurisdiction of the misdemeanor charge and the sentence includes that the child is to be committed to, incarcerated in or imprisoned in a jail or other place of detention, the commencement of such commitment, incarceration or imprisonment in a jail or other place of detention is stayed until the criminal court has notified the youth court judge or the judge's designee of the conviction and sentence.

U.R.Y.C.P. 19

Any child who is charged with a hunting or fishing violation, a traffic violation, a violation of the Mississippi Implied Consent Law, or any other criminal offense for which the youth court shall have power on its own motion to remove jurisdiction from any criminal court, may be detained only in the same juvenile facilities designated by the youth court for children within the jurisdiction of the youth court.

§ 45-27-9 Information forwarded to the Mississippi Justice Information Center:

(4) All persons in charge of law enforcement agencies shall submit to the center detailed descriptions of arrest warrants and related identifying data immediately upon determination of the fact that the warrant cannot be served for the reasons stated. If the warrant is subsequently served or withdrawn, the law enforcement agency concerned must immediately notify the center of the service or withdrawal. Also, the agency concerned must annually, no later than January 31 of each year and at other times if requested by the center, confirm all arrest warrants which continue to be outstanding. Upon receipt of a lawful expunction order, the center shall purge and destroy files of all data relating to an offense when an individual is subsequently exonerated from criminal liability of that offense. The center shall not be liable for the failure to purge, destroy or expunge any records if an agency or court fails to forward to the center proper documentation ordering the action.

. . .

(6) All persons in charge of law enforcement agencies, all court clerks, all municipal justices where they have no clerks, all justice court judges and all persons in charge of state and county probation and parole offices, shall supply the center with the information described in subsections (4) and (10) of this section on the basis of the forms and instructions for the disposition form to be supplied by the center.

1001 WARRANTLESS ARRESTS

§ 99-3-7 For a felony or breach of peace:

(1) An officer or private person may arrest any person without warrant, for an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony, though not in his presence; or when a felony has been committed, and he has reasonable ground to suspect and believe the person proposed to be arrested to have committed it; or on a charge, made upon reasonable cause, of the commission of a felony by the party proposed to be arrested. And in all cases of arrests without warrant, the person making such arrest must inform the accused of the object and cause of the arrest, except when he is in the actual commission of the offense, or is arrested on pursuit.

See also United States Supreme Court cases:

Payton v. New York, 445 U.S. 573, 576 (1979) ("[T]he Fourth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.").

Virginia v. Moore, 553 U.S. 164, 178 (2008) ("When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment

permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.").

Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

See also Mississippi cases:

Elkins v. McKenzie, 865 So. 2d 1065, 1083 (Miss. 2003) ("Prior to invading or entering a home, the government has the burden to demonstrate exigent circumstances to 'overcome the presumption of unreasonableness that attaches to all warrantless home entries.'").

Brewer v. State, 725 So. 2d 106, 129 (Miss. 1998) ("The facts necessary to uphold an arrest without a warrant must be sufficiently strong to support the issuance of a warrant for arrest.").

Strode v. State, 231 So. 2d 779, 782 (Miss. 1970) ("[Probable cause] arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it.").

McCoy v. State, 811 So. 2d 482 (Miss. Ct. App. 2002) ("[T]he arrest of McCoy was not inconsistent with Mississippi statutory law or case law which provides for the warrantless arrest of a suspect for a misdemeanor offense committed in the officer's presence.").

Spencer v. State, 908 So. 2d 783, 786 (Miss. Ct. App. 2005) ("[T]he presence requirement is contextual and may be satisfied under specific circumstances even though the arresting officer did not physically see the misdemeanor criminal act.").

§ 99-3-7 Knowledge of an outstanding warrant:

(2) Any law enforcement officer may arrest any person on a misdemeanor charge without having a warrant in his possession when a warrant is in fact outstanding for that person's arrest and the officer has knowledge through official channels that the warrant is outstanding for that person's arrest. In all such cases, the officer making the arrest must inform such person at the time of the arrest the object and cause therefor. If the person arrested so requests, the warrant shall be shown to him as soon as practicable.

§ 99-3-7 For domestic violence or a protective order violation:

(3)(a) Any law enforcement officer shall arrest a person with or without a warrant when he has probable cause to believe that the person has, within twenty-four (24) hours of such arrest, knowingly committed a misdemeanor or felony that is an act of domestic

violence or knowingly violated provisions of a criminal domestic violence or sexual assault protection order issued pursuant to Section 97-3-7(11), 97-3-65(6) or 97-3-101(5) or an ex parte protective order, protective order after hearing or court-approved consent agreement entered by a chancery, circuit, county, justice or municipal court pursuant to the Protection from Domestic Abuse Law, Sections 93-21-1 through 93-21-29, Mississippi Code of 1972, or a restraining order entered by a foreign court of competent jurisdiction to protect an applicant from domestic violence.
(b) If a law enforcement officer has probable cause to believe that two (2) or more persons committed an act of domestic violence as defined herein, or if two (2) or more persons make complaints of domestic violence to the officer, the officer shall attempt to determine who was the principal aggressor. The term principal aggressor is defined as the party who poses the most serious ongoing threat, or who is the most significant, rather than the first, aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the principal aggressor. If the officer affirmatively finds more than one (1) principal aggressor was involved, the officer shall document those findings.
(c) To determine which party was the principal aggressor, the officer shall consider the following factors, although such consideration is not limited to these factors:
(i) Evidence from the persons involved in the domestic abuse;
(ii) The history of domestic abuse between the parties, the likelihood of future injury to each person, and the intent of the law to protect victims of domestic violence from continuing abuse;
(iii) Whether one (1) of the persons acted in self-defense; and
(iv) Evidence from witnesses of the domestic violence.
(d) A law enforcement officer shall not base the decision of whether to arrest on the consent or request of the victim.

See also Anderson v. State, 102 So.3d 304, 309 (Miss. Ct. App. 2012) ("[Section 99–3–7(3)(a)] sets forth Mississippi's principal-aggressor law applicable to domestic-violence cases. A victim's cooperation is not required to proceed with a charge of domestic violence.").

§ 99-3-7 "Misdemeanor or felony act of domestic violence" defined:

(5) As used in subsection (3) of this section, the phrase "misdemeanor or felony that is an act of domestic violence" shall mean one or more of the following acts between current or former spouses or a child of current or former spouses, persons living as spouses or who formerly lived as spouses or a child of persons living as spouses or who formerly lived as spouses, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, persons who have a current or former dating relationship, or persons who have a biological or legally adopted child together:
(a) Simple or aggravated domestic violence within the meaning of Section 97–3–7;
(b) Disturbing the family or public peace within the meaning of Section 97–35–9, 97–35–11, 97–35–13 or 97–35–15; or
(c) Stalking within the meaning of Section 97–3–107.

§ 99-3-7 Arrest docket and incident report:

(6) Any arrest made pursuant to subsection (3) of this section shall be designated as domestic assault or domestic violence on both the arrest docket and the incident report. Any officer investigating a complaint of a misdemeanor or felony that is a crime of domestic violence who finds probable cause that such an offense has occurred within the past twenty-four (24) hours shall file an affidavit on behalf of the victim(s) of the crime, regardless of whether an arrest is made within that time period. If the crime is reported or investigated outside of that twenty-four-hour period, the officer may file the affidavit on behalf of the victim. In the event the officer does not file an affidavit on behalf of the victim, the officer shall instruct the victim of the procedure for filing on his or her own behalf.

§ 99-3-7 Civil immunity for arrests made in good faith:

(7) A law enforcement officer shall not be held liable in any civil action for an arrest based on probable cause and in good faith pursuant to subsection (3) of this section, or failure, in good faith, to make an arrest pursuant to subsection (3) of this section.

1002 GOVERNING LAW ON SEARCH WARRANTS

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

See also Colorado v. Bannister, 449 U.S. 1, 2 (1980). Absent a specifically established exception warrantless searches are per se unreasonable.

Article 3 § 23 of the Mississippi Constitution:

The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.

See also Hamilton v State, 556 So. 2d 685, 690 (Miss. 1990) ("[T]he affidavit and search warrant, both of which [were] incorporated by reference and made a part of the instruments the underlying facts and circumstances sheet, sufficiently directed the officers to the appellant's premises where they found him in his residence, executed the warrant and discovered marijuana."); Moore v. State, 103 So. 483, 485 (Miss. 1925) ("[The

reasonableness of a search or seizure is] a judicial question to be determined by the court in each case, taking into consideration the place searched, the thing seized, the purpose for, and the circumstances under which the search or seizure was made, and the presence or absence of probable cause therefor.").

Applies to federal and state officers:

The Fourth Amendment and Article 3, Section 23 of the Mississippi Constitution apply to public officers, not private persons. *See* Holliday v. State, 180 So. 800, 800 (Miss. 1938). Evidence obtained through the search of a private citizen acting on own initiative, even in instances of trespassing, has been held admissible. *See* United States v. Kirk, 392 F. Supp.2d 760, 764 (N.D. Miss. 2005); Wolf v. State, 281 So. 2d 445, 449 (Miss. 1973). But this is not the case if the private citizen is acting as a government agent or instrument:

> An officer can not obviate the necessity of obtaining a search warrant before invading the private premises of a citizen, merely by carrying with him other persons who are not officers to make the find.

Holder v. State, 93 So. 2d 841, 843 (Miss. 1957).

Two critical factors considered by courts in determining if a private is acting as a government agent or instrument include: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends. *See* United States v. Bazan, 807 F.2d 1200, 1203-04 (5th Cir. 1986). De minimis or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure is insufficient. *See* United States v. Miller, 688 F.2d 652, 657 (9th Cir.1982).

MRCrP 4.1 Persons or things subject to search and seizure:

A search warrant may be issued for any of the following:

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

MRCrP 4.2 Warrant on affidavit:

(a) In General. No search warrant shall issue except upon affidavit presented to the issuing judge authorized by law to issue search warrants, establishing grounds for issuing the warrant.

(b) Issuance. If the judge finds probable cause exists, the judge shall issue a warrant naming or describing the person or thing to be seized, and naming or describing the person or place to be searched.

MRCrP 4.3 Contents of search warrants:

Every search warrant issued by the court shall:

> (1) command the law enforcement officer to search, within a specified time not to exceed ten (10) days, the person(s) or place(s) named in the search warrant and to return the warrant and an inventory of the thing(s) seized to the court as designated in the warrant;
> (2) designate the court to which the warrant and an inventory of the thing(s) seized shall be returned; and
> (3) be signed and dated by the judge, showing the exact time and date and the name of the law enforcement officer to whom the warrant was delivered for execution.

See also:

> Brown v. State, 2021 WL 973047 (Miss. Ct. App. 2021), which held:
>
> "Because the officer executed the warrant within mere hours of its issuance, the laudable goals of execution of the warrant within ten days were met. Although the warrant technically violated Rule 4.3, the search and seizure actions by the government in this case were in conformance with the Constitution. Thus, we find that the warrant's failure to provide the exact time was harmless error because the warrant was clearly executed within hours of issuance and within the mandated ten-day time frame. We further find that the warrant's failure to include the name of the designated officer was harmless error because the record is clear that Officer Ray was the officer who requested and received the warrant. In conclusion, the goals of Rule of 4.3 were met, and to hold the search warrant in this case invalid would, without doubt, put form over substance."

MRCrP 4.4 Execution and return with inventory; return of papers to court; custody of things:

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

(b) Return of Papers to Court. The law enforcement officer executing the search warrant shall promptly return the search warrant, along with any inventory of things seized, to the court specified in the search warrant. Unexecuted search warrants shall be returned to the court.

(c) Custody of Things. All things taken pursuant to a search warrant shall be retained in the custody of the seizing officer or agency, subject to court order.

Judge's authority to issue search warrants:

Justice court judges may issue search warrants:

- as a conservator of the peace within the county. *See* Miss. Code Ann. § 99-15-11.
- for administrative inspection and warrants under the Uniform Controlled Substance Law. *See* Miss. Code Ann. § 41-29-157.
- for intoxicating beverages offenses. *See* Miss. Code Ann. § 99-27-15.

A judge who issues a search warrant is not automatically disqualified from presiding over the case on the merits. Recusal is only required if a reasonable person, knowing all the circumstances, would harbor doubt as to the judge's impartiality. *See* Code of Judicial Conduct, Canon 3; Wallace v. State, 741 So. 2d 938, 941-42 (Miss. 1999).

See also Ormond v. State, 599 So. 2d 951, 958 (Miss. 1992) ("Under this state's and the federal guidelines, for a search warrant to be valid it must be issued by a neutral and detached magistrate."); McCommon v. State, 467 So. 2d 940, 942 (Miss. 1985) ("A magistrate who fails to perform his neutral and detached function and who serves "merely as a rubber stamp for the police" cannot validly issue a search warrant.").

Who may execute search warrants:

Officials authorized to execute search warrants include:

- sheriffs in the county and in any municipalities within the county. *See* Miss. Code Ann. §§ 19-19-5; 19-25-35 and 19-25-37.
- police officers within the boundaries of the municipality. *See* Miss. Code Ann. § 21-21-1.
- peace officers of the State of Mississippi, any enforcement officer of the Mississippi Department of Transportation, or any highway patrolman. *See* Miss. Code Ann. § 41-29-159.
- conservation officers. *See* Miss. Code Ann. § 49-1-43.

MRE 1101 When the Mississippi Rules of Evidence do not apply:

(a) To Courts and Proceedings. These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b).

(b) Exceptions. These rules--except for those on privilege--do not apply to the following:
. . .
(4) these miscellaneous proceedings:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- probable cause hearings in criminal cases and youth court cases;
- sentencing;
- disposition hearings;
- granting or revoking probation; and
- considering whether to release on bail or otherwise.

1003 REASONABLE EXPECTATION OF PRIVACY

Determined by the totality of the circumstances:

The Fourth Amendment and Article 3, Section 23 of the Mississippi Constitution protect people, not places. What a person seeks to protect as private, even in an area accessible to the public, may be constitutionally protected. *See* Katz v. United States, 389 U.S. 347, 359 (1967) ("[Fourth Amendment protections] do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth."). The key inquiry is whether the person challenging the lawfulness of the search had a legitimate expectation of privacy, i.e., one that society is prepared to recognize as reasonable, in the invaded place. *See* Rakas v. Illinois, 439 U.S. 128, 143 (1978). This is determined by considering the totality of circumstances. Absent a legitimate expectation of privacy there is no standing to contest the lawfulness of the search. Important, though certainly not conclusive, considerations are where and how the search is conducted.

The Mississippi Constitution, at least as to an expectation of privacy in the home, provides greater protection than federal law. *See* Graves v. State, 708 So. 2d 858, 862 (Miss. 1998) ("[T]his Court has found that the Mississippi Constitution extends greater protections of an individual's reasonable expectation of privacy than those enounced under Federal Law.").

In the home:

Ordinarily the expectation of privacy in the home is greater than that of a public or commercial setting. *See* New York v. Burger, 482 U.S. 691, 700 (1987). This may be

significantly lessened, though, where the activities or circumstances on the premises create a risk of intrusion that is reasonably foreseeable, e.g., exposing activities to public scrutiny by leaving drapes open or using home to shop illegal drugs. *See* Lewis v. United States, 385 U.S. 206, 211 (1966); Lee v. State, 489 So. 2d 1382, 1386 (Miss. 1986). A medical emergency in the home or a house afire presents an exigency of compelling gravity making a warrantless entry and plain view seizure, but not an intensive search absent a warrant or consent, reasonable. *See* Thompson v. Louisiana, 469 U.S. 17, 22 (1984); Rose v. State, 586 So. 2d 746, 752 (Miss. 1991). A homeowner has a legitimate expectation of privacy in the contents of garbage kept inside the residence, but not if left for collection next to the street. *See* California v. Greenwood, 486 U.S. 35, 40 (1988); Welch v. State, 830 So. 2d 664, 668 (Miss. 2002).

In the curtilage:

A resident has a legitimate expectation of privacy in the curtilage, but not open fields.

> [C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

United States v. Dunn, 480 U.S. 294, 301 (1987).

See also Florida v. Jardines, 133 S.Ct. 1409, 1415 (2013) ("[The curtilage] is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened." . . . The front porch is the classic exemplar . . . ."); Oliver v. United States, 466 U.S. 170, 179 (1984) ("Open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance."); Arnett v. State, 532 So. 2d 1003, 1009 (Miss. 1988) ("Four-factor test [in *Dunn*] is not to be rigidly applied in all cases, but is to be used as an analytical tool in determining whether an area is so intimately tied to a home as to be within its curtilage.").

On someone else's premises:

"While an ownership of possessory interest is not necessarily required, the mere legitimate presence on the searched premises by invitation or otherwise, is insufficient in itself to create a protectable expectation." States v. Meyer, 656 F.2d 979, 980 (5th Cir. 1981). Instead, the defendant must show an expectation of privacy in the invaded place that society is prepared to recognize as reasonable. *See, e.g.,* Minnesota v. Carter, 525 U.S. 83, 91 (1998) (holding that defendant being on premises with consent of householder to assist in bagging cocaine had no legitimate expectation of privacy); Hopson v. State, 625 So. 2d 395, 401 (Miss. 1993) (holding that occasional baby-sitter did not have legitimate expectation of privacy). A houseguest is entitled to the same

Fourth Amendment protections that one would ordinarily expect at home–but not more. *See* Minnesota v. Olson, 495 U.S. 91, 98 (1990) (holding that overnight houseguest had legitimate expectation of privacy); U.S. v. Taylor, 482 F.3d 315, 318 (5th Cir. 2007) ("Taylor fails to recognize that under [Minnesota v. Olson], his Fourth Amendment rights as a guest are limited to those that he could assert with respect to his own residence.").

In a vehicle:

There is less expectation of privacy in a vehicle than a home. This is due in part by the exigency created by its mobility. *See* Cady v. Dombrowski, 413 U.S. 433, 442 (1973). The owner or driver of a vehicle has a greater expectation of privacy than a mere passenger. *See* United States v. Roberson, 6 F.3d 1088, 1091 (5th Cir. 1993) ("Typically, a passenger without a possessory interest in an automobile lacks standing to complain of its search because his privacy expectation is not infringed."); Bradshaw v. State, 192 So. 2d 387 (Miss. 1966) ("[Defendant] was neither the owner nor driver of the car, and any search of it, as to him, was not unlawful."); McKee v. State, 878 So. 2d 232, 236 (Miss. Ct. App. 2004) ("[Defendant who] was not the owner of the vehicle [but] merely test-driving it [would have lacked standing to complain of its search.]").

Of letters and sealed packages:

Letters and other sealed packages ordinarily require a warrant before government agents may examine the contents:

> Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package. Such a warrantless search could not be characterized as reasonable simply because, after the official invasion of privacy occurred, contraband is discovered.

United States v. Jacobsen, 466 U.S. 109, 114 (1983).

In a jail:

A prisoner has a legitimate expectation of privacy when talking to his attorney in a secure room at the jail, but not when talking with other inmates in a cell. *See* Hudson v. Palmer, 468 U.S. 517, 536 (1984); Lanza v. New York, 370 U.S. 139, 144-45 (1962).

From ariel observations:

Ariel observations of private and commercial properties ordinarily do not invoke Fourth Amendment protections. California v. Ciraolo, 476 U.S. 207, 215 (1986) ("The Fourth Amendment simply does not require the police traveling in the public airways to obtain a warrant in order to observe [on residential property] what is visible to the naked eye.").

From the use of sense-enhancing devices:

The use of sense-enhancing devises not in general public use to explore details of the home which otherwise would not be knowable requires a warrant. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) ("Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant."). The use of flashlights or binoculars do not require a warrant. *See* United States v. Lee, 274 U.S. 559, 563 (1927).

Installation of a Global-Positioning-System:

"[T]he Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" United States v. Jones, 132 S.Ct. 945 (2012).

1004 CHALLENGING A DEFECTIVE SEARCH WARRANT

Is there probable cause?

The judge's decision for issuing a warrant is a practical, common-sense decision of whether, given all the circumstances set forth in the affidavit [and any sworn oral testimony supplementing the affidavit], including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

See Illinois v. Gates, 462 U.S. 213, 237 (1983); Hickson v. State, 512 So. 2d 1, 3 (Miss. 1987) ("While the underlying facts stated in the affidavit for the search warrant considered alone, may not have been sufficient, oral testimony was adduced before the magistrate which, taken together with the affidavit, sufficiently established that probable cause existed for the issuance of the warrant."); Lee v. State, 435 So. 2d 674, 676 (Miss. 1983) ("[W]e reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations."); Prueitt v. State, 261 So. 2d 119, 123 (Miss. 1972) ("Oral testimony is admissible before the officer who is requested to issue a search warrant."); Donerson v. State, 812 So. 2d 1081, 1085 (Miss. Ct. App. 2001) ("A judge may make a determination of probable cause on any evidence offered . . ., [including hearsay that is reasonably trustworthy,] regardless of whether that evidence is admissible in court.").

Probable cause is more than a mere suspicion of illegal activity:

> [A]ll judges [must] scrupulously examine the facts in each case, make a careful evaluation, and in their own best judgment gleaned from life's

> experiences determine whether probable cause existed for a particular search or issuance of a magistrate's search warrant. It is not what some officer thought, it is not some conduct that was simply unusual, not some conduct which simply roused the suspicion that illegal activity could be afoot when there was at the same time just as likely a possibility that nothing at all illegal was transpiring. Rather, it must be information reasonably leading an officer to believe that then and there contraband or evidence material to a criminal investigation would be found. While no more than this will be required, at least this much will be demanded.

Rooks v. State, 529 So. 2d 546, 554 (Miss. 1988).

See also Washington v. State, 382 So. 2d 1086, 1087-88 (Miss. 1980) ("While it is true that search warrant affidavits must be interpreted in a common sense manner with appreciation for the fact that non-lawyers prepare them in haste of criminal investigations . . . it is equally well established that no interpretation may excuse the absence of sufficient underlying facts and circumstances to provide a rational basis for a neutral and judicial determination of probable cause.").

Stale information?

Staleness of information is but one factor in the totality of circumstances for establishing probable cause in issuing a search warrant. *See* Renfrow v. State, 34 So. 3d 617, 627 (Miss. Ct. App. 2009) ("[I]t was reasonable for the judge who issued the search warrant to conclude that images on a computer could still be recovered by forensic methods nine or ten months after the children saw them."); Flake v. State, 948 So. 2d 493, 496-97 (Miss. Ct. App. 2007) ("[T]he facts here do not imply that the information forming the basis for the probable cause was stale. . . . It defies common sense to believe that the confidential informant purchased methamphetamine from Flake and then carried it around for several weeks before notifying the police.").

False statements?

If a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. *See* Franks v. Delaware, 438 U.S. 154, 155-156 (1978); McNeal v. State, 617 So. 2d 999, 1004 (Miss. 1993); Busick v. State, 906 So. 2d 846, 854 (Miss. Ct. App. 2005).

At the hearing, the defendant must show by a preponderance of the evidence that the officer intentionally misrepresented facts or made them in reckless disregard for the truth:

> We find . . . no showing that [the officer] intentionally misrepresented facts or made them in reckless disregard for the truth. [He] described the

> CI as reliable in the past because he knew him to be a reliable CI used by the department on occasion.

Roach v. State, 7 So. 3d 911, 919 (Miss. 2009).

If the allegation is proved, then the court must set aside the false statement and determine whether the remaining affidavit (i.e., absent the false statement) along with the sworn oral testimony supplementing the affidavit are still sufficient to establish probable cause:

> [The criminal investigator] erred in some of the statements set forth in the underlying facts [of the warrant affidavit] . . . [but] there was no showing that [he] intentionally misrepresented those facts, or made them in reckless disregard for the truth. Moreover, the remaining underlying facts clearly constituted probable cause for the issuance of the search warrants.

Bevill v. State, 556 So. 2d 699, 713 (Miss. 1990).

But if the remaining facts are not sufficient, the search warrant is voided and the fruits of the search are suppressed to the same extent as if no warrant was issued. *See* Petti v. State, 666 So. 2d 754, 757-60 (Miss. 1995); Shaw v. State, 938 So. 2d 853, 857-59 (Miss. Ct. App. 2006).

Oath and affirmation?

The "oath and affirmation" condition is satisfied if the affiant does some unequivocal act, whether by words or conduct, that indicates to the issuing judge that the affidavit is under oath. *See* Boyd v. State, 40 So. 2d 303, 306 (Miss.1949) ("[W]e do not think that the issuance of the search warrant in the instant case was 'supported by oath or affirmation' before the officer issuing the same, as contemplated by the Constitution."); Atwood v. State, 111 So. 865 (Miss. 1927) ("The affiant, in the presence of the [judge], signed the affidavit; the [judge] affixed his jurat thereto, and issued the search warrant in proper form.").

Designated with reasonable certainty?

Descriptions in search warrants need not be positively specific and definite, but are sufficient if the places and things to be searched are designated in such manner that the officer making the search may locate them with reasonable certainty. *See* Pool v. State, 483 So. 2d 331, 334 (Miss. 1986); Conn v. State, 170 So. 2d 20 (Miss. 1964); Matthews v. State, 100 So. 18, 19-20 (Miss. 1924); Loeb v. State, 98 So. 449, 452 (Miss. 1923). In determining whether the search warrant adequately describes the places to be searched or things to be seized, the court may look to the affidavit and its underlying facts and circumstances. *See* Hamilton v. State, 556 So. 2d 685, 688-90 (Miss. 1990). Naming the owner or occupant of the premises is relevant only to assist and aid in particularizing the place to be searched:

> It is proper to name the owner or occupant if known, but, if he is unknown, this fact will not prevent a search of the premises when probable cause exists, and the property to be searched is described with sufficient clarity.

Traxler v. State, 142 So. 2d 14, 15 (Miss. 1962).

See also Sutton v. State, 238 So. 3d 1150, 1157 (Miss. 2018) ("Sutton argues that the search warrant did not adequately describe the property to be seized. After review, we agree. 'The description 'stolen property' is no description.'"); Williams v. State, 583 So. 2d 620, 624 (Miss. 1991) ("[N]othing in the Fourth Amendment requires that either the affidavit or the warrant give the name of the owner of the property to be searched."); Wince v. State, 39 So. 2d 882, 884 (Miss. 1949) ("There is no good reason to require that the affidavit and search warrant shall show the name of the owners of the property, and we do not think that such a showing in the affidavit and the search warrant is necessary or required by our statutes.").

Anticipatory warrant?

Anticipatory warrants meet the Fourth Amendment's particularity requirements so long as the supporting affidavit contains information showing:
1) that if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place, and
2) that there is probable cause to believe the triggering event will occur.

See United States v. Grubbs, 547 U.S. 90, 98 (2006) ("[The Fourth Amendment's] particularity requirement does not include the conditions precedent to execution of the warrant.").

Functus officio?

"Functus officio" is term that is applied to an instrument, power, or agency, which has fulfilled the purpose of its creation, and is therefore of no further virtue or effect:

> Was the search warrant lawfully available to the officers for further and other searches of the premises of defendant after the search had been completed, evidence obtained, the defendant arrested, plead guilty, and paid his fine? We think not. The power to the search warrant had become exhausted.

Riley v. State, 37 So. 2d 768, 769-70 (Miss. 1948).

See also Taylor v. State, 102 So. 267, 268 (Miss. 1924) ("We think it is necessary that some time shall be fixed in a search warrant for the return thereof, and that after that time it becomes functus officio, and cannot be executed.")

Returnable to a blank or past date?

A search warrant returnable to a blank or past date is void. *See* Buxton v. State, 39 So. 2d 310, 311 (Miss. 1949); Buckley v. State, 117 So. 115, 116 (Miss. 1928). A search warrant "returnable instanter" is valid since such is not an indefinite or impossible return date. *See* Meyer v. State, 309 So. 2d 161, 166 (Miss. 1975).

Signed and dated?

A search warrant not signed or dated is void:

> If undated search warrants were allowed to be placed in the hands of officers with no date fixed therein for the reasonably early execution and return thereof, and after execution the court were allowed to insert the essential date or dates by amendment, the door to the equivalent of the odious general warrant or writ of assistance which our forefathers had so earnestly sought to close by the searches and seizures provisions in state and federal constitutions, would be open again.

Johnson v. State, 31 So. 2d 127, 128 (Miss. 1947).

But this requirement doesn't necessarily apply to the affidavit in support of the warrant. *See* McKinney v. State, 724 So. 2d 928, 933 (Miss. Ct. App. 1998) ("Although the affidavit [in support of the warrant] was undated, we find that there was a substantial basis to support the judge's finding of probable cause."). It should be noted too that Sunday warrants are not prohibited. *See* Armstrong v. State, 15 So. 2d 438, 438 (Miss. 1943) ("The fact that a search warrant is issued on Sunday does not render it invalid, unless expressly prohibited by statutory enactment.").

Telephonic search warrant?

Telephonic search warrants, absent statutory procedures authorizing their use, are not valid in Mississippi. *See* White v. State, 842 So. 2d 565, 570 (Miss. 2003).

1005 CHALLENGING THE EXECUTION OF A SEARCH WARRANT

Scope of the search exceeded?

A judge in issuing a search warrant may limit the scope of the search. Evidence seized as a result of exceeding that scope, and for which no recognizable exception applies, is inadmissible. *See, e.g.,* Strange v. State, 530 So. 2d 1336, 1339 (Miss. 1998) (holding that marijuana seized in nighttime search inadmissible where warrant limited scope to "in the daytime"); Carney v. State, 525 So. 2d 776, 787 (Miss. 1988) ("As the search warrant was

properly issued only for the television and radio, then only that contraband discovered in plain view during the search for [those items] is properly admissible."); Strangi v. State, 98 So. 340 (Miss. 1923) (holding that warrant specifically authorizing search of a particular room occupied by a particular person did not justify the search of a different and separate building 100 feet away.).

But there is significant leeway:

> The search warrant specifically stated that the resulting search was "[t]o include items inside the vehicle." . . . [W]e interpret the search warrant as authorizing the seizure of any evidence that tended to demonstrate that Taylor was intoxicated at the time she hit and killed William. The black box and the data within it contained information that would assist in that regard.

Taylor v. State, 94 So. 3d 298, 311 (Miss. Ct. App. 2012).

Even when searching homes:

> The search warrant listed the following items to be seized: "money, checks, money order receipts, clothing worn during the robbery of the Piggly Wiggly store to include gray hooded sweatshirt, dark denim pants, long sleeve black shirt."
> . . .
> Officer Brown was entitled to make reasonable inspection of places where the items identified in the search warrant may have been hidden, and the living-room closet was such a location. Having discovered the gun, it was reasonable for Officer Brown to believe, under the circumstances of the investigation, that the gun had evidentiary value. Accordingly, we affirm the trial court's denial of Trammell's motion to suppress.

Trammell v. State, 62 So. 3d 424, 427-28 (Miss. Ct. App. 2011).

However, officers must still consider the expectation of privacy of others:

> Where the proof shows that a portion of a residence is in the sole, separate, and exclusive possession of an individual other than the one named by the search warrant, that individual has a reasonable expectation of privacy in his or her solely occupied portion.

Graves v. State, 708 So. 2d 858, 861 (Miss. 1997).

A search pursuant to a warrant should be accomplished from its onset, taking into account the totality of the circumstances, within a reasonable length of time. *See* Smith v. State, 102 So. 2d 699, 700 (Miss. 1958).

Reasonable reliance on warrant's validity or contents?

The Fourth Amendment exclusionary rule should not be applied if officers in executing the search acted in objectively reasonable reliance as to the warrant's validity or contents:

> [The judge] unequivocally stated that it was her intent to issue a "no knock" warrant, and that she informed the officer-affiant of this intent. . . . There is no reason why a clerical mistake on the part of the judge should result in the suppression of the evidence seized.

White v. State, 746 So. 2d 953, 957-58 (Miss. Ct. App. 1999).

See also Massachusetts v. Sheppard, 468 U.S. 981, 989-90 (1984) ("We refuse to rule that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested."); United States v. Leon, 468 U.S. 897, 922 (1984) ("We conclude that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion); White v. State, 842 So. 2d 565, 568 (Miss. 2003) ("[W]e adopt the *Leon* good faith exception to warrantless searches . . . .").

But this "good faith" exception does not apply if officers deliberately mislead the judge with false statements to secure the warrant. *See* Shaw v. State, 938 So. 2d 853, 858 (Miss. Ct. App. 2005). Moreover, probable cause developed subsequent to the unlawful search and seizure does not retroactively cure the prior violation. *See* McDuff v. State, 763 So. 2d 850, 856 (Miss. 2000).

Was the warrant properly served?

Failure to serve the owner or person occupying or controlling the premises with a copy of the warrant, despite statutory language mandating that it be done, does not void an otherwise valid search. *See* Williams v. State, 583 So. 2d 620, 624-25 (Miss. 1991). Serving the person in charge of the premises, even though no attempt is made to locate the owner, is clearly sufficient. *See* Brown v. State, 77 So. 2d 694, 695 (Miss. 1955).

Were the occupants unlawfully detained?

Police executing a valid search warrant have limited authority to detain the occupants of the premises while the search is conducted so as to minimize the risk of harm to the officers and occupants, prevent flight in the event incriminating evidence is found, and facilitate the orderly completion of the search. *See* Michigan v. Summers, 452 U.S. 692, 701-05 (1981); Dees v. State, 758 So. 2d 492, 494 (Miss. Ct. App. 2000). But "[o]nce an individual has left the immediate vicinity of a premises to be searched, however, detentions must be justified by some other rationale." Bailey v. U.S., 133 S.Ct. 1031,

1043 (2013).

Did the officers announce their presence?

Absent a legitimate justification for not doing so, police are required to announce their presence before entering the home pursuant to a warrant:

> In order to justify a "no knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example allowing the destruction of evidence . . . . This showing is not high, but the police should be required to make it whenever the reasonableness of a no knock entry is challenged.

Richards v. Wisconsin, 520 U.S. 385, 390 (1997).

See also Wilson v. Arkansas, 514 U.S. 927, 934 (1995) ("The Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests."); White v. State, 746 So. 2d 953, 957 (Miss. Ct. App. 1999) ("Mississippi has no statute which specifically prohibits 'no-knock' warrants, and our case law has never prohibited the issuance of 'no-knock warrants.'").

But a violation of the knock-and-announce rule does not necessarily require the exclusion of seized evidence:

> What the knock-and-announce rule has never protected . . . is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that were violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

Hudson v. Michigan, 547 U.S. 586, 594 (2006).

See also United States v. Ramirez, 523 U.S. 65, 71 (1998) ("Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search are not subject to suppression.").

1006 CONFIDENTIAL INFORMANTS

For establishing probable cause:

The judge's decision for issuing a warrant is a practical, common-sense decision of whether, given all the circumstances set forth in the affidavit and any sworn oral testimony supplementing the affidavit, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *See* Illinois v. Gates, 462 U.S. 213, 237 (1983); Lee v. State, 435 So. 2d 674, 676 (Miss. 1983); Reid v. State, 825 So. 2d 701, 702 (Miss. Ct. App. 2002).

When corroborating evidence is necessary:

When information in the affidavit, or sworn oral testimony supplementing the affidavit, is furnished by a confidential informant who is neither an eyewitness nor a participant to the crime, then there must be some corroborating evidence to show that the information provided by such person was truthful or reliable. Had the confidential informant in the past given true and reliable information? Does the suspect's extensive criminal record corroborate the informant's report? Did an independent investigation by law enforcement corroborate the informant's report? But, in any event, the *Gates/Lee* test must still be met:

> [S]imply repeating an informant's allegation, without more, does not overcome the threshold requirements for probable cause.

Roebuck v. State, 915 So. 2d 1132, 1137 (Miss. Ct. App. 2005).

See also United States v. Satterwhite, 980 F. 2d 317, 321 (5th Cir. 1992); State v. Woods, 866 So. 2d 422, 428 (Miss. 2003); Donerson v. State, 812 So. 2d 1081, 1085-86 (Miss. 2001); Walker v. State, 473 So. 2d 435, 438 (Miss. 1985); Holland v. State, 263 So. 2d 566, 566-67 (Miss. 1972); Cooper v. State, 93 So. 3d 898, 901 (Miss. Ct. App. 2012).

When divulging identity is not required:

If the confidential informant is not an eyewitness or participant in the crime, nor present when the defendant is apprehended, then the State is not required to divulge the identity of such person. *See* Breckenridge v. State, 472 So. 2d 373, 377 (Miss. 1985). Otherwise disclosure is ordinarily required:

> [T]his Court is reluctant to require the State to divulge the name of informants because once their identity is known they lose their ability to detect criminal activity. However, when it appears that the informant is a participant or is a material witness essential to the defense of the accused, this Court will not hesitate to require the state to divulge his identity.

Raper v. State, 317 So. 2d 709, 714 (Miss. 1975).

See also Johnson v. State, 155 So. 3d 733, 740 (Miss. 2014) ("The search warrant materials in effect allowed the unseen, unknown, and unsworn confidential informant to testify against Johnson, without any opportunity for cross examination by the accused. We therefore find that admission of such statements at trial offends the Confrontation Clauses of our federal and state constitutions."); Corry v. State, 710 So. 2d 853, 858 (Miss. 1998) ("[W]here the informer is an actual participant in the alleged crime, the accused is entitled to know who he is."); Garvis v. State, 483 So. 2d 312, 316 (Miss. 1986) ("[W]here the informant takes part in the police activity, or if the informant becomes a witness to the facts constituting a crime, he becomes a witness who may be required to appear at trial.").

CHAPTER 11

EXCEPTIONS TO THE WARRANT REQUIREMENT

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1100 FOURTH AMENDMENT ANALYSIS APPLIES

Recognized exceptions to the warrant requirement excuse the need to obtain a valid search warrant prior to the search and seizure of incriminating evidence. Absent a recognized exception, a warrantless search is per se unreasonable. But labels do not always fit! Each case must be closely examined upon its own set of facts. Exigent circumstances may arise making an otherwise unreasonable warrantless search "reasonable" under a Fourth Amendment analysis. Also, circumstances surrounding the initial encounter or intrusion may give rise to an expanded search. For example, a consensual encounter may give rise to an articulable and reasonable belief that criminal activity is afoot permitting a stop; the stop may give rise to an articulable and reasonable belief that the person is armed and dangerous permitting a frisk; the frisk may give rise to a plain view seizure of contraband permitting a search incident to an arrest.

1101 PLAIN VIEW

Circumstances allowing for "plain view" seizure of contraband are determined within the overall framework of Fourth Amendment analysis. *See* Smith v. State, 419 So. 2d 563, 571 n.2 (Miss.1982). A plain view seizure requires:

- the officer to be in a lawful position to view the object. *See* Washington v. Chrisman, 455 U.S. 1, 9 (1982); Mc Farlin v. State, 883 So. 2d 594, 598-99 (2004);
- probable cause, i.e., the incriminating nature of the object must be "immediately apparent." *See* Minnesota v. Dickerson, 508 U.S. 366, 374 (1993); Brown v. State, 690 So. 2d 276, 285 (Miss. 1996); and
- the officer have a lawful right of access to the object itself. *See* Horton v. California, 496 U.S. 128, 138 (1990).

See also Texas v. Brown, 460 U.S. 730, 743-44 (1983) (holding that officer's seizure of knotted balloon containing heroin proper since the officer was in a lawful position to view the knotted balloon and its incriminating nature was immediately apparent); Godbold v. State, 731 So. 2d 1184, 1190 (Miss 1999) (holding that a paint speckled gas grill matching the description of reported stolen property was properly seized since its incriminating nature was immediately apparent).

1102 CONSENSUAL ENCOUNTER

A consensual encounter is an investigative inquiry without a restrained detention, i.e., the person is "free to leave" and "free not to cooperate." *See* Florida v. Royer, 460 U.S. 491, 497 (1983); Randolph v. State, 973 So. 2d 254, 259 (Miss. Ct. App. 2007). No particularized or objective justification is required to initiate or engage in such an encounter:

> Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other places and putting questions to them if they are willing to listen.

United States v. Drayton, 536 U.S. 194, 200 (2002).

A seizure takes place only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed there was a restrained detention. Florida v. Bostick, 501 U.S. 429, 439 (1991) ("[A] court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter."). Circumstances that might indicate a seizure, even where the person did not attempt to leave, include: a threatening presence of several officers; a display of a weapon by an officer; some physical touching of the citizen; or the use of language or tone of voice indicating that compliance with the officer might be compelled. *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980).

1103 INVESTIGATORY STOPS

Grounds for an investigatory stop:

Reasonable suspicion, not probable cause, is the standard for making an investigatory stop:

> The constitutional requirements for an investigative stop and detention are less stringent than those for an arrest. This Court has recognized that "given reasonable circumstances an officer may stop and detain a person to resolve an ambiguous situation without having sufficient knowledge to justify an arrest," that is, on less information than is constitutionally required for probable cause to arrest.

Wilson v. State, 935 So. 2d 945, 950 (Miss. 2006).

An officer has a duty to be alert for suspicious circumstances. *See* Dies v. State, 926 So. 2d 910, 919 (Miss. 2006) ("The Fourth Amendment does not require police who lack the information necessary for probable cause to simply shrug their shoulders and allow a crime or a criminal escape to occur. Rather, it allows for investigatory stops to encourage the police to pursue their reasonable suspicions."). But any investigative stop must be within constitutional limits. *See* Walker v. State, 881 So. 2d 820, 826 (Miss. 2004). The stopping of a vehicle and the detention of its occupants is a "seizure" within the meaning of the Fourth Amendment. *See* Delaware v. Prouse, 440 U.S. 648, 653 (1979); U.S. v. Shabazz, 993 F.2d 431, 434 (5th Cir. 1993).

To make an investigatory stop the officer must:

- have a reasonable suspicion;
- based upon specific and articulable facts; and
- which, taken together with rational inferences from those facts, result in the conclusion that criminal behavior has occurred or is imminent.

See Terry v. Ohio, 392 U.S. 1, 21 (1968); Burchfield v. State, 892 So. 2d 191, 194 (Miss. 2004); Bone v. State, 914 So. 2d 209, 212 (Miss. Ct. App. 2005).

What is reasonable suspicion?

Reasonable suspicion exists when the detaining officer can point to specific and articulable facts that, when taken together with rational inferences from those facts, reasonably warrant the search and seizure. *See* United States v. Estrada, 459 F.3d 627, 631 (5th Cir. 2006). It is more than an inchoate and unparticularized suspicion or hunch of criminal activity, but considerably less than proof of wrongdoing by a preponderance of the evidence. *See* Illinois v. Wardlow, 528 U.S. 119, 124 (2000); U.S. v. Rodriguez, 564 F.3d 735, 741 (5th Cir. 2009).

> [It is] a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.
>
> Alabama v. White, 496 U.S. 325, 330 (1990).

The test is one of reasonableness to be determined on a case-by-case basis. *See* Green v. State, 348 So. 2d 428, 429 (Miss. 1977). Both the content of information possessed by police and its degree of reliability must be taken into account. *See* United States v. Cortez, 449 U.S. 411, 417 (1981). No single fact is determinative. *See* U.S. v. Rodriguez, 564 F.3d 735, 741 (5th Cir. 2009) ("A 'divide-and-conquer' approach to this analysis is not permitted.").

Instead,

> The reasonable suspicion analysis is a fact-intensive test in which the court looks at all circumstances together to weigh not the individual layers, but the laminated total. Factors that ordinarily constitute innocent behavior may provide a composite picture sufficient to raise reasonable suspicion in the minds of experienced officers.

U.S. v. Jacquinot, 258 F.3d 423, 427-28 (5th Cir. 2001).

Thus, "a brief stop of a suspicious individual, in order to determine [a person's] identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time."Adams v. Williams, 407 U.S. 143, 147 (1972).

Reasonable suspicion to be determined from the totality of the circumstances:

Courts must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. The officer's collective knowledge and experience is an important consideration:

> This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person."

U.S. v. Arvizu, 534 U.S. 266, 273 (2002).

See also Anderson v. State, 864 So. 2d 948, 951 (Miss. Ct. App. 2003) ("A collection of actions which, individually, are subject to innocent explanation may be sufficient to create reasonable suspicion under the totality of the circumstances.").

Below are a few cases where our courts have upheld the investigatory stop upon reasonable suspicion:

- Dies v. State, 926 So. 2d 910, 918 (Miss. 2006) ("[T]he agents identified the smell of burnt marijuana, and their experience with the Mississippi Bureau of Narcotics exposed them to that smell on multiple occasions. They were able to trace the smell back to the red camaro through an open window. They came to this knowledge while remaining outside of the vehicle in space that was open to the public.").

- Wilson v. State, 935 So. 2d 945, 950 (Miss. 2006) ("Officer Young was aware from the dispatch call that the bank had been robbed, and he was in route to the bank. On the way to respond, Officer Young testified that he saw an individual that appeared to be a shoplifter at the County Market. The individual, later identified as Wilson, was crouched behind cars when the police passed. He then ran down the street and behind a school bus.").

- Burchfield v. State, 892 So. 2d 191, 195 (Miss. 2004) ("[T]he police were informed by a Walgreens clerk that two white males in a Cadillac with Arkansas license plates had each purchased a quantity of pills containing pseudoephedrine and were leaving the parking lot, westbound on Goodman Road from Highway 51. Within minutes, officer Thomas spotted two white males in a Cadillac with Arkansas license plates, on Goodman Road.").

- Bone v. State, 914 So. 2d 209, 212 (Miss. Ct. App. 2005) ("Thompson's decision to stop Bone was reasonable. A clerk from Fred's informed Thompson that Bone had purchased a large amount of pseudoephedrine. Bone proceeded to Kroger. Thompson personally observed Bone purchase several boxes of pseudoephedrine at Kroger. Additionally, Thompson verified with the police department that Bone was driving his vehicle. Furthermore, Thompson received information regarding Bone's criminal history before proceeding with the stop. Given the available information, it was reasonable for Thompson to infer that Bone was purchasing these products with the intent to manufacture narcotics thereby validating the stop.").

But there must be a "particularized and objective basis" for suspecting legal wrongdoing to withstand constitutional scrutiny:

> Spooner stated that when he exited his car and identified himself as an officer, Rainer "began to back out of the parking lot in an effort to flee." This bare, uncorroborated assertion is not supported by any facts submitted by the State. Spooner's report makes no mention of any facts that support the conclusion that Rainer entered into unprovoked flight at the sight of the police. For example, there is no evidence of the speed at which Rainer attempted to exit the parking lot, nor is there evidence that Rainer drove erratically upon trying to leave. Notably, the lack of evidence of flight compelled the trial court to mention that "[i]t may very well have been that [Rainer] was leaving the gas pump simply because he was through getting his gas and had paid for it." Accordingly, in the absence of more detail, we are not prepared to affirm a finding of flight.

Rainer v. State, 944 So. 2d 115, 119 (Miss. Ct. App. 2006).

See also United States v. Hill, 752 F.3d 1029, 1038 (5th Cir. 2014) ("The government has not satisfied its burden under *Terry* of pointing to specific and articulable facts warranting

reasonable suspicion of criminal activity. . . . Essentially, the police, around 11:00 p.m. at night, happened upon a car, backed into its space in the parking lot of an apartment complex with a reputation for drugs, and, at the same time that they arrived, the car's passenger stepped out and took a few steps away. Reasonable officers in such circumstances would have very little cause to suspect criminal activity rather than, say, a couple who just arrived home on a weekend night and were preparing to go inside."); Harrell v. State, 109 So. 3d 604, 607 (Miss. Ct. App. 2013) ("When [the officer] stopped Harrell to obtain his name and social security number, he did not have reasonable suspicion that any crime—even disobeying a city ordinance—had occurred or was about to occur. [Thus,] Harrell's Fourth Amendment rights were violated . . . .").

An anonymous tip may provide the basis for a *Terry* stop if it is suitably corroborated to support a finding of reasonable suspicion that criminal activity is afoot. A vague description that lacks predictive information is constitutionally insufficient:

> So we are left to determine whether an anonymous tip—"young men, young black men, are standing out on the sidewalks, corners, selling drugs" at the 500 block of Union Street—demonstrates the tipster's veracity, reliability, and basis of knowledge to support a finding of reasonable suspicion before Edney stopped Cooper. We find that it does not.

Cooper v. State, 145 So. 3d 1164, 1169 (Miss. 2014).

Probable cause to believe a traffic violation has occurred is sufficient:

A traffic stop is reasonable if the officer has probable cause to believe that a traffic violation has occurred. *See* Brendlin v. California, 551 U.S. 249, 263 (2007); Whren v. United States, 517 U.S. 806, 810 (1996); Walker v. State, 881 So. 2d 820, 826-27 (Miss. 2004). This is true irrespective of the officer's motives. *See* United States v. Colin, 928 F.2d 676, 678 (5th Cir. 1991) ("Officer Gomez had probable cause to stop the vehicle. Because he had probable cause, his motive-even if anything but proper-was irrelevant."). It is also true even if the officer doesn't issue a citation for the predicate traffic violation. Mosley v. State, 89 So. 3d 41, 47 (Miss. Ct. App. 2012).

Probable cause is a practical, nontechnical concept, based upon the conventional considerations of everyday life on which reasonable and prudent men, not legal technicians, act. "It arises when the facts and circumstances within an officer's knowledge, or of which he has reasonably trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that a crime has been committed and that a particular individual committed it." Maryland v. Pringle, 540 U.S. 366, 370-71 (2003); Adams v. City of Booneville, 910 So. 2d 720, 722 (Miss. Ct. App. 2005).

Our courts have upheld the following circumstances for conducting a traffic stop:

- No brake lights. *See* Walker v. State, 881 So. 2d 820 (Miss. 2004).
- Running onto the shoulder of the road. *See* Leuer v. City of Flowood, 744 So. 2d 266 (Miss. 1999).
- Crossing center line of the road. *See* Loveless v. City of Booneville, 972 So. 2d 723 (Miss. Ct. App. 2007).
- Driving at night with only one headlight. *See* Scott v. City of Booneville, 962 So. 2d 698 (Miss. Ct. App. 2007).
- Drifting into the lane of oncoming traffic. *See* Tran v. State, 963 So. 2d 1 (Miss. Ct. App. 2006).
- Tint-law violation. *See* Walker v. State, 962 So. 2d 39 (Miss. Ct. App. 2006).
- Driving in the middle of the two northbound lanes in the early hours of New Year's Day. *See* Adams v. City of Booneville, 910 So. 2d 720 (Miss. Ct. App. 2005).
- Swerving off the side of the road. *See* Henderson v. State, 878 So. 2d 246 (Miss. Ct. App. 2004).
- Speeding. *See* Burnett v. State, 876 So. 2d 409 (Miss. Ct. App. 2004).
- Crossing over double-line multiple times. *See* Saucier v. City of Poplarville, 858 So. 2d 933 (Miss. Ct. App. 2003).
- Crossing the fog line once, and then again approach or "bump" the fog line. *See* Martin v. State, 240 So. 3d 1047, 1054 (Miss. 2017).
- No valid tag displayed. *See* Gonzales v. State, 963 So. 2d 1138 (Miss. 2007).
- Seat belt violation. *See* Austin v. State, 72 So. 3d 565 (Miss. Ct. App. 2011).
- Revving engine and spinning wheels, i.e., a "burnout" *See* Fogleman v. State, 311 So. 3d 1221 (Miss. Ct. App. 2021).

But a random traffic stop simply to check for a valid driver's license and registration is not reasonable. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979).

Tip of erratic driving as a basis for the stop:

An officer may conduct a traffic stop upon a tip of erratic driving if:

- the tip contains is a sufficient indicia of reliability, including predictive information that tests the informant's knowledge or credibility. *See* Alabama v. White, 496 U.S. 325, 332 (1990); Williamson v. State, 876 So. 2d 353, 355 (Miss. 2004); and
- the tip is reliable in its assertion of illegality, not just in its tendency to identify a particular person. *See* Florida v. J.L., 529 U.S. 266, 267-72 (2000).

There is no requirement that the officer actually observe the erratic driving to make the stop:

> Officer Palmer merely investigated a complaint received from the dispatcher regarding a reckless driver. The public concern served by the seizure is evident-a reckless driver poses a mortal danger to others. . . . [He] had a duty to investigate the detailed complaint given to the police department concerning a driver who may have been ill, impaired, reckless or dangerous to the public.

Floyd v. City of Crystal Springs, 749 So. 2d 110, 117 (Miss. 1999).

Instead, the court must consider the totality of the circumstances. *See, e.g.,* Navarette v. California, 134 S.Ct. 1683, 1692 (2014) ("Under the totality of the circumstances . . . the officer [had] reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road."); Alabama v. White, 496 U.S. 325, 332 (1990) ("When significant aspects of the caller's predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop."); Cook v. State, 159 So. 3d 534, 541 (Miss. 2015) ("The lack of sufficient indicia of reliability in today's case, coupled with the officers' failure to corroborate the criminal activity reported, results in the stop violating Cook's Fourth–Amendment right to be secure from unreasonable searches and seizures."); Page v. State, 250 So.3d 1276, 1280 (Miss. Ct. App. 2018) ("The fact that the tipster had been participating in the same AA meeting as Page and personally witnessed Page's behavior, speaks to the tip's reliability regardless of whether the tipster had provided credible information to the police in the past.").

Reasonable suspicion transferrable:

Reasonable suspicion (and probable cause) can be transferred from officer to officer and police department to police department: "There is no reason why information received from another law enforcement official, who has a sworn duty to uphold the law, should be any less reliable than information received from an informant [whose] credibility, in many situations, is uncertain." Dies v. State, 926 So. 2d 910, 920 (Miss. 2006).

Mistake in law allowable as a basis for the stop:

A mistake in law may provide probable cause for a stop:

> [A] good faith, reasonable belief that a traffic law has been violated may give an officer probable cause to stop a vehicle, even though, in hindsight, a mistake of law was made and the defendant is acquitted of the traffic violation.

Adams v. City of Booneville, 910 So. 2d 720, 724 (Miss. Ct. App. 2005).

See also Harrison v. State, 800 So. 2d 1134, 1139 (Miss. 2001) ("Regardless of whether there were construction workers present in the area the deputies had an objective

reasonable basis for believing that Harrison violated the traffic laws of Mississippi by exceeding the speed limit.").

But any mistake in law must have a reasonable basis:

> Officer Vincent had no reasonable basis to believe that Couldery was committing a traffic violation in driving in the left-hand lane of the interstate. Under the totality of the circumstances, Officer Vincent lacked a reasonable basis for his stop, and the stop was not proper. Accordingly, the trial court erred in not suppressing all contraband which stemmed from this stop.

Couldery v. State, 890 So. 2d 959, 965-66 (Miss. Ct. App. 2004).

Traffic stops may not extend beyond a reasonable duration:

An investigatory stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *See* Haddox v. State, 636 So. 2d 1229, 1234 (Miss. 1994). Further, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion. *See* Florida v. Royer, 460 U.S. 491, 501 (1983). The reasonableness of an investigatory stop is determined by balancing the scope of the intrusion against the governmental interest in conducting the stop and, then, deciding if a person of reasonable caution and belief would find the action taken appropriate. When conducting a traffic stop the officer may:

- request to examine a driver's license and vehicle registration or rental papers and to run a computer check on both. *See* United States v. Estrada, 459 F.3d 627, 631 (5th Cir. 2006); U.S. v. Brigham, 382 F.3d 500, 508 (5th Cir. 2004); and
- ask about the purpose and itinerary of a driver's trip during the traffic stop. *See* United States v. Gonzalez, 328 F.3d 755, 758-59 (5th Cir. 2003).

Additionally,

> An officer may ask questions outside the scope of the stop, but only so long as such questions do not extend the duration of the stop. It is the length of the detention, not the questions asked, that makes a specific stop unreasonable: the Fourth Amendment prohibits only unreasonable seizures, not unreasonable questions, and law enforcement officers are always free to question individuals if in doing so the questions do not effect a seizure.

U.S. v. Machuca-Barrera, 261 F.3d 425, 432 (5th Cir. 2001).

"There is . . . no constitutional stopwatch on traffic stops. Instead, the relevant question in assessing whether a detention extends beyond a reasonable duration is 'whether the

police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly.'" U.S. v. Brigham, 382 F.3d 500, 511 (5th Cir. 2004) (citing U.S. v. Sharpe, 470 U.S. 675, 686 (1985)). But once the purpose of a valid traffic stop has been completed and an officer's initial suspicions have been verified or dispelled, the detention must end unless there is additional reasonable suspicion supported by articulable facts. *See, e.g.,* United States v. Estrada, 459 F.3d 627, 633 (5th Cir. 2006) ("[T]he discovery of the scratch marks and the adhesive created a reasonable belief that the vehicle contained a false compartment that has recently been used, and this belief created at least reasonable suspicion."); United States v. Alvarado, 989 F. Supp. 2d 505, 520 (S.D. Miss. 2013), ("Under the circumstances of this case, the fact that the passengers were Spanish-speaking did not justify Alvarado's continued detention after the purpose of the stop had been fulfilled.").

Protective search incident to a traffic stop:

"It is a fundamental concept of police work that officers, in the course of conducting an investigation that involves close contact with persons suspected of criminal activity, are entitled to take reasonable precautions to ensure their safety." Dees v. State, 758 So. 2d 492, 495 (Miss. Ct. App. 2000). Incident to a traffic stop, an officer may order the driver and passengers out of the vehicle. *See* Maryland v. Wilson, 519 U.S. 408, 415 (1997); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977). If there is an articulable and reasonable belief that the driver or passengers are armed and dangerous, the officer may frisk the outer clothing for concealed weapons. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968); United States v. Colin, 928 F.2d 676, 678 (5th Cir. 1991). Further, if there is an articulable and reasonable belief that the driver or passengers are dangerous and might access the vehicle to gain immediate control of weapons, the officer may search the interior of the vehicle for concealed weapons–including the passenger compartment and any open or closed containers that might contain a weapon. *See* Michigan v. Long, 463 U.S. 1032, 1049-51 (1983). But a protective search for weapons is not a general warrant to rummage and seize at will. *See* Texas v. Brown, 460 U.S. 730, 748 (1983). The key inquiry is whether the steps taken to ensure the safety of the officer were reasonable:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 556 U.S. 332, 351 (2009).

In *Gant*, the U.S. Supreme Court held that the police had overstepped the constitutional limitations:

> [Once handcuffed and secured in a patrol car,] Gant clearly was not within reaching distance of his car at the time of the search. . . . An evidentiary basis for the search was also lacking in this case. . . . Gant was arrested for driving with a suspended license-an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

Arizona v. Gant, 556 U.S. 332, 344 (2009).

Thus, a protective search may not escalate into an evidentiary search absent some independent probable cause to arrest or other exception. *See* Tate v. State, 946 So. 2d 376, 384 (Miss. Ct. App. 2006) ("Agent Lea stated that the when he touched the bulge, he could feel stems and seeds through the fabric of Tate's shorts that he thought [based upon his six years of experience as a narcotics officer] was marijuana. . . . Agent Lea had the requisite probable cause to . . . reach into Tate's shorts and remove the bag."); McFarlin v. State, 883 So. 2d 594, 599 (Miss. Ct. App. 2004) ("Even if [the officer] had been authorized to do a pat down search for weapons under *Terry*, his identification of a small 'knot like nudge' was unreasonable. The continued exploration of McFarlin's pockets after determining that no weapon was present amounts to 'the sort of evidentiary search that *Terry* expressly refused to authorize.'").

Smell of marijuana emanating from vehicle:

"The smell of marijuana constitutes reasonable suspicion and supports further investigation of suspected criminal offense, including the search of the passengers and interior of a vehicle." Walker v. State, 962 So. 2d 39, 42 (Miss. Ct. App. 2006). An arrest following a plain view seizure allows an officer to conduct a search of the immediate surrounding area for weapons and evidence of criminal conduct. *See* McFarland v. State, 936 So. 2d 960, 963 (Miss. Ct. App. 2006).

No stop occurs if person resists or flees:

For a stop to take place there must be either physical force or submission to the assertion of authority. If a person who is ordered to stop resists by walking away or fleeing, then no stop has occurred. Even if the order to stop is unreasonable, any contraband discarded in flight is considered abandoned property and not the fruit of an unlawful seizure or arrest. *See* California v. Hodari, 499 U.S. 621,626 (1991); Harper v. State, 635 So. 2d 864, 866-867 (Miss. 1994).

After making a lawful stop, an officer possessing an articulable and reasonable belief that the person is armed and dangerous may conduct a limited search for concealed weapons. *See* Terry v. Ohio, 392 U.S. 1, 30 (1968). And that search is not strictly limited to patting down a suspect's outer clothing. *See* Parks v. State, 172 So. 3d 1237, 1241 (Miss. Ct. App. 2015) ("Agent Walker stated that Parks was wearing a 'large shirt' that 'was definitely not tight on his skin' and that, in his experience, a weapon is often concealed in the waistband of a suspect's pants. . . . [His] slight lifting of the shirt to view Parks's waistband was a 'limited intrusion' in this instance, and we find that his actions did not violate Parks's Fourth Amendment rights."). In assessing whether the protective search for weapons was reasonable, the court must determine if a reasonably prudent person in the circumstances would be warranted in the belief that the safety of the officer or others was in danger. *See* Ybarra v. Illinois, 444 U.S. 85, 93 (1979) ("[T]he State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous."). But a protective search for weapons is not a general warrant to rummage and seize at will. *See* Texas v. Brown, 460 U.S. 730, 748 (1983). That is, the limited search for weapons may not escalate into an evidentiary search absent some independent probable cause to arrest or other exception:

> Even if [the officer] had been authorized to do a pat down search for weapons under *Terry*, his identification of a small "knot like nudge" was unreasonable. The continued exploration of McFarlin's pockets after determining that no weapon was present amounts to the sort of evidentiary search that Terry expressly refused to authorize.

McFarlin v. State, 883 So. 2d 594, 599 (Miss. Ct. App. 2004).

But if there is probable cause through the sense of touch, the officer may seize the detected contraband:

> Regardless of whether the officer detects the contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have probable cause to believe that the item is contraband before seizing it ensures against excessively speculative seizures.

Minnesota v. Dickerson, 508 U.S. 366, 376 (1993).

See also United States v. Mitchell, 832 F. Supp. 1073, 1079 (N.D. Miss. 1993) ("[T]he court is not convinced that under the facts of this case, an 'immediately apparent' determination of contraband is within the realm of human capability with a single pass of one's hand over the outer clothing."); Tate v. State, 946 So. 2d 376, 384 (Miss. Ct. App. 2006) ("Agent Lea stated that the when he touched the bulge, he could feel stems and seeds through the fabric of Tate's shorts that he thought [based upon his six years of experience as a narcotics officer] was marijuana. . . . Agent Lea had the requisite probable

cause to . . . reach into Tate's shorts and remove the bag."); Anderson v. State, 16 So. 3d 756, 762 (Miss. Ct. App. 2009) ("Deputy Truett could not ascertain the contents of the pill bottle by touch. It was only . . . by reaching inside Anderson's pocket, removing the pill bottle, and visually inspecting its contents that [he] was able to determine that the pill bottle may have contained narcotics. . . . [W]e reverse the circuit court's decision to admit the evidence seized incident to [the] pat-down search.").

A simple request to voluntarily empty one's pockets may be considered reasonable in certain circumstances:

> [Officer] Gray further testified that for safety, "I patted him down for weapons. Well, Mr. Shannon had a coat on, and there are times when you pat someone down, if they have a coat on, that you could possibly miss something. So I asked Mr. Shannon ... 'If you don't mind, could you empty the contents of your pockets on the trunk of the car there?'" . . . We hold that the seizure of the cocaine was the result of a valid investigative stop. The seized cocaine was not the fruit of an illegal arrest. What emerged was a temporary, investigatory stop, or a voluntary conversation, that was reasonable under the circumstances.

Shannon v. State, 739 So. 2d 468, 471 (Miss. Ct. App. 1999).

1105 CHECKPOINTS

Balancing test for reasonableness:

A Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976). Whether the checkpoint stop is "reasonable" under a Fourth Amendment analysis is determined by balancing:

- the gravity of the public concerns served by the seizure;
- the degree to which the seizure advances the public interest; and
- the severity of the interference with individual liberty.

See Michigan Department of State Police v. Sitz, 496 U.S. 444, 447-55 (1990); McLendon v. State, 945 So. 2d 372, 379 (Miss. 2006); Rogowski v. State, 145 So. 3d 1232, 1236 (Miss. Ct. App. 2014); Graham v. State, 878 So. 2d 162, 165 (Miss. Ct. App. 2004).

Gravity of the public concerns served by the seizure:

The State has a legitimate interest in the health, safety, and welfare of its citizens. However, if the primary purpose of the State's legitimate interest in conducting the checkpoint is not distinct from a "general interest in crime control" (i.e., an interest in detecting evidence of ordinary criminal wrongdoing) then the ensuing stop is unreasonable. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 37-44 (2000).

Primary interests distinct from a general interest in crime control include:

- Sobriety checkpoints to remove drunk drivers from the road. *See* Michigan Department of State Police v. Sitz, 496 U.S. 444, 455 (1990); Sasser v. City of Richland, 850 So. 2d 206, 208 (Miss. Ct. App. 2003).

- Driver's licenses, valid tags, and insurance checkpoints. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000); McLendon v. State, 945 So. 2d 372, 379 (Miss. 2006); Caissie v. State, 254 So.3d 849, 853 (Miss. Ct. App. 2018); Hampton v. State, 966 So. 2d 863, 867 (Miss. Ct. App. 2007); Dixon v. State, 828 So. 2d 844, 846 (Miss. Ct. App. 2002).

- Roadside truck weigh-stations and inspection checkpoints. *See* Delaware v. Prouse, 440 U.S. 648, 663 n.26. (1979); Edwards v. State, 795 So. 2d 554, 557-58 (Miss. Ct. App. 2001).

- Illegal game or firearms checkpoints in a game management area. *See* Drane v. State, 493 So. 2d 294, 296-97 (Miss. 1986).

- Border checkpoints to detect illegal aliens. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 545-67 (1976).

- Certain exigencies warranting "an appropriately tailored" checkpoint, e.g., to thwart an imminent terrorist attack or to catch an escaping criminal. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000).

"[I]t is the primary purpose which determines whether a roadblock is constitutional." Dale v. State, 785 So. 2d 1102, 1105 (Miss. Ct. App. 2001). Minor deviations in departmental policies ordinarily will not affect the validity of the stop if there is a legitimate public safety purpose and the roadblock is conducted in a safe and reasonable manner. *See* Field v. State, 28 So. 3d 697, 706 (Miss. Ct. App. 2010).

Degree to which the seizure advances the public interest:

To be reasonable under a Fourth Amendment analysis, the State must show some measure of empirical evidence that the roadblock advances the State's interest. *See, e.g.,* Michigan Department of State Police v. Sitz, 496 U.S. 444, 455 (1990) (1.6 percent of drivers passing through the checkpoint arrested for alcohol impairment sufficient); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (0.5 percent ratio of illegal aliens detected to vehicles stopped sufficient). The mere fact that a reasonable alternative to a checkpoint is available is inconsequential:

> [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.

Michigan Department of State Police v. Sitz, 496 U.S. 444, 453-54 (1990).

Severity of the interference with individual liberty:

Random spot checks or roving-patrol stops are unreasonable since such involve an unconstrained exercise of discretion. *See* Delaware v. Prouse, 440 U.S. 648, 661 (1979). But routine checkpoint stops are far less intrusive:

> First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring to law-abiding motorists, that the stops are duly authorized and believed to serve the public interest.

United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976).

The State's interest in conducting stationary roadblocks in which every vehicle is stopped substantially outweighs the minimal intrusion of the motorist's individual liberty. *See* McLendon v. State, 945 So. 2d 372, 382 (Miss. 2006). Further, because this type of checkpoint is considered routine and not random, there is no requirement that the officers keep a logbook detailing how many cars were stopped or given tickets. *See* McLendon v. State, 945 So. 2d 372, 382 (Miss. 2006) ("McLendon fails to recognize that while there were no written guidelines or set procedures in place, the officers stopped every single vehicle which came through the roadblock. Thus, there was no unbridled officer discretion since the officers did not choose who to stop or who not to stop.").

When a motorist evades a checkpoint:

When a motorist evades a roadblock, police may stop the vehicle to check the validity of the license tag and inspection sticker. *See* Boches v. State, 506 So. 2d 254, 264 (Miss. 1987); Boyd v. State, 751 So. 2d 1050, 1052 (Miss. Ct. App. 1998). Such an investigative stop must be reasonably related in scope to the circumstances which justified the interference in the first place. *See* Terry v. Ohio, 392 U.S. 1, 20 (U.S. 1968). In assessing whether a detention is too long in duration, the court should look to see whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly during which time it was necessary to detain the defendant. *See* United States v. Sharpe, 470 U.S. 675, 686 (1985). Where a detention exceeds the scope of an investigative stop, it approaches a seizure. *See* Boches v. State, 506 So. 2d 254, 264 (Miss. 1987); McCray v. State, 486 So. 2d 1247, 1250 (Miss.1986).

1106 CONSENT

Consent is voluntary permission to search. It may general or limited. *See* Florida v. Jimeno, 500 U.S. 248, 251 (1991) ("We think that it was objectively reasonable for police to conclude that the general consent to search respondent's car included consent to search containers within that car which might bear drugs."); Buford v. State, 2020 WL 5793287 (Miss. Ct. App. 2020) ("The United States Supreme Court has determined that the correct question to ask is, "[W]hat would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.* (quoting Florida v. Jimeno, 500 U.S. 248 (1991)). In this case, the officer's testimony reflects that Buford consented to a search of his person "and anything on him." It is objectively reasonable that an officer, having received consent to search "the person and anything on him," would believe that he had received consent to examine what he found after conducting that search.").

Whether consent is voluntary is determined from the totality of the circumstances. *See* Ohio v. Robinette, 519 U.S. 33, 40 (1996); Comby v. State, 901 So. 2d 1282, 1285 (Miss. Ct. App. 2004). The Mississippi Constitution requires clear evidence of a knowledgeable waiver of the right not to be searched. Simply not objecting to the search is insufficient to constitute a valid waiver. *See* Penick v. State, 440 So. 2d 547, 551 (Miss. 1983). On the other hand, there is no absolute requirement that the person receive "*Miranda*-like" notification of the right to refuse the officer's request to search. *See* Logan v. State, 773 So. 2d 338, 343 (Miss. 2000). Also, the State does not have the initial burden to demonstrate a knowledgeable waiver. Instead, the burden is on the defendant to raise the issue of lack of knowledgeable waiver by showing impaired consent or some diminished capacity. *See* Jones v. Mississippi Department of Public Safety, 607 So. 2d 23, 26-28 (Miss. 1991); Graves v. State, 708 So. 2d 858, 863-64 (Miss. 1997); Milliorn v. State, 755 So. 2d 1217, 1222 (Miss. Ct. App. 1999). A consent to search is not effective if it is tainted by an illegal search or seizure. *See* Florida v. Royer, 460 U.S. 491, 507-08 (1983).

Third party consent is proper where there is common authority (i.e., mutual use of property by those with joint access or control) over the property. *See* Illinois v. Rodriguez, 497 U.S. 177, 181 (1990). In making this determination, it is sufficient that an officer is acting upon a reasonable belief that the third party giving consent possessed the authority to give consent:

> The police were reasonable in their belief that [third party] had common authority . . . [where the person] was title holder, told them she owned the car and provided keys to enter.

Mettetal v. State, 615 So. 2d 600, 603 (Miss. 1993).

The key question is whether the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the property. Peters v. State, 920 So. 2d 1050, 1056 n.1 (Miss. Ct. App. 2006). But this analysis is dependent on whether a physically present co-occupant makes an express refusal of consent. *See* Fernandez v. California, 134 S.Ct. 1126, 1134 (2014) ("We therefore hold that an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason."); Georgia v. Randolph, 547 U.S. 103, 122-23 (2006) ("This case invites a straightforward application of the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant."). A person having no privacy interest in the property searched lacks standing to challenge the validity of consent given. *See* Ross v. State, 954 So. 2d 968, 996 (Miss. 2007).

1107 SEARCH INCIDENT TO A LAWFUL ARREST

A search incident to a lawful arrest is to disarm the suspect being taken into custody and to preserve evidence of criminal conduct. *See* United States v. Robinson, 414 U.S. 218, 235 (1973). But it can precede the formal arrest if probable cause for making the arrest was already present:

> Where the formal arrest followed quickly on the heels of the challenged search of the petitioner's person, we do not believe it particularly important that the search preceded the arrest or visa versa.

Rawlings v. Kentucky, 448 U.S. 98, 111 (1980).

See also Ellis v. State, 573 So. 2d 724, 726 (Miss. 1990) ("Further clarification came in Rawlings v. Kentucky, ..."); Williams v. State, 763 So. 2d 202, 205 (Miss. Ct. App. 2000) ("[Defendant's] admission of possession of marijuana gave the officers probable cause to arrest him for that crime, thereby allowing a search incident to that arrest, which in turn yielded the crack.").

In conducting a search incident to a lawful arrest, the officer may search the arrestee and the immediate surrounding area for weapons and evidence of criminal conduct. *See* Chimel v. California, 395 U.S. 752, 763 (1969) ("There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."); Rankin v. State, 636 So. 2d 652, 657 (Miss. 1994) ("The area within the arrestee's immediate control, from which he might obtain a weapon or where he may conceal evidence, may also be searched, consistent with the Fourth Amendment."). But the search may not be conducted if it is too remote in time or place to have been incidental to the arrest. Instead it must be "reasonably contemporaneous" to the arrest in light of the particular circumstances. *See* Preston v. United States, 376 U.S. 364, 367 (1964); United States v. Maslanka, 501 F.2d 208, 214 (5th Cir. 1974); Gales v. State, 153 So. 3d 632, 643 (Miss. 2014).

Moreover, *Gant* applies when searching a vehicle incident to a recent occupant's arrest:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 556 U.S. 332, 351 (2009).

See also Knowles v. Iowa, 525 U.S. 113, 114 (1998) ("[The officer] issued [the driver] a [speeding] citation rather than arresting him. [The Fourth Amendment prohibits] a full search of the car.").

1108 PROTECTIVE SWEEP

Police who lawfully enter a home for a legitimate law enforcement purpose may make a "protective sweep" of the premises to prevent an ambush. But the sweep may last no longer than is necessary to dispel a reasonable suspicion of danger. *See* Maryland v. Buie, 494 U.S. 325, 335 (1990). The plain view exception applies to protective sweeps. *See* McNeil v. State, 813 So. 2d 767, 770-72 (Miss. Ct. App. 2002).

1109 VEHICLE SEARCH

The vehicle exception to the warrant requirement arises out of both a diminished expectation of privacy in a vehicle as well as the exigency created by its mobility. *See* Cady v. Dombrowski, 413 U.S. 433, 442 (1973). But it applies even in situations where the vehicle has been immobilized or is unmovable. *See* Moore v. State, 787 So. 2d 1282, 1288 (Miss. 2001). Officers who have legitimately stopped a vehicle and who have probable cause to believe that the vehicle contains contraband may conduct without a warrant as thorough a search as a magistrate could authorize by a warrant–including the search of open or closed containers. *See* Maryland v. Dyson, 527 U.S. 465, 466 (1999); Wyoming v. Houghton, 526 U.S. 295, 307 (1999); United States v. Ross, 456 U.S. 798, 823 (1982); United States v. Castelo, 415 F.3rd 407, 412 (5th Cir. 2005); Jim v. State, 911 So. 2d 658, 660-61 (Miss. Ct. App. 2005). The smell of marijuana is sufficient probable cause for a vehicle search. Townsend v. State, 681 So. 2d 497, 502 (Miss. 1996); Fleming v. State, 502 So. 2d 327, 328 (Miss. 1987). The actual search may occur after the lawful seizure of the vehicle:

> Because it is undisputed that Sorge had probable cause to search the oxygen tanks that he found in Malloy's vehicle, it was permissible for him to conclude the search away from the scene after a brief delay.

United States v. Malloy, 217 F.Appx. 342, 346 (5th Cir. 2007).

1110 DOG SNIFFS

A "dog sniff" of closed containers in plain view by well-trained narcotics agents does not constitute a "search" within the meaning of the Fourth Amendment. *See* United States v. Place, 462 U.S. 696, 707 (1983). This includes a "dog sniff" around the exterior of a vehicle following a valid traffic stop or lawful seizure of the vehicle. *See* Illinois v. Caballes, 543 U.S. 405, 410 (2005); United States v. Seals, 987 F.2d 1102, 1106 (5th Cir. 1993); Jaramillo v. State, 950 So. 2d 1104, 1107 (Miss. Ct. App. 2007). A relatively brief detention is permissible to resolve a reasonable, articulable suspicion of drug trafficking. *See* Wade v. State, 33 So. 3d 498, 506 (Miss. Ct. App. 2009) ("The record reflects that it took just three minutes to respond with a dog [to resolve the officer's reasonable suspicion that the driver was smuggling narcotics.]"). But an excessively prolonged detention of the driver and vehicle for purposes of conducting a "dog sniff" may require probable cause. *See* United States v. Zucco, 71 F.3d 188, 191 (5th Cir. 1995). Once the dog "alerts" to the presence of drugs, the officer has probable cause to search the area to which the dog alerted. *See* Shelton v. State, 45 So. 3d 1203, 1209 (Miss. 2010); Millsap v. State, 767 So. 2d 286, 292 (Miss. Ct. App. 2000). Officers may employ any "necessary and reasonable" means to carry out the search:

> That the officers had to use tools to extricate the metal panel where the police dog indicated the presence of an illegal substance is of no consequence. Once the dog alerted to that particular area, the officers had probable cause to search which included the necessary and reasonable means to carry out the search.

Hurlburt v. State, 803 So. 2d 1277, 1281 (Miss. Ct. App. 2002).

The reliability of the dog's alert is to be viewed through the lens of common sense:

> If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence.

Florida v. Harris, 133 S.Ct. 1050, 1058 (2013).

1111 INVENTORY

An inventory of a lawfully impounded or seized vehicle conducted in good faith pursuant to reasonable police procedures is constitutionally permissible. *See* Colorado v. Bertine, 479 U.S. 367, 374 (1987); Ray v. State, 798 So. 2d 579, 583-84 (Miss. Ct. App. 2001). Its purpose is to:

- to protect an owner's property while in the custody of the police;
- to insure against claims of lost, stolen or vandalized property, and
- to protect the police from potential dangers.

See South Dakota v. Opperman, 428 U.S. 364, 369 (1976); Bolden v. State, 767 So. 2d 315, 317 (Miss. Ct. App. 2000).

It must be conducted either contemporaneously with the impoundment of the vehicle or as soon thereafter as is reasonably safe and practical. *See* Black v. State, 418 So. 2d 819, 823 (Miss. 1982). "Plain view" evidence may be seized. *See* Michigan v. Thomas, 458 U.S. 259, 262 (1982); Harris v. United States, 390 U.S. 234, 236 (1968); Jackson v. State, 440 So. 2d 307, 310 (Miss. 1983). In any event, an inventory may not be employed as a ruse to rummage for incriminating evidence. Standardized criteria or established routine may provide sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and the characteristics of the container itself. *See* Florida v. Wells, 495 U.S. 1, 4 (1990).

1112 STATIONHOUSE SEARCH

As part of a routine administrative procedure and incident to booking and jailing a suspect, police may conduct a search of any container or article found on or in the possession of the arrested suspect. See Rankin v. State, 636 So. 2d 652, 657 (Miss. 2001). The purpose of the search is to inventory property and to guard against concealed dangers:

> [I]t is not "unreasonable" for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures.

Illinois v. Lafayette, 462 U.S. 640, 648 (1983).

1113 EMERGENCY SITUATION

An emergency situation excuses the need to obtain a warrant if from the totality of the circumstances:

- the officer has reasonable grounds to believe that there is an emergency at hand and an immediate need for the officer's assistance to protect life or property,
- the search is not primarily motivated by intent to arrest and seize evidence, and
- there is some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

See Michigan v. Fisher, 558 U.S. 45, 49 (2009) ("Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception."); Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) ("One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury."); Cady v. Dombrowski, 413 U.S. 433, 448 (1973) ("Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not 'unreasonable' within the meaning of the Fourth and Fourteenth Amendments.").

1114 TO PREVENT THE DESTRUCTION OF EVIDENCE

If an officer has probable cause to conduct a search, but the delay in procuring a valid search warrant would create a substantial risk of imminent destruction of contraband the warrant requirement may be excused:

> If the exigencies had been such that a delay in procuring a valid warrant would have created a substantial risk of imminent destruction of contraband or the like, the warrant requirement could have been excused; but where time permits the constitution requires allegations of probable cause supported by a statement of underlying facts or circumstances so that a judicial determination of probable cause might be made.

Washington v. State, 382 So. 2d 1086, 1088 (Miss. 1980).

See also Missouri v. McNeely, 133 S.Ct. 1552, 1563-68 (2013) ("Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances. . . . [T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."); Vaughn v. State, 972 So. 2d 56, 61 (Miss. Ct. App. 2008) ("Vaughn's blood needed to be tested quickly in order to preserve the evidence of drugs or alcohol in his system. [E]xigent circumstances existed to permit a search.").

Factors to consider include:

- the degree of urgency involved and the amount of time necessary to obtain a warrant;
- the reasonable belief that contraband is about to be removed;
- the possibility of danger to police officers guarding the site of contraband while a search warrant is sought;
- information that the possessors of the contraband are aware that the police are on their trail; and
- the ready destructibility of the contraband.

United States v. Blount, 123 F.3d 831, 837 (5th Cir.1997).

See also United States v. Morales, 171 F.3d 978, 982 (5th Cir. 1999) ("The record reflects no evidence that the contraband was about to be removed or destroyed. The officers could have waited while a search warrant was obtained with little or no danger to the officers guarding the warehouse."); United States v. Woods, 416 F. Supp. 2d 489, 495 (N.D. Miss. 2006) ("[T]he agents could not obtain a warrant in the short period of time that it took Woods to discard the [pornographic] material, pour gasoline on it and burn it.").

But police cannot create the exigency by violating or threatening to violate the Fourth Amendment.

> Officer Cobb testified without contradiction that the officers "banged on the door as loud as [they] could" and announced either " 'Police, police, police' " or " 'This is the police.' " This conduct was entirely consistent with the Fourth Amendment, and we are aware of no other evidence that

> might show that the officers either violated the Fourth Amendment or threatened to do so (for example, by announcing that they would break down the door if the occupants did not open the door voluntarily).

Kentucky v. King, 131 S.Ct. 1849, 1863 (2011).

Any imposed restraint must be both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests:

> Police officers, with probable cause to believe that a man had hidden marijuana in his home, prevented that man from entering the home for about two hours while they obtained a search warrant. . . . We conclude that the officers acted reasonably.

Illinois v. McArthur, 531 U.S. 326, 328 (2001).

1115 HOT PURSUIT

Officers in "hot pursuit" of a criminal suspect are not required to delay in the course of the investigation if to do so would gravely endanger their lives or the lives of others. *See* U.S. v. Santana, 427 U.S. 38, 43 (1976) ("The District Court was correct in concluding that 'hot pursuit' means some sort of a chase, but it need not be an extended hue and cry 'in and about (the) public streets.'"); United States v. Hardy, 2007 WL 683941 (S.D. Miss.) ("[T]he officers plainly were in hot pursuit of an armed and dangerous suspect at the time they searched Odie's apartment. Those exigent circumstances justified searching the apartment without first obtaining a warrant."). The permissible scope of the search is as broad as may be reasonably necessary to prevent the dangers which could arise from the pursuit. *See* Maryland Penitentiary v. Hayden, 387 U.S. 294, 298-300 (1967); Hall v. State, 288 So. 2d 850, 852 (Miss. 1974).

1116 THE EXCLUSIONARY RULE

General considerations:

The Fourth Amendment prohibition against unreasonable searches and seizures applies to States through the Due Process Clause of the Fourteenth. *See* Mapp v. Ohio, 367 U.S. 643, 654-56 (1961). Evidence that has been obtained, whether directly or indirectly, by exploitation of an illegal search or seizure is ordinarily inadmissible in the prosecution's case in chief against a criminal defendant.

> [T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, . . . but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree."

Segura v. United States, 468 U.S. 796, 804 (1984);

See also Wong Sun v. United States, 371 U.S. 471, 484 (1963) ("The exclusionary prohibition extends as well to the indirect as the direct products of such [illegal] invasions.").

But the Fourth Amendment does not require that the exclusionary rule be applied unless the "remedial objectives" for having the rule is "efficaciously served." The primary "remedial objective" is deter future unlawful police conduct. *See* United States v. Calandra, 414 U.S. 338, 348 (1974). Any remedial objectives, though, must be weighed against the "substantial social costs" and "harm to the justice system" exacted by the exclusion:

> Here, a multiple DUI offender, who was driving under the influence on Christmas Eve, would not be required to answer for his actions because of Langston's error. The counter-effect would be that innocent citizens of this State, who look to the government for protection from drunk drivers, would be subjected to the potentially fatal risk of a recalcitrant, multiple-DUI offender being placed back on their roadways. This risk only adds to the undeniable substantial social costs exacted by drunk drivers through not only fatalities, but also through grief to the survivors; personal injuries ranging from catastrophic to minor; and property loss. . . . The "substantial social costs" and "harm to the justice system" resulting from giving the keys to the jail to a serial drunk driver, under the facts and circumstances presented here, far outweigh any imagined deterrent effect.

Delker v. State, 50 So. 3d 300, 305-06 (Miss. 2010).

Ordinarily the exclusionary rules do not apply to:

- Civil proceedings. *See* United States v. Janis, 428 U.S. 433 (1976).
- Grand juries proceedings. *See* United States v. Calandra, 414 U.S. 338 (1974).
- Federal habeas corpus reviews. *See* Stone v. Powell, 428 U.S. 465 (1976).
- Impeachment of the defendant's own testimony. *See* James v. Illinois, 493 U.S. 307 (1990).

Attenuation of the taint doctrine:

The exclusionary rule does not apply if the connection between the unlawful police conduct and the discovery of the evidence sought to be admitted has become so attenuated as to dissipate the taint of the Fourth Amendment violation. *See* Wong Sun v. United States, 371 U.S. 471, 484 (1963).

Independent-source doctrine:

The exclusionary rule does not apply if the evidence has been discovered wholly independent of the unlawful police conduct:

> Whether the initial entry was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized.

Segura v. United States, 468 U.S. 796, 813-14 (1984).

See also Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) ("[The Fourth Amendment prohibition against unlawful searches and seizures] does not mean that the facts obtained [in an unlawful manner] become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, ..."). The "independent source" doctrine applies not only to evidence obtained for the first time during an independent lawful search, but also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. *See* Murray v. United States, 487 U.S. 533, 537-38 (1988).

Inevitable discovery doctrine:

The exclusionary rule does not apply if the government can prove that the evidence would have been obtained inevitably regardless of the unlawful police conduct. *See* Nix v. Williams, 467 U.S. 431, 447 (1984) ("The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. . . . [I]ts rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule."); United States v. Crews, 445 U.S. 463, 474 (1980) ("[T]he illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct.").

***Leon* good faith exception:**

The exclusionary rule does not apply if evidence is obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause. *See* Eaddy v. State, 63 So. 3d 1209, 1215 (Miss. 2011) ("Under the White/Leon good-faith exception, the relevant inquiry turns to whether the officers reasonably relied in good faith on an invalid search warrant.").

Suppression of the evidence is appropriate only if:

- the magistrate was not detached and neutral;
- the officers were dishonest or reckless in preparing their affidavit; or
- the officers could not have harbored an objectively reasonable belief in the existence of probable cause.

See United States v. Leon, 468 U.S. 897, 926 (1984).

See also Davis v. United States, 131 S.Ct. 2419, 2429 (2011) ("Indeed, in 27 years of practice under Leon 's good-faith exception, we have 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct."); White v. State, 842 So. 2d 565, 568 (Miss. 2003) ("[W]e adopt the *Leon* good faith exception to warrantless searches . . . ."); Magee v. State, 73 So. 3d 1183, 1190 (Miss. Ct. App. 2011) ("We find it clear from his affidavit that Officer Heath sought a warrant to collect Magee's DNA. And he believed the warrant authorized him to do so. Thus, we find Officer Heath acted reasonably.").

But, the *Leon* good faith exception does not apply if the warrant is so facially deficient that the officer cannot presume it to be valid:

> "A warrant with a blank section cannot even rise to the level of "failing to particularize" a place. It is clearly, facially defective, and the whole premise of the good faith exception would be negated if we were to find the exception applies. Thus, we hold that the good faith exception does not apply, and the instant issue is, therefore, moot."

State ex rel. Mississippi Bureau of Narcotics v. Canada, 164 So. 3d 1003, 1009 (Miss. 2015).

1117 A SUMMARY OF SEARCH AND SEIZURE ISSUES

- Did the police conduct constitute a search or seizure? A consensual encounter is not.

- If the police conduct did constitute a search or seizure– Was there a warrant? The exclusionary rule ordinarily does not apply if, in accordance with *United States v. Leon*, the evidence is obtained by officers acting in reasonable reliance on a search warrant issued by a neutral and detached magistrate but ultimately found to be unsupported by probable cause.

- If a warrant was issued– Was it defective?
  Was it issued by one authorized to do so?
  Was it supported by probable cause? But see above. Was a confidential informant used?
  Did affiant knowingly make a false statement?
  Was it supported by oath or affirmation?
  Did warrant designate with reasonable certainty the place to be searched and the persons or things to be seized?
  Was the warrant "functus officio"?
  Was it returnable to a blank or past date?
  Was it signed and dated?

- If a warrant was issued– Was it properly executed?
  Did the officers exceed the scope authorized by the warrant?
  Did the officers act in reasonable reliance as to the warrant's validity or contents?

- If a warrant was issued– Does Section 41-29-157 (administrative inspection warrant under the Uniform Controlled Substance Law) or Section 99-27-15 (sale or possession of intoxicating beverages) apply?

- If a warrant was not issued– Is there a recognized exception to the warrant requirement?

- If there is not a recognized exception to the warrant requirement– Is there a sound argument that when applied to the "totality of the circumstances" of the case would make the search "reasonable" under the Fourth Amendment to the U.S. Constitution and Section 23 of the Mississippi Constitution?

- If the search or seizure is unlawful, i.e., not "reasonable"– Is there an exception to the exclusionary rule that will still allow it into evidence?

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CHAPTER 12

CONFESSIONS

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Whether adequate warnings of *Miranda* rights were given
Whether there was a valid waiver of *Miranda* rights
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1202 FOURTH AMENDMENT CONSIDERATIONS

Governing laws
Fruit of the poisonous tree

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1200 FIFTH AMENDMENT CONSIDERATIONS

Governing laws:

Fifth Amendment:

> [N]or shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law;

See also Miss. Const. art. III, § 14 ("No person shall be deprived of life, liberty, or property except by due process of law."); Miss. Const. art. III, § 26 ("In all criminal prosecutions . . . [the accused] shall not be compelled to give evidence against himself;").

Challenge heard outside the jury:

The defendant is entitled to challenge, in the absence of a jury, the admissibility of a confession. *See* Thorson v. State, 653 So. 2d 876, 888 (Miss. 1995). At the hearing, the trial judge must determine if:

- there was a custodial interrogation;
- adequate *Miranda* warnings were given; and
- from the totality of the circumstances there was a "knowing and intelligent" and voluntary waiver of the rights within those warnings.

See McCarty v. State, 554 So. 2d 909, 911 (Miss. 1989).

The trial judge's ruling is not subject to reversal on appeal unless it is "manifestly in error" or "contrary to the overwhelming weight of the evidence." *See* Applewhite v. State, 753 So. 2d 1039, 1041 (Miss. 2000). However, if the trial judge fails to make specific findings in determining the admissibility of a confession, the scope of appellate review may broaden. This is particularly true if the precise points at issue on appeal cannot be clearly inferred from the testimony given. *See* Gavin v. State, 473 So. 2d 952, 955 (Miss. 1985); Forrest v. State, 782 So. 2d 1260, 1264 (Miss. Ct. App. 2001).

Custodial interrogation:

"Custodial interrogation" is questioning initiated by law enforcement officers of a person in custody. Such questioning triggers the need for *Miranda* warnings. "In custody" means that from the totality of the circumstances a reasonable person would feel arrested as opposed to being temporarily detained. *See* California v. Beheler, 463 U.S. 1121, 1125 (1983); Oregon v. Mathiason, 429 U.S. 492, 494 (1977).

Important, but not per se dispositive, factors include:

- the place of interrogation;
- the time of interrogation;
- the people present;
- the amount of force or physical restraint used by the officers;
- the length and form of the questions;
- whether the defendant comes to the authorities voluntarily; and
- what the defendant is told about the situation.

See Hunt v. State, 687 So. 2d 1154, 1160 (Miss. 1997).

Miranda warnings or "their equivalent" are NOT required for:

- a volunteered statement, i.e., a voluntary statement that is not in response to custodial interrogation or any police action designed to elicit an incriminating response. *See* Wilson v. State, 936 So. 2d 357, 360-62 (Miss. 2006); Wright v. State, 730 So. 2d 1106, 1108 (Miss. 1998).
- general on-the-scene investigative questioning. *See* Tolbert v. State, 511 So. 2d 1368, 1375 (Miss. 1987).
- routine booking questions that are non-interrogative. *See* Alexander v. State, 736 So. 2d 1058, 1063 (Miss. Ct. App. 1999).
- roadside questioning of motorist detained for routine traffic stop. *See* Levine v. City of Louisville, 924 So. 2d 643, 644 (Miss. Ct. App. 2006).

Does taking vehicle keys from a driver transform a routine traffic into a custodial interrogation? The Mississippi Court of Appeals held that it did not:

> "During a Terry stop, officers are 'authorized to take such steps as are reasonably necessary to protect their personal safety and to maintain the status quo ....' " Wrenn v. State, 281 So. 3d 838, 843 (Miss. Ct. App. 2018) (quoting United States v. Hensley, 469 U.S. 221 (1985)). Parker suspected that Johnson was intoxicated, and taking Johnson's keys was a reasonable means of protecting the officers' safety during the course of the stop. This reasonable safety precaution did not transform the routine traffic stop into a custodial interrogation.
>
> Johnson v. State, 2021 WL 1184663 (Miss. Ct. App. 2021).

See also Salinas v. Texas, 133 S.Ct. 2174, 2180 (2013) ("[Where the defendant had not expressly invoked the privilege against self-incrimination,] the prosecution's use of his noncustodial silence did not violate the Fifth Amendment."); Posey v. State, 822 So. 2d 315, 319 (Miss. Ct. App. 2002) (holding that the defendant's voluntary and unsolicited remark to officer while en route from hospital to station was admissible).

Whether adequate warnings of *Miranda* rights were given:

An accused subject to custodial interrogation must be given *Miranda* warnings or "their equivalent" for the confession to be deemed "knowingly and intelligently" given:

> [W]hen an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, ... [h]e must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Miranda v. Arizona, 384 U.S. 436, 478-79 (1966).

See also Rhode Island v. Innis, 446 U.S. 291, 300 (1980) ("[T]he special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation.").

A verbatim recital of the familiar words from the *Miranda* opinion is not required. *See* California v. Prysock, 453 U.S. 355, 359 (1981) ("[N]o talismanic incantation [is] required to satisfy [*Miranda*] strictures"). The inquiry is simply whether the warnings given reasonably conveyed those rights. *See* Duckworth v. Eagan, 492 U.S. 195, 203 (1989). Oral *Miranda* warnings are sufficient if the requisite standards are otherwise met. *See* Dees v. State, 758 So. 2d 492, 495 (Miss. Ct. App. 2000).

Also, there are notable exceptions:

- "[A] suspect who has responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." Oregon v. Elstad, 470 U.S. 298, 318 (1985).
- *Miranda* does not require that a defendant be re-advised of his rights every time

there is a brief pause in questioning. *See* Taylor v. State, 789 So. 2d 787, 794 (Miss. 2001).

- the public safety exception. *See* New York v. Quarles, 467 U.S. 649, 655-66 (1984)).

Whether there was a valid waiver of *Miranda* rights:

The mere giving of the *Miranda* warnings or "their equivalent," no matter how meticulously repeated, does not render a confession admissible. The State must also prove from the totality of the circumstances that the defendant made a 'knowing and intelligent' and voluntary waiver of the rights within those warnings. *See* Jones v. State, 461 So. 2d 686, 696 (Miss 1984). That is, the State must show that the waiver was made with a full awareness of both:

- the nature of the right being abandoned and the consequences of the decision to abandon it. ("knowing and intelligent"), and
- the product of a free and rational choice rather than intimidation, coercion, or deception. ("voluntary").

See Moran v. Burbine, 475 U.S. 412, 421 (1985); Herring v. State, 691 So. 2d 948, 956 (Miss. 1997).

Reading *Miranda* warnings from a standard card may not suffice:

> This heightened duty [to explain and determine whether defendant with known severe mental problems understood his Miranda rights] could not be filled by merely reading the standard card and ending with the standard question, "Do you understand these rights?"

Evans v. State, 844 So. 2d 470, 477 (Miss. 2002).

Although the preferred practice, a *Miranda* waiver does not have to be in writing to be effective.

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the Miranda case.

North Carolina v. Butler, 441 U.S. 369, 373 (1979).

See also Berghuis v. Thompkins, 560 U.S. 370, 384 (2010) ("The prosecution . . . does not need to show that a waiver of Miranda rights was express. An 'implicit waiver' of the

'right to remain silent' is sufficient to admit a suspect's statement into evidence."); Garcia v. State, 828 So. 2d 1279, 1285 (Miss. Ct. App. 2002) ("The fact that Garcia did not waive his rights in writing is of little consequence since the lack of a written waiver does not invalidate the waiver.").

Totality of the circumstances:

The totality of the circumstances surrounding the interrogation is decisive in determining whether there has been a 'knowingly, intelligently and voluntarily' given waiver. *See* Chim v. State, 972 So. 2d 601, 603 (Miss. 2008); Gavin v. State, 473 So. 2d 952, 954 (Miss. 1985). Important, but not per se dispositive, factors are age, intelligence, degree of intoxication, and sickness. *See* Johnson v. State, 511 So. 2d 1360, 1365 (Miss. 1987). But, in any event, if the accused invokes the right to remain silent or the right to the presence of an attorney the interrogation must immediately cease. *See* Reuben v. State, 517 So. 2d 1383, 1388-89 (Miss. 1987).

- **Age:**

The totality of the circumstances test is used to determine whether a child's confession is admissible:

> The totality approach permits-indeed, it mandates-inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.

Fare v. Michael C., 442 U.S. 707, 725 (1979).

The child's age is to be considered in the *Miranda* custody analysis:

> [W]e hold that so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. . . . It is, however, a reality that courts cannot simply ignore.

J.D.B. v. North Carolina, 131 S.Ct. 2394, 2406 (2011).

See also Martin v. State, 854 So. 2d 1004, 1006-07 (Miss. 2003); Dancer v. State, 721 So. 2d 583, 587-89 (Miss. 1998).

- **Intelligence:**

The totality of the circumstances test is used to determine whether the defendant's low intelligence renders the confession inadmissible. *See* Blue v. State, 674 So. 2d 1184, 1203-05 (Miss. 1996); Odom v. State, 769 So. 2d 189, 196 (Miss. Ct. App. 2000); Johnson v. State, 760 So. 2d 33, 37-38 (Miss. Ct. App. 2000). The trial judge's decision will not be reversed on appeal unless it is clearly erroneous. Neal v. State, 451 So. 2d 743, 756 (Miss. 1984).

A reversal is a difficult climb:

> During the suppression hearing, Dr. Janet St. Lawrence was accepted as an expert in psychology and testified for the defense. Dr. St. Lawrence, who had performed many psychological tests on Smith, stated that Smith had a verbal I.Q. of 65, which placed him in the first percentile of the general population. In her opinion Smith was borderline or mildly mentally retarded. She stated that Smith could not read; would not recognize the word "waiver"; generally could not understand multi-syllabic words; and, if a speaker used compound or complex sentences, Smith would not be able to understand the meaning of the sentence. St. Lawrence also testified that Smith had "the minimal skills necessary for daily functioning, but he is a functioning illiterate." When asked about his capacity for understanding his Miranda rights, "understanding and comprehension, his intellectual functioning and my professional opinion, he was incapable of understanding what it was that he was signing or what that meant."
> . . .
> [But the trial] court was persuaded by a review of the questions and responses in the taped confession that Smith was capable of voluntarily confessing and found that the psychological evidence did not outweigh this conclusion.
> . . .
> On the facts in this case, we cannot say that the trial court's finding of fact was clearly erroneous.
>
> Smith v. State, 534 So. 2d 194, 196-97 (Miss. 1988).

See also Richardson v. State, 722 So. 2d 481, 488 (Miss. 1998) ("There was simply no evidence presented to the trial court beyond the uncorroborated numbers in Dr. Hearne's report about Richardson's I.Q. which suggested that he could not give a valid waiver of his Miranda rights and subsequently give an intelligent, knowing and voluntary confession."); Harvey v. State, 207 So. 2d 108, 117 (Miss. 1968) ("[E]xpert testimony shows that the defendant functioned at a level of an eight to twelve-year-old boy, but that when he became upset his ability to function decreased. . . . [We conclude] that the alleged confession of the defendant should not have been admitted into evidence before the jury.").

- **Degree of intoxication:**

The totality of the circumstances test is used to determine whether the defendant's intoxication renders the confession inadmissible. The degree of intoxication is a decisive factor in making this determination. *See* Baggett v. State, 793 So. 2d 630, 634 (Miss. 2001) ("The evidence before the trial court concerning the degree of [the defendant's] intoxication does not indicate such a degree of intoxication as to render the confession and waiver involuntary."); O'Halloran v. State, 731 So. 2d 565, 571 (Miss. 1999) ("Applying law to the facts at hand, there is no reversible error. Indeed, the testimony of the law enforcement officers demonstrates that O'Halloran was not impaired by intoxicants."). Such is true irrespective of the particular intoxicant. *See, e.g.,*

Holloway v. State, 809 So. 2d 598, 605 (Miss. 2000) (librium);
Stevens v. State, 458 So. 2d 726, 729 (Miss. 1984) (alcohol);
Thomas v. State, 936 So. 2d 964, 966 (Miss. Ct. App. 2006) (crack and Lorcet);
Morris v. State, 798 So. 2d 603, 606 (Miss. Ct. App. 2001) (cocaine);
Marshall v. State, 812 So. 2d 1068, 1073-75 (Miss. Ct. App. 2001) (mellaril).

The confession of a defendant in a state of acute intoxication equivalent to mania has been held inadmissible. *See* State v. Williams, 208 So. 2d 172, 175 (Miss. 1968). On the other hand, the confession of a defendant who had been drinking heavily but in control of his faculties has been held admissible. *See* Kemp v. State, 352 So. 2d 446, 448 (Miss. 1977). The confession of a defendant too intoxicated to drive, but not so intoxicated as to be unable to understand his *Miranda* rights has been held admissible. *See* Taylor v. State, 94 So. 3d 298, 308 (Miss. Ct. App. 2011); Bolden v. State, 767 So. 2d 315, 318 (Miss. Ct. App. 2000).

- **Sickness:**

The totality of the circumstances test is used to determine whether the defendant's sickness renders the confession inadmissible. *See* Coulter v. State, 506 So. 2d 282, 285-86 (Miss. 1987); Kircher v. State, 753 So. 2d 1017, 1023-30 (Miss. 1999).

Knowing and intelligent waiver:

For *Miranda* rights to be "knowingly and intelligently" waived there must be a full awareness of the nature of the rights being abandoned and the consequences of the decision to abandon those rights. *See* McGowan v. State, 706 So. 2d 231, 236 (Miss. 1997); Coverson v. State, 617 So. 2d 642, 647 (Miss. 1993). A recital of the *Miranda* warnings or "their equivalent" does not necessarily guarantee that a subsequent waiver is 'knowingly and intelligently' made. Instead, the court must determine whether the words used by the officer, in view of the defendant's age, intelligence, and demeanor were sufficient to convey a clear understanding of the *Miranda* rights and the consequences in waiving them. *See* Jenkins v. State, 214 So. 2d 470, 472 (Miss. 1968).

Voluntary waiver:

- **When a suppression hearing is required:**

If the defendant challenges a confession on the basis of coercion or other improper inducement, the court must conduct a suppression hearing, in the absence of the jury, to determine whether such confession was involuntarily given. *See* Hogan v. State, 730 So. 2d 94, 98 (Miss. 1998). At the suppression hearing, the State bears the burden of proving all facts prerequisite to admissibility beyond a reasonable doubt. *See* Gavin v. State, 473 So. 2d 952, 954 (Miss. 1995). This burden is met and a prima facia case made out by the testimony of an officer, or other person having knowledge of the facts, that the confession was voluntarily made without any threats, coercion, or offers of reward. *See* Miller v. State, 740 So. 2d 858, 867 (Miss. 1999). The burden then shifts to the defendant to offer rebuttal testimony:

> After the State has made out its prima facie case, the defendant must rebut the State's evidence by offering testimony that violence, threats of violence, or offers of reward induced the confession.

Kircher v. State, 753 So. 2d 1017, 1024 (Miss. 1999).

If the rebuttal is successful, then the State must either offer the testimony of those officers who are claimed to have induced the confession through some means of coercion or improper inducement or otherwise show cause for not being able to offer such testimony. *See* Abram v. State, 606 So. 2d 1015, 1030 (Miss. 1992); Powell v. State, 928 So. 2d 974, 978-79 (Miss. Ct. App. 2006). Once all the testimony is presented, the trial court determines from the totality of the circumstances whether the confession was voluntarily made, i.e., a product of the defendant's free and rational choice. *See* Herring v. State, 691 So. 2d 948, 956 (Miss. 1997); Frost v. State, 483 So. 2d 1345, 1350 (Miss. 1986). In making this determination, the trial court must resist any inclination to consider the truthfulness or authenticity of the confession, but instead limit its focus only to the issue of voluntariness. *See* Armstead v. State, 978 So. 2d 642, 648 (Miss. 2008) ("Threats to arrest a defendant's family member(s) do not render a confession involuntary so long as probable cause exists to arrest such persons."); Sistrunk v. State, 773 So. 2d 419, 420-21 (Miss. Ct. App. 2000) ("[N]o testimony from [defendant] or anyone else that [officer] withheld [defendant's] medication until he confessed to crime."). The trial judge's decision will not be reversed on appeal unless it is manifestly in error or contrary to the overwhelming weight of the evidence. *See* McCarty v. State, 554 So. 2d 909, 912 (Miss. 1989).

- **Alleging an improper inducement:**

If an improper inducement is alleged, the trial court must determine from the specific circumstances of the confession whether the officer's statement was an implied promise

and not merely an exhortation to tell the truth and, if an implied promise, whether it was the proximate cause of the confession. *See* Willie v. State, 585 So. 2d 660, 668 (Miss. 1991); Layne v. State, 542 So. 2d 237, 241 (Miss. 1989); Holland v. State, 956 So. 2d 322, 329 (Miss. Ct. App. 2007). In other words,

> [Was the inducement] of a nature calculated under the circumstances to induce a confession irrespective of its truth or falsity[?]

Taylor v. State, 789 So. 2d 787, 795 (Miss. 2001).

See also Willie v. State, 585 So. 2d 660, 669 (Miss. 1991) ("Willie has shown no evidence that the sheriffs' statements ["it was always best to tell the truth" and "it would be better for him to tell the truth"] induced him to confess."); Singleton v. State, 151 So. 3d 1046, 1053-54 (Miss. Ct. App. 2014) ("In this instance, Investigator Ellis told Singleton that it was 'time to come to Jesus' [as an inducement] to tell the truth in light of the incriminating evidence. . . . While Singleton stated he found the remark offensive, Investigator Ellis testified he did not use any threatening or intimidating language or tone that would constitute coercion. This inducement to tell the truth without more does not rise to the level of coercion. Thus, the religious reference did not render Singleton's statement involuntary."); Harper v. State, 722 So. 2d 1267, 1273 (Miss. Ct. App. 1998) ("[T]he record is clear that the [agent] gave [the defendant] the impression that his cooperation with law enforcement authorities would be beneficial to him in violation of the strict guidelines of our supreme court . . . that law enforcement officers should refrain from giving such an impression, 'however slight.'").

- **Conduct by third parties:**

Conduct by third parties not connected with the law enforcement officers in the investigation will not vitiate a confession which might be rendered incompetent or inadmissible if such conduct had been committed by a law enforcement officer. *See* Genry v. State, 735 So. 2d 186, 196 (Miss. 1999); Wilson v. State, 759 So. 2d 1258, 1261 (Miss. Ct. App. 2000).

Was the third party acting on behalf of law enforcement to get a confession?

> [The defendant's girlfriend] was not acting on behalf of law enforcement. Rather, [the defendant] requested her presence . . . . Moreover, there is no indication that [she] induced [him] to confess . . . . [T]here is nothing in the record which compels the conclusion that [she] induced [him] to confess.

Evans v. State, 725 So. 2d 613, 637-38 (Miss. 1998).

"You have the right to remain silent . . .":

Miranda requires officers subjecting a person to "custodial interrogation" to warn that person of the "right to remain silent. . . ."

If at any time the accused clearly indicates a desire to remain silent (i.e., makes some indication that can reasonably be construed to be an expression of a desire to remain silent), the interrogation must immediately cease, and thereafter the invoked right must be "scrupulously honored." *See* Michigan v. Mosely, 423 U.S. 96, 103 (1975); Neal v. State, 451 So. 2d 743, 754 (Miss. 1984).

But the assertion of the right needs to be clearly made:

> A suspect must articulate his desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. If the statement is ambiguous or equivocal, then the police have no duty to clarify the suspect's intent, and they may proceed with the interrogation.

Coleman v. Singletary, 30 F.3d 1420, 1424 (11th Cir. 1994).

Also, *Miranda* does not require that a defendant be explicitly informed of the right to stop answering questions. *See* Brown v. State, 130 So. 3d 1074, 1079 (Miss. 2013). Unsolicited voluntary statements made after invoking right to remain silent are admissible. *See* Blue v. State, 827 So. 2d 721, 724-25 (Miss. Ct. App. 2002). Interrogation should not resume unless there is: a "cooling off" period; a reasonable basis for inferring the accused has voluntarily changed his mind; and a re-advising and waiver of *Miranda* rights. *See* Jones v. State, 461 So. 2d 686, 700 (Miss 1984). A refusal to sign a waiver of rights is not a per se invocation of the right to remain silent. *See* Mohr v. State, 584 So. 2d 426, 429 (Miss. 1991).

"You have the right to an attorney . . .":

Miranda requires officers subjecting a person to "custodial interrogation" to warn that person of the "right to the presence of an attorney, [retained or appointed] . . . prior to any questioning."

See also Johnson v. State, 129 So. 3d 148, 152 (Miss. 2013) ("The question concerning the *Miranda* warning is not complicated. Johnson was informed that he had "the right to have an attorney present during interrogation," but he was not specifically informed that he had the right to consult with counsel. The trial judge found that informing a defendant of his right to have an attorney present during questioning carries with it the understanding that he may consult with that attorney. We agree.").

- **When accused clearly requests an attorney:**

If at any time the accused clearly requests an attorney (i.e., makes "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney"), the interrogation must immediately cease and officers may not reinitiate interrogation without an attorney present, whether or not the accused has consulted with the attorney. *See* Minnick v. Mississippi, 498 U.S. 146, 153 (1990); Downey v. State, 144 So. 3d 146, 152 (Miss. 2014); Holifield v. State, 275 So. 2d 851, 855 (Miss. 1973).

But any request for counsel must not be ambiguous or equivocal:

> [The suspect] must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, [*Edwards v. Arizona*, 451 U.S. 477 (1981)] does not require that the officers stop questioning the suspect.

Davis v. United States, 512 U.S. 452, 459 (1994).

See also Barnes v. State, 30 So. 3d 313, 318 (Miss. 2010) ("[The defendant's] statement, 'So, I don't need legal, okay . . . .' [was] not an assertion of her right to counsel, but rather an attempt to clarify whether she must have an attorney present.").

A request for someone other than attorney, e.g., probation officer, clergyman, or close friend, is not a request for counsel and therefore does not invoke the right to presence of an attorney. *See* Fare v. Michael C., 442 U.S. 707, 722 (1979). Once a defendant has invoked the right to the presence of an attorney any further questioning is permissible only if the accused initiates discussions with the police and makes a knowing, intelligent, and voluntary waiver of the invoked right:

> Berry was given the opportunity to telephone an attorney before further questioning. Berry, without any overreaching, pressure, or persuasion by the police, made the decision not to call. Gore's question clarified this waiver, after which Berry was asked only one question, about the pond. Berry was then again advised of his *Miranda* rights and made the confession.
> . . .
> Clearly, the officers in this case honored Berry's request for counsel, as expeditiously as possible. Immediately after Berry finished his meal, he was provided a telephone with which to contact an attorney. Berry chose not to do so, then clearly indicated that he was willing to continue the interrogation without aid of counsel.

Berry v. State, 575 So. 2d 1, 7 (Miss. 1990).

See also Smith v. Illinois, 469 U.S. 91, 98-99 (1984); Edwards v. Arizona, 451 U.S. 477, 484-85 (1980). Unsolicited voluntary statements made after invoking right to an attorney are admissible. *See* Randolph v. State, 852 So. 2d 547, 556-57 (Miss. 2002). Another exception is where there is a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation. *See* Maryland v. Shatzer, 559 U.S. 98, 117 (2010).

- **Did the accused initiate further discussions with police?**

The trial court must determine if the accused made an inquiry or statement that could have reasonably been interpreted by the officer as evincing a willingness and desire for a generalized discussion relating directly or indirectly to the investigation as opposed to inquiries relating to routine incidents of the custodial relationship. *See* Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983) ("'Well, what is going to happen to me now?' evinced willingness and desire for further discussions with police"); Haynes v. State, 934 So. 2d 983, 987 (Miss. 2006). ("Haynes did not say he wanted to talk about his case, but instead asked Officer Pope several questions about his bond, scheduling, and a preliminary hearing.").

The credibility of the witnesses is a factor to consider:

> The trial judge heard conflicting accounts from the officer and Savell as to whether Savell initiated the confession, and found the officer's testimony to be more credible.

Savell v. State, 928 So. 2d 961, 974 (Miss. Ct. App. 2006).

Evidentiary concerns:

- ***Oregon v. Elstad*:**

The extent to which an unlawfully obtained confession or incriminating statement must be suppressed depends upon whether the confession was the result of a technical violation of *Miranda* or the result of a violation of the Due Process Clause:

> It is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Oregon v. Elstad, 470 U.S. 298, 309 (1985).

- **Technical violations of *Miranda*:**

The *Miranda* rule is a prophylactic employed to protect against violations of the Fifth Amendment's Self-Incrimination Clause:

> Introduction of the nontestimonial fruit of a voluntary statement . . . does not implicate the Self-Incrimination Clause.

United States v. Patane, 542 U.S. 630, 643 (2004).

If there is a technical violation of the procedural safeguards imposed by *Miranda,* e.g., the police fail to provide adequate *Miranda* warnings or their equivalent to a person being subjected to custodial interrogation, and subsequently, the accused makes a confession that is freely and voluntarily given, i.e., the product of a free and deliberate choice rather than intimidation, coercion, or deception, the State may not use that statement in its case in chief, but may use it for impeachment purposes if the accused takes the stand and testifies to the contrary. In other words,

> The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.

Harris v. New York, 401 U.S. 222, 224-26 (1971).

If the State uses a contradictory statement to impeach the defendant's false or inconsistent testimony, the defendant, upon request, is entitled to "an instruction that contradictory statements may not be used as proof of guilt but may be considered only in passing on [the] credibility [of the] witness." *See* Murphy v. State, 336 So. 2d 213, 216-17 (Miss. 1976).

- **Involuntary confessions:**

If the confession is involuntary (i.e., a result of intimidation, coercion, or deception), the State may not use that statement in its case-in-chief or to impeach the defendant's false or inconsistent testimony. *See* James v. Illinois, 493 U.S. 307, 311-13 (1990); Bowen v. State, 607 So. 2d 1159, 1162 (Miss. 1992). "The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and is so violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise." Kansas v. Ventris, 556 U.S. 586, 590 (2009).

- **Post-arrest silence ("Doyle Rule"):**

The Due Process Clause prohibits using the defendant's post-*Miranda* silence for impeachment purposes. *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976); Emery v. State,

869 So. 2d 405, 407-10 (Miss. 2004). If the State does so, and the defense objects, the Court must sustain the objection and warn the jury to disregard any questions to which the objection was sustained. Unless the State's misconduct is "of sufficient significance to result in the denial of the defendant's right to a fair trial," the curative instruction prevents a mistrial. *See* Greer v. Miller, 483 U.S. 756, 764-65 (1987).

But the *Doyle* prohibition does not apply if the defendant voluntarily breaks silence:

> *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But [it] does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent.

Anderson v. Charles, 447 U.S. 404, 408 (1980).

See also Fletcher v. Weir, 455 U.S. 603, 607 (1982) ("[W]e do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand."); McGrone v. State, 807 So. 2d 1232, 1235 (Miss. 2002) ("This Court applies the rule of *Fletcher v. Weir* [455 U.S. 603 (1982)] and finds that Timothy McGrone's due process rights were not violated by the State's cross-examination concerning his post-arrest silence."); Puckett v. State, 737 So. 2d 322, 351 (Miss. 1999) ("[T]he prosecutor's questions upon cross-examination are admissible . . . to show that Puckett's prior statements were inconsistent with his statements at trial.").

- **Written statements of non-recorded confessions:**

The State may not introduce a written statement of a non-recorded confession that the defendant denies having made. Instead, it may only introduce the statement by the testimony of the officers who took the statement:

> To permit the jury, in addition to hearing such testimony from the stand, to have a written version of the statement in the jury room during its deliberations improperly permits too much emphasis to be placed on this evidence.

Cobb v. State, 734 So. 2d 182, 185 (Miss. Ct. App. 1999).

On the other hand, a written statement signed or adopted by the defendant is admissible if otherwise relevant. *See* Randolph v. State, 924 So. 2d 636, 640 (Miss. Ct. App. 2006) ("[W]e find that his signature on the statement, along with the testimony of the investigating officers that Randolph signed the statement, was sufficient to permit its admission into evidence.").

1201 SIXTH AMENDMENT CONSIDERATIONS

Governing laws:

Sixth Amendment:

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law;

See also Miss. Const. art. III, § 14 ("No person shall be deprived of life, liberty, or property except by due process of law."); Miss. Const. art. III, § 26 ("In all criminal prosecutions the accused have a right to be heard by himself or counsel, or both, ...").

Whereas the Fifth Amendment provides the "right to the presence of an attorney" at custodial interrogations, the Sixth Amendment provides "the right to counsel" at or after the initiation of adversary proceedings. *See* Michigan v. Jackson, 475 U.S. 625, 629-35 (1986); Brewer v. Williams, 430 U.S. 387, 398-99 (1976).

Waiving the right to counsel:

Courts are not required to presume invalid a defendant's waiver of a right to counsel whenever police initiate an interrogation following an arraignment or similar proceeding:

> [A] defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the Miranda warnings. . . . If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached.

Montejo v. Louisiana, 556 U.S. 778, 794-95 (2009).

See also Michigan v. Harvey, 494 U.S. 344, 353 (1990) ("To hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be 'to imprison a man in his privileges and call it the Constitution.'"); Mettetal v. State, 602 So. 2d 864, 868 (Miss. 1992) ("Nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney.").

Questioning as to unrelated, uncharged offenses:

Police may question a suspect concerning unrelated, uncharged offenses if *Miranda* rights are read and there is a voluntary waiver:

> The Sixth Amendment right . . . is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, " 'at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' "

Neal v. State, 57 So. 3d 1271, 1278 (Miss. 2011).

See also McNeil v. Wisconsin, 501 U.S. 171, 175 (1991) ("If a suspect does not wish to communicate with the police [concerning an unrelated, uncharged offense] except through an attorney, he can simply tell them that when they give him the Miranda warnings.").

Evidentiary concerns:

Incriminating statements elicited by a law enforcement officer by deliberately violating the defendant's Sixth Amendment right to counsel may not be used in the prosecution's case-in-chief. *See* Massiah v. U.S., 377 U.S. 201, 207 (1964). However, such statements may be used for impeachment purposes. *See* Kansas v. Ventris, 556 U.S. 586, 594 (2009) ("[Police] informant's testimony, concededly elicited in violation of the Sixth Amendment, was admissible to challenge [the defendant's] inconsistent testimony at trial.").

When the right to counsel attaches:

The "right to counsel" under Article 3, Section 26 of the Mississippi Constitution is congruent to that of the Sixth Amendment to the U.S. Constitution, except that it attaches earlier– that is, when the police move from an investigatory phase to an accusatory phase rather than at the actual start of adversary proceedings. Thus, if invoked, such right would attach at the time of the suspect's arrest. *See* Grayson v. State, 806 So. 2d 241, 247-48 (Miss. 2001).

But it does not attach at non-critical stages such as scientific analysis of fingerprints, dental impressions, blood samples, breath samples, hair samples, and clothing samples; photographic lineups; and non-testimonial voice and handwriting exemplars. *See* Kirby v. Illinois, 406 U.S. 682, 689 (1971); Burns v. State, 729 So. 2d 203, 217 (Miss. 1998); Brewer v. State, 725 So. 2d 106, 130 (Miss. 1998).

1202 FOURTH AMENDMENT CONSIDERATIONS

Governing laws:

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law;

See also Miss. Const. art III, § 14 ("No person shall be deprived of life, liberty, or property except by due process of law."); Miss. Const. art. III, Section 23 ("The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.").

Fruit of the poisonous tree:

The Fourth Amendment protects against unreasonable searches and seizures by requiring that evidence, including written or verbal statements, acquired by the exploitation of an illegal search or arrest be suppressed as fruit of the poisonous tree. *See* Wong Sun v. United States, 371 U.S. 471, 484-93 (1963). But, the mere fact that a person confesses while in custody following an illegal arrest does not per se render the confession inadmissible. *See* Butler v. State, 296 So. 2d 673, 677 (Miss. 1974). The confession is not fruit of the poisonous tree if the State can show that the Fifth Amendment standard of voluntariness was met and in light of the distinct policies and interests of the Fourth Amendment, significant intervening events cleansed the primary taint of the illegal arrest.

Important, but not per se dispositive, factors include:

- whether *Miranda* warnings were given and under what circumstances;
- the "temporal proximity" (i.e., closeness in time) between the arrest and confession.
- the presence of intervening circumstances;
- the purpose and flagrancy of the official misconduct; and
- any other relevant information.

It should be noted too that satisfying the Fifth Amendment is only the "threshold" condition of the Fourth Amendment analysis:

> No intervening events broke the connection between the petitioner's illegal detention and his confession. To admit petitioner's confession in such a case would allow "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth."

Dunaway v. New York, 442 U.S. 200, 218-19 (1979).

See also Brown v. Illinois, 422 U.S. 590, 601-04 (1975); Coleman v. State, 592 So. 2d 517, 521-22 (Miss. 1991); Bolton v. State, 530 So. 2d 1360, 1362 (Miss. 1988).

In any event, the State bears burden to show that factors suggesting admissibility outweigh those suggesting inadmissibility. *See* Conerly v. State, 760 So. 2d 737, 741 (Miss. 2000); Hall v. State, 427 So. 2d 957, 958-61 (Miss 1983).

CHAPTER 13

RELEASE

1300 MISSISSIPPI CONSTITUTION

Excessive bail prohibited
When bail must be revoked
If bail is denied

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1303 FORFEITURE OF BAIL

Purpose of bail
Ordering the forfeiture of bail

Art. 3, § 29 Excessive bail prohibited:

(1) Excessive bail shall not be required, and all persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses (a) when the proof is evident or presumption great; or (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more.

See also Miss. Code Ann. § 99-5-33 (Bail for attempted murder); Miss. Code Ann. § 99-5-35 (Bail for certain capital offenses); Thompson v. Moss Point, 2015 WL 10322003 (S.D. Miss. 2015) ("No person may, consistent with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, be held in custody after an arrest because the person is too poor to post a monetary bond. If the government generally offers prompt release from custody after arrest upon posting a bond pursuant to a schedule, it cannot deny prompt release from custody to a person because the person is financially incapable of posting such a bond."); Smith v. Banks, 134 So. 3d 715, 719 (Miss. 2014) ("Because Smith is charged with capital murder, he is not entitled to bail pending trial if "the proof is evident or the presumption great" concerning his guilt."); Brown v. State, 217 So. 2d 521, 523 (Miss. 1969) ("[T]he United States Constitution and the Mississippi Constitution guarantee that excessive bail bonds shall not be required, and if excessive bail is required, it is considered tantamount to a denial of bail.").

Art. 3, § 29 When bail must be revoked:

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

Mississippi Attorney General's opinions:

Revoking bail under Article 3, Section 29.
"[I]f a person is granted bail by a municipal court on a charge of aggravated assault and while out on bail a justice court finds probable cause that the person has committed commercial burglary, the justice court [under Article 3, Section 29(2)] should revoke bail for the aggravated assault charge and shall order the person detained, without bail, on the commercial burglary charge, pending trial on the aggravated assault charge." Op. Atty.

Gen. Turnage, June 26, 2006.

Notice to be sent to the court which granted bail.
"If another court had granted bail for the first offense, then the court which revokes the bail [under Article 3, Section 29(2)] should send notice to the court which granted bail that the bail has been revoked and that the defendant should be detained, without further bail, pending trial for the first offense." Op. Atty. Gen. Parker, May 4, 2001.

Art. 3, § 29 If bail is denied:

(3) In the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment, a county or circuit court judge may deny bail for such offenses when the proof is evident or the presumption great upon making a determination that the release of the person or persons arrested for such offense would constitute a special danger to any other person or to the community or that no condition or combination of conditions will reasonably assure the appearance of the person as required.
(4) In any case where bail is denied before conviction, the judge shall place in the record his reasons for denying bail. Any person who is charged with an offense punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment and who is denied bail prior to conviction shall be entitled to an emergency hearing before a justice of the Mississippi Supreme Court. The provisions of this subsection (4) do not apply to bail revocation orders.

See Mississippi Commission on Judicial Performance v. Martin, 921 So.2d 1258, 1261 (Miss. 2005) ("[Article 3, Section 29 of the Mississippi Constitution gives] authority to deny bail only to County and Circuit Judges [in the case of offenses punishable by imprisonment for a maximum of twenty (20) years or more or by life imprisonment].").

1301 THE MISSISSIPPI RULES OF CRIMINAL PROCEDURE

MRCrP 8.1 Definitions and requirements:

Whenever the terms below appear in these Rules, they shall have the following meanings:

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

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

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

(d) Cash Deposit Bond. A "cash deposit bond" is an appearance bond secured by deposit with the clerk of security, in the form of a cash deposit or certified funds, in an amount set by the judge. The following requirements shall be met for a cash deposit bond:

(1) The accused must never have been convicted in any court of this state, another state or a federal court, of a crime punishable by more than one (1) year's imprisonment, currently is not charged with or previously been convicted of escape, or had an order nisi entered on a previous bond;
(2) The amount of the bond must be set by the proper authority;
(3) A return date must be set by the proper authority;
(4) The accused must tender to the clerk of the circuit court ten percent (10%) of the amount of the bond as set, in cash, or $250.00 in cash, whichever is greater;
(5) The accused must sign an appearance bond guaranteeing his/her appearance and binding himself/herself unto the State of Mississippi in the full amount of the bond as set to be used in the case of default;
(6) The accused, by affidavit duly notarized, must swear in substantially the following form:

State of Mississippi
County of _____
Personally appeared before me, the undersigned authority in and for said county and state, _____, who after being duly sworn states:

(a) I have never been convicted in any court of this state, another state, or a federal court of a crime punishable by more than one (1) year's imprisonment. I am not charged with escape and I have never been convicted of escape. I have had no order nisi entered on a bail bond executed by me.
(b) The proper authority has set the sum of $ _____ as the amount of bail bond to be executed by me. This bond was set by _____.
(c) A return date has been set for this bond. Its return date is _____ and was set by _____.
(d) I have tendered to the clerk of the Circuit Court of _____ County, Mississippi, ten percent (10%) of the amount of said bond in cash, which sum is not less than $250.00. Said cash is my property. I authorize the clerk of said court to dispose of the same as follows: If the bond is forfeited, the cash tendered will be paid by the clerk, less a fee of not more than $10,00 to be county, and the amount so paid will be credited on the bond forfeited. If I appear on the return day and a final with the clerk, less a fee of not more than $10.00 to be retained by the clerk, will be disposed of as

ordered by the court.
(e) I agree to report to the clerk of the court by telephone, or in person, and in writing on the first Monday of each month as to my current address and telephone number. If I fail to do so. I agree that the bond may be declared in default.

(7) The amount of money tendered under this rule shall not be disbursed to any person except on written order of the court. The money deposited with the clerk shall be disbursed in the following manner: first, to pay any court costs assessed against the defendant; second, to pay any restitution the defendant has been ordered to make; third, to pay any fines imposed against the defendant; fourth, to pay any assignment of the sum made by the defendant to defendant's attorney; and fifth, any refund to the defendant or other disbursements as allowed by the court.

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

(f) Surety. A "surety" is someone (other than the person seeking release) who executes an appearance bond and is therefore bound to pay its amount, if the person released fails to appear for any proceeding as ordered by the court. A surety, except one governed by Mississippi Code Section 83-39-1 et. seq., shall file with the appearance bond an affidavit or sworn certification:

(1) stating that the surety is not an attorney, judicial official, or person authorized to accept bail;

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

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

Generally, an attorney, judicial official, or person authorized to accept bail (e.g., a sheriff) may not be a surety. However, an attorney, judicial official, or person authorized to accept bail may be a surety for a member of the surety's immediate family. For purposes of this Rule, the term "immediate family" shall be limited to include only: a spouse, a sibling, a spouse's sibling, a lineal ancestor or descendant, a lineal ancestor or descendant of a spouse, or a minor or incompetent person dependent upon the surety for more than one-half (½) of his/her support. In such cases, the attorney, judicial official, or person authorized to accept bail shall file with the appearance bond an affidavit stating the

surety's position, the surety's relationship to the person seeking release, and the information required in Rule 8.1(f)(2) and (3).

(g) Bail. "Bail" is a monetary amount for or condition of pretrial release from custody, normally set by a judge at the initial appearance.

(h) Insurer. The terms "insurer," "professional bail agent," "soliciting bail agent," "bail enforcement agent," and "personal surety agent" shall be defined as in Mississippi Code Section 83-39-1, et seq.

(i) Compliance Required. All agents and insurers shall comply fully with Mississippi Code Sections 83-39-1, et seq., and 99-5-1, et seq., and all related statutes and regulations.

MRCrP 8.2 Right to pretrial release on personal recognizance or on bond:

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

(1) the age, background and family ties, relationships and circumstances of the defendant;

(2) the defendant's reputation, character, and health;

(3) the defendant's prior criminal record, including prior releases on recognizance or on unsecured or secured appearance bonds, and other pending cases;

(4) the identity of responsible members of the community who will vouch for the defendant's reliability;

(5) violence or lack of violence in the alleged commission of the offense;

(6) the nature of the offense charged, the apparent probability of conviction, and the likely sentence, insofar as these factors are relevant to the risk of nonappearance;

(7) the type of weapon used (e.g., knife, pistol, shotgun, sawed-off shotgun, assault or automatic weapon, explosive device, etc.);

(8) threats made against victims or witnesses;

(9) the value of property taken during the alleged commission of the offense;

(10) whether the property allegedly taken was recovered or not, and damage or lack of damage to the property allegedly taken;

(11) residence of the defendant, including consideration of real property ownership, and length of residence in the defendant's domicile;

(12) in cases where the defendant is charged with a drug offense, evidence of selling or distribution activity that should indicate a substantial increase in the amount of bond;

(13) consideration of the defendant's employment status and history, the location of defendant's employment (e.g., whether employed in the county where the alleged offense occurred), and the defendant's financial condition;

(14) sentence enhancements, if any, included in the charging document; and

(15) any other fact or circumstance bearing on the risk of nonappearance or on the danger to others or to the public.

MRCrP 8.2 Specific statutory limits apply:

(b) Specific statutory limits apply. When a statute limits a judge's bail authority, such statutory limits shall apply to the extent any of the amounts listed in section (c) are in conflict therewith.

MRCrP 8.2 Bond guidelines:

(c) Bond Guidelines. The following is established as a general guide for circuit, county, justice, and municipal courts in setting bail for persons charged with bailable offenses. Except in situations where release is required in the minimum scheduled amount pursuant to Rule 5.1(b) or (c), or any other Rule, courts may and should exercise discretion in setting bail above or below the scheduled amounts, as supported by consideration of the factors listed in Rule 8.2(a).

SECURED OR UNSECURED APPEARANCE BOND GUIDELINES
Recommended Range

FELONIES:

- Capital felony: $25,000 to No Bail Allowed
- Manslaughter (or any other non-capital crime involving loss of human life): $10,000 to $1,000,000
- Drug Distribution and Trafficking: $ 5,000 to $1,000,000
- All other non-capital felonies:
  - punishable by maximum 20 years or more: $20,000 to $250,000
  - punishable by maximum 10 years to 20 years: $10,000 to $100,000
  - punishable by maximum up to 10 years: $ 5,000 to $50,000

MISDEMEANORS (not included elsewhere in the schedule):

- punishable by maximum 1 year: $500 to $2,000
- punishable by maximum 6 mos.: $250 to $1,000
- punishable by less than 6 mos.: $100 to $500
- punishable by fine only: $50 to Max. Fine/Costs*

Misdemeanor DUI and DWLS: $500 to $2,000
Municipal Ordinance Violations: $100 to $1,000
* Maximum amount of fine(s), court costs, and statutory assessments which might be due upon conviction.

MRCrP 8.3 Release after conviction and sentencing:

A convicted defendant shall be entitled to bail pending appeal as prescribed by Mississippi Code Section 99-35-115. A condition of the appeal bond shall be that the defendant will obey every order and judgment of the Supreme Court or Court of Appeals or every order and judgment of the trial court affirmed by the Supreme Court or Court of Appeals. The sheriff shall not accept the appeal bond unless the appeal has been perfected. If a defendant is admitted to bail pending appeal, the trial court clerk shall so notify the clerk of the Supreme Court.

MRCrP 8.4 Conditions of release:

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

(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.

(b) Additional Conditions. An order of release may include any one (1) or more of the following conditions reasonably necessary to secure a defendant's appearance or to protect the public:

(1) execution of an appearance bond in an amount specified by the court, either with or without requiring that the defendant deposit with the clerk security in an amount as required by the court;
(2) execution of a secured appearance bond;
(3) placing the defendant in the custody of a designated person or organization agreeing to supervise the defendant;
(4) restrictions on the defendant's travel, associations, or place of abode during the period of release:
(5) restrictions on the defendant's direct or indirect contact with any specified person(s);
(6) return to custody after specified hours;
(7) participation in, and successful completion of, any drug, alcohol, anger management, mental health, or other treatment required by the court, and/or substance testing;
(8) participation in General Educational Development (GED®) classes and testing or in any other educational activities required by the court;
(9) electronic monitoring; or
(10) any other conditions which the court deems reasonably necessary.

MRCrP 8.5 Procedure for determination of release conditions:

(a) Initial Decision. When a defendant is brought before a court for initial appearance, a determination of the conditions of release shall be made. The judge shall issue an order containing the conditions of release and shall inform the defendant of the conditions, the possible consequences of their violation, and that a warrant for the defendant's arrest may be issued immediately upon report of a violation.

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

(c) Review by Circuit Court. No later than seven (7) days before the commencement of each term of circuit court in which criminal cases are adjudicated, the official(s) having custody of felony defendants being held for trial, grand jury action, or extradition within the county (or within the county's judicial districts in which the court term is to be held) shall provide the presiding judge, the district attorney, and the clerk of the circuit court the names of all defendants in their custody, the charge(s) upon which they are being held, and the date they were most recently taken into custody. The senior circuit judge, or such other judge as the senior circuit judge designates, shall review the conditions of release for every felony defendant who is eligible for bail and has been in jail for more than ninety (90) days.

MRCrP 8.5 Review of conditions; revocation of bail:

(a) Issuance of Warrant. If it is alleged that a defendant previously released has committed a material breach of the conditions of release, then the court having jurisdiction over the defendant may procure the defendant's presence in court by issuing an order to appear before the court to show cause, or by issuing an arrest warrant under Rule 3.1. Such action shall be predicated upon a motion of the prosecuting attorney, or the court's own motion, which states with particularity:

(1) the facts or circumstances alleged to constitute a material breach of the conditions of release;

(2) that material misrepresentations or omissions of fact were made in securing the defendant's release; or

(3) that revocation is otherwise required by law.
If action is taken on motion of the prosecuting attorney, then a copy of the motion shall be served with the order or warrant, and a hearing shall be held on the motion without unnecessary delay.

(b) Hearing; Review of Conditions; Revocation of Release. If, after a hearing on the matters set forth in the motion, the court finds that the released defendant has materially breached the conditions of release, the court may modify the conditions or revoke the release. If a ground alleged for revocation of the release is that the defendant has committed a criminal offense or has made misrepresentations or omissions in informing the court of other charges pending against the defendant, the court may modify the conditions of release or revoke the release, if the court finds that there is probable cause to believe that the defendant committed the other pending offense(s).

(c) Cases Governed by Article 3, Section 29(2) of the Mississippi Constitution. In cases governed by Article 3, section 29(2) of the Mississippi Constitution of 1890, on motion of the prosecuting attorney or on the court's own motion, a court having jurisdiction over the defendant may revoke the defendant's bail.

MRCrP 8.7 Transfer and disposition of bond:

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

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

(c) Surrender of Defendant by Surety. The surrender of the defendant by a surety shall be governed by Mississippi Code Sections 99-5-27 and 99-5-29. In the event that a Professional Bail Agent, Soliciting Bail Agent, or Insurer has provided a surety bond or other form of bail for a defendant without first obtaining payment in full for the premium on the bond, that defendant may not be surrendered because the defendant, or anyone assuming financial responsibility for the bond premium on the defendant's behalf, has failed to make any payment to the surety following release of the defendant.

(d) Forfeiture. If at any time it appears to the court that a defendant has failed to appear, the court shall proceed as appropriate pursuant to Mississippi Code Sections 99-5-25 or 21-23-8, and any related statutes or regulations which may apply.

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

Rules prevail over conflicting statutory procedures:

See Jones v. City of Ridgeland, 48 So. 3d 530, 537 (Miss. 2010) ("Procedure is defined as '[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the rights, and which, by means of the proceedings, the court is to administer; the machinery, as distinguished from its product.' Black's Law Dictionary 1203-04 (6th ed.1990)."); Newell v. State, 308 So. 2d 71, 76 (Miss. 1975) ("We are keenly aware of, and measure with great respect, legislative suggestions concerning procedural rules and they will be followed unless determined to be an impediment to justice or an impingement upon the constitution. The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts."); Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968) ("The phrase 'judicial power' in section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business.").

§ 99-5-1 Bail form; information required from professional or soliciting bail agents; penalties for noncompliance:

Bail may be taken in the following form, viz:

. . .

When the bail is for appearance before any committing court or a judge, the form may be varied to suit the condition.

When a bond is taken from a professional bail agent, the following must be preprinted or stamped clearly and legibly on the bond form: full name of the professional bail agent, Department of Insurance license number, full and correct legal address of the professional bail agent and complete phone number of the professional bail agent. In addition, if the bond is posted by a limited surety professional bail agent, the name of the insurer, the legal address of the insurer on file with the department and phone number of the insurer must be preprinted or stamped, and a true and correct copy of an individual's power of attorney authorizing the agent to post such bond shall be attached.

If the bond is taken from a soliciting bail agent, the full name of the soliciting bail agent and the license number of such agent must be preprinted or stamped clearly and legibly along with all information required for a professional bail agent and a true and correct copy of an individual's power of attorney authorizing such soliciting bail agent to sign the name of the professional bail agent.

Any professional bail agent and/or soliciting bail agents who issue a bail bond that does not contain this required information may have their license suspended up to six (6) months and/or be fined not more than One Thousand Dollars ($1,000.00) for the first offense, may have their license suspended up to one (1) year and/or be fined not more than Five Thousand Dollars ($5,000.00) for the second offense and shall have their license permanently revoked if they commit a third offense.

The court or the clerk of the court shall notify the department when any professional bail agent or soliciting bail agent or insurer issues a bail bond that contains information that misleads a court about the proper delivery by personal service or certified mail of a writ of scire facias, judgment nisi or final judgment.

§ 99-5-3 Form of bail in open court:

Bail taken in open court may be entered on the minutes as follows, to wit:
"The State No. ___ v. A. B.
"Came the said A. B. and C. D. and E. F. and agreed to pay the state of Mississippi _____ dollars, unless the said A. B. shall appear at the present term of this court, and remain from day to day, and from term to term until discharged by law, to answer a charge of _____."

§ 99-5-5 Bonds payable to state:

All bonds and recognizances taken for the appearance of any party, either as defendant, prosecutor, or witness in any criminal proceeding or matter, shall be made payable to the state, and shall have the effect to bind the accused and his sureties on the bond or recognizance until the principal shall be discharged by due course of law, and shall be in full force, from term to term, for a period of three (3) years, except that a bond returnable to the Supreme Court shall be in full force for a period of five (5) years. If it is necessary to renew a bond, it shall be renewed without additional premium. At the end of the applicable period, a bond or recognizance that is not renewed shall expire and shall be uncollectible unless the collection process was started on or before the expiration date of such bond or recognizance. Any bond or recognizance taken prior to July 1, 1996, shall expire on July 1, 1999. If a defendant is charged with multiple counts in one (1) warrant only one (1) bond shall be taken.

§ 99-5-7 Fidelity or surety companies providing bail:

Bail may be given to the sheriff or officer holding the defendant in custody, by a fidelity or surety insurance company authorized to act as surety within the State of Mississippi. Any such company may execute the undertaking as surety by the hand of officer or attorney authorized thereto by a resolution of its board of directors, a certified copy of which, under its corporate seal, shall be on file with the clerk of the circuit court and the sheriff of the county, and such authority shall be deemed in full force and effect until revoked in writing by notice to said clerk and sheriff.

§ 99-5-9 Cash bail bond:

(1) In addition to any type of bail allowed by statute, any committing court, in its discretion, may allow any defendant, to whom bail is allowable, to deposit cash as bail bond in lieu of a surety or property bail bond, by depositing such cash sum as the court may direct with the sheriff or officer having custody of defendant, who shall receipt

therefor and who shall forthwith deliver the said monies to the county treasurer, who shall receipt therefor in duplicate. The sheriff, or other officer, upon receipt of the county treasurer, shall forthwith deliver one (1) copy of such receipt to the committing court who shall then order the release of such defendant.
(2) The order of the court shall set forth the conditions upon which such cash bond is allowed and shall be determined to be the agreement upon which the bailee has agreed.
(3) The sums received by the county treasurer shall be deposited by him in a special fund to be known as "Cash Bail Fund," and shall be received by him subject to the terms and conditions of the order of the court.
(4) If the committing court authorizes bail by a cash deposit under subsection (1) of this section, but anyone authorized to release a criminal defendant allows the deposit of an amount less than the full amount of the bail ordered by the court, the defendant may post bail by a professional bail agent in an amount equal to one-fourth (¼) of the full amount fixed under subsection (1) or the amount of the actual deposit whichever is greater.

§ 99-5-11 When judge may take recognizance or bond:

(1) All justice court judges and all other conservators of the peace are authorized, whenever a person is brought before them charged with any offense not capital for which bail is allowed by law, to take the recognizance or bond of the person, with sufficient sureties, in such penalty as the justice court judge or conservator of the peace may require, for his appearance before the justice court judge or conservator of the peace for an examination of his case at some future day. And if the person thus recognized or thus giving bond fails to appear at the appointed time, it shall be the duty of the justice court judge or conservator of the peace to return the recognizance or bond, with his certificate of default, to the court having jurisdiction of the case, and a recovery may be had therein by scire facias, as in other cases of forfeiture. The justice court judge or other conservator of the peace shall also issue an alias warrant for the defaulter.
(2) In circumstances involving an offense against any of the following: (a) a current or former spouse of the accused or child of that person; (b) a person living as a spouse or who formerly lived as a spouse with the accused or a child of that person; (c) a parent, grandparent, child, grandchild or someone similarly situated to the accused; (d) a person who has a current or former dating relationship with the accused; or (e) a person with whom the accused has had a biological or legally adopted child, the justice court judge or other conservator of the peace shall check, or cause to be made a check, of the status of the person for whom recognizance or bond is taken before ordering bail in the Mississippi Protective Order Registry authorized under Section 93–21–25, and the existence of a domestic abuse protection order against the accused shall be considered when determining appropriate bail.
(3) After the court considers the provisions of subsection (2) of this section, a misdemeanant may be released on his or her own recognizance unless:
(a) The misdemeanant:
(i) Is on probation or parole;
(ii) Has other unresolved charges pending; or
(iii) Has a history of nonappearance; or

(b) The court finds that:
(i) The release of the misdemeanant would constitute a special danger to any other person or to the community; or
(ii) Release of the misdemeanant on his or her own recognizance is highly unlikely to assure the appearance of the misdemeanant as required.

§ 99-5-13 Insufficient or excessive bail; hearing; orders for reduction or additional bail:

When it shall appear to the committing court or the court before which any person charged with a criminal offense has given bail to appear is insufficient or excessive in any respect, the court may (i) after a hearing, order the issuance of a revised mittimus reducing the previously set bail; or (ii) order the issuance of process for the arrest of such person, and may, after a hearing, require him to give bail as may be ordered, and, in default thereof, may commit him to jail as in other cases.

§ 99-5-15 Release of defendant:

It is the duty of the sheriff or other officer having custody of such defendant, upon his compliance with the order of the committing court or officer, to release him from custody; and he shall approve the sureties on the bond, except admitted and authorized fidelity and surety insurance companies acting as surety, and for that purpose may examine them on oath, or take their affidavit in writing, and may administer such oath.

See also Miss. Code Ann. § 83-39-23 ("No sheriff or other official shall accept bond from a professional bail agent unless the bail agent is licensed under this chapter and unless the bail agent shall exhibit to the court a valid certificate or license issued by the department, and the license of the bail agent shall not have been suspended or revoked. The department shall provide notice to the sheriff and municipal law enforcement and to the courts of every county and municipality of any suspension or revocation of a professional, soliciting or bail enforcement license. The department, upon request, may furnish to any sheriff, district, circuit, county or justice court judge or municipal judge additional information which would appropriately identify the duly licensed professional bail agent and insurers whose operation is covered by this chapter."); Miss. Code Ann. § 99-33-7 ("It is lawful for any officer having a person in custody by virtue of a warrant of a justice court judge, in a case in which the judge has a final jurisdiction, to take bond with sufficient sureties, in a sum of not less than Fifty Dollars ($50.00), nor more than One Thousand Dollars ($1,000.00), except . . . .").

§ 99-5-17 Return of bail bond to clerk:

It is the duty of the sheriff taking a bail-bond to return the same to the clerk of the circuit court of the county in which the offense is alleged to have been committed on or before the first day of the next term thereof.

§ 99-5-19 Special bail:

If any person, except a properly authorized judge, authorized to release a criminal defendant neglects to take a bail bond, or if the bail bond from any cause is insufficient at the time he took and approved the same, on exceptions taken and filed before the close of the next term, after the same should have been returned, and upon reasonable notice thereof to the person, he shall stand as special bail, and judgment shall be rendered against him as such, except when bond is tendered by a fidelity or insurance company or professional bail agent or its bail agent authorized by Mississippi state license to act as bail surety. The person taking and approving a bail bond from a fidelity or insurance company or professional bail agent or its bail agent with a valid Mississippi state license shall bear no financial liability on the bail bond in the event of a bail bond forfeiture or default.

§ 99-5-21 Description of offense in bond:

All bonds and recognizances taken in criminal cases, whether they describe the offense actually committed or not, shall have the effect to hold the party bound thereby to answer to such offense as he may have actually committed, and shall be valid for that purpose until he be discharged by the court.

§ 99-5-23 Bonds deemed valid and binding:

All bonds, recognizances, or acknowledgments of indebtedness, conditioned for the appearance of any party before any court or officer, in any state case or criminal proceeding, which shall have the effect to free such party from jail or legal custody of any sort, shall be valid and bind the party and sureties, according to the condition of such bond, recognizance, or acknowledgment, whether it was taken by the proper officer or under circumstances authorized by law or not, or whether the officer's return identify it or not.

It shall not be an objection to any bail-bond or recognizance that it is in the form of an acknowledgment before a court or officer and is without the signature of any person, or is without the indorsement of approval by any officer; but all persons who, by their acknowledgment before any officer of liability to pay a sum of money to the state if some person shall not appear before some court or officer in a criminal prosecution, procure the discharge from custody of such person, shall be bound accordingly upon the recognizance. An obligation signed by a person to obtain the discharge from custody of another shall not be invalid, if it have that effect, because it does not have indorsed on it the approval of any officer, or because the taking thereof be not recited in the return of the officer.

§ 99-33-13 Procedure in felony cases; remand of cases to be tried as misdemeanors:

If on the trial of any criminal case the justice court judge discover that it is a felony, and not a misdemeanor, of which the accused has been guilty, he shall not punish the offender nor render any judgment finally disposing of the case, but shall require him to give bail for his appearance in the circuit court, unless the felony be not bailable, in which case the justice shall commit him without bail. A circuit court grand jury may remand a case to justice court to be tried as a misdemeanor after finding that the felony charge presented should be remanded with its bond to justice or municipal court to be tried as a misdemeanor.

1303 FORFEITURE OF BAIL

§ 99-5-25 Purpose of bail:

(1)(a) The purpose of bail is to guarantee appearance and a bail bond shall not be forfeited for any other reason.

§ 99-5-25 Ordering the forfeiture of bail and notifying surety:

(1)(b) If a defendant in any criminal case, proceeding or matter fails to appear for any proceeding as ordered by the court, then the court shall order the bail forfeited and a judgment nisi and a bench warrant issued at the time of nonappearance.

§ 99-5-25 Notifying surety of the forfeiture:

(1)(b) . . . The clerk of the court shall notify the surety of the forfeiture by writ of scire facias, with a copy of the judgment nisi and bench warrant attached thereto, within ten (10) working days of such order of judgment nisi either by personal service or by certified mail. Failure of the clerk to provide the required notice within ten (10) working days shall constitute prima facie evidence that the order should be set aside. Any felony warrant issued by a court for nonappearance shall be put on the National Crime Information Center (NCIC) until the defendant is returned to custody.

§ 99-5-25 Setting aside a judgment nisi:

(1)(c) The judgment nisi shall be returnable for ninety (90) days from the date of issuance. If during such period the defendant appears before the court, or is arrested and surrendered, then the judgment nisi shall be set aside and a copy of the judgment that is set aside shall be served on the surety by personal service or certified mail. If the surety produces the defendant or provides to the court reasonable mitigating circumstances upon such showing, then the forfeiture shall not be made final.

§ 99-5-25 Reasonable mitigating circumstances:

(1)(c) . . . Reasonable mitigating circumstances shall be that the defendant is incarcerated in another jurisdiction, that the defendant is hospitalized under a doctor's care, that the defendant is in a recognized drug rehabilitation program, that the defendant has been placed in a witness protection program and it shall be the duty of any such agency placing such defendant into a witness protection program to notify the court and the court to notify the surety, or any other reason justifiable to the court.

§ 99-5-25 If forfeiture is made final:

(1)(c) . . . If the forfeiture is made final, a copy of the final judgment shall be served on the surety within ten (10) working days by either personal service or certified mail.
(d) Execution upon the final judgment shall be automatically stayed for ninety (90) days from the date of entry of the final judgment. If, at any time before execution of the final judgment, the defendant appears in court either voluntarily or in custody after surrender or arrest, the court shall on its own motion direct that the forfeiture be set aside and the bond exonerated as of the date the defendant first appeared in court.

§ 99-5-25 Revoking surety's authority to write bail bonds:

(2) If a final judgment is entered against a surety licensed by the Department of Insurance and has not been set aside after ninety (90) days, or later if such time is extended by the court issuing the judgment nisi, then the court shall order the department to revoke the authority of the surety to write bail bonds. The commissioner shall, upon notice of the court, notify the surety within five (5) working days of receipt of revocation. If after ten (10) working days of such notification the revocation order has not been set aside by the court, then the commissioner shall revoke the authority of the surety and all agents of the surety and shall notify the sheriff of every county of such revocation.

§ 99-5-25 Refunding bail amounts:

(3) If within eighteen (18) months of the date of the final forfeiture the defendant appears for court, is arrested or surrendered to the court, or if the defendant is found to be incarcerated in another jurisdiction and a hold order placed on the defendant, then the amount of bail, less reasonable extradition cost, excluding attorney fees, shall be refunded by the court upon application by the surety.

Mississippi Attorney General's opinions:

Reinstatement of surety's authority to write bail bonds.
"Pursuant to Section 99-5-25(2) of the Mississippi Code if the court orders the department of insurance to revoke the authority of a surety to write bail bonds and the commissioner of insurance revokes the authority of the surety, and the surety does not have the revocation set aside pursuant to section 83-39-17 et seq, only the department of

insurance may reissue or reinstate the authority of the surety to do business." Op. Atty. Gen. Ray, November 14, 2011.

1304 SURETY OR ARREST OF PRINCIPAL

§ 99-5-27 Surrender defined:

(1)(a) "Surrender" means the delivery of the defendant, principal on bond, physically to the sheriff or chief of police or in his absence, his jailer, and it is the duty of the sheriff or chief of police, or his jailer, to accept the surrender of the principal when presented and such act is complete upon the execution of verbal or written surrender notice presented by a bail agent and shall relieve the bail agent of liability on the principal's bond.

§ 99-5-27 Surrendering the principal:

(1)(b) A bail agent may surrender the principal if the principal is found to be detained on another charge. If the principal is found incarcerated in another jurisdiction, the bail agent may surrender him by verbal or written notice of surrender to the sheriff or chief of police, or his jailer, of that jurisdiction and the notice of surrender shall act as a "Hold Order" and upon presentation of written surrender notice to the court of proper jurisdiction, the court shall order a "Hold Order" placed on the principal for the court and shall relieve the bail agent of liability on the principal's bond, with the provision that, upon release from incarceration in the other jurisdiction, return of the principal to the sheriff shall be the responsibility of the bail agent. The bail agent shall satisfy the responsibility to return a principal held by a "Hold Order" in another jurisdiction upon release from the other jurisdiction either by personally returning the principal to the sheriff at no cost to the county or, where the other jurisdiction will not release the principal to any person other than a law enforcement officer, by reimbursing to the county the reasonable cost of the return of the principal, not to exceed the cost that would be entailed if the first option were available.

. . .

(2)(a) A bail agent, at any time, may surrender the principal to any law enforcement agency or in open court in discharge of the bail agent's liability on the principal's bond if the law enforcement agency that was involved in setting the original bond approves of such surrender, to the State of Mississippi and any of its courts and at any time may arrest and transport its principal anywhere or may authorize another to do so, may be assisted by any law enforcement agency or its agents anywhere upon request of bail and may receive any information available to law enforcement or the courts pertaining to the principal for the purpose of safe surrender or for any reasonable cause in order to safely return the principal to the custody of law enforcement and the court.

§ 99-5-27 Effect of a timely surrender:

(1)(c) The surrender of the principal by the bail agent, within the time period provided in Section 99-5-25, shall serve to discharge the bail agent's liability to the State of Mississippi and any of its courts; but if this is done after forfeiture of the bond or recognizance, the court shall set aside the judgment nisi or final judgment upon filing of surrender notice by the bail agent.

§ 99-5-27 Effect of failing to accept surrender:

(2)(b) A bail agent, at any time, may arrest its principal anywhere or authorize another to do so for the purpose of surrender of the principal on bail bond. Failure of the sheriff or chief of police or his jailer, any law enforcement agency or its agents or the court to accept surrender by a bail agent shall relieve the bail agent of any liability on the principal's bond, and the bond shall be void.

(3) A bail agent, at any time, upon request by the defendant or others on behalf of the defendant, may privately interview the defendant to obtain information to help with surrender before posting any bail bond on behalf of the defendant. All licensed bail agents shall have equal access to jails or detention facilities for the purpose of such interviews, the posting of bail bonds and the surrender of the principal.

§ 99-5-27 Review of bail upon surrender:

(4) Upon surrender, the court, after full review of the defendant and the pending charges, in open court, may discharge the prisoner on his giving new bail, but if he does not give new bail, he shall be detained in jail.

§ 99-5-29 Surety may cause arrest of principal by officer:

The sheriff or a constable in a proper case, upon the request of a surety in any bond or recognizance, and tender of the legal fee for executing a capias in a criminal case, and the production of a certified copy of the bond of recognizance, shall arrest, within his county, the principal in the bond or recognizance. The surety or his agent shall accompany the officer to receive the person.

§ 99-5-31 Mittimus in bailable cases to fix the bail:

When a defendant charged with a criminal offense shall be committed to jail by a court, judge, justice or other officer, for default in not giving bail, it is the duty of such court or officer to state in the mittimus the nature of the offense, the county where committed, the amount of bail, and number of sureties required, and to direct the sheriff of the county where such party is ordered to be confined to release him, on his entering into bond as required by the order of the court or committing officer; and this shall apply to a case where, on habeas corpus, an order for bail may be made.

1305 DOMESTIC VIOLENCE CONSIDERATIONS

§ 99-5-37 Required appearance:

(1) In any arrest for (a) a misdemeanor that is an act of domestic violence as defined in Section 99-3-7(5); (b) aggravated domestic violence as defined in Section 97-3-7(4); (c) aggravated stalking as defined in Section 97-3-107(2); (d) a knowing violation of a condition of bond imposed pursuant to this section; or (e) a knowing violation of a domestic abuse protection order issued pursuant to Section 93-21-1 et seq., or a similar order issued by a foreign court of competent jurisdiction for the purpose of protecting a person from domestic abuse, no bail shall be granted until the person arrested has appeared before a judge of the court of competent jurisdiction. The appearance may be by telephone. Nothing in this section shall be construed to interfere with the defendant's right to an initial appearance or preliminary hearing.

§ 99-5-37 Judge to consider exigencies of the case:

(2) Upon setting bail, the judge may impose on the arrested person a holding period not to exceed twenty-four (24) hours from the time of the initial appearance or setting of bail. The judge also shall give particular consideration to the exigencies of the case, including, but not limited to, (a) the potential for further violence; (b) the past history, if any, of violence between the defendant and alleged victim; (c) the level of violence of the instant offense; (d) any threats of further violence; and (e) the existence of a domestic violence protection order prohibiting the defendant from engaging in abusive behavior, and shall impose any specific conditions on the bond as he or she may deem necessary. Specific conditions which may be imposed by the judge may include, but are not limited to, the issuance of an order prohibiting the defendant from contacting the alleged victim prior to trial, prohibiting the defendant from abusing or threatening the alleged victim or requiring defendant to refrain from drug or alcohol use.

§ 99-5-37 Bond conditions to be entered into Uniform Offense Report:

(3) All bond conditions imposed by the court shall be entered into the corresponding Uniform Offense Report and written notice of the conditions shall be provided at no cost to the arrested person upon his or her release, to the appropriate law enforcement agency, and to the clerk of the court. Upon request, a copy of the written notice of conditions shall be provided at no cost to the victim. In any prosecution for violation of a bond condition imposed pursuant to this section, it shall not be a defense that the bond conditions were not entered into the corresponding Uniform Offense Report.

§ 99-5-37 Arresting a violator of bond conditions:

(4) Within twenty-four (24) hours of a violation of any bond conditions imposed pursuant to this section, any law enforcement officer having probable cause to believe that the violation occurred may make a warrantless arrest of the violator.

§ 99-5-37 Section not construed as interfering with judge's authority:

(5) Nothing in this section shall be construed to interfere with the judges' authority, if any, to deny bail or to otherwise lawfully detain a particular defendant.

§ 99-5-38 Global positioning system as a condition of bond:

(1)(a) "Domestic violence" has the same meaning as the term "abuse" as defined in Section 93-21-3.
(b) "Global positioning monitoring system" means a system that electronically determines and reports the location of an individual through the use of a transmitter or similar device carried or worn by the individual that transmits latitude and longitude data to a monitoring entity through global positioning satellite technology. The term does not include a system that contains or operates global positioning system technology, radio frequency identification technology or any other similar technology that is implanted in or otherwise invades or violates the individual's body.
(2) The court may require as a condition of release on bond that a defendant charged with an offense involving domestic violence:
(a) Refrain from going to or near a residence, school, place of employment, or other location, as specifically described in the bond, frequented by an alleged victim of the offense;
(b) Carry or wear a global positioning monitoring system device and, except as provided by subsection (8), pay the costs associated with operating that system in relation to the defendant; or
(c) If the alleged victim of the offense consents after receiving the information described by subsection (4) and, except as provided by subsection (8), pay the costs associated with providing the victim with an electronic receptor device that:
(i) Is capable of receiving the global positioning monitoring system information from the device carried or worn by the defendant; and
(ii) Notifies the victim if the defendant is at or near a location that the defendant has been ordered to refrain from going to or near under paragraph (a).
(3) Before imposing a condition described by subsection (2)(a), the court must afford an alleged victim an opportunity to provide the court with a list of areas from which the victim would like the defendant excluded and shall consider the victim's request, if any, in determining the locations the defendant will be ordered to refrain from going to or near. If the court imposes a condition described by subsection (2)(a), the court shall specifically describe the locations that the defendant has been ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations.
(4) Before imposing a condition described by subsection (2)(c), the court must provide to an alleged victim information regarding:
(a) The victim's right to participate in a global positioning monitoring system or to refuse to participate in that system and the procedure for requesting that the court terminate the victim's participation;
(b) The manner in which the global positioning monitoring system technology functions

and the risks and limitations of that technology, and the extent to which the system will track and record the victim's location and movements;
(c) Any locations that the defendant is ordered to refrain from going to or near and the minimum distances, if any, that the defendant must maintain from those locations;
(d) Any sanctions that the court may impose on the defendant for violating a condition of bond imposed under this section;
(e) The procedure that the victim is to follow, and support services available to assist the victim, if the defendant violates a condition of bond or if the global positioning monitoring system equipment fails;
(f) Community services available to assist the victim in obtaining shelter, counseling, education, child care, legal representation, and other assistance available to address the consequences of domestic violence; and
(g) The fact that the victim's communications with the court concerning the global positioning monitoring system and any restrictions to be imposed on the defendant's movements are not confidential.
(5) In addition to the information described by subsection (4), the court shall provide to an alleged victim who participates in a global positioning monitoring system under this section the name and telephone number of an appropriate person employed by a local law enforcement agency who the victim may call to request immediate assistance if the defendant violates a condition of bond imposed under this section.
(6) In determining whether to order a defendant's participation in a global positioning monitoring system under this section, the court shall consider the likelihood that the defendant's participation will deter the defendant from seeking to kill, physically injure, stalk, or otherwise threaten the alleged victim before trial.
(7) An alleged victim may request that the court terminate the victim's participation in a global positioning monitoring system at any time. The court may not impose sanctions on the victim for requesting termination of the victim's participation in or refusing to participate in a global positioning monitoring system under this section.
(8) The court may allow a defendant to perform community service in lieu of paying the costs required by subsection (2)(b) or (c) if the court determines that the defendant is indigent.
(9) The court that imposes a condition described by subsection (2)(a) or (b) shall order the entity that operates the global positioning monitoring system to notify the court and the appropriate local law enforcement agency if a defendant violates a condition of bond imposed under this section.
(10) This section does not limit the authority of the court to impose any other reasonable conditions of bond or enter any orders of protection under other applicable statutes.

1306 APPEARANCE BOND AS CONDITION OF PROBATION, COMMUNITY CONTROL, PAYMENT PLAN, OR OTHER COURT ORDERED SUPERVISION

§ 99-5-39

(1) As a condition of any probation, community control, payment plan for any fine imposed or any other court ordered supervision, the court may order the posting of a bond to secure the appearance of the defendant at any subsequent court proceeding or to otherwise enforce the orders of the court. The appearance bond shall be filed by a duly licensed professional bail agent with the court or with the sheriff who shall provide a copy to the clerk of court.
(2) The court may issue an order sua sponte or upon notice by the clerk or the probation officer that the person has violated the terms of probation, community control, court ordered supervision or other applicable court order to produce the defendant. The court or the clerk of the court shall give the bail agent a minimum of a seventy-two-hour notice to have the defendant before the court. If the bail agent fails to produce the defendant in court or to the sheriff at the time noticed by the court or the clerk of court, the bond shall be forfeited according to the procedures set forth in Section 99-5-25. The defendant's failure to appear shall be the sole grounds for forfeiture of the appearance bond.
(3) The provisions of Sections 83-39-1 et seq. and 99-5-1 et seq. shall govern the relationship between the parties except where they are inconsistent with this section.

1307 STATUTORY BOND FEES

§ 83-39-1 Bail defined:

(j) “Bail” means the use of money, property or other security to cause the release of a defendant from custody and secure the appearance of a defendant in criminal court proceedings, or the monitoring or supervision of defendants who are released from custody on recognizance, parole or probation, except when such monitoring or supervision is conducted after conviction, sentencing or other adjudication and solely by public employees.

§ 83-39-31 Fees that may be imposed:

(1) Upon every defendant charged with a criminal offense who posts a cash bail bond, a surety bail bond, a property bail bond or a guaranteed arrest bond certificate conditioned for his appearance at trial, there is imposed a fee equal to two percent (2%) of the face value of each bond or Twenty Dollars ($20.00), whichever is greater, to be collected by the clerk of the court when the defendant appears in court for final adjudication or at the time the defendant posts cash bond unless subsection (4) applies.
(2) Upon each defendant charged with a criminal offense who is released on his own recognizance, who deposits his driver's license in lieu of bail, or who is released after

arrest on written promise to appear, there is imposed a fee of Twenty Dollars ($20.00) to be collected by the clerk of the court when the defendant appears in court for final adjudication unless subsection (4) applies.

§ 83-39-31 Fee if defendant appeals conviction:

(3) Upon each defendant convicted of a criminal offense who appeals his conviction and posts a bond conditioned for his appearance, there is imposed a fee equal to two percent (2%) of the face value of each bond or Twenty Dollars ($20.00), whichever is greater. If such defendant is released on his own recognizance pending his appeal, there is imposed a fee of Twenty Dollars ($20.00). The fee imposed by this subsection shall be imposed and shall be collected by the clerk of the court when the defendant posts a bond unless subsection (4) applies.

§ 83-39-31 When fees are not to be imposed:

(4) If a defendant is found to be not guilty or if the charges against a defendant are dismissed, or if the prosecutor enters a nolle prosequi in the defendant's case or retires the defendant's case to the file, or if the defendant's conviction is reversed on appeal, the fees imposed pursuant to subsections (1), (2), (3) and (7) shall not be imposed.

§ 83-39-31 State Auditor regulations pertaining to bail bonds:

(5) The State Auditor shall establish by regulation procedures providing for the timely collection, deposit, accounting and, where applicable, refund of the fees imposed by this section. The Auditor shall provide in the regulations for certification of eligibility for refunds and may require the defendant seeking a refund to submit a verified copy of a court order or abstract by which the defendant is entitled to a refund.

§ 83-39-31 Clerk to promptly collect fees:

(6) It shall be the duty of the clerk or any officer of the court authorized to take bonds or recognizances to promptly collect, at the time such bonds or recognizances are received or taken, all fees imposed pursuant to this section. In all cases, the clerk or officer of the court shall deposit all fees so collected with the State Treasurer, pursuant to appropriate procedures established by the State Auditor, for deposit into the State General Fund.

§ 83-39-31 Fee for Victims of Domestic Violence Fund:

(7) In addition to the fees imposed by this section, there shall be an assessment of Ten Dollars ($10.00) imposed upon every criminal defendant charged with a criminal offense who posts a cash bail bond, a surety bail bond, a property bail bond or a guaranteed arrest bond to be collected by the clerk of the court and deposited in the Victims of Domestic Violence Fund created by Section 93-21-117, unless subsection (4) applies.

Mississippi Attorney General's opinions:

Collection fee under § 83-39-31.
"[B]ased upon the facts set forth in your letter there is no conviction and therefore the 2% / $20 fee shall not be imposed and therefore not collected." Op. Atty. Gen. Henderson, September 30, 2005.

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CHAPTER 14

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1400 SCOPE AND APPLICABILITY OF RULES

MRCrP 1.1. Scope:

These are the Mississippi Rules of Criminal Procedure and shall govern the procedure in all criminal proceedings, from arrest through post-trial motions, in all trial courts within the State of Mississippi, except as otherwise provided in these Rules, They may be cited as MRCrP; e.g., MRCrP 1.

See also:

RJC l Scope of rules:

(a) These are the Rules of Justice Court and may be cited as RJC: e.g., RJC 1. They shall govern procedures in justice courts. Rules 1-10 shall be applicable to all cases, whether civil or criminal in nature. Rules 11-27 shall only be applicable to civil cases. The Mississippi Rules of Criminal Procedure shall apply to all criminal cases before the justice courts and shall supersede any conflicting provision of these rules.

(b) No rule of procedure, local or otherwise, shall be adopted without the approval of the Mississippi Supreme Court. See MRCrP 1.9 (Local Court Rules).

(c) Any person who violates these rules may be subject to sanctions, contempt proceedings, or disciplinary action.

MRCrP 1.2. Purpose and construction:

These Rules are to be interpreted to provide for the just and speedy determination of criminal proceedings, to secure simplicity in procedure and fairness in administration, to eliminate unjustifiable delay and expense, and to protect the rights of individuals while protecting the public.

1401 COMPUTATION AND ENLARGEMENT OF TIME

MRCrP 1.3

(a) Computation. In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to ran shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, as defined by statute, or any other day when the court clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day

when the court clerk's office is in fact closed, In the event any legal holiday falls on a Sunday, the next day shall be a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(b) Enlargement. When by these Rules or by order of court an act is required or allowed to be done at or within a specified time, the court may at any time:

> (1) with or without motion, and for cause shown, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or
>
> (2) upon motion made after the expiration of the specified period, permit the act to be done where failure to act was the result of excusable neglect or good cause shown.
> But a court may not, except as provided elsewhere in these Rules, extend the time for making a motion for directed verdict, a motion for new trial, a motion to vacate judgment, or for taking an appeal.

(c) Unaffected by Expiration of Term. The doing of any act or the taking of any action permitted by these Rules is not affected or limited by the existence or expiration of a term of court. However, a criminal sentence cannot be modified, altered, or vacated after the end of the term of court in which the defendant was sentenced, except as provided by law.

(d) Motions Regarding Computation and Enlargement of Time. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than five (5) days before the time fixed for the hearing, unless a different period is fixed by these Rules or by order of the court. Such an order may, for cause shown, be made on ex parte application. Service shall be accomplished in accordance with Rule 1.7.

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

Art. 6 § 171 Concurrent jurisdiction with circuit court for misdemeanors:

The justice court shall have jurisdiction concurrent with the circuit court over all crimes whereof the punishment prescribed does not extend beyond a fine and imprisonment in the county jail; but the Legislature may confer on the justice court exclusive jurisdiction in such petty misdemeanors as the Legislature shall see proper.

See also Miss. Code Ann. § 99-33-1(2) ("[Justice] court judges shall have jurisdiction concurrent with the circuit court of the county over all crimes occurring in the county whereof the punishment prescribed does not extend beyond a fine and imprisonment in the county jail.").

§ 9-9-21 Concurrent jurisdiction with county court for misdemeanors:

(1) The jurisdiction of the county court shall be as follows: It shall have jurisdiction concurrent with the justice court in all matters, civil and criminal of which the justice court has jurisdiction;

See also Smith v. State, 24 So. 2d 85, 88 (Miss. 1945) ("An affidavit is essential to confer jurisdiction on a [justice court] . . . the court has no jurisdiction without it."); Hodnett v. State, 787 So. 2d 670, 674 (Miss. Ct. App. 2001) ("[Section 9-9-21] provides that the county court enjoys jurisdiction concurrent with the justice court 'in all matters, civil and criminal of which the justice court has jurisdiction.' To avoid confusion, 'the first court acquiring jurisdiction should proceed with trial and disposition of [the] case.'"); Rhodes v. State, 335 So. 2d 907, 908 (Miss. 1976) ("[W]hen one court which has concurrent jurisdiction with another court has acquired jurisdiction but voluntarily relinquishes it by a nolle pros or dismissal of the cause, the other court may proceed.").

Mississippi Attorney General's opinions:

Concurrent jurisdiction over county ordinances.
"[S]ince the justice court would have jurisdiction to hear violations of county ordinances, the county court would also have concurrent jurisdiction over violations of county ordinances." Op. Atty. Gen. Montgomery, June 10, 2011.

Remand of cases to be tried as misdemeanors:

§ 99-33-1

(3) A circuit court grand jury, after an evidentiary determination, may remand any case that may be tried as a felony or misdemeanor, and which it deems should be tried as a misdemeanor, to justice or municipal court to be tried as a misdemeanor.

§ 99-33-13

A circuit court grand jury may remand a case to justice court to be tried as a misdemeanor after finding that the felony charge presented should be remanded with its bond to justice or municipal court to be tried as a misdemeanor.

Mississippi Attorney General's opinions:

Grand jury has no authority to remand an uncharged matter.
"There is no authority for the grand jury to remand an uncharged matter for trial in justice court as a misdemeanor. However, the grand jury could return a no bill, and the prosecuting attorney or other interested party could have a misdemeanor affidavit filed in justice court and proceed with trial therein." Op. Atty. Gen. Martin, January 15, 2015.

Procedures upon remand from grand jury.
"[Section 99-33-13] provides no guidance as to the procedures to be utilized upon remand. However, it is the opinion of this office that the Grand Jury should forward a written notice of Remand to the justice court specifying the misdemeanor charge for which the defendant is to be tried. The notice of remand should be signed by the foreperson of the grand jury and approved by the district attorney. Upon receipt of the notice of remand the justice court should forward, by certified mail, or by service by a law enforcement officer, a copy of the notice of remand from the grand jury together with an order signed by the judge containing notice of the hearing date on the charge." Op. Atty. Gen. Erby, November 21, 2008.

§ 9-11-15 Justice court is a court of record:

(1) . . . [Justice court] court shall be a court of record, with all the power incident to a court of record, including power to fine in the amount of fine and length of imprisonment as is authorized for a municipal court in Section 21-23-7(11) for contempt of court.

1403 VENUE

§ 99-11-3 Proper venue:

(1) The local jurisdiction of all offenses, unless otherwise provided by law, shall be in the county where committed. But, if on the trial the evidence makes it doubtful in which of several counties, including that in which the indictment or affidavit alleges the offense was committed, such doubt shall not avail to procure the acquittal of the defendant.

See also Russell v. State, 126 So. 3d 145, 147 (Miss. Ct. App. 2013) ("Russell argues that

the State failed to establish venue because Officer Penson did not specifically state that the events occurred in the City of Flowood, Rankin County, Mississippi. We disagree. Although Officer Penson did not say the 'magic words,' there is direct and circumstantial evidence in the record to show the crimes occurred in the City of Flowood, Rankin County.").

Mississippi Attorney General's opinions:

If there are two judicial districts.
"A criminal offense in a justice court having two judicial districts must be tried in the district where the offense occurred. Therefore, in the subject case the district 1 judge must travel to district 2 to hear the case. See Travis v. State, 230 Miss. 578, 93 So.2d 468 (1957) and Clark v. State, 230 Miss. 143, 92 So.2d 452(1957);" Op. Atty. Gen. Parker, March 12, 2012.

Venue generally.
"Generally speaking, a Justice Court Judge would have venue over all misdemeanors occurring within the county of his election." Op. Atty. Gen. Whitten, III, May 23, 1989.

MRCrP 11.1 Change of venue:

(a) Grounds. The trial judge, for good cause, may grant the defendant a change of venue. Good cause includes a satisfactory showing made to the court in writing, supported by the affidavits of two (2) or more credible persons, that the defendant cannot have a fair and impartial trial in the county where the offense is charged to have been committed.

(b) Prejudicial Pretrial Publicity. Whenever the grounds for change of venue are based on pretrial publicity, the trial judge shall consider the level of adverse publicity (both in extent of coverage and its inflammatory nature) and the potential effect of such publicity on the venire.

(c) Time for Filing Motion. A motion for change of venue should be made at the earliest opportunity after learning of the cause for challenge.

(d) Venue Upon Remand. When an action is remanded by an appellate court for a new trial or jury sentencing, all rights to request a change of venue may be asserted de novo.

MRCrP 11.2 Transfer to another county:

(a) Proceedings on Transfer. If a change of venue is granted pursuant to Rule 11.1, the judge shall direct that a certified copy of the order granting the change of venue be transmitted to the circuit clerk of the county to which the venue has been changed. The circuit clerk of the county to which the venue has been changed must file the certified order and designate a docket number for said case for future reference. Unless otherwise directed by the judge, all pleadings, motions, orders of the court, and other matters

thereafter filed shall bear both the original number of the county of original venue and the assigned number of the county of changed venue, and shall be filed with the circuit clerk of the county of original venue. The judge may hear or determine all pretrial and post-trial matters in the county to which venue has been changed or in any county of the judge's district.

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

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

1404 TRANSFERS

§ 99-33-17 To municipal court:

A justice court judge shall not dismiss a criminal case but may transfer the case to a municipal court within the county if the justice court judge is prohibited from presiding over the case by the Canons of Judicial Conduct and provided that venue and jurisdiction is proper in the municipal court. Upon transfer of any such case, the justice court judge shall give the justice court clerk a written order to transmit the affidavit or complaint and all other records and evidence in the court's possession to the municipal court by certified mail or to instruct the arresting officer to deliver such documents and records to the municipal court. There shall be no court costs charged for the transfer of the case to the municipal court.

§ 21-23-7 From municipal court:

(12) A municipal court judge shall not dismiss a criminal case but may transfer the case to the justice court of the county if the municipal court judge is prohibited from presiding over the case by the Canons of Judicial Conduct and provided that venue and jurisdiction are proper in the justice court. Upon transfer of any such case, the municipal court judge shall give the municipal court clerk a written order to transmit the affidavit or complaint and all other records and evidence in the court's possession to the justice court by certified mail or to instruct the arresting officer to deliver such documents and records to the justice court. There shall be no court costs charged for the transfer of the case to the justice court.

Mississippi Attorney General's opinions:

Transfer of felony cases to justice court.
"Section 21-23-7(12) of the Mississippi Code provides for the transfer of criminal cases from municipal court to justice court. It does not distinguish between misdemeanor and felony cases. Therefore, a municipal judge can transfer felony cases to justice court. . . . In justice court the defendant would be entitled to an initial appearance and a preliminary hearing under the same guidelines as if the case originated in justice court." Op. Atty. Gen. Mullen, June 10, 2005.

Justice court may not refuse proper transfer.
"[A] justice court may not refuse the transfer of a case from municipal court as contemplated by Section 21-23-7(12) unless proper venue and jurisdiction do not exist. Any such case that is transferred from municipal court to justice court should be treated as if the case were originally filed in justice court." Op. Atty. Gen. Via, May 18, 2001.

When municipal court judge may transfer a case to justice court.
"[O]nce a case is filed in municipal court, a municipal court judge may not transfer a case from municipal court to justice court unless the Canons of Judicial Conduct prohibit him from presiding over the case or there is some other jurisdictional problem. If the case is transferred as a result of the municipal court judge recusing himself, that same judge may not hear the case while serving as justice court judge." Op. Atty. Gen. Griffith, December 8, 2000.

Justice court has total jurisdiction of transferred case.
"[O]nce a case has been transferred from municipal court to justice court, the justice court has total jurisdiction over the case and it is the responsibility of the county prosecutor to prosecute the case. . . . The justice court clerk is responsible for issuing all process in the case and collecting any fine that may be imposed. The county would be entitled to any fine money collected from such a case." Op. Atty. Gen. Prewitt, May 1, 2000.

1405 COURT TERMS

§ 9-11-15 Regular terms of court:

(1) Justice court judges shall hold regular terms of their courts, at such times as they may appoint, not exceeding two (2) and not less than one (1) in every month, at the appropriate justice court courtroom established by the board of supervisors; and they may continue to hold their courts from day to day so long as business may require; and all process shall be returnable, and all trials shall take place at such regular terms, except where it is otherwise provided;

§ 9-11-15 Scheduling trials for non-resident defendants:

(1) . . . [W]here the defendant is a nonresident or transient person, and it shall be shown by the oath of either party that a delay of the trial until the regular term will be of material injury to him, it shall be lawful for the judge to have the parties brought before him at any reasonable time and hear the evidence and give judgment or where the defendant is a nonresident or transient person and the judge and all parties agree, it shall be lawful for the judge to have the parties brought before him on the day a citation is made and hear the evidence and give judgment.

§ 9-11-15 Traffic court day if population is under 150,000:

(2)(a) In counties with a population of less than one hundred fifty thousand (150,000), each justice court shall designate at least one-half (1/2) day each month as a traffic court day, sufficient to handle the traffic violations docket of that court, and shall notify all appropriate law enforcement agencies of the date or dates. On the day or days so designated, the justice court shall give priority to all cases involving traffic violations.

§ 9-11-15 Traffic court day if population is 150,000 or more:

(2)(b) In counties with a population of one hundred fifty thousand (150,000) or more, each justice court shall designate at least one (1) day each month as a traffic court day, sufficient to handle the traffic violations of that court, and shall notify all appropriate law enforcement agencies of the date or dates. On the day or days so designated, the justice court shall give priority to all cases involving traffic violations. The one (1) day may be one (1) whole day or it may be divided into half days as long as one-half (1/2) day is held in the morning and one-half (1/2) day is held in the afternoon, in the discretion of the court.

1406 COURTROOM DECORUM AND SECURITY

RJC 2 Courtroom decorum and security:

The court shall be opened formally and conducted with dignity and decorum at all times. The judge shall wear a judicial robe at all times when presiding in open court. Each officer of the court shall be responsible for promotion of respect for the court. No one shall carry firearms or weapons of any description in the courtroom, except:

(1) the bailiffs;
(2) any necessary guards of a prisoner;
(3) other law enforcement or security authorized by the court to do so; or
(4) the judge if he/she has met the requirements set forth in section 97-37-7 of the Mississippi Code or as provided by applicable law.

In the interest of security, all persons entering the courtroom may be searched. Any or all individuals may be excluded or removed from the courtroom for engaging in disorderly, disruptive, or contemptuous conduct, or when their conduct or presence constitutes a threat or menace to the court, parties, attorneys, witnesses, jurors, officials, members of the public, or a fair trial.

§ 97-37–7

(2) It shall not be a violation of this or any other statute for pistols, firearms or other suitable and appropriate weapons to be carried . . . by judges of the . . . justice . . . courts. Before any person shall be authorized under this subsection to carry a weapon, he shall complete a weapons training course approved by the Board of Law Enforcement Officer Standards and Training.

§ 19-19-7 Constable to attend justice court:

It shall be the duty of the constable to attend the justices' courts of his district, and to obey their lawful orders. He shall execute all judgments of said courts in any criminal case before them.

Mississippi Attorney General's opinions:

When the constable is to serve as bailiff in justice court.
"Section 19-19-7 states that it is the duty of the constables to attend justice court and follow the orders of the judge. [But] the constable should only serve as bailiff for justice court if ordered to do so by the justice court judge. Justice court judges may choose whom they wish to serve as bailiff of their court, which may include a constable from another district within the county or a deputy sheriff if the sheriff, with permission of the judge, assigns such a deputy to bailiff duty. We find no authority for a municipal police officer to serve as bailiff of the justice court, since this is not a proper municipal

function." Op. Atty. Gen. McCormack, November 6, 1998.

Attendance requirement.
"[A] constable still has an obligation to attend Justice Court even if he is not serving as bailiff." Op. Atty. Gen. Aldridge, December 18, 1998.

§ 9-11–5 All trials to be held in courtroom provided by county:

(1) The justice court judges shall be provided courtrooms by the county and all trials shall be held therein. Such courtrooms shall be in the county courthouse, county office building or any other building within the county deemed appropriate by the board of supervisors.
(2) The county shall provide office space and furnish each justice court office and provide necessary office supplies.
(3) The board of supervisors of each county may secure insurance coverage to protect the office of the justice court clerk against losses due to theft or robbery.

What are adequate court facilities?

> While adequate facilities do not encompass luxurious surroundings by any means, they do at a minimum also include the following: they must enable a judge to conduct court with dignity, they must be comfortable, and as noted, quiet. There must be sanitary restrooms. No participant in court should be required to endure physical discomfort. The courtroom must be properly ventilated, properly heated in cold weather, and properly cooled in hot weather. The chairs must be of sufficient comfort so that lawyers, parties, courtroom personnel and jurors, who are required to sit for long periods, can do so without physical unease. Since court proceedings are public, there must also be sufficient space and chairs or benches provided for spectators and press.

Hosford v. State, 525 So.2d 789, 797 n.4 (Miss. 1988).

Mississippi Attorney General's opinions:

If board of supervisors fail to provide a courtroom or office space.
"[I]f the board of supervisors fails to provide a courtroom or office space for the justice court, a writ of mandamus may be sought in circuit court requiring the board of supervisors to fulfill their statutory duties." Op. Atty. Gen. Smith, August 1, 1997.

§ 19-25-69 Charge of the courthouse:

The sheriff shall have charge of the courthouse and jail of his county, of the premises belonging thereto, and of the prisoners in said jail. He shall preserve the said premises and prisoners from mob violence, from any injuries or attacks by mobs or otherwise, and from trespasses and intruders. He shall keep the courthouse, jail, and premises belonging thereto, in a clean and comfortable condition, and it shall be his duty to prosecute all persons who are guilty of injuring or defacing same. . . .

Mississippi Attorney General's opinions:

Sheriff's duty in providing courthouse security.
"[I]t is the duty of the sheriff to provide courthouse security which is separate and apart from the duty of the bailiff to assist the court relating to courtroom procedures including the seating of witnesses and activities of jurors." Op. Atty. Gen. Thompson, August 3, 2012.

Sheriff to provide security.
"[A]lthough the justice court judge may, by order, appoint the constable as bailiff, it remains the duty of the sheriff to provide security for the courtroom." Op. Atty. Gen. Thompson, January 17, 2012.

Providing security separate and apart from the constable acting as bailiff.
"The sheriff is responsible for the security of the courthouse at all times, including the courtroom, pursuant to Section 19-25-69, regardless of whether a constable is serving as bailiff in the courtroom." Op. Atty. Gen. Mueller, August 15, 2008.

1407 USE OF CAMERAS, RECORDING AND BROADCASTING EQUIPMENT

RJC 3 Use of cameras, recording, and broadcasting equipment:

Any attorney of record or self-represented litigant may record or have recorded any justice court proceeding by audiovisual-recording device or stenographically consistent with section 9-13-32 of the Mississippi Code. Any other use of cameras, recording devices, or broadcasting equipment shall be governed by Canon 3B(12) of the Mississippi Code of Judicial Conduct or other applicable rules.

Canon 3

(B)(12) Except as may be authorized by rule or order of the Supreme Court, a judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;
(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;
(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
(i) the means of recording will not distract participants or impair the dignity of the proceedings;
(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;
(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Mississippi Attorney General's opinions:

Use of cameras under Canon 3B(12).
"[Canon 3B(12)] prohibits the use of cameras in all courtrooms except under limited circumstances." Op. Atty. Gen. Robinson, January 3, 2003.

MRCrP 1.10 Recordation of proceedings where official court reporter not provided:

Any attorney of record or pro se litigant in a court which does not provide an official court reporter may record or have recorded any court proceeding by audio-recording device or stenographically. Any expenses incident thereto shall be borne by the party or parties.

MRCrP Rule 20 Duties of court reporters:

(b) Other Cases.
. . .
(2) Municipal and justice court. In criminal proceedings in municipal and justice court, either party may engage the services of a court reporter to take down the proceedings, at the expense of the requesting party.

MRCrP 10.2 Consequences of defendant's disruptive behavior:

(a) Disruptive Conduct. A defendant who engages in disruptive or disorderly conduct may be removed and shall forfeit the right to be present at that proceeding.

(b) Restoration of Right. The court shall grant any defendant so removed reasonable opportunities to return to the court upon the defendant's personal assurance of good behavior and/or such other conditions as the court may require. Any subsequent disruptive conduct on the part of the defendant may result in removal.

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

MRCrP 10.3 Presence of witnesses and spectators:

(a) Witnesses. Pursuant to Rule 615 of the Mississippi Rules of Evidence, the court may, and at the request of either party shall, exclude prospective witnesses from the courtroom. The court also shall direct witnesses not to communicate with each other concerning the case until all have testified. If the court finds that a party's claim that a person is a prospective witness is not made in good faith, the person may be allowed to remain in the courtroom. Once a witness has testified on direct examination and has been made available to all parties for cross-examination and excused by the court, the witness shall be allowed to remain in the courtroom unless the court finds, upon application of a party or witness, that the presence of the witness would be prejudicial to a fair trial. This Rule does not authorize excluding a person whose presence a party shows to be essential to presenting the party's claim or defense.

(b) Spectators.

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

(2) Exception for Certain Crimes. Pursuant to Article 3, Section 26 of the Mississippi Constitution, the court may exclude from the courtroom all persons except those necessary in the conduct of the trial.

(3) Victims. Pursuant to Article 3, Section 26A of the Mississippi Constitution, the alleged victim has the right to be present throughout ail criminal proceedings when authorized by law. If the alleged victim is a witness, then Rule 10.3(a) controls.

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

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

RJC 10 Conduct of counsel and parties:

(a) Attendance. Prompt attendance is required by the attorneys and parties, the witnesses, and all other persons whose presence is required to conduct the business of the court.

(b) Civility in proceedings. The attorneys and parties must show professional courtesy and respect toward the judge, the jurors, the opposing attorneys and parties, the witnesses, and all other court personnel and participants within the courthouse. Any person engaging in behavior or tactics purposefully calculated to disrupt the proceedings or to irritate the judge, a party, an attorney, or a witness is subject to contempt.

(c) Objections. When addressing the court, the attorneys and parties must:

(1) stand unless excused for good cause by the court;
(2) give specific grounds on any objections to testimony; and
(3) make all objections to the judge, and not to opposing counsel.

(d) Jury panels. When addressing the jury panel, the attorneys and parties must stand unless excused for good cause by the court. Attorneys may directly address the jury panel only during voir dire, opening statements, and closing arguments.

(e) Witnesses. When examining witnesses, the attorneys and parties must:

(1) stand, except when excused for good cause by the court;
(2) limit themselves to asking questions; and
(3) refrain from making statements, quips, or side remarks.

Any examination of witnesses is to be conducted fairly and objectively, with the attorneys, parties, and witnesses showing courtesy and respect to one another. Attorneys and parties may not ask questions merely to embarrass or humiliate the witness.

(f) Opening statements / Closing arguments. When making an opening statement or closing argument, the attorneys and parties must:

(1) not denigrate or ridicule the opposing attorney;
(2) not call any juror by name;

(3) not have any personal contact with the jury whatsoever;
(4) not attempt to converse with or solicit audible answers from the jurors individually; and
(5) not thank the jury for acting as jurors.

The attorneys and parties are required to keep within proper bounds, and any attempt to inject an improper matter may be stopped by the court without the necessity of an objection. After the return of the verdict, the attorneys, the parties, and any spectators shall not express to the jury any congratulations, thanks, or condemnation for the verdict returned.

1409 EX PARTE COMMUNICATIONS

RJC 4

The judge shall not allow any person:

(1) to discuss in his/her presence the law or facts or alleged facts of any case then pending in the court, or likely to be instituted therein, except as allowed by law in the orderly progress of proceedings under these rules, or
(2) to influence his/her decision in any manner that is prohibited by these rules or the Mississippi Code of Judicial Conduct.

1410 COMMENCING A CRIMINAL PROSECUTION

MRCrP 2.1 Commencement of criminal proceedings:

(a) Commencement. All criminal proceedings shall be commenced either by charging affidavit, indictment, or bill of information.

(b) Docketing the Case.
(1) Charging affidavit. Anyone bringing a criminal charge in municipal court or justice court shall lodge a charging affidavit with the judge or clerk of the court. The clerk of the court shall record all charging affidavits on the docket.

See also Murshid v. State, 2021 WL 1540595 (Miss. Ct. App. 2021) ("A prosecution may be commenced ... by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit." Miss. Code Ann. § 99-1-7 (Rev. 2020); see also MRCrP 2.1(a) ("All criminal proceedings shall be commenced either by charging affidavit, indictment, or bill of information.").

MRCrP 2.2 Duty of judge upon making of a charging affidavit:

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

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

§ 99-33-2 Affidavit lodged with the judge or clerk:

(1) Anyone bringing a criminal matter in the justice court shall lodge the affidavit with the judge or clerk of the justice court.

See also Miss. Code Ann. § 99-1-5 (Statute of limitations) and § 99-1-7 (Commencement of prosecution).

Mississippi Attorney General's opinions:

Tolling the statute of limitations.
"The ticket is an affidavit having been sworn to prior to filing. . . . Thus, [under Section 99-1-7,] the filing of the affidavit tolls the statute." Op. Atty. Gen. Hogsett, February 29, 2008.

Commencing a criminal trial against a teacher or law enforcement officer.
"Mississippi Code Annotated Section 99-3-28 requires a probable cause determination to be made by a circuit judge prior to a municipal or justice court commencing a criminal trial against a teacher or law enforcement officer for an offense committed within the performance of official duties." Op. Atty. Gen. Tucker, August 29, 2003.

§ 99-33-2 Criminal cases assigned on a rotating basis:

(1) . . . The clerk shall record all affidavits and shall, as far as practicable, assign criminal cases to the justice court judges in the county on a rotating basis to ensure equal distribution of the cases among the judges of the county; however, in all counties in which the courtrooms provided by the county for use of the justice court judges are located in more than one (1) place in the county, the clerk, in addition to assigning cases to the judges on a rotating basis, may also assign a courtroom for each case, such assignment may be made based upon the proximity

of the courtroom to the defendant's residence or place of business.

§ 99-33-2 Certified copies of documents forwarded to the judge:

(2) When the case has been recorded and assigned and all necessary process issued, the clerk shall, within two (2) working days, forward certified copies of all documents pertaining to the case to the justice court judge to which the case is assigned for further processing.

§ 99-33-2 If affidavit lodged with the judge:

(3) Within forty-eight (48) hours of the receipt of any criminal affidavit lodged with a justice court judge, the justice court judge shall forward such affidavit and all documents pertaining thereto to the clerk of the justice court for the recording of such affidavit and documents and the assignment of the case as provided in subsection (1) of this section. Any justice court judge who willfully fails or refuses to comply with this subsection shall be guilty of a misdemeanor and shall be punished by a fine of not more than Five Hundred Dollars ($500.00), or by imprisonment in the county jail not more than six (6) months, or both.

§ 99-15-28 Right of accused to copy of the affidavit:

Any person alleged to have committed a criminal offense in violation of a state law, or ordinance of any political subdivision, which upon conviction carries a sentence of any length of time or fine of any amount, shall be entitled, upon request made by such person or their counsel, to receive a copy of the affidavit . . . at any time after such affidavit is filed . . . . No charge or fee shall be imposed for any copy of an affidavit . . . as herein provided.

1411 JUDGE AS CONSERVATOR OF THE PEACE

§ 99-15-1 Conservator of the peace within the county:

The judges of the Supreme, circuit and chancery courts and of the court of appeals are conservators of the peace throughout the state, and each judge of the county court and every justice court judge is such within his county.

§ 99-5-11 Taking recognizance or bond:

(1) All justice court judges and all other conservators of the peace are authorized, whenever a person is brought before them charged with any offense not capital for which bail is allowed by law, to take the recognizance or bond of the person, with sufficient sureties, in such penalty as the justice court judge or conservator of the peace may

require, for his appearance before the justice court judge or conservator of the peace for an examination of his case at some future day. And if the person thus recognized or thus giving bond fails to appear at the appointed time, it shall be the duty of the justice court judge or conservator of the peace to return the recognizance or bond, with his certificate of default, to the court having jurisdiction of the case, and a recovery may be had therein by scire facias, as in other cases of forfeiture. The justice court judge or other conservator of the peace shall also issue an alias warrant for the defaulter.
(2) In circumstances involving an offense against any of the following: (a) a current or former spouse of the accused or child of that person; (b) a person living as a spouse or who formerly lived as a spouse with the accused or a child of that person; (c) a parent, grandparent, child, grandchild or someone similarly situated to the accused; (d) a person who has a current or former dating relationship with the accused; or (e) a person with whom the accused has had a biological or legally adopted child, the justice court judge or other conservator of the peace shall check, or cause to be made a check, of the status of the person for whom recognizance or bond is taken before ordering bail in the Mississippi Protective Order Registry authorized under Section 93–21–25, and the existence of a domestic abuse protection order against the accused shall be considered when determining appropriate bail.
(3) After the court considers the provisions of subsection (2) of this section, a misdemeanant may be released on his or her own recognizance unless:
(a) The misdemeanant:
(i) Is on probation or parole;
(ii) Has other unresolved charges pending; or
(iii) Has a history of nonappearance; or
(b) The court finds that:
(i) The release of the misdemeanant would constitute a special danger to any other person or to the community; or
(ii) Release of the misdemeanant on his or her own recognizance is highly unlikely to assure the appearance of the misdemeanant as required.

§ 99-15-3 If recognizance or bond is returnable to the circuit court:

Any conservator of the peace has power to take all manner of bonds and recognizances from persons charged on affidavit with crimes and offenses, for their appearance in the circuit court to answer thereto, as well as for crimes and offenses committed in their presence. If any person fail to give bond or enter into recognizance, with the sureties prescribed, when required to do so by a conservator of the peace, he shall be committed to the county jail, there to remain until he comply or be otherwise discharged by due course of law. Every bond or recognizance so taken shall be returned to the circuit court before its next term. If any person so bound fail to appear in the circuit court, his bond or recognizance shall be adjudged forfeited, and otherwise proceeded with as provided by law.

Mississippi Attorney General's opinions:

Limited jurisdiction in felony cases.
"A justice court's jurisdiction in felony cases is limited to acting as a conservator of the peace to preliminary matters, i.e. determining probable cause, issuing warrants, setting bonds and conducting initial appearances and preliminary hearings." Op. Atty. Gen. Regan, May 10, 1996.

1412 INITIAL APPEARANCES

Right to a probable cause hearing:

"The Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." Gerstein v. Pugh, 420 U.S. 103, 114 (1975). Systemic challenges will not lie if the procedures are "fair and reliable" and are conducted "either before or promptly after arrest." *See* Gerstein at 125. "Promptly" is an appearance without "unreasonable delay." *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991). Ordinarily this requirement is satisfied if the hearing takes place within 48 hours of arrest. *See* McLaughlin at 56. But there are exceptions. Delays merely for reasons of gathering additional evidence to justify an arrest, ill will against the arrested individual, or delay for delay's sake are unreasonable. *See* McLaughlin at 56.

MRCrP 5.1 Procedure upon arrest:

(a) Telephone Call. Any person under arrest shall be afforded a reasonable opportunity to make a telephone call to, or otherwise make effective communication with, any person the accused may choose.

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

> (1) may, unless prohibited by law, be released upon the defendant's personal recognizance after being notified in writing to appear at a specified time and place; or
>
> (2) shall be released upon execution of an appearance bond set according to Rule 8, unless the charge upon which the person was arrested is not a bailable offense, and directed to appear at a specified time and place; or
>
> (3) if not released pursuant to subsections (b)(1) or (b)(2), the accused shall be taken without unnecessary delay, and in no event later than forty-eight (48) hours after arrest, before a judge for an initial appearance. If the person arrested is not taken before a judge as so required then, unless the offense for which the person

was arrested is not a bailable offense, the person shall be released upon execution of an appearance bond in specified in Rule 8, and shall be directed to appear at a specified time and place.

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

(c) On Arrest with a Warrant.

(1) If provision for bail or personal recognizance has been made by the judge issuing the arrest warrant, a person arrested with a warrant shall be released and directed to appear at a specified time and place.

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

(A) if such person was arrested pursuant to a warrant issued on a charging affidavit, the accused shall be taken without unnecessary delay, and in no event later than forty-eight (48) hours after arrest, before a judge for an initial appearance. If the person arrested has not been taken before a judge as required herein, unless the charge upon which the person was arrested is not a bailable offense, such person shall be released upon execution of an appearance bond in the amount of the minimum bail specified in Rule 8, and shall be notified in writing to appear at a specified time and place; or

(B) if such person was arrested pursuant to a capias issued upon an indictment, the accused shall be taken without unnecessary delay before a judge, who shall proceed as provided in Rule 8.

(3) The defendant shall be given a copy of the charging document.

See also ODonnell v. Harris Cty., 892 F.3d 147, 160 (5th Cir. 2018) ("We conclude that the federal due process right entitles detainees to a hearing within 48 hours."); Swinney v. State, 829 So. 2d 1225, 1230-31 (Miss. 2002) ("To satisfy the dictates of . . . prevailing case law, arrested persons must be afforded an initial appearance both (1) within 48 hours, and (2) without unnecessary delay. We have defined 'without unnecessary delay' to mean 'as soon as custody, booking, administrative and security needs have been met. Once these needs have been met, there is but one possible excuse for delay: lack of access to a judge.'"). The 48 hour time period begins when the defendant is under the control of the arresting state officers. *See* Jones v. State, 841 So. 2d 115, 133 (Miss. 2003) ("The practical reality of waiting for Jones to waive extradition and then transporting him back to Mississippi naturally caused a delay in providing an initial appearance. The 48 hour period should have begun at the point when Jones was under the

control of the [Washington County Sheriff's Office].").

MRCrP 5.2 Initial appearance:

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

(1) ascertain the defendant's true name, age, and address, and amend the formal charge if necessary to reflect this information, instructing the defendant to notify the court promptly of any change of address;

(2) inform the defendant of the charges and provide the defendant with, a copy of the charging affidavit;

(3) if the arrest has been made without a warrant, determine whether there was probable cause for the arrest and note the probable cause determination for the record. If there was no probable cause for the warrantless arrest, the defendant shall be released;

(4) if the defendant is unrepresented, advise of the right to assistance of an attorney, and that if the defendant is unable to afford an attorney, an attorney will be appointed as required by law. If the indigent defendant is unrepresented and desires representation, counsel shall be appointed pursuant to Rule 7.2, Rule 7.3 and local rule promulgated pursuant to Rule 1.9; and

(5) advise the defendant of:

(A) the right to remain silent and that any statements made may be used against the defendant;

(B) the right to communicate with an attorney, family or friends, and that reasonable means will be provided to enable the defendant to do so; and

(C) the conditions, if any, under which the defendant may obtain release.

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

(1) inform, the defendant of the right to a preliminary hearing and the procedure by which that right may be exercised; and

(2) if requested, set the time for a preliminary hearing in accordance with Rule 6.1.

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

See also Anderson v. State, 577 So. 2d 390, 391 (Miss. 1991) ("[A] valid guilty plea operates as a waiver of all non-jurisdictional rights or defects which are incident to trial."); Hall v. State, 455 So. 2d 1303, 1304 (Miss. 1984) ("Probable cause exists when the facts and circumstances within an officer's knowledge, or of which he has reasonable trustworthy information, are sufficient in themselves to justify a man of average caution in belief that a crime has been committed and that a particular individual has committed it.").

MRE 1101 When the Mississippi Rules of Evidence do not apply:

(a) To Courts and Proceedings. These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b).

(b) Exceptions. These rules--except for those on privilege--do not apply to the following:
. . .
(4) these miscellaneous proceedings:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- probable cause hearings in criminal cases and youth court cases;
- sentencing;
- disposition hearings;
- granting or revoking probation; and
- considering whether to release on bail or otherwise.

If failing to provide a prompt initial appearance:

Failure to provide a prompt initial appearance does not automatically require a reversal. Instead, it must be shown that the incriminating evidence was the product of an unreasonable delay and prejudiced the merits of the case. *See* Davis v. State, 743 So. 2d 326, 338 (Miss. 1999) ("An initial appearance might have resulted in less evidence being gathered, but it would not have resulted in suppression of the evidence against Davis to the extent where there is any reasonable probability that the verdict would have changed."); Thornson v. State, 653 So. 2d 876, 887 (Miss. 1995) ("His confession was not a product of any delay in taking him before a magistrate, and was therefore admissible.").

MRCrP 1.8 Interactive audiovisual devices:

(a) General Provisions. When the appearance of a defendant required in circuit, county, municipal or justice court, subject to the provisions of this Rule, the appearance may be

made by the use of interactive audiovisual equipment including video conferencing equipment. Interactive audiovisual equipment shall at a minimum operate so as to enable the court and all parties to view and converse with each other.

(b) Requirements. In using interactive audiovisual equipment, the following are required:

(1) a full record of the proceedings shall be made as provided in applicable rules;

(2) the court shall determine that the defendant knowingly, intelligently, and voluntarily agrees to appear at the proceeding by interactive audiovisual means; and

(3) provisions shall be made to allow for confidential communications between the defendant and counsel before and during the proceeding. Defense counsel shall be present at the location with the defendant during the proceedings.

(c) Permissible Proceedings. Appearance by interactive audiovisual equipment, including video conferencing, may be permitted in the discretion of the court at any proceeding except that this Rule shall not apply to any trial, probation violation hearing, or any felony plea and/or sentencing.

§ 99-1-23 Closed-circuit television or web cam:

(1) When the physical appearance in person in court is required of any person who is represented by counsel and held in a place of custody or confinement operated by the state or any of its political subdivisions, upon waiver of any right such person may have to be physically present, such personal appearance may be made by means of closed circuit television or Web cam from the place of custody or confinement, provided that such television or Web cam facilities provide two-way audio-visual communication between the court and the place of custody or confinement and that a full record of such proceedings be made by split-screen imaging and recording of the proceedings in the courtroom and the place of confinement or custody in addition to such other record as may be required, in the following proceedings:
(a) Initial appearance before a judge on a criminal complaint;
(b) Waiver of preliminary hearing;
(c) Arraignment on information or indictment where a plea of not guilty is entered;
(d) Arraignment on information or indictment where a plea of guilty is entered;
(e) Any pretrial or post-trial criminal proceeding not allowing the cross-examination of witnesses;
(f) Sentencing after conviction at trial;
(g) Sentencing after entry of a plea of guilty; and
(h) Any civil proceeding other than trial by jury.
(2) This section shall not prohibit other appearances via closed circuit television or Web cam upon waiver of any right such person held in custody or confinement might have to

be physically present.
(3) Nothing contained in this section shall be construed as establishing a right for any person held in custody to appear on television or Web cam or as requiring that a place of custody shall provide a two-way audio-visual communication system.
(4) The provisions of this section shall apply to all courts.

Mississippi Attorney General's opinions:

County responsible for providing equipment necessary under rules and statutes.
"The Mississippi Supreme Court [in *Board of Supervisors of Choctaw County v. Hughes*, 35 So. 424 (Miss. 1903)] held that the Board of Supervisors has a primary duty to provide the supplies and equipment necessary for the operation of court. . . . Furthermore, Article 14 Section 261 of the Mississippi Constitution of 1980 states: 'The expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun; and all fines and forfeitures shall be paid into the treasury of such county. Defendants, in cases of conviction, may be taxed with the costs.' Based upon the above and foregoing, it is the opinion of this office that it is the county, not the judge, which is responsible for providing all equipment necessary for the court to meet the requirements set forth by court rules and Mississippi statutes. This responsibility would include setting up and operating audio-visual equipment and/or webcams."). Op. Atty. Gen. Hopson, May 13, 2020.

1413 PRELIMINARY HEARINGS

MRCrP 6.1 Right to a preliminary hearing; waiver; postponement:

(a) Right to a Preliminary Hearing.

(1) Generally. A defendant who has been charged with a felony is entitled to a preliminary hearing upon request. But a defendant who has been indicted by a grand jury is not entitled to a preliminary hearing.

(2) When Commenced. The preliminary hearing shall be held within fourteen (14) days following the demand for preliminary hearing unless:

(A) the charging affidavit has been dismissed;

(B) the hearing is subsequently waived, as provided in section (b);

(C) the hearing is postponed as provided in section (d); or

(D) before commencement of the hearing, an indictment charging the same offense has been returned by the grand jury.

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

(c) Delay.

(1) Release on Recognizance. If a preliminary hearing has not been commenced within fourteen (14) days as required by subsection (a), unless postponed as provided in subsection (d), the defendant shall be released on recognizance.

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

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

MRCrP 6.2 Proceedings at preliminary hearing:

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

At the close of the prosecution's case, including cross-examination of prosecution witnesses by the defendant, the judge shall determine and state for the record or state in open court whether the prosecution's case establishes probable cause. The defendant may then make a specific offer of proof, including the names of witnesses who would testify, or the defendant may produce the evidence offered.

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

(c) Hearsay Evidence. The findings by the court shall be based on substantial evidence, which may be hearsay, in whole or in part, provided there is a basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

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

(e) Amendment of Charging Affidavit. The charging affidavit may be amended at any time to conform to the evidence, unless substantial rights of the defendant would be prejudiced.

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

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

See also Mayfield v. State, 612 So. 2d 1120, 1129 (Miss. 1992) ("[T]he fundamental purpose of a preliminary hearing is to "determine whether there is probable cause to believe that an offense has been committed and whether the defendant committed it." . . . The procedure is designed, for example, to prevent a victim of malicious prosecution from enduring extended incarceration or the distress of unjust accusations while waiting for his case to come before a grand jury."); Stevenson v. State, 244 So. 2d 30, 33 (Miss. 1971) ("The nature and purpose of a preliminary hearing . . . is to determine whether probable cause exists to have a person held for trial.").

MRE 1101 When the Mississippi Rules of Evidence do not apply:

(a) To Courts and Proceedings. These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b).

(b) Exceptions. These rules--except for those on privilege--do not apply to the following:
. . .
(4) these miscellaneous proceedings:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- probable cause hearings in criminal cases and youth court cases;
- sentencing;
- disposition hearings;
- granting or revoking probation; and
- considering whether to release on bail or otherwise.

See also Burns v. State, 729 So. 2d 203, 211 (Miss. 1999) ("[O]nce a defendant has been indicted by a grand jury, the right to a preliminary hearing is deemed waived."); Sanders v. State, 847 So. 2d 903, 907 (Miss. Ct. App. 2003) ("The purpose of a preliminary hearing is to explore whether there is probable cause to believe that the defendant has committed an offense. The indictment by a grand jury removes the purpose of the

hearing and none need thereafter be conducted.").

1414 REPRESENTATION BY COUNSEL

Art. 3, § 26 Rights of the accused:

In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, ...

The United States Supreme Court has held:

> "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.
> . . .
> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts."

Argersinger v. Hamlin, 407 U.S. 25, 37-40 (1972).

This ruling applies to suspended sentences too:

> "Where the State provides no counsel to an indigent defendant, does the Sixth Amendment permit activation of a suspended sentence upon the defendant's violation of the terms of probation? We conclude that it does not."

Alabama v. Shelton, 535 U.S. 654, 662 (2002).

See also Scott v. Illinois, 440 U.S. 367, 373 (1979) ("[T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense."); United States v. Eckford, 910 F.2d 216, 218 (5th Cir. 1990) ("Of necessity . . . the sixth amendment does not ensure an unlimited right to counsel in all criminal cases. If a criminal defendant were guaranteed counsel in comparatively insignificant criminal prosecutions that did not pose the possibility of imprisonment, the already overburdened criminal justice system would face crippling costs, congestion and confusion."); Porter v. State, 732 So. 2d 899, 904 (Miss. 1999) ("[Under Mississippi law, the right to counsel] attaches 'once the proceedings

against the defendant reach the accusatory stage.' The 'accusatory stage' is defined by Mississippi law to occur when a warrant is issued or, 'by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit.'").

MRCrP 7.1 Right to counsel; waiver:

(a) Right to be Represented by Counsel. A defendant shall be entitled to be represented by counsel in any criminal proceeding. The right to be represented shall include the right to consult in private with an attorney or the attorney's agent, without unnecessary delay, after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

(b) Right to Appointed Counsel. An indigent defendant shall be entitled to have an attorney appointed in any criminal proceeding which may result in punishment by loss of liberty, in any other criminal proceeding in which the court concludes that the interests of justice so require, or as required by law. The determination of the right to appointed counsel, and the appointment of such counsel, is to be made no later than at the indigent defendant's first appearance before a judge.

(c) Waiver of Right to Counsel. When the court learns that a defendant desires to act as his/her own attorney, the court shall conduct an on-the-record examination of the defendant to determine if the defendant knowingly and voluntarily desires to act as his/her own attorney. The court shall inform the defendant that:

1. The defendant has a right to an attorney, and if the defendant cannot afford an attorney, then the court will appoint one free of charge to defend or assist the defendant in his/her defense.

2. The defendant has the right to conduct the defense and may elect to do so and allow whatever role (s)he desires to his/her attorney.

3. The court will not relax or disregard the rules of evidence, procedure or courtroom protocol for the defendant and that the defendant will be bound by and have to conduct himself/herself within the same rules as an attorney, that these rules are not simple and that without legal advice his/her ability to defend himself/herself will be hampered.

4. The right to proceed pro se usually increases the likelihood of a trial outcome unfavorable to the defendant.

5. Other matters as the court deems appropriate.

After informing the defendant and ascertaining that the defendant understands these matters, the court will ascertain whether the defendant still wishes to proceed pro se or if

the defendant desires an attorney to assist him/her in his/her defense. If the defendant desires to proceed pro se, the court should determine whether the defendant has exercised this right knowingly and voluntarily and, if so, make the finding a matter of record. At the time of accepting a defendant's waiver of the right to counsel, the court shall inform the defendant that the waiver may be withdrawn and counsel appointed or retained at any stage of the proceedings. Additionally, the court may appoint an attorney to assist the defendant on procedure and protocol, even if the defendant does not desire an attorney. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

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

(e) Unreasonable Delay in Retaining Counsel. If a non-indigent defendant appears without counsel at any proceeding after having been given reasonable time to retain counsel, the cause may proceed. If an indigent defendant who has refused appointed counsel in order to obtain private counsel appears without counsel at any proceeding after having been given reasonable time to retain counsel, the court shall appoint counsel unless the indigent defendant waives the right under section (c). If the indigent defendant continues to refuse appointed counsel, the cause may proceed.

MRCrP 7.2 Procedure for appointment of counsel for indigent defendants; appearance; withdrawal:

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

(1) Generally. A procedure shall be established in each circuit, county, municipal, and justice court for the appointment of counsel for each indigent defendant entitled thereto.

(2) Appointment of Multiple Attorneys. In all death penalty trial proceedings, the court shall appoint two (2) attorneys pursuant to the standards in Rule 7.4. At the time of the appointment, and subject to court approval, the appointed attorney may recommend co-counsel so long as co-counsel is willing to accept the appointment and meets all of the requirements of Rule 7.4. If the appointed attorney does not recommend co-counsel upon accepting an appointment, the court shall select co-counsel. In non-death penalty cases, the appointment of multiple attorneys is within the discretion of the court.

(b) Entry of Appearance. At or before a first appearance in any court on behalf of a defendant, an attorney, whether privately retained or court-appointed, shall file an entry of appearance or, in lieu thereof, the court shall note the attorney's appearance on the record.

(c) Duty of Continuing Representation. Counsel representing a defendant at any stage following indictment shall continue to represent that defendant in all farther proceedings

in the trial court, including filing a notice of appeal, unless counsel withdraws for good cause as approved by the court.

(d) Withdrawal. When an attorney makes an appearance for any party in a case, that attorney will not be allowed to withdraw as attorney for the party without the permission of the court. The attorney making the request shall give notice to his/her client and to all attorneys in the cause and certify the same to the court in writing. The court shall not permit withdrawal without prior notice to his/her client and all attorneys of record.

MRCrP 7.3 Determination of indigency; appointment of counsel; compensation:

(a) Standard for Indigency. The term "indigent" as used in these Rules means a person who is financially unable to employ counsel.

(b) Affidavit or Sworn Testimony of Substantial Hardship. A defendant desiring to proceed as an indigent may complete an affidavit concerning the defendant's financial resources on a court-approved form. In lieu of an affidavit, or together with an affidavit, the defendant may be examined under oath regarding defendant's financial resources by the judge responsible for determining indigency. Before said questioning, the defendant shall be advised of the penalties for perjury as provided by law.

(c) Reconsideration. Following a determination of indigency or non-indigency, if there has been a material change appointed attorney, or the prosecutor may move for reconsideration.

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

(e) Appointment of Public Defender. In counties or municipalities 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.

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

(g) Appointment of Counsel During Appeal Following Withdrawal. When prior counsel is permitted to withdraw, the trial or appellate court shall appoint new counsel for a defendant legally entitled to such representation on appeal.

(h) Compensation. A private attorney appointed to represent an indigent defendant is entitled to compensation for services rendered as provided by law. Other than compensation for services rendered as provided by law, no appointed counsel may request

or accept any payment or promise of payment for assisting in the representation of a defendant.

(i) Expenses. Appointed counsel shall be entitled to reasonable and necessary expenses incurred in defense of an indigent client, including fees and expenses of expert or professional persons, provided that such expenses are approved in the sound discretion of the court. Extraordinary expenses, including expert expenses, shall be approved in advance by the court.

§ 25-32-9 Appointment of public defender:

(1) When any person shall be arrested and charged with a felony, a misdemeanor or an act of delinquency, then the arresting authority shall afford such person an opportunity to sign an affidavit stating that such person is an indigent and unable to employ counsel. Upon the signing of such affidavit by such person, the public defender shall represent said person unless the right to counsel be waived by such person. Provided further, a statement shall be executed by the alleged indigent, under oath, listing all assets available to the indigent for the payment of attorney's fees, including the ownership of any property, real or personal, and setting out therein the alleged indigent's employment status, number of dependents, income from any source, the ability of his parents or spouse to provide an attorney's fee, and any other information which might prove or disprove a finding of indigency. The affidavit and statement shall be a part of the record in the case and shall be subject to review by the appropriate court. Based on review of the affidavit, statement or other appropriate evidence, if the appropriate court finds that the defendant is not indigent, said court shall terminate the representation of the defendant by the public defender.
When any person shall be arrested and charged with a misdemeanor, the presiding judge or justice, upon determination that the person is indigent as provided in this section, and that representation of the indigent is required, shall appoint the public defender whose duty it shall be to provide such representation. No person determined to be an indigent as provided in this section shall be imprisoned as a result of a misdemeanor conviction unless he was represented by the public defender or waived the right to counsel.
(2) The accused shall have such representation available at every critical stage of the proceedings against him where a substantial right may be affected.
(3) The public defender shall also represent persons in need of mental treatment, as provided under Sections 41-21-61 et seq. The chancery court may tax costs as provided in Sections 41-21-79 and 41-21-85.

§ 99-15-15 Appointing counsel for indigent persons:

When any person shall be charged with a felony, misdemeanor punishable by confinement for ninety (90) days or more, or commission of an act of delinquency, the court or the judge in vacation, being satisfied that such person is an indigent person and is unable to employ counsel, may, in the discretion of the court, appoint counsel to defend him.

Such appointed counsel shall have free access to the accused who shall have process to compel the attendance of witnesses in his favor.
The accused shall have such representation available at every critical stage of the proceeding against him where a substantial right may be affected.

See also Atterberry v. State, 667 So. 2d 622, 630 (Miss. 1995) ("Though the right to counsel is absolute, the right to counsel of choice is not absolute."); Ormond v. State, 599 So. 2d 951, 956 (Miss. 1992) ("Denial of the right to counsel 'will result in reversal of a subsequent conviction only where it is shown that the accused experienced some untoward consequence flowing directly from denial of counsel.'"); Evans v. State, 93 So. 3d 62, 66 (Miss. Ct. App. 2012) ("[Evans] neither requested a court-appointed attorney nor properly qualified himself as indigent . . . ."); Clay v. State, 829 So. 2d 676, 681 (Miss. Ct. App. 2002) ("[Clay] has failed to show he was taken advantaged, forced to confess, or prejudiced in some other way due to his not having had an attorney at the time of his initial appearance.").

§ 99-15-17 Compensation:

The compensation for counsel for indigents appointed as provided in section 99-15-15, shall be approved and allowed by the appropriate judge and in any one (1) case may not exceed one thousand dollars ($1000.00) for representation in circuit court whether on appeal or originating in said court. Provided, however, if said case is not appealed to or does not originate in a court of record, the maximum compensation shall not exceed two hundred dollars ($200.00) for any one (1) case, the amount of such compensation to be approved by a judge of the chancery court, county court or circuit court in the county where the case arises. Provided, however, in a capital case two (2) attorneys may be appointed, and the compensation may not exceed two thousand dollars ($2,000.00) per case. If the case is appealed to the state supreme court by counsel appointed by the judge, the allowable fee for services on appeal shall not exceed one thousand dollars ($1000.00) per case. In addition, the judge shall allow reimbursement of actual expenses. The attorney or attorneys so appointed shall itemize the time spent in defending said indigents together with an itemized statement of expenses of such defense, and shall present same to the appropriate judge. The fees and expenses as allowed by the appropriate judge shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced.

See also Gibson v. State, 656 So. 2d 312, 315 (Miss. 1995) ("[Under Section 99-15-17] the trial judge is authorized to award an order of payment up to $1000, and is not confined to the $200 statutory cap that should be applied in nonrecord courts. [The] trial judge was not restricted by the $200 limitation simply because [such] originated in justice court, which we find to be a court of record.").

MRCrP 1.5 Information on each pleading and motion:

(a) Pleadings filed by counsel. All pleadings, motions, or other applications to the court shall bear the name, address, bar association number, email address, and office phone number of the attorney who will try the case and, if different from the attorney who will try the case, the name, address, bar association number, email address, and office phone number of the attorney who will be prepared to argue the pleading, motion or other application.

(b) Pleadings filed pro se. All pleadings, motions, or other applications to the court shall bear the name, address, email address, and phone number of the party proceeding pro se.

MRCrP 1.6 Size of paper:

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

MRCrP 1.7 Service and filing of pleadings and certificate of service:

(a) Service: When Required. Unless otherwise ordered by the court, any person filing a pleading, motion, or application to the court, except the initial pleading or an indictment, shall:

> (1) serve a correct copy of that pleading, motion, or application to the court on all attorneys of record in the case, and any unrepresented defendant, pursuant to section (b) of this rule; and
>
> (2) file with the court an original certificate of service certifying that a correct copy of the pleading, motion, or application to the court has been served on all attorneys of record in the case, and on any unrepresented defendant, pursuant to section (b) of this rule; stating the manner of service; and identifying on whom it was served.

(b) Service How Made

(1) Generally. Whenever under these Rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by:

(A) personally handing a copy to the attorney/party;

(B) transmitting it to the attorney/party by electronic means; or

(C) mailing it to the attorney/party at the last known address.

Service by electronic means is complete when the electronic equipment being used by the attorney or party being served acknowledges receipt of the material. If the equipment used by the attorney or party being served does not automatically acknowledge the transmission, service is not complete until the sending party obtains an acknowledgment from the recipient. Service by mail is complete upon mailing.

(2) Electronic Court System Service. Where a court has, by local rule, adopted the Mississippi Electronic Court System, service which is required or permitted under these Rules shall be made in conformity with the Mississippi Electronic Court System procedures.

(c) Filing With the Court Defined.

(1) Generally. The filing of pleadings and other papers with the court as required by these Rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.

(2) Electronic Filing. A court may, by local rule, allow pleadings and other papers to be filed, signed, or verified by electronic means in conformity with the Mississippi Electronic Court System procedures. Pleadings and other papers filed electronically in compliance with the procedures are written papers for purposes of these Rules.

MRCrP 34.1 Form, content, rights of reply:

(a) In General. A party applying to the court for an order must do so by motion.

(b) Form and Content of a Motion. A motion--except when made during a trial or hearing--must be in writing, unless the court permits the party to make the motion by other means. A motion shall contain a concise statement of the precise relief requested and shall state the specific factual grounds and specific legal authority in support thereof. A motion may be supported by affidavit. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion or if the matter is presented in an agreed order.

(c) Rights of Reply. Unless otherwise ordered by the court, each party may file and serve a response within ten (10) days after service of the motion, and the moving party may file and serve a reply, which shall be directed only to matters raised in a response, within five (5) days after service of the response. Responses and replies shall be in the form required

for motions.

MRCrP 34.2 Hearing; oral argument:

Upon request of any party, or on its own initiative, the court may set any motion for hearing. The court may limit or deny oral argument on any motion. It is the duty of the movant, when a motion or other pleading is filed (including a motion for a new trial), to pursue the motion to hearing and decision. Failure to pursue a pretrial motion to hearing and decision before trial is deemed an abandonment of that motion; however, the motion may be heard after the commencement of trial.

MRCrP 34.3 Waiver of formal requirements:

Upon request of any party, or on its own initiative, the court may waive a requirement specified in this Rule or overlook a formal defect in a motion or request.

MRCrP 34.4 Service and filing:

Unless otherwise specified in these Rules, the manner and sufficiency of service and filing of motions, requests, petitions, applications, and all other pleadings and documents shall be governed by Rule 1.7.

MRCrP 34.5 Entry of order and duty of clerk:

Immediately upon entry of an order or judgment of the court, the clerk of court shall make a diligent effort to ensure that all attorneys of record have received notice of the entry of the order.

1416 PLEAS

MRCrP 15.2 Proceedings at arraignment:

(a) Pleas. A defendant may plead not guilty, guilty, or, with leave of the court in misdemeanor cases, nolo contendere.

(b) Failure or Refusal to Plead. If the defendant, on arraignment, refuses or neglects to plead, stands mute, or pleads evasively, the court will enter a plea of not guilty and will set the case for trial.

(c) Absence of Defendant. If the defendant is released on bail or recognizance, and does not appear to be arraigned, or as required by the bond or recognizance, the court may, in addition to forfeiture of bail, direct the clerk to issue a bench warrant to bring the defendant before the court.

MRCrP 15.3 Entry of plea of guilty or nolo contendere:

(a) Defendant's Presence at Plea.

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

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

(b) Entry of Plea. A person charged with a criminal offense in county or circuit court, who is represented by counsel, may appear before the court at any time the judge may fix, be arraigned, enter a plea of guilty to the offense charged or, with leave of the court in misdemeanor cases, nolo contendere, and be sentenced at that time or some future time set by the court,

(c) Voluntariness. Before the trial court may accept a plea of guilty, the court must determine that the plea is voluntarily and intelligently made and that there is a factual basis for the plea. A plea is not voluntary if induced by fear, violence, deception, or improper inducements. A showing that the plea of guilty was voluntarily and intelligently made must appear in the record.

(d) Advice to the Defendant. When the defendant is arraigned and wishes to plead guilty to a felony or a misdemeanor with the possibility of incarceration, the defendant may be placed under oath and it is the duty of the trial court to address the defendant personally in open court to inquire and determine:

(1) That the accused is competent to understand the nature of the charge;

(2) That the accused understands the nature and consequences of the plea, and the maximum and minimum penalties provided by law;

(3) That the accused understands that, by pleading guilty, the accused waives the constitutional rights of trial by jury, the right to confront and cross-examine adverse witnesses, and the right against self-incrimination; as well as that, if the accused is not represented by an attorney, that the accused is aware of the right to an attorney at every stage of the proceeding and that one will be appointed to represent the accused, if indigent; and

(4) That the accused understands that, if the accused is not a citizen of the United States, the plea may have immigration consequences. The court shall specify that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

MRCrP 15.4 Plea bargaining:

(a) Entering into Plea Agreements.

(1) The prosecuting attorney is encouraged to discuss and agree on pleas which may be entered by the defendant. Any discussions or agreements must be conducted with defendant's attorney or, if defendant is unrepresented, the discussion and agreement may be conducted with the defendant.

(2) The prosecuting attorney and the defendant's attorney, or the defendant acting pro se, may reach an agreement that upon entry of a plea of guilty or, with leave of the court in misdemeanor cases, nolo contendere, to the offense charged or to a lesser or related offense, the prosecuting attorney may do any of the following:

(A) Move for a dismissal of other charges;

(B) Make a recommendation to the trial court for a particular sentence, with the understanding that such recommendation or request will not be binding upon the court; or

(C) Make a recommendation to the trial court for a particular sentence, which the court may accept or reject. If the court accepts the plea agreement, it must inform the defendant the agreed disposition will be included in the judgment. If the court rejects the recommendation, the court must do the following on the record:

(i) inform the parties that the court rejects the plea agreement;

(ii) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(iii) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(3) Defense attorneys shall not conclude any plea bargaining on behalf of the defendant without the defendant's full and complete consent, being certain that the decision to plead is made by defendant. Defense attorneys must advise the defendant of all pertinent matters bearing on the choice of plea, including likely results or alternatives.

(b) Disclosure and Consideration of Plea Agreement. The trial judge shall not participate in any plea discussion. The court may designate a cut-off date for plea discussions and may refuse to consider the recommendation after that date. After a recommended disposition on the plea has been reached, it may be made known to the court, along with the reasons for the recommendation, prior to the acceptance of the plea.

The court shall require disclosure of the recommendation in open court, with the terms of the recommendation to be placed in the record.

(c) Withdrawing a Plea.

(1) It is within the discretion of the court to permit or deny a motion for the withdrawal of a guilty plea, except as provided in (a)(2).

(2) In order to be sufficient, a motion to withdraw a guilty plea must show good cause.

(d) Inadmissibility of Withdrawn Guilty Plea. The fact that the defendant may have entered a plea of guilty to the offense charged may not be used against the defendant at trial if the plea has been withdrawn.

See also Nelson v. State, 626 So. 2d 121, 126 (Miss. 1993) ("We note however, that the guilty plea colloquy left much to be desired. It is not enough to ask an accused whether counsel has explained his constitutional rights. Nor is a standardized petition to enter a plea sufficient standing alone. The court must go further and determine in a face-to-face exchange in open court that the accused knows and understands the rights to which he is entitled."); Turner v. State, 262 So. 3d 547, 551 (Miss. Ct. App. 2018) ("The record shows Turner was advised of the nature of the charges against him and the consequences of a guilty plea. Turner was further advised that by pleading guilty, he was waiving certain constitutional rights. Importantly, Turner stated his guilty plea was not the result of any force, threats, coercion, or intimidation. Instead, Turner stated he was pleading guilty because he committed both crimes. We find Turner's guilty plea was voluntarily entered."); Smith v. State, 845 So. 2d 703, 705 (Miss. Ct. App. 2003) ("The judge thoroughly questioned Smith to insure that he made an informed decision.").

Accepting a guilty plea:

The decision to accept a guilty plea rests within the sound discretion of the court. *See* Santobello v. New York, 404 U.S. 257, 262 (1971) ("There is . . . no absolute right to have a guilty plea accepted. A court may reject a plea in exercise of sound judicial discretion."); Beard v. State, 392 So. 2d 1143, 1144 (Miss. 1981) ("The trial court committed no error in declining to accept a plea of guilty from a defendant who adamantly maintained that he was innocent."); Epting v. State, 720 So. 2d 487, 488 (Miss. Ct. App. 1998) ("The trial judge in the present case concluded that Epting's response regarding his participation in the crime was insufficient to accept as an admission of guilt, and in the final analysis, such decision rests within the sound discretion of the trial judge.").

Nolo contendere plea:

A nolo contendere plea, if accepted by the court, is not admissible evidence for any subsequent criminal proceeding or civil action. However, it still stands as a conviction and may be used for purposes of sentence enhancement. *See* Bailey v. State, 728 So. 2d 1070, 1070 (Miss. 1997) ("Prior DUI convictions based on the nolo contendere pleas were valid and can be used for purposes of enhancing the sentence under Mississippi's implied consent law.").

1417 DISCLOSURE AND DISCOVERY

MRCrP 17.1 Scope:

Rules 17.2 and 17.3 apply in felony cases and in trials of misdemeanor cases in circuit and county court. Rule 17.10 applies in municipal and justice court. The balance of Rule 17 applies in all courts.

MRCrP 17.4 Notice of defenses:

(a) Alibi Defense.

(1) In General. Upon the written demand of the prosecuting attorney stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten (10) days, or at such other time as the court may direct, upon the prosecuting attorney, a written notice of the intention to offer a defense of alibi, which notice shall state the specific place(s) at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish such alibi.

Within ten (10) days thereafter, but in no event less than ten (10) days before the trial, unless the court otherwise directs, the prosecuting attorney shall serve upon the defendant or the defendant's attorney a written notice stating the names and addresses of the witnesses upon whom the State intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

If, prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information previously famished, the party shall promptly notify the other party or the other party's attorney of the name and address of such additional witness.

(2) Effect of Failure to Comply. Upon the failure of either party to comply with subsection (a)(1), the court may use such sanctions as it deems proper, including:

(A) Granting a continuance;
(B) Limiting further discovery of the party failing to comply;
(C) Finding the attorney failing to comply in contempt; or
(D) Excluding the testimony of the undisclosed witness.

(3) Additional Provisions. Subsections (a)(1) and (a)(2) do not limit the defendant's right to testify in the defendant's own behalf.

(b) Insanity Defense.

(1) In General. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, the defendant shall, within the time provided for filing pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court a written notice of the intention to offer a defense of insanity. Within ten (10) days thereafter, but in no event less than ten (10) days before the trial, unless the court otherwise directs, the defendant shall serve upon the prosecuting attorney the names and addresses of the witnesses upon whom the defendant intends to rely to establish the defense of insanity.

If a defendant intends to introduce expert testimony relating to a mental illness, defect, or other condition bearing upon the issue of whether the defendant had the mental state required for the offense charged, the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, serve upon the prosecuting attorney and the clerk of the court notice of such intention, with the names and addresses of such expert witnesses upon whom the defendant intends to rely. The prosecuting attorney shall serve notice on the defendant promptly, but in no event less than ten (10) days prior to trial, stating the names and addresses of any witnesses upon whom the State intends to rely relating to the issue of the defendant's mental condition at the time of the alleged offense or the defendant's mental state required for the offense charged.

If, prior to or during trial, either party learns of an additional witness whose identity should have been included in the notice under this rule, the party shall promptly notify the other party or the other party's attorney of the name and address of such additional witness.

(2) Effect of Failure to Comply. If there is a failure to comply with the requirements of subsection (b)(1), the court may use such sanctions as it deems eluding:

(A) Granting a continuance and/or assessing costs against the appropriate attorney or party;
(B) Limiting further discovery of the party failing to comply;
(C) Finding the attorney failing to comply in contempt; or
(D) Excluding the testimony of appropriate witnesses.

(c) Exceptions. For good cause shown, the court may grant an exception to the requirements of sections (a) and (b).

MRCrP 17.5 Depositions:

(a) When Taken.

(1) In General. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. If the court orders the deposition to be taken, it may also require the deponent to produce at the deposition any designated material that is not privileged, including any book, paper, document, record, recording, or data.

(2) Detained Material Witness. A witness who is detained under Mississippi Code Section 99-15-7 may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) Notice.

(1) In General. A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) To the Custodial Officer. A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) Defendant's Presence.

(1) Defendant in Custody. The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

> (A) waives in writing the right to be present; or
>
> (B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) Defendant Not in Custody. A defendant who is not in custody has the right, upon request, to be present at the deposition, subject to any conditions imposed by the court. If the State tenders the defendant's expenses as provided in section (d), but the defendant still fails to appear, the defendant--absent good cause--waives both the right to appear and any objection to the taking and use of the deposition based on that right.

(d) Expenses. If the deposition was requested by the State, the court may--or, is unable to bear the deposition expenses, must--order the State to pay;

(1) any reasonable travel and subsistence expenses of the defendant and the defendant's attorney to attend the deposition; and

(2) the costs of the deposition transcript.

(e) Manner of Taking. Unless these Rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

(1) A defendant may not be deposed without that defendant's consent.

(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The State must provide to the defendant or the defendant's attorney, for use at the deposition, any statement of the deponent in the State's possession to which the defendant would be entitled at trial.

(4) The trial judge may preside over the taking of the deposition.

(f) Use as Evidence. Depositions may be used in the manner provided by Mississippi Rule of Civil Procedure 32.

(g) Objections. A party objecting to deposition testimony or evidence must state the grounds for the objection during the deposition.

(h) Depositions by Agreement Permitted. The parties may, by agreement, take and use a deposition with the court's consent.

MRCrP 17.6 General standards:

In all disclosures under this Rule the following shall apply:

(a) Materials Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of legal staff.

(2) Informants. Disclosure of an informant's identity shall not be required unless the confidential informant is to be produced at a hearing or trial, a failure to disclose his/her identity will infringe the constitutional rights of the accused, and/or the informant was, or

depicts himself/herself as, an eyewitness to the event(s) constituting the charge against the defendant.

(b) Use of Discovery Material. The attorney receiving discovery material is responsible for those materials and shall not distribute them to third parties.

(c) Advice from Counsel Regarding Relevant Information. Except as otherwise provided by law, or in cases where the witness would be forced to reveal self-incriminating evidence, neither an attorney for the parties nor other prosecution or defense personnel shall:

(1) advise persons having relevant information or material, except the accused, to retrain from discussing the case with, or snowing any relevant material to, the opposing attorney(s), or

(2) otherwise impede the opposing attorney(s') investigation of the case.
(d) Filing Discovery Material. Discovery material shall not be filed with the clerk unless authorized by the court.

MRCrP 17.7 Excision and protective orders:

(a) Discretion of the Court to Deny, Restrict, or Defer Disclosure. Upon a showing of cause, the court may order that specified disclosures be denied, restricted, or deferred, or make such other order as is appropriate. For instance, the court may limit or deny disclosure if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure. However, all material and information to which a party is entitled must be disclosed in time to permit the party's attorney to make beneficial use thereof.

(b) Discretion of the Court to Authorize Excision. When some parts of certain materials are discoverable under these Rules and other parts are not discoverable, as much of the material should be disclosed as is consistent with the Rules.

(c) Protective and Excision Order Proceedings. In the event there are matters arguably within the scope of a party's discovery request or an order for discovery, and the opposing party is of the opinion that the requesting party is not entitled to discovery of same, the opposing party shall, as soon as is reasonably practicable, file with the clerk of the court a written statement describing the nature of the information or the materials at issue as fully as is reasonably possible without disclosure of same and stating the grounds for objection to disclosure. Subject to the limitations otherwise provided in these Rules, determinations such as whether the matters requested in discovery are relevant to the case, exculpatory, possible instruments of impeachment, and the like may be made only by the party requesting or to receive the discovery.

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a hearing in camera, the entire record of such hearing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(d) Preservation of Record. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

MRCrP 17.8 Continuing duty to disclose:

Both the State and the defendant have a duty timely to supplement discovery, If, subsequent to compliance with these Rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall promptly notify the other party or the other party's attorney of the existence of such additional material or information and, if the additional material or information is discovered during trial, the court shall also be notified.

MRCrP 17.9 Failure to disclose; sanctions:

(a) Failure to Make Disclosure--Pre-Trial. If, at any time prior to trial, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, or enter such other order as it deems just under the circumstances.

(b) Failure to Make Disclosure--Trial. If, during the course of trial, the prosecution attempts to introduce evidence which has not been timely disclosed to the defense as required by these Rules and the defense objects to the introduction for that reason, the court shall:

(1) Grant the defense a reasonable opportunity to interview the newly discovered witness and/or examine the newly produced documents, photographs or other evidence.

(2) If, after such opportunity, the defense claims unfair surprise or undue prejudice and seeks a continuance or mistrial, the court shall, In the interest of justice and absent unusual circumstances, exclude the evidence, grant a continuance for a period of time reasonably necessary for the defense to meet the non-disclosed evidence, or grant a mistrial.

(3) The court shall not be required to grant either a continuance or mistrial for such a discovery violation if the prosecution withdraws its efforts to introduce such evidence. The court shall follow the same procedure for violation of

discovery by the defense.

(c) Sanctions. Willful violation by an attorney of an applicable discovery rule, or an order issued pursuant thereto, may subject the attorney to appropriate sanctions by the court.

MRCrP 17.10 Discovery in municipal and justice courts:

(a) Discovery by the Defense. Upon written request made prior to trial, the prosecuting attorney shall provide to the defense the following:

(1) the names of all witnesses expected to testify for the prosecution;

(2) a copy of any written statement of the defendant;

(3) a copy of the criminal record of the defendant, if proposed for use as impeachment;

(4) a copy of laboratory reports or reports of any tests made;

(5) any physical evidence, photographs, and/or electronic data to be offered in evidence;

(6) a copy of any exculpatory material concerning the defendant; and

(7) any affidavit used to obtain a search warrant in the case.

The prosecutor has a continuing duty to supplement any disclosure previously furnished. (b) Reciprocal Discovery. The prosecuting attorney is entitled to reciprocal discovery of items (a)(1)--(7).

§ 63-11-15 Access to information on DUI chemical test:

Upon the written request of the person tested, or his attorney, full information concerning the test taken at the direction of the law enforcement officer shall be made available to him or to his attorney.

See also Administrative Order (August 27, 2008) (Statement of Policy Regarding Openness and Availability of Public Records), which may be accessed on the State of Mississippi Judiciary website at www.mssc.state.ms.us/ and clicking "Public Records Policy."

A prosecutor may not suppress evidence favorable to the accused:

[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

punishment, irrespective of the good faith or bad faith of the prosecution.

Brady v. Maryland, 373 U.S. 83, 87 (1963).

In determining whether a *Brady* violation has occurred the defendant must prove:

1) that the State possessed evidence favorable to the defendant (including impeachment evidence);
2) that the defendant does not possess the evidence nor could obtain it with any reasonable diligence;
3) that the prosecution suppressed the favorable evidence; and
4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

See Carr v. State, 873 So. 2d 991, 999 (Miss. 2004); King v. State, 656 So. 2d 1168, 1174 (Miss. 1995).

1418 INTERPRETERS

See CHAPTER 29 "INTERPRETERS."

1419 PRO SE DEFENDANTS

See CHAPTER 30 "PRO SE DEFENDANTS."

1420 SUBPOENAS

MRCrP 33 Subpoenas:

(a) Generally. Except as set forth below, the procedures for subpoenas shall conform to Rule 45 of the Mississippi Rules of Civil Procedure. This Rule shall not apply to proceedings before a grand jury.

(b) Subpoenas Duces Tecum for Production at Trial or Hearing. A subpoena may, without a motion or hearing, require the production of books, papers, documents or other objects at the date, time and place at which the trial, hearing or proceeding at which these items are to be offered in evidence is scheduled to take place.

(c) Subpoenas Duces Tecum for Production other than at Trial or Hearing.

(1) Generally. No subpoena may require the production of books, papers, documents or other objects at a date and time or place other than the date, time and place at which the trial, hearing or proceeding at which these items are to be offered in evidence is scheduled to take place, unless the court has entered an order pursuant to this Rule authorizing the issuance of such subpoena.

(2) Motions; Service; Opposition. A hearing on a motion for the issuance of a subpoena duces tecum shall be set at the time the motion is filed and served. The hearing shall be set no earlier than ten (10) days after filing and service of the motion. Except for good cause shown, all motions for subpoenas duces tecum shall be served on:

(A) the custodian of the books, papers, documents or other objects which would be subject to the subpoena;

(B) all parties;

(C) all persons whose books, papers, documents or other objects would be subject to the subpoena; and

(D) all persons who may have a claim that privileged material would be subject to the subpoena.

Any party to the action or other interested person may file an opposition or response.

(3) Supporting Affidavit or Declaration. Motions seeking subpoenas duces tecum shall be supported by an affidavit or declaration stating facts which establish:

(A) the documents or objects sought are evidentiary and relevant;

(B) the documents or objects sought are not otherwise reasonably procurable in advance of the trial, hearing or proceeding by exercise of due diligence;

(C) the moving party cannot properly prepare for trial without such production and inspection in advance of trial and the failure to obtain such inspection may tend unreasonably to delay the trial; and

(D) the application is made in good faith and is not intended for the purpose of general discovery.

(4) Immediate Lodging with Court. Any subpoena duces tecum under section (c) shall be returnable to, and the items sought thereunder produced before, the court. In the event that materials subject to a subpoena are received by a party, an attorney, or an attorney's agent or investigator directly from the subpoenaed person, any person receiving such

materials shall immediately notify the court and shall immediately lodge such materials with the court. The materials shall not be opened, reviewed or copied by a recipient without a prior court order.

(d) Sanctions. Violation of this Rule may provide a basis for sanctions.

Subpoena duces tecum:

A subpoena duces tecum requires a witness produce certain documents or other materials relevant to the case, and is obtained by filing a petition which describes the requested materials with 'certainty and particularity' and states their relevance. The judge must decide whether the request is reasonable and proper. Factors considered are the situation, volume, purpose, and materiality of the request. *See* Griffin v. State, 494 So. 2d 376, 380 (Miss. 1986); Williams v. State, 125 So. 2d 535, 536 (Miss. 1960).

§ 99-43-45 Protections as to subpoenas:

The victim shall respond to a subpoena to testify in a criminal proceeding or participate in the reasonable preparation of criminal proceeding without loss of employment, intimidation or threat or fear of the loss of employment.

1421 CONTINUANCES

Article 3 § 26 Reasonable opportunity to prepare for trial:

In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed;

See also Barnes v. State, 249 So. 2d 383, 385 (Miss. 1971) ("A judicial trial becomes a farce, a mere burlesque, and in serious cases a most gruesome one at that, when a person is hurried into a trial upon an indictment charging him with a high crime, without permitting him the privilege of examining the charge and time for preparing his defense.").

MRCrP 9 Trial setting:

(a) Trial Docket. Within sixty (60) days after arraignment (or waiver thereof), the court shall enter an order setting a date for trial. Trial shall be set for no later than two-hundred-and-seventy (270) days after arraignment (or waiver thereof). A docket of cases set for trial shall be maintained by the clerk or the court administrator. Cases set by

the judge for trial must be ready at the appointed time.

(b) Criminal Docket to Have Priority. Insofar as is practicable, trials of criminal cases shall have priority over trials of civil cases.

(c) Continuance of Trial Date. For good cause shown, a continuance may be granted by written order of the court on its own motion, or on the motion of a party stating, with specificity, the reasons for the continuance.

§ 99-15-29 To secure an absent witness or documents:

On all applications for a continuance the party shall set forth in his affidavit the facts which he expects to prove by his absent witness or documents that the court may judge of the materiality of such facts, the name and residence of the absent witness, that he has used due diligence to procure the absent documents, or presence of the absent witness, as the case may be, stating in what such diligence consists, and that the continuance is not sought for delay only, but that justice may be done. The court may grant or deny a continuance, in its discretion, and may of its own motion cross-examine the party making the affidavit. The attorneys for the other side may also cross-examine and may introduce evidence by affidavit or otherwise for the purpose of showing to the court that a continuance should be denied. No application for a continuance shall be considered in the absence of the party making the affidavit, unless his absence be accounted for to the satisfaction of the court. A denial of the continuance shall not be ground for reversal unless the supreme court shall be satisfied that injustice resulted therefrom.

See also Culberson v. State, 379 So. 2d 499, 505 (Miss. 1979) ("Appellant failed to satisfy the requirements of the statute in that his motion was not supported by affidavit and did not state with particularity the material testimony expected from the absent witnesses."); Triplett v. State, 666 So. 2d 1356, 1361 (Miss. 1995) ("In order to be entitled to a continuance because of an absent witness, counsel must demonstrate to the court that 'he has used due diligence' to secure his presence. . . . Embraced therein is the requirement that counsel has made a timely effort to place the absent witness under a subpoena."); Robinson v. State, 228 So. 2d 373, 375 (Miss. 1969) ("The motion for continuance did not identify the missing witnesses, the steps taken to secure their attendance, any due diligence in attempting to procure their presence, or the nature of their testimony."); McClendon v. State, 335 So. 2d 887, 888 (Miss. 1976) ("Appellant's ore tenus motion does not conform to the statute in that it . . . fails to state that the continuance was not sought for delay only, but that justice may be done."); Ware v. State, 98 So. 229, 229 (Miss. 1923) ("It does not appear from the application with sufficient clearness that [the absent witness] would testify contradicting the state's witnesses."); Donald v. State, 41 So. 4, 5 (Miss. 1906) ("The affidavit for continuance is fatally defective in not giving the residence of the witness."); Johnson v. State, 872 So. 2d 65, 70 (Miss. Ct. App. 2004) ("What the appellants were attempting to do was go on the proverbial fishing expedition--unnamed and unknown individuals somewhere may have

pertinent information. [T]he motion for a continuance was properly denied.").

Additional time to prepare for trial:

A request for continuance for additional time to prepare for trial is subject to proof. Barnes v. State, 249 So. 2d 383, 384 (Miss. 1971). That is,

> [I]t is incumbent upon a movant requesting a continuance to set forth with specificity the reasons why additional time is necessary to prepare for trial.

Farrish v. State, 840 So. 2d 820, 822 (Miss. Ct. App. 2003).

Significant factors to consider include the complexity of the case and the seriousness of the offense. *See* Brown v. State, 252 So. 2d 885, 887 (Miss. 1971).

See also Shaw v. State, 378 So. 2d 631, 634 (Miss. 1979) ("[T]he record is devoid of any evidence or proof as to precisely how additional time by way of continuance might have been used to his advantage. There was merely the naked statement of counsel that he had other cases set for the term . . . ."); Martin v. State, 312 So. 2d 5, 6 (Miss. 1975) ("[W]e recognize that preparation for trial is a tedious and time-consuming process. . . . [T]his is one of those rare instances in which the trial court abused its discretion in overruling appellant's motion for a continuance.").

To retain new counsel:

There are two competing considerations when a continuance is requested to retain new counsel:

> The right of a defendant to obtain a continuance for the purpose of seeking counsel of his own choosing must be considered in light of the court's right to manage its docket.

Fields v. State, 879 So. 2d 481, 484 (Miss. Ct. App. 2004).

Thus, the voluntary substitution of counsel (either prior to or during the course of trial) is not by itself grounds for continuance. Speagle v. State, 390 So. 2d 990, 992 (Miss. 1980); *see also* Byrd v. State, 522 So. 2d 756, 759 (Miss. 1988) ("[W]here a defendant retains new counsel at the eleventh hour, he is not entitled to a continuance merely because new counsel was unprepared."); Harrison v. State, 520 So. 2d 1352, 1354 (Miss. 1987) ("Defendant was not entitled to a continuance so that he could work and earn money with which to hire an attorney.").

1422 STATE'S MOTION FOR DISMISSAL OR REDUCTION OF CHARGES

§ 99-15-51 Compromise of petty misdemeanors:

In prosecutions for petty misdemeanors, if the party injured appear before the court where the same shall be pending and acknowledge to have received satisfaction, on motion of the prosecuting attorney the court, if it shall adjudge that the ends of justice will be conserved thereby, may discharge the defendant and dismiss the proceedings and may require the payment of court costs.

§ 63-11-39 Reduction of charges under Implied Consent Law prohibited:

The court having jurisdiction or the prosecutor shall not reduce any charge under this chapter to a lesser charge.

1423 TRIAL PROCEDURES

MRCrP 16.1 Motion deadline; hearings and rulings on motions:

(a) Motion Deadline. At arraignment or thereafter, the court may set a reasonable deadline for the filing and hearing of all pretrial motions. Pretrial motions shall include, but are not limited to, motions: to dismiss, to suppress evidence, to request discovery, for continuance, for severance, for appointment of experts, for mental examination, or for any other matters which may delay the trial.

(b) Ruling on a Motion Generally. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

MRCrP 16.2 Effects of rulings:

(a) Effect of Granting Motion Based on Defective Charge. If the court grants a motion to dismiss based on a defect in instituting the prosecution or in the charge, the court may:

(1) order the defendant released; or

(2) upon motion of the prosecuting attorney and upon a finding by the court of probable cause, order the defendant's continued detention; or

(3) if the defendant is free on bail or recognizance, order the continuation of such bail or recognizance for a reasonable time to afford the prosecutor an opportunity to file a new charging affidavit.

(b) Motion to Suppress. If a motion to suppress is granted, any suppressed property that was seized shall be restored to its rightful owner, unless otherwise subject to lawful detention. However, no firearm shall be returned to a convicted felon.

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

MRCrP 10.1 Right of defendant to be present; waiver:

(a) Right to Be Present. The defendant has the right to be present at the arraignment and at every stage of the proceedings. A corporate criminal defendant may appear by counsel for all purposes at any proceeding.

(b) Waiver of the Right to Be Present.

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

> (A) with the consent of the court, by a knowing, intelligent, and explicit waiver in open court or by a written waiver executed by the defendant and by the defendant's attorney of record, filed in the case; or
>
> (B) by the defendant's absence from any proceeding, if the court finds that such absence was voluntary and constitutes a knowing and intelligent waiver of the right to be present.

(2) A defendant may not waive the right to be present:

> (A) during the imposition of his/her sentence in a felony case; or
>
> (B) if the defendant is not represented by counsel, except in minor misdemeanor cases where the potential punishment is a fine only and carries no potential for the loss of liberty.
>
> (c) Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the return of the verdict.

(d) Unexcused Defendant. If a defendant is not present at the trial, or any stage of the proceedings, and the defendant's presence has not been waived or the absence has not been excused, the court, by order, may direct law enforcement officers forthwith to bring the defendant before the court.

MRCrP 12.1 Mental competency; definition:

(a) Mental Competency. There is a presumption of mental competency. In order to be deemed mentally competent, a defendant must have the ability to perceive and understand the nature of the proceedings, to communicate rationally with the defendant's attorney about the case, to recall relevant facts, and to testify in the defendant's own defense, if appropriate. The presence of a mental illness, defect, or disability alone is not grounds for finding a defendant incompetent to stand trial. If as a result of mental illness, defect, or disability, a defendant lacks mental competency, then the defendant shall not be tried, convicted, or sentenced for a criminal offense.

(b) Mental Illness, Defect, or Disability. Mental illness, defect, or disability means a psychiatric or neurological disorder that is evidenced by behavioral or emotional symptoms, including congenital mental conditions, conditions resulting from injury or disease, or developmental disabilities.

MRCrP 21 Motions for directed verdict:

(a) After the Prosecution's Case-In-Chief. After the prosecution rests, the court, on its own motion or upon motion by the defendant, may consider whether the evidence is sufficient to sustain a conviction. A motion for directed verdict must specify the manner in which the evidence is deficient. When, with respect to one (1) or more elements of the offense charged, the evidence is insufficient to support a conviction, the court shall order a directed verdict of "not guilty." The trial shall proceed with respect to the remaining count(s), if any.

(b) At the Close of the Evidence. If the motion for directed verdict is denied, the defendant may rest or proceed to introduce evidence on his/her behalf. If the defendant chooses to go forward with his/her own case, the defendant may renew the motion for directed verdict after the close of all the evidence.

(c) Waiver. The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner prescribed will constitute a waiver of any argument on appeal pertaining to the sufficiency of the evidence to support the verdict.

(d) Denial by Operation of Law. If, for any reason, a motion or a renewed motion for directed verdict is not ruled upon by the entry of judgment, it is deemed denied for purposes of appellate review.

Burden of proof:

In criminal cases, the State must prove all the elements of the crime and the defendant's connection to them beyond a reasonable doubt. *See* McVeay v. State, 355 So. 2d 1389, 1391 (Miss. 1978).

MRE 615 Excluding of witnesses:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

The Comment to Rule 615 of the Mississippi Rules of Evidence provides in part: "This rule does not discuss sanctions for violation of the sequestration order. Under existing Mississippi law the court has the discretion to exclude the offending witness from testifying. See Johnson v. State, 346 So. 2d 927 (Miss. 1977). The trial judge should not permit a witness who has violated the rule to testify unless he has first determined that the adversary would not be prejudiced by the violation of the rule. Other available remedies might be to strike the testimony of a witness who violated the rule, cite the witness for contempt, or allow a "full-bore" cross-examination. See Douglas v. State, 525 So. 2d 1312 (Miss. 1988)."

See also Brown v. State, 682 So. 2d 340, 347 (Miss. 1996) ("Often called 'the rule,' the witness exclusion rule serves to discourage a witness's tailoring his testimony to what he has heard from the stand and the rule serves to facilitate exposing false testimony.").

MRCrP 19.1 Proceedings at trial:

(a) Order of Proceedings. Following the impanelment of the jury, the trial shall proceed in the following order unless otherwise directed by the court:

(1) A summary of the charge and the plea of the defendant may be provided by the court. In summarizing the charge, all references to prior conviction(s) alleged as sentencing enhancers shall be omitted.

(2) The prosecuting attorney may make an opening statement to the jury, confining the statement to the facts the prosecutor expects to prove.

(3) The defendant (personally or by counsel) may make an opening statement to the jury at the conclusion of the State's opening statement or prior to the defendant's case-in-chief. The statement shall be confined to a statement of the defense and the facts, if any, the defendant expects to prove in support thereof.

(4) The prosecuting attorney shall offer the evidence in support of the charge.

(5) The defendant (personally or by counsel) may then make an opening statement, if it was deferred, and offer evidence in defense.

(6) The prosecuting attorney shall then be allowed to offer evidence in rebuttal.

(7) The court may allow surrebuttal for good cause.

(8) The judge shall then read the instructions to the jury. The court clerk may read the instructions to the jury when the judge is unable by reason of physical infirmity.

(9) The prosecuting attorney may then make a closing argument to the jury. Thereafter, the defendant may make a closing argument to the jury. Failure of the prosecuting attorney to make a closing argument shall not deprive the defendant of the right to argue. The prosecuting attorney may then make a rebuttal argument, not to exceed one-half (½) of the prosecuting attorney's allotted time. If, after the prosecuting attorney's initial closing argument, a defendant declines to make a closing argument, the prosecuting attorney shall make no further argument.

(b) Enhancement of Punishment.

(1) Sentencing enhancements based upon prior conviction(s). In cases involving enhanced punishment based upon prior conviction(s), the trial shall proceed as follows:

(A) Separate trials shall be held on the principal charge and on the charge of previous conviction(s). In the trial on the principal charge, the previous conviction(s) will not be mentioned by the state or the court except as provided by the Mississippi Rules of Evidence.

(B) If the defendant is convicted or enters a plea of guilty on the principal charge then, unless there is an agreement or ruling to the contrary, a hearing before the court without a jury will be conducted on the previous conviction(s).

(2) Elevated crimes based upon facts required to be found by a jury.

(A) Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum shall be submitted to a jury and must be proved beyond a reasonable doubt.

(B) When a prior conviction is an element of the principal charge, the fact of a prior conviction shall be submitted to a jury and proved beyond a reasonable doubt, However, the defendant may stipulate to, or waive proof regarding, the prior conviction and the trial court shall accept such a stipulation. The stipulation

then shall be submitted to the jury with a proper limiting instruction.

Case law:

Banks v. State, 725 So. 2d 711, 718 (Miss. 1997) ("Generally, attorneys on both sides in a criminal prosecution are given broad latitude during closing arguments. Prosecutors are afforded the right to argue anything in the State's closing argument that was presented as evidence. However, arguing statements of fact that are not in evidence or necessarily inferable from it and that are prejudicial to the defendant is error. Thus, prosecuting attorneys should refrain from doing or saying anything that would tend to cause the jury to disfavor the defendant due to matters other than evidence relative to the crime.").

Powell v. State, 662 So. 2d 1095, 1098 (Miss. 1995) ("Generally, the party who has the burden of proof must introduce all substantive evidence in his case-in-chief. However, where there is a doubt as to whether evidence is properly case-in-chief or rebuttal evidence, then the court should resolve the doubt in favor of reception into rebuttal if: (1) its reception will not consume so much additional time as to give an undue weight impractical probative force to the evidence so received in rebuttal, and (2) the opposite party would be substantially well prepared to meet it by surrebuttal as if the testimony had been offered in chief, and (3) the opposite party upon request therefor is given the opportunity to reply by surrebuttal.").

Crenshaw v. State, 513 So. 2d 898, 900 (Miss. 1987) ("The purpose of an opening statement is to inform the jury what a party to the litigation expects the proof to show. Sometimes the proof does not follow the expectations of the party's attorney in opening statement and, if so, that failure usually militates against the party.").

Trunell v. State, 487 So. 2d 820, 826 (Miss. 1986) ("Trunell had a constitutional right to make an opening statement without impingement of his constitutional guaranty against self-incrimination, which was denied him by the trial court. Our law does not require a defendant to make a choice between proceeding pro se and exercising his constitutional right against self-incrimination. He may conduct his entire defense without ever being sworn in or being subject to any cross-examination.").

Clemons v. State, 320 So. 2d 368, 371-72 (Miss. 1975) ("So long as counsel in his address to the jury keeps fairly within the evidence *372 and the issues involved, wide latitude of discussion is allowed; but, when he departs entirely from the evidence in his argument, or makes statements intended sloely to excite the passions or prejudices of the jury, or makes inflammatory and damaging statements of fact not found in the evidence, the trial judge should intervene to prevent an unfair argument. Moreover, this Court will not withhold a reversal where such statements are so inflammatory (in the judgment of this court) as to influence the verdict of the jury, and thus prevent a fair trial.").

MRCrP 24.1 Time and form of verdict:

When the jurors have agreed upon a verdict they shall be returned to the courtroom by the bailiff(s). The court shall ask the foreperson or the jury panel whether an agreement has been reached on a verdict. If the foreperson or the jury panel answers in the affirmative, the judge shall call upon the foreperson or any member of the panel to deliver the verdict, in writing, to the clerk or the court. The verdict of the jury shall be unanimous, but need not be signed. The court shall examine the verdict and, if found to be in proper order, the clerk or the court then shall read the verdict in open court in the presence of the jury. If neither party nor the court desires to poll the jury, or when a poll of the jury reveals the verdict is unanimous, and if the verdict is in the form required by Rule 24.3, the court shall order the verdict filed and entered of record. The court then shall discharge the jurors, unless a bifurcated hearing is necessary.

MRCrP 25.1 Motion for a new trial:

(a) Motion by Defendant. The court, on written motion of the defendant, may vacate any judgment and grant a new trial for the grounds set forth in section (b).

(b) Grounds. The court may grant a new trial for any of the following reasons:

(1) if required in the interests of justice;

(2) if the verdict is contrary to law or the weight of the evidence;

(3) if new and material evidence has recently been discovered which probably would produce a different result at a new trial and, by reasonable diligence, such evidence could not have been discovered sooner;

(4) if the jury has received any evidence, papers or documents, not authorized by the court, or the court has admitted illegal testimony, or excluded competent and legal testimony;

(5) if the jurors, after retiring to deliberate on the verdict, separated without leave of court;

(6) if the court has misdirected the jury in a material matter of law, or has failed to instruct the jury on all questions of law necessary for their guidance; or

(7) if, for any other reason, the defendant has not received a fair and impartial trial.

(c) Timeliness. A motion for a new trial shall be made within ten (10) days after entry of judgment (which, for purposes of this Rule, includes both adjudication of guilt and sentence). Upon good cause shown, the court may grant a reasonable extension thereof.

(d) Court's Own Motion. The court may, on its own motion and with the consent of the defendant and notice to the prosecuting attorney, order a new trial before the entry of judgment.

MRCrP 25.2 Motion to vacate judgment:

(a) Power of the Court. The court, on motion of a defendant or on its own motion, may vacate judgment and dismiss the case without prejudice if the indictment or charging affidavit did not charge an offense, or if the court was without jurisdiction.

(b) Timeliness. A motion to vacate judgment shall be filed within ten (10) days after entry of judgment. The court may act on its own motion in vacating judgment only during the period in which a motion to vacate judgment would be timely.

MRCrP 25.3 Denial by operation of law:

A motion for a new trial or a motion to vacate judgment pending thirty (30) days after entry of judgment shall be deemed denied as of the thirtieth (30th) day after the motion was filed. However, the parties may agree in writing, or the court may order, that the motion be continued past the thirtieth (30th) day to a date certain within ninety (90) days after the motion was filed; any motion still pending after the date to which it is continued shall be deemed denied as of that date. The motion may be continued from time to time as provided in this Rule.

MRCrP 25.4 Clerical and technical errors:

After giving notice to the State and the defendant, the court may correct a clerical error in a judgment or order, correct an error in the record arising from oversight or omission, or correct a sentence that resulted from arithmetical, technical, or other clear error.

1424 TRIAL IN ABSENTIA

§ 99-17-9 When judge may hold trial in absentia:

In criminal cases the presence of the prisoner may be waived (a) if the defendant is in custody and consenting thereto, or (b) is on recognizance or bail, has been arrested and escaped, or has been notified in writing by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or is in any way in default for nonappearance, the trial may progress at the discretion of the court, and judgment made final and sentence awarded as though such defendant were personally present in court.

See also In re Chisolm, 837 So. 2d 183, 190 (Miss. 2003) ("Chisolm was not improperly tried in absentia, as the statute contains an exception for a trial in the absence of a defendant who has been charged with a misdemeanor offense and is properly notified of the setting and chooses not to appear."); Barksdale v. State, 176 So. 3d 108, 111 (Miss. Ct. App. 2015) ("Because Barksdale was released on bond pending trial and was in default for nonappearance, it was not plain error to conduct his trial in absentia. He was well aware of his trial date, understood he had to be at trial, and offers no proof that his absence was not willful, voluntary, and deliberate."); Lott v. City of Bay Springs, 960 So. 2d 525, 527 (Miss. Ct. App. 2007) ("Lott's uniform traffic ticket clearly stated that his case would be heard in the Municipal Court of the City of Bay Springs on August 2, 2004, at 9:00 a.m. On that date the court did in fact hear his case . . . Lott's voluntary absence, be it as a result of a conscience decision not to attend or confusion over the correct court date brought about by statements from his family, cannot be cured by this Court.").

Mississippi Attorney General's opinions:

Effect on bail bond.
"This office remains of the opinion that the finding of guilt in absentia does not release the surety or discharge the bond." Op. Atty. Gen. Shirley, June 15, 2013.

Issuing a capias if defendant convicted in absentia.
"[If] the defendant has [been] convicted [in absentia] the proper method to bring the defendant before the court to receive judgment would be by the serving of a capias (technically a capias ad audiendum judicium, which is a writ issued to bring a defendant found guilty of a misdemeanor before the court to receive sentence)." Op. Atty. Gen. Turnage, December 10, 2004.

When issuance of a capias is proper.
"[A] capias . . . may be issued for a person who has already been convicted demanding his appearance before the court to receive judgment or it may be issued for the arrest of a person prior to a trial demanding he answer or defend himself against criminal charges." Op. Atty. Gen. Nowak, June 6, 2003.

Traffic tickets may be tried in absentia.
"[A]n individual may be tried in absentia on a traffic ticket if the individual has been provided proper notice of the date for the appearance and trial and fails to appear or make other arrangements. Please note that the officer who wrote the ticket must also be present to testify about the offense. The traffic ticket alone in not sufficient to convict an individual of a traffic offense." Op. Atty. Gen. Arnold, January 11, 2002.

1425 DOUBLE JEOPARDY

Fifth Amendment:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb;

See also Miss. Const. art. III § 22 ("No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution.").

Double jeopardy protections:

Double jeopardy embodies three separate constitutional protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Thomas v. State, 711 So. 2d 867, 870 (Miss. 1998).

See also United States v. Dinitz, 424 U.S. 600, 606 (1976) ("The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense."); Wallace v. State, 607 So. 2d 1184, 1187 (Miss. 1992) ("Where a guilty plea is accepted and a suspended sentence is imposed, the court cannot later impose a period of incarceration exceeding the original suspended sentence where the defendant fails to maintain a standard of good behavior. To do so would expose the defendant to double jeopardy.").

When jeopardy attaches:

Jeopardy does not attach until a defendant is put to trial before a jury or a judge. *See* Serfass v. United States, 420 U.S. 377, 388 (1974). That is,

- when the jury is sworn and empaneled to hear the case. *See* McGraw v. State, 688 So. 2d 764, 767 (Miss. 1997); or
- in a bench trial when the first witness is sworn. *See* King v. State, 527 So. 2d 641, 643 (Miss. 1988).

In other words, a defendant must first suffer actual jeopardy to avail on a claim of double jeopardy:

> [J]eopardy had not attached when the municipal court dismissed Deed's DUI charge in the Olive branch Municipal Court. It is undisputed that the municipal judge received no evidence and heard no witnesses before dismissing the DUI charge. Stated otherwise, Deeds was never "put to trial before the trier of facts" before the charge was dismissed.

Deeds v. State, 27 So. 3d 1135, 1139 (Miss. 2009).

See also Levario v. State, 90 So. 3d 608, 612 (Miss. 2012) ("Because the justice court had no jurisdiction for its conviction of Levario, that conviction did not preclude the State from indicting and prosecuting Levario in circuit court for felony DUI Causing Death."); Lee v. State, 759 So. 2d 390, 393 (Miss. 2000) ("Probable cause is neither tantamount or necessary to that process."); Thomas v. State, 845 So. 2d 751, 753 (Miss. Ct. App. 2003) ("[A] petition to revoke probation or to revoke suspension of a sentence is not a criminal case and not a trial on the merits of the case. Therefore, double jeopardy protection does not apply to such hearings.").

Mississippi Attorney General's opinions:

If traffic ticket is dismissed due to lack of jurisdiction.
"[I]f a court grants a motion to dismiss a traffic ticket due to lack of jurisdiction, the officer may issue a new traffic citation and serve it upon the defendant since jeopardy never attached in the prior charge." Op. Atty. Gen. Nowak, January 10, 2003.

"Same elements" test:

The following test is used to determine whether a second prosecution is precluded by the double jeopardy prohibition:

> A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

Blockburger v. United States, 284 U.S. 299, 304 (1932).

In other words, the double jeopardy prohibition does not apply if each crime contains at least one element the other lacks. *See* United States v. Dixon, 509 U.S. 688, 711 (1993) (overruled Grady "same conduct" test); Brown v. State, 731 So. 2d 595, 599 (Miss. 1999) ("The test for determining whether a defendant has been subjected to double jeopardy is the "same elements" test as set out in *Blockburger* . . . ."); Cook v. State, 671 So. 2d 1327, 1331 (Miss. 1996) ("However, when the two crimes are conspiracies, the test may not be the '*Blockburger* test.'").

Separate acts constituting separate crimes:

Separate acts though committed close in point of time to one another may constitute separate criminal offenses. In such cases, the double jeopardy prohibition does not apply. *See* Clemons v. State, 482 So. 2d 1102, 1106-07 (Miss. 1985) (double jeopardy prohibition did not apply to two separate cocaine purchases); Pharr v. State, 465 So. 2d 294, 300 (Miss. 1984) (double jeopardy prohibition did not apply to three separate acts of headlighting deer); Cox v. State, 134 So. 3d 712, 715 (Miss. 2014) ("[D]ouble jeopardy attaches only as to that particular offense and sentence, not subsequent crimes.").

Applicability to DUI and traffic offenses:

Blockburger "same elements" test is applicable to DUI and traffic offenses. *See* Lee v. State, 759 So. 2d 390, 393 (Miss. 2000) ("[I]t can be readily seen that proof of reckless driving is not necessary to prove felony DUI or felony murder."); Smith v. State, 736 So. 2d 381, 383 (Miss. Ct. App. 1999) ("Clearly, under the authority of *Blockburger*, the three crimes at issue [i.e., first offense DUI, second offense DUI, and felony DUI] in this assignment of error are separate and distinct. . . . Although the three statutory [offenses] are similar in that they all require proof that the defendant operated a vehicle while under the influence of intoxicants, they also differ in that each . . . requires proof of an additional element.").

Applicability to mistrials:

The double jeopardy prohibition does not mean that every time a trial aborts or does not end with a final judgment the defendant must be set free. However, if a mistrial is granted upon the court's own motion, or upon the state's motion, a second trial is barred because of double jeopardy unless there was a manifest necessity for the mistrial, taking into consideration all the circumstances. Some examples of manifest necessity are:

- failure of a jury to agree on a verdict,
- biased jurors,
- an otherwise tainted jury,
- improper separation of jury,
- when jurors demonstrate their unwillingness to abide by the instructions of the court.

Watts v. State, 492 So. 2d 1281, 1284 (Miss. 1986).

See also United States v. Dinitz, 424 U.S. 600, 611 (1976) ("The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions."); Roberson v. State, 856 So. 2d 532, 535 (Miss. Ct. App. 2003) ("There was no persuasive evidence that the State intended to 'goad' or 'provoke' Roberson into seeking a mistrial.").

Civil sanctions ordinarily not applicable:

The following two-step approached is used to determine if the sanction imposed rises to the level of criminal punishment:

1. Did the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other?
2. If legislature indicated an intention to establish a civil penalty - Was the statutory scheme so punitive either in purpose or effect as to negate that intention?

See Hudson v. U.S., 522 U.S. 93, 99 (1997).

Administrative driver's license suspension, even though it may have punitive aspects, is viewed as a remedial measure. *See* Keyes v. State, 708 So. 2d 540, 548 (Miss. 1998) ("[T]he Double Jeopardy Clauses of the United States and Mississippi Constitutions do not preclude criminal prosecution for violation of Miss. Code Ann. § 63-11-30 subsequent to administrative license suspension pursuant to § 63-11-23(2).").

§ 99-33-13 Discovered felonies on the trial of a criminal case:

If on the trial of any criminal case the justice court judge discover that it is a felony, and not a misdemeanor, of which the accused has been guilty, he shall not punish the offender nor render any judgment finally disposing of the case, but shall require him to give bail for his appearance in the circuit court, unless the felony be not bailable, in which case the justice shall commit him without bail.

1426 MISTRIAL

MRCrP 23.5 Mistrials:

Upon motion of any party, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by a party, a party's attorney(s), or someone acting at the behest of a party or a party's attorney(s), resulting in substantial and irreparable prejudice to the movant's case.

Upon motion of a party or its own motion, the court may declare a mistrial if:

(a) The trial cannot proceed in conformity with the law; or

(b) It appears there is no reasonable probability of the jury's agreement upon a verdict.

U.R.Y.C.P. 11 When an arrest warrant for a child is prohibited:

Comments & Procedures to 11(a)(1):
Justice and municipal courts may not issue an order to take a child into custody, or an arrest warrant, for any child within the exclusive original jurisdiction of the youth court. Such is not applicable to offenses outside the exclusive original jurisdiction of the youth court, e.g., hunting, fishing or traffic violations. See White v. Walker, 950 F.2d 972, 979 (5th Cir. 1991). However, in those instances, the custody of the child must comply with all state and federal laws pertaining to the detention of juveniles. See U.R.Y.C.P. 19(c). When a child is convicted of a misdemeanor offense by a criminal court having original jurisdiction of the misdemeanor charge and the sentence includes that the child is to be committed to, incarcerated in or imprisoned in a jail or other place of detention, the commencement of such commitment, incarceration or imprisonment in a jail or other place of detention is stayed until the criminal court has notified the youth court judge or the judge's designee of the conviction and sentence.

U.R.Y.C.P. 19 Detention restrictions:

Any child who is charged with a hunting or fishing violation, a traffic violation, a violation of the Mississippi Implied Consent Law, or any other criminal offense for which the youth court shall have power on its own motion to remove jurisdiction from any criminal court, may be detained only in the same juvenile facilities designated by the youth court for children within the jurisdiction of the youth court.

U.R.Y.C.P. 23 Removal by the youth court:

(c) Removal by the youth court of certain criminal misdemeanor offenses. Unless the cause has been transferred, or unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult and was convicted, the youth court shall have power on its own motion to remove jurisdiction from any criminal court of any offense including a hunting or fishing violation, a traffic violation, a violation of the Mississippi Implied Consent Law, or a violation of section 67-3-70 of the Mississippi Code, committed by a child in a matter under the jurisdiction of the youth court and proceed therewith in accordance with the provisions of the Mississippi Youth Court Law. Such does not apply to a youth who has a pending charge or a conviction for any crime over which circuit court has original jurisdiction.

U.R.Y.C.P. 23 When youth court may stay execution of sentence:

(d) Stay of execution by the youth court of certain criminal misdemeanor offenses. After conviction and sentence of any child by any court having original jurisdiction on a misdemeanor charge, and within the time allowed for an appeal of such conviction and sentence, the youth court of the county shall have the full power to stay the execution of the sentence and to release the child on good behavior or on other order as the youth court

may see fit to make unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult and was convicted. When a child is convicted of a misdemeanor and is committed to, incarcerated in or imprisoned in a jail or other place of detention by a criminal court having proper jurisdiction of such charge, such court shall notify the youth court judge or the judge's designee of the conviction and sentence prior to the commencement of such incarceration.

§ 43-21-159

(1) . . . In cases where the child is charged with a hunting or fishing violation or a traffic violation, whether it be any state or federal law, a violation of the Mississippi Implied Consent Law, or municipal ordinance or county resolution, or where the child is charged with a violation of Section 67–3–70, the appropriate criminal court shall proceed to dispose of the same in the same manner as for other adult offenders and it shall not be necessary to transfer the case to the youth court of the county. However, unless the cause has been transferred, or unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult and was convicted, the youth court shall have power on its own motion to remove jurisdiction from any criminal court of any offense including a hunting or fishing violation, a traffic violation, a violation of the Mississippi Implied Consent Law, or a violation of Section 67–3–70, committed by a child in a matter under the jurisdiction of the youth court and proceed therewith in accordance with the provisions of this chapter.
. . .
(3) Nothing in subsection (1) or (2) shall apply to a youth who has a pending charge or a conviction for any crime over which circuit court has original jurisdiction.

1428 VICTIMS' RIGHTS

See CHAPTER 31 "VICTIMS' RIGHTS."

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CHAPTER 15

SENTENCING

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1500 RULES ON SENTENCING

MRCrP 26.1 Definitions; scope:

(a) Determination of Guilt. The term "determination of guilt" means a verdict of guilty by a jury, a finding of guilt by a court following a non-jury trial, or the acceptance by the court of a plea of guilty or nolo contendere.

(b) Judgment. The term "judgment" means the adjudication of the court based on the verdict of the jury, the plea of the defendant of guilty or nolo contendere, or on its own finding following a non-jury trial, that the defendant is guilty or not guilty. The term "judgment" may include both determination of guilt and sentence.

(c) Sentence. The term "sentence" means the pronouncement by the court of the penalty imposed upon the defendant after an adjudication of guilt.

(d) Scope. Rule 26 shall apply to death penalty cases only to the extent that a procedure is not otherwise provided.

MRCrP 26.2 Judgment; time:

(a) On Acquittal. When a defendant is acquitted of any charge, judgment pertaining to that charge shall be pronounced and entered immediately.

(b) On Conviction.

(1) On a determination of guilt on any charge, judgment pertaining to that charge shall be pronounced and entered together with the sentence.

(2) On a determination of guilt, the court shall, after receipt of the presentence report (unless a presentence report is not required), set a date for sentencing.

(3) Sentence shall be imposed without unreasonable delay.

MRCrP 26.3 Presentence report:

(a) In General. A presentence investigation may be conducted and a report thereof shall be made as required for cases where the court has discretion in imposition of sentence. Contents of this report shall be disclosed only to the parties. A copy of said report shall be delivered to both the prosecutor and the defendant or the defense attorney within a reasonable time prior to sentencing so as to afford a reasonable opportunity for verification of the material. Prior to the sentencing proceeding, each party is required to notify the opposing party and the court of any part of the presentence report which the party intends to controvert by the production of evidence.

(b) Content. The presentence report may contain, but is not limited to, the following information:

(1) a description of the offense and the circumstances surrounding it, not limited to aspects developed for the record as part of the determination of guilt;

(2) any prior criminal convictions of the defendant, or juvenile adjudications of delinquency;

(3) a statement considering the economic, physical, and psychological impact of the offense on the victim and the victim's immediate family;

(4) the defendant's financial condition;

(5) the defendant's educational background;

(6) a description of the defendant's employment background, including any military record and present employment status and capabilities;

(7) the social history of the defendant, including family relationships, marital status, residence history, and alcohol or drag use;

(8) information about environments to which the defendant might return or to which the defendant could be sent should probation be granted;

(9) information about special resources which might be available to assist the defendant, such as treatment centers, rehabilitative programs, or vocational training centers;

(10) a physical and mental examination of the defendant, if ordered by the court; and

(11) any other information required by the court.

(c) Excluded Content. The report shall not include:

(1) sources of information obtained on a promise of confidentiality; or

(2) information which would disrupt an existing police investigation.

(d) Special Duty of the Prosecuting Attorney. The prosecuting attorney shall disclose to the defendant any information within the prosecuting attorney's possession or control, not already disclosed, which would tend to reduce the punishment to be imposed.

MRCrP 26.4 Sentencing hearing:

(a) Generally. If the court has either discretion as to the penalty to be imposed or power to suspend execution of the sentence, the court shall conduct a sentencing hearing in all felony cases, unless waived by the parties with consent of the court. The sentencing hearing may commence immediately after a determination of guilt or may be continued to a later date. If a presentence report is required, the sentencing hearing shall not be conducted until copies thereof have been furnished or made available to the court and the parties.

(b) Enhanced Punishment Based on Prior Conviction(s). Absent stipulation, the court shall hold a hearing in order to establish the alleged prior conviction(s) to determine the defendant's status as a habitual or enhanced offender. The prosecution must establish the defendant's prior conviction(s) beyond a reasonable doubt. If the defendant disputes any conviction presented by the prosecution, the court may allow the prosecution to present additional evidence of the disputed conviction.

(c) Evidence. Evidence may be presented by both the prosecuting attorney and the defendant as to any matter that the court deems probative on the issue of sentencing.

MRCrP 26.5 Pronouncement of judgment and sentence:

(a) Pronouncement of Judgment. The judgment shall be pronounced in open court at any time after conviction, in the presence of the defendant (unless waived pursuant to Rule 10.1(b)), and recorded in the minutes of the court. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(b) Pronouncement of Sentence. In pronouncing sentence, the court shall:

(1) afford the defendant an opportunity, personally and/or through the defendant's attorney, to make a statement on the defendant's behalf before imposing sentence;

(2) state that a credit will be allowed on the sentence, as provided by law, for time during which the defendant has been incarcerated on the present offense; and

(3) explain to the defendant the terms of the sentence.

MRCrP 26.6 Fine, restitution, and/or court costs following adjudication of guilt:

(a) Scope. Rule 26.6 applies only following a determination of guilt and, therefore has no applicability to pretrial diversion, non-adjudication, and the like.

(b) Method of Payment; Installments. When the defendant is sentenced to pay a fine, restitution, and/or court costs, the court may permit payment to be made within a specified period of time or in specified installments. Restitution shall be payable as promptly as possible, taking into account the defendant's indigency or economic ability to pay.

(c) Method of Payment; To Whom. Unless the court expressly directs otherwise:

(1) the payment of a fine, restitution, and/or court costs shall be made to the clerk of court; and

(2) monies received from the defendant shall be applied as follows:

(A) first, to pay any and all court costs (as designated by statute) assessed against the defendant;

(B) second, to pay any restitution the defendant has been ordered to make; and

(C) third, to pay any fines imposed against the defendant.

The clerk shall, as promptly as practicable, forward restitution payments to the victim.

(d) Court Action upon Failure of Defendant to Pay Fine, Restitution, and/or Court Costs. Upon the defendant's failure to pay a fine, restitution, and/or court costs, the court first must require the defendant to appear and show cause why said defendant should not be held in contempt of court. A summons requiring the defendant's appearance shall be personally served on the defendant and shall set forth the time and location of the hearing. If the defendant fails to appear, the court may issue a warrant for the defendant's arrest. During the hearing, the court shall inquire and cause an investigation to be made into the reasons for nonpayment, including whether nonpayment was willful or due to indigency or economic inability to pay. In that review:

(1) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or order of restitution or the unpaid portion thereof in whole or in part.

(2) If the court finds nonpayment is willful and finds the defendant in contempt of court, the court may direct that the defendant be incarcerated until the unpaid obligation is paid, subject, however, to section (e).

(e) Incarceration for Nonpayment of Fine, Restitution, and/or Court Costs.

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution, and/or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant could have made payment but refused to do so. In justice and municipal court, such finding shall be included in the court's order.

(2) After consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of any incarceration, subject to the limitations set by statute.

(3) If, at the time the fine, restitution and/or court costs was ordered, a sentence of incarceration was also imposed, the aggregate of the period of incarceration imposed pursuant to this Rule and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense.

MRCrP 26.7 Consecutive or concurrent sentences:

Unless otherwise provided by law, the court may direct that the sentence being imposed will be served concurrently with, or consecutively to, any other sentence previously or simultaneously imposed upon the defendant by any court. When sentencing orders are silent, sentences shall run concurrently.

MRCrP 26.8 Entry of judgment of conviction and sentence:

(a) Entry of Judgment and Sentence. The judgment is complete and valid upon its entry in the minutes.

(b) Entry of Order and Duty of Clerk. Immediately upon entry of an order or judgment of the court, the clerk of the court shall make a diligent effort to assure that all attorneys of record have received notice of the entry of the order or judgment.

§ 99-19-20.1. Required hearing before incarcerating a defendant for nonpayment of a fine, restitution, or court costs:

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant was not indigent or could have made payment but refused to do so. When determining whether a person is indigent, the court shall use the current Federal Poverty Guidelines and there shall be a presumption of indigence when a defendant's income is at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, subject to a review of his or her assets. A defendant at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines without substantial liquid assets available to pay fines, fees, and costs shall be deemed indigent. In determining whether a defendant has substantial liquid assets, the judge shall not consider up to Ten Thousand Dollars ($10,000.00) in tangible personal property, including motor vehicles, household goods, or any other assets exempted from seizure under execution or attachment as provided under Section 85–3–1. If the defendant is above one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, the judge shall make an individualized assessment of his or her ability to pay based on the totality of the circumstances including, but not limited to, the defendant's disposable income, financial obligations and liquid assets. If the judge determines that a defendant who claims indigence is not indigent and the defendant could have made payment but refused to do so, the case file shall include a written explanation of the basis for the determination of the judge. In justice and municipal court, such finding shall be included in the court's order.
(2) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order that allows the defendant additional time for payment, reduces the amount of each installment, revokes the fine, in whole or in part, or allows the defendant to perform community service at the state minimum wage per hour rate. If the court finds nonpayment is willful after consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of incarceration, if any, subject to the limitations set by law and subsection (3) of this section.
(3) If at the time the fine, restitution or court cost is ordered, a sentence of incarceration is also imposed, the aggregate total of the period of incarceration imposed pursuant to this section and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense.
(4) A minor who is to serve as a confidential informant must be notified that the minor has the right to contact one (1) or both parents.

§ 9-11-33 Setting aside any proceeding or judgment in a case:

A justice court judge may correct any errors or mistakes in any proceedings that are conducted before such judge or in the records of proceedings conducted before such judge. A justice court judge may set aside any proceeding or judgment in a case conducted before such judge upon a written order as may be just and proper after a

proceeding in which the judge determines that good cause has been shown to support such order.

See also Levario v. State, 90 So. 3d 608, 612 (Miss. 2012) ("[Section] 9-11-33 does not impose filing deadlines or timing requirements.").

Mississippi Attorney General's opinions:

As deemed just and proper.
"[Under § 9-11-33], if the judge in the case, after a proceeding, determines that good cause exists to support a modification of the sentence he may enter a judgement that he deems is just and proper. The defendant would have the right to file a motion to modify the judgement." Op. Atty. Gen. Strait, December 5, 2008.

In a case conducted before such judge.
"While [§ 9-11-33] allows a justice court judge to set aside a judgment of a case heard before that same judge, there is no authority for a justice court judge to set aside a judgment in a case heard before another judge." Op. Atty. Gen. Cooper, July 3, 1997.

Good cause must be shown.
"[S]ection 9-11-33 of the Mississippi Code of 1972 applies to both civil and criminal judgments. Good cause must be shown the court before any judgment is set aside." Op. Atty. Gen. Bass, July 18, 1991.

§ 47–1–1 Commitment and confinement:

Every convict sentenced to imprisonment in the county jail, or to such imprisonment and the payment of a fine, or the payment of a fine, shall be committed to jail, and shall remain in close confinement for the full time specified for imprisonment in the sentence of the court, and in like confinement, subject to the provisions of Section 99-19-20.1, until the fine, costs and jail fees be fully paid, unless discharged in due course of law, or as hereinafter provided. Subject to the provisions of Section 99-19-20.1, no convict shall be held in continuous confinement under a conviction for any one (1) offense for failure to pay fine and costs in such case for a period of more than one (1) year.

§ 63-9-11 Traffic violations for which another penalty is not provided:

(2) Every person convicted of a misdemeanor for a violation of any of the provisions of [Chapters 3, 5, or 7 of Title 63] for which another penalty is not provided shall for first conviction thereof be punished by a fine of not more than One Hundred Dollars ($100.00) or by imprisonment for not more than ten (10) days; for a second such conviction within one (1) year thereafter such person shall be punished by a fine of not more than Two Hundred Dollars ($200.00) or by imprisonment for not more than twenty (20) days or by both such fine and imprisonment; upon a third or subsequent conviction within one (1) year after the first conviction such person shall be punished by a fine of not more than Five

Hundred Dollars ($500.00) or by imprisonment for not more than six (6) months or by both such fine and imprisonment.

§ 99-19-20 Ordering the payment of fines:

(1) Except as otherwise provided under Section 99-19-20.1, when any court sentences a defendant to pay a fine, the court may order (a) that the fine be paid immediately, or (b) that the fine be paid in installments to the clerk of the court or to the judge, if there be no clerk, or (c) that payment of the fine be a condition of probation, or (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or (e) any combination of the above.
(2) Except as otherwise provided under Section 99-19-20.1, the defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations provided under this section. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned.
This subsection shall be limited as follows:
(a) In no event shall such period of imprisonment exceed one (1) day for each One Hundred Dollars ($100.00) of the fine.
(b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.
(c) It shall be in the discretion of the judge to determine the rate of the credit to be earned for work performed under subsection (1)(d), but the rate shall be no lower than the rate of the highest current federal minimum wage.
(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

See also Daniels v. State, 742 So. 2d 1140, 1145 (Miss. 1999) ("[W]hen a statute is amended before sentencing and provides for a lesser penalty, the lesser penalty must be imposed.").

Mississippi Attorney General's opinions:

Judge may not order "house arrest" under Section 99-19-20.
"[A] Judge may not order 'house arrest' under the provisions of Section 99-19-20. The statute specifically requires "imprisonment" and offers the Judge no alternative to "imprisonment" in its sentencing order if the defendant has the ability to pay the fine. The statute then provides specific means by which the imprisonment may be satisfied. Of course, the Judge does not have to order imprisonment, but may do so." Op. Atty. Gen. Bruni, December 15, 2006.

§ 99-19-21 Consecutive or concurrent sentences:

(1) When a person is sentenced to imprisonment on two (2) or more convictions, the imprisonment on the second, or each subsequent conviction shall, in the discretion of the court, commence either at the termination of the imprisonment for the preceding conviction or run concurrently with the preceding conviction.

See also Thomas v. State, 277 So. 3d 532, 536 (Miss. 2019) ("Determining whether multiple sentences run concurrently or consecutively is within the trial court's discretion.").

§ 99-19-23 Credit for jail time served:

The number of days spent by a prisoner in incarceration in any municipal or county jail while awaiting trial on a criminal charge, or awaiting an appeal to a higher court upon conviction, shall be applied on any sentence rendered by a court of law or on any sentence finally set after all avenues of appeal are exhausted.

See also Foster v. Durr, 123 So. 3d 940, 941 (Miss. Ct. App. 2013) ("[Section 99–19–23] states that a prisoner shall receive credit for the number of days incarcerated in municipal or county jail while awaiting trial on a criminal charge or appeal to a higher court after conviction. However, this Court clarified in *Stanley v. State*, 850 So. 2d 154, 157 (Miss. Ct. App. 2003), that 'a prisoner actually serving time for another conviction is not, within the meaning of [s]ection 99–19–23, being held to await trial.'").

§ 99-19-25 Suspension of sentence:

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. 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. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of two (2) years. Provided, however, the justice courts in cases arising under Sections 49-7-81, 49-7-95 and the Implied Consent Law shall not suspend any fine.

Mississippi Attorney General's opinions:

Limit of the probationary period.
"Mississippi Code Annotated Section 99-19-25 allows a justice court to establish a probationary period of up to two (2) years after suspension of a sentence." Op. Atty. Gen. Adams, August 1, 2003.

No authority to suspend state assessments.
"[A] justice court judge is without the authority to suspend the mandatory state assessments." Op. Atty. Gen. Knight, August 31, 2001.

§ 99-19-27 Violation of terms of suspended sentence

Every convicted offender of a criminal law who receives a parole or suspended sentence for a definite time, and fails to surrender himself to the proper authority for execution of sentence on expiration of such parole or suspended sentence, shall be regarded and treated as an escaped convict and subject as such to arrest and return to the proper authorities by any officer or citizen who could have made such arrest had such offender been an ordinary escaped prisoner, and shall be promptly returned to the proper authorities for execution of sentence.

§ 99-19-29 Vacation of suspension or conditional pardon

Whenever any court granting a suspended sentence, or the governor granting a pardon, based on conditions which the offender has violated or failed to observe, shall be convinced by proper showing, of such violation of sentence or pardon, then the governor or the judge of the court granting such suspension of sentence shall be authorized to annul and vacate such suspended sentence or conditional pardon in vacation or court time. The convicted offender shall thereafter be subject to arrest and court sentence service, as if no suspended sentence or conditional pardon had been granted, and shall be required to serve the full term of the original sentence that has not been served. The offender shall be subject, after such action by the court or the governor, to arrest and return to proper authorities as in the case with ordinary escaped prisoner.

§ 99-19-31 If penalty is not provided elsewhere by statute:

Offenses for which a penalty is not provided elsewhere by statute, and offenses indictable at common law, and for which a statutory penalty is not elsewhere prescribed, shall be punished by fine of not more than one thousand dollars ($1,000.00) and imprisonment in the county jail not more than six (6) months, or either.

§ 99-23-27 Misdemeanor bonds:

Every court before which any person shall be convicted of an offense less than a felony may, in addition to the penalty prescribed by law, require the convict to enter into bond in a reasonable sum, with or without sureties, to keep the peace and to be of good behavior for any time not longer than two years, and may order him to stand committed until such bond be executed; and for any breach thereof it may be proceeded on by scire facias as in other cases.

§ 99-33-3 No fine imposed shall be less than $15.00:

[O]n conviction, [the justice court] shall order such punishment to be inflicted as the law provides; provided, however, that no fine imposed shall be in an amount less than Fifteen Dollars ($15.00).

§ 99-33-15 Weekend and intermittent sentences:

Upon conviction of any person of a misdemeanor in a justice court of this state, the justice court judge shall be authorized, in his discretion, to sentence such person to:
(a) A period of time in jail to be served either on weekends only;
(b) Other periods of time during the week wherein such offender may not be engaged in gainful employment; or
(c) A specified number of days in jail with a provision for the release of such offender for the purpose of engaging in gainful employment at such times as the offender is actually gainfully employed, whether self-employed or otherwise.
In addition, the court may, in its discretion, sentence any convicted person to split periods of incarceration in lieu of serving the sentence of imprisonment all in one (1) period.

1502 WITHHOLDING ACCEPTANCE OF PLEA PENDING SUCCESSFUL COMPLETION OF CONDITIONS

§ 99-15-26 Eligibility for release after successful completion of conditions:

(1)(a) In all criminal cases, felony and misdemeanor, other than crimes against the person, a crime of violence as defined in Section 97–3–2, a violation of Section 97–11–31 or crimes in which a person unlawfully takes, obtains or misappropriates funds received by or entrusted to the person by virtue of his or her public office or employment, the circuit or county court shall be empowered, upon the entry of a plea of guilty by a criminal defendant made on or after July 1, 2014, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

(b) In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.
(c) Notwithstanding paragraph (a) of this subsection (1), in all criminal cases charging a misdemeanor of domestic violence as defined in Section 99–3–7(5), a circuit, county, justice or municipal court shall be empowered, upon the entry of a plea of guilty by the criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.
(d) No person having previously qualified under the provisions of this section shall be eligible to qualify for release in accordance with this section for a repeat offense. A person shall not be eligible to qualify for release in accordance with this section if charged with the offense of trafficking of a controlled substance as provided in Section 41–29–139(f) or if charged with an offense under the Mississippi Implied Consent Law. 41 Violations under the Mississippi Implied Consent Law can only be nonadjudicated under the provisions of Section 63-11-30.

§ 99-15-26 Conditions which may be imposed:

(2)(a) Conditions which the circuit, county, justice or municipal court may impose under subsection (1) of this section shall consist of:
(i) Reasonable restitution to the victim of the crime.
(ii) Performance of not more than nine hundred sixty (960) hours of public service work approved by the court.
(iii) Payment of a fine not to exceed the statutory limit.
(iv) Successful completion of drug, alcohol, psychological or psychiatric treatment, successful completion of a program designed to bring about the cessation of domestic abuse, or any combination thereof, if the court deems treatment necessary.
(v) The circuit or county court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed five (5) years. The justice or municipal court, in its discretion, may require the defendant to remain in the program subject to good behavior for a period of time not to exceed two (2) years.

§ 99-15-26 When judge is to release bail bond:

(3) When the court has imposed upon the defendant the conditions set out in this section, the court shall release the bail bond, if any.

§ 99-15-26 When cause may be dismissed:

(4) Upon successful completion of the court-imposed conditions permitted by subsection (2) of this section, the court shall direct that the cause be dismissed and the case be closed.

§ 99-15-26 Petition for expungement:

(5) Upon petition therefor, the court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped, there was no disposition of such case, or the person was found not guilty at trial.

1503 RESTITUTION

§ 99-37-3 For pecuniary damages:

(1) When a person is convicted of criminal activities which have resulted in pecuniary damages, in addition to any other sentence it may impose, the court may order that the defendant make restitution to the victim; provided, however, that the justice court shall not order restitution in an amount exceeding Five Thousand Dollars ($5,000.00).

See also Smith v. State, 146 So. 3d 376, 379 (Miss. Ct. App. 2014) ([T]he State argues that the circumstantial proof presented of the causal connection between Smith's driving under the influence and the pecuniary damages was sufficient to satisfy the requirements of the restitution statute. We agree."); Craft v. State, 955 So. 2d 384, 385 (Miss. Ct. App. 2006) ("Joint and several liability has been consistently upheld as to criminal co-defendants who act in concert.").

§ 99-37-3 Factors the court shall take into account:

(2) In determining whether to order restitution which may be complete, partial or nominal, the court shall take into account:
(a) The financial resources of the defendant and the burden that payment of restitution will impose, with due regard to the other obligations of the defendant;
(b) The ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court; and
(c) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.

§ 99-37-3 Defendant's right to be heard on issue of restitution:

(3) If the defendant objects to the imposition, amount or distribution of the restitution, the court shall, at the time of sentencing, allow him to be heard on such issue.

§ 99-37-3 If restitution is inappropriate or undesirable:

(4) If the court determines that restitution is inappropriate or undesirable, an order reciting such finding shall be entered, which should also state the underlying circumstances for such determination.

§ 99-37-5 Terms of payment:

(1) When a defendant is sentenced to pay a fine or costs or ordered to make restitution, the court may order payment to be made forthwith or within a specified period of time or in specified installments. If a defendant is sentenced to a term of imprisonment, an order of payment of a fine, costs or restitution shall not be enforceable during the period of imprisonment unless the court expressly finds that the defendant has assets to pay all or part of the amounts ordered at the time of sentencing.

§ 99-37-5 As a condition of probation or suspended sentence:

(2) When a defendant sentenced to pay a fine or costs or ordered to make restitution is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs or the making of restitution a condition of probation or suspension of sentence. Such offenders shall make restitution payments directly to the victim. As an alternative to a contempt proceeding under sections 99-37-7 through 99-37-13, the intentional refusal to obey the restitution order or a failure by a defendant to make a good faith effort to make such restitution may be considered a violation of the defendant's probation and may be cause for revocation of his probation or suspension of sentence.

§ 99-37-17 Right to bring civil action not limited or impaired:

(1) Nothing in this chapter limits or impairs the right of a person injured by a defendant's criminal activities to sue and recover damages from the defendant in a civil action. Evidence that the defendant has paid or been ordered to pay restitution pursuant to this chapter may not be introduced in any civil action arising out of the facts or events which were the basis for the restitution. However, the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in such civil action.
(2) If conviction in a criminal trial necessarily decides the issue of a defendant's liability for pecuniary damages of a victim, that issue is conclusively determined as to the defendant, if it is involved in a subsequent civil action.

1504 ENHANCED SENTENCES

Some offenses carry an enhanced sentenced for a prior conviction of the offense. *See, e.g.,* Miss. Code Ann. § 97-23-93 (shoplifting). But this is not to be confused with those offenses where the prior conviction an element of the crime itself:

> In the case sub judice, the underlying crime is itself a felony, and prior DUI convictions are necessary elements of the crime, not merely enhancement factors for sentencing purposes.

Watkins v. State, 910 So. 2d 591, 595 (Miss. Ct. App. 2005).

MRCP 19.2(b)(2)(B) provides:

> (b) Enhancement of Punishment.
> *(2) Elevated crimes based upon facts required to be found by a jury.*
> . . .
> (B) When a prior conviction is an element of the principal charge, the fact of a prior conviction shall be submitted to a jury and proved beyond a reasonable doubt, However, the defendant may stipulate to, or waive proof regarding, the prior conviction and the trial court shall accept such a stipulation. The stipulation then shall be submitted to the jury with a proper limiting instruction.

Comment to MRCrP 19.2(b)(2)(B) provides in part:

> [W]hen a prior conviction is an element of the principal charge, that fact must be determined by a jury. See Sallie v. State, 155 So.3d 760, 762 (Miss. 2015) ("the jury must find the elements of the firearm enhancement beyond a reasonable doubt under Apprendi before a trial court may apply the enhancement"); Rogers v. State, 130 So.3d 544, 550 (Miss. Ct. App. 2013); Rigby v. State, 826 So.2d 694, 700 (Miss. 2002) ("This Court has repeatedly held that prior DUI convictions are necessary elements of a felony DUI charge. Thus, they must be proven beyond a reasonable doubt to the jury"). That said, the defendant may stipulate to the prior conviction(s), and such a stipulation "should be submitted to the jury with a proper limiting instruction." Rigby, 826 So. 2d at 702.

"Abstracts of court records, when properly certified, are clearly allowed to prove prior convictions." McIllwain v. State, 700 So. 2d 586, 589 (Miss. 1997). After the prior convictions are introduced, the burden shifts to the defendant to demonstrate any infringement of rights or irregularity of procedure in the prior convictions. *See* Nichols v. United States, 511 U.S. 738, 749 (1994) ("[A]n uncounseled misdemeanor conviction, valid under [*Scott v. Illinois*, 440 U.S. 367 (1979)] because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."); Ghoston v. State, 645 So. 2d 936, 939 (Miss. 1994) ("We decline to hold that because Ghoston chose to represent himself, his convictions were "irregular" and therefore unfit to be used to

enhance punishment.”).

1505 EXPUNGING OF MISDEMEANOR CONVICTION

§ 99-19-71 Expungement under § 99-19-71:

(1) Any person who has been convicted of a misdemeanor that is not a traffic violation, and who is a first offender, may petition the justice, county, circuit or municipal court in which the conviction was had for an order to expunge any such conviction from all public records.
(2)(a) Except as otherwise provided in this subsection, a person who has been convicted of a felony and who has paid all criminal fines and costs of court imposed in the sentence of conviction may petition the court in which the conviction was had for an order to expunge one (1) conviction from all public records five (5) years after the successful completion of all terms and conditions of the sentence for the conviction upon a hearing as determined in the discretion of the court; however, a person is not eligible to expunge a felony classified as:
(i) A crime of violence as provided in Section 97-3-2;
(ii) Arson, first degree as provided in Sections 97-17-1 and 97-17-3;
(iii) Trafficking in controlled substances as provided in Section 41-29-139;
(iv) A third, fourth or subsequent offense DUI as provided in Section 63-11-30(2)(c) and (2)(d);
(v) Felon in possession of a firearm as provided in Section 97-37-5;
(vi) Failure to register as a sex offender as provided in Section 45-33-33;
(vii) Voyeurism as provided in Section 97-29-61;
(viii) Witness intimidation as provided in Section 97-9-113;
(ix) Abuse, neglect or exploitation of a vulnerable person as provided in Section 43-47-19; or
(x) Embezzlement as provided in Sections 97-11-25 and 97-23-19.
A person is eligible for only one (1) felony expunction under this paragraph. For the purposes of this section, the terms “one (1) conviction” and “one (1) felony expunction” mean and include all convictions that arose from a common nucleus of operative facts as determined in the discretion of the court.
(b) The petitioner shall give ten (10) days' written notice to the district attorney before any hearing on the petition. In all cases, the court wherein the petition is filed may grant the petition if the court determines, on the record or in writing, that the applicant is rehabilitated from the offense which is the subject of the petition. In those cases where the court denies the petition, the findings of the court in this respect shall be identified specifically and not generally.
(3) Upon entering an order of expunction under this section, a nonpublic record thereof shall be retained by the Mississippi Criminal Information Center solely for the purpose of determining whether, in subsequent proceedings, the person is a first offender. The order of expunction shall not preclude a district attorney's office from retaining a nonpublic

record thereof for law enforcement purposes only. The existence of an order of expunction shall not preclude an employer from asking a prospective employee if the employee has had an order of expunction entered on his behalf. The effect of the expunction order shall be to restore the person, in the contemplation of the law, to the status he occupied before any arrest or indictment for which convicted. No person as to whom an expunction order has been entered shall be held thereafter under any provision of law to be guilty of perjury or to have otherwise given a false statement by reason of his failure to recite or acknowledge such arrest, indictment or conviction in response to any inquiry made of him for any purpose other than the purpose of determining, in any subsequent proceedings under this section, whether the person is a first offender. A person as to whom an order has been entered, upon request, shall be required to advise the court, in camera, of the previous conviction and expunction in any legal proceeding wherein the person has been called as a prospective juror. The court shall thereafter and before the selection of the jury advise the attorneys representing the parties of the previous conviction and expunction.
(4) Upon petition therefor, a justice, county, circuit or municipal court shall expunge the record of any case in which an arrest was made, the person arrested was released and the case was dismissed or the charges were dropped or there was no disposition of such case, or the person was found not guilty at trial.
(5) No public official is eligible for expunction under this section for any conviction related to his official duties.

Mississippi Attorney General's opinions:

Expungement and nonadjudication.
"A non-adjudication does not serve the same purpose as an expunction. Once an order for expungement is entered pursuant to Section 99-19-71, the effect of such an order is to "restore the person . . . to the status he occupied before any arrest or indictment for which convicted." . . . A defendant who successfully completes the terms of non-adjudication and has the case dismissed can then petition the court for an expunction pursuant to Section 99-15-26(5). If approved, the order or the case file would then need to either be redacted or removed from public access or destroyed as discussed above." Op. Atty. Gen. Lee, November 22, 2019.

No waiting period for misdemeanor expungement.
"[Section 99-19-71(1)] has no requirement for a waiting period [for an expungement] after conviction of a misdemeanor." Op. Atty. Gen. Lambert, December 11, 2015.

An expungement is a civil action.
"[T]here is nothing prohibiting the county prosecuting attorney from assisting the court in expungements if the prosecutor so desires, but there is no statutory duty to do so." Op. Atty. Gen. Greenlee, March 21, 2014.

Expungement restriction.
"[Section 99-19-71(1)] allows for the expungement of only one misdemeanor for a first

offender." Op. Atty. Gen. Morris, November 14, 2011.

What constitutes a traffic offense under Section 99-19-71.
"At the outset it is noted that the subject offense [under Section 41-29-139(c)(2)(B)] is not a traffic offense. Traffic offenses are violations of Chapters 3, 5, 7 and 11 of Title 63 of the Mississippi Code." Op. Atty. Gen. Ringer, August 5, 2011.

What constitutes "first offender" in subsection (3).
"The "first offender" status in subsection (3) [of Section 99-19-71] applies only to misdemeanor expunctions pursuant to subsection (1). . . . The provisions of (2) stand alone and are not related to the provisions of subsection (1)." Op. Atty. Gen. Smith, December 10, 2010.

"First offender" under Section 99-19-17 defined.
"[T]he term "first offender" as used in [Section 99-19-71] means an individual who has no prior non-traffic convictions of any offense." Op. Atty. Gen. Mitchell, October 24, 2003.

Expunged offense cannot be used to enhance a penalty for a subsequent offense.
"[O]nce an offense has been expunged, it cannot be used to enhance a penalty for a subsequent offense. The purpose of the nonpublic record is to determine the eligibility of the offender for the expungement." Op. Atty. Gen. Carson, May 9, 2003.

Non-adjudicated offenses not exempt from Public Records Act.
"[W]e can find no statutes which would exempt non-adjudicated or suspended sentences from the Public Records Act, Section 25–61–1 and following of the Mississippi Code. The non-adjudication statute, Section 99–15–26, does not exempt records of non-adjudication from the Public Records Act." Op. Atty. Gen. Brown, June 4, 1993.

§ 45-27-9 Reporting the expunged conviction:

(4) . . . Upon receipt of a lawful expunction order, the center shall purge and destroy files of all data relating to an offense when an individual is subsequently exonerated from criminal liability of that offense. The center shall not be liable for the failure to purge, destroy or expunge any records if an agency or court fails to forward to the center proper documentation ordering the action.
. . .
(6) All persons in charge of law enforcement agencies, all court clerks, all municipal justices where they have no clerks, all justice court judges and all persons in charge of state and county probation and parole offices, shall supply the center with the information described in subsections (4) and (10) of this section on the basis of the forms and instructions for the disposition form to be supplied by the center.
. . .
(10) All law enforcement agencies in the state and clerks of the various courts shall promptly report to the center all instances where records of convictions of criminals are

ordered expunged by courts of this state as now provided by law. The center shall promptly expunge from the files of the center and destroy all records pertaining to any convictions that are ordered expunged by the courts of this state as provided by law.

§ 9-11-15 Expungement under § 9-11-15:

(3) The justice court may, in its discretion, upon prior notice to the county prosecutor and upon a showing in open court of rehabilitation, good conduct for a period of two (2) years since the last conviction in any court and that the best interest of society would be served, order the record of conviction of a person of any or all misdemeanors in that court expunged, and upon so doing, such person thereafter legally stands as though he or she had never been convicted of the misdemeanor(s) and may lawfully so respond to any query of prior convictions. This order of expunction does not apply to the confidential records of law enforcement agencies and has no effect on the driving record of a person maintained under Title 63, Mississippi Code of 1972, or any other provision of said Title 63.
(4) Notwithstanding the provisions of subsection (3) of this section, a person who was convicted in justice court of a misdemeanor before reaching his twenty-third birthday, excluding conviction for a traffic violation, and who is a first offender, may utilize the provisions of Section 99-19-71, to expunge such misdemeanor conviction.

1506 STATE ASSESSMENTS

State Auditor's report:

A report of the State Auditor on state assessments and court costs and fees is distributed at the Justice Court Clerks Statewide Seminar each year. This report contains valuable information regarding collection amounts and procedures.

1507 JUSTICE COURT COSTS AND FEES

§ 11-53-79 Posting bill of fees:

It shall be the duty of the clerks of the circuit and chancery courts, and of the sheriff, to post in a conspicuous place in his office, and each justice of the peace at his place of holding court, a copy of the bill of fees which he is entitled to receive, and on failure to do so he shall not be entitled to receive or collect any fee for any service rendered during the time of such failure.

§ 25-7-25 Justice court fees:

(1) Costs and fees in the justice court shall be charged as follows and shall be paid in advance to the clerk of the justice court in accordance with the provisions of Section 9-11-10:

(a) A uniform total fee in all civil cases, whether contested or uncontested, which shall include all services in connection therewith, except as hereinafter stated, each $25.00

(b) For more than one (1) defendant, for service of process on each defendant. 5.00

(c) After final judgment has been enrolled, further proceedings involving levy of execution on judgments, and attachment and garnishment proceedings 15.00

(d) or all services in connection with the issuance of a peace bond 25.00

(e) For celebrating a marriage, and certificate thereof 10.00

(f) Commission to take depositions 5.00

(g) Appeal with proceedings and bond 5.00

(h) A clerk's fee to be collected in all criminal cases in which the defendant is convicted, as follows:

(i) For all violations in Title 63 other than driving under the influence of intoxicating liquor or reckless driving 5.00

(ii) All other criminal cases. 25.00

(2) The justice court shall have the power to impose a fee not to exceed Fifty Dollars ($50.00) for an expungement or dismissal of any criminal affidavit, complaint or charge.

(3) In addition to the salary provided for in subsection (1) of Section 25-3-36, each justice court judge may receive a fee of not more than Twenty-five Dollars ($25.00) for each marriage ceremony he performs in the courtroom or offices of the justice court at any time the courtroom or offices are open to the public. This fee shall be paid by the parties to the marriage. Each justice court judge may receive money or gratuities for marriage ceremonies performed outside of and away from the courtroom and the offices of the justice court, that the parties to the marriage request to have performed at any time the courtroom or offices of the justice court are closed. These monies or gratuities, in an amount agreed upon by the parties to the marriage, are not considered fees for the justice court and are not subject to the requirements set forth in the provisions of Section 9-11-10.

See also Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) ("The test of whether a particular fee system is constitutionally valid is whether it presents a 'possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.'"); Brown v. Vance, 637 F. 2d 272, 282 (5th Cir. 1981) (Mississippi's previous fee system held unconstitutional).

§ 25-7-27 Payments to marshals and constables:

(1) Marshals and constables shall charge the following fees:
(a)(i) In all civil and criminal cases, for each service of process, summons, warrant, writ or other notice 45.00
(ii) In all cases where there is more than one (1) defendant residing at the same household, for service on each additional defendant . . . . . $ 5.00
(iii) For service of each process of every kind and nature issued from outside the county where it is to be served, the fees provided in subparagraphs (i) and (ii) of this paragraph, as applicable, shall be assessed.
(iv) When a complaining party has provided erroneous information to the clerk of the court relating to the service of process on the defendant or defendants and process cannot be served after diligent search and inquiry on oath thereof of the marshal or constable, as the case may be, charged with serving such process, the fees provided in subparagraphs (i) and (ii) of this paragraph, as applicable, shall be assessed.
(v) When process has been attempted in one (1) county but the defendant is not found, and process must be served on that defendant in another county, the clerk shall notify the complaining party that an additional fee or fees must be paid before the process can be delivered to the other county.
(b) After final judgment has been enrolled, further proceedings involving levy of execution on judgments, and attachment and garnishment proceedings shall be a new suit for which the marshal or constable shall be entitled to the following fee. . . . . $ 45.00
(c) For conveying a person charged with a crime to jail, mileage reimbursement in an amount not to exceed the rate established under Section 25-3-41(2).
To be paid out of the county treasury on the allowance of the board of supervisors, when the state fails in the prosecution, or the person is convicted but is not able to pay the costs.
(d) For other service, the same fees allowed sheriffs for similar services.
(e) For service as a bailiff in any court in a civil case, to be paid by the county on allowance of the court on issuance of a warrant therefor, an amount equal to the amount provided under Section 19-25-31 for each day, or part thereof, for which he serves as bailiff when the court is in session.
(f) For serving all warrants and other process and attending all trials in state cases in which the state fails in the prosecution, to be paid out of the county treasury on the allowance of the board of supervisors without itemization, subject, however, to the condition that the marshal or constable must not have overcharged in the collection of fees for costs, contrary to the provisions of this section, annually . . . . . $ 2,500.00
(2) Marshals and constables shall be paid all uncollected fees levied under subsection (1) of this section in full from the first proceeds received by the court from the guilty party or from any other source of payment in connection with the case.
(3) In addition to the fees authorized to be paid to a constable under subsection (1) of this section, a constable may receive payments for collecting delinquent criminal fines in justice court pursuant to the provisions of Section 19-3-41(3).

Mississippi Attorney General's opinions:

Bailiff fees.
"A constable is paid for each day, or part thereof, for civil and criminal cases, regardless of the number of judges he or she serves as bailiff for that day. Thus, a constable, serving as bailiff, may receive a fee of $55.00 for attending each day or portion of a day in a civil case and may receive a fee of $55.00 for attending each day or portion of a day for attending a criminal case on the same day for a combined total of $110.00 if serving as a bailiff in both a civil case and criminal case on the same day." Op. Atty. Gen. White, May 13, 2020.

Paid from first proceeds received.
"[A] constable is entitled to his fees from the first proceeds received by the court on each case." Op. Atty. Gen. Busby, July 23, 2004.

If defendant is indigent.
"Mississippi Code Annotated Section 25-7-27(2) provides that if a defendant is found guilty and assessed a fine and court costs, the first proceeds collected from the defendant go to pay the constable's fees. If the defendant is indigent and cannot pay any costs, the defendant should be put on a work program to work off the fines and costs and as a result, the constable will not collect a fee." Op. Atty. Gen. Moore, July 20, 2001.

CHAPTER 16

ENFORCING CRIMINAL JUDGMENTS

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1600 COLLECTING FINES, COSTS AND ASSESSMENTS

Successful collection programs:

Studies show that collections are more successful when:

- fines are set properly,
- collection procedures are clear and encourage prompt payment,
- enforcement efforts are consistent and compel timely payments, and
- sentencing permits the imposition of nonfinancial and noncustodial alternatives for indigent defendants.

Tools for an effective collection system include:

- Assessing fines at an amount that is realistically payable considering the defendant's income and assets.

- Shortening time periods for payment by collecting all or part on the date of sentence, minimizing installment payments, and taking into account the defendant's financial resources when imposing a payment schedule.

- Explaining to a defendant how and where to make payments and the consequences of defaulting in payments.

- Using incentives to encourage prompt payment.

- Using collection procedures which ensure a timely response to nonpayment through notifications and warrants, impose effective sanctions for non-compliance, and establish sound financial control.

See Steve Bouch, National Center for State Courts, Key Elements of a Successful Collection Program and Self-Assessment (1994); John Matthias, National Center for State Courts, Tools Available for Effective Collection (1994); *see also* Wallace v. State, 607 So. 2d 1184, 1188 (Miss. 1992) ("As a general rule, sentencing is purely a matter of trial court discretion so long as the sentence imposed lies within the statutory limits.").

Explaining policies on collections:

A copy of the court's policy on the payment of fines should be given to the defendant to read and sign. The court should discuss its contents to make sure the defendant understands how and where to make payments and the consequences of defaulting in payments. Various methods of payment include cash, money orders, cashiers checks, and certified checks.

§ 9-11-27 Clerk may refuse personal check for payment:

The clerk or deputy clerks may refuse to accept a personal check in payment of any fine or cost or to satisfy any other payment required to be made to the justice court.

§ 17-25-1 Credit or debit cards:

The board of supervisors of any county and the governing authorities of any municipality may allow the payment of various taxes, fees and other accounts receivable to the county or municipality, and the payment for retail merchandise sold by the county or municipality, by credit cards, charge cards, debit cards and other forms of electronic payment, in accordance with policies established by the State Auditor. Except as otherwise provided in this section, any fees or charges associated with the use of such electronic payments shall be assessed to the user of the electronic payment as an additional charge for processing the electronic payment, so that the user will pay the full cost of using the electronic payment. However, a county or municipality shall not charge the user any additional amount above the processing fee on each transaction. For purposes of this section, the term "accounts receivable" includes, but is not limited to, judgments, fines, costs and penalties imposed upon conviction for criminal and traffic offenses. A county or municipality may bear the full cost of processing such electronic payments for retail merchandise sold by the county or municipality.

§ 63-9-12 Personal checks:

Personal checks shall be accepted from Mississippi residents in payment of any fine imposed as a result of a violation of Chapters 3, 5 and 7 of Title 63, Mississippi Code of 1972. The person accepting a check in payment of such a fine shall not be liable if such check is returned not paid provided he makes reasonable efforts to collect the fine.

§ 99-19-73 Collecting assessments:

(10)(a) After a determination by the court of the amount due, it shall be the duty of the clerk of the court to promptly collect all state assessments imposed under the provisions of this section. The state assessments imposed under the provisions of this section may not be paid by personal check.

See also Miss. Code Ann. § 9-21-9(m) ("The Administrative Director of Courts shall have the following duties and authority with respect to all courts in addition to any other duties and responsibilities as may be properly assigned by the Supreme Court: . . . (m) To take necessary steps in the collection of unpaid court costs, fines and forfeitures;").

§ 99-37-13 Collecting fines and costs:

A default in the payment of a fine or costs or failure to make restitution or any installment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine or restitution shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine or restitution has actually been collected.

Mississippi Attorney General's opinion:

Enrollment of unpaid fines.
"[Section 99-37-13] statute does not contemplate the timing for an enrollment, but states only that a court has the authority to collect unpaid fines by any means as authorized by law. It is, therefore, the opinion of this office that the court should not enroll the judgment until there has been a default in the payment of fines, costs, or restitution payments. . . . The fact that a defendant is determined to be indigent would not prohibit the enrollment of the judgment. Any determination that the defendant is indigent would only affect the ability of the court to incarcerate the defendant for failure to pay a fine." Op. Atty. Gen. Bryan, June 26, 2020.

Collection of justice court fines.
"Based on [Section 99-37-13], it is the opinion of this office that a justice court has the authority to issue a garnishment to collect a fine that has been imposed upon a conviction of a traffic offense but has not been paid by the offender. It should be noted that failure to appear for a hearing on a traffic offense does not automatically result in a conviction against the defendant. A conviction may be obtained by trying the defendant in absentia if he fails to appear for the hearing. It must also be noted that a judge is not mandated to issue a garnishment in such situations." Op. Atty. Gen. Fillingane (October 5, 2001).

Use of a garnishment to collect outstanding fines and court cost.
"It is the opinion of this office that it would not be necessary for the Justice Court to commence a civil action to obtain a judgment, but that the Justice Court may rely on the conviction and sentence i.e. fine and cost to constitute the judgment in which the garnishment will be predicated." Op. Atty. Gen. Fondren (March 23, 1989).

§ 15-1-51 Statutes of limitation:

Statutes of limitation in civil cases shall not run against the state, or any subdivision or municipal corporation thereof, except that any judgment or decree rendered in favor of the state, or any subdivision or municipal corporation thereof, shall not be a lien on the property of the defendant therein for a longer period than seven (7) years from the date of filing notice of the lien, unless an action is brought before the expiration of such time or unless the state or such subdivision or municipal corporation refiles notice of the lien. There shall be no limit upon the number of times that the state, or any subdivision or municipal corporation

thereof, may refile such notices of lien.

Mississippi Attorney General's opinions:

No statute of limitations against the state under Section 15-1-15.
"There is no statute of limitations against the state pursuant to Section 15-1-51 of the Mississippi Code. However, there is no lien on the property of the defendant for a longer period than seven years from the date of filing notice of the lien on the judgment rolls, unless an action is brought before that time or the judgment has been renewed." Op. Atty. Gen. Ray, November 14, 2011.

§ 19-3-41 Contracting with an attorney or collection agency:

(2) The board of supervisors of any county, in its discretion, may contract with a private attorney or private collection agent or agency to collect any type of delinquent payment owed to the county including, but not limited to, past-due fees, fines and assessments, delinquent ad valorem taxes on personal property and delinquent ad valorem taxes on mobile homes that are entered as personal property on the mobile home rolls, collection fees associated with the disposal or collection of garbage, rubbish and solid waste, or with the district attorney of the circuit court district in which the county is located to collect any delinquent fees, fines and other assessments. Any such contract may provide for payment contingent upon successful collection efforts or payment based upon a percentage of the delinquent amount collected; however, the entire amount of all delinquent payments collected shall be remitted to the county and shall not be reduced by any collection costs or fees. There shall be due to the county from any person whose delinquent payment is collected pursuant to a contract executed under this subsection an amount, in addition to the delinquent payment, of not to exceed twenty-five percent (25%) of the delinquent payment for collections made within this state and not to exceed fifty percent (50%) of the delinquent payment for collections made outside of this state. However, in the case of delinquent fees owed to the county for garbage or rubbish collection or disposal, only the amount of the delinquent fees, which may include an additional amount not to exceed up to One Dollar ($1.00) or ten percent (10%) per month, whichever is greater, on the current monthly bill on the balance of delinquent monthly fees as prescribed under Sections 19–5–21 and 19–5–22, may be collected and no amount in addition to such delinquent fees may be collected if the board of supervisors of the county has notified the county tax collector under Section 19–5–22 for the purpose of prohibiting the issuance of a motor vehicle road and bridge privilege license tag to the person delinquent in the payment of such fees. Any private attorney or private collection agent or agency contracting with the county under the provisions of this subsection shall give bond or other surety payable to the county in such amount as the board of supervisors deems sufficient. Any private attorney with whom the county contracts under the provisions of this subsection must be a member in good standing of The Mississippi Bar. Any private collection agent or agency with whom the county contracts under the provisions of this subsection must meet all licensing requirements for doing business in the State of Mississippi. Neither the county nor any officer or employee of the county

shall be liable, civilly or criminally, for any wrongful or unlawful act or omission of any person or business with whom the county has contracted under the provisions of this subsection. The Mississippi Department of Audit shall establish rules and regulations for use by counties in contracting with persons or businesses under the provisions of this subsection.

1601 STATUTES AUTHORIZING THE JUDGE TO SUSPEND A SENTENCE OR TO SUSPEND THE EXECUTION OF A SENTENCE

§ 99-19-25

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. 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. Provided, the suspension of imposition or execution of a sentence hereunder may not be revoked after a period of two (2) years. Provided, however, the justice courts in cases arising under Sections 49-7-81, 49-7-95 and the Implied Consent Law shall not suspend any fine.

§ 99-19-20

(1) Except as otherwise provided under Section 99-19-20.1, when any court sentences a defendant to pay a fine, the court may order (a) that the fine be paid immediately, or (b) that the fine be paid in installments to the clerk of the court or to the judge, if there be no clerk, or (c) that payment of the fine be a condition of probation, or (d) that the defendant be required to work on public property for public benefit under the direction of the sheriff for a specific number of hours, or (e) any combination of the above.
(2) Except as otherwise provided under Section 1 of [House Bill 387], the defendant may be imprisoned until the fine is paid if the defendant is financially able to pay a fine and the court so finds, subject to the limitations provided under this section. The defendant shall not be imprisoned if the defendant is financially unable to pay a fine and so states to the court in writing, under oath, after sentence is pronounced, and the court so finds, except if the defendant is financially unable to pay a fine and such defendant failed or refused to comply with a prior sentence as specified in subsection (1) of this section, the defendant may be imprisoned.
This subsection shall be limited as follows:
(a) In no event shall such period of imprisonment exceed one (1) day for each One

Hundred Dollars ($100.00) of the fine.
(b) If a sentence of imprisonment, as well as a fine, were imposed, the aggregate of such term for nonpayment of a fine and the original sentence of imprisonment shall not exceed the maximum authorized term of imprisonment.
(c) It shall be in the discretion of the judge to determine the rate of the credit to be earned for work performed under subsection (1)(d), but the rate shall be no lower than the rate of the highest current federal minimum wage.
(3) Periods of confinement imposed for nonpayment of two (2) or more fines shall run consecutively unless specified by the court to run concurrently.

§ 99-37-5

(2) When a defendant sentenced to pay a fine or costs or ordered to make restitution is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs or the making of restitution a condition of probation or suspension of sentence. Such offenders shall make restitution payments directly to the victim. As an alternative to a contempt proceeding under sections 99-37-7 through 99-37-13, the intentional refusal to obey the restitution order or a failure by a defendant to make a good faith effort to make such restitution may be considered a violation of the defendant's probation and may be cause for revocation of his probation or suspension of sentence.

1602 COURT ACTION UPON FAILURE OF DEFENDANT TO PAY FINE, RESTITUTION, AND/OR COURT COSTS

MRCrP 26.6

(d) Court Action upon Failure of Defendant to Pay Fine, Restitution, and/or Court Costs. Upon the defendant's failure to pay a fine, restitution, and/or court costs, the court first must require the defendant to appear and show cause why said defendant should not be held in contempt of court. A summons requiring the defendant's appearance shall be personally served on the defendant and shall set forth the time and location of the hearing. If the defendant fails to appear, the court may issue a warrant for the defendant's arrest. During the hearing, the court shall inquire and cause an investigation to be made into the reasons for nonpayment, including whether nonpayment was willful or due to indigency or economic inability to pay. In that review:

> (1) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment, or revoking the fine or order of restitution or the unpaid portion thereof in whole or in part. However, the court shall not suspend or reduce an assessment imposed pursuant to Mississippi Code Section 99-19-73.

(2) If the court finds nonpayment is willful and finds the defendant in contempt of court, the court may direct that the defendant be incarcerated until the unpaid obligation is paid, subject, however, to section (e).

(e) Incarceration for Nonpayment of Fine, Restitution, and/or Court Costs.

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution, and/or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant could have made payment but refused to do so. In justice and municipal court, such finding shall be included in the court's order.

(2) After consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of any incarceration, subject to the limitations set by statute.

(3) If, at the time the fine, restitution and/or court costs was ordered, a sentence of incarceration was also imposed, the aggregate of the period of incarceration imposed pursuant to this Rule and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense.

Comment to Rule 26.6 provides in part:

Section (d) outlines the court's authority to inquire into and address non-payment or non-compliance, through contempt and other means, and provides reasonable alternatives to automatic incarceration. Section (d)(1) generally follows Mississippi Code Section 99-37-11, while section (d)(2) follows Mississippi Code Section 99-19-20(2). The court may address contempt by any other means provided by statute. See, e.g., Miss. Code § 99-19-65 (clerk's issuance of execution of any portion remaining unpaid). Nothing in Rule 26.6 precludes, in an appropriate case, proceeding pursuant to Rule 27.
Section (e) governs incarceration for non-payment and limits incarceration to instances in which the defendant could have satisfied payment but refused to do so. A defendant should not be imprisoned automatically when alternative methods are available. See Bearden v. Georgia, 461 U.S. 660, 672, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983); Tate v. Short, 401 U.S. 395, 91 S. Ct. 668, 28 L. Ed. 2d 130 (1971) (denial of equal protection to limit punishment to payment of a fine for those who are able to pay, but to convert the fine to imprisonment for those who are unable to pay). Further, the period of incarceration, if any, is subject to Mississippi Code Sections 99-19-20 and 99-37-9. Section (e)(3) follows Mississippi Code Section 99-19-20(2)(b) and Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970), which forbid imprisonment of an indigent defendant for non-payment beyond the maximum sentence authorized for the offense.

Case law:

Alabama v. Shelton, 535 U.S. 654, 662 (2002) ("Where the State provides no counsel to an indigent defendant, does the Sixth Amendment permit activation of a suspended sentence upon the defendant's violation of the terms of probation? We conclude that it does not.").

Bearden v. Georgia, 461 U.S. 660, 672 (1983) ("If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.").

Cassibry v. State, 453 So. 2d 1298, 1299 (Miss. 1984) ("[I]t is established beyond per adventure that an indigent may not be incarcerated because he is financially unable to comply with an otherwise lawfully imposed sentence of a fine.").

Williams v. State, 409 So.2d 1331, 1332 (Miss. 1982) ("It is a narrow inquiry; the process [of a revocation hearing] should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."). p

Boone v. State, 148 So. 3d 377, 380 (Miss. Ct. App. 2014) ("Because Boone 'willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay,' the trial court was not required to consider alternative sentencing.").

McClinton v. State, 799 So. 2d 123, 127 (Miss. Ct. App. 2001) ("McClinton did not claim inability to pay or indigence as a defense at the revocation hearing. It should also be noted that his probation was revoked on three other grounds, namely: failure to regularly report, refusal to submit to chemical analysis and criminal misconduct.").

§ 99-19-20.1 Required hearing before incarcerating a defendant for nonpayment of a fine, restitution, or court costs:

(1) Incarceration shall not automatically follow the nonpayment of a fine, restitution or court costs. Incarceration may be employed only after the court has conducted a hearing and examined the reasons for nonpayment and finds, on the record, that the defendant was not indigent or could have made payment but refused to do so. When determining whether a person is indigent, the court shall use the current Federal Poverty Guidelines and there shall be a presumption of indigence when a defendant's income is at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, subject to a review of his or her assets. A defendant at or below one hundred twenty-five percent (125%) of the Federal Poverty Guidelines without substantial liquid assets available to pay fines, fees, and costs shall be deemed indigent. In determining whether a defendant has substantial liquid assets, the judge shall not consider up to Ten Thousand Dollars

($10,000.00) in tangible personal property, including motor vehicles, household goods, or any other assets exempted from seizure under execution or attachment as provided under Section 85–3–1. If the defendant is above one hundred twenty-five percent (125%) of the Federal Poverty Guidelines, the judge shall make an individualized assessment of his or her ability to pay based on the totality of the circumstances including, but not limited to, the defendant's disposable income, financial obligations and liquid assets. If the judge determines that a defendant who claims indigence is not indigent and the defendant could have made payment but refused to do so, the case file shall include a written explanation of the basis for the determination of the judge. In justice and municipal court, such finding shall be included in the court's order.

(2) If it appears to the satisfaction of the court that nonpayment is not willful, the court shall enter an order that allows the defendant additional time for payment, reduces the amount of each installment, revokes the fine, in whole or in part, or allows the defendant to perform community service at the state minimum wage per hour rate. If the court finds nonpayment is willful after consideration of the defendant's situation, means, and conduct with regard to the nonpayment, the court shall determine the period of incarceration, if any, subject to the limitations set by law and subsection (3) of this section.

(3) If at the time the fine, restitution or court cost is ordered, a sentence of incarceration is also imposed, the aggregate total of the period of incarceration imposed pursuant to this section and the term of the sentence originally imposed may not exceed the maximum term of imprisonment authorized for the offense.

(4) A minor who is to serve as a confidential informant must be notified that the minor has the right to contact one (1) or both parents.

1603 RULES ON REVOKING PROBATION

MRCrP 27.1 Initiation of revocation proceedings; securing the probationer's presence:

(a) Initiation of Revocation Proceedings. If a probationer has violated a condition of probation or has acted contrary to a lawful instruction issued by the supervising officer, the supervising officer or the prosecuting attorney may petition the sentencing court to revoke or modify probation.

(b) Securing the Probationer's Presence. Pursuant to a petition to revoke or modify, the sentencing court may, when appropriate, issue a warrant for the probationer's arrest or issue a summons directing the probationer to appear on a specified date for a revocation hearing.

(c) Arrest by Supervising Officer. The probationer may be arrested without a warrant by

the supervising officer responsible for the probationer's supervision or by the officer's agent, pursuant to statute, for violation of a condition of probation imposed or an instruction issued.

MRCrP 27.2 Preliminary hearing after arrest:

Whenever a probationer is arrested for an alleged violation of probation, an informal preliminary hearing shall be conducted as prescribed by statute.

MRCrP 27.3 Revocation of probation:

(a) Hearing. A hearing to determine whether probation should be revoked shall be held before the sentencing court, as prescribed by statute.

(b) Summary Disposition. The probationer may waive the hearing prescribed by Rule 27.3(a) and the sentencing court may make a final disposition of the issue, if:

(1) the probationer has been given sufficient notice of the charges and sufficient notice of the evidence to be relied upon; and

(2) the probationer admits, under the requirements of Rule 27.3(e), commission of the alleged violation.

(c) Presence. The probationer is entitled to be present at the hearing.

(d) Counsel.

(1) The probationer may be represented by retained counsel.
(2) Counsel shall be appointed to represent an indigent probationer if the probationer makes a colorable claim that:

(A) the probationer has not committed the alleged violation of the conditions of probation or the instructions issued by the supervising officer; or

(B) even when the violation is a matter of public record or is uncontested, there are substantial reasons that justify or mitigate the violation and make revocation inappropriate, and those reasons are complex or otherwise difficult to develop or present.

(e) Admissions by the Probationer. Before accepting an admission by a probationer that the probationer has violated a condition of probation or a lawful instruction issued by the supervising officer, the court shall determine that the probationer understands the following:

(1) the nature of the violation to which an admission is offered;

(2) the right to be represented by counsel as provided by Rule 27.3(d);

(3) the right to testify and to present witnesses and other evidence on the probationer's own behalf and to cross-examine adverse witnesses under subsection (f)(1); and

(4) that, if the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer may still be tried for that offense and, although the probationer may not be required to testify, that any statement made by the probationer at the present proceeding may be used against the probationer at a subsequent proceeding or trial.

The court shall also determine that the probationer waives these rights, that the admission is voluntary and not the result of force, threats, coercion, or promises, and that there is a factual basis for the admission.

(f) Nature of the Hearing.

(1) The judge must find by a preponderance of the evidence that a violation of the conditions of probation or the instructions occurred. Each party shall have the right to present evidence and the right to confront and cross-examine adverse witnesses who appear and testify in person. The court may receive any reliable, relevant evidence not legally privileged, including hearsay.

(2) If the alleged violation involves a criminal offense for which the probationer has not yet been tried, the probationer shall be advised at the beginning of the revocation hearing that, regardless of the outcome of the revocation hearing, the probationer may still be held for that offense and that any statement made by the probationer at the hearing may be used against the probationer at a subsequent proceeding or trial.

(3) In cases involving breach of a condition of probation because of nonpayment of a fine, restitution, or court costs, incarceration shall not automatically follow nonpayment. Incarceration may be employed only after the court has examined the reasons for nonpayment and finds, on the record, that the probationer could have satisfied payment but refused to do so.

(g) Disposition. If the judge finds that a violation of the conditions of probation or lawful instructions occurred, it may revoke, modify, or continue probation.

(h) Record. The judge shall make a written statement or state for the record the evidence relied upon, and the reasons for, revoking probation.

MRCrP 27.4 Other proceedings:

Proceedings to revoke or modify any other suspended sentence or period of post-release supervision shall be conducted in accordance with Rule 27.

1604 PURGING JUDGMENT ROLLS OF FINES AND FEES

§ 9-1-47 Of fines and fees owed by deceased person:

The municipal and justice courts are authorized to purge judgment rolls of all fines and fees owed by any deceased person upon presentation of proof that the person liable for such fines or fees is deceased.

CHAPTER 17

DUI

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1700 TRAFFIC STOPS

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1701 PROBABLE FOR DUI ARRESTS

When an officer may make an arrest:

"If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

What is probable cause?

Probable cause arises when the facts and circumstances within the officer's knowledge, including any reasonably trustworthy information, are sufficient to justify a person of average caution in the belief that a crime has been committed and that a particular person committed it. *See* Beck v. Ohio, 379 U.S. 89 (1964); Bevill v. State, 556 So. 2d 699 (Miss. 1990); Strode v. State, 231 So. 2d 779, 782 (Miss. 1970); Passman v. State, 937 So. 2d 17 (Miss. Ct. App. 2006). It is more than a bare suspicion, but less than needed for a conviction. *See* Brinegar v. U.S., 338 U.S. 160, 174-176 (1949).

Probable cause determined from the totality of the circumstances:

Probable cause is determined from the totality of the circumstance on a case by case basis. Young v. City of Brookhaven, 693 So. 2d 1355, 1361 (Miss. 1997). The key inquiry is "whether a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the officer possessed." Anderson v. Creighton, 483 U.S. 635 (1987).

The following are appropriate considerations for probable cause:

- The smell of alcohol emanating from inside the car. *See* Dale v. State, 785 So. 2d 1102, 1107 (Miss. Ct. App. 2001).
- Poor performance of field sobriety tests. *See* Edwards v. State, 795 So. 2d 554, 563 (Miss. Ct. App. 2001).
- Stumbling, slurring, or staggering. *See* McDonald v. City Of Aberdeen, 906 So. 2d 774, 776 (Miss. Ct. App. 2004).
- Glassy and bloodshot eyes. *See* Saucier v. City of Poplarville, 858 So. 2d 933, 935 (Miss. Ct. App. 2003).
- Admission of drinking. *See* Mayo v. State, 843 So. 2d 739, 742 (Miss. Ct. App. 2003).
- Open container of intoxicating substance. *See* Watson v. State, 835 So. 2d 112, 116 (Miss. Ct. App. 2003).

- Erratic driving. *See* McDuff v. State, 763 So. 2d 850, 855 (Miss. 2000).
- Expired tag. *See* Platt v. State, 151 So. 3d 236, 240 (Miss. 2014).

Field sobriety tests as a basis for probable cause:

An officer may request a motorist suspected of driving under the influence of alcohol or drugs to perform field sobriety tests. *See* Pennsylvania v. Bruder, 488 U.S. 9, 11 (1988). "Probable cause to administer a field sobriety test can be the basis of probable cause to arrest and administer a breath test." Saucier v. City of Poplarville, 858 So. 2d 933, 935 (Miss. Ct. App. 2003).

There two different types of field sobriety tests:

- psychophysical tasks; and
- scientific field sobriety tests.

Psychophysical tasks.

Psychophysical tasks are simple exercises allowing an officer to observe if the driver is slurring words, stumbling, staggering, or otherwise appearing intoxicated or impaired. *See* Young v. City of Brookhaven, 693 So. 2d 1355, 1360 (Miss. 1997); Capler v. City of Greenville, 207 So. 2d 339, 340 (Miss. 1968). Common psychophysical tasks include, but are not limited to, the following:

- walking a straight line;
- standing on one leg;
- finger-count; and
- finger-to-nose.

The officer's observations of such tasks are admissible to show probable cause to arrest and administer a breath test and, at trial, as proof of intoxication. *See* Edwards v. State, 795 So. 2d 554, 563 (Miss. Ct. App. 2001); Graves v. State, 761 So. 2d 950, 955 (Miss. Ct. App. 2000).

Scientific field sobriety tests:

Horizontal Gaze Nystagmus and the portable breath test are scientific tests. These tests are admissible, within the sound discretion of the judge, to show probable cause to arrest and administer a breath test, but not as evidence of DUI. *See* Young v. City of Brookhaven, 693 So. 2d 1355, 1360-61 (Miss. 1997); Graves v. State, 761 So. 2d 950, 954 (Miss. Ct. App. 2000); Price v. State, 752 So. 2d 1070, 1077 (Miss. Ct. App. 1999).

Form of ticket, citation, or affidavit under Implied Consent Law:

(4) The traffic ticket, citation or affidavit issued to a person arrested for a violation of this chapter shall conform to the requirements of Section 63-9-21(3)(b), and, if filed

electronically, shall conform to Section 63-9-21(8).

1702 DEFINITIONS UNDER IMPLIED CONSENT LAW

§ 63-11-3 Definitions

The following words and phrases shall have the meaning ascribed herein, unless the context clearly indicates otherwise:

(a) "Driving privilege" or "privilege" means both the driver's license of those licensed in Mississippi and the driving privilege of unlicensed residents and the privilege of nonresidents, licensed or not, the purpose of this section being to make unlicensed and nonresident drivers subject to the same penalties as licensed residents.

(b) "Community service" means work, projects or services for the benefit of the community assigned, supervised and recorded by appropriate public officials.

(c) "Chemical test" means an analysis of a person's blood, breath, urine or other bodily substance for the determination of the presence of alcohol or any other substance which may impair a person's mental or physical ability.

(d) "Refusal to take breath, urine and/or blood test" means an individual declining to take a chemical test, and/or the failure to provide an adequate breath sample as required by the Implied Consent Law when requested by a law enforcement officer.

(e) "Alcohol concentration" means either grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath.

(f) "Qualified person to withdraw blood" means any person who has been trained to withdraw blood in the course of their employment duties including but not limited to laboratory personnel, phlebotomist, emergency medical personnel, nurses and doctors.

(g) "Victim impact panel" means a two-hour seminar in which victims of DUI accidents relate their experiences following the accident to persons convicted under the Implied Consent Law. Paneling programs shall be based on a model developed by Mothers Against Drunk Driving (MADD) victim panel or equivalent program approved by the court.

(h) "Booked" means the administrative step taken after the arrested person is brought to the police station, which involves entry of the person's name, the crime for which the arrest was made, and other relevant facts on the police docket, and which may also include photographing, fingerprinting, and the like.

See also Miss. Code Ann. § 63-11-5(6) ("The Commissioner of Public Safety and the

Mississippi Forensics Laboratory created pursuant to Section 45-1-17 are authorized to adopt procedures, rules and regulations applicable to the Implied Consent Law.").

1703 ADMINISTERING CHEMICAL TESTS FOR ALCOHOL OR DRUGS

§ 63-11-5 Implied consent to tests:

(1)(a) Any person who operates a motor vehicle upon the public highways, public roads and streets of this state shall be deemed to have given his consent, subject to the provisions of this chapter, to a chemical test or tests of his breath, blood or urine for the purpose of determining alcohol concentration. A person shall give his consent to a chemical test or tests of his breath, blood or urine for the purpose of determining the presence in his body of any other substance which would impair a person's ability to operate a motor vehicle.

Chemical tests that may be requested:

The Implied Consent Law allows not only a chemical test or tests of a person's breath, but also blood or urine tests. All three methods are valid tests for determining whether a person is DUI. *See* Fulton v. City of Starkville, 645 So. 2d 910, 913-914 (Miss. 1994).

§ 63-11-5 Tests administered upon reasonable grounds and probable cause:

(1)(b) The test or tests shall be administered at the direction of any authorized officer, when such officer has reasonable grounds and probable cause to believe that the person was driving or had under his actual physical control a motor vehicle upon the public streets or highways of this state while under the influence of intoxicating liquor or any other substance which had impaired such person's ability to operate a motor vehicle.

§ 63-11-5 Who is authorized to administer tests

(2)(a) A breath analysis test must be administered by a person who has met all the educational and training requirements of the appropriate course of study prescribed by the Board on Law Enforcement Officers Standards and Training; however, sheriffs and elected chiefs of police are exempt from the educational and training requirement. A breath analysis test must not be given to any person within fifteen (15) minutes of consumption of any substance by mouth.

(b) For purposes of this section, the term "authorized officer" means any highway patrol officer, sheriff or his duly commissioned deputies, police officer in any incorporated municipality, national park ranger, officer of a state-supported institution of higher learning campus police force if such officer is exercising this authority in regard to a violation that occurred on campus property, or security officer appointed and commissioned pursuant to the Pearl River Valley Water Supply District Security Officer

Law of 1978 if such officer is exercising this authority in regard to a violation that occurred within the limits of the Pearl River Valley Water Supply District.

§ 63-11-5 Observation period:

(2)(a) . . . A breath analysis test must not be given to any person within fifteen (15) minutes of consumption of any substance by mouth.

See Rhymer v. State, 176 So. 3d 104, 107 (Miss. Ct. App. 2015) ("Deputy Cook testified that Rhymer did not consume any foods or liquids between the time of the traffic stop and the breath test. . . . Although conflicting testimony was presented about whether Rhymer had tobacco in his mouth at the time Deputy Cook administered the breath test, the circuit court judge determined Deputy Cook's testimony to be the most credible.").

Note: The Mississippi Department of Public Safety Guidelines and the Intoxilyzer 8000 Implied Consent Policies and Procedures Manual require that the person be observed for 20 minutes immediately before any breath sample is taken. This 20-minute observation period does not require that a single officer observe the person being tested, but only that "the person being tested has been observed" for 20 minutes immediately prior to collecting the breath sample. *See* Gore v. State, 168 So.3d 1097, 1099 (Miss. Ct. App. 2013); Dominick v. State, 108 So. 3d 452, 455 (Miss. Ct. App. 2012); Hudspeth v. State, 28 So. 3d 600, 603 (Miss. Ct. App. 2009).

§ 63-11-5 Officer to inform of consequences for refusal:

(3) If the officer has reasonable grounds and probable cause to believe such person to have been driving a motor vehicle upon the public highways, public roads, and streets of this state while under the influence of intoxicating liquor or any other substance that has impaired the person's ability to operate a motor vehicle, the officer shall inform the person that his failure to submit to such chemical test or tests of his breath, blood or urine shall result in the suspension of his privilege to operate a motor vehicle upon the public streets and highways of this state for a period of ninety (90) days if the person has not previously been convicted of a violation of Section 63-11-30, or, for a period of one (1) year if the person has a prior conviction under Section 63-11-30.

§ 63-11-5 Informing of right to telephone for legal or medical assistance:

(5) Any person arrested under the provisions of this chapter shall be informed that he has the right to telephone for the purpose of requesting legal or medical assistance immediately after being booked for a violation under this chapter.

No duty to notify person of the right to an independent test:

There is no obligation to inform of Implied Consent rights beyond those specifically delineated by the legislature. An officer does not need to give notification of the right to an independent test. Moreover, a defendant's failure or inability to obtain an additional

test does not preclude the admissibility of the test taken by the officer:

> Because [section 63-11-13] does not impose an affirmative duty on law enforcement to give notification of the right to an independent test, and Green is presumed to know his rights under the law, and was given the opportunity to obtain legal assistance, this Court holds that there is no merit to Green's claim that the results of the intoxilyzer test administered by Officer McLaurin should be suppressed.

Green v. State, 710 So. 2d 862, 869 (Miss. 1998).

§ 63-11-41 Refusal admissible as evidence:

If a person under arrest refuses to submit to a chemical test under the provisions of this chapter, evidence of refusal shall be admissible in any criminal action under this chapter.

Refusal to submit to an intoxilyzer test may be considered as evidence of guilt. Brewer v. State, 812 So. 2d 1153, 1155 (Miss. Ct. App. 2002). It is considered physical instead of testimonial evidence:

> The very nature of a drunk driving charge makes it critical for the State to obtain the necessary evidence before that evidence dissipates with time. Therefore, the penalty of introducing the refusal serves an important state interest in encouraging defendants to take the test. And as the refusal is physical instead of testimonial, its introduction into evidence violates neither the Fifth Amendment nor § 26.

Ricks v. State, 611 So. 2d 212, 216 (Miss. 1992).

See also Schlepphorst v. State, 201 So. 3d 517 (Miss. Ct. App. 2016) ("A urine test constitutes a chemical test under the statute. His refusal of the urine test is admissible under the statute."); Fancher v. State, 185 So. 3d 1066, 1068 (Miss. Ct. App. 2016) ("[R]efusal to submit to an Intoxilyzer test does not, by itself, substantiate a DUI conviction. Rather, credible evidence on the whole must establish beyond a reasonable doubt that a defendant had consumed either intoxicating liquor or another substance and that the consumption impaired the defendant's ability to operate a motor vehicle.").

DUI ticket is notice of misdemeanor DUI:

The DUI ticket is notice of DUI, whether common law or per se, despite which particular box is checked. *See* Deloach v. City of Starkville, 911 So. 2d 1014, 1018 (Miss. Ct. App. 2005) ("[We] find the argument to be without merit that the State failed to mark both box (a) and (c) since the charge of DUI is the same regardless of the State's method of proving it."). DUI is the charged offense:

> Leuer refused the intoxilyzer according to Officer Harper, and Leuer testified contrarily that the machine would not register. The record reveals that no test results were obtained. Since no BAC analysis was available, subsection (1)(a) is the offense committed as it is a different method of proving the same crime - DUI.

Leuer v. City of Flowood, 744 So. 2d 266, 269 (Miss. 1999).

Indictment is the charging instrument for felony DUI:

An indictment, not a traffic citation, is the charging instrument for felony DUI. *See* Williams v. State, 708 So. 2d 1358, 1364 (Miss. 1998) ("Section 27 of the Mississippi Constitution requires that a grand jury return an indictment before a prosecution for a felony may be had.").

§ 63-11-39 Reduction of charges prohibited:

The court having jurisdiction or the prosecutor shall not reduce any charge under this chapter to a lesser charge.

See also Ostrander v. State, 803 So. 2d 1172, 1176 (Miss. 2002) ("The sole function of § 63-11-39 is to prohibit reduction of DUI charges to non-DUI charges."); Mississippi Commission on Judicial Performance v. Chinn, 611 So. 2d 849, 853 (Miss. 1992) ("The statutes do not allow a judge to reduce a DUI to reckless driving.").

§ 63-11-30 Variety of ways to prove DUI:

(1) It is unlawful for a person to drive or otherwise operate a vehicle within this state if the person:

> (a) Is under the influence of intoxicating liquor;
>
> (b) Is under the influence of any other substance that has impaired the person's ability to operate a motor vehicle;
>
> (c) Is under the influence of any drug or controlled substance, the possession of

which is unlawful under the Mississippi Controlled Substances Law; or

(d) Has an alcohol concentration in the person's blood, based upon grams of alcohol per one hundred (100) milliliters of blood, or grams of alcohol per two hundred ten (210) liters of breath, as shown by a chemical analysis of the person's breath, blood or urine administered as authorized by this chapter, of:

(i) Eight one-hundredths percent (.08%) or more for a person who is above the legal age to purchase alcoholic beverages under state law;

(ii) Two one-hundredths percent (.02%) or more for a person who is below the legal age to purchase alcoholic beverages under state law; or

(iii) Four one-hundredths percent (.04%) or more for a person operating a commercial motor vehicle.

See also:

Warwick v. State, 179 So. 3d 1069, 1074 (Miss. 2015) ("[The officers] presented detailed testimony supporting their opinions that Warwick had been driving under the influence of marijuana, and these opinions ultimately were corroborated by Warwick's blood tests.").

Parish v. State, 176 So. 3d 781, 786 (Miss. 2015) ("[The evidence] was sufficient to prove not only that Parish had ingested marijuana before driving, but that he was driving 'in a state of intoxication that lessens a person's normal ability for clarity and control.'").

Moore v. State, 151 So. 3d 200, 203 (Miss. 2014) *("*In the instant case, although it is unclear whether Moore argues that the intoxilyzer machine was not working properly or that he was unable to blow correctly due to a possible disability, Moore contends that his blood alcohol content has not been established. However, as outlined above, under common law DUI, an arrestee's blood alcohol level is not necessary.").

Young v. City of Brookhaven, 693 So. 2d 1355, 1358 (Miss. 1997) ("Miss. Code Ann. § 63-11-30 merely sets forth numerous methods of committing the same crime.").

Baughman v. State, 294 So. 3d 108, 113 (Miss. Ct. App. 2020) ("At trial, the State presented evidence that Baughman's eyes were bloodshot, he exhibited eyelid tremors during the Romberg test, he displayed a lack of convergence, and he did not successfully complete the walk-and-turn test or the one-leg-stand test. Our supreme court and this Court have found that similar evidence was sufficient to support a finding that the defendant was under the influence of marijuana. Furthermore, Jason testified that Baughman was the only person in the vehicle who smelled of marijuana and did not smell of alcohol. He also testified that he found a "burnt, green leafy-like substance" in a pipe that was found in Baughman's pocket and in a cigarillo that was found in his wallet. Nate testified that he smelled marijuana on Baughman's person as well. We find that this was sufficient evidence for any rational trier of fact to find that Baughman was guilty of being

under the influence of "any other substance.").

Huhn v. City of Brandon, 121 So. 3d 947, 950 (Miss. Ct. App. 2013) (discussing proof of common-law DUI).

***Johnston* three-prong test for admitting DUI test results:**

Intoxilyzer test results are deemed valid if performed:

- according to approved methods;
- by a person certified to do so; and
- on a machine certified to be accurate.

See McIlwain v. State, 700 So. 2d 586, 590 (Miss. 1997) ("Where one of the safeguards is deficient the State bears the burden of showing that the deficiency did not affect the accuracy of the result."); Johnston v. State, 567 So. 2d 237, 238 (Miss. 1990); Miller v. State, 152 So. 3d 1184, 1188 (Miss. Ct. App. 2014) ("Here, through the testimony of Trooper McBride, all three prongs of the test were satisfied. Trooper McBride testified as to the proper procedure he followed in administering the test; he testified that he was certified to operate the machine; and the certificate of calibration and Trooper McBride's certification were admitted into the record."); Ludwig v. State, 122 So. 3d 1229, 1232 (Miss. Ct. App. 2013) ("[I]f the calibration certificates bear the seal of the crime lab and the signature of the one attesting to the truth of their contents, then the certificates are considered self-authenticating.").

But this three-prong test only applies if DUI test results are being presented at trial to establish guilt. *See* Evans v. State, 93 So. 3d 62 (Miss. Ct. App. 2012) ("[Evans] refused . . . to take the test at the proper time. [Thus, whether the officer] possessed sufficient qualifications and certifications to administer breath-analysis tests is irrelevant.").

Further,

> [R]ecords pertaining to intoxilyzer inspection, maintenance, or calibration are indeed nontestimonial in nature, and thus, their admission into evidence is not violative of the Confrontation Clause of the Sixth Amendment.

Matthies v. State, 85 So. 3d 838, 844 (Miss. 2012).

But such only applies to intoxilyzer inspection, maintenance or calibration records, and not forensic laboratory reports containing a testimonial certification. *See* Bullcoming v. New Mexico, 131 S.Ct. 2705, 2710 (2011) ("The accused's right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.").

§ 63-11-30 Proving DUI 2nd offense:

(b) Second offense DUI. (i) Upon any second conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, the person shall be guilty of a misdemeanor, fined not less than Six Hundred Dollars ($600.00) nor more than One Thousand Five Hundred Dollars ($1,500.00), shall be imprisoned not less than five (5) days nor more than six (6) months and sentenced to community service work for not less than ten (10) days nor more than six (6) months. The minimum penalties shall not be suspended or reduced by the court and no prosecutor shall offer any suspension or sentence reduction as part of a plea bargain.
(ii) Suspension of commercial driving privileges is governed by Section 63-1-216.
(iii) Eligibility for an interlock-restricted license is governed by Section 63-11-31 and suspension of regular driving privileges is governed by Section 63-11-23.

The State must prove:

- the present DUI charge;
- the prior DUI conviction; and
- that the date of the prior DUI offense occurred within five years of the charged offense.

McCool v. State, 930 So. 2d 465, 467 (Miss. Ct. App. 2006); Heidelberg v. State, 976 So. 2d 948, 950 (Miss. Ct. App. 2007).

See also Smith v. State, 950 So. 2d 1056, 1058 (Miss. Ct. App. 2007) ("The [statutory phrase 'the offenses being committed within a period of five (5) years'] requires that the offenses must have been committed within a period of five years of each other, not the convictions."); Mason v. State, 799 So. 2d 884, 885 (Miss. Ct. App. 2001) ("[The record] fails to clearly reflect any evidentiary basis that prior convictions were ever formally put into evidence. Therefore, there is nothing . . . to support sentencing Mason as a DUI second time offender.").

Proof of prior DUI conviction and date of offense:

Proof of the prior DUI conviction and the date of the offense may be proved by putting into evidence a certified abstract or certified copy of the prior conviction or by a sworn written stipulation. *See* McIlwain v. State, 700 So. 2d 586, 589 (Miss. 1987) ("Abstracts of court records, when properly certified, are clearly allowed to prove prior convictions."); Nelson v. State, 69 So. 3d 50, 52-53 (Miss. Ct. App. 2011) ("The record shows that the abstract does not state the date of the offense. . . . However, the abstract . . . does include the date of arrest. As the State asserts, a reasonable juror could infer that the date of arrest for the DUI was the same date that the offense occurred.").

Such applies to out-of-state convictions, too:

> The abstracts in question in the present case were properly certified;

> therefore, it was permissible for them to be used . . . to prove [the] prior convictions. [T]he fact that the prior convictions occurred out-of-state does not affect their validity or applicability in Mississippi.

Watkins v. State, 910 So. 2d 591, 596 (Miss. Ct. App. 2005).

§ 63-11-30 Out-of-state prior convictions:

(7) Out–of–state prior convictions. Convictions in another state, territory or possession of the United States, or under the law of a federally recognized Native American tribe, of violations for driving or operating a vehicle while under the influence of an intoxicating liquor or while under the influence of any other substance that has impaired the person's ability to operate a motor vehicle occurring within five (5) years before an offense shall be counted for the purposes of determining if a violation of subsection (1) of this section is a second, third, fourth or subsequent offense and the penalty that shall be imposed upon conviction for a violation of subsection (1) of this section.

1705 DOUBLE JEOPARDY CONCERNS

Governing laws:

Fifth Amendment: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . ."

Art. 3 § 22 of the Mississippi Constitution: "No person's life or liberty shall be twice placed in jeopardy for the same offense; but there must be an actual acquittal or conviction on the merits to bar another prosecution."

See also United States v. Dinitz, 424 U.S. 600, 606 (1976) ("The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense.").

Prior conviction an element of a DUI 2nd offense:

A prior conviction is a necessary element of a DUI 2nd offense. Thus, proof of the prior conviction should be presented at trial–and not after the close of the evidence:

> In this case, the trial judge initially instructed the parties that proof of previous DUI convictions should be submitted after the close of the evidence. However, prior convictions are elements of a felony DUI charge. The same reasoning applies to charges of second-offense DUI. The prior conviction is a necessary element of second-offense DUI. Therefore, bifurcation in cases alleging DUI, second offense is improper.

Lyle v. State, 987 So. 2d 948, 950-51 (Miss. 2008).

If the defendant is charged with DUI second offense and the State fails to prove a prior DUI conviction, the court is required to give a directed verdict as to the DUI second offense. The prosecution, though, may still proceed on the lesser-included DUI first offense. *See* Ostrander v. State, 803 So. 2d 1172, 1177 (Miss. 2002). But if the judge dismisses the DUI charge without expressly limiting the directed verdict to only the DUI second offense, then double jeopardy attaches to both the DUI second offense and the lesser-included DUI first offense. *See* Jamison v. City of Carthage, 864 So. 2d 1050, 1053 (Miss. Ct. App. 2004) ("Although the municipal judge could have dismissed only that part of the affidavit charging DUI second and allowed the City to proceed on DUI first, the judge dismissed the entire DUI charge against Jamison. When the judgment was entered, jeopardy attached.").

Administrative driver's license suspension is a remedial measure:

Civil sanctions ordinarily do not invoke the double jeopardy prohibition. Thus, an administrative driver's license suspension, even though it may have punitive aspects, is viewed as a remedial measure. *See* Keyes v. State, 708 So. 2d 540, 548 (Miss. 1998)("[T]he Double Jeopardy Clauses of the United States and Mississippi Constitutions do not preclude criminal prosecution for violation of Miss. Code Ann. § 63-11-30 subsequent to administrative license suspension pursuant to § 63-11-23(2).").

1706 DISCOVERY

See CHAPTER 14 "CRIMINAL CASES."

1707 SENTENCING

Apply DUI penalties in effect at time of the offense:

A DUI offender is subject to the DUI laws in effect at the time of the offense. Boyd v. State, 751 So. 2d 1050, 1054 (Miss. Ct. App. 1998).

§ 63-11-30 DUI 1st offense penalties:

(2) Except as otherwise provided in subsection (3) of this section (Zero Tolerance for Minors):
(a) First offense DUI. (i) Upon conviction of any person for the first offense of violating subsection (1) of this section where chemical tests under Section 63-11-5 were given, or where chemical test results are not available, the person shall be fined not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00), or

imprisoned for not more than forty-eight (48) hours in jail, or both; the court shall order the person to attend and complete an alcohol safety education program as provided in Section 63-11-32 within six (6) months of sentencing. The court may substitute attendance at a victim impact panel instead of forty-eight (48) hours in jail.
(ii) Suspension of commercial driving privileges is governed by Section 63-1-216.
(iii) A qualifying first offense may be nonadjudicated by the court under subsection (14) of this section. The holder of a commercial driver's license or a commercial learning permit at the time of the offense is ineligible for nonadjudication.
(iv) Eligibility for an interlock-restricted license is governed by Section 63-11-31 and suspension of regular driving privileges is governed by Section 63-11-23.

§ 63-11-30 DUI 2nd offense penalties:

(b) Second offense DUI. (i) Upon any second conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, the person shall be guilty of a misdemeanor, fined not less than Six Hundred Dollars ($600.00) nor more than One Thousand Five Hundred Dollars ($1,500.00), shall be imprisoned not less than five (5) days nor more than six (6) months and sentenced to community service work for not less than ten (10) days nor more than six (6) months. The minimum penalties shall not be suspended or reduced by the court and no prosecutor shall offer any suspension or sentence reduction as part of a plea bargain.
(ii) Suspension of commercial driving privileges is governed by Section 63-1-216.
(iii) Eligibility for an interlock-restricted license is governed by Section 63-11-31 and suspension of regular driving privileges is governed by Section 63-11-23.
. . .
(e) Any person convicted of a second or subsequent violation of subsection (1) of this section shall receive an in-depth diagnostic assessment, and if as a result of the assessment is determined to be in need of treatment for alcohol or drug abuse, the person must successfully complete treatment at a program site certified by the Department of Mental Health. Each person who receives a diagnostic assessment shall pay a fee representing the cost of the assessment. Each person who participates in a treatment program shall pay a fee representing the cost of treatment.
(f) The use of ignition-interlock devices is governed by Section 63-11-31.
. . .
(8) (a) For the purposes of determining how to impose the sentence for a second, third, fourth or subsequent conviction under this section, the affidavit or indictment shall not be required to enumerate previous convictions. It shall only be necessary that the affidavit or indictment states the number of times that the defendant has been convicted and sentenced within the past five (5) years for a second or third offense, or without a time limitation for a fourth or subsequent offense, under this section to determine if an enhanced penalty shall be imposed. The amount of fine and imprisonment imposed in previous convictions shall not be considered in calculating offenses to determine a second, third, fourth or subsequent offense of this section.
(b) Before a defendant enters a plea of guilty to an offense under this section, law enforcement must submit certification to the prosecutor that the defendant's driving record, the confidential registry and National Crime Information Center record have been

searched for all prior convictions, nonadjudications, pretrial diversions and arrests for driving or operating a vehicle while under the influence of an intoxicating liquor or while under the influence of any other substance that has impaired the person's ability to operate a motor vehicle. The results of the search must be included in the certification.

. . .

(11) Ignition interlock. If the court orders installation and use of an ignition-interlock device as provided in Section 63-11-31 for every vehicle operated by a person convicted or nonadjudicated under this section, each device shall be installed, maintained and removed as provided in Section 63-11-31.

1708 REPORTING DUI CONVICTIONS

§ 63-11-30 Judge to sign that person employed or waived right to an attorney:

(6) DUI citations. (a) Upon conviction of a violation of subsection (1) of this section, the trial judge shall sign in the place provided on the traffic ticket, citation or affidavit stating that the person arrested either employed an attorney or waived his right to an attorney after having been properly advised. If the person arrested employed an attorney, the name, address and telephone number of the attorney shall be written on the ticket, citation or affidavit. The court clerk must immediately send a copy of the traffic ticket, citation or affidavit, and any other pertinent documents concerning the conviction or other order of the court, to the Department of Public Safety as provided in Section 63-11-37.

(b) A copy of the traffic ticket, citation or affidavit and any other pertinent documents, having been attested as true and correct by the Commissioner of Public Safety, or his designee, shall be sufficient proof of the conviction for purposes of determining the enhanced penalty for any subsequent convictions of violations of subsection (1) of this section. The Department of Public Safety shall maintain a central database for verification of prior offenses and convictions.

§ 63-11-37 Documentation to be sent to Public Safety:

(1) It shall be the duty of the trial judge, upon conviction of a person under Section 63-11-30, to mail or otherwise deliver in a method prescribed by the commissioner a true and correct copy of the traffic ticket, citation or affidavit evidencing the arrest that resulted in the conviction and a certified copy of the abstract of the court record within five (5) days to the Commissioner of Public Safety at Jackson, Mississippi. The trial judge in municipal and justice courts shall show on the docket and the trial judge in courts of record shall show on the minutes:

(a) Whether a chemical test was given and the results of the test, if any; and

(b) Whether conviction was based in whole or in part on the results of such a test.

(2) The abstract of the court record shall show the date of the conviction, the results of the test if there was one, and the penalty, so that a record of same may be made by the Department of Public Safety.

(3) For the purposes of Section 63-11-30, a bond forfeiture shall operate as and be

considered as a conviction.
(4) A trial court clerk who fails to provide a true and correct copy of the traffic ticket, citation or affidavit evidencing the arrest that resulted in the conviction and a copy of the abstract of the court record within five (5) days of the availability of that information as required in subsection (1) of this section is guilty of a civil violation and shall be fined One Hundred Dollars ($100.00), for which civil fine the clerk bears sole and personal responsibility. Each instance of failure is a separate violation.

1709 DRIVING AFTER SUSPENSION OR REVOCATION

§ 63-11-40 Penalties:

Any person whose driver's license, or driving privilege has been cancelled, suspended or revoked under the provisions of this chapter and who drives any motor vehicle upon the highways, streets or public roads of this state, while such license or privilege is cancelled, suspended or revoked, shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment for not less than forty-eight (48) hours nor more than six (6) months, and fined not less than two hundred dollars ($200.00) nor more than five hundred dollars ($500.00).

§ 63-11-40 Additional suspension of driver’s license or driving privileges:

The commissioner of public safety shall suspend the driver's license or driving privilege of any person convicted under the provisions of this section for an additional six (6) months. Such suspension shall begin at the end of the original cancellation, suspension or revocation and run consecutively.

1710 ZERO TOLERANCE FOR MINORS

§ 63-11-30

(3) Zero Tolerance for Minors. (a) This subsection shall be known and may be cited as Zero Tolerance for Minors. The provisions of this subsection shall apply only when a person under the age of twenty-one (21) years has a blood alcohol concentration of two one-hundredths percent (.02%) or more, but lower than eight one-hundredths percent (.08%). If the person's blood alcohol concentration is eight one-hundredths percent (.08%) or more, the provisions of subsection (2) shall apply.
(b)(i) A person under the age of twenty-one (21) is eligible for nonadjudication of a qualifying first offense by the court pursuant to subsection (14) of this section.
(ii) Upon conviction of any person under the age of twenty-one (21) years for the first offense of violating subsection (1) of this section where chemical tests provided for under Section 63-11-5 were given, or where chemical test results are not available, the person

shall be fined Two Hundred Fifty Dollars ($250.00); the court shall order the person to attend and complete an alcohol safety education program as provided in Section 63-11-32 within six (6) months. The court may also require attendance at a victim impact panel.
(c) A person under the age of twenty-one (21) years who is convicted of a second violation of subsection (1) of this section, the offenses being committed within a period of five (5) years, shall be fined not more than Five Hundred Dollars ($500.00).
(d) A person under the age of twenty-one (21) years who is convicted of a third or subsequent violation of subsection (1) of this section, the offenses being committed within a period of five (5) years, shall be fined not more than One Thousand Dollars ($1,000.00).
(e) License suspension is governed by Section 63-11-23 and ignition interlock is governed by Section 63-11-31.
(f) Any person under the age of twenty-one (21) years convicted of a third or subsequent violation of subsection (1) of this section must complete treatment of an alcohol or drug abuse program at a site certified by the Department of Mental Health.

See Palmer v. City of Oxford, 860 So. 2d 1203, 1214 (Miss. 2003) ("Since Palmer's BAC level was .127% it is not within the parameters of the Zero Tolerance for Minor's provision of the Implied Consent Law."); Baker v. State, 99 So. 3d 241, 244 (Miss. Ct. App. 2012) ("The field AlcoSensor test is insufficient evidence of Baker's blood alcohol content for nonajudication [under the Zero Tolerance for Minors Act].").

See also Miss. Code Ann. § 43-21-159 ("However, unless the cause has been transferred, or unless the child has previously been the subject of a transfer from the youth court to the circuit court for trial as an adult and was convicted, the youth court shall have power on its own motion to remove jurisdiction from any criminal court of any offense including . . a violation of the Mississippi Implied Consent Law . . . committed by a child in a matter under the jurisdiction of the youth court and proceed therewith in accordance with the provisions of this chapter.").

1711 ENDANGERING A CHILD BY DRIVING UNDER THE INFLUENCE

§ 63-11-30 If transporting a child under 16 years of age:

(12) DUI child endangerment. A person over the age of twenty-one (21) who violates subsection (1) of this section while transporting in a motor vehicle a child under the age of sixteen (16) years is guilty of the separate offense of endangering a child by driving under the influence of alcohol or any other substance which has impaired the person's ability to operate a motor vehicle. The offense of endangering a child by driving under the influence of alcohol or any other substance which has impaired the person's ability to operate a motor vehicle shall not be merged with an offense of violating subsection (1) of this section for the purposes of prosecution and sentencing. An offender who is convicted of a violation of this subsection shall be punished as follows:
(a) A person who commits a violation of this subsection which does not result in the

serious injury or death of a child and which is a first conviction shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than One Thousand Dollars ($1,000.00) or shall be imprisoned for not more than twelve (12) months, or both;
(b) A person who commits a violation of this subsection which does not result in the serious injury or death of a child and which is a second conviction shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than One Thousand Dollars ($1,000.00) nor more than Five Thousand Dollars ($5,000.00) or shall be imprisoned for one (1) year, or both;

See also Miss. Code Ann. § 21-13-19 ("All offenses under the penal laws of this state which are misdemeanors, together with the penalty provided for violation thereof, are hereby made, without further action of the municipal authorities, criminal offenses against the municipality in whose corporate limits the offenses may have been committed to the same effect as though such offenses were made offenses against the municipality by separate ordinance in each case. However, for such misdemeanor, any penalty of incarceration is hereby limited to no more than six (6) months in jail, and any fine is hereby limited to a maximum of one thousand dollars ($1,000.00) for each such violation in any case tried without a jury. . . .").

1712 NONADJUDICATION

§ 63-11-30 "Nonadjudication" defined:

(14) Nonadjudication. (a) For the purposes of this chapter, "nonadjudication" means that the court withholds adjudication of guilt and sentencing, either at the conclusion of a trial on the merits or upon the entry of a plea of guilt by a defendant, and places the defendant in a nonadjudication program conditioned upon the successful completion of the requirements imposed by the court under this subsection.

§ 63-11-30 Criteria for a qualifying first offense:

(14)(b) A person is eligible for nonadjudication of an offense under this Section 63-11-30 only one (1) time under any provision of a law that authorizes nonadjudication and only for an offender:
(i) Who has successfully completed all terms and conditions imposed by the court after placement of the defendant in a nonadjudication program;
(ii) Who was not the holder of a commercial driver's license or a commercial learning permit at the time of the offense;
(iii) Who has not previously been convicted of and does not have pending any former or subsequent charges under this section; and
(iv) Who has provided the court with justification as to why nonadjudication is appropriate.

§ 63-11-30 Conditions to be imposed by the court:

(14)(c) Nonadjudication may be initiated upon the filing of a petition for nonadjudication or at any stage of the proceedings in the discretion of the court; the court may withhold adjudication of guilt, defer sentencing, and upon the agreement of the offender to participate in a nonadjudication program, enter an order imposing requirements on the offender for a period of court supervision before the order of nonadjudication is entered. Failure to successfully complete a nonadjudication program subjects the person to adjudication of the charges against him and to imposition of all penalties previously withheld due to entrance into a nonadjudication program. The court shall immediately inform the commissioner of the conviction as required in Section 63-11-37.
(i) The court shall order the person to:
1. Pay the nonadjudication fee imposed under Section 63-11-31 if applicable;
2. Pay all fines, penalties and assessments that would have been imposed for conviction;
3. Attend and complete an alcohol safety education program as provided in Section 63-11-32 within six (6) months of the date of the order;
4. a. If the court determines that the person violated this section with respect to alcohol or intoxicating liquor, the person must install an ignition-interlock device on every motor vehicle operated by the person, obtain an interlock-restricted license, and maintain that license for one hundred twenty (120) days or suffer a one-hundred-twenty-day suspension of the person's regular driver's license, during which time the person must not operate any vehicle.
b. If the court determines that the person violated this section by operating a vehicle when under the influence of a substance other than alcohol that has impaired the person's ability to operate a motor vehicle, including any drug or controlled substance which is unlawful to possess under the Mississippi Controlled Substances Law, the person must submit to a one-hundred-twenty-day period of a nonadjudication program that includes court-ordered drug testing at the person's own expense not less often than every thirty (30) days, during which time the person may drive if compliant with the terms of the program, or suffer a one-hundred-twenty-day suspension of the person's regular driver's license, during which time the person will not operate any vehicle.
(ii) Other conditions that may be imposed by the court include, but are not limited to, alcohol or drug screening, or both, proof that the person has not committed any other traffic violations while under court supervision, proof of immobilization or impoundment of vehicles owned by the offender if required, and attendance at a victim-impact panel.

§ 63-11-30 When the court may enter an order of nonadjudication:

(14)(d) The court may enter an order of nonadjudication only if the court finds, after a hearing or after ex parte examination of reliable documentation of compliance, that the offender has successfully completed all conditions imposed by law and previous orders of the court. The court shall retain jurisdiction over cases involving nonadjudication for a period of not more than two (2) years.

§ 63-11-30 Clerk to forward record of nonadjudication to Public Safety:

(14)(e) (i) The clerk shall immediately forward a record of every person placed in a nonadjudication program and of every nonadjudication order to the Department of Public Safety for inclusion in the permanent confidential registry of all cases that are nonadjudicated under this subsection (14).
(ii) Judges, clerks and prosecutors involved in the trial of implied consent violations and law enforcement officers involved in the issuance of citations for implied consent violations shall have secure online access to the confidential registry for the purpose of determining whether a person has previously been the subject of a nonadjudicated case and 1. is therefore ineligible for another nonadjudication; 2. is ineligible as a first offender for a violation of this section; or 3. is ineligible for expunction of a conviction of a violation of this section.
(iii) The Driver Services Bureau of the department shall have access to the confidential registry for the purpose of determining whether a person is eligible for a form of license not restricted to operating a vehicle equipped with an ignition-interlock device.
(iv) The Mississippi Alcohol Safety Education Program shall have secure online access to the confidential registry for research purposes only.

1713 VEHICLE IMPOUNDMENT, IMMOBILIZATION AND IGNITION LOCKS

§ 63-11-30 If installation and use of an ignition-interlock device is ordered:

(11) Ignition interlock. If the court orders installation and use of an ignition-interlock device as provided in Section 63-11-31 for every vehicle operated by a person convicted or nonadjudicated under this section, each device shall be installed, maintained and removed as provided in Section 63-11-31.

§ 63–11–31 Supplemental to Section 63–11–30:

(1)(a) The provisions of this section are supplemental to the provisions of Section 63-11-30.

§ 63–11–31 "Ignition-interlock device" and "interlock restricted license" defined:

(1)(b)(i) "Ignition-interlock device" means a device approved by the Department of Public Safety that connects a motor vehicle ignition system to a breath-alcohol analyzer and prevents a motor vehicle ignition from starting if the driver's blood alcohol level exceeds the calibrated setting on the device.
(ii) "Interlock-restricted license" means a driver's license bearing a restriction that limits the person to operation of vehicles equipped with an ignition-interlock device.
(iii) "Court-ordered drug-testing program" means a program that qualifies under Section 63-11-31.1.

See also Miss. Code Ann. § 63-1-5(3) ("An interlock-restricted license allows a person to drive only a motor vehicle equipped with an iginition-interlock device.").

§ 63–11–31 Required on all motor vehicles owned or operated by the person:

(1)(c) A person who can exercise the privilege of driving only under an interlock-restricted license must have an ignition-interlock device installed and operating on all motor vehicles owned or operated by the person.
(d) A person who installs an ignition-interlock device may obtain an interlock-restricted license.

§ 63–11–31 Who bears the costs?

(2)(a)(i) The cost of installation and operation of an ignition-interlock device shall be borne by the person to whom an interlock-restricted driver's license is issued, and the costs of court-ordered drug testing shall be borne by the person so ordered, unless the person is determined by the court to be indigent.
(ii) The cost of participating in a court-ordered drug-testing program shall be borne by the person, unless the person is determined by the court to be indigent.

§ 63–11–31 Fees to be imposed by the court:

(2)(b)(i) A person convicted under Section 63-11-30 shall be assessed by the court, in addition to the criminal fines, penalties and assessments provided by law for violations of Section 63-11-30, a fee of Fifty Dollars ($50.00), to be deposited in the Interlock Device Fund in the State Treasury unless the person is determined by the court to be indigent.
(ii) A person nonadjudicated under Section 63-11-30 shall be assessed by the court, in addition to the criminal fines, penalties and assessments provided by law for violations of Section 63-11-30, a fee of Two Hundred Fifty Dollars ($250.00) to be deposited in the Interlock Device Fund in the State Treasury unless the person is determined by the court to be indigent.

§ 63–11–31 Public Safety to promulgate rules and regulations:

(3)(a) The Department of Public Safety shall promulgate rules and regulations for the use of an ignition-interlock device. The Department of Public Safety shall approve which vendors shall be used to furnish the systems, may assess fees to the vendors, and shall prescribe the maximum costs to the offender for installation, removal, monthly operation, periodic inspections, calibrations and repairs.

§ 63–11–31 Proof of installation and proper operation of the device:

(3)(b) A person who has an ignition-interlock device installed in a vehicle shall:
(i) Provide proof of the installation of the device and periodic reporting for verification of the proper operation of the device;
(ii) Have the system monitored for proper use and accuracy as required by departmental

regulation;
(iii) Pay the reasonable cost of leasing or buying, monitoring, and maintaining the device unless the person is determined to be indigent; and
(iv) Obtain an ignition-interlock driver's license.

§ 63–11–31 Interlock-restricted driver's license violations:

(4)(a)(i) A person who is limited to driving only under an interlock-restricted driver's license shall not operate a vehicle that is not equipped with an ignition-interlock device.
(ii) A person prohibited from operating a motor vehicle that is not equipped with an ignition-interlock device may not solicit or have another person attempt to start or start a motor vehicle equipped with such a device.
(iii) A person may not start or attempt to start a motor vehicle equipped with an ignition-interlock device for the purpose of providing an operable motor vehicle to a person who is prohibited from operating a motor vehicle that is not equipped with an ignition-interlock device.
(iv) A person may not tamper with, or in any way attempt to circumvent, the operation of an ignition-interlock device that has been installed in a motor vehicle.
(v) A person may not knowingly provide a motor vehicle not equipped with a functioning ignition-interlock device to another person who the provider of the vehicle knows or should know is prohibited from operating a motor vehicle not equipped with an ignition-interlock device.
(b) A violation of this subsection (4) is a misdemeanor and upon conviction the violator shall be fined an amount not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00) or imprisoned for not more than six (6) months, or both, unless the starting of a motor vehicle equipped with an ignition-interlock device is done for the purpose of safety or mechanical repair of the device or the vehicle, and the person subject to the restriction does not operate the vehicle.

§ 63–11–31 Criteria for obtaining an interlock restricted license:

(5) In order to obtain an interlock-restricted license, a person must:
(a) Be otherwise qualified to operate a motor vehicle, and will be subject to all other restrictions on the privilege to drive provided by law;
(b) Submit proof that an ignition-interlock device is installed and operating on all motor vehicles operated by the person; and
(c) Pay the fee set forth in Section 63-1-43 to obtain the license without regard to indigence; no license reinstatement fee under Section 63-1-46 shall be charged for a person obtaining an interlock-restricted license.

§ 63–11–31 Impounding or immobilizing vehicle:

(6)(a) In addition to the penalties authorized for any second or subsequent conviction under Section 63-11-30, the court shall order that all vehicles owned by the offender that are not equipped with an ignition-interlock device must be either impounded or immobilized pending further order of the court lifting the offender's driving restriction.

However, no county, municipality, sheriff's department or the Department of Public Safety shall be required to keep, store, maintain, serve as a bailee or otherwise exercise custody over a motor vehicle impounded under the provisions of this section. The cost associated with any impoundment or immobilization shall be paid by the person convicted without regard to ability to pay.
(b) A person may not tamper with, or in any way attempt to circumvent, vehicle immobilization or impoundment ordered by the court under this section. A violation of this paragraph (b) is a misdemeanor and, upon conviction, the violator shall be fined an amount not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00) or imprisoned for not more than six (6) months, or both.

§ 63–11–31 Interlock Device Fund:

(7)(a) The Department of Public Safety shall promulgate rules and regulations for the use of monies in the Interlock Device Fund to offset the cost of interlock device installation and operation by and court-ordered drug testing of indigent offenders.
(b) The court shall determine a defendant's indigence based upon whether the defendant has access to adequate resources to pay the ignition-interlock fee and the costs of installation and maintenance of an ignition-interlock device, or the costs of court-ordered drug testing or both, and may further base the determination of indigence on proof of enrollment in one or more of the following types of public assistance:
(i) Temporary Assistance for Needy Families (TANF);
(ii) Medicaid assistance;
(iii) The Supplemental Nutritional Assistance Program (SNAP), also known as “food stamps”;
(iv) Supplemental security income (SSI);
(v) Participation in a federal food distribution program;
(vi) Federal housing assistance;
(vii) Unemployment compensation; or
(viii) Other criteria determined appropriate by the court.
(c) No more than ten percent (10%) of the money in the Interlock Device Fund in any fiscal year shall be expended by the department for the purpose of administering the fund.
(d) The Commissioner of the Department of Public Safety must promulgate regulations for the program and for vendors, including at a minimum:
(i) That the offender must pay the cost of the testing program or, if the court finds the offender to be indigent, that the cost be paid from the Interlock Device Fund.
(ii) How indigent funds will be accessed by the vendors, and the maximum cost to the offender or the fund.
(e)(i) Money in the Interlock Device Fund will be appropriated to the department to cover part of the costs of court-ordered drug testing and installing, removing and leasing ignition-interlock devices for indigent people who are required, because of a conviction or nonadjudication under Section 63-11-30, to install an ignition-interlock device in all vehicles operated by the person.
(ii) If money is available in the Interlock Device Fund, the department shall pay to the vendor, for one (1) vehicle per offender, up to Fifty Dollars ($50.00) for the cost of installation, up to Fifty Dollars ($50.00) for the cost of removal, and up to Thirty Dollars

($30.00) monthly for verified active usage of the ignition-interlock device. The department shall not pay any amount above what an offender would be required to pay for the installation, removal or usage of an ignition-interlock device.
(iii) If money is available in the Interlock Device Fund, the department shall pay to the vendor an amount not to exceed that promulgated by the Forensics Laboratory for court-ordered drug testing. The department shall not pay any amount above what an offender would be required to pay individually.

§ 63–11–31 Reinstatement of the regular driver's license:

(8) In order to reinstate a form of driver's license that is not restricted to operation of an ignition-interlock equipped vehicle, the person must submit proof to the Department of Public Safety to substantiate the person's eligibility for an unrestricted license, which may be a court order indicating completion of sentence or final order of nonadjudication; in the absence of a court order, the proof may consist of the following or such other proof as the commissioner may set forth by regulation duly adopted under the Administrative Procedures Act:
(a) Proof of successful completion of an alcohol safety program as provided in Section 63-11-32 if so ordered by the court;
(b) Payment of the reinstatement fee required under Section 63-1-46(1)(a);
(c) Payment of the driver's license fee required under Section 63-1-43;
(d) A certificate of liability insurance or proof of financial responsibility; and
(e)(i) For those driving under an interlock-restricted license, a declaration from the vendor, in a form provided or approved by the Department of Public Safety, certifying that there have been none of the following incidents in the last thirty (30) days:
1. An attempt to start the vehicle with a breath alcohol concentration of 0.04 or more;
2. Failure to take or pass any required retest; or
3. Failure of the person to appear at the ignition-interlock device vendor when required for maintenance, repair, calibration, monitoring, inspection, or replacement of the device; or
(ii) For a person who violated Section 63-11-30 with respect to drugs other than alcohol, proof of successful compliance with all court-ordered drug testing; or
(iii) Both subparagraphs (i) and (ii) of this paragraph (e) if applicable.

§ 63–11–31 When court may extend interlock-restricted period:

(9) The court may extend the interlock-restricted period if the person had a violation in the last thirty (30) days.

§ 63–11–31 Jurisdiction under section 63-11-31:

(10) The court that originally ordered installation of the ignition-interlock device for a violation of Section 63-11-30 and a court in the municipality or county in which the violation occurred have jurisdiction over an offense under this section.

§ 63–11–31 Criteria for converting to another form of license:

(11) A person who voluntarily obtains an interlock-restricted license may convert at any time to any other form of license for which the person is qualified.

§ 63–11–31 Policies for reporting and sharing ignition-interlock data:

(12)(a) The Department of Public Safety shall require all manufacturers of ignition-interlock devices to report ignition-interlock data in a consistent and uniform format as prescribed by the Department of Public Safety. Ignition-interlock vendors must also use the uniform format when sharing data with courts ordering an ignition interlock, with alcohol safety education programs, or with other treatment providers.
(b) The Department of Public Safety shall require all vendors of drug testing programs approved under Section 63-11-31.1 to report test results in a consistent and uniform format as prescribed by the Forensics Laboratory. Vendors must report test results to the court on a monthly basis, except that a positive test or failure of the testing participant to submit to verification must be reported to the court within five (5) days of verification of the positive test or the failure to submit.

§ 63–11–31.1 Mississippi Forensics Laboratory to approve vendors:

(1) The Mississippi Forensics Laboratory shall promulgate rules and regulations for court-ordered drug testing of DUI/other drug violators and shall approve which vendors are eligible to be utilized by the trial courts when ordering defendants to undergo drug testing as a condition of continuing to exercise the privilege to drive. The Forensics Laboratory may assess fees to the vendors, and shall prescribe the maximum costs to the offender for drug testing. The Forensics Laboratory may seek the advice of the State Drug Court Advisory Committee in fulfilling these duties.
(2) The Forensics Laboratory must evaluate proposals made by prospective vendors for acceptability, including, without limitation, the following factors:
(a) A description of the method used for assessment;
(b) The frequency with which the offender will be tested;
(c) The procedure used by the vendor to ensure the accuracy of the test results;
(d) The length of time allowed the offender to provide a biological sample after being given notice;
(e) The frequency with which the vendor will make reports to the court;
(f) The list of approved sites for the collection of biological samples for testing.
(3) The Forensics Laboratory must promulgate regulations for the program and for vendors, including at a minimum:
(a) That the offender must pay the cost of the testing program or, if the court finds the offender to be indigent, that the cost be paid from the Interlock Device Fund.
(b) How indigent funds will be accessed by the vendors, and the maximum cost to the offender or the fund.
(4) The Forensics Laboratory will provide the list of approved vendors, subject to continuous updating, to the Mississippi Judicial College for dissemination to the trial courts.

§ 63-1-58 License suspensions and restrictions to run consecutively:

Suspension or restriction of driving privileges for any person convicted of or nonadjudicated for violations of the Implied Consent Law or any administrative suspension imposed under this chapter shall run consecutively and not concurrently.

See also Miss. Code Ann. 63-11-30(10) ("License suspensions and restrictions to run consecutively. Suspension or restriction of driving privileges for any person convicted of or nonadjudicated for violations of subsection (1) of this section shall run consecutively to and not concurrently with any other administrative license suspension.").

§ 63-11-21 Refusal to submit; effect:

If a person refuses upon the request of a law enforcement officer to submit to a chemical test of his breath designated by the law enforcement agency as provided in Section 63-11-5, none shall be given, but the officer shall at that point demand the driver's license of the person, who shall deliver his driver's license into the hands of the officer. If a person refuses to submit to a chemical test under the provisions of this chapter, the person shall be informed by the law enforcement officer that the refusal to submit to the test shall subject him to suspension of the privilege to operate a motor vehicle. The officer shall give the driver a receipt for his license on forms prescribed and furnished by the Commissioner of Public Safety. The officer shall forward the driver's license together with a sworn report to the Commissioner of Public Safety stating that he had reasonable grounds and probable cause to believe the person had been operating a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor or any other substance which may impair a person's mental or physical ability, stating the grounds, and that the person had refused to submit to the chemical test of his breath upon request of the law enforcement officer.

§ 63-11-23 Review of refusal; sanctions:

(1) Administrative license suspension for test refusal. The Commissioner of Public Safety, or his authorized agent, shall review the sworn report by a law enforcement officer as provided in Section 63-11-21.
(a) If upon review the Commissioner of Public Safety, or his authorized agent, finds (i) that the law enforcement officer had reasonable grounds and probable cause to believe the person had been operating a motor vehicle upon the public highways, public roads and streets of this state while under the influence of intoxicating liquor or any other substance that may impair a person's mental or physical ability; (ii) that the person refused to submit to the chemical test of the person's breath, blood or urine upon request of the officer; and (iii) that the person was informed that his license and driving privileges would be suspended or denied if he refused to submit to the chemical test of his breath, blood or urine, then the Commissioner of Public Safety, or his authorized agent, shall give notice

to the licensee that his license or permit to drive, or any nonresident operating privilege, shall be suspended thirty (30) days after the date of the notice for a period of ninety (90) days if the person has not previously been convicted of or nonadjudicated for a violation of Section 63-11-30, or, for a period of one (1) year if the person was previously convicted or nonadjudicated under Section 63-11-30. If the commissioner or his authorized agent determines that the license or permit should not be suspended, he shall return the license or permit to the licensee.
(b) The notice of suspension shall be in writing and conform to Section 63-1-52.
(c) A person may continue to drive on either an interlock-restricted license or under a drug-testing program if so ordered by a court in the course of a criminal proceeding for a violation of Section 63-11-30.

(2) Extension or suspension of privilege to drive; request for trial. (a) If the chemical testing of a person's breath indicates the blood alcohol concentration was eight one-hundredths percent (.08%) or more for persons who are above the legal age to purchase alcoholic beverages under state law, or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred ten (210) liters of breath as shown by a chemical analysis of the person's blood, breath, or urine, the arresting officer shall seize the license and give the driver a receipt for his license on forms prescribed by the Commissioner of Public Safety and shall promptly forward the license together with a sworn report to the Commissioner of Public Safety. The receipt given a person shall be valid as a permit to operate a motor vehicle for thirty (30) days in order that the defendant may be processed through the court having original jurisdiction and a final disposition had.
(b) If the defendant requests a trial within thirty (30) days and trial is not commenced within thirty (30) days, then the court shall determine if the delay in the trial is the fault of the defendant or his counsel. If the court finds that it is not the fault of the defendant or his counsel, then the court shall order the defendant's privileges to operate a motor vehicle to be extended until the defendant is convicted upon final order of the court.
(c) If a receipt or permit to drive issued under this subsection expires without a trial having been requested as provided in this subsection, then the Commissioner of Public Safety, or his authorized agent, shall suspend the license or permit to drive or any nonresident operating privilege for the applicable period of time as provided in subsection (1) of this section.

(3) Offenders driving without a license. If the person is a resident without a license or permit to operate a motor vehicle in this state, the Commissioner of Public Safety, or his authorized agent, shall deny to the person the issuance of a license or permit for a period of one (1) year beginning thirty (30) days after the date of notice of the suspension.

(4) Appeal. It shall be the duty of the municipal prosecuting attorney, county prosecuting attorney, an attorney employed under the provisions of Section 19-3-49, or if there is not a prosecuting attorney for the municipality or county, the duty of the district attorney to represent the state in any hearing on a de novo appeal held under the provisions of Section 63-11-25, Section 63-11-37 or Section 63-11-30.

(5) Suspension subsequent to conviction. Unless the person obtains an interlock-restricted license or the court orders the person to exercise the privilege to operate a motor vehicle only under an interlock-restricted license or while participating in a court-ordered drug-testing program, thirty (30) days after receipt of the court abstract documenting a person's conviction under Section 63-11-30, the Department of Public Safety shall suspend the driver's license and privileges of the person to operate a motor vehicle as follows:
(a) When sentenced under Section 63-11-30(2):
(i) For a first offense: one hundred twenty (120) days;
(ii) For a second offense: one (1) year;
(iii) For a third offense: for the full period of the person's sentence; upon release from incarceration, the person will be eligible for only an interlock-restricted license for three (3) years;
(iv) For a fourth or subsequent offense: for the full period of the person's sentence; upon release from incarceration, the person will be eligible for only an interlock-restricted license for ten (10) years and will further be subject to court-ordered drug testing if the original offense involved operating a motor vehicle under the influence of a drug other than alcohol.
(b) When sentenced under Section 63-11-30(3) (Zero Tolerance for Minors):
(i) For a first offense: one hundred twenty (120) days;
(ii) For a second offense: one (1) year;
(iii) For a third offense occurring within five (5) years, suspend or deny the driving privilege for two (2) years or until the person reaches the age of twenty-one (21), whichever is longer.

(6) Suspensions. (a) Notices of suspension given under this section shall be in writing and conform to Section 63-1-52.
(b) Suspensions under this and any other chapter shall run consecutively and not concurrently.

(7) License reinstatement. A person is eligible for an unrestricted license when the person has completed an alcohol safety education program as provided in Section 63-11-32, has satisfied all other conditions of law and of the person's sentence or nonadjudication, and is not otherwise barred from obtaining an unrestricted license.

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CHAPTER 18

RULES OF THE ROAD

1806 PROPER LANE USE; OVERTAKING AND PASSING; FOLLOWING

Use of lanes
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1800 REGULATIONS ON RULES OF THE ROAD

The "Uniform Highway Traffic Regulation Law–Rules of the Road" is subdivided into 13 separate Articles under Chapter 3 of Title 63. Article 1 (§§ 63-3-1 through 63-3-11) provides that these rules govern the operation of vehicles on the highways within the state, except as otherwise provided by law, but does not curtail or abridge the right to sue for civil damages. Unless another punishment is provided for by law, violations of rules of the road regulations are misdemeanors punishable under Section 63-9-11.

1801 DEFINITIONS

Article 3 (§§ 63-3-101 through 63-3-123) defines various words and phrases found within the "Uniform Highway Traffic Regulation Law–Rules of the Road", including: vehicles, equipment and the like, governmental agencies, owners, police officers and other persons, and highways, districts, signals and the like.

§ 63-3-103 Types of vehicles

(a) "Vehicle" means every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices used exclusively upon stationary rails or tracks.

(b) "Motor vehicle" means every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. The term "motor vehicle" shall not include electric personal assistive mobility devices or electric bicycles.

(c) "Motorcycle" means every motor vehicle having a saddle for the use of the rider and designed to travel on not more than three (3) wheels in contact with the ground but excluding a tractor. The term "motorcycle" includes motor scooters as defined in subsection (j) of this section. The term "motorcycle" shall not include electric bicycles.

(d) "Authorized emergency vehicle" means every vehicle of the fire department (fire patrol), every police vehicle, every 911 Emergency Communications District vehicle, every such ambulance and special use EMS vehicle as defined in Section 41–59–3, every Mississippi Emergency Management Agency vehicle as is designated or authorized by the Executive Director of MEMA and every emergency vehicle of municipal departments or public service corporations as is designated or authorized by the commission or the chief of police of an incorporated city.

(e) "School bus" means every motor vehicle operated for the transportation of children to or from any school, provided same is plainly marked "School Bus" on the front and rear thereof and meets the requirements of the State Board of Education as authorized under Section 37–41–1.

(f) “Recreational vehicle” means a vehicular type unit primarily designed as temporary living quarters for recreational, camping or travel use, which either has its own motive power or is mounted on or drawn by another vehicle and includes travel trailers, fifth-wheel trailers, camping trailers, truck campers and motor homes.

(g) “Motor home” means a motor vehicle that is designed and constructed primarily to provide temporary living quarters for recreational, camping or travel use.

(h) “Electric assistive mobility device” means a self-balancing two-tandem wheeled device, designed to transport only one (1) person, with an electric propulsion system that limits the maximum speed of the device to fifteen (15) miles per hour.

(i) “Autocycle” means a three-wheel motorcycle with a steering wheel, nonstraddle seating, rollover protection and seat belts.

(j) “Motor scooter” means a two-wheeled vehicle that has a seat for the operator, one (1) wheel that is ten (10) inches or more in diameter, a step-through chassis, a motor with a rating of two and seven-tenths (2.7) brake horsepower or less if the motor is an internal combustion engine, an engine of 50cc or less and otherwise meets all safety requirements of motorcycles. The term “motor scooter” shall not include electric bicycles.

(k) “Platoon” means a group of individual motor vehicles traveling in a unified manner at electronically coordinated speeds at following distances that are closer than would be reasonable and prudent without such coordination.

(l) “Electric bicycle” means a bicycle or tricycle equipped with fully operable pedals, a saddle or seat for the rider, and an electric motor of less than seven hundred fifty (750) watts that meets the requirements of one of the following three (3) classes:
(i) “Class 1 electric bicycle” means an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling, and that ceases to provide assistance when the bicycle reaches the speed of twenty (20) miles per hour.
(ii) “Class 2 electric bicycle” means an electric bicycle equipped with a motor that may be used exclusively to propel the bicycle, and that is not capable of providing assistance when the bicycle reaches the speed of twenty (20) miles per hour.
(iii) “Class 3 electric bicycle” means an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling, and that ceases to provide assistance when the bicycle reaches the speed of twenty-eight (28) miles per hour.

Other terms defined under Article 3 include:

Police officer: Miss. Code Ann. § 63-3-119 provides that “police officer” means “every officer authorized to direct or regulate traffic or to make arrests for violations of traffic regulations.”

Driver: Miss. Code Ann. § 63-3-121 provides that “driver” means “every person who drives or is in actual physical control of a vehicle.”

Street or highway: Miss. Code Ann. § 63-3-125(a) provides that "street or highway" means "the entire width between property lines of every way or place of whatever nature when any part thereof is open to the use of the public, as a matter of right, for purposes of vehicular traffic."

Private road or driveway: Miss. Code Ann. § 63-3-125(e) provides that "private road or driveway" means "every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner but not by other persons."

Right-of way: Miss. Code Ann. § 63-3-135 provides that "right-of way" means "the privilege of the immediate use of the highway."

Stop: Miss. Code Ann. § 63-3-137(a) provides that "stop" means "the complete cessation from movement."

Mississippi Attorney General's opinions:

4-wheelers must have tag to operate on the public roads.
"4-wheelers are motor vehicles and therefore must have a tag to operate on the public roads. They must also be properly equipped to operate on the public roads. The driver of a 4-wheeler on the public roads may be given a citation for no tag or improper equipment." Op. Atty. Gen. Reno, July 29, 2005.

1802 OBEDIENCE TO AND EFFECT OF TRAFFIC LAWS

Article 5 (§§ 63-3-201 through 63-3-213) provides that, unless otherwise excepted, the "Uniform Highway Traffic Regulation Law–Rules of the Road" applies to drivers of vehicles on highways in the state and, as applicable, bicyclists and animal riders.

§ 63-3-205 To whom applicable:

The provisions of this chapter applicable to the drivers of vehicles upon the highways shall apply to the drivers of all vehicles owned or operated by the United States, this state or any county, city, town, district, or any other political subdivision of the state, subject to such specific exceptions as are set forth in this chapter with respect to authorized emergency vehicles.
The provisions of this chapter shall not apply to persons, teams, motor vehicles and other equipment while actually engaged in work upon the surface of a highway but shall apply to such persons and vehicles when traveling to or from such work.
No driver of any authorized emergency vehicle shall assume any special privilege under this chapter except when such vehicle is operated in response to an emergency call or in the immediate pursuit of an actual or suspected violator of the law.

§ 63-3-211 Local powers:

(a) The provisions of this chapter shall not be deemed to prevent local authorities with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power from-
1. Regulating the standing or parking of vehicles;
2. Regulating traffic by means of police officers or traffic control signals;
3. Regulating or prohibiting processions or assemblages on the highways;
4. Designating particular highways as one-way highways and requiring that all vehicles thereon be moved in one specific direction;
5. Regulating the speed of vehicles in public parks;
6. Designating any highway as a through highway and requiring that all vehicles stop before entering or crossing the same or designating any intersection as a stop intersection and requiring all vehicles to stop at one or more entrances to such intersections;
7. Restricting the use of highways as authorized in Chapter 5 of this title.
(b) No ordinance or regulation enacted under subdivision 4, 5, 6, or 7 of this section shall be effective until signs giving notice of such local traffic regulations are posted upon or at the entrances to the highway or part thereof affected as may be most appropriate.

1803 TRAFFIC SIGNS, SIGNALS AND MARKINGS

Article 7 (§§ 63-3-301 through 63-3-325) requires the commissioner of public safety to adopt, in conformity to the American Association of State Highway Officials' standards, a manual and specifications for a uniform system of traffic-control devices. The Commissioner, with approval from the state highway commission (or local authorities with the permission of the state highway commission), must also place and maintain such devices on the state and county highways. Article 7 also requires local authorities, subject to state highway commission standards, to place and maintain like traffic-control devices on the local highways.

§ 63-3-315 Emergency vehicles:

The driver of any authorized emergency vehicle when responding to an emergency call upon approaching a red or stop signal or any stop sign shall slow down as necessary for safety but may proceed cautiously past such red or stop sign or signal. At other times drivers of authorized emergency vehicles shall stop in obedience to a stop sign or signal.

§ 63-3-321 Sign, barricade and fence violations:

Any person who wilfully destroys, knocks down, removes, defaces, or alters any letters or figures on a detour or warning sign set upon a highway or road of this state, or who wilfully knocks down, removes, rearranges, destroys, defaces, or alters any letter or figures on a barricade or fence erected on any highway or road of this state, or who drives around or through any barricade or fence on any officially closed highway or road of this

state, or who drives around such detour sign or barricade or fence, or who wilfully ignores or disregards a warning sign before such road has been officially opened to the public traffic by the Mississippi State Highway Department, or in appropriate cases by the county or municipal officer responsible for constructing or maintaining such roads, shall be guilty of a misdemeanor.

§ 63-3-323 Signs, barricades and fences defined:

The following words, terms and phrases, when used in section 63-3-321 shall have the meaning ascribed to them herein:
(a) "Detour sign" means any sign placed across or on a public road of the state, by the state, the county or municipal authorities or by their contractors, indicating that such road is closed or partially closed, which sign also indicates the direction of an alternate route to be followed to give access to certain points.
(b) "Warning sign" means a sign indicating construction work in area.
(c) "Barricade" means a barrier for obstructing the passage of motor vehicle traffic.
(d) "Fence" means a barrier to prevent the intrusion of motor vehicle traffic.
(e) "Officially closed" means a highway or road that has been officially closed by a governmental unit, the Mississippi State Highway Department, a city or a county.
(f) "Officially opened" shall mean any highway that does not have signs or barriers stating that it is closed.

§ 63-3-325 Sanctions for sign, barricade or fence violations:

Every person convicted of a violation of section 63-3-321 shall be punished by a fine of not less than five dollars ($5.00) nor more than one hundred dollars ($100.00), or by imprisonment for not more than thirty (30) days, or by both such fine and imprisonment. The conviction of a violation of section 6303 321 shall not be competent evidence in any civil action.

1804 ACCIDENTS AND REPORTS

Article 9 (§§ 63-3-401 through 63-3-423) provides rules of the road as to accidents and reports.

§ 63-3-401 Duty if accident results in injury or death:

(1) The driver of any vehicle involved in an accident resulting in injury to or death of any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until he has fulfilled the requirements of Section 63-3-405.
(2) Every stop under the provisions of subsection (1) of this section shall be made without obstructing traffic or endangering the life of any person more than is necessary.
(3) Except as provided in subsection (4) of this section, if any driver of a vehicle involved

in an accident that results in injury to any person willfully fails to stop or to comply with the requirements of subsection (1) of this section, then such person, upon conviction, shall be punished by imprisonment for not less than thirty (30) days nor more than one (1) year, or by fine of not less than One Hundred Dollars ($100.00) nor more than Five Thousand Dollars ($5,000.00), or by both such fine and imprisonment.

§ 63-3-403 Duty if only damage to the vehicle:

The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of section 63-3-405. Every such stop shall be made without obstructing traffic more than is necessary.
Any person failing to stop or comply with said requirements under such circumstances shall be guilty of a misdemeanor.

§ 63-3-405 Driver to provide information and assistance:

The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address and the registration number of the vehicle he is driving and shall, upon request and if available, exhibit his operator's or chauffeur's license to the person struck or the driver or occupant of or person attending any vehicle collided with. Said driver shall render to any person injured in such accident reasonable assistance, including the carrying, or the making of arrangements for the carrying, of such person to a physician, surgeon or hospital for medical or surgical treatment if it is apparent that such treatment is necessary or if such carrying is requested by the injured person. No such driver who, in good faith and in the exercise of reasonable care, renders emergency care to any injured person at the scene of an accident or in transporting said injured person to a point where medical assistance can be reasonably expected, shall be liable for any civil damages to said injured person as a result of any acts committed in good faith and in the exercise of reasonable care or omission in good faith and in the exercise of reasonable care by such driver in rendering the emergency care to said injured person.

§ 63-3-407 Duty if damage is to an unattended vehicle:

The driver of any vehicle which collides with any vehicle which is unattended shall immediately stop and shall then and there either locate and notify the operator or owner of such vehicle of the name and address of the driver and owner of the vehicle striking the unattended vehicle or shall leave in a conspicuous place in the vehicle struck a written notice giving the name and address of the driver and of the owner of the vehicle doing the striking and a statement of the circumstances thereof. However, the provisions herein shall not apply where no material damage is done and where the owner of the unattended vehicle was guilty of negligence in leaving said vehicle parked as same was when so struck.

§ 63-3-411 When an accident report is required:

(1) The driver of a vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of Five Hundred Dollars ($500.00) or more shall immediately, by the quickest means of communication, give notice of the collision to the local police department if the collision occurs within an incorporated municipality, or if the collision occurs outside of an incorporated municipality to the nearest sheriff's office or highway patrol station.

§ 63-3-417 Admissibility of accident reports:

(1) All required accident reports and supplemental reports shall be without prejudice to the individual so reporting and, except as otherwise provided in this section, shall be for the confidential use of the department; however, the department may, upon written request of any person involved in an accident, the spouse or next of kin of any such person, or any person against whom a claim is made as a result of the accident or upon written request of the representative of his estate, disclose to such requester or his legal counsel or a representative of his insurer any information contained in such report except the parties' version of the accident as set out in the written report filed by such parties, or may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident. The admissibility of an accident report into evidence in any court shall be governed by the Mississippi Rules of Evidence. However, the department shall furnish, upon demand of any person who has, or claims to have, made such a report or, upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department solely to prove a compliance or a failure to comply with the requirement that such a report be made to the department.

§ 63-3-417 Fraudulently obtaining an accident report:

(4) Any person to whom information contained in an accident report is not authorized to be disclosed under this section who fraudulently obtains or fraudulently attempts to obtain a copy of such report or information contained in such report shall be guilty of a misdemeanor and such person, upon conviction, shall be punished by a fine of not more than Two Thousand Five Hundred Dollars ($2,500.00), or imprisonment in the county jail for a term of not more than six (6) months, or by both such fine and imprisonment.

1805 RESTRICTIONS ON SPEED; USE OF RADAR

Article 11 (§§ 63-3-501 through 63-3-521) provides rules of the road as to restrictions on speed and use of radar.

§ 63-3-501 Speed limit restrictions:

Except as otherwise provided in this section, no person shall operate a vehicle on the highways of the state at a speed greater than sixty-five (65) miles per hour.
The Mississippi Transportation Commission may, in its discretion, by order duly entered on its minutes, increase the speed restrictions on any portion of the Interstate Highway System provided such speed restrictions are not increased to more than seventy (70) miles per hour. The commission may likewise increase the speed limit to seventy (70) miles per hour on controlled access highways with four (4) or more lanes.

§ 63-3-503 Penalties for speeding:

The maximum fine and sentence to be imposed for a violation of excessive speed above the maximum limits set by the state highway commission pursuant to the authority granted by this section shall be one-half (1/2) the fine and sentence imposed by section 63-9-11 if the excessive speed does not exceed the maximum limits imposed by section 63-3-501.

§ 63-3-505 Required speed reductions:

The driver or operator of any motor vehicle must decrease speed when approaching and crossing an intersection, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, or when special hazard exists with respect to pedestrians or other traffic. All trucks, or truck-trailer combinations and passenger buses shall be required to reduce speed to forty-five miles per hour during inclement weather when visibility is bad.

§ 63-3-507 Complaint to specify speed:

In every charge of violation of sections 63-3-501 to 63-3-505, and subsection (2) of section 63-3-509 the complaint as well as the summons or notice to appear, shall specify the speed at which the defendant is alleged to have driven as well as the speed applicable within the district or at the location.

§ 63-3-511 Reduced speed limits:

Whenever local authorities, including boards of supervisors, within their respective jurisdictions, determine upon the basis of an engineering and traffic investigation that the speed permitted under this article on any street, or any county road or any portion thereof, or at any intersection is greater than is reasonable or safe under conditions found to exist upon such street, or any county road or any portion thereof, or at such intersection, such

local authorities shall determine and declare, by ordinance, a reasonable and safe speed limit, which shall be effective when appropriate signs giving notice thereof are erected on such street, or any county road or any portion thereof, or at such intersection, or upon the approaches thereto. However, no speed limit shall be fixed by any such local authorities at less than fifteen (15) miles per hour.

§ 63-3-516 Highway work zones:

(1) It is unlawful for any person to operate a motor vehicle within a highway work zone at a speed in excess of the maximum speed limit specifically established for the zone whenever workers are present and whenever the zone is indicated by appropriately placed signs displaying the reduced maximum speed limit. Any person violating the provisions of this section shall be punished, upon conviction, for a first offense by a fine of not more than Two Hundred Fifty Dollars ($250.00); and for second, third and subsequent offenses by a fine of double the maximum fine imposed for second, third or subsequent offenses under Section 63-9-11.
(2) For the purposes of this section the term "highway work zone" means a construction or maintenance area that is located on or along any public highway, road or street within this state that is marked:
(a) By appropriate warning signs or other traffic control devices indicating that work is in progress; and
(b) By signs of a design approved by the Department of Transportation indicating that any person who operates a motor vehicle within a highway work zone at a speed in excess of the reduced maximum speed limit may be punished by a fine of double the maximum amount otherwise authorized by law.
(3) Nothing in this section shall preclude the prosecution or conviction for careless or reckless driving of any motor vehicle operator whose operation of a motor vehicle in a highway work zone, apart from speed, demonstrates the operation of the same in a careless or imprudent manner in violation of Section 63–3–1213 or in a reckless manner in violation of Section 63–3–1201.
(4)(a) Every person who operates any motor vehicle in violation of the provisions of this section and who causes property damage to road construction equipment or a motor vehicle in an amount of Five Hundred Dollars ($500.00) or greater within a highway work zone shall, upon conviction, be guilty of a separate misdemeanor and shall be punished by a fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00), or by imprisonment in the county jail for a term of not less than thirty (30) days nor more than one (1) year, or by both such fine and imprisonment, in the discretion of the court, and the court shall, as a condition of any sentence imposed determine the extent of the property damage caused by the violator and require the violator to make restitution to the injured party upon such terms and conditions determined by the court. Nothing herein however shall prevent the injured party from pursuing any other civil remedies against the violators as allowed by law.

§ 63-3-517 Emergency vehicle exception:

The speed limitations set forth in this article shall not apply to authorized emergency vehicles when responding to emergency calls and the drivers thereof sound audible signal by bell, siren, or exhaust whistle. This section shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the street, nor shall it protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.

§ 63-3-519 Radar speed detection equipment:

It shall be unlawful for any person or peace officer or law enforcement agency, except the Mississippi Highway Safety Patrol, to purchase or use or allow to be used any type of radar speed detection equipment upon any public street, road or highway of this state. However, such equipment may be used:
1. By municipal law enforcement officers within a municipality having a population of two thousand (2,000) or more upon the public streets of the municipality;
2. By any college or university campus police force within the confines of any campus wherein more than two thousand (2,000) students are enrolled;
3. By municipal law enforcement officers in any municipality having a population in excess of fifteen thousand (15,000) according to the latest federal census on federally designated highways lying within the corporate limits.
The Mississippi Highway Safety Patrol will not set up radar on highways within municipalities with a population in excess of fifteen thousand (15,000) according to the latest federal census.

§ 63-3-521 Sanctions for unlawful use of radar:

Any person who violates section 63-3-519 shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment for not more than six (6) months, or by both such fine and imprisonment.

See Freeman v. State, 121 So. 3d 888, 898 (Miss. 2013) ("[B]ecause the Radar Unit Certification was not properly authenticated, it was inadmissible hearsay and should have been suppressed."); Stidham v. State, 750 So. 2d 1238, 1241 (Miss. 2000) ("[A] radar device reading should be deemed admissible only upon a showing of the radar device's accuracy. See MRE 901(b)(9). . . . It is also generally required that proof be offered that the operator of the radar device is qualified to operate the device. By prevailing authority, the officer need not be an expert in the science of radar or electronics.").

1806 PROPER LANE USE; OVERTAKING AND PASSING; FOLLOWING

Article 13 (§§ 63-3-601 through 63-3-621) provides rules of the road as to proper lane use, overtaking and passing, and following.

§ 63–3–603 Use of lanes:

(1) Whenever any roadway has been divided into three (3) or more clearly marked lanes for traffic, except through or bypassing a municipality, the following rules in addition to all others consistent herewith shall apply:
(a) A vehicle shall be driven as nearly as practical entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.
(b) A vehicle shall not be driven in the center lane upon a roadway which is divided into three (3) lanes except when:
(i) Overtaking and passing another vehicle where the roadway is clearly visible and such center lane is clear of traffic within a safe distance;
(ii) Such vehicle is in preparation for a left turn; or
(iii) Such center lane is at the time allocated exclusively to traffic moving in the direction such vehicle is proceeding and is signposted to give notice of such allocation.
(c) Official signs may be erected directing slow-moving traffic to use a designated lane or allocating specified lanes to traffic moving in the same direction, and drivers of vehicles shall obey the directions of every such sign.
(d) Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.
(e) Persons riding bicycles upon a roadway shall not ride more than two (2) abreast except on paths or parts of roadways set aside for the exclusive use of bicycles. Persons riding two (2) abreast shall not impede the normal and reasonable movement of traffic and, on a laned roadway, shall ride within a single lane.
(2)(a) A vehicle shall not be driven in the outermost left lane of any roadway with two (2) or more lanes allowing for movement of traffic in the same direction except when:
(i) Overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
(ii) The right lane(s) of a roadway is closed to traffic while under construction or repair;
(iii) The right lane(s) of the roadway is in disrepair or in an otherwise impassable or unsafe condition; or
(iv) A vehicle is preparing to exit the roadway on the left.
(b) A vehicle shall not be driven continuously in the outermost left lane of a multi-lane roadway whenever it impedes the flow of other traffic.
(c) A violation of this subsection (2) is punishable by a fine of not less than Five Dollars ($5.00) nor more than Fifty Dollars ($50.00).

§ 63-3-615 Stopped school buses:

(1)(a) The driver of a vehicle upon a street or highway upon meeting or overtaking any school bus that has stopped on the street or highway for the purpose of receiving or discharging any school children shall come to a complete stop at least ten (10) feet from the school bus before reaching the school bus when there is in operation on the school bus the flashing red lights provided in Section 63-7-23, or when a retractable, hand-operated stop sign is extended; the driver shall not proceed until the children have crossed the street or highway and the school bus has resumed motion or the flashing red lights are no longer actuated and the hand-operated stop sign is retracted.
(b) The driver of a vehicle upon a divided highway that has four (4) lanes or more and permits at least two (2) lanes of traffic to travel in opposite directions need not stop upon meeting or passing a school bus that is stopped in the opposing roadway, or if the school bus is stopped in a loading zone that is a part of or adjacent to the highway and where pedestrians are not permitted to cross the roadway.
(2)(a) Except as provided in paragraph (b), any person violating the provisions of subsection (1) of this section shall be guilty of a misdemeanor and upon a first conviction thereof shall be fined not less than Three Hundred Fifty Dollars ($350.00) nor more than Seven Hundred Fifty Dollars ($750.00), or imprisoned for not more than one (1) year, or both. For a second or subsequent offense, the offenses being committed within a period of five (5) years, the person shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than Seven Hundred Fifty Dollars ($750.00) nor more than One Thousand Five Hundred Dollars ($1,500.00), or imprisoned for not more than one (1) year, or both. In addition, the Commissioner of Public Safety or his duly authorized designee, after conviction for a second or subsequent offense and upon receipt of the court abstract, shall suspend the driver's license and driving privileges of the person for a period of ninety (90) days.
(b) A conviction under this section for a violation resulting in any injury to a child who is in the process of boarding or exiting a school bus shall be a violation of Section 97-3-7, and a violator shall be punished under subsection (2) of that section.
(3) This section shall be applicable only in the event the school bus shall bear upon the front and rear thereon a plainly visible sign containing the words “school bus” in letters not less than four (4) inches in height.
(4) If any person witnesses the driver of any vehicle violating the provisions of this section and the identity of the driver of the vehicle is not otherwise apparent, it shall be a rebuttable inference that the person in whose name the vehicle is registered committed the violation. If charges are filed against multiple owners of a motor vehicle, only one (1) of the owners may be convicted and court costs may be assessed against only one (1) of the owners. If the vehicle that is involved in the violation is registered in the name of a rental or leasing company and the vehicle is rented or leased to another person at the time of the violation, the rental or leasing company may rebut the inference of guilt by providing the law enforcement officer or prosecuting authority with a copy of the rental or lease agreement in effect at the time of the violation.

§ 63-3-619 Tailgating:

(1) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.
(2) The driver of any motor truck or motor truck drawing another vehicle when traveling upon a roadway outside of a business or residence district shall not follow within three hundred (300) feet of another motor truck or motor truck drawing another vehicle. The provisions of this subsection shall not be construed to prevent overtaking and passing nor shall the same apply upon any lane specially designated for use by motor trucks.
(3)(a) Subject to the provisions of paragraph (b) of this subsection, subsections (1) and (2) of this section shall not apply to the operator of a nonlead vehicle in a platoon, as defined in Section 63–3–103(k), as long as the platoon is operating on a limited access divided highway with more than one (1) lane in each direction and the platoon consists of not more than two (2) motor vehicles.
(b) A platoon may be operated in this state only after an operator files a plan for approval of general platoon operations with the Department of Transportation. If that department approves the submission, it shall forward the plan to the Department of Public Safety for approval. The plan shall be reviewed and either approved or disapproved by the Department of Transportation and the Department of Public Safety within thirty (30) days after it is filed. If approved by both departments, the operator shall be allowed to operate the platoon five (5) working days after plan approval. The Motor Carrier Division of the Department of Public Safety shall develop the acceptable standards required for each portion of the plan.

§ 63–3–103 "Platoon" defined:

(k) "Platoon" means a group of individual motor vehicles traveling in a unified manner at electronically coordinated speeds at following distances that are closer than would be reasonable and prudent without such coordination.

See Robinette v. State, 189 So. 3d 675, 681 (Miss. Ct. App. 2015) ("The evidence was sufficient to sustain Robinette's conviction for tailgating."); Nolan v. State, 182 So. 3d 484, 494 (Miss. Ct. App. 2016) ("[Section 63–3–619], coupled with the rules of the road, is sufficiently definite such that an ordinary person can understand the prohibited conduct and that law enforcement can avoid arbitrary enforcement. We find the statute sufficiently specific to pass constitutional scrutiny.").

1807 STARTING AND TURNING; SIGNALING

Article 15 (§§ 63-3-701 through 63-3-711) provides rules of the road as to starting, turning, and signaling.

§ 63-3-707 Signaling turns and stops:

No person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving a clearly audible signal by sounding the horn if any pedestrian may be affected by such movement or after giving an appropriate signal in the manner provided in this article in the event any other vehicle may be affected by such movement.
A signal of intention to turn right or left shall be given continuously for a reasonable distance before turning.
No person shall stop or suddenly decrease the speed of a vehicle without first giving an appropriate signal in the manner provided in this article to the driver of any vehicle immediately to the rear when there is opportunity to give such signal.

See also Johnson v. State, 228 So. 3d 933, 936 (Miss. Ct. App. 2017) ("Here, Officer Garvin testified that he personally observed Johnson make a right turn onto a state highway without signaling while traffic was present, a traffic violation."); Woods v. State, 175 So. 3d 579, 582 (Miss. Ct. App. 2015) ("Section 63–3–707 clearly requires a signal when other vehicles may be affected by a turn—'even when no accident is likely to occur as the result of the driver's failure to give a proper signal.'"); Melton v. State, 118 So. 3d 605, 609 (Miss. Ct. App. 2012) ("Section 63–3–707 requires a driver turning right or left to give a continuous signal for a reasonable distance before turning in the event any other vehicle may be affected by such movement.").

Mississippi Attorney General's opinions:

Use of turn signals.
"A driver turning left at a T intersection onto a 1-way street must signal his intention to turn for a reasonable distance." Op. Atty. Gen. Phillips, April 8, 2005.

1808 ARTICLE 17. RIGHT-OF-WAY

Article 17 (§§ 63-3-801 through 63-3-809) provides rules of the road as to yielding right-of-way, including: at intersections, left turns, at entrances to through highways, at stop signs, coming from a private road or driveway, and for emergency vehicles.

1809 STOPPING, STANDING AND PARKING

Article 19 (§§ 63-3-901 through 63-3-913) provides rules of the road as to stopping, standing, and parking.

§ 63-3-909 Proper parking:

No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key, and, when standing upon any perceptible grade, without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway.

§ 63-3-913 Parking on restricted access private property:

(1) The designation of areas on private property which are clearly marked to restrict access thereto to emergency vehicles shall be considered permission by the owner of such property that law enforcement officers may enter such private property to enforce such restricted access; and all municipal, county and state law enforcement officers are authorized to enforce such restriction.
(2) It is unlawful to park a motor vehicle, other than an emergency vehicle responding to an emergency, in an area which has been marked as provided in subsection (1) of this section; and any person who unlawfully parks a motor vehicle in such an area or who blocks access thereto is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than One Hundred Dollars ($100.00) for each violation. For the third and any subsequent offense under this section, the offender's driver's license shall be suspended for ninety (90) days in accordance with Section 63-1-53, Mississippi Code of 1972, in addition to any fine imposed.
(3) For the purpose of this section “emergency vehicle” means fire department vehicles, law enforcement vehicles, ambulances and any other vehicle designated as an emergency vehicle by the governing authority of the county or municipality within which the private property is located.

See also Langston v. City of Iuka, 792 So. 2d 1013, 1015 (Miss. Ct. App. 2001) (“[Section 63-3-913] does not require that emergency lanes be designated by a sign.”); Miss. Code Ann. § 27-19-56 (License plates, placards and parking for disabled individuals); 23 C.F.R. § 1235 (Uniform System for Parking for Persons with Disabilities).

1810 REQUIRED STOPS

Article 21 (§§ 63-3-1001 through 63-3-1013) provides rules of the road as to required stops, including: at stop signs, at yield signs if proceeding would constitute an immediate hazard, emerging from an alley, driveway, or building prior to entering sidewalk area, at railroad crossings, if signal device gives warning or crossing gate lowers, at dangerous railroad crossings with erected stop signs, at all railroad crossings for certain vehicles (e.g., school buses carrying any school child, motor vehicles carrying passengers for hire, trucks carrying explosives or flammable liquids).

1811 PEDESTRIANS' RIGHTS AND DUTIES

Article 23 (§§ 63-3-1101 through 63-3-1113) provides rules of the road as to pedestrian rights and duties.

1812 RECKLESS AND CARELESS DRIVING

Article 25 (§§ 63-3-1201 through 63-3-1213) provides rules of the road as to reckless driving, careless driving, and miscellaneous rules.

§ 63-3-1201 Reckless driving:

Any person who drives any vehicle in such a manner as to indicate either a wilful or a wanton disregard for the safety of persons or property is guilty of reckless driving. Reckless driving shall be considered a greater offense than careless driving.
Every person convicted of reckless driving shall be punished upon a first conviction by a fine of not less than Five Dollars ($5.00) nor more than One Hundred Dollars ($100.00), and on a second or subsequent conviction he may be punished by imprisonment for not more than ten (10) days or by a fine of not exceeding Five Hundred Dollars ($500.00), or by both.

See also Floyd v. City of Crystal Springs, 749 So. 2d 110, 118 (Miss. 1999) ("Reasonable cause for an investigatory stop may be based on an officer's personal observation or on an informant's tip if it bears indicia of reliability."); Barnes v. State, 162 So. 2d 865, 484 (Miss. 1964) ("The wobbling, swaying and weaving back and forth by defendant while driving the truck constituted such reckless driving as to justify the constable in stopping Barnes."); Ouzts v. State, 947 So. 2d 1005, 1008 (Miss. Ct. App. 2006) ("Reckless driving means the commission of conscious acts or omissions which the driver knows or should know create an unreasonable risk of injury or harm. That which is necessary is that the driver should realize the strong probability of harm likely to ensue."); Nix v. State, 763 So. 2d 896, 900 (Miss. Ct. App. 2000) ("Reckless driving occurs when the driver commits conscious acts which a driver knows or should know would create an

unreasonable risk of injury or damage.").

§ 63-3-1213 Careless driving:

Any person who drives any vehicle in a careless or imprudent manner, without due regard for the width, grade, curves, corner, traffic and use of the streets and highways and all other attendant circumstances is guilty of careless driving. Careless driving shall be considered a lesser offense than reckless driving. Every person convicted of careless driving shall be punished by a fine of not less than Five Dollars ($5.00) nor more than Fifty Dollars ($50.00).

See also United States v. Escalante, 239 F.3d 678, 680 (5th Cir. 2001) ("The Mississippi careless driving statute is constitutional."); Leuer v. City of Flowood, 744 So. 2d 266, 269 (Miss. 1999) ("Miss. Code Ann. § 63-11-30(1)(a) is not void for vagueness and does sufficiently provide fair notice of the proscribed conduct."); Evers v. City of Starkville, 996 So. 2d 170, 171 (Miss. Ct. App. 2008) ("The City presented sufficient facts to show that Cook had probable cause to stop Evers for careless driving."); Adams v. City of Booneville, 910 So. 2d 720, 725 (Miss. Ct. App. 2005) ("[V]iewing the totality of the circumstances, we find that [the officer] did have an objective, reasonable suspicion [of] careless driving."); Henderson v. State, 878 So. 2d 246, 247 (Miss. Ct. App. 2004) ("The presence of traffic is not controlling. Carelessness is a matter of reasonable interpretation, based on a wide range of factors."); Varvaris v. City of Pearl, 723 So. 2d 1215, 1216-17 (Miss. Ct. App. 1998) ("[The defendant] was driving about 20-25 m.p.h. in a 35 m.p.h. zone and had been weaving between the two north bound lanes of Pearson Road. . . . [W]e find that the evidence was sufficient to support the verdict of careless driving.").

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CHAPTER 19

FINANCIAL RESPONSIBILITY, PASSENGER SAFETY, AND EQUIPMENT

1900 PROOF OF FINANCIAL RESPONSIBILITY

1901 MANDATORY USE OF SAFETY SEAT BELTS

1902 REGULATIONS ON SIZE, WEIGHT AND LOAD

1903 REGULATIONS ON EQUIPMENT AND IDENTIFICATION

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§ 63-15-3 Proof of financial responsibility defined:

The following words and phrases, when used in this chapter, shall, for the purposes of this chapter, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:
. . .
(j) "Proof of financial responsibility" means proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of Twenty-five Thousand Dollars ($25,000.00) because of bodily injury to or death of one (1) person in any one (1) accident, and subject to said limit for one (1) person, in the amount of Fifty Thousand Dollars ($50,000.00) because of bodily injury to or death of two (2) or more persons in any one (1) accident, and in the amount of Twenty-five Thousand Dollars ($25,000.00) because of injury to or destruction of property of others in any one (1) accident. Liability insurance required under this paragraph (j) may contain exclusions and limitations on coverage as long as the exclusions and limitations language or form has been filed with and approved by the Commissioner of Insurance.

§ 63-15-4 Vehicles exempted:

(1) The following vehicles are exempted from the requirements of this section:
(a) Motor vehicles exempted by Section 63–15–5;
(b) Motor vehicles for which a bond or a certificate of deposit of money or securities in at least the minimum amounts required for proof of financial responsibility is on file with the department;
(c) Motor vehicles that are self-insured under Section 63–15–53; and
(d) Implements of husbandry.

See also Miss. Code Ann. § 63-15-5 ("This chapter shall not apply with respect to any motor vehicle owned by the United States, the State of Mississippi or any political subdivision of this state. Nothing in this chapter shall be construed so as to exclude from this chapter its applicability to taxicabs, jitneys or other vehicles for hire operating under franchise or permit of any incorporated city, town or village.").

§ 63-15-4 Insurance card to be maintained in vehicle:

(2)(a) Every motor vehicle operated in this state shall have a motor vehicle liability insurance policy that covers the vehicle and is in compliance with the liability limits required by Section 63-15-3(j). The insured parties shall be responsible for maintaining the insurance on each motor vehicle.
(b) An insurance company issuing a policy of motor vehicle liability insurance as required by this section shall furnish to the insured an insurance card for each motor vehicle at the time the insurance policy becomes effective. The insurance card may be furnished in either paper or electronic format as chosen by the insured. Acceptable electronic formats

include display of electronic images on a cellular phone or any other type of electronic device. Beginning on July 1, 2013, insurers shall furnish commercial auto coverage customers with an insurance card clearly marked with the identifier, "Commercial Auto Insurance" or "Fleet" or similar language, to reflect that the vehicle is insured under a commercial auto policy.

§ 63-15-4 Verifying that insurance card is in vehicle:

(3) Upon stopping a motor vehicle at a roadblock where all passing motorists are checked as a method to enforce traffic laws or upon stopping a motor vehicle for any other statutory violation, a law enforcement officer, who is authorized to issue traffic citations, shall verify that the insurance card required by this section is in the motor vehicle or is displayed by electronic image on a cellular phone or other type of electronic device. However, no driver shall be stopped or detained solely for the purpose of verifying that the motor vehicle is covered by liability insurance in the amounts required under Section 63-15-3(j) unless the stop is part of such roadblock. If the law enforcement officer uses the verification system created in Section 63-16-3 and receives a response from the system verifying that the owner of the motor vehicle has liability insurance in the amounts required under Section 63-15-3(j), then the officer shall not issue a citation under this section notwithstanding any failure to display an insurance card by the owner or operator.

Mississippi Attorney General's opinions:

Valid stop required before verification.
"Section 63-15-4(3) prohibits any officer from stopping a vehicle solely to verify the officer's belief that the vehicle is not insured." Op. Atty. Gen. Barton, March 8, 2019.

Issuing a citation for no proof of insurance when investigating traffic accidents.
"[A]n officer who is investigating a traffic accident may issue a citation for no proof of insurance if one of the drivers involved in the accident does not have insurance." Op. Atty. Gen. Arnold, February 9, 2001.

§ 63-15-4 Penalties if no proof of insurance:

(4) Failure of the owner or the operator of a motor vehicle to have the insurance card in the motor vehicle, or to display the insurance card by electronic image on a cellular phone or other type of electronic device, is a misdemeanor and, upon conviction, is punishable by a fine of One Hundred Dollars ($100.00) and suspension of driving privilege for a period of one (1) year or until the owner of the motor vehicle shows proof of liability insurance that is in compliance with the liability limits required by Section 63-15-3(j) and has paid the fines and assessments imposed and the driver's license reinstatement fees imposed by the Department of Public Safety. A judge shall determine whether the defendant is indigent, and if a determination of indigence is made, shall authorize the reinstatement of that person's driver's license upon proof of mandatory liability insurance subject to compliance with a payment plan for any fines, assessments and/or fees.

Fraudulent use of an insurance card shall be punishable in accordance with Section 97-7-10. If such fines are levied in a municipal court, the funds from such fines shall be deposited in the general fund of the municipality. If such fines are levied in any of the courts of the county, the funds from such fines shall be deposited in the general fund of the county. A person convicted of a criminal offense under this subsection (4) shall not be convicted of a criminal offense under Section 63-16-13(1) arising from the same incident.

Mississippi Attorney General's opinion:

Authority to suspend fine.
"[A] justice or municipal court judge has the authority to suspend the $100.00 fine imposed, pursuant to Section 63-15-4." Op. Atty. Gen. Barrett, August 31, 2018.

Violation only if both the owner and operator fail to have proof of insurance.
"[A] violation of Section 63-15-4 occurs only when both the owner and operator fail to have proof of insurance. Therefore, if the operator has proof of insurance which covers his operation of the vehicle but the owner does not, there is no violation. Likewise, if the owner of the motor vehicle has proof of insurance in the vehicle but the operator does not, there is still no violation." Op. Atty. Gen. Lawrence, February 9, 2001.

§ 63-15-4 If owner shows proof of insurance:

(5) If, at the hearing date or the date of payment of the fine the owner shows proof that such insurance was in effect at the time of citation, the case shall be dismissed as to the defendant with prejudice and all court costs shall be waived against the defendant.

Mississippi Attorney General's opinions:

If defendant shows proof of insurance.
"If the owner, at the hearing date or the date of payment of the fine, shows he procured motor vehicle liability insurance in the proper amounts after receiving the citation the court should fine the owner $100.00. If the owner shows he had insurance in effect at the time he received the citation, the citation should be dismissed." Op. Atty. Gen. Sturgis, August 11, 2006.

§ 63-15-4 Limitations on accessing electronic images:

(6) No law enforcement officer may access any function, feature or other electronic image on a person's cellular phone or other type of electronic device when enforcing the provisions of this section except for the electronic image of an insurance card shown to the officer.

§ 63-15-41 Nonresident's proof:

(1) The nonresident owner of a motor vehicle, the owner or operator of which is not licensed in this state, may give proof of financial responsibility by filing with the

department a written certificate or certificates of an insurance company authorized to transact business in the state in which the motor vehicle or motor vehicles described in such certificate or certificates are registered, or if such nonresident does not own a motor vehicle, then in the state in which the insured resides, provided such certificate otherwise conforms to the provisions of this chapter. The department shall accept the same upon condition that said insurance company complies with the following provisions with respect to the policies so certified:
(a) Said insurance company shall execute a power of attorney authorizing the department to accept service on its behalf of notice or process in any action arising out of a motor vehicle accident in this state;
(b) Said insurance company shall agree in writing that such policies shall be deemed to conform with the laws of this state relating to the terms of motor vehicle liability policies issued herein.
(2) If any insurance company not authorized to transact business in this state, which has qualified to furnish proof of financial responsibility, defaults in any said undertakings or agreements, the department shall not thereafter accept as proof any certificate of said company whether theretofore filed or thereafter tendered as proof, so long as such default continues.

§ 63-16-13 Suspension of vehicle registration:

(1) If the operator of a motor vehicle being operated on the public roads, streets or highways of the State of Mississippi or registered in the State of Mississippi has been found failing to have motor vehicle liability insurance in at least the minimum amounts required under Section 63-15-3(j), it is a misdemeanor and, upon conviction, is punishable by a fine of One Hundred Dollars ($100.00) and suspension of driving privilege for a period of one (1) year or until the owner of the motor vehicle shows proof of liability insurance that is in compliance with the liability limits required by Section 63-15-3(j) and has paid the fines and assessments imposed and the driver's license reinstatement fees imposed by the Department of Public Safety. A judge shall determine whether the defendant is indigent, and if a determination of indigence is made, shall authorize the reinstatement of that person's driver's license upon proof of mandatory liability insurance subject to compliance with a payment plan for any fines, assessments and/or fees. If such fines are levied in a municipal court, the funds from such fines shall be deposited in the general fund of the municipality. If such fines are levied in any of the courts of the county, the funds from such fines shall be deposited in the general fund of the county. A person convicted of a criminal offense under this subsection (1) shall not be convicted of a criminal offense under Section 63-15-4(4) arising from the same incident.

§ 63-16-5 Traffic stops:

(1) A law enforcement officer or authorized employee of a law enforcement agency may, during the course of a traffic stop or accident investigation, access the verification system established under Section 63-16-3 to verify whether a motor vehicle is covered by a valid motor vehicle liability policy in at least the minimum amounts required under Section 63-15-3(j).

(2) The response received from the system supersedes an insurance card produced by a motor vehicle operator, and notwithstanding the display of an insurance card by the operator, the law enforcement officer may issue a complaint and notice to appear to the operator for a violation of the Mississippi Motor Vehicle Safety-Responsibility Law. A law enforcement officer may exercise discretion in issuing a citation during the first sixty (60) days after proof of temporary insurance is issued by an insurance company, if the verification system shows that the insured's policy is expired and the operator provides proof of insurance with a new insurance company or a new insurance card.
(3) Except upon reasonable cause to believe that a driver has violated another traffic regulation or that the driver's motor vehicle is unsafe or not equipped as required by law, a law enforcement officer may not use the verification system to stop a driver for operating a motor vehicle in violation of this chapter.

1901 MANDATORY USE OF SAFETY SEAT BELTS

§ 63-2-1 Seat belts required:

(1) When a passenger motor vehicle is operated in forward motion on a public road, street or highway within this state, every operator and every passenger shall wear a properly fastened safety seat belt system, required to be installed in the vehicle when manufactured pursuant to Federal Motor Vehicle Safety Standard 208.

See also Austin v. State, 72 So. 3d 565, 568-69 (Miss. Ct. App. 2011) ("Officer Luckey testified that he initiated the traffic stop based solely on his observation of Austin's and his passengers' failure to wear their seat belts in violation of section 63–2–1(1); thus, we find that Officer Luckey's traffic stop was constitutionally reasonable.").

Mississippi Attorney General's opinions:

Seat belt violations.
"It is the opinion of this office that only the driver of the vehicle should be issued a citation. The thrust of the statute is to place the burden on the driver of the vehicle to ensure that the passengers comply with its terms byuse of seat belts. This is evident by the fact that only the driver may be assessed the $25.00 fine. Also, subsection (2) provides that a violation of this chapter, 'shall not be entered on the driving record of any individual so convicted.'" Op. Atty. Gen. Sparks, August 15, 2008.

§ 63-2-1 Passenger motor vehicle defined:

(2) "Passenger motor vehicle" for purposes of this chapter means a motor vehicle designed to carry fifteen (15) or fewer passengers, including the driver, but does not include motorcycles, mopeds, all-terrain vehicles or trailers.

§ 63-2-1 Vehicles and persons exempt:

(3) This section shall not apply to:
(a) Vehicles which may be registered for "farm" use, including "implements of husbandry" as defined in Section 63–21–5(d), and "farm tractors" as defined in Section 63–3–105(a);
(b) An operator or passenger possessing a written verification from a licensed physician that he is unable to wear a safety belt system for medical reasons;
(c) A passenger car operated by a rural letter carrier of the United States Postal Service or by a utility meter reader while on duty;
(d) Buses; or
(e) A child who is required to be protected by the use of a child passenger restraint device or system or a belt-positioning booster seat system under the provisions of Sections 63–7–301 through 63–7–311.

§ 63-2-7 Sanctions:

(1) A violation of this chapter shall be a misdemeanor, punishable by a fine of Twenty-five Dollars ($25.00) upon conviction; however, only the operator of a vehicle may be fined for a violation of this chapter by the operator and any passengers. The maximum fine that may be imposed against the operator of a vehicle for a violation of this chapter by the operator or for a violation of this chapter by one or more passengers shall be Twenty-five Dollars ($25.00) in the aggregate.

Mississippi Attorney General's opinions:

Only vehicle operator to be fined.
"Under Section 63-2-7, only the vehicle operator may be fined for a seatbelt violation of the operator and/or any passengers. The maximum fine that may be imposed against the operator for his own violation or for a violation by a passenger is twenty-five dollars ($25.00) "in the aggregate." Therefore, whether the operator, one passenger or multiple passengers violate Section 63-2-1, a citation will only be issued to the operator, and the total amount of the fine will not exceed $25.00. A logical reading of the statute leads us to conclude that when one or more seatbelt violations occur in a vehicle, the law enforcement officer should issue one citation to the operator of the vehicle." Op. Atty. Gen. Horne, January 25, 2019.

Seat belt violations.
"It is the opinion of this office that only the driver of the vehicle should be issued a citation. The thrust of the statute is to place the burden on the driver of the vehicle to ensure that the passengers comply with its terms byuse of seat belts. This is evident by the fact that only the driver may be assessed the $25.00 fine. Also, subsection (2) provides that a violation of this chapter, 'shall not be entered on the driving record of any individual so convicted.'" Op. Atty. Gen. Sparks, August 15, 2008.

§ 63-2-7 No state assessments imposed:

(2) A violation of this chapter shall not be entered on the driving record of any individual so convicted, nor shall any state assessment provided for by Section 99-19-73, or any other state law, be imposed or collected.

§ 63-2-3 Violation not entered on driving record:

Failure to provide and use a seat belt restraint device or system shall not be considered contributory or comparative negligence, nor shall the violation be entered on the driving record of any individual.

1902 REGULATIONS ON SIZE, WEIGHT AND LOAD

The "Uniform Highway Traffic Regulation Law— Size, Weight and Load Regulations" is set forth in Chapter 5 of Title 63. This chapter places limitations on the size, weight and load of vehicles traveling the highways of the state. Unless another punishment is provided for by law, violations of size, weight and load regulations are misdemeanors punishable under Section 63-9-11.

1903 REGULATIONS ON EQUIPMENT AND IDENTIFICATION

The "Uniform Highway Traffic Regulation Law–Equipment and Identification Regulations" is set forth in Chapter 7 of Title 63. This chapter provides laws regulating equipment and identification of vehicles traveling the highways of the state, including general provisions, tampering with or alteration of odometers, and child passenger restraint devices. Unless another punishment is provided for by law, violations of equipment and identification regulations are misdemeanors punishable under Section 63-9-11.

§ 63-7-9 Exempt vehicles:

Except as may otherwise be provided in this chapter, the provisions of this chapter with respect to equipment on vehicles shall not apply to implements of husbandry, road machinery, road rollers, or farm tractors.

§ 63-7-20 Unauthorized blue or red lights:

(1) It is unlawful for any person, other than a law enforcement officer on duty, to use or display blue lights on a motor vehicle as provided for in Section 63-7-19.
(2) It is unlawful for any person to use or display red lights on a motor vehicle except as provided for in Section 63-7-19. It is not unlawful for the red lights authorized for private

or department-owned vehicles used by firemen of volunteer fire departments, as provided in Section 63-7-19, to remain mounted on such vehicles when the lights are not in use.
(3) It is unlawful for any vehicle to use alternating flashing headlights except an emergency vehicle as provided in Section 63-7-19.
(4) A person violating this section is guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than Fifty Dollars ($50.00) nor more than Five Hundred Dollars ($500.00).

§ 63-7-203 Tampering with odometers:

(1) It shall be unlawful for any person to advertise for sale, to sell, to use, or to install on any part of a motor vehicle or on an odometer in a motor vehicle any device which causes the odometer to register any mileage other than the true mileage driven. For the purposes of this section the true mileage driven is that mileage driven by the car as registered by the odometer within the manufacturer's designed tolerance.
(2) It shall be unlawful for any person with the intent to defraud to operate a motor vehicle on any street or highway knowing that the odometer of such vehicle is disconnected or nonfunctional.
(3) It shall be unlawful for any person to disconnect, turn back, reset or alter, or cause to be disconnected, reset or altered, the odometer of any motor vehicle with the intent to reduce the number of miles indicated thereon.

§ 63-7-207 Servicing odometers:

Nothing in sections 63-7-201 to 63-7-209 shall prevent the service, repair, or replacement of an odometer, provided the mileage indicated thereon remains the same as before the service, repair, or replacement. Where the odometer is incapable of registering the same mileage as before such service, repair, or replacement, the odometer shall be adjusted to read zero and a notice in writing shall be attached to the left door frame of the vehicle by

the owner or his agent specifying the mileage prior to repair or replacement of the odometer and the date on which it was repaired or replaced. Any removal or alteration of such notice so affixed shall be unlawful.

§ 63-7-209 Penalties for tampering with odometers:

Violation of the provisions of Sections 63-7-201 through 63-7-209 shall be deemed a misdemeanor and upon conviction shall be punishable by a fine of not more than five hundred dollars ($500.00) or by imprisonment for not more than six (6) months or by both such fine and imprisonment.

§ 63-7-301 When a child restraint device is required:

(1)(a) Every person transporting a child under the age of four (4) years in a passenger motor vehicle, and operated on a public roadway, street or highway within this state, shall provide for the protection of the child by properly using a child passenger restraint device

or system meeting applicable federal motor vehicle safety standards.

§ 63-7-301 When a booster seat system is required:

(1)(b) Every person transporting a child in a passenger motor vehicle operated on a public roadway, street or highway within this state, shall provide for the protection of the child by properly using a belt positioning booster seat system meeting applicable federal motor vehicle safety standards if the child is at least four (4) years of age, but less than seven (7) years of age and measures less than four (4) feet nine (9) inches in height or weighs less than sixty-five (65) pounds.

§ 63-7-301 If more than two children require a booster seat:

(1)(c) If more than two (2) children who are required under subsection (1) of this section to use a booster seat are being transported in a vehicle at one time, and the vehicle only has two (2) lap and shoulder belts in the rear seat, then only the two (2) children sitting in the seats with the lap and shoulder belts are required to use a belt positioning booster seat system and safety belt, and any other children may be secured with a safety seat lap belt only.

§ 63-7-301 Passenger motor vehicle defined:

(2) "The term "passenger motor vehicle" as used in Sections 63-7-301 through 63-7-311 has the same meaning as defined in Section 63-2-1(2). Sections 63-7-301 through 63-7-311 do not apply to the vehicles described in Section 63-2-1(3)."

§ 63-7-305 Enforceable by any law enforcement officer:

The provisions of Section 63-7-301 may be enforced by any duly sworn law enforcement officer of this state, or of any county or political subdivision thereof.

§ 63-7-309 Penalties for child restraint device or booster seat violations:

Any person convicted of violating the provisions of Section 63-7-301 shall be fined not more than Twenty-five Dollars ($25.00) for each offense.

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CHAPTER 20

TRAFFIC VIOLATIONS PROCEDURES

2000 REGULATIONS ON TRAFFIC VIOLATIONS PROCEDURES

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2000 REGULATIONS ON TRAFFIC VIOLATIONS PROCEDURES

The "Uniform Highway Traffic Regulation Law–Traffic Violations Procedure" is set forth in Chapter 9 of Title 63 and covers traffic violation procedures for Chapter 3 of Title 63 "Rules of the Road," Chapter 5 of Title 63 "Size, Weight, and Load Regulations," and Chapter 7 of Title 63 "Equipment and Identification Regulations."

2001 UNIFORM TRAFFIC TICKET LAW

§ 63-9-21 Form and content of tickets:

(1) This section shall be known as the Uniform Traffic Ticket Law.
(2) All traffic tickets, except traffic tickets filed electronically as provided under subsection (8) of this section, shall be printed in the original and at least two (2) copies and such other copies as may be prescribed by the Commissioner of Public Safety. All traffic tickets shall be uniform as prescribed by the Commissioner of Public Safety and the Attorney General, except as otherwise provided in subsection (3)(b) and except that the Commissioner of Public Safety and the Attorney General may alter the form and content of traffic tickets to meet the varying requirements of the different law enforcement agencies. The Commissioner of Public Safety and the Attorney General shall prescribe a separate traffic ticket, consistent with the provisions of subsection (3)(b) of this section, to be used exclusively for violations of the Mississippi Implied Consent Law.
(3)(a) Every traffic ticket issued by any sheriff, deputy sheriff, constable, county patrol officer, municipal police officer or State Highway Patrol officer for any violation of traffic or motor vehicle laws shall be issued on the uniform traffic ticket or uniform implied consent law violation ticket consisting of an original and at least two (2) copies and such other copies as may be prescribed by the Commissioner of Public Safety.
(b) The traffic ticket, citation or affidavit issued to a person arrested for a violation of the Mississippi Implied Consent Law shall contain a place for the trial judge hearing the case or accepting the guilty plea, as the case may be, to sign, stating that the person arrested either employed an attorney or waived his right to an attorney after having been properly advised of his right to have an attorney. If the person arrested employed an attorney, the name, address and telephone number of the attorney shall be entered or written on the ticket, citation or affidavit.
(c) Every traffic ticket shall show, among other necessary information, the name of the issuing officer, the name of the court in which the cause is to be heard, and the date and time the person is to appear to answer the charge. The ticket shall include information that will constitute a complaint charging the offense for which the ticket was issued, and when duly sworn to and filed with a court of competent jurisdiction, prosecution may proceed thereunder.
(d) The traffic ticket shall contain a space to include the current address and current telephone number of the person being charged. It shall not contain a space to include the social security number of the person being charged.

See also Loveless v. City of Booneville, 958 So. 2d 230, 233 (Miss. Ct App. 2007) ("There is no requirement that the address of the municipal court be contained on the ticket."); Scott v. City of Booneville, 962 So. 2d 698, 702 (Miss. Ct. App. 2007) ("This is not a case of the city purposefully continuing to use outdated Uniform Traffic Tickets. . . . [T]he ticket in question contained all the statutorily required information; therefore, it constituted a sworn affidavit.").

Mississippi Attorney General's opinions:

Due process requires the date and time for appearance.
"Due process would mandate that a person served with a ticket be provided the date and time on which he is to answer the charge. The ticket should either be dismissed without prejudice and a new ticket providing the required information be served on the person; or the ticket should be amended to include all of the required information and the amended ticket be served on the person." Op. Atty. Gen. Pittman, March 21, 2008.

Officer who issues the ticket must sign and acknowledge it.
"[T]he law enforcement officer who actually issues the ticket to the defendant must sign the affidavit/ticket and acknowledge the affidavit when filed with the clerk of the court. One officer cannot acknowledge an affidavit/citation that is issued by another officer." Op. Atty. Gen. Hatcher, July 30, 2004.

Section 63-9-21(3)(c) requires the date and time for appearance.
"Section 63-9-21(3)(c) requires the date and time for appearance on the face of the citation. . . . Therefore, it is the opinion of this office that notice to the defendant to either pay the ticket or contact the court does not satisfy the requirements of Section 63-9-21(3)(c)." Op. Atty. Gen. Payne, September 6, 2002.

§ 63-9-21 Traffic ticket books:

(4) All traffic tickets, except traffic tickets filed electronically under subsection (8) of this section, shall be bound in book form, shall be consecutively numbered and each traffic ticket shall be accounted for to the officer issuing such book. The traffic ticket books shall be issued to sheriffs, deputy sheriffs, constables and county patrol officers by the chancery clerk of their respective counties, to each municipal police officer by the clerk of the municipal court, and to each State Highway Patrol officer by the Commissioner of Public Safety.

§ 63-9-21 Who is to keep a record of traffic ticket books issued:

(5) The chancery clerk, clerk of the municipal court and the Commissioner of Public Safety shall keep a record of all traffic ticket books issued and to whom issued, accounting for all books printed and issued.

§ 63-9-21 Automatic filing for traffic tickets submitted electronically:

(5) . . . All traffic tickets submitted electronically shall be filed automatically with the Commissioner of Public Safety and either the clerk of the municipal court or clerk of the justice court using the system of electronic submission for the purpose of maintaining a record of account as prescribed by this subsection (5).

§ 63-9-21 Officer to deliver ticket to clerk:

(6) The original traffic ticket, unless the traffic ticket is filed electronically as provided under subsection (8) of this section, shall be delivered by the officer issuing the traffic ticket to the clerk of the court to which it is returnable to be retained in that court's records and the number noted on the docket. However, if a ticket is issued and the person is incarcerated based upon the conduct for which the ticket was issued, the ticket shall be filed with the clerk of the court to which it is returnable no later than 5:00 p.m. on the next business day, excluding weekends and holidays, after the date and time of the person's incarceration; however, failure to timely file the traffic ticket shall not be grounds for dismissal of the traffic ticket and shall not prevent the person's release from incarceration. The officer issuing the traffic ticket shall also give the accused a copy of the traffic ticket.

§ 63-9-21 Copy of ticket filed with the State Auditor:

(6) . . . The clerk of the court shall file a copy with the Commissioner of Public Safety within forty-five (45) days after judgment is rendered showing such information about the judgment as may be required by the commissioner or, in cases in which no judgment has been rendered, within one hundred twenty (120) days after issuance of the ticket. Other copies that are prescribed by the commissioner pursuant to this section shall be filed or retained as may be designated by the commissioner. All copies shall be retained for at least two (2) years.

§ 63-9-21 Failure to comply with Section 63-9-21 a misdemeanor:

(7) Failure to comply with the provisions of this section shall constitute a misdemeanor and, upon conviction, shall be punishable by a fine of not less than Ten Dollars ($10.00) nor more than One Hundred Dollars ($100.00).

§ 63-9-21 Filing by computer or electronic means:

(8)(a) Law enforcement officers and agencies may file traffic tickets, including tickets issued for a violation of the Mississippi Implied Consent Law and general misdemeanor affidavits, by computer or electronic means if the ticket or affidavit conforms in all substantive respects, including layout and content, as provided under subsections (2) or (3)(b) of this section. The provisions of subsection (4) of this section requiring tickets bound in book form do not apply to a ticket that is produced by computer or electronic means. Information concerning tickets produced by computer or electronic means shall be

available for public inspection in substantially the same manner as provided for the uniform tickets described in subsection (2) of this section.
(b) The defendant shall be provided with a paper copy of the ticket. A law enforcement officer who files a ticket or misdemeanor affidavit electronically shall be considered to have certified, signed and sworn to the ticket or misdemeanor affidavit and has the same rights, responsibilities and liabilities as with all other tickets or affidavits issued pursuant to this section.

Mississippi Attorney General's opinions:

Filing electronic tickets.
"[Section 63-9-21] provides that the officer shall be considered to have certified, signed and sworn to the ticket. It is the opinion of this office that the officer is not required to appear before the clerk to swear to a ticket that by law has been already been sworn to." Op. Atty. Gen. Smith, February 21, 2014.

§ 63-9-21 Penalties for failing to comply with § 63-9-21:

(7) Failure to comply with the provisions of this section shall constitute a misdemeanor and, upon conviction, shall be punishable by a fine of not less than Ten Dollars ($10.00) nor more than One Hundred Dollars ($100.00).

2002 DEPOSITING LICENSE FOR BAIL

§ 63-9-25 When allowed:

(1) Whenever any person lawfully possessed of a driver's license theretofore issued to him by the Department of Public Safety of the State of Mississippi, or under the laws of any other state or territory, or the District of Columbia of the United States, shall be arrested and charged with any offense against the traffic or motor vehicle laws or rules of the road of this state, or any municipality thereof, he shall have the option of depositing his driver's license so issued to him with the arresting officer or the court in lieu of any other security which may be required for his appearance in any court in this state in answer to such charge lodged in such court.

§ 63-9-25 Receipt for license deposited:

(2) If such person arrested elects to deposit his license as provided, the arresting officer or court shall issue such person a receipt for said license upon a form furnished or prescribed by the Mississippi Department of Public Safety, and thereafter said person shall be permitted to operate a motor vehicle upon the highways of this state and streets of the municipalities thereof during the pendency of the case in which the license was deposited unless his license or privilege is otherwise revoked, suspended or canceled, but in no case for a period longer than thirty (30) days.

§ 63-9-25 License forwarded to Public Safety if driver fails to appear:

(3) The clerk of the court in which the charge is lodged shall immediately forward to the department the license of the driver deposited in lieu of bail if the driver fails to appear in answer to the charge against him. The Commissioner of Public Safety or his authorized agent shall, upon receipt of a license so forwarded by the court, suspend the driver's license and driving privilege of the defaulting driver until notified by the court that the charge against such driver has been finally adjudicated.

§ 63-9-25 If out-of-state license is forwarded:

(4) The commissioner shall, upon receipt of a license of a nonresident driver, forward notice to his counterpart in the state of the driver's residence of the fact that such driver has been charged with a traffic or motor vehicle offense or a violation of the rules of the road and has so deposited his license in lieu of bail.

§ 63-9-25 Unlawful application for a duplicate license:

(5) The making of an application for a duplicate driver's license during the period when the original license is posted for an appearance in a court shall be unlawful, shall constitute a misdemeanor and a person convicted thereof shall be subject to a fine of not more than Five Hundred Dollars ($500.00) or imprisonment for not more than six (6) months, or both fine and imprisonment.

§ 63-9-25 DUI arrests not governed by § 63-9-25:

(6) The provisions of this section shall not govern arrests for driving under the influence of alcohol. The procedure set forth in the Mississippi Implied Consent Law, Sections 63-11-1 through 63-11-47, Mississippi Code of 1972, shall apply.

Mississippi Attorney General's opinions:

Posting driver's license in lieu of bond.
"[Section] 63-9-25 allows a defendant to post his driver's license in lieu of bond when he is charged with a traffic offense." Op. Atty. Gen. Strait, September 26, 2003.

2003 GUARANTEED ARREST BOND CERTIFICATE

§ 63-9-27 Posting a guaranteed arrest bond certificate:

(1) A guaranteed arrest bond certificate with respect to which a fidelity and surety company has become surety as provided in subsection (2) of this section, when posted by the person whose signature appears thereon, shall be accepted in lieu of cash bail in an amount not to exceed two hundred dollars ($200.00), as a bail bond, to guarantee the

appearance of such person in any court in this state at such time as may be required by the court, when such person is arrested for violation of any traffic laws of any municipality or county of this state, except for the offense of driving while under the influence of intoxicating liquors, drugs or narcotics, or for any felony, and the alleged violation was committed prior to the date of expiration shown on such guaranteed arrest bond certificate.

§ 63-9-27 Forfeiture and collection:

(1) . . . Any such guaranteed arrest bond certificate so posted as a bail bond in any court in this state shall be subject to the forfeiture and collection provisions of law applicable to a bail bond, except that any judgment forfeiting a guaranteed arrest bond certificate rendered under such forfeiture and collection provisions shall, at any time within thirty (30) days after rendition, be set aside upon the surrender, or the appearance and trial and conviction or acquittal of the defendant, or upon a continuance granted upon motion of the district attorney after such appearance.

§ 63-9-27 Authorized sureties:

(2) Any domestic or foreign insurance company which has qualified to transact fidelity and surety insurance business in this state may, in any year, become surety in an amount not to exceed two hundred dollars ($200.00) with respect to each guaranteed arrest bond certificate issued in such year by an automobile club, automobile association or insurance company authorized to transact automobile liability insurance business within this state or by the fidelity and surety company itself.

§ 63-9-27 Guaranteed arrest bond certificate defined:

(2) . . . The term “guaranteed arrest bond certificate,” as used in this section, means a printed card or other certificate issued by an automobile club, automobile association, insurance company authorized to transact automobile liability insurance within this state, or an insurance company authorized to transact fidelity and surety insurance business within this state to any of its members or insureds, which is signed by such member or insured, and contains a printed statement that a fidelity and surety company authorized to do business in this state guarantees the appearance of the person whose signature appears on the card or certificate, and that such company will, in the event of the failure of such person to appear in court at the time of trial, pay any fine or forfeiture imposed on such person in an amount not to exceed two hundred dollars ($200.00).
The issuance of a “guaranteed arrest bond certificate,” as defined above, by an automobile club, automobile association or insurance company not authorized to transact fidelity and surety insurance business in this state shall not be construed as engaging in fidelity and surety insurance business in this state by such automobile club, automobile association or insurance company.

§ 63-9-27 Supplementary and complementary to § 63-9-25:

(3) This section shall be supplementary and complementary to section 63-9-25 and shall not be construed as affecting or amending that section in any way.

2004 CRIMINAL LIABILITY

§ 63-9-11 Traffic violations as misdemeanors:

(1) It is a misdemeanor for any person to violate any of the provisions of Chapter 3, 5 or 7 of this title, unless such violation is by such chapters or other law of this state declared to be a felony.

§ 63-9-11 Penalties:

(2) Every person convicted of a misdemeanor for a violation of any of the provisions of [Chapter 3, 5 or 7 of this title] for which another penalty is not provided shall for first conviction thereof be punished by a fine of not more than One Hundred Dollars ($100.00) or by imprisonment for not more than ten (10) days; for a second such conviction within one (1) year thereafter such person shall be punished by a fine of not more than Two Hundred Dollars ($200.00) or by imprisonment for not more than twenty (20) days or by both such fine and imprisonment; upon a third or subsequent conviction within one (1) year after the first conviction such person shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment for not more than six (6) months or by both such fine and imprisonment.

§ 63-9-12 Paying a traffic fine by personal check:

Personal checks shall be accepted from Mississippi residents in payment of any fine imposed as a result of a violation of Chapters 3, 5 and 7 of Title 63, Mississippi Code of 1972. The person accepting a check in payment of such a fine shall not be liable if such check is returned not paid provided he makes reasonable efforts to collect the fine.

§ 63-9-13 Depositing fines and forfeitures:

All fines and forfeitures collected upon conviction or upon forfeiture of bail of any person charged with a violation of any of the provisions of Chapters 3, 5 or 7 of this title constituting a misdemeanor shall be deposited in the treasury of the county maintaining the court wherein such conviction or forfeiture was had.

2005 TRAFFIC SAFETY VIOLATOR COURSE

§ 63-9-11 Eligibility:

(3)(a) Whenever a person not covered under Section 63-1-55 is charged with a misdemeanor violation of any of the provisions of Chapter 3, 5 or 7 of this title, the person shall be eligible to participate in not less than four (4) hours of a traffic safety violator course and thereby have no record of the violation on the person's driving record if the person meets all the following conditions:
(i) The defendant has a valid Mississippi driver's license or permit.
(ii) The defendant has not had a conviction of a violation under Chapter 3, 5 or 7 of this title within three (3) years before the current offense; any conviction entered before October 1, 2002, does not constitute a prior offense for the purposes of this subsection (3).
(iii) The defendant's public and nonpublic driving record as maintained by the Department of Public Safety does not indicate successful completion of a traffic safety violator course under this section in the three-year period before the offense.
(iv) The defendant files an affidavit with the court stating that this is the defendant's first conviction in more than three (3) years or since October 1, 2002, whichever is the lesser period of time; the defendant is not in the process of taking a course under this section; and the defendant has not completed a course under this section that is not yet reflected on the defendant's public or nonpublic driving record.
(v) The offense charged is for a misdemeanor offense under Chapter 3, 5 or 7 of this title.
(vi) The defendant pays the applicable fine, costs and any assessments required by law to be paid upon conviction of such an offense.
(vii) The defendant pays to the court an additional fee of Ten Dollars ($10.00) to elect to proceed under the provisions of this subsection (3).

§ 63-9-11 If a plea of nolo contendere or guilty:

(3)(b)(i) 1. An eligible defendant may enter a plea of nolo contendere or guilty in person or in writing and present to the court, in person or by mail postmarked on or before the appearance date on the citation, an oral or written request to participate in a course under this subsection (3).
2. The court shall withhold acceptance of the plea and defer sentencing in order to allow the eligible defendant ninety (90) days to successfully complete not less than four (4) hours of a court-approved traffic safety violator course at the cost of the defendant. Upon proof of successful completion entered with the court, the court shall dismiss the prosecution and direct that the case be closed. The only record maintained thereafter shall be the nonpublic record required under Section 63-9-17 solely for use by the courts in determining eligibility under this subsection (3).

§ 63-9-11 If convicted at trial:

(3)(b)(ii) If a person pleads not guilty to a misdemeanor offense under any of the provisions of Chapter 3, 5 or 7 of this title but is convicted, and the person meets all the requirements under paragraph (a) of this subsection, upon request of the defendant the court shall suspend the sentence for such offense to allow the defendant forty-five (45) days to successfully complete not less than four (4) hours of a court-approved traffic safety violator course at his own cost. Upon successful completion by the defendant of the course, the court shall set the conviction aside, dismiss the prosecution and direct that the case be closed. The court on its own motion shall expunge the record of the conviction, and the only record maintained thereafter shall be the nonpublic record required under Section 63-9-17 solely for use by the courts in determining an offender's eligibility under this subsection (3).

§ 63-9-11 Out-of-state residents:

(3)(c) An out-of-state resident shall be allowed to complete a substantially similar program in his home state, province or country provided the requirements of this subsection (3) are met, except that the necessary valid driver's license or permit shall be one issued by the home jurisdiction.

§ 63-9-11 Traffic safety violator course requirements:

(3)(d) A court shall not approve a traffic safety violator course under this subsection (3) that does not supply at least four (4) hours of instruction, an instructor's manual setting forth an appropriate curriculum, student workbooks, some scientifically verifiable analysis of the effectiveness of the curriculum and provide minimum qualifications for instructors.

§ 63-9-11 Court to inform the defendant of traffic safety violator course:

(3)(e) A court shall inform a defendant making inquiry or entering a personal appearance of the provisions of this subsection (3).

§ 63-9-11 Conviction not invalidated if defendant fails to elect option:

(3)(g) Failure of a defendant to elect to come under the provisions of this subsection (3) for whatever reason, in and of itself, shall not invalidate a conviction.

§ 63-9-11 Prohibition that applies to employees of sentencing court:

(3)(h) No employee of the sentencing court shall personally benefit from a defendant's attendance of a traffic safety violator course. Violation of this prohibition shall result in termination of employment.

§ 63-9-11 Clerk to forward $10.00 fee to State Treasurer:

(3)(i) The additional fee of Ten Dollars ($10.00) imposed under this subsection (3) shall be forwarded by the court clerk to the State Treasurer for deposit into a special fund created in the State Treasury.

§ 63-9-11 Option does not apply to the holder of a commercial driver's license:

(4) The provisions of subsection (3) of this section shall not be applicable to violation of any of the provisions of Chapter 3, 5 or 7 of this title committed by the holder of a commercial driver's license issued under the Mississippi Commercial Driver's License Law, regardless of whether the violation occurred while operating a commercial motor vehicle or some other motor vehicle.

2006 REPORTING CONVICTIONS

§ 63-9-17 Court to keep full record of proceedings:

(1) Every court shall keep a full record of the proceedings of every case in which a person is charged with any violation of law regulating the operation of vehicles on the highways, streets or roads of this state.

§ 63-9-17 Certified abstract forwarded to Public Safety:

(2) Unless otherwise sooner required by law, within five (5) days after the conviction of a person upon a charge of violating any law regulating the operation of vehicles on the highways, streets or roads of this state, every court in which such conviction was had shall prepare and immediately forward to the Department of Public Safety an abstract of the record of said court covering the case in which said person was so convicted, which abstract must be certified by the person so authorized to prepare the same to be true and correct.

See also Miss. Code Ann. 63-1-51(1) ("It shall be the duty of the court clerk, upon conviction of any person holding a license issued pursuant to this article where the penalty for a traffic violation is as much as Ten Dollars ($10.00), to mail a copy of abstract of the court record or provide an electronically or computer generated copy of abstract of the court record immediately to the commissioner at Jackson, Mississippi, showing the date of conviction, penalty, etc., so that a record of same may be made by the Department of Public Safety.").

§ 63-9-17 Information to be included in the certified abstract:

(3) Said abstract must be made upon a form approved by the Department of Public Safety, and shall include the name and address of the party charged, the registration number of

the vehicle involved, the nature of the offense, the date of hearing, the plea, the judgment, and if the fine was satisfied by prepayment or appearance bond forfeiture, and the amount of the fine or forfeiture, as the case may be.

§ 63-9-17 Reporting completion of approved traffic safety violator course:

(5) Every court shall also forward a like report to the Department of Public Safety after the satisfactory completion by a defendant of an approved traffic safety violator course under Section 63-9-11, and the department shall make and maintain a private, nonpublic record to be kept for a period of ten (10) years. The record shall be solely for the use of the courts in determining eligibility under Section 63-9-11, as a first-time offender, and shall not constitute a criminal record for the purpose of private or administrative inquiry. Reports forwarded to the Department of Public Safety under this subsection shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

§ 63-9-17 Penalties for failing to comply with § 63-9-17:

(6) The failure by refusal or neglect of any such judicial officer to comply with any of the requirements of this section shall constitute misconduct in office and shall be grounds for removal therefrom.

§ 63-9-17 Public Safety to keep copies of abstracts for 3 years:

(7) The Department of Public Safety shall keep copies of all abstracts received hereunder for a period of three (3) years at its main office and the same shall be open to public inspection during reasonable business hours. This subsection shall not apply to nonpublic records maintained solely for the use of the courts in determining offender eligibility.

2007 VOLUNTARY ADVANCE PAYMENT OF FINES

§ 99-19-3 Definitions:

(3) For the purposes of this section:
(a) The term "fine" means, in addition to the pecuniary punishment, all fees, costs, assessments and other charges required by law to be imposed in such cases.
(b) The term "traffic misdemeanor" means a violation of traffic or motor vehicle laws that do not require mandatory imprisonment upon conviction but shall not include repeat offenders where a sentence of imprisonment is likely and shall not include charges under the Mississippi Implied Consent Law.

§ 99-19-3 Paying the amount of fine in advance:

(2) In all cases in the circuit, county, justice and municipal courts involving a traffic misdemeanor violation . . . where a person has been issued a ticket or has been formally

charged by affidavit, indictment or information and desires to waive a trial and not appear in court and defend the charge, the amount of the fine, in the discretion of the court, may be paid in advance to the clerk of the court. When the fine is paid in advance, the person cited must be notified by language plainly printed on a waiver form or the ticket of the person's right to a trial and the consequences of the voluntary advance payment of the fine.

§ 99-19-3 Court may accept a cash appearance bond:

(2) . . . In cases where formal charges have been made and the person charged has been notified to appear in court at a certain date and time, the clerk of the court is authorized to accept a cash appearance bond, not to exceed the amount of the fine, conditioned upon the appearance of the person in court at the cited date and time. In the event of default, the cash appearance bond may be forfeited in payment of any judgment in the case in an amount not to exceed the amount of the bond; and in such cases of cash appearance bond forfeiture, it shall be final without necessity of judgment nisi and issuance of the writ of scire facias.

§ 99-19-3 Court's authority to convict:

(2) . . . In the event a person so cited or charged pays a fine in advance after notice of the person's rights, this shall constitute a waiver of formal charge, arraignment and trial; and in such cases and in cases of default on cash appearance bond, such action shall be a plea of nolo contendere by such person and the court, upon the advance payment of fine or the default on cash appearance bond, may convict the person of the offense stated in the ticket or formal charges without further appearance by the person.

§ 99-19-3 Reporting requirements:

(2) . . . Traffic convictions shall be reported to the Commissioner of Public Safety as required by law . . . It shall not be necessary to enter traffic misdemeanor cases in the municipal court docket.

§ 63-1-53 Notice for failure to pay any fine, fee or assessment:

(1) Upon failure of any person to pay timely any fine, fee or assessment levied as a result of any violation of this title, the clerk of the court shall give written notice to such person by United States first-class mail at his last known address advising such person that, if within ninety (90) days after such notice is deposited in the mail, the person has not paid the entire amount of all fines, fees and assessments levied, then the court will pursue collection as for any other delinquent payment, and shall be entitled to collection of all additional fees in accordance with subsection (4) of this section.

§ 63-1-53 Public Safety authorized to suspend license:

(2) The commissioner is hereby authorized to suspend the license of an operator without preliminary hearing upon a showing by his records or other sufficient evidence that the licensee:
(a) Has committed an offense for which mandatory revocation of license is required upon conviction except under the provisions of the Mississippi Implied Consent Law;
(b) Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage;
(c) Is an habitually reckless or negligent driver of a motor vehicle;
(d) Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways;
(e) Is incompetent to drive a motor vehicle;
(f) Has permitted an unlawful or fraudulent use of such license;
(g) Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation; or
(h) Has committed a violation for which mandatory revocation of license is required upon conviction, entering a plea of nolo contendere to, or adjudication of delinquency, pursuant to the provisions of subsection (1) of Section 63–1–71.

§ 63-1-53 Court may pursue collection for delinquent payment:

(4) If a licensee has not paid all cash appearance bonds authorized under Section 99–19–3 or all fines, fees or other assessments levied as a result of a violation of this title within ninety (90) days after receiving notice of the licensee's failure to pay all fines, fees or other assessments as provided in subsection (1) of this section, the court is authorized to pursue collection under Section 21–17–1(6) or 19–3–41(2) as for any other delinquent payment, and shall be entitled to collection of all additional fees authorized under those sections.

§ 63-1-55 Judge's suspension of minor's license:

A trial judge, in his discretion, if the person so convicted or who has entered a plea of guilty for any traffic violation, except the offenses enumerated in paragraphs (a) through (e) of subsection (1) of Section 63-1-51 and violations of the Implied Consent Law and the Uniform Controlled Substances Law, is a minor and dependent upon and subject to the care, custody and control of his parents or guardian, may, in lieu of the penalties otherwise provided by law and the provision of said section, suspend such minor's driver's license by taking and keeping same in custody of the court for a period of time not to exceed ninety (90) days. The judge so ordering such suspension shall enter upon his docket "DEFENDANT'S DRIVER'S LICENSE SUSPENDED FOR _____ DAYS IN LIEU OF CONVICTION" and such action by the trial judge shall not constitute a conviction. The trial judge also may require the minor to successfully complete a defensive driving course approved by the judge as a condition of the suspension. Costs of court and penalty assessment for driver education and training program may be imposed in such actions within the discretion of the court. Should a minor appeal, in the time and manner as by law provided, the decision whereby his license is suspended, the trial judge shall then return said license to the minor and impose the fines and/or penalties that he would have otherwise imposed and same shall constitute a conviction.

CHAPTER 21

DOMESTIC VIOLENCE, ASSAULTS, AND DISTURBANCES

2100 SIMPLE DOMESTIC VIOLENCE

§ 93-21-113 Prosecutor's duty to file charges:

Every municipal prosecutor, county attorney, district attorney or other appropriate law enforcement official who, having had reported to him a case of domestic violence, if the facts submitted be sufficient, shall immediately file charges against the offender on the behalf of the victim. Such prosecutor may in plea bargaining with the offender enter into an agreement whereby the offender shall receive counseling in lieu of further prosecution, and if the offender shall successfully attend counseling as agreed upon for the period of time agreed upon, the municipal prosecutor, county attorney or district attorney, as the case may be, shall pass such case to the file.
No municipal prosecutor, county attorney or district attorney shall grant such right in plea bargaining to the same offender more than once.

§ 97-3-7 Simple domestic violence:

(3)(a) When the offense is committed against a current or former spouse of the defendant or a child of that person, a person living as a spouse or who formerly lived as a spouse with the defendant or a child of that person, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person who has a current or former dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child, a person is guilty of simple domestic violence who:
(i) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another;
(ii) Negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or
(iii) Attempts by physical menace to put another in fear of imminent serious bodily harm.
Upon conviction, the defendant shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment in the county jail for not more than six (6) months, or both.
. . .
(6) In sentencing under subsections (3), (4) and (5) of this section, the court shall consider as an aggravating factor whether the crime was committed in the physical presence or hearing of a child under sixteen (16) years of age who was, at the time of the offense, living within either the residence of the victim, the residence of the perpetrator, or the residence where the offense occurred.
. . .
(7) Reasonable discipline of a child, such as spanking, is not an offense under subsections (3) and (4) of this section.

See also Miss. Code Ann. § 99-3-7 (Warrantless arrests; domestic violence and protection order violations); Miss. Code Ann. § 99-5-37 (Appearance in domestic violence and knowing violation of domestic abuse protective orders cases; bail; imposition of special conditions).

§ 97-3-7 Simple domestic violence third is a felony:

(3)(b) Simple domestic violence: third. A person is guilty of the felony of simple domestic violence third who commits simple domestic violence as defined in this subsection (3) and who, at the time of the commission of the offense in question, has two (2) prior convictions, whether against the same or another victim, within seven (7) years, for any combination of simple domestic violence under this subsection (3) or aggravated domestic violence as defined in subsection (4) of this section or substantially similar offenses under the law of another state, of the United States, or of a federally recognized Native American tribe. Upon conviction, the defendant shall be sentenced to a term of imprisonment not less than five (5) nor more than ten (10) years.

See also Miss. Code Ann. § 97-3-7(4) and (5) (aggravated domestic violence, aggravated domestic violence third, and sentencing for fourth or subsequent domestic violence offense).

§ 97-3-7 "Dating relationship" defined:

(9)(b) For the purposes of this section: "Dating relationship" means a social relationship as defined in Section 93–21–3.

Miss. Code Ann. § 93-21-3 provides in part:

(d) "Dating relationship" means a social relationship of a romantic or intimate nature between two (2) individuals; it does not include a casual relationship or ordinary fraternization between two (2) individuals in a business or social context. Whether a relationship is a "dating relationship" shall be determined by examining the following factors:
(i) The length of the relationship;
(ii) The type of relationship; and
(iii) The frequency of interaction between the two (2) individuals involved in the relationship.

§ 97-3-7 Requiring counseling or treatment:

(10) Every conviction under subsection (3), (4) or (5) of this section may require as a condition of any suspended sentence that the defendant participate in counseling or treatment to bring about the cessation of domestic abuse. The defendant may be required to pay all or part of the cost of the counseling or treatment, in the discretion of the court.

§ 97-3-7 Criminal protection orders:

(11)(a) Upon conviction under subsection (3), (4) or (5) of this section, the court shall be empowered to issue a criminal protection order prohibiting the defendant from any contact with the victim. The court may include in a criminal protection order any other condition available under Section 93–21–15. The duration of a criminal protection order

shall be based upon the seriousness of the facts before the court, the probability of future violations, and the continued safety of the victim or another person. However, municipal and justice courts may issue criminal protection orders for a maximum period of time not to exceed one (1) year. Circuit and county courts may issue a criminal protection order for any period of time deemed necessary. Upon issuance of a criminal protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays, pursuant to Section 93-21-25.
(b) A criminal protection order shall not be issued against the defendant if the victim of the offense, or the victim's lawful representative where the victim is a minor or incompetent person, objects to its issuance, except in circumstances where the court, in its discretion, finds that a criminal protection order is necessary for the safety and well-being of a victim who is a minor child or incompetent adult.
(c) Criminal protection orders shall be issued on the standardized form developed by the Office of the Attorney General and a copy provided to both the victim and the defendant.
(d) It shall be a misdemeanor to knowingly violate any condition of a criminal protection order. Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment in the county jail for not more than six (6) months, or both.

§ 97-3-7 Sentencing order to include designation “domestic violence”:

(13) In any conviction under subsection (3), (4), (5) or (11) of this section, the sentencing order shall include the designation “domestic violence.” The court clerk shall enter the disposition of the matter into the corresponding uniform offense report.

2101 SIMPLE AND AGGRAVATED ASSAULT

§ 97-3-7 Simple assault:

(1)(a) A person is guilty of simple assault if he or she (i) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; (ii) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) attempts by physical menace to put another in fear of imminent serious bodily harm; and, upon conviction, he or she shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment in the county jail for not more than six (6) months, or both.

§ 97-3-7 Felony assault:

(1)(b) However, a person convicted of simple assault upon any of the persons listed in subsection (14) of this section under the circumstances enumerated in subsection (14) shall be punished by a fine of not more than One Thousand Dollars ($1,000.00) or by imprisonment for not more than five (5) years, or both.

(2)(a) A person is guilty of aggravated assault if he or she (i) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; (ii) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) causes any injury to a child who is in the process of boarding or exiting a school bus in the course of a violation of Section 63–3–615; and, upon conviction, he or she shall be punished by imprisonment in the county jail for not more than one (1) year or sentenced to the custody of the Department of Corrections for not more than twenty (20) years.

. . . .

(14) Assault upon any of the following listed persons is an aggravating circumstance for charging under subsections (1)(b) and (2)(b) of this section:

(a) When acting within the scope of his or her duty, office or employment at the time of the assault: a statewide elected official; law enforcement officer; fireman; emergency medical personnel; health care provider; employees of a health care provider or health care facility; social worker, family protection specialist or family protection worker employed by the Department of Human Services or another agency; Division of Youth Services personnel; any county or municipal jail officer; superintendent, principal, teacher or other instructional personnel, school attendance officer or school bus driver; any member of the Mississippi National Guard or United States Armed Forces; a judge of a circuit, chancery, county, justice, municipal or youth court or a judge of the Court of Appeals or a justice of the Supreme Court; district attorney or legal assistant to a district attorney; county prosecutor or municipal prosecutor; court reporter employed by a court, court administrator, clerk or deputy clerk of the court; public defender; or utility worker;

(b) A legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his or her duty, office or employment; or

(c) A person who is sixty-five (65) years of age or older or a person who is a vulnerable person, as defined in Section 43–47–5.

2102 DISTURBING THE FAMILY OR PUBLIC PEACE

§ 97-35-9 Tumultuous or offensive conduct:

A person who wilfully disturbs the peace of any family or person by an explosion of gunpowder or other explosive substance, or by loud or unusual noise, or by any tumultuous or offensive conduct, shall be punished by fine or imprisonment, or both; the fine not to exceed one hundred dollars, and the imprisonment not to exceed six months in the county jail.

§ 97-35-11 Abusive language or indecent exposure:

Any person who enters the dwelling house of another, or the yard or curtilage thereof, or upon the public highway, or any other place near such premises, and in the presence or hearing of the family or the possessor or occupant thereof, or of any member thereof,

makes use of abusive, profane, vulgar or indecent language, or is guilty of any indecent exposure of his or her person at such place, shall be punished for a misdemeanor. The act of breast-feeding shall not constitute indecent exposure.

§ 97-35-13 Disturbance in public place:

Any person who shall enter any public place of business of any kind whatsoever, or upon the premises of such public place of business, or any other public place whatsoever, in the State of Mississippi, and while therein or thereon shall create a disturbance, or a breach of the peace, in any way whatsoever, including, but not restricted to, loud and offensive talk, the making of threats or attempting to intimidate, or any other conduct which causes a disturbance or breach of the peace or threatened breach of the peace, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

§ 97-35-15 Disturbance of the peace:

(1) Any person who disturbs the public peace, or the peace of others, by violent, or loud, or insulting, or profane, or indecent, or offensive, or boisterous conduct or language, or by intimidation, or seeking to intimidate any other person or persons, or by conduct either calculated to provoke a breach of the peace, or by conduct which may lead to a breach of the peace, or by any other act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment in the county jail not more than six (6) months, or both.
(2) The act of breast-feeding shall not constitute a breach of the peace.
(3) The provisions of this section are supplementary to the provisions of any other statute of this state.

See also Collins v. State, 223 So. 3d 817, 822 (Miss. Ct. App. 2017) ("[Section 97-35-15] only prohibits disturbing the public peace or the peace of others . . . [it] does not prohibit disturbing the peace of ***another***.").

2103 STALKING

§ 97-3-107 Elements of the offense:

(1)(a) Any person who purposefully engages in a course of conduct directed at a specific person, or who makes a credible threat, and who knows or should know that the conduct would cause a reasonable person to fear for his or her own safety, to fear for the safety of another person, or to fear damage or destruction of his or her property, is guilty of the crime of stalking.

§ 97-3-107 General penalties:

(1)(b) A person who is convicted of the crime of stalking under this section shall be punished by imprisonment in the county jail for not more than one (1) year or by a fine of not more than One Thousand Dollars ($1,000.00), or by both such fine and imprisonment.

§ 97-3-107 Penalties if there is a protective order:

(1)(c) Any person who is convicted of a violation of this section when there is in effect at the time of the commission of the offense a valid temporary restraining order, ex parte protective order, protective order after hearing, court approved consent agreement, or an injunction issued by a municipal, justice, county, circuit or chancery court, federal or tribal court or by a foreign court of competent jurisdiction prohibiting the behavior described in this section against the same party, shall be punished by imprisonment in the county jail for not more than one (1) year and by a fine of not more than One Thousand Five Hundred Dollars ($1,500.00).

§ 97-3-107 Aggravated stalking:

(2)(a) A person who commits acts that would constitute the crime of stalking as defined in this section is guilty of the crime of aggravated stalking if any of the following circumstances exist:
(i) At least one (1) of the actions constituting the offense involved the use or display of a deadly weapon with the intent to place the victim of the stalking in reasonable fear of death or great bodily injury to self or a third person;
(ii) Within the past seven (7) years, the perpetrator has been previously convicted of stalking or aggravated stalking under this section or a substantially similar law of another state, political subdivision of another state, of the United States, or of a federally recognized Indian tribe, whether against the same or another victim; or
(iii) At the time of the offense, the perpetrator was a person required to register as a sex offender pursuant to state, federal, military or tribal law and the victim was under the age of eighteen (18) years.

§ 97-3-107 Prohibiting contact with the victim:

(3) Upon conviction, the sentencing court shall consider issuance of an order prohibiting the perpetrator from any contact with the victim. The duration of any order prohibiting contact with the victim shall be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim or another person.

§ 97-3-107 Ordering psychological counseling:

(4) Every conviction of stalking or aggravated stalking may require as a condition of any suspended sentence or sentence of probation that the defendant, at his own expense, submit to psychiatric or psychological counseling or other such treatment or behavioral modification program deemed appropriate by the court.

§ 97-3-107 Prohibited defense to stalking:

(5) In any prosecution under this section, it shall not be a defense that the perpetrator was not given actual notice that the course of conduct was unwanted or that the perpetrator did not intend to cause the victim fear.

§ 97-3-107 Officers to utilize the Uniform Offense Report:

(6) When investigating allegations of a violation of this section, law enforcement officers shall utilize the Uniform Offense Report prescribed by the Office of the Attorney General in consultation with the sheriffs' and police chiefs' associations. However, failure of law enforcement to utilize the Uniform Offense Report shall in no way invalidate the crime charged under this section.

§ 97-3-107 Venue for stalking offenses:

(7) For purposes of venue, any violation of this section shall be considered to have been committed in any county in which any single act was performed in furtherance of a violation of this section. An electronic communication shall be deemed to have been committed in any county from which the electronic communication is generated or in which it is received.

§ 97-3-107 “Course of conduct” and “credible threat” defined:

(8) For the purposes of this section:
(a) “Course of conduct” means a pattern of conduct composed of a series of two (2) or more acts over a period of time, however short, evidencing a continuity of purpose and that would cause a reasonable person to fear for his or her own safety, to fear for the safety of another person, or to fear damage or destruction of his or her property. Such acts may include, but are not limited to, the following or any combination thereof, whether done directly or indirectly: (i) following or confronting the other person in a public place or on private property against the other person's will; (ii) contacting the other person by telephone or mail, or by electronic mail or communication as defined in Section 97-45-1; or (iii) threatening or causing harm to the other person or a third party.
(b) “Credible threat” means a verbal or written threat to cause harm to a specific person or to cause damage to property that would cause a reasonable person to fear for the safety of that person or damage to the property.
(c) “Reasonable person” means a reasonable person in the victim's circumstances.

§ 97-3-107 If person incarcerated at time of the threat:

(9) The incarceration of a person at the time the threat is made shall not be a bar to prosecution under this section. Constitutionally protected activity is not prohibited by this section.

2104 THREATENING LETTERS

§ 97-3-85 Elements of the offense:

If any person shall post, mail, deliver, or drop a threatening letter or notice to another, whether such other be named or indicated therein or not, with intent to terrorize or to intimidate such other, he shall, upon conviction, be punished by imprisonment in the county jail not more than six months, or by fine not more than five hundred dollars, or both.

2105 PUBLIC PROFANITY OR DRUNKENNESS

§ 97-29-47 Elements of the offense:

If any person shall profanely swear or curse, or use vulgar and indecent language, or be drunk in any public place, in the presence of two (2) or more persons, he shall, on conviction thereof, be fined not more than one hundred dollars ($100.00) or be imprisoned in the county jail not more than thirty (30) days or both.

§ 41-30-19 Ordering alcohol treatment and rehabilitation:

The judge of any court, before whom appears an individual charged with a second or subsequent offense of public intoxication, may, upon a plea of guilty or conviction suspend execution of sentence and require the offender to participate in and complete a prescribed course of alcohol abuse treatment and rehabilitation. The judge shall consult with the division to determine the course of treatment best suited to the needs of the convicted person. The convicted person while participating in the course of treatment shall not be considered committed, civilly or criminally, as otherwise provided by law for commitment to any institution; provided that no judge may require in-patient care for a period in excess of ninety (90) days. Upon completion of the course of treatment prescribed by the judge, the sentence shall not be executed. The convicted person, if financially able, shall be responsible for defraying any cost of the prescribed course of treatment.

§ 97-5-39 Misdemeanor offenses and penalties:

(1)(a) Except as otherwise provided in this section, any parent, guardian or other person who intentionally, knowingly or recklessly commits any act or omits the performance of any duty, which act or omission contributes to or tends to contribute to the neglect or delinquency of any child or which act or omission results in the abuse of any child, as defined in Section 43-21-105(m) of the Youth Court Law, or who knowingly aids any child in escaping or absenting himself from the guardianship or custody of any person, agency or institution, or knowingly harbors or conceals, or aids in harboring or concealing, any child who has absented himself without permission from the guardianship or custody of any person, agency or institution to which the child shall have been committed by the youth court shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine not to exceed One Thousand Dollars ($1,000.00), or by imprisonment not to exceed one (1) year in jail, or by both such fine and imprisonment.

Felonious child abuse or child endangerment:

Miss. Code Ann. § 97-5-39(1)(d), -(e) and § 97-5-39(2) set forth acts that constitute felonious child abuse, while Miss. Code Ann. § 97-5-39(4)(a), -(b) set forth acts that constitute felonious child endangerment.

§ 97-5-39 Parent or guardian not exempt from prosecution:

(5) Nothing contained in this section shall prevent proceedings against the parent, guardian or other person under any statute of this state or any municipal ordinance defining any act as a crime or misdemeanor. Nothing in the provisions of this section shall preclude any person from having a right to trial by jury when charged with having violated the provisions of this section.

§ 97-5-39 Ordering treatment at an approved facility:

(6) After consultation with the Department of Human Services, a regional mental health center or an appropriate professional person, a judge may suspend imposition or execution of a sentence provided in subsections (1) and (2) of this section and in lieu thereof require treatment over a specified period of time at any approved public or private treatment facility. A person may be eligible for treatment in lieu of criminal penalties no more than one (1) time.

§ 97-5-39 Admissibility of the physician's testimony and report:

(7) In any proceeding resulting from a report made pursuant to Section 43-21-353 of the Youth Court Law, the testimony of the physician making the report regarding the child's injuries or condition or cause thereof shall not be excluded on the ground that the physician's testimony violates the physician-patient privilege or similar privilege or rule

against disclosure. The physician's report shall not be considered as evidence unless introduced as an exhibit to his testimony.

§ 97-5-39 Jurisdiction to try case:

(8) Any criminal prosecution arising from a violation of this section shall be tried in the circuit, county, justice or municipal court having jurisdiction; provided, however, that nothing herein shall abridge or dilute the contempt powers of the youth court.

2107 SECTION 99-15-26 LIMITATIONS; EXCEPTION

§ 99-15-26 Not applicable to crimes against the person:

(1)(b) In all misdemeanor criminal cases, other than crimes against the person, the justice or municipal court shall be empowered, upon the entry of a plea of guilty by a criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

§ 99-15-26 Exception for domestic violence:

(1)(c) Notwithstanding paragraph (a) of this subsection (1), in all criminal cases charging a misdemeanor of domestic violence as defined in Section 99-3-7(5), a circuit, county, justice or municipal court shall be empowered, upon the entry of a plea of guilty by the criminal defendant, to withhold acceptance of the plea and sentence thereon pending successful completion of such conditions as may be imposed by the court pursuant to subsection (2) of this section.

CHAPTER 22

SHOPLIFTING

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2200 SHOPLIFTING

§ 97-23-93 Elements of the offense:

(1) Any person who shall willfully and unlawfully take possession of any merchandise owned or held by and offered or displayed for sale by any merchant, store or other mercantile establishment with the intention and purpose of converting such merchandise to his own use without paying the merchant's stated price therefor shall be guilty of the crime of shoplifting and, upon conviction, shall be punished as is provided in this section.

§ 97-23-93 Prima facie evidence:

(2) The requisite intention to convert merchandise without paying the merchant's stated price for the merchandise is presumed, and shall be prima facie evidence thereof, when such person, alone or in concert with another person, willfully:
(a) Conceals the unpurchased merchandise;
(b) Removes or causes the removal of unpurchased merchandise from a store or other mercantile establishment;
(c) Alters, transfers or removes any price-marking, any other marking which aids in determining value affixed to the unpurchased merchandise, or any tag or device used in electronic surveillance of unpurchased merchandise;
(d) Transfers the unpurchased merchandise from one container to another; or
(e) Causes the cash register or other sales recording device to reflect less than the merchant's stated price for the unpurchased merchandise.

See also Newson v. State, 107 So. 3d 1079, 1082 (Miss. Ct. App. 2013) ("[T]he crime [of shoplifting] is completed at the moment that the defendant takes possession of the merchandise with the intention of taking the merchandise without paying for it.); Williams v. Jitney Jungle, 910 So. 2d 39, 42 (Miss. Ct. App. 2005) ("The shoplifting statute clearly contemplates the criminal liability of persons acting 'alone or in concert with another person' and specifically provides that the intent to shoplift is presumed when merchandise is either concealed, removed, or caused to be removed.").

§ 97-23-93 Evidence of stated price or ownership:

(3) Evidence of stated price or ownership of merchandise may include, but is not limited to:
(a) The actual merchandise or the container which held the merchandise alleged to have been shoplifted; or
(b) The content of the price tag or marking from such merchandise; or
(c) Properly identified photographs of such merchandise.

§ 97-23-93 Who may testify on stated price or ownership:

(4) Any merchant or his agent or employee may testify at a trial as to the stated price or ownership of merchandise.

§ 97-23-93 Misdemeanor penalties:

(5) A person convicted of shoplifting merchandise for which the merchant's stated price is less than or equal to One Thousand Dollars ($1,000.00) shall be punished as follows:
(a) Upon a first shoplifting conviction the defendant shall be guilty of a misdemeanor and fined not more than One Thousand Dollars ($1,000.00), or punished by imprisonment in the county jail not to exceed six (6) months, or by both if the court finds substantial and compelling reasons why the offender cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety. If such a finding is not made, the court shall suspend the sentence of imprisonment and impose a period of probation not exceeding one (1) year or a fine of not more than One Thousand Dollars ($1,000.00).
(b) Upon a second shoplifting conviction the defendant shall be guilty of a misdemeanor and fined not more than One Thousand Dollars ($1,000.00) or punished by imprisonment in the county jail for a term not to exceed six (6) months, or by both if the court finds substantial and compelling reasons why the offender cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety. If such a finding is not made, the court shall suspend the sentence of imprisonment and impose a period of probation not exceeding one (1) year or a fine of not more than One Thousand Dollars ($1,000.00), or both.

§ 97-23-93 When a third shoplifting conviction a felony:

(6) Upon a third or subsequent shoplifting conviction where the value of the shoplifted merchandise is not less than Five Hundred Dollars ($500.00) or greater than One Thousand Dollars ($1,000.00), the defendant shall be guilty of a felony and fined not more than One Thousand Dollars ($1,000.00), or imprisoned for a term not exceeding three (3) years, or by both such fine and imprisonment.

§ 97-23-93 Shoplifting merchandise over $1000.00 a felony:

(7) A person convicted of shoplifting merchandise for which the merchant's stated price exceeds One Thousand Dollars ($1,000.00) shall be guilty of a felony and, upon conviction, punished as provided in Section 97–17–41 for the offense of grand larceny.

§ 97-23-93 Determining number of prior shoplifting convictions:

(8) In determining the number of prior shoplifting convictions for purposes of imposing punishment under this section, the court shall disregard all such convictions occurring more than seven (7) years prior to the shoplifting offense in question.

§ 97-23-93 Determining the gravity of the offense:

(9) For the purpose of determining the gravity of the offense under subsection (7) of this section, the prosecutor may aggregate the value of merchandise shoplifted from three (3) or more separate mercantile establishments within the same legal jurisdiction over a

period of thirty (30) or fewer days.

§ 97-23-95 Detaining a suspected shoplifter:

If any person shall commit or attempt to commit the offense of shoplifting, or if any person shall wilfully conceal upon his person or otherwise any unpurchased goods, wares or merchandise held or owned by any store or mercantile establishment, the merchant or any employee thereof or any peace or police officer, acting in good faith and upon probable cause based upon reasonable grounds therefor, may question such person in a reasonable manner for the purpose of ascertaining whether or not such person is guilty of shoplifting as defined herein. Such questioning of a person by a merchant, merchant's employee or peace or police officer shall not render such merchant, merchant's employee or peace or police officer civilly liable for slander, false arrest, false imprisonment, malicious prosecution, unlawful detention or otherwise in any case where such merchant, merchant's employee or peace or police officer acts in good faith and upon reasonable grounds to believe that the person questioned is committing or attempting to commit the crime of shoplifting.

See also Earnest v. Wal-Mart Stores, Inc., 2000 WL 33907695 (N.D. Miss.) ("Wal-Mart can gain no shelter from the qualified privilege of Miss.Code Ann. § 97-23-95, which protects a merchant from slander and false imprisonment claims when it detains and questions a suspected shoplifter. To gain protection under this statute, the merchant not only must show good faith and reasonable grounds for believing that the customer is shoplifting but also present evidence that the detention and questioning of the customer were done in a reasonable manner.").

2201 THEFT DETECTION DEVICES

§ 97-23-93.1 Theft detection device defined:

(1) As used in this section:
(a) "Theft detection device" means any tag or other device that is used to prevent or detect theft and that is attached to merchandise held for resale by a merchant or to property of a merchant.
(b) "Theft detection device remover" means any tool or device specifically designed or manufactured to be used to remove a theft detection device from merchandise held for resale by a merchant or property of a merchant.
(c) "Theft detection shielding device" means any laminated or coated bag or device designed to shield merchandise held for resale by a merchant or property of a merchant from being detected by an electronic or magnetic theft alarm sensor.

§ 97-23-93.1 Offenses pertaining to theft detection devices:

(2)(a) A person commits unlawful distribution of a theft detection shielding device when he or she knowingly manufactures, sells, offers to sell or distributes any theft detection shielding device.
(b) A person commits unlawful possession of a theft detection shielding device when he or she knowingly possesses any theft detection shielding device with the intent to commit larceny or shoplifting.
(c) A person commits unlawful possession of a theft detection device remover when he or she knowingly possesses any theft detection device remover with the intent to use such tool to remove any theft detection device from any merchandise without the permission of the merchant or person owning or holding said merchandise.
(d) A person commits unlawful use of a theft detection shielding device or a theft detection device remover when he or she uses or attempts to use either device while committing a violation of Section 97-23-93, Mississippi Code of 1972.

§ 97-23-93.1 Penalties:

(2)(e) Any person convicted of violating this subsection (2) is guilty of a misdemeanor, and upon conviction thereof, shall be imprisoned for not less than thirty (30) days nor more than one (1) year, and fined not less than Two Hundred Fifty Dollars ($250.00), nor more than One Thousand Dollars ($1,000.00).

§ 97-23-93.1 Unlawful removal of a theft detection device:

(3)(a) A person commits unlawful removal of a theft detection device when he or she intentionally removes any theft detection device from merchandise prior to purchase without the permission of the merchant or person owning or holding said merchandise.
(b) Any person convicted of violating this subsection (3) is guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than One Hundred Dollars ($100.00) nor more than Five Hundred Dollars ($500.00), and such fine shall not be suspended, or the person shall be imprisoned not more than sixty (60) days, or both.

§ 97-23-93.1 Anti-shoplifting or inventory control devices:

(4)(a) The activation of an anti-shoplifting or inventory control device as a result of a person exiting the establishment or a protected area within the establishment shall constitute reasonable cause for the detention of the person so exiting by the owner or operator of the establishment or by an agent or employee of the owner or operator, provided notice has been posted to advise patrons that such a device is being utilized. Each such detention shall be made only in a reasonable manner and only for a reasonable period of time sufficient for any inquiry into the circumstances surrounding the activation of the device or for the recovery of goods.
(b) The taking into custody and detention by a law enforcement officer, merchant or merchant's employee, if in compliance with the requirements of this section, does not render such law enforcement officer, merchant or merchant's employee criminally or

civilly liable for false arrest, false imprisonment, unlawful detention, malicious prosecution, intentional infliction of emotional distress or defamation.

2202 AIDING AND ABETTING SHOPLIFTING BY MINOR

§ 97-23-94 Elements of offense:

(1) In addition to any other offense and penalty provided by law, it shall be unlawful for any person eighteen (18) years of age or older to encourage, aid or abet any person under the age of eighteen (18) years to commit the crime of shoplifting as defined in Section 97-23-93.

See also Miss. Code Ann. § 97-23-94.1 ("Any person aged eighteen (18) years or older who encourages, aids or abets any person under the age of eighteen (18) years to violate Section 97-23-93 shall be punished as provided in Section 97-23-94 and as otherwise provided by law.").

§ 97-23-94 Penalties:

(1) . . . In addition to any other penalty provided by law, any person who violates this section shall be punished as follows:
(a) Upon a first conviction the defendant shall be guilty of a misdemeanor and fined not more than Seven Hundred Fifty Dollars ($750.00), or punished by imprisonment not to exceed thirty (30) days, or by both such fine and imprisonment.
(b) Upon a second conviction the defendant shall be guilty of a misdemeanor and fined not more than One Thousand Dollars ($1,000.00) or punished by imprisonment not to exceed ninety (90) days, or by both such fine and imprisonment.
(c) Upon a third or subsequent conviction the defendant shall be guilty of a felony and fined One Thousand Dollars ($1,000.00), or imprisoned for a term not exceeding three (3) years, or by both such fine and imprisonment.

§ 97-23-94 Ordering restitution:

(2) In addition to the penalties prescribed in subsection (1) of this section, the court is authorized to require the defendant to make restitution to the owner of the property where shoplifting occurred in an amount equal to twice the value of such property.

2203 EMPLOYEE'S UNAUTHORIZED GIVING AWAY OF MERCHANT'S GOODS

§ 97-23-99 Penalty if merchandise is less than $250.00:

It shall be unlawful for any employee of a merchant engaged in the sale of goods to the public to willfully give away any merchandise of a value of less than Two Hundred Fifty Dollars ($250.00) intended for sale without receiving full payment for such merchandise or to give away any merchandise without the specific authorization of the merchant. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not more than One Thousand Dollars ($1,000.00) or imprisoned for not more than one (1) year or both.

CHAPTER 23

BAD CHECKS

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2300 PROVING A BAD CHECK OFFENSE

§ 97-19-55 Issuing a bad check:

(1) It shall be unlawful for any person with fraudulent intent:
(a) To make, draw, issue, utter, deliver, or authorize any check, draft, electronically converted check, or electronic commercial debit to obtain money, delivery of other valuable property, services, the use of property or credit extended by any licensed gaming establishment drawn on any real or fictitious bank, corporation, firm or person, knowing at the time of making, drawing, issuing, uttering, delivering or authorizing said check, draft order, electronically converted check, or electronic commercial debit that the maker, drawer or payor has not sufficient funds in or on deposit with such bank, corporation, firm or person for the payment of such check, draft, order, electronically converted check, or electronic commercial debit in full, and all other checks, drafts or orders, electronic fund transfers upon such funds then outstanding;

§ 97-19-55 Closing an account without leaving sufficient funds:

(1)(b) It shall be unlawful for any person with fraudulent intent: . . .
To close an account without leaving sufficient funds to cover all outstanding checks, electronically converted check, or electronic commercial debit written or authorized on such account.

§ 97-19-65 Each violation a separate offense:

Each making, drawing, issuing, uttering or delivering of any such check, draft or order as aforesaid shall constitute a separate offense.

§ 97-19-57 Presumption of fraudulent intent:

(1) As against the maker, drawer or payor thereof, the making, drawing, issuing, uttering, delivering, or initiation of a check, draft, order, electronically converted check, or electronic commercial debit payment of which is refused by the drawee, shall be prima facie evidence and create a presumption of intent to defraud and of knowledge of insufficient funds in, or on deposit with, such bank, corporation, firm or person, provided such maker, drawer or payor shall not have paid the holder or payee thereof the amount due thereon, together with a service charge of Forty Dollars ($40.00), within fifteen (15) days after receiving notice that such check, draft, order, electronically converted check, or electronic commercial debit has not been paid by the drawee or payor's bank.

§ 97-19-61 Exceptions to notice requirement:

Such notice as is provided for in Section 97-19-57 is dispensed with: (a) in the event the situs of the drawee is not in the State of Mississippi; (b) if the drawer or payor is not a resident of the State of Mississippi or has left the State of Mississippi at the time such check, draft, order, electronically converted check, or electronic commercial debit is dishonored; or (c) if the drawer or payor of such check, draft, order, electronically converted check, or electronic commercial debit did not have an account with the drawee or payor 183 bank of such check, draft, order, electronically converted check, or electronic commercial debit at the time the same was issued or dishonored, or payment of the same is denied because the account was closed at the time the check, draft, order, or electronically converted check, or electronic commercial debit was issued or dishonored.

§ 97-19-62 Prima facie evidence of identity:

(1) In any prosecution or action under the provisions of Section 97-19-55, a check, draft, order, or electronically converted check for which the information required in subsections (2) and (3) of this section is available at the time of issuance, utterance or delivery shall constitute prima facie evidence of the identity of the party issuing, uttering or delivering the check, draft, order, or electronically converted check and that such person was a party authorized to draw upon the named account.
(2) To establish prima facie evidence of the identity of the party presenting such check, draft, order, or electronically converted check, the following information regarding such identity shall be requested by the party receiving such instrument: The presenter's name, residence address and home phone number. Such information may be provided in the following manner:
(a) The information may be recorded upon the check, draft or order, or electronically converted check itself; or
(b) The number of a check-cashing identification card issued by the receiving party may be recorded on the check, draft, order, or electronically converted check. Such check-cashing identification card shall be issued only after the information required in this subsection has been placed on file by the receiving party.
(3) In addition to the information required in subsection (2) of this section, the party receiving the check, draft, order, or electronically converted check shall witness the signature or endorsement of the party presenting such instrument and, as evidence of such, the receiving party shall initial the instrument.
(4) In any prosecution or action under the provisions of Section 97-19-55 for an electronic commercial debit, the following shall constitute prima facie evidence that the payee was a party authorized to draw upon the named account for the electronic commercial debit: (i) the existence of an enforceable written agreement between the payor and the payee whereby the payee agrees to provide a good or service to the payor conditioned and in reliance upon the payor's provision of its account and bank information and agreement to pay for the good or service through an electronic commercial debit, and (ii) an invoice, bill of lading, or other business record evidencing the delivery of the good or service by the payee to the payor.

§ 97-19-63 Statement of reason for dishonor:

(1) It shall be the duty of the drawee of any check, draft or other order for the payment of money, before refusing to pay the same to the holder thereof upon presentation, to cause to be written, printed, or stamped in plain language thereon or attached thereto, the reason for drawee's dishonor or refusal of the same. In all prosecutions under sections 97-19-55 to 97-19-69, the introduction in evidence of any unpaid and dishonored check, draft or other order for the payment of money, having the drawee's refusal to pay stamped or written thereon or attached thereto, with the reason therefor as aforesaid, shall be prima facie evidence of the making or uttering of said check, draft or other order for the payment of money and the dishonor thereof, and that the same was properly dishonored for the reasons written, stamped or attached by the drawee on such dishonored check, draft or other such order for the payment of money.
(2) It shall be the duty of the drawee or the payor's bank in an electronically converted check or electronic commercial debit transaction, before refusing to pay the same to the payee's bank and the payee thereof upon initiation of such a transaction through the ACH Network, to provide such notice for the reason for dishonor or refusal of the same by the payor's bank as would be required by the NACHA Operating Rules & Guidelines for the reasons of insufficient funds, account closed, no account or unable to locate account, payment stopped, or uncollected funds. In all prosecutions under Sections 97-19-55 through 97-19-69, the introduction in evidence of any such notice of an unpaid and dishonored electronically converted check or electronic commercial debit properly given under the NACHA rules with the reason of insufficient funds, account closed, no account or unable to locate account, payment stopped, or uncollected funds shall be prima facie evidence of the dishonor of said electronically converted check or electronic commercial debit for the reasons recorded and noticed pursuant to the NACHA Operating Rules & Guidelines.
(3) In the case of an electronically converted check, the introduction into evidence of a check payable to the payee and signed by the drawer to authorize the transaction is prima facie evidence of the making or uttering of said electronically converted check for the payment of money.

2301 PRESENTING A COMPLAINT TO THE DISTRICT ATTORNEY

§ 97-19-75 District attorney to evaluate the complaint:

(1) The holder of any check, draft or order for the payment of money which has been made, drawn, issued, uttered or delivered in violation of Section 97-19-55, Mississippi Code of 1972, may, after complying with the provisions of Section 97-19-57, Mississippi Code of 1972, present a complaint to the district attorney. The complaint shall be accompanied by the original check, draft or order upon which the complaint is filed and the return receipt showing mailing of notice under Section 97-19-57, Mississippi Code of 1972. Not more than one (1) check, draft or order shall be included within a single complaint. Upon receipt of such complaint, the district attorney shall evaluate the

complaint to determine whether or not the complaint is appropriate to be processed by the district attorney.

§ 97-19-75 Withdrawing the complaint for good cause:

(2) If, after filing a complaint with the district attorney, the complainant wishes to withdraw the complaint for good cause, the complainant shall pay a fee of Thirty Dollars ($30.00) to the office of the district attorney for processing such complaint. Upon payment of the processing fee and withdrawal of the complaint, the district attorney shall return the original check, draft or order to the complainant.

§ 97-19-75 Issuing an arrest warrant:

(3) After approval of the complaint by the district attorney, a warrant may be issued by any judicial officer authorized by law to issue arrest warrants, and the warrant may be held by the district attorney. After issuance of a warrant or upon approval of a complaint by the district attorney, the district attorney shall issue a notice to the individual charged in the complaint, informing him that a warrant has been issued for his arrest or that a complaint has been received by the district attorney and that he may be eligible for deferred prosecution for a violation of Section 97-19-55, Mississippi Code of 1972, by voluntarily surrendering himself to the district attorney within ten (10) days, Saturdays, Sundays and legal holidays excepted, from receipt of the notice. Such notice shall be sent by United States mail.

§ 97-19-75 Deferred prosecution:

(4)(a) If the check is not a casino marker, and the accused voluntarily surrenders himself within the time period as provided by subsection (3) of this section, the accused shall be presented with the complaint and/or warrant and prosecution of the accused may be deferred upon payment by the accused of a service charge in the amount of Forty Dollars ($40.00) to the district attorney and by execution of a restitution agreement as hereinafter provided.

§ 97-19-75 Restitution agreement:

(6) After an accused has voluntarily surrendered himself and paid the service charge as provided by subsection (4) of this section, the district attorney may enter into a restitution agreement with the accused prescribing the terms by which the accused shall satisfy restitution to the district attorney on behalf of the complainant. The terms of such agreement shall be determined on a case-by-case basis by the district attorney, but the duration of any such agreement shall be no longer than a period of six (6) months. No interest shall be charged or collected on restitution monies. The restitution agreement shall be signed by the accused and approved by the district attorney before it is effective. If the accused does not honor each term of the restitution agreement signed by him, the accused may be proceeded against by prosecution under the provisions of Sections 97-19-55 through 97-19-69, Mississippi Code of 1972, and as provided by Section

97-19-79. If the accused makes restitution and pays all charges set out by statute or if the accused enters into a restitution agreement as set out above and honors all terms of such agreement, then if requested, the original check may be returned to the accused and a photocopy retained in the check file.

§ 97-19-79 Failing to comply with service agreement:

If, after receiving notice as provided for by subsection (3) of Section 97-19-75, the accused fails to timely surrender himself to the district attorney as prescribed in the notice or, if having timely surrendered himself, the accused fails to pay the service charge prescribed by subsection (4) of Section 97-19-75 and/or fails to execute or comply with the terms of any restitution agreement executed in accordance with the provisions of Section 97-19-75, then the district attorney shall file the complaint, along with the arrest warrant, if any, which the district attorney may be holding against the accused, with the municipal court, justice court, county court or circuit court in his district having jurisdiction, and prosecution against the accused may be commenced in accordance with the provisions of Sections 97-19-55 through 97-19-69, Mississippi Code of 1972, or as otherwise provided by law. If such prosecution is commenced, the court may assess the defendant the service charge payable to the district attorney as provided in Section 97-19-75(4), Mississippi Code of 1972.

§ 97-19-75 Restitution defined:

(5) For the purposes of Sections 97-19-73 through 97-19-81, the term "restitution" shall mean and be defined as the face amount of any check, draft or order for the payment of money made, drawn, issued, uttered or delivered in violation of Section 97-19-55, Mississippi Code of 1972, plus a service charge payable to the complainant in the amount of Thirty Dollars ($30.00).

§ 97-19-75 If original check or draft is unavailable:

(7) If the holder of any check, draft or order for the payment of money presents to the district attorney satisfactory evidence that the original check, draft or order is unavailable and satisfactory evidence of the check, draft or order is presented in the form of bank records or a photographic copy of the instrument, whether from microfilm or otherwise, then the procedures provided for in this section may be followed in the absence of the original check, draft or order.

See also Moody v. State, 716 So. 2d 562, 565 (Miss. 1998) ("[A]n indigent's equal protections rights are violated when all potential defendants are offered one way to avoid prosecution and that one way is to pay a set fine, and there is no determination as to an individual's ability to pay such fine.").

2302 PENALTIES UPON CONVICTION

§ 97-19-67 Misdemeanor penalties:

(1) Except as may be otherwise provided by subsection (2) of this section, any person violating Section 97-19-55, upon conviction, shall be punished as follows:
(a) For the first offense of violating said section, where the check, draft, order, electronically converted check, or electronic commercial debit involved be less than One Hundred Dollars ($100.00), the person committing such offense shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than Twenty-five Dollars ($25.00), nor more than Five Hundred Dollars ($500.00), or by imprisonment in the county jail for a term of not less than five (5) days nor more than six (6) months, or by both such fine and imprisonment, in the discretion of the court;
(b) Upon commission of a second offense of violating said section, where the check, draft, order, electronically converted check, or electronic commercial debit involved is less than One Hundred Dollars ($100.00), the person committing such offense shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than Fifty Dollars ($50.00) nor more than One Thousand Dollars ($1,000.00), or by imprisonment in the county jail for a term of not less than thirty (30) days nor more than one (1) year, or by both such fine and imprisonment, in the discretion of the court;

See Miss. Code Ann. § 97-19-67(1)(c) and (d) for felony penalties.

§ 97-19-67 Worthless check to satisfy a pre-existing debt:

(2) Where the conviction was based on a worthless check, draft, order, or electronically converted check given for the purpose of satisfying a preexisting debt or making a payment or payments on a past-due account or accounts, no imprisonment shall be ordered as punishment, but the court may order the convicted person to pay a fine of up to the applicable amounts prescribed in subsection (1)(a)(b) and (d) of this section; provided, however, that an electronic commercial debit initiated following the delivery of goods or services that were provided in reliance upon the agreement for payment through that means shall not be considered payment for a preexisting debt or a past-due account or accounts for the purposes of this section.

§ 97-19-67 Restitution:

(3) In addition to or in lieu of any penalty imposed under the provisions of subsection (1) or subsection (2) of this section, the court may, in its discretion, order any person convicted of violating Section 97-19-55 to make restitution in accordance with the provisions of Sections 99-37-1 through 99-37-23 to the holder or payee of any check, draft, order, electronically converted check, or electronic commercial debit for which payment has been refused.

§ 97-19-67 Court to impose additional fee:

(4) Upon conviction of any person for a violation of Section 97-19-55, when the prosecution of such person was commenced by the filing of a complaint with the court by the district attorney under the provisions of Section 97-19-79, the court shall, in addition to any other fine, fee, cost or penalty which may be imposed under this section or as otherwise provided by law, and in addition to any order as the court may enter under subsection (3) of this section requiring the offender to pay restitution under Sections 99-37-1 through 99-37-23, impose a fee in the amount up to eighty-five percent (85%) of the face amount of the check, draft, order, electronically converted check, or electronic commercial debit for which the offender was convicted of drawing, making, issuing, uttering, delivering or authorizing in violation of Section 97-19-55.

§ 97-19-67 Clerk to deposit fees with State Treasurer:

(5) It shall be the duty of the clerk or judicial officer of the court collecting the fees imposed under subsection (4) of this section to monthly deposit all such fees so collected with the State Treasurer, either directly or by other appropriate procedures, for deposit in the special fund of the State Treasury created under Section 99-19-32, known as the "Criminal Justice Fund."

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CHAPTER 24

DRUG OFFENSES

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2400 UNIFORM CONTROLLED SUBSTANCES LAW

The "Uniform Controlled Substances Law" (i.e., Sections 41-29-101 through -187) makes it a crime to knowingly or intentionally possess any controlled substance unless lawfully prescribed or otherwise allowed by law. Penalties for unlawful possession of controlled substances depend on the classification of the controlled substance and the dosage unit (i.e., tablet, capsule, milliliter, stamp, square, dot or microdot) or weight (i.e., grams).

2401 DEFINITIONS

§ 41-29-105

The following words and phrases, as used in this article, shall have the following meanings, unless the context otherwise requires:

(a) "Administer" means the direct application of a controlled substance, whether by injection, inhalation, ingestion or any other means, to the body of a patient or research subject by:

(i) A practitioner (or, in his presence, by his authorized agent); or

(ii) The patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor or dispenser. Such word does not include a common or contract carrier, public warehouseman or employee of the carrier or warehouseman. This definition shall not be applied to the term "agent" when such term clearly designates a member or officer of the Bureau of Narcotics or other law enforcement organization.

(c) "Board" means the Mississippi State Board of Medical Licensure.

(d) "Bureau" means the Mississippi Bureau of Narcotics. However, where the title "Bureau of Drug Enforcement" occurs, that term shall also refer to the Mississippi Bureau of Narcotics.

(e) "Commissioner" means the Commissioner of the Department of Public Safety.

(f) "Controlled substance" means a drug, substance or immediate precursor in Schedules I through V of Sections 41-29-113 through 41-29-121.

(g) "Counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer,

distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the substance.

(h) “Deliver” or “delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

(i) “Director” means the Director of the Bureau of Narcotics.

(j) “Dispense” means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling or compounding necessary to prepare the substance for that delivery.

(k) “Dispenser” means a practitioner who dispenses.

(l) “Distribute” means to deliver other than by administering or dispensing a controlled substance.

(m) “Distributor” means a person who distributes.

(n) “Drug” means

> (i) a substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;
>
> (ii) a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animals;
>
> (iii) a substance (other than food) intended to affect the structure or any function of the body of man or animals; and
>
> (iv) a substance intended for use as a component of any article specified in this paragraph. Such word does not include devices or their components, parts, or accessories.

(o) “Hashish” means the resin extracted from any part of the plants of the genus Cannabis and all species thereof or any preparation, mixture or derivative made from or with that resin.

(p) “Immediate precursor” means a substance which the board has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

(q) “Manufacture” means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly, by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container. The term “manufacture” does not include the preparation, compounding, packaging or labeling of a controlled substance in conformity with applicable state and local law:

(i) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice; or

(ii) By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching or chemical analysis and not for sale.

(r) “Marijuana” means all parts of the plant of the genus Cannabis and all species thereof, whether growing or not, the seeds thereof, and every compound, manufacture, salt, derivative, mixture or preparation of the plant or its seeds, excluding hashish.

The term “marijuana” does not include “hemp” as defined in and regulated by Sections 69-25-201 through 69-25-221.

(s) “Narcotic drug” means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(i) Opium and opiate, and any salt, compound, derivative or preparation of opium or opiate;

(ii) Any salt, compound, isomer, derivative or preparation thereof which is chemically equivalent or identical with any of the substances referred to in subparagraph (i), but not including the isoquinoline alkaloids of opium;

(iii) Opium poppy and poppy straw; and

(iv) Cocaine, coca leaves and any salt, compound, derivative or preparation of cocaine, coca leaves, and any salt, compound, isomer, derivative or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(t) “Opiate” means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under Section 41-29-111, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts

(dextromethorphan). Such word does include its racemic and levorotatory forms.

(u) “Opium poppy” means the plant of the species Papaver somniferum L., except its seeds.

(v)(i) “Paraphernalia” means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance in violation of the Uniform Controlled Substances Law. It includes, but is not limited to:

1. Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

2. Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances;

3. Isomerization devices used, intended for use or designed for use in increasing the potency of any species of plant which is a controlled substance;

4. Testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances;

5. Scales and balances used, intended for use or designed for use in weighing or measuring controlled substances;

6. Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use or designed for use in cutting controlled substances;

7. Separation gins and sifters used, intended for use or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

8. Blenders, bowls, containers, spoons and mixing devices used, intended for use or designed for use in compounding controlled substances;

9. Capsules, balloons, envelopes and other containers used, intended for use or designed for use in packaging small quantities of controlled substances;

10. Containers and other objects used, intended for use or designed for use in storing or concealing controlled substances;

11. Hypodermic syringes, needles and other objects used, intended for use or

designed for use in parenterally injecting controlled substances into the human body;

12. Objects used, intended for use or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish or hashish oil into the human body, such as:

a. Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;

b. Water pipes;

c. Carburetion tubes and devices;
d. Smoking and carburetion masks;

e. Roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;.

f. Miniature cocaine spoons and cocaine vials;

g. Chamber pipes;

h. Carburetor pipes;

i. Electric pipes;

j. Air-driven pipes;

k. Chillums;

l. Bongs; and

m. Ice pipes or chillers.

(ii) In determining whether an object is paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

1. Statements by an owner or by anyone in control of the object concerning its use;

2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;

3. The proximity of the object, in time and space, to a direct violation of the

Uniform Controlled Substances Law;

4. The proximity of the object to controlled substances;

5. The existence of any residue of controlled substances on the object;

6. Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of the Uniform Controlled Substances Law; the innocence of an owner, or of anyone in control of the object, as to a direct violation of the Uniform Controlled Substances Law shall not prevent a finding that the object is intended for use, or designed for use as paraphernalia;

7. Instructions, oral or written, provided with the object concerning its use;

8. Descriptive materials accompanying the object which explain or depict its use;

9. National and local advertising concerning its use;

10. The manner in which the object is displayed for sale;

11. Whether the owner or anyone in control of the object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;

13. The existence and scope of legitimate uses for the object in the community;

14. Expert testimony concerning its use.

(w) “Person” means individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

(x) “Poppy straw” means all parts, except the seeds, of the opium poppy, after mowing.

(y) “Practitioner” means:

(i) A physician, dentist, veterinarian, scientific investigator, optometrist certified to prescribe and use therapeutic pharmaceutical agents under Sections 73-19-153 through 73-19-165, or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state; and

(ii) A pharmacy, hospital or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of professional practice or research in this state.

(z) "Production" includes the manufacture, planting, cultivation, growing or harvesting of a controlled substance.

(aa) "Sale," "sell" or "selling" means the actual, constructive or attempted transfer or delivery of a controlled substance for remuneration, whether in money or other consideration.

(bb) "State," when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legal authority of the United States of America.
(cc) "Ultimate user" means a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for administering to an animal owned by him or by a member of his household.

2402 PROHIBITED ACTS AND PENALTIES

§ 41-29-139

(a) Transfer and possession with intent to transfer. Except as authorized by this article, it is unlawful for any person knowingly or intentionally:
(1) To sell, barter, transfer, manufacture, distribute, dispense or possess with intent to sell, barter, transfer, manufacture, distribute or dispense, a controlled substance; or
(2) To create, sell, barter, transfer, distribute, dispense or possess with intent to create, sell, barter, transfer, distribute or dispense, a counterfeit substance.

(b) Punishment for transfer and possession with intent to transfer. Except as otherwise provided in Section 41-29-142, any person who violates subsection (a) of this section shall be, if convicted, sentenced as follows:
(1) For controlled substances classified in Schedule I or II, as set out in Sections 41-29-113 and 41-29-115, other than marijuana or synthetic cannabinoids:
(A) If less than two (2) grams or ten (10) dosage units, by imprisonment for not more than eight (8) years or a fine of not more than Fifty Thousand Dollars ($50,000.00), or both.
(B) If two (2) or more grams or ten (10) or more dosage units, but less than ten (10) grams or twenty (20) dosage units, by imprisonment for not less than three (3) years nor more than twenty (20) years or a fine of not more than Two Hundred Fifty Thousand Dollars ($250,000.00), or both.
(C) If ten (10) or more grams or twenty (20) or more dosage units, but less than thirty (30) grams or forty (40) dosage units, by imprisonment for not less than five (5) years nor more than thirty (30) years or a fine of not more than Five Hundred Thousand Dollars

($500,000.00), or both.
(2)(A) For marijuana:
1. If thirty (30) grams or less, by imprisonment for not more than three (3) years or a fine of not more than Three Thousand Dollars ($3,000.00), or both;
2. If more than thirty (30) grams but less than two hundred fifty (250) grams, by imprisonment for not more than five (5) years or a fine of not more than Five Thousand Dollars ($5,000.00), or both;
3. If two hundred fifty (250) or more grams but less than five hundred (500) grams, by imprisonment for not less than three (3) years nor more than ten (10) years or a fine of not more than Fifteen Thousand Dollars ($15,000.00), or both;
4. If five hundred (500) or more grams but less than one (1) kilogram, by imprisonment for not less than five (5) years nor more than twenty (20) years or a fine of not more than Twenty Thousand Dollars ($20,000.00), or both.
(B) For synthetic cannabinoids:
1. If ten (10) grams or less, by imprisonment for not more than three (3) years or a fine of not more than Three Thousand Dollars ($3,000.00), or both;
2. If more than ten (10) grams but less than twenty (20) grams, by imprisonment for not more than five (5) years or a fine of not more than Five Thousand Dollars ($5,000.00), or both;
3. If twenty (20) or more grams but less than forty (40) grams, by imprisonment for not less than three (3) years nor more than ten (10) years or a fine of not more than Fifteen Thousand Dollars ($15,000.00), or both;
4. If forty (40) or more grams but less than two hundred (200) grams, by imprisonment for not less than five (5) years nor more than twenty (20) years or a fine of not more than Twenty Thousand Dollars ($20,000.00), or both.
(3) For controlled substances classified in Schedules III and IV, as set out in Sections 41-29-117 and 41-29-119:
(A) If less than two (2) grams or ten (10) dosage units, by imprisonment for not more than five (5) years or a fine of not more than Five Thousand Dollars ($5,000.00), or both;
(B) If two (2) or more grams or ten (10) or more dosage units, but less than ten (10) grams or twenty (20) dosage units, by imprisonment for not more than eight (8) years or a fine of not more than Fifty Thousand Dollars ($50,000.00), or both;
(C) If ten (10) or more grams or twenty (20) or more dosage units, but less than thirty (30) grams or forty (40) dosage units, by imprisonment for not more than fifteen (15) years or a fine of not more than One Hundred Thousand Dollars ($100,000.00), or both;
(D) If thirty (30) or more grams or forty (40) or more dosage units, but less than five hundred (500) grams or two thousand five hundred (2,500) dosage units, by imprisonment for not more than twenty (20) years or a fine of not more than Two Hundred Fifty Thousand Dollars ($250,000.00), or both.
(4) For controlled substances classified in Schedule V, as set out in Section 41-29-121:
(A) If less than two (2) grams or ten (10) dosage units, by imprisonment for not more than one (1) year or a fine of not more than Five Thousand Dollars ($5,000.00), or both;
(B) If two (2) or more grams or ten (10) or more dosage units, but less than ten (10) grams or twenty (20) dosage units, by imprisonment for not more than five (5) years or a fine of not more than Ten Thousand Dollars ($10,000.00), or both;
(C) If ten (10) or more grams or twenty (20) or more dosage units, but less than thirty (30)

grams or forty (40) dosage units, by imprisonment for not more than ten (10) years or a fine of not more than Twenty Thousand Dollars ($20,000.00), or both;
(D) For thirty (30) or more grams or forty (40) or more dosage units, but less than five hundred (500) grams or two thousand five hundred (2,500) dosage units, by imprisonment for not more than fifteen (15) years or a fine of not more than Fifty Thousand Dollars ($50,000.00), or both.

(c) Simple possession. It is unlawful for any person knowingly or intentionally to possess any controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his professional practice, or except as otherwise authorized by this article. The penalties for any violation of this subsection (c) with respect to a controlled substance classified in Schedules I, II, III, IV or V, as set out in Section 41-29-113, 41-29-115, 41-29-117, 41-29-119 or 41-29-121, including marijuana or synthetic cannabinoids, shall be based on dosage unit as defined herein or the weight of the controlled substance as set forth herein as appropriate:
"Dosage unit (d.u.)" means a tablet or capsule, or in the case of a liquid solution, one (1) milliliter. In the case of lysergic acid diethylamide (LSD) the term, "dosage unit" means a stamp, square, dot, microdot, tablet or capsule of a controlled substance.
For any controlled substance that does not fall within the definition of the term "dosage unit," the penalties shall be based upon the weight of the controlled substance.
The weight set forth refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance.
If a mixture or substance contains more than one (1) controlled substance, the weight of the mixture or substance is assigned to the controlled substance that results in the greater punishment.
A person shall be charged and sentenced as follows for a violation of this subsection with respect to:
(1) A controlled substance classified in Schedule I or II, except marijuana and synthetic cannabinoids:
(A) If less than one-tenth (0.1) gram or two (2) dosage units, the violation is a misdemeanor and punishable by imprisonment for not more than one (1) year or a fine of not more than One Thousand Dollars ($1,000.00), or both.
(B) If one-tenth (0.1) gram or more or two (2) or more dosage units, but less than two (2) grams or ten (10) dosage units, by imprisonment for not more than three (3) years or a fine of not more than Fifty Thousand Dollars ($50,000.00), or both.
(C) If two (2) or more grams or ten (10) or more dosage units, but less than ten (10) grams or twenty (20) dosage units, by imprisonment for not more than eight (8) years or a fine of not more than Two Hundred Fifty Thousand Dollars ($250,000.00), or both.
(D) If ten (10) or more grams or twenty (20) or more dosage units, but less than thirty (30) grams or forty (40) dosage units, by imprisonment for not less than three (3) years nor more than twenty (20) years or a fine of not more than Five Hundred Thousand Dollars ($500,000.00), or both.
(2)(A) Marijuana and synthetic cannabinoids:
1. If thirty (30) grams or less of marijuana or ten (10) grams or less of synthetic cannabinoids, by a fine of not less than One Hundred Dollars ($100.00) nor more than

Two Hundred Fifty Dollars ($250.00). The provisions of this paragraph (2)(A) may be enforceable by summons if the offender provides proof of identity satisfactory to the arresting officer and gives written promise to appear in court satisfactory to the arresting officer, as directed by the summons. A second conviction under this section within two (2) years is a misdemeanor punishable by a fine of Two Hundred Fifty Dollars ($250.00), not more than sixty (60) days in the county jail, and mandatory participation in a drug education program approved by the Division of Alcohol and Drug Abuse of the State Department of Mental Health, unless the court enters a written finding that a drug education program is inappropriate. A third or subsequent conviction under this paragraph (2)(A) within two (2) years is a misdemeanor punishable by a fine of not less than Two Hundred Fifty Dollars ($250.00) nor more than One Thousand Dollars ($1,000.00) and confinement for not more than six (6) months in the county jail.
Upon a first or second conviction under this paragraph (2)(A), the courts shall forward a report of the conviction to the Mississippi Bureau of Narcotics which shall make and maintain a private, nonpublic record for a period not to exceed two (2) years from the date of conviction. The private, nonpublic record shall be solely for the use of the courts in determining the penalties which attach upon conviction under this paragraph (2)(A) and shall not constitute a criminal record for the purpose of private or administrative inquiry and the record of each conviction shall be expunged at the end of the period of two (2) years following the date of such conviction;
2. Additionally, a person who is the operator of a motor vehicle, who possesses on his person or knowingly keeps or allows to be kept in a motor vehicle within the area of the vehicle normally occupied by the driver or passengers, more than one (1) gram, but not more than thirty (30) grams of marijuana or not more than ten (10) grams of synthetic cannabinoids is guilty of a misdemeanor and, upon conviction, may be fined not more than One Thousand Dollars ($1,000.00) or confined for not more than ninety (90) days in the county jail, or both. For the purposes of this subsection, such area of the vehicle shall not include the trunk of the motor vehicle or the areas not normally occupied by the driver or passengers if the vehicle is not equipped with a trunk. A utility or glove compartment shall be deemed to be within the area occupied by the driver and passengers;
(B) Marijuana:
1. If more than thirty (30) grams but less than two hundred fifty (250) grams, by a fine of not more than One Thousand Dollars ($1,000.00), or confinement in the county jail for not more than one (1) year, or both; or by a fine of not more than Three Thousand Dollars ($3,000.00), or imprisonment in the custody of the Department of Corrections for not more than three (3) years, or both;
2. If two hundred fifty (250) or more grams but less than five hundred (500) grams, by imprisonment for not less than two (2) years nor more than eight (8) years or by a fine of not more than Fifty Thousand Dollars ($50,000.00), or both;
3. If five hundred (500) or more grams but less than one (1) kilogram, by imprisonment for not less than four (4) years nor more than sixteen (16) years or a fine of not more than Two Hundred Fifty Thousand Dollars ($250,000.00), or both;
4. If one (1) kilogram or more but less than five (5) kilograms, by imprisonment for not less than six (6) years nor more than twenty-four (24) years or a fine of not more than Five Hundred Thousand Dollars ($500,000.00), or both;
5. If five (5) kilograms or more, by imprisonment for not less than ten (10) years nor more

than thirty (30) years or a fine of not more than One Million Dollars ($1,000,000.00), or both.
(C) Synthetic cannabinoids:
1. If more than ten (10) grams but less than twenty (20) grams, by a fine of not more than One Thousand Dollars ($1,000.00), or confinement in the county jail for not more than one (1) year, or both; or by a fine of not more than Three Thousand Dollars ($3,000.00), or imprisonment in the custody of the Department of Corrections for not more than three (3) years, or both;
2. If twenty (20) or more grams but less than forty (40) grams, by imprisonment for not less than two (2) years nor more than eight (8) years or by a fine of not more than Fifty Thousand Dollars ($50,000.00), or both;
3. If forty (40) or more grams but less than two hundred (200) grams, by imprisonment for not less than four (4) years nor more than sixteen (16) years or a fine of not more than Two Hundred Fifty Thousand Dollars ($250,000.00), or both;
4. If two hundred (200) or more grams, by imprisonment for not less than six (6) years nor more than twenty-four (24) years or a fine of not more than Five Hundred Thousand Dollars ($500,000.00), or both.
(3) A controlled substance classified in Schedule III, IV or V as set out in Sections 41-29-117 through 41-29-121, upon conviction, may be punished as follows:
(A) If less than fifty (50) grams or less than one hundred (100) dosage units, the offense is a misdemeanor and punishable by not more than one (1) year or a fine of not more than One Thousand Dollars ($1,000.00), or both.
(B) If fifty (50) or more grams or one hundred (100) or more dosage units, but less than one hundred fifty (150) grams or five hundred (500) dosage units, by imprisonment for not less than one (1) year nor more than four (4) years or a fine of not more than Ten Thousand Dollars ($10,000.00), or both.
(C) If one hundred fifty (150) or more grams or five hundred (500) or more dosage units, but less than three hundred (300) grams or one thousand (1,000) dosage units, by imprisonment for not less than two (2) years nor more than eight (8) years or a fine of not more than Fifty Thousand Dollars ($50,000.00), or both.
(D) If three hundred (300) or more grams or one thousand (1,000) or more dosage units, but less than five hundred (500) grams or two thousand five hundred (2,500) dosage units, by imprisonment for not less than four (4) years nor more than sixteen (16) years or a fine of not more than Two Hundred Fifty Thousand Dollars ($250,000.00), or both.

(d) Paraphernalia. (1) It is unlawful for a person who is not authorized by the State Board of Medical Licensure, State Board of Pharmacy, or other lawful authority to use, or to possess with intent to use, paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance in violation of the Uniform Controlled Substances Law. Any person who violates this subsection (d)(1) is guilty of a misdemeanor and, upon conviction, may be confined in the county jail for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both; however, no person shall be charged with a violation of this subsection when such person is also charged with the possession of thirty (30) grams or less of marijuana under subsection (c)(2)(A) of this section.

(2) It is unlawful for any person to deliver, sell, possess with intent to deliver or sell, or manufacture with intent to deliver or sell, paraphernalia, knowing, or under circumstances where one reasonably should know, that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of the Uniform Controlled Substances Law. Except as provided in subsection (d)(3), a person who violates this subsection (d)(2) is guilty of a misdemeanor and, upon conviction, may be confined in the county jail for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both.
(3) Any person eighteen (18) years of age or over who violates subsection (d)(2) of this section by delivering or selling paraphernalia to a person under eighteen (18) years of age who is at least three (3) years his junior is guilty of a misdemeanor and, upon conviction, may be confined in the county jail for not more than one (1) year, or fined not more than One Thousand Dollars ($1,000.00), or both.
(4) It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement, knowing, or under circumstances where one reasonably should know, that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as paraphernalia. Any person who violates this subsection is guilty of a misdemeanor and, upon conviction, may be confined in the county jail for not more than six (6) months, or fined not more than Five Hundred Dollars ($500.00), or both.

(e) It shall be unlawful for any physician practicing medicine in this state to prescribe, dispense or administer any amphetamine or amphetamine-like anorectics and/or central nervous system stimulants classified in Schedule II, pursuant to Section 41-29-115, for the exclusive treatment of obesity, weight control or weight loss. Any person who violates this subsection, upon conviction, is guilty of a misdemeanor and may be confined for a period not to exceed six (6) months, or fined not more than One Thousand Dollars ($1,000.00), or both.

(f) Trafficking. (1) Any person trafficking in controlled substances shall be guilty of a felony and, upon conviction, shall be imprisoned for a term of not less than ten (10) years nor more than forty (40) years and shall be fined not less than Five Thousand Dollars ($5,000.00) nor more than One Million Dollars ($1,000,000.00). The ten-year mandatory sentence shall not be reduced or suspended. The person shall not be eligible for probation or parole, the provisions of Sections 41-29-149, 47-5-139, 47-7-3 and 47-7-33, to the contrary notwithstanding.
(2) “Trafficking in controlled substances” as used herein means:
(A) A violation of subsection (a) of this section involving thirty (30) or more grams or forty (40) or more dosage units of a Schedule I or II controlled substance except marijuana and synthetic cannabinoids;
(B) A violation of subsection (a) of this section involving five hundred (500) or more grams or two thousand five hundred (2,500) or more dosage units of a Schedule III, IV or V controlled substance;
(C) A violation of subsection (c) of this section involving thirty (30) or more grams or

forty (40) or more dosage units of a Schedule I or II controlled substance except marijuana and synthetic cannabinoids;
(D) A violation of subsection (c) of this section involving five hundred (500) or more grams or two thousand five hundred (2,500) or more dosage units of a Schedule III, IV or V controlled substance; or
(E) A violation of subsection (a) of this section involving one (1) kilogram or more of marijuana or two hundred (200) grams or more of synthetic cannabinoids.

(g) Aggravated trafficking. Any person trafficking in Schedule I or II controlled substances, except marijuana and synthetic cannabinoids, of two hundred (200) grams or more shall be guilty of aggravated trafficking and, upon conviction, shall be sentenced to a term of not less than twenty-five (25) years nor more than life in prison and shall be fined not less than Five Thousand Dollars ($5,000.00) nor more than One Million Dollars ($1,000,000.00). The twenty-five-year sentence shall be a mandatory sentence and shall not be reduced or suspended. The person shall not be eligible for probation or parole, the provisions of Sections 41-29-149, 47-5-139, 47-7-3 and 47-7-33, to the contrary notwithstanding.

(h) Sentence mitigation. (1) Notwithstanding any provision of this section, a person who has been convicted of an offense under this section that requires the judge to impose a prison sentence which cannot be suspended or reduced and is ineligible for probation or parole may, at the discretion of the court, receive a sentence of imprisonment that is no less than twenty-five percent (25%) of the sentence prescribed by the applicable statute. In considering whether to apply the departure from the sentence prescribed, the court shall conclude that:
(A) The offender was not a leader of the criminal enterprise;
(B) The offender did not use violence or a weapon during the crime;
(C) The offense did not result in a death or serious bodily injury of a person not a party to the criminal enterprise; and
(D) The interests of justice are not served by the imposition of the prescribed mandatory sentence.
The court may also consider whether information and assistance were furnished to a law enforcement agency, or its designee, which, in the opinion of the trial judge, objectively should or would have aided in the arrest or prosecution of others who violate this subsection. The accused shall have adequate opportunity to develop and make a record of all information and assistance so furnished.
(2) If the court reduces the prescribed sentence pursuant to this subsection, it must specify on the record the circumstances warranting the departure.

§ 63-1-71

(1) Notwithstanding the provisions of Section 63–11–30(3) and in addition to any penalty authorized by the Uniform Controlled Substances Law or any other statute indicating the dispositions that can be ordered for an adjudication of delinquency, every person convicted of driving under the influence of a controlled substance, or entering a plea of nolo contendere thereto, or adjudicated delinquent therefor, in a court of this state, the United States, another state, a territory or possession of the United States, the District of Columbia or the Commonwealth of Puerto Rico, shall forthwith forfeit his right to operate a motor vehicle over the highways of this state for a period of not less than six (6) months. In the case of any person who at the time of the imposition of sentence does not have a driver's license or is less than sixteen (16) years of age, the period of the suspension of driving privileges authorized herein shall commence on the day the sentence is imposed and shall run for a period of not less than six (6) months after the day the person obtains a driver's license or reaches the age of sixteen (16). If the driving privilege of any person is under revocation or suspension at the time of any conviction or adjudication of delinquency for driving under the influence of a controlled substance, the revocation or suspension period imposed herein shall commence as of the date of termination of the existing revocation or suspension.

(2) The court in this state before whom any person is convicted of or adjudicated delinquent for driving under the influence of a controlled substance shall collect forthwith the Mississippi driver's license of the person and forward such license to the Department of Public Safety along with a report indicating the first and last day of the suspension or revocation period imposed pursuant to this section. If the court is for any reason unable to collect the license of the person, the court shall cause a report of the conviction or adjudication of delinquency to be filed with the Commissioner of Public Safety. That report shall include the complete name, address, date of birth, eye color and sex of the person and shall indicate the first and last day of the suspension or revocation period imposed by the court pursuant to this section. The court shall inform the person orally and in writing that if the person is convicted of personally operating a motor vehicle during the period of license suspension or revocation imposed pursuant to this section, the person shall, upon conviction, be subject to the penalties set forth in Section 63–11–40. A person shall be required to acknowledge receipt of the written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of Section 63–11–40. If the person is the holder of a driver's license from another jurisdiction, the court shall not collect the license but shall notify forthwith the Commissioner of Public Safety who shall notify the appropriate officials in the licensing jurisdiction. The court shall, however, in accordance with the provisions of this section, revoke the person's nonresident driving privilege in this state.

(3) The county court or circuit court having jurisdiction, on petition, may reduce the suspension of driving privileges under this section if the suspension would constitute a hardship on the offender. When the petition is filed, such person shall pay to the circuit clerk of the court where the petition is filed a fee of Twenty Dollars ($20.00) for each

year, or portion thereof, of license revocation or suspension remaining under the original sentence, which shall be deposited into the State General Fund to the credit of a special fund hereby created in the State Treasury to be used for alcohol or drug abuse treatment and education, upon appropriation by the Legislature. This fee shall be in addition to any other court costs or fees required for the filing of petitions.

2404 PROVING POSSESSION OF CONTROLLED SUBSTANCES

Possession can be actual or constructive, joint or individual, and proven with direct or circumstantial evidence. *See* McKinney v. State, 724 So. 2d 928, 930 (Miss. Ct. App. 1998); Roberson v. State, 595 So. 2d 1310, 1319 (Miss. 1992). But sometimes those distinctions are blurred:

> [W]hen drawing an analytical distinction between actual and constructive possession, it is the relationship between the individual and the particular property which must be scrutinized. Actual possession is an actual physical holding of the property, consisting of the capacity to control it coupled with an intent to do so. Constructive possession also consists of the capacity and the intent to control such property, but actual physical control is absent.

George H. Singer, *Constructive Possession of Controlled Substances: A North Dakota Look at a Nationwide Problem*, 68 N.D. L. Rev. 981, 983 (1992).

Several factors must be considered:

> What constitutes a sufficient external relationship between the defendant and the narcotic property to complete the concept of 'possession' is a question which is not susceptible of a specific rule. However, there must be sufficient facts to warrant a finding that defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. It need not be actual physical possession. Constructive possession may be shown by establishing that the drug involved was subject to his dominion or control. Proximity is usually an essential element, but by itself is not adequate in the absence of other incriminating circumstances.

Curry v. State, 249 So. 2d 414, 416 (Miss. 1971).

2405 ACTUAL POSSESSION

Actual possession may be established by showing physical possession and control, or alternatively, incriminating circumstances and a confession:

> [T]here is direct evidence of actual possession in the present case. Officer Leonard testified that he saw, at a distance of about 25 feet, a plastic bag leave Givens' hand and travel to the ground, where it was immediately seized in an area close to Givens. Although the general area was littered and crowded, Leonard stated that no other plastic bags were found in the immediate area, nor were there any plastic cups.

Givens v. State, 618 So. 2d 1313, 1319 (Miss. 1993).

See also Millsaps v. State, 767 So. 2d 286, 293 (Miss. Ct. App. 2000) ("Constructive possession instructions are properly given as a vehicle whereby the State can prove guilt when either the drugs are not found on the defendant's person or the defendant did not confess. Millsap confessed. There was no need to instruct the jury on constructive possession."); Mauldin v. State, 750 So. 2d 564, 566 (Miss. Ct. App. 1999) ("[S]ince the drugs were not found on Mauldin and the cigarette case was not his, the only basis which the jury could find that he had actual possession would be the fact that he had briefly handled the cigarette case with the drugs in it earlier. Such actions are not sufficient . . . because possession requires actual or constructive control, not a mere passing control which occurs from a momentary handling.").

Often criminals will try to ditch the drugs while being pursued. But,

> [A]ctual possession of drugs can be established by testimony from an officer that he observed the defendant tossing an object which was subsequently located at the same site and, upon examination of the object, it was determined to be a controlled substance.

Boyd v. State, 634 So. 2d 113, 116 (Miss. 1994).

See also Hicks v. State, 580 So. 2d 1302, 1306 (Miss. 1991) ("[T]here is clear evidence establishing actual possession by Hicks from the testimony of the detective, who actually saw Hicks with the canister of cocaine packets.").

2406 CONSTRUCTIVE POSSESSION

Used by courts when actual possession cannot be proven:

"The doctrine of constructive possession is a legal fiction used by the courts when actual possession cannot be proven." Swington v. State, 742 So. 2d 1106, 1119 (Miss. 1999).

How constructive possession is shown:

Constructive possession requires sufficient facts to warrant a finding that the defendant was aware of the presence and character of the particular substance and was intentionally and consciously in possession of it. This may be shown by establishing that the drug involved was subject to the defendant's dominion or control as determined from the "totality of the circumstances."

See, e.g:

Terry v. State, 2021 WL 218999 (Miss. 2021) ("The jury heard evidence that Terry lived in the apartment. At the time the search warrant was executed, Terry was exerting control over the premises. Because the drugs were in plain view, Terry knew or should have known of the presence of the substance. Accordingly, considering the evidence in the light most favorable to the State, sufficient evidence supported the jury's verdict."

Berry v. State, 652 So. 2d 745, 751 (Miss. 1995) ("Possession, no matter how fleeting, is sufficient to sustain a conviction. Possession is defined, however, in terms of the exercise of dominion and control. We hold only, that in the circumstances here presented, the momentary handling was insufficient to support an inference of dominion and control.").

Rebuttable presumption as to the owner of premises or vehicle:

The owner in possession of the premises, or the vehicle in which contraband is kept or transported, is presumed to be in constructive possession of the articles found in or on the property possessed. But the presumption may be rebutted:

> The presumption of a constructive possession . . . is a rebuttable presumption and must give way to the facts proven. Moreover, the rebuttable presumption of constructive possession does not relieve the State of the burden to establish defendant's guilt as required by law and the defendant is presumed to be innocent until this is done.

Hamburg v. State, 248 So. 2d 430, 432 (Miss. 1971).

See also Brown v. State, 143 So. 3d 624, 628 (Miss. Ct. App. 2014) ("Brown presented no evidence to rebut the constructive-possession presumption other than a showing that another person had been in the passenger's seat immediately prior to the incident."); Spencer v. State, 908 So. 2d 783, 788 (Miss. Ct. App. 2005) ("Spencer neither testified at

trial nor produced witnesses in order to rebut the presumption that he was driving the truck and that he was found to have constructive possession over the methamphetamine.").

But, "this presumption is rebuttable, however, and does not relieve the State of its burden to prove guilt beyond a reasonable doubt." Pool v. State, 483 So. 2d 331, 337 (Miss. 1986).

If defendant does not own premises or vehicle where drugs are recovered:

Constructive possession can be proved even if the accused is not in the exclusive control and possession of the premises. But, in those circumstances, there must be additional incriminating facts to connect the accused with the contraband. *See* Powell v. State, 355 So. 2d 1378, 1379 (Miss. 1978). If not, then the court should grant a directed verdict. *See* Jones v. State, 693 So. 2d 375, 377 (Miss. 1997); Fultz v. State, 573 So. 2d 689, 691 (Miss. 1990).

Sometimes the connection is there:

> There was sufficient evidence presented to the jury to enable a finding beyond a reasonable doubt that Rudolph Miller was in constructive possession of crack cocaine. Miller was the only passenger in a police car that was searched immediately prior to his occupancy and again subsequent to Miller's leaving the car. The police car was locked and secure at all times.

Miller v. State, 634 So. 2d 127, 130-31 (Miss. 1974).

See also Johnson v. State, 81 So. 3d 1020, 1026 (Miss. 2011) ("Johnson's location near the vehicle, absent 'additional incriminating circumstances,' is not sufficient to sustain his conviction of constructive possession."); Fox v. State, 756 So. 2d 753, 758 (Miss. 2000) ("[T]he fact that Fox had a pair of scissors in his hand while standing near containers with freshly cut marijuana in a house owned by his mother and with no one else in the house shown to have had a substantial connection to it or control of it, shows Fox had constructive possession."); Bell v. State, 830 So. 2d 1285, 1288 (Miss. Ct. App. 2002) ("Examples [of 'additional incriminating facts'] are Bell's proximity to the drugs, Garcia's statements that Bell was involved with the methamphetamine production and that Bell received the finished product, and testimony that it would be nearly impossible for a resident to miss the strong smell generated by cooking methamphetamine."); Mitchell v. State, 754 So. 2d 519, 522 (Miss. Ct. App. 1999) ("[The] link of competent evidence is the testimony of Dedeaux that Mitchell admitted possession of the cocaine.").

Other times it is not:

> The only proof here is that Pate rented the room and that the contraband was found there the day after he had checked out. Any one of the motel

> staff could have put it there. Any guest of Pate's could have put it there. Finally, it may have been there before Pate rented the room, or it may have been hidden there afterwards. In any event, there is not enough evidence here to support Pate's conviction based upon constructive possession, ...

Pate v. State, 557 So. 2d 1183, 1186-87 (Miss. 1990).

See also Martin v. State, 804 So. 2d 967, 970 (Miss. 2001) ("Martin's mere presence in the kitchen area where the marijuana was found, without more, is simply not enough [to establish constructive possession].").

2407 JOINT OR INDIVIDUAL POSSESSION

"Possession of contraband may be actual or constructive, and may be joint or individual. Two or more persons may be in possession where they have joint power of control and an inferable intent to control jointly." Wolf v. State, 260 So. 2d 425, 432 (Miss. 1972). A driver whose vehicle reeks of marihuana has some explaining to do:

> [The driver] did not present any evidence to overcome [the presumption of constructive possession] aside of mentioning the fact that there was a passenger present in the vehicle with him. However, it is of no consequence that there was a passenger in the vehicle with [the defendant]. It is quite possible to have joint constructive possession.

Wall v. State, 718 So. 2d 1107, 1111 (Miss. 1998).

2408 PROVEN BY DIRECT OR CIRCUMSTANTIAL EVIDENCE

Possession of drugs may be proved by direct or circumstantial evidence. *See* United States v. Munoz, 150 F.3d 401, 416 (5th Cir. 1998).

> What is "circumstantial evidence"? The least inadequate definition we can provide is that circumstantial evidence is evidence which, without going directly to prove the existence of a fact, gives rise to a logical inference that such fact does exist. Conversely, eye witness testimony is thought of as direct evidence. The problem is that evidence in criminal cases does not fit into two nice, neat, mutually exclusive categories: direct and circumstantial. There are too many shades of gray. Most trials are full of evidence from one end of the spectrum to the other.

Keys v. State, 478 So. 2d 266, 268 (Miss. 1985).

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CHAPTER 25

CRIMINAL TRESPASSES

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2500 APPLICABLE LAWS

§ 97-17-103 Definitions:

(1) As used in this section:
(a) "Perpetrator" means a person who has engaged in criminal trespass and includes a person convicted of trespass under applicable state law;
(b) "Victim" means a person who was the object of another's criminal trespass and includes a person at the scene of an emergency who gives reasonable assistance to another person who is exposed to or has suffered grave physical harm;
(c) "Course of criminal conduct" includes the acts or omissions of a victim in resisting criminal conduct;
(d) "Convicted" includes a finding of guilt, whether or not the adjudication of guilt is stayed or executed, an unwithdrawn judicial admission of guilt or guilty plea, a no contest plea, a judgment of conviction, an adjudication as a delinquent child, an admission to a juvenile delinquency petition, or a disposition as an extended jurisdiction juvenile; and
(e) "Trespass" means an offense named in Sections 97-17-1 through 97-17-97, Mississippi Code of 1972, or any attempt to commit any of these offenses. Trespass includes crimes in other states or jurisdictions which would have been within the definition set forth in this subdivision if they had been committed in this state.

See also White v. Mississippi Power & Light Company, 196 So. 2d 343, 351 (Miss. 1967) ("To constitute the offense of criminal trespass, intentional acts must be used, or a willful demonstration of force calculated to intimidate or alarm, or acts involving or tending to a breach of the peace. It is obvious, therefore, that in order to show a criminal trespass, it is necessary that it be shown that there was an intent to do an act which is in violation of the statutory misdemeanor, as distinguished from a civil trespass or injury as a result of negligence.").

§ 97-17-103 Civil immunity for victim:

(2) A perpetrator assumes the risk of loss, injury or death resulting from or arising out of a course of criminal trespass, as defined in this section, engaged in by the perpetrator or an accomplice, and the crime victim is immune from and not liable for any civil damages as a result of acts or omissions of the victim.

§ 97-17-79 Boxing pine trees:

If any person shall box for turpentine, or cut or cause to be cut, a box or boxes in a pine tree growing on land known to belong to another, without the consent of the owner, he shall, on conviction, be fined not less than five dollars nor more than twenty dollars for each tree so cut or boxed, or be imprisoned in the county jail not exceeding three months, or both.

§ 97-17-81 Cutting trees:

If any person shall cut or raft any cypress, pine, oak, gum, hickory, pecan, walnut, mulberry, poplar, cottonwood, sassafras, or ash trees or timber upon any lands belonging to any other person or corporation, without permission from the owner thereof, or his agent duly authorized, such person shall, on conviction, be imprisoned in the county jail not more than five months, or fined not less than ten dollars nor more than one thousand dollars, or both.

§ 97-17-83 Injuring or destroying shade or ornamental trees:

If any person shall wilfully injure or destroy any shade tree or any ornamental tree not his own, on any highway or street, or in any yard, garden, or park, he shall, on conviction, be fined not less than five dollars nor more than twenty dollars for each tree so injured or destroyed, or shall be imprisoned in the county jail not less than ten days nor more than thirty days for each offense.

§ 97-17-84 Removal of "sea oats" from shore:

Any person who removes a plant commonly known as "sea oats" or "uniola paniculata" from the shores of this state shall be guilty of a misdemeanor and shall, upon conviction, be fined not more than Five Hundred Dollars ($500.00).

§ 97-17-85 Going upon enclosed land of another:

Except as otherwise provided in Section 73-13-103, if any person shall go upon the enclosed land of another without his consent, after having been notified by such person or his agent not to do so, either personally or by published or posted notice, or shall remain on such land after a request by such person or his agent to depart, he shall, upon conviction, be fined not more than Fifty Dollars ($50.00) for such offense. The provisions of this section shall apply to land not enclosed where the stock law is in force.

§ 97-17-87 Upon the real or personal property of another:

(1) Any person who shall be guilty of a willful or malicious trespass upon the real or personal property of another, for which no other penalty is prescribed, shall, upon conviction, be fined not exceeding Five Hundred Dollars ($500.00), or imprisoned not longer than six (6) months in the county jail, or both.

§ 97-17-87 Upon any air operations area or sterile area of an airport:

(2)(a) Any person who shall willfully trespass upon any air operations area or sterile area of an airport serving the general public shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than One Thousand Dollars ($1,000.00) or imprisoned in the county jail for up to one (1) year, or both.
(b) For the purposes of this subsection (2), "air operations area" means a portion

of an airport designed and used for landing, taking off, or surface maneuvering of airplanes; “sterile area” means an area to which access is controlled by the inspection of persons and property in accordance with an approved security program.

§ 97-17-89 Destruction or carrying away of vegetation:

Any person who shall enter upon the closed or unenclosed lands of another or of the public and who shall willfully and wantonly gather and unlawfully sever, destroy, carry away or injure any trees, shrubs, flowers, moss, grain, turf, grass, hay, fruits, nuts or vegetables thereon, where such action shall not amount to larceny, shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding five hundred dollars ($500.00), or be imprisoned not exceeding six (6) months in the county jail, or both; and a verdict of guilty of such action may be rendered under an indictment for larceny, if the evidence shall not warrant a verdict of guilty of larceny, but shall warrant a conviction under this section.

§ 97-17-91 Defacing, altering or destroying notices posted on land:

Any person who shall deface, remove, alter or destroy any notice placed upon any lands by the owner thereof or his agent posting or otherwise prohibiting the entrance upon any lands in this state shall, upon conviction, be fined not more than fifty dollars ($50.00) for each such notice defaced, removed, altered or destroyed.

§ 97-17-93 Entry without permission:

(1) Any person who knowingly enters the lands of another without the permission of or without being accompanied by the landowner or the lessee of the land, or the agent of such landowner or lessee, shall be guilty of a misdemeanor and, upon conviction, shall be punished for the first offense by a fine of Two Hundred Fifty Dollars ($250.00). Upon conviction of any person for a second or subsequent offense, the offenses being committed within five (5) years of the last offense, such person shall be punished by a fine of Five Hundred Dollars ($500.00), and may be imprisoned in the county jail for a period of not less than ten (10) nor more than thirty (30) days, or by both such fine and imprisonment. This section shall not apply to the landowner's or lessee's family, guests, or agents, to a surveyor as provided in Section 73-13-103, or to persons entering upon such lands for lawful business purposes.
(2)(a) It shall be the duty of sheriffs, deputy sheriffs, constables and conservation officers to enforce this section.
(b) Such officers shall enforce this section by issuing a citation to those charged with trespassing under this section.
(3) The provisions of this section are supplementary to the provisions of any other statute of this state.
(4) A prosecution under the provisions of this section shall be dismissed upon the request of the landowner, lessee of the land or agent of such landowner or lessee, as the case may be.

§ 97-17-97 Going into or upon premises after being forbidden to do so:

(1) Except as otherwise provided in Section 73-13-103, if any person or persons shall without authority of law go into or upon or remain in or upon any building, premises or land of another, including the premises of any public housing authority after having been banned from returning to the premises of the housing authority, whether an individual, a corporation, partnership, or association, or any part, portion or area thereof, after having been forbidden to do so, either orally or in writing including any sign hereinafter mentioned, by any owner, or lessee, or custodian, or other authorized person, or by the administrators of a public housing authority regardless of whether or not having been invited onto the premises of the housing authority by a tenant, or after having been forbidden to do so by such sign or signs posted on, or in such building, premises or land, or part, or portion, or area thereof, at a place or places where such sign or signs may be reasonably seen, such person or persons shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than Five Hundred Dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.
(2) The provisions of this section are supplementary to the provisions of any other statute of this state.

See also Miss. Code Ann. § 73-13-103 providing for criminal immunity to land surveyors who enter public or private lands or waters (but not buildings) while in the lawful performance of surveying duties.

Mississippi Attorney General's opinions:

Trespass after being told to leave premises.
"[I]f an invitee or guest in a home or guest house remains after having been orally or in writing forbidden to remain, the person my be found guilty of a misdemeanor trespass." Op. Atty. Gen. Dearman, December 17, 2010.

§ 97-17-99 Inciting or soliciting others to go into or upon premises of another:

(1) If any person or persons shall incite, or solicit, or urge, or encourage, or exhort, or instigate, or procure any other person or persons to go into or upon or to remain in or upon any building, or premises, or land of another whether an individual, a corporation, partnership, or association, or any part, portion or area thereof, knowing such other person or persons to have been forbidden, either orally or in writing including any sign hereinafter mentioned, to do so by any owner, or lessee, or custodian, or other authorized person, or knowing such other person or persons to have been forbidden to do so by a sign or signs posted in or upon such building, or premises, or land, or part, or portion thereof, at a place or places where it or they may be reasonably seen, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than five hundred dollars ($500.00) or by confinement in the county jail not exceeding six (6) months, or by both such fine and imprisonment.
(2) The provisions of this section are supplementary to the provisions of any other statute

of this state.

§ 97-23-17 Right to choose or refuse to serve:

(1) Every person, firm or corporation engaged in any public business, trade or profession of any kind whatsoever in the State of Mississippi, including, but not restricted to, hotels, motels, tourist courts, lodging houses, restaurants, dining room or lunch counters, barber shops, beauty parlors, theatres, moving picture shows, or other places of entertainment and amusement, including public parks and swimming pools, stores of any kind wherein merchandise is offered for sale, is hereby authorized and empowered to choose or select the person or persons he or it desires to do business with, and is further authorized and empowered to refuse to sell to, wait upon or serve any person that the owner, manager or employee of such public place of business does not desire to sell to, wait upon or serve. The provisions of this section shall not apply to corporations or associations engaged in the business of selling electricity, natural gas, or water to the general public, or furnishing telephone service to the public.
(2) Any public place of business may, if it so desires, display a sign posted in said place of business serving notice upon the general public that "the management reserves the right to refuse to sell to, wait upon or serve any person," however, the display of such a sign shall not be a prerequisite to exercising the authority conferred by this section.
(3) Any person who enters a public place of business in this state, or upon the premises thereof, and is requested or ordered to leave therefrom by the owner, manager or any employee thereof, and after having been so requested or ordered to leave, refuses so to do, shall be guilty of a trespass and upon conviction therefor shall be fined not more than five hundred dollars ($500.00) or imprisoned in jail not more than six (6) months, or both such fine and imprisonment.

CAUTION: State and federal laws prohibit discrimination. Businesses may not refuse entry or service in violation of civil rights or equal protections.

§ 97-25-59 Critical infrastructure:

As used in this act, unless otherwise defined, "critical infrastructure facility" means:
(a) Any portion of an oil, gas, carbon dioxide, hazardous liquid or chemical pipeline or tank that is buried or enclosed by a fence or other physical barrier obviously designed to exclude intruders, or clearly marked with a sign or signs reasonably likely to come to the attention of intruders and indicating that entry is forbidden without authorization.
(b) One (1) of the following, if enclosed by a fence or other physical barrier obviously designed to exclude intruders, or if clearly marked with a sign or signs reasonably likely to come to the attention of intruders and indicating that entry is forbidden without authorization:

(i) A chemical or polymer manufacturing facility;
(ii) A telecommunications central switching office;
(iii) Wireless or other telecommunications infrastructure, including cell towers, communication towers, telephone poles and lines, cable headend or fiber-optic

lines, other than those connecting to individual residences;
(iv) A transmission facility used by a federally licensed radio or television station, a governmental law enforcement or emergency services radio system, or electric utility;
(v) A petroleum refinery;
(vi) A liquid natural gas terminal or storage facility or compressed gas liquids plant or storage facility;
(vii) A natural gas compressor station;
(viii) A hydrocarbon processing plant, including a plant used in the processing, treatment or fractionation of oil, natural gas or natural gas liquids;
(ix) A natural gas distribution utility facility, including transmission facilities, pipeline interconnections, a city gate or town border station, metering stations, piping, a regulator station or a natural gas storage facility;
(x) A crude oil or refined products storage and distribution facility, including storage tanks, valve sites, pipeline interconnections, pump stations, metering stations, pipelines, or piping and truck loading or offloading facilities;
(xi) An above-ground or underground mining facility;
(xii) An electrical power generating facility, substation, switching station, communication facility, electrical control center or electric power lines and associated equipment infrastructure other than those connections to individual residences;
(xiii) A data center or supercomputing center that has an average constant draw of at least one (1) megawatt of electricity;
(xiv) A commercial airport, trucking terminal or other freight transportation facility, including a railroad switching yard, railroad facility or railroad track;
(xv) Any reservoir that supplies water for industrial or municipal supplies or irrigation for multiple users or an irrigation district; or
(xvi) A water intake structure, water treatment facility, wastewater treatment plant, pump station or water lines and associated equipment infrastructure other than those connections to individual residences.

(c) Any site where the construction or improvement of any facility or structure referenced in this section is occurring.
(2) Impeding critical infrastructure.
(a) A person is guilty of impeding critical infrastructure if he or she intentionally or knowingly impedes the operations of a critical infrastructure facility in a manner not otherwise authorized by law.

(b) Impeding critical infrastructure is:

(i) A misdemeanor punishable by imprisonment for not more than six (6) months, a fine of not more than One Thousand Dollars ($1,000.00), or both, if the impediment causes damage or economic loss, the cost of which is less than One Thousand Dollars ($1,000.00);
(ii) A felony punishable by imprisonment for not more than seven (7) years, a fine of not more than Ten Thousand Dollars ($10,000.00), or both, if the

impediment causes damage or economic loss, the cost of which is One Thousand Dollars ($1,000.00) or more.

(c) If a series of damage or loss results from a single continuing course of conduct, a single violation of this section may be charged and penalties imposed based on the aggregate cost of the damage or loss.

(d) An organization that aids, abets, solicits, compensates, hires, conspires with, commands or procures a person to commit the crime of impeding critical infrastructure is subject to a fine not to exceed One Hundred Thousand Dollars ($100,000.00), provided that the organization acted with the intent that the crime of impeding critical infrastructure be completed. A critical infrastructure facility may maintain a civil action against an organization for damages suffered as a consequence of a violation of this subsection, including damages for lost profits, whether or not any fine is imposed pursuant to this subsection.

(e) No person shall be liable for a violation of paragraph (a) or (b) of this subsection if the person:

(i) Owns or legally occupies the land upon which the critical infrastructure facility is located and is engaged in conduct that is not inconsistent with the operation of the critical infrastructure facility or that is authorized by an agreement;
(ii) Is lawfully engaged in any regulatory or legal process to which the critical infrastructure facility is subject; or
(iii) Is engaged in conduct arising out of a bona fide dispute about access to land.

(f) As used in this subsection, "impede" means:

(i) To block the operation of or prevent legal access to a critical infrastructure facility or the construction site of a permitted critical infrastructure facility; or
(ii) To damage, destroy, deface or tamper with the equipment of a critical infrastructure facility, whether completed or under construction.

(3) Critical infrastructure trespass. (a) A person is guilty of critical infrastructure trespass if he or she enters or remains on or in a critical infrastructure facility or the construction site of a permitted critical infrastructure facility knowing he is not authorized to do so, or by means of false, forged, altered or counterfeit identification, or after having been notified to depart or not to trespass. For purposes of this subsection, notice is given by:

(i) Personal communication to the person by the owner or occupant, or his agent, or by a peace officer;
(ii) Posting of signs reasonably likely to come to the attention of intruders; or
(iii) The presence of fencing or other physical barrier designed to exclude intruders.

(b) Critical infrastructure trespass is a misdemeanor punishable by imprisonment for not more than one (1) year, a fine of not more than One Thousand Dollars ($1,000.00), or both.

(c) No person shall be liable for a violation of paragraph (a) of this subsection if that person:

(i) Owns or legally occupies the land upon which the facility is located and is engaged in conduct that is not inconsistent with the operation of the critical infrastructure facility or that is authorized by an agreement; or
(ii) Is lawfully engaged in any regulatory or legal process to which the critical infrastructure facility is subject.

(4) Nothing in this section shall be construed to prohibit:

(a) Public demonstrations or other expressions of free speech or free association to the extent such activity is protected under the United States or Mississippi Constitutions;

(b) Lawful commercial or recreational activities conducted in the open or unconfined areas around a pipeline, including, but not limited to, fishing, hunting, boating and birdwatching; or

(c) The lawful exercise of the right of ownership by an owner of real property, including use, enjoyment and disposition within the limits and under the conditions established by law.

2501 HUNTING AND FISHING TRESPASSES

§ 49-7-71 Unlawful to disturb traps:

It shall be unlawful for any person to disturb the traps of another or to take any fur-bearing animals from them unless specifically authorized by the owner and any person so doing shall be guilty of larceny, or trespass as the case may be, and punishable as provided by law.

§ 49-7-79 Unlawful to hunt on lands of another when warned not to do so:

It shall be unlawful to hunt, shoot, or trap or otherwise trespass on the lands or leases of another after having been warned not to do so, whether in person or by posting of suitable notice in conspicuous places on such lands.

§ 49-5-39 Trespassing on game or fish refuge:

(2) Any person trespassing on any game or fish refuge in any game or fish management area shall be guilty of a misdemeanor and punished by a fine of not less than one hundred dollars ($100.00) nor more than two hundred fifty dollars ($250.00) and imprisonment in the county jail of not more than thirty (30) days.

2502 DEFENSE OF NECESSITY

The defense of necessity is applicable only if the trespass was to prevent a significant evil, there was no adequate alternative, harm caused is not disproportionate to harm avoided, and threatened harm was specific and imminent. *See* McMillan v. City of Jackson, 701 So. 2d 1105 (Miss. 1997) (discussing defense of necessity).

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CHAPTER 26

JURY TRIALS

2600 WHEN A JURY TRIAL MAY BE DEMANDED

§ 11-9-143 In civil actions:

On or before the return day of the process either party may demand a trial by jury, and thereupon the [justice court] shall order the proper officer to summon six persons, competent to serve as jurors in the circuit court, to appear immediately, or at such early day as he may appoint, whether at a regular term or not, who shall be sworn to try the case;

§ 99-33-9 In criminal cases:

A defendant in a criminal case before a justice court judge where the potential period of incarceration is more than six (6) months in jail, in like manner as in civil cases, may demand a jury, and thereupon the justice shall proceed as in other cases. If the potential of incarceration is less than six (6) months in jail, there shall be no jury trial.

2601 WHO MAY SERVE AS JURORS

§ 13-5-1 Competent jurors:

Every citizen not under the age of twenty-one years, who is either a qualified elector, or a resident freeholder of the county for more than one year, is able to read and write, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard, is a competent juror. No person who is or has been within twelve months the overseer of a public road or road contractor shall, however, be competent to serve as a grand juror. The lack of any such qualifications on the part of one or more jurors shall not, however, vitiate an indictment or verdict. Moreover, no talesman or tales juror shall be qualified who has served as such talesman or tales juror in the last preceding two years, and no juror shall serve on any jury who has served as such for the last preceding two years. No juror shall serve who has a case of his own pending in that court, provided there are sufficient qualified jurors in the district, and for trial at that term.

§ 13-5-1 Determination of literacy:

In order to determine that prospective jurors can read and write, the presiding judge shall, with the assistance of the clerk, distribute to the jury panel a form to be completed personally by each juror prior to being empaneled as follows:

1. Your name _____ Last _____ First _____ Middle initial
2. Your home address _____
3. Your occupation _____
4. Your age _____
5. Your telephone number _____ If none, write none
6. If you live outside the county seat, the number of miles you live from the courthouse _____ Miles

_____
Sign your name

The judge shall personally examine the answers of each juror prior to empaneling the jury and each juror who cannot complete the above form shall be disqualified as a juror and discharged.

2602 JURY SERVICE EXEMPTIONS

§ 13-5-23 Grounds for jury service exemption:

(1) All qualified persons shall be liable to serve as jurors, unless excused by the court for one (1) of the following causes:
(a) When the juror is ill and, on account of the illness, is incapable of performing jury service;
(b) When the juror's attendance would cause undue or extreme physical or financial hardship to the prospective juror or a person under his or her care or supervision; or
(c) When the potential juror is a breast-feeding mother.

§ 13-5-23 Excuse of illness:

(2) An excuse of illness under subsection (1)(a) of this section may be made to the clerk of court outside of open court by providing the clerk with a certificate of a licensed physician, stating that the juror is ill and is unfit for jury service, in which case the clerk may excuse the juror. If the excuse of illness is not supported by a physician's certificate, a judge of the court for which the individual was called to jury service shall decide whether to excuse an individual under subsection (1)(a) of this section.

§ 13-5-23 What constitutes extreme physical or financial hardship:

(3)(a) The test of an excuse under subsection (1)(b) of this section for undue or extreme physical or financial hardship shall be whether the individual would either:
(i) Be required to abandon a person under his or her personal care or supervision due to the impossibility of obtaining an appropriate substitute caregiver during the period of participation in the jury pool or on the jury; or
(ii) Incur costs that would have a substantial adverse impact on the payment of the

individual's necessary daily living expenses or on those for whom he or she provides the principal means of support; or
(iii) Suffer physical hardship that would result in illness or disease.
(b) "Undue or extreme physical or financial hardship" does not exist solely based on the fact that a prospective juror will be required to be absent from his or her place of employment or business.
(c) A judge of the court for which the individual was called to jury service shall decide whether to excuse an individual under subsection (1)(b) of this section.
(d) A person asking to be excused based on a finding of undue or extreme physical or financial hardship must take all actions necessary to have obtained a ruling on that request by no later than the date on which the individual is scheduled to appear for jury duty.
(e) A person asking a judge to grant an excuse under subsection (1)(b) of this section may be required to provide the judge with documentation such as, but not limited to, federal and state income tax returns, medical statements from licensed physicians, proof of dependency or guardianship and similar documents, which the judge finds to clearly support the request to be excused. Failure to provide satisfactory documentation may result in a denial of the request to be excused.

§ 13-5-23 Breast-feeding mother:

(f) In cases under subsection (1)(c) of this section, the excuse must be made by the juror in open court under oath.

§ 13-5-23 When excusing from jury service permanently:

(4) A person is excused from jury service permanently only when the deciding judge determines that the underlying grounds for being excused are of a permanent nature. A person who has been summoned for jury duty who meets the age threshold for exemption from jury service shall have the option to be permanently excused from jury service due to age by filing with the circuit clerk a notarized request to be permanently excused.

§ 13-5-25 Personal privilege exemptions:

Every citizen over sixty-five (65) years of age, and everyone who has served as a grand juror or as a petit juror in the trial of a litigated case within two (2) years, shall be exempt from service if the juror claims the privilege. No qualified juror shall be excluded because of any such reasons, but the same shall be a personal privilege to be claimed by any person selected for jury duty. Any citizen over sixty-five (65) years of age may claim this personal privilege outside of open court by providing the clerk of court with information that allows the clerk to determine the validity of the claim.
Provided, however, that no person who has served as a grand juror or as a petit juror in a trial of a litigated case in one (1) court may claim the exemption in any other court where the juror may be called to serve.

§ 11-9-147 Fining juror for failing to attend:

The [justice court judge] may fine any person summoned as a juror failing to attend in any sum not exceeding ten dollars; and if such person, when summoned to show cause why the fine should not be made final, shall not appear and show cause, execution shall issue for the fine and costs.

A list of any jurors disqualified for jury duty by reason of inability to complete the form shall be kept by the circuit clerk and their names shall not be placed in the jury box thereafter until such person can qualify as above provided.

See Milano v. State, 790 So. 2d 179, 189 (Miss. 2001) (upholding constitutionality of Miss. Code Ann. § 13-5-1).

§ 11-9-145 Trying multiple cases by same jury:

If a justice have more jury cases than one on the same day, he shall use the same jury for the trial of each, subject to the right of challenge by either party and like proceedings in all respects as in other cases. If more cases than one be tried by the same jury, the justice shall apportion the cost of the jury among the several cases and tax it in accordance with justice.

2603 JURY TRIALS IN CRIMINAL CASES

RJC 9 Conducted pursuant to Mississippi Rules of Criminal Procedure:

(a) Statutory right to a jury trial. A jury trial may be demanded in criminal cases pursuant to section 99-33-9 of the Mississippi Code and in civil actions pursuant section 11-9-143 of the Mississippi Code.

(b) Summons of jurors. When a jury trial is demanded pursuant to a statutory right to a jury trial, the justice court clerk shall notify the circuit court clerk who shall issue summonses for a jury in the same manner as for circuit court. The summonses shall be returnable to justice court.

(c) Procedures in criminal cases. In criminals cases, the court shall conduct jury trials pursuant to the Mississippi Rules of Criminal Procedure as applicable to justice courts.

MRCrP 18.1 Trial by jury:

(a) Generally.

(1) Qualifications. Jurors shall have the qualifications as required by law.

(2) Number of Jurors--Felony Cases. In felony cases, conviction requires the unanimous consent of twelve (12) impartial jurors.

(3) Number of Jurors--Misdemeanor Cases. A six (6) person jury shall be used in all criminal misdemeanor actions tried in justice or county court (including, in county court, whether the case originated in such court or was appealed from a lower court). In such cases, the unanimous consent of six (6) impartial jurors is required for conviction. If the case is injustice court, a trial by jury may be demanded as provided by law, although there is no right to a jury trial injustice-court if the potential sentence is less than six (6) months in jail. Trial by jury is not available in municipal court.

(4) Alternate Jurors. The court may direct the selection of a sufficient number of alternate jurors.

(b) Waiver. The defendant may waive the right to trial by jury with consent of the prosecution and the court. In a death penalty case, the defendant may also waive the right to have a jury determine the penalty if the prosecution and the court concur. Regarding any such waiver:

> (1) Before acceptance, the court shall address the defendant personally, advise the defendant of the right to a jury trial, and ascertain that the waiver is knowing, voluntary, and intelligent.
>
> (2) A waiver of jury trial or sentencing under this Rule shall be made in writing or in open court on the record.
>
> (3) For good cause shown, the court may allow the defendant to withdraw the waiver of jury trial or sentencing.

See also Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020) ("This Court has long explained that the Sixth Amendment right to a jury trial is "fundamental to the American scheme of justice" and incorporated against the States under the Fourteenth Amendment. This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government. So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.").

MRCrP 18.2 Jury information:

Before the voir dire examination, each party shall be furnished with a list of the names

and addresses of the prospective jurors present and qualified to serve. Each party shall also be furnished with each prospective juror's employment status, occupation, employer, residency status, education level, prior jury duty experience, and felony conviction status. Further information may be required by the court.

MRCrP 18.3 Challenges:

(a) Preliminary Challenge to the Jury Panel. Any party may challenge the panel for good cause shown. Challenges to the panel shall be in writing or on the record, specifying the facts on which the challenge is based. Absent a showing of good cause, all such challenges shall be made and decided before the commencement of voir dire.

(b) Challenges for Cause. When there is reasonable ground to believe that a juror cannot render a fair and impartial verdict, the court, on its own initiative or on motion of any party, shall excuse the juror from service in the case. A challenge for cause may be made at any time, but may be denied for failure of the party making it to exercise due diligence. Challenges for cause and rulings thereon shall be made out of the hearing of the jurors, but shall be of record.

(c) Peremptory Challenges.

(1) In General. Both parties shall be allowed the following number of peremptory challenges for the selection of jurors:

(A) Selection of Regular Jurors: Regarding regular jurors, the defendant and the prosecution shall each have peremptory challenges, as follows:

(i) In cases wherein the punishment may be death or life imprisonment, the defendant and the prosecution each shall have twelve (12) peremptory challenges for the selection of the regular twelve (12) jurors.

(ii) In felony cases not involving the possible sentence of death or life imprisonment, the defendant and the prosecution each shall have six (6) peremptory challenges for the selection of the twelve (12) regular jurors.

(iii) The defendant and the prosecution each shall have two (2) peremptory challenges in a trial with a six (6) person jury.

These challenges may not be used in the selection of alternate juror(s).

(B) Selection of Alternate Jurors: When the court has elected to impanel alternate juror(s), the defendant and the prosecution shall each have peremptory challenges, as follows:

(i) In death penalty cases, the peremptory challenges shall equal the number of alternate jurors the court has ordered to be selected.

(ii) In all other cases, the peremptory challenges shall be one (1) challenge for each two (2) alternate jurors, or part thereof, ordered by the court to be selected.

These challenges for alternate jurors may not be used in the selection of regular jurors.
(2) Joint Trial of Several Defendants. When two (2) or more defendants are jointly tried, two (2) additional challenges shall be allowed to the defense and to the prosecuting attorney for each additional defendant. When two (2) or more defendants are jointly tried and cannot agree on the allocation of the peremptory challenges, they shall be exercised in the manner prescribed by the court.

MRCrP 18.4 Procedure for selecting a jury:

(a) Oath. The court shall give all members of the panel the following oath:
You, and each of you, do solemnly swear (or affirm) that you will true answer give to all questions asked you by or under the direction of the court, touching your qualifications as Jurors. So help you God.

(b) Inquiry by the Court; Brief Opening Statements. The court shall initiate the examination of jurors by identifying the parties and their counsel, briefly outlining the nature of the case, and explaining the purposes of the examination, The court shall ask any questions which it thinks necessary relating to the prospective jurors' qualifications to serve in the case on trial. The parties may, before voir dire and with the court's consent, present brief opening statements to the entire jury panel. On its own motion, the court may require counsel to do so.

(c) Voir dire Examination. The court shall permit the parties to conduct the examination of the prospective jurors and may itself conduct its own examination. The court may impose reasonable limitations with respect to questions allowed during a party's examination of the prospective jurors, giving due regard to the purpose of such examination.

(d) Scope of Examination. The examination of prospective jurors shall be limited to inquiries directed to bases for challenge for cause and information to enable the parties to exercise intelligently their peremptory challenges.

(e) Exercise of Peremptory Challenges. Following examination of the jurors, the parties shall exercise their peremptory challenges, in the order in which the jurors have been seated, as follows:

(1) the court shall rule upon all challenges for cause before the parties are required to exercise peremptory challenges;

(2) next, the prosecuting attorney shall tender a full panel of accepted jurors to the defendant(s), after having exercised any-peremptory challenges desired;

(3) next, the defendant(s) shall go down the juror list accepted by the prosecuting attorney and exercise any peremptory challenges to that panel;

(4) once the defendant(s) exercise peremptory challenges to the panel tendered, the prosecuting attorney shall then be required to tender sufficient additional jurors to constitute a full panel of accepted jurors;

(5) the above procedure shall be repeated until a full panel of jurors has been accepted by all parties; and

(6) once the jury panel is selected, alternate jurors shall be selected following the procedure set forth above for selecting the jury panel.

Constitutional challenges to the use of peremptory challenges shall be made at the time each panel is tendered. Peremptory challenges shall be made out of the hearing of the jurors, and shall be of record.

(f) Alternate Jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a regular juror shall be discharged at the time the jury retires to consider its verdict.

See also Cotton v. State, 790 So. 2d 235, 238 (Miss. Ct. App. 2001) ("The complained-of statements were clearly made to determine whether the potential jurors understood their function and how the evidence was to be evaluated, which is the very purpose of voir dire. There is no error in ascertaining whether potential jurors know what is expected of them in order to determine their suitability to serve as jurors.").

MRCrP 18.5 Oath and preliminary instructions:

(a) Oath of Jurors. The court shall, on the record of each trial, give the jurors the following oath or remind the jurors that they are still under the following oath:

> You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, or under its direction, during the present term, and true verdicts give according to the evidence. So help you God.

Additionally, in each capital case, the jurors shall be sworn to "well and truly try the issue between the state and the defendant, and a true verdict give according to the evidence and the law."

(b) Oath of Bailiffs. In capital cases, bailiffs may be specially sworn by the court, or under its direction, to attend on such jury and perform such duties as the court may prescribe for them.

(c) Preliminary Instructions. Immediately after the jury is sworn, the court, on the record, may instruct the jury concerning its duties, its conduct, the order of proceedings, and the elementary legal principles that will govern the proceeding.

MRCrP 18.6 Note taking by jurors:

(a) Note Taking Permitted in the Discretion of the Court. The court may permit jurors to take written notes concerning testimony and other evidence. If the court permits jurors to take written notes, jurors shall have access to their notes during deliberations. Those notes shall be secured in the custody of the clerk when court is not in session. Immediately after the jury has rendered its verdict, all notes shall be collected by the bailiff or clerk and destroyed.

(b) Instructions. The court shall instruct the jury as to whether note taking will be permitted. If the court permits jurors to take written notes, the trial judge shall give both a preliminary instruction and an instruction at the close of all the evidence on the appropriate use of juror notes. These instructions shall be given in the following manner:

(1) Preliminary Instruction: Note Taking Forbidden.

You may not take notes during the course of the trial. There are several reasons for this. It is difficult to take notes and, at the same time, pay attention to what a witness is saying, Further, in a group the size of yours, certain persons will take better notes than others will, and there is a risk that jurors who do not take good notes will depend on jurors who do. The jury system depends upon all jurors paying close attention and arriving at a decision. I believe that the jury system works better when the jurors do not take notes,
You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(2) Preliminary Instruction; Note Taking Permitted.

If you would like to do so, you may take notes during the course of me trial. On the other hand, you are not required to take notes if you prefer not to do so. Each of you should make your own decision about this. If you decide to take notes, be careful not to get so involved in note taking that you become distracted from the ongoing proceedings.

Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you take notes or not, each of you must form and express your own opinion as to the facts of this case. An individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. Immediately after the jury has rendered its verdict, all notes shall be collected by

the bailiff or clerk and destroyed.

You will notice that we do have an official court reporter making a record of the trial; however, we will not have typewritten transcripts of this record available for your use in reaching a decision in this case.

(3) Use of Notes During Deliberations.

Jury Instruction #

Members of the Jury, shortly after you were selected I informed you that you could take notes and 1 instructed you as to the appropriate use of any notes that you might take. Most importantly, an individual juror's notes may be used by that juror only and may not be shown to or shared with other jurors. Notes are only a memory aid and a juror's notes may be used only as an aid to refresh that particular juror's memory and assist that juror in recalling the actual testimony. Each of you must rely on your own independent recollection of the proceedings. Whether you took notes or not, each of you must form and express your own opinion as to the facts of this case. Be aware that during the course of your deliberations there might be the temptation to allow notes to cause certain portions of the evidence to receive undue emphasis and receive attention out of proportion to the entire evidence. But a juror's memory or impression is entitled to no greater weight just because he or she took notes, and you should not be influenced by the notes of other jurors.

See also Miss. Code Ann. § 99-17-35 ("The judge in any criminal cause, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the court, as being "given" or "refused," as the case may be, and all instructions so marked shall be a part of the record, on appeal, without a bill of exceptions.").

MRCrP 18.7 Admonitions to jurors:

In all cases, the court, among other matters it deems proper, shall admonish the jurors that they are not to:

(1) discuss among themselves any subject connected with the trial until the case is submitted to them for deliberation;

(2) converse with anyone else on any subject connected with the trial, until they are discharged as jurors in the case;

(3) permit themselves to be exposed to outside comments or news accounts of the proceedings, until they are discharged as jurors in the case;

(4) conduct independent research about the case, legal issues, and/or the parties involved;

(5) view the place where the offense was allegedly committed; or

(6) form or express any opinion on the case until it is submitted to them for deliberation.

The jurors shall report to the court any communications or attempts to communicate with them on the case or any subject connected with the trial. When the jury is reconvened, the court, in its discretion, may poll the jury to determine if the jury has complied with the court's instructions.

MRCrP 18.8 Jury sequestration:

(a) Death Penalty Cases. In a death penalty case, the jury shall be sequestered during the entire trial.

(b) Other Cases. In all other cases, the jury may be sequestered on request of either the defendant or the prosecuting attorney made at least forty-eight (48) hours in advance of the trial. The court may grant or refuse the request to sequester the jury. The court may, on its own initiative or upon request of either party, sequester a jury at any stage of a trial.

Rule 18.9 Prohibited disclosures:

Prior to the conclusion of the trial, no defense attorney, prosecuting attorney, clerk, deputy clerk, law enforcement official or other officer of the court, may release or authorize release of any statement for dissemination by any means of public communication on any matter concerning:

(1) The prior criminal record of the defendant or the defendant’s character or reputation;

(2) The existence or contents of any confession, admission or statement given by the defendant; or the refusal or failure of the defendant to make any statement;

(3) The defendant’s performance on any examinations or tests, or the defendant’s refusal or failure to submit to an examination or test;

(4) The identity, testimony, or credibility of prospective witnesses;

(5) The possibility of a plea of guilty to the offense charged, or a lesser offense; and

(6) The defendant's guilt or innocence, or other matters relating to the merits of the case, or the evidence in the case.

MRCrP 22 Jury instructions:

(a) Procedural Instructions. At the commencement of and during the course of a trial, the court may orally give the jury cautionary and other instructions of law relating to trial procedure and the duty and function of the jury, and may acquaint the jury generally with the nature of the case. Every oral instruction shall be recorded by the court reporter as it is delivered to the jury. All other instructions shall be in writing.

(b) Substantive Instructions.

(1) By the Parties. At least twenty-four (24) hours before trial, or at such other time during the trial as the court directs, each party must file with the clerk and deliver to all counsel jury instructions on the forms of verdict and the substantive law of the case. Except for good cause shown, the court shall not entertain a request for instructions which have not been pre-filed. At the conclusion of testimony, each party may present to the judge up to six (6) pre-filed substantive instructions. The court, for good cause shown, may allow more than six (6) instructions to be presented.

(2) By the Court. The court's instructions, if any, must be in writing and must be submitted to the parties who, in accordance with section (d), must make their specific objections on the record. The court shall not comment upon the evidence.

(c) Identification

(1) Caption. All instructions shall be captioned at the top of the page "Jury Instruction No. ___" in order to allow the court to number the instructions given in such sequence as it deems proper.

(2) Identifying Submitted Instructions. All instructions submitted shall be identified with letters and numerals placed in the bottom right corner of each page. The court's written instructions shall be numbered and prefixed with the letter C. The State's instructions shall be numbered and prefixed with the letter S. A defendant's instructions shall be numbered and prefixed with the letter D. In actions with multiple defendants, Roman numerals shall be used to identify the proposed instructions of each defendant; the Roman numerals shall be placed after the alphabetical designation I), and shall conform to the sequential listing of defendants as stated in the indictment. Instructions shall not otherwise be identified with a party.

(d) Objections. A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court, on the record, of the specific objection and the grounds therefor before the instructions are presented to the jury. An opportunity

must be given to object out of the jury's hearing.

(e) Rulings on Instructions. Prior to closing argument, the court shall rule on the requested instructions, marking each "given" or "refused," and all such instructions shall become part of the record.

(f) When Read. Instructions shall be read by the court to the jury before closing arguments. Instructions will not be given after closing arguments have begun, except when justice so requires. All given instructions shall be available to the parties for use during closing arguments, and will be carried into the jury room when the jury retires to consider its verdict.

MRCrP 23.1 Retirement of jurors:

(a) Retirement. After closing arguments, the court may direct the jury to select one of its members as a foreperson to preside over the deliberations and to write and return any verdict. The court also may admonish the jurors that, until they are discharged as jurors in the cause, they may communicate upon subjects connected with the trial only while the jury is convened in the jury room for the purpose of reaching a verdict. The jurors shall then retire in the custody of the bailiff(s) and consider their verdict.

(b) Permitting the Jury to Disperse. Except in cases in which the jury has been sequestered, the court may permit the jurors to disperse after their deliberations have commenced, instructing them when to reassemble, and giving the admonitions of Rule 18.7.

MRCrP 23.2 Materials used during deliberation:

Upon retiring for deliberation, the jurors shall take with them:

(a) forms of verdict approved by the court;

(b) a copy of the written instructions;

(c) their notes (if any); and

(d) such exhibits and equipment as the court shall direct.

MRCrP 23.3 Additional instructions; further review of evidence prohibited:

(a) Additional Instructions. If the jury, after they retire for deliberation, desires to be informed of any point of law, the court shall instruct the jury to reduce its question to writing and the court, after affording the parties an opportunity to state their objections or assent, may grant additional written instructions in response to the jury's request.

(b) Further Review of Evidence Prohibited. After the jurors have retired to consider

their verdict, the court shall not recall the jurors to hear additional evidence.

MRCrP 24.1 Time and form of verdict:

When the jurors have agreed upon a verdict they shall be returned to the courtroom by the bailiff(s). The court shall ask the foreperson or the jury panel whether an agreement has been reached on a verdict. If the foreperson or the jury panel answers in the affirmative, the judge shall call upon the foreperson or any member of the panel to deliver the verdict, in writing, to the clerk or the court. The verdict of the jury shall be unanimous, but need not be signed. The court shall examine the verdict and, if found to be in proper order, the clerk or the court then shall read the verdict in open court in the presence of the jury. If neither party nor the court desires to poll the jury, or when a poll of the jury reveals the verdict is unanimous, and if the verdict is in the form required by Rule 24.3, the court shall order the verdict filed and entered of record. The court then shall discharge the jurors, unless a bifurcated hearing is necessary.

MRCrP 24.2 Types of verdict:

(a) General Verdicts. Except as otherwise specified by this Rule, the jury shall in all cases render a verdict finding the defendant either guilty or not guilty.

(b) Insanity or Intellectual Disability Verdicts. When the jury determines that a defendant is not guilty by reason of insanity or intellectual disability, the verdict shall so state.

(c) Different Counts or Offenses. If the jury is instructed on different counts, offenses, or degrees of offenses, the verdict shall specify each count, offense, or degree of offense of which the defendant has been found guilty or not guilty.

(d) Lesser-included Offense or Attempt. The jury may be instructed that it can return a verdict on any of the following:

(1) an offense necessarily included in the offense charged; or

(2) an attempt to commit the offense charged or an offense necessarily included therein, if such attempt is an offense.

MRCrP 24.3 Necessity for forms of verdict:

Forms of verdicts shall be contained in the jury instructions for each offense charged and, where warranted by the evidence, the trial judge may instruct for any or all lesser-included or attempt offenses as provided in Rule 24.2(d). The defendant may not be found guilty of any offense for which no form of verdict has been submitted to the jury. If the verdict returned is not fully responsive, the court shall direct the jury to retire for further deliberations. The court may correct or complete the verdict, as to form only, in open court in the presence of the parties and the jury.

MRCrP 24.4 Partial verdicts and mistrial:

(a) Multiple Defendants. If there are multiple defendants, the jury shall return a verdict as to any defendant about whom it has agreed.

(b) Multiple Counts. If the jury cannot agree on all counts as to any defendant, the jury shall return a verdict on those counts on which it has agreed.

(c) Mistrial. If the jury cannot agree on a verdict on one (1) or more defendants or counts, the court may declare a mistrial as to those defendants or counts.

MRCrP 24.5 Jury poll:

After a verdict is returned, but before the jury is discharged, the court shall on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

MRCrP 24.6 Miscellaneous provisions:

(a) Defective Verdicts. If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall, with proper instructions, direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury. If the jury persists in rendering defective verdicts, the court shall declare a mistrial.

(b) Comments by the Court to Jurors. While it is appropriate for the court to thank jurors at the conclusion of a trial for their public service, such comments should not include praise or criticism of their verdict.

(c) Limits on Impeaching the Verdict. After the verdict has been received by the court and entered on the record, the testimony or affidavits of the jurors shall not be received to impeach the verdict, except as permitted by the Mississippi Evidence.

RJC 9

(a) Statutory right to a jury trial. A jury trial may be demanded in criminal cases pursuant to section 99-33-9 of the Mississippi Code and in civil actions pursuant section 11-9-143 of the Mississippi Code.

(b) Summons of jurors. When a jury trial is demanded pursuant to a statutory right to a jury trial, the justice court clerk shall notify the circuit court clerk who shall issue summonses for a jury in the same manner as for circuit court. The summonses shall be returnable to justice court.

. . .

(d) Procedures in civil actions.

(1) Composition of jury. Juries shall consist of six (6) persons and, in the discretion of the court, an alternate juror. Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his/her qualifications.

(2) Voir dire. Voir dire is the procedure whereby the court and the attorneys or parties ask questions of the venire to ensure the selection of a fair and impartial jury. It shall proceed in the following order:

(i) The judge asks questions of the venire;

(ii) The plaintiffs attorney or the plaintiff asks questions of the venire; and

(iii) The defendant's attorney or the defendant asks questions of the venire.

Individual jurors may be examined only by leave of court upon good cause shown. No hypothetical questions shall be allowed requiring any juror to pledge a particular verdict. Attorneys or parties shall not offer an opinion on the law. The judge may set a reasonable time limit for voir dire.

(3) Selecting the jury panel. The jury panel shall be selected, in the order of their appearance on the venire, as follows:

(i) The court shall consider all challenges for cause;

(ii) The plaintiffs attorney or the plaintiff may use one or both of its peremptory challenges, then tender to the defendant a full panel of accepted jurors;

(iii) The defendant's attorney or the defendant may use one or both of its peremptory challenges, then tender to the plaintiff a full panel of accepted jurors; and

(iv) Steps (ii) and (iii) of this subdivision are then repeated until a full panel of jurors has been accepted by both sides.

Each side shall have two (2) peremptory challenges. Objections shall be made at the time the panel is tendered to the opposing party. Upon the motion of any party, or upon the judge's own initiative, the judge shall excuse any juror from service in the case ifthere is reasonable ground to believe that such juror cannot render a fair and impartial verdict.

(4) Alternate jurors. Once a jury panel is selected, an alternate juror is selected following the same procedures set forth above for selecting the jury panel, except that each side is only allowed one peremptory challenge. The alternate juror shall take the oath of a juror and hear all evidence and arguments, but may not retire to deliberate the case unless a juror is excused by the court or becomes unable to serve.

(5) Communications with jurors. Jurors are not permitted to mix and mingle anywhere in the courthouse with the attorneys, the parties, the witnesses, or spectators. The judge must instruct jurors to avoid all contact with the attorneys, the parties, the witnesses, and any spectators.

(6) Jury instructions. Procedures for instructions to the jury shall be consistent with Rule 51 of the Mississippi Rules of Civil Procedure.

(7) Jury deliberations. The judge shall:

(i) give the jurors, on the record of each trial, the following oath or remind the jurors that they are still under the following oath:

"You, and each of you, do solemnly swear (or affirm) that you will well and truly try all issues and execute all writs of inquiry that may be submitted to you, or left to your decision by the court, or under its direction, during the present term, and true verdicts give according to the evidence. So help you God.";

(ii) direct the jury to select one of its members to preside over the deliberations;
(iii) direct the jury to return its verdict in writing to the court; and
(iv) admonish the jurors that, until discharged as jurors in the cause, they may only discuss the case with other members of the jury when convened in the jury room for the purpose of reaching a verdict.

Unless otherwise authorized by the court, the jurors shall not disperse once deliberations have begun. After the jurors have retired to consider their verdict, the judge shall not recall the jurors to hear additional evidence.

(8) Materials allowed during deliberation. When retiring for deliberation, the jurors are allowed to take with them:

(i) the form of verdict approved by the court;
(ii) a copy of the written jury instructions;
(iii) any tangible evidence that was admitted at the trial; and
(iv) their personal notes made during the course of the trial.

(9) Returning the verdict. The verdict shall be in writing and returned in open court. A verdict of five or more of the jurors shall be taken as the verdict of the jury. Any verdict returned may be appealed pursuant to these rules.

(10) Jury poll. After a verdict is returned but before the jury is discharged, the judge shall on the request of either side, or may on his/her own initiative, poll the jurors individually by asking whether the returned verdict is indeed the verdict of the jury. The judge shall direct the jury to retire and deliberate further if the poll reveals that the verdict is less than five of the jurors.

(11) Court costs. The judge shall assess court costs of the jury trial to the losing party.

See also Graham v. State, 967 So.2d 670, 674 (Miss. Ct. App. 2007) ("A defendant is entitled to have the trial court give jury instructions that present his theory of the case; however, the court may deny an instruction that misstates the law, is covered elsewhere in the instructions, or is not supported by the evidence.").

CHAPTER 27

CONTEMPT OF COURT

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2700 CONTEMPT PROCEEDINGS IN CRIMINAL CASES

MRCrP 32.1 Applicability; indirect and direct contempt defined; criminal and civil contempt defined:

(a) Applicability. Rule 32 applies to both civil and criminal contempt arising in a criminal action.

(b) Indirect Contempt. "Indirect contempt," also known as "constructive contempt," means any contempt other than a direct contempt.

(c) Direct Contempt. "Direct contempt" means contempt committed:

(1) in the presence of the judge presiding in court; or
(2) so near to the judge as to interrupt the court's proceedings.

(d) Criminal Contempt. "Criminal contempt" means either:

(1) misconduct of a person that obstructs the administration of justice and that is committed either in the presence of the judge presiding in court or so near thereto as to interrupt its proceedings;

(2) willful disobedience or resistance of any person to a court's lawful writ, subpoena, process, order, rale, or command, where the primary purpose of the finding of contempt is to punish the contemner; or

(3) any other willfully contumacious conduct which obstructs the administration of justice, or which lessens the dignity and authority of the court.

(e) Civil Contempt. "Civil contempt" means willful, continuing failure or refusal of any person to comply with a court's lawful writ, subpoena, process, order, rale or command that by its nature is still capable of being complied therewith.

MRCrP 32.2 Direct contempt:

(a) Summary Imposition of Sanctions. The court against which a direct civil or criminal contempt has been committed may summarily impose sanctions on the person who committed it if:

(1) the presiding judge has personally perceived the conduct constituting the contempt and has personal knowledge of the identity of the person committing it;

(2) the contempt has interrupted the order of the court or interfered with the dignified conduct of the court's business; and

(3) the punishment imposed does not exceed thirty (30) days incarceration or a

fine of One-Hundred Dollars ($100.00).

The court shall afford the alleged contemnor an opportunity, consistent with the circumstances then existing, to present exculpatory or mitigating evidence. If the court summarily finds and announces on the record that direct contempt has been committed, the court may defer imposition or execution of sanctions until the conclusion of the proceeding during which the contempt was committed.

(b) Order of Contempt. Either before sanctions are imposed, or promptly thereafter, the court shall issue a written order stating, or shall state on the record, that a direct contempt has been committed and specifying:

(1) whether the contempt is civil or criminal;

(2) the evidentiary facts known to the court from the judge's own personal knowledge concerning the conduct constituting the contempt and, regarding any relevant evidentiary facts not so known, the basis of the court's findings;

(3) the sanction imposed for the contempt;

(4) in the case of civil contempt, how the contempt may be purged; and

(5) in the case of criminal contempt, if the sanction is incarceration, a determinate term.

(c) Review and Record.

(1) Review. The contemnor may seek review by appeal or by writ of habeas corpus, if appropriate.

(2) Record. The appellate record in cases of direct contempt in which sanctions have been summarily imposed shall consist of:

(1) the order of contempt; and, if the proceeding during which the contempt occurred was recorded, a transcript of that part of the proceeding; and

(2) any evidence admitted in the proceeding.

(d) No Summary Imposition of Sanctions. In any proceeding involving a direct contempt for which the court determines not to impose sanctions summarily, the judge shall issue a written order specifying the evidentiary facts within the personal knowledge of the judge respecting the conduct constituting the contempt and the identity of the contemnor. Thereafter, the proceeding shall be conducted pursuant to Rule 32.3 or Rule 32.4, whichever is applicable, and Rule 32.5 in the same manner as an indirect contempt.

MRCrP 32.3 Indirect criminal contempt; commencement; prosecution:

(a) Nature of the Proceedings. All criminal contempts not adjudicated pursuant to Rule 32.2 shall be prosecuted by means of a written motion or on the court's own initiative.

(b) Disqualification of the Judge. Indirect criminal contempt charges shall be heard by a judge other than the trial judge.

MRCrP 32.4 Indirect civil contempt:

(a) Commencement. A civil contempt proceeding may be commenced by the filing of a motion for contempt with the clerk of the court whose order or judgment is claimed to have been violated. No filing fee shall be required in connection with the filing of the motion for civil contempt. The proceeding shall be considered part of the action out of which the contempt arose.

(b) Contents of the Motion. The motion for civil contempt shall contain:

(1) a statement of the order or judgment involved, or a copy thereof, if available, and the name of the issuing judge where appropriate;

(2) the case caption and the docket number of the case;

(3) a short, concise statement of the facts on which the asserted contempt is based; and

(4) a request for the issuance of a summons as specified below.

The motion for civil contempt shall be verified or supported by affidavits.

(c) Summons. The summons shall issue only on a judge's order and shall direct the parties to appear before the court at a date and time certain for the purpose(s) specifically stated therein of:

(1) scheduling a trial;

(2) considering whether and when the filing of an answer is necessary;

(3) considering whether discovery is necessary;

(4) holding a hearing on the merits of the motion; or

(5) considering such other matters or performing such other acts as the court may deem appropriate.

A hearing on the merits of the motion shall be held not less than seven (7) days after service of the summons.

(d) Service of the Summons and Motion. The following shall be served upon the alleged contemnor:

(1) a copy of the summons;

(2) a copy of the motion for civil contempt;

(3) a copy of the accompanying affidavits; and

(4) if incarceration to compel compliance is sought, notice to the alleged contemnor in the following form:

TO THE PERSON ALLEGED TO BE IN CONTEMPT OF COURT:

1. It is alleged that you have disobeyed a court order, are in contempt of court, and should go to jail until you obey the court's order.

2. You have the right to have a lawyer. If you already have a lawyer, you should consult the lawyer at once, If you do not now have a lawyer, please note:

(a) A lawyer can be helpful to you by:

(1) explaining the allegations against you;

(2) helping you determine and present any defense to those allegations;

(3) explaining to you the possible outcomes; and

(4) helping you at the hearing.

(b) Even if you do not plan to contest that you are in contempt of court, a lawyer can be helpful.

(c) If you want a lawyer but do not have the money to hire one, you may ask the court to appoint one for you.

3. IF YOU DO NOT APPEAR FOR A SCHEDULED COURT HEARING BEFORE THE JUDGE, YOU WILL BE SUBJECT TO ARREST.

MRCrP 32.5 Further proceedings:

(a) Consolidation of Criminal and Civil Contempts. If a person has been charged with more than one (1) contempt pursuant to Rule 32.3, Rule 32.4, or both, the court may consolidate the proceedings for hearing and disposition.

(b) When Judge Disqualified. A judge who enters an order pursuant to Rule 32.2(d), institutes an indirect contempt proceeding on the court's own initiative pursuant to Rule 32.3 or Rule 32.4, or reasonably expects to be called as a witness at any hearing on the matter, is disqualified from sitting at the hearing.

(c) Failure to Appear at Hearing.

(1) Generally. If, after proper notice, the alleged contemnor fails to appear personally at the time and place set by the court, the court may enter an order directing the alleged contemnor be taken into custody and brought before the court or judge designated in the order.

(2) Civil Contempt. If, after proper notice, the alleged contemnor in a civil contempt proceeding fails to appear in person or by counsel at the time and place set by the court, the court may proceed in the alleged contemnor's absence.

(d) Disposition. When a court makes a finding of contempt, the court shall issue a written order that specifies the sanction imposed for the contempt. In the case of a civil contempt, the order shall specify how the contempt may be purged. In the case of a criminal contempt, if the sanction is incarceration, the order shall specify a determinate term.

MRCrP 32.6 Bail:

A contemner incarcerated for contempt is entitled to the same consideration with respect to bail pending appeal as a defendant convicted in a criminal proceeding, as provided by law.

2701 CONTEMPT PROCEEDINGS IN CIVIL ACTIONS

RJC 26 Contempt of court:

Procedures in civil actions for contempt of court shall conform to Rule 32 of the Mississippi Rules of Criminal Procedure.

Rules prevail over conflicting statutory procedures:

See Jones v. City of Ridgeland, 48 So. 3d 530, 537 (Miss. 2010) ("Procedure is defined as '[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the rights, and which, by means of the proceedings, the court is to administer; the machinery, as distinguished from its product.' Black's Law Dictionary 1203-04 (6th ed.1990)."); Newell v. State, 308 So. 2d 71, 76 (Miss. 1975) ("We are keenly aware of, and measure with great respect, legislative suggestions concerning procedural rules and they will be followed unless determined to be an impediment to justice or an impingement upon the constitution. The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts."); Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968) ("The phrase 'judicial power' in section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business.").

§ 9-11-15 Statutory authority:

[Justice court] shall be a court of record, with all the power incident to a court of record, including power to fine in the amount of fine and length of imprisonment as is authorized for a municipal court in Section 21-23-7(11) for contempt of court.

Miss. Code Ann. § 21-23-7(11) provides in part: "The municipal court shall have the power to impose punishment of a fine of not more than One Thousand Dollars ($1,000.00) or six (6) months' imprisonment, or both, for contempt of court."

§ 99-15-109 Pretrial intervention to collect unpaid restitution and fines:

Notwithstanding any other provision of this section, in all criminal cases wherein an offender has been held in contempt of court for failure to pay fines or restitution, the offender may be placed in pretrial intervention for the purpose of collecting unpaid restitution and fines regardless of any prior criminal conviction, whether felony or misdemeanor.

§ 99-37-7 Contempt for default:

(1) Subject to the provisions of Section 99-19-20.1, when a defendant sentenced to pay a fine or to make restitution defaults in the payment thereof or of any installment, the court, on motion of the district attorney, or upon its own motion, may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.
(2) Subject to the provisions of Section 99-19-20.1, unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a

failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine or the restitution, or a specified part thereof, is paid.
(3) A judicial officer shall not be held criminally or civilly liable for failure of any defendant to pay any fine or to make restitution if the officer exercises his judicial authority in accordance with subsections (1) and (2) of this section to require the payment of such fine or restitution.
(4) When a fine or an order of restitution is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine or make the restitution from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

§ 99-37-9 Imprisonment for contempt:

The term of imprisonment for contempt for failure to make restitution shall be set forth in the commitment order, and shall not exceed one (1) day for each twenty-five dollars ($25.00) of the restitution, or thirty (30) days if the order of the restitution was imposed upon conviction of a violation or misdemeanor, or one (1) year in any other case, whichever is the shorter period. A person committed for failure to make restitution shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

§ 99-37-11 Relief from payments:

If it appears to the satisfaction of the court that the default in the payment of a fine or restitution is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each installment or revoking the fine or order of restitution or the unpaid portion thereof in whole or in part.

2703 CASE LAW ON CONTEMPT OF COURT

United States Supreme Court cases:

Bearden v. Georgia, 461 U.S. 660, 672 (1983) (“If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay.”).

Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”).

Mayberry v. Pennsylvania, 400 U.S. 455, 463-66 (1970) ("Many of the words leveled at the judge in the instant case were highly personal aspersions, even 'fighting words'-'dirty sonofabitch', 'dirty tyrannical old dog,' 'stumbling dog,' and 'fool.' He was charged with running a Spanish Inquisition and told to 'Go to hell' and 'Keep your mouth shut.' Insults of that kind are apt to strike 'at the most vulnerable and human qualities of a judge's temperament.' . . . In the present case, [the Due Process Clause] can be satisfied only if . . . another judge, not bearing the sting of these slanderous remarks and having the impersonal authority of the law, sits in judgment on the conduct of petitioner as shown by the record.").

Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 441 (1911). ("Contempts are neither wholly civil nor altogether criminal. . . . If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.").

In re Terry, 128 U.S. 289, 303 (1888) ("'The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to the exercise of all other powers.' Without such power, . . . the administration of the law would be in continual danger of being thwarted by the lawless.").

Ex parte Robinson, 86 U.S. 505, 510 (1873) ("The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.").

Mississippi cases:

In re McDonald, 98 So. 3d 1040, 1044 (Miss. 2012) ("Since Chancellor Harris initiated the constructive criminal contempt proceedings, he was required to recuse himself and have the hearings conducted by another judge.").

Corr v. State, 97 So. 3d 1211, 1215 (Miss. 2012) ("This Court repeatedly has found that a judge who initiates constructive contempt proceedings has substantial personal involvement and must recuse himself.").

Graves v. State, 66 So. 3d 148, 154 (Miss. 2011) ("Judge Smith was the complainant for alleged criminal contempt that occurred, at least in part, outside his presence, so Graves was entitled to due-process notice and a hearing.").

Dennis v. Dennis, 824 So. 2d 604, 609 (Miss. 2002) ("A defendant in contempt proceedings is entitled to notice and is entitled to be informed of the nature and cause of the accusation, of his rights to be heard, to counsel, to call witnesses, to an unbiased judge, to a jury trial, and against self-incrimination, and that he is presumed innocent until proven guilty beyond reasonable doubt.").

Illinois Central Railroad Company v. Winters, 815 So. 2d 1168, 1180 (Miss. 2002) ("[T]he distinction between criminal and civil contempt generally turns on two factors. First, a criminal contempt charge typically carries a fixed sentence or fine, while a civil contemnor "carries the keys to his prison in his own pocket" through his ability to comply with the court's orders and end his sentence. Second, in criminal contempt, the court is the aggrieved party, so the fine is paid to the court. In civil contempt, the opposing party is the aggrieved party and the one who is paid.").

Brame v. State, 755 So. 2d 1090, 1094 (Miss. 2000) ("Gross negligence does not rise to the level of willful conduct which is required to support a finding of criminal contempt.").

Shields v. State, 702 So. 2d 380, 385 (Miss. 1997) ("[T]he defendant's conduct [in calling the judge a 'cold blooded, cruel perverted bastard' and accusing him of taking pay-offs] was directed at the judge in his judicial capacity. Such conduct is unexcusable and it offends the dignity and authority of the court. The defendant was indeed guilty of [direct contempt of court] beyond a reasonable doubt.").

Lamar v. State, 607 So. 2d 129, 130 (Miss. 1992) ("In the "immediate area of the courtroom" Watkins' mother, Betty Byrd Watkins, struck Lamar, causing him to stagger. Lamar countered by pushing Betty down. Watkins entered the fray by jumping on Lamar's back. When separated by the chancellor and others, the men were bloody and Lamar was choking Watkins with a necktie. The fight began in the foyer leading into the courtroom, and actually spilled over into the courtroom. . . . The record shows beyond a reasonable doubt that Lamar is guilty of direct contempt.").

Newell v. Hinton, 556 So. 2d 1037, 1044 (Miss. 1990) ("Even when there has been established a prima facie case of contempt, the defendant may avoid judgment of contempt by establishing that he is without present ability to discharge his obligation.").

Hentz v. State, 496 So. 2d 668, 674 (Miss. 1986) ("It is apparent that the trial court found the appellant guilty of direct criminal contempt . . . and ordered summary punishment. Even though punishment was not imposed until the day following the conclusion of the trial, we find nothing wrong with this procedure. There was no undue delay.").

Cook v. State, 483 So. 2d 371, 376 (Miss.1986) ("Cases of direct contempt, where a personal attack has been made on the court necessitating an instantaneous response, may be dealt with by the judge offended. In other criminal contempt cases, particularly those in which the allegedly contemptuous actions were committed outside the presence of the court and where the trial judge has substantial personal involvement in the prosecution, the accused contemnor must be tried by another judge.").

Cassibry v. State, 453 So. 2d 1298, 1299 (Miss. 1984) ("[I]t is established beyond per adventure that an indigent may not be incarcerated because he is financially unable to comply with an otherwise lawfully imposed sentence of a fine.").

Williams v. State, 409 So.2d 1331, 1332 (Miss. 1982) ("It is a narrow inquiry; the process [of a revocation hearing] should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.").

In re Holmes, 355 So. 2d 677, 679 (Miss. 1978) ("[The mother's act in failing] to have the child present [as ordered by the court], if willful, was one which resisted, from a distance, . . . falls squarely within the definition of constructive contempt. . . . [Therefore,] the trial court should have afforded [her] a hearing at which she could have the assistance of counsel, the right to call witnesses, the right to be heard in her own behalf, and the right to make a record.").

Boone v. State, 148 So. 3d 377, 380 (Miss. Ct. App. 2014) ("Because Boone 'willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay,' the trial court was not required to consider alternative sentencing.").

Lumumba v. State, 868 So. 2d 1018, 1021 (Miss. Ct. App. 2003) ("[T]he statements made toward the judge about how he can better get along with lawyers in the future, about the judge's "henchmen", about being proud to be thrown out of the courtroom, and about paying the judge for justice were made to embarrass the court or impede the administration of justice.").

McClinton v. State, 799 So. 2d 123, 127 (Miss. Ct. App. 2001) ("McClinton did not claim inability to pay or indigence as a defense at the revocation hearing. It should also be noted that his probation was revoked on three other grounds, namely: failure to regularly report, refusal to submit to chemical analysis and criminal misconduct.").

CHAPTER 28

EVIDENCE

Effective June 16, 2016

SUPREME COURT OF MISSISSIPPI

This matter is now before the en banc Court on the Court's own motion.

When the Court adopted the Mississippi Rules of Evidence effective January 1, 1986, it also adopted the comments appended to each rule as the "Official Comments of the Court." Those comments were to serve as "authoritative guides" for interpreting the Mississippi Rules of Evidence.

After due consideration, we find that the comments should not represent the "Official Comments of the Court" or serve as "authoritative guides" for interpreting the Mississippi Rules of Evidence. Instead, we find that the comments should be renamed Advisory Committee Notes and represent commentary from the Advisory Committee on Rules, whose members represent the bench, bar, and the law schools of this state.

The Advisory Committee has agreed, for now, to adopt the current comments as its Advisory Committee Notes. In due time, the Advisory Committee will draft and submit new, revised notes for publication.

IT IS THEREFORE ORDERED that the title "Advisory Committee Note" must be substituted for the title "Comment" for each comment to the Mississippi Rules of Evidence.

IT IS FURTHER ORDERED that the Advisory Committee Notes represent commentary from the Advisory Committee and are neither the "Official Comments of the Court" nor "authoritative guides" for interpreting the Mississippi Rules of Evidence.

IT IS FURTHER ORDERED that this order is effective upon the date of entry.

SO ORDERED, this the 13th day of June, 2016.

MICHAEL K. RANDOLPH,
PRESIDING JUSTICE
FOR THE COURT

ALL JUSTICES AGREE.

2801 GENERAL PROVISIONS

MRE 102 Scope; definitions:

(a) Scope. These rules apply to proceedings in Mississippi courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "record" includes a memorandum, report, or data compilation; and

(4) a reference to any kind of written material or any other medium includes electronically stored information.

MRE 102 Purpose:

These rules shall be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Complete listing of Article I rules:

Rule 101. Scope; Definitions
Rule 102. Purpose
Rule 103. Rulings on Evidence
Rule 104. Preliminary Questions
Rule 105. Limiting Evidence That Is Not Admissible Against Other Parties or for Other Purposes
Rule 106. Remainder of or Related Writings or Recorded Statements

2802 JUDICIAL NOTICE

MRE 201 Judicial notice of adjudicative facts:

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

Complete listing of Article II rules:

Rule 201. Judicial Notice of Adjudicative Facts

2803 PRESUMPTIONS IN CIVIL CASES

MRE 301 Presumptions in civil cases generally:

In a civil case, unless a Mississippi statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

Complete listing of Article III rules:

Rule 301. Presumptions in Civil Cases Generally

2804 RELEVANCE AND ITS LIMITS

MRE 401 Test for relevant evidence:

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the case.

MRE 402 General admissibility of relevant evidence:

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- the Mississippi Constitution; or
- these rules.

Irrelevant evidence is not admissible.

MRE 403 Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons:

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

MRE 404 Character evidence; crimes or other acts:

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it; and

(C) the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

Complete listing of Article IV rules:

Rule 401. Test for Relevant Evidence
Rule 402. General Admissibility of Relevant Evidence
Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons
Rule 404. Character Evidence; Crimes or Other Acts
Rule 405. Methods of Proving Character
Rule 406. Habit; Routine Practice
Rule 407. Subsequent Remedial Measures
Rule 408. Compromise Offers and Negotiations
Rule 409. Offers to Pay Medical and Similar Expenses
Rule 410. Pleas, Plea Discussions, and Related Statements
Rule 411. Liability Insurance
Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

2805 PRIVILEGES

MRE 501 Privileges established by constitution or rule only:

Unless the federal or state constitution or these or other applicable rules provide otherwise, no person has a privilege to:

- refuse to be a witness;
- refuse to disclose any matter;
- refuse to produce an object or writing; or
- prevent another from being a witness, disclosing any matter, or producing an object or writing.

MRE 504 Spousal privilege:

(a) Definition. A communication is "confidential" if a person makes it privately to the person's spouse and does not intend its disclosure to any other person.

(b) General Rule of Privilege. A person has a privilege to prevent the person's current or former spouse from testifying in a civil or criminal case about any confidential communication between them.

(c) Who may Claim the Privilege. Either spouse may claim the privilege. A spouse has authority to claim the privilege on the other spouse's behalf.

(d) Exceptions. The privilege does not apply:

(1) in a civil case between the spouses; or

(2) in a criminal case when one spouse is charged with a crime against:

(A) the person of a minor child; or

(B) the person or property of:

(i) the other spouse;

(ii) a resident of either spouse's household; or

(iii) a third person when committed during a crime against any person described in paragraphs (d)(1) and (2).

Complete listing of Article V rules:

Rule 501. Privileges Established by Constitution or Rule Only
Rule 502. Lawyer-Client Privilege
Rule 503. Privilege between Patient and Physician or Psychotherapist
Rule 504. Spousal Privilege
Rule 505. Communications to Clergy

MRE 601 Competency to testify:

(a) In General. Every person is competent to be a witness, except as provided in subdivisions (b) and (c).

(b) Competency of Spouse. If one spouse is a party, the other spouse may not testify as a witness in the case unless both consent, except:

(1) when called as a witness by the spouse who is a party;

(2) in a controversy between them; or

(3) in a criminal case for:

(A) a criminal act against a child;

(B) contributing to the neglect or delinquency of a child;

(C) desertion or nonsupport of a child under 16; and

(D) abandonment of a child.

(c) Competency of Appraiser. When the court--as required by law--appoints a person to make an appraisal for the immediate possession of property in an eminent domain case:

(1) the appraiser may not testify as a witness in the trial of the case; and

(2) the appraiser's report is not admissible in evidence during the trial.

MRE 602 Need for personal knowledge:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

MRE 603 Oath or affirmation to testify truthfully:

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

MRE 604 Interpreter:

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

MRE 607 Who may impeach a witness:

Any party, including the party that called the witness, may attack the witness's credibility.

MRE 608 A witness's character for truthfulness or untruthfulness:

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

MRE 611 Mode and order of examining witnesses and presenting evidence:

(a) Control by the Court; Purposes.

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. The court may not limit cross-examination to the subject matter of the direct examination and matters affecting the witness's credibility.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

MRE 612 Writing used to refresh a witness's memory:

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing, recording, or object to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing, recording, or object produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing, recording, or object includes unrelated matter, the court must examine the writing, recording, or object in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver. If a writing, recording, or object is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or--if justice so requires--declare a mistrial.

MRE 613 Witness's prior statement:

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not

apply to an opposing party's statement under Rule 801(d)(2).

MRE 614 Court's calling or examining a witness:

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) Examining. The court may examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

MRE 615 Excluding witnesses:

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense.

MRE 616 Witness's bias:

Evidence of a witness's bias, prejudice, or interest--for or against any party--is admissible to attack the witness's credibility.

Complete listing of Article VI rules:

Rule 601. Competency to Testify
Rule 602. Need for Personal Knowledge
Rule 603. Oath or Affirmation to Testify Truthfully
Rule 604. Interpreter
Rule 605. Judge's Competency as a Witness
Rule 606. Juror's Competency as a Witness
Rule 607. Who May Impeach a Witness
Rule 608. A Witness's Character for Truthfulness or Untruthfulness
Rule 609. Impeachment by Evidence of a Criminal Conviction
Rule 610. Religious Beliefs or Opinions
Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence
Rule 612. Writing Used to Refresh a Witness's Memory
Rule 613. Witness's Prior Statement

Rule 614. Court's Calling or Examining a Witness
Rule 615. Excluding Witnesses
Rule 616. Witness's Bias
Rule 617. Taking Testimony of a Child by Closed Circuit Television

2807 OPINIONS AND EXPERT TESTIMONY

MRE 701 Opinion testimony by lay witnesses:

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

MRE 702 Testimony by expert witnesses:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

MRE 704 Opinion on an ultimate issue:

An opinion is not objectionable just because it embraces an ultimate issue.

Complete listing of Article VII rules:

Rule 701. Opinion Testimony by Lay Witnesses
Rule 702. Testimony by Expert Witnesses
Rule 703. Bases of an Expert's Opinion Testimony

Rule 704. Opinion on an Ultimate Issue
Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion
Rule 706. Court-Appointed Expert Witnesses

2808 HEARSAY

MRE Preface:

A witness's testimony is evaluated on the basis of four factors: perception, memory, narration, and sincerity. In order that the testimony can be properly considered in the light of these factors, the testimony should comply with three conditions. The witness should testify (1) under oath, (2) in the presence of the trier of fact, and (3) be subjected to cross-examination. Past experience as well as common sense indicate that some testimony which does not conform to these three conditions may be more valuable than testimony that does. The four factors may, in some instances, be present in the absence of compliance with the three aforementioned conditions. The solution that the common law developed over a period of time was a general rule against hearsay which permitted exceptions which furnished guarantees of trustworthiness and reliability.
The hearsay provisions of the uniform rules retain the common law scheme. The traditional common law hearsay exceptions have been retained in Rules 803 and 804. Rule 803 concerns itself with situations where availability of the declarant is immaterial. Rule 804 pertains to exceptions which are usable only where the declarant is unavailable. The concluding provisions of both Rule 803 and 804 (Rule 803(24) and Rule 804(b)(5) respectively) allow for the use of hearsay statements which do not fall within the recognized exceptions, when the guarantees of trustworthiness and necessity are present. These two provisions are a recognition that the law is not stagnant; they are designed to encourage the development of this area of the law.

MRE 801 Definitions that apply to this article; exclusions from hearsay:

(a) Statement. “Statement” means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. “Declarant” means the person who made the statement.

(c) Hearsay. “Hearsay” means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

MRE 802 The rule against hearsay:

Hearsay is not admissible except as provided by law. The words “as provided by law” include other rules prescribed by the Mississippi Supreme Court.

MRE 803 Exceptions to the rule against hearsay--regardless of whether the declarant is available as a witness:

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made to any person at any time for--and is reasonably pertinent to--medical diagnosis or treatment;

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause; and

(C) is supported by circumstances that substantially indicate its trustworthiness.

In this paragraph, “medical” includes emotional, mental, and physical health.

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11); and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law enforcement personnel; or

(iii) in a civil case or against the prosecution in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) Public Records of Vital Statistics. A record of a vital statistic, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

> (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
>
> (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit. A treatise used in direct examination must be disclosed to an opposing party without charge in discovery.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

> (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
>
> (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
>
> (C) the evidence is admitted to prove any fact essential to the judgment; and
>
> (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) Other Exceptions. A statement not specifically covered by this Rule if:

(A) the statement has equivalent circumstantial guarantees of trustworthiness;

(B) it is offered as evidence of a material fact;

(C) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts;

(D) admitting it will best serve the purposes of these rules and the interests of justice; and

(E) before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

(25) Tender Years Exception. A statement by a child of tender years describing any act of sexual contact with or by another is admissible if:

(A) the court--after a hearing outside the jury's presence--determines that the statement's time, content, and circumstances provide substantial indicia of reliability; and

(B) the child either:

(i) testifies; or

(ii) is unavailable as a witness, and other evidence corroborates the act.

Complete listing of Article VIII rules:

2809 AUTHENTICATION AND IDENTIFICATION

MRE 901 Authenticating or identifying evidence:

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) Opinion About a Voice. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

> (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
>
> (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

(10) Methods Provided by the Mississippi Constitution or Court Rule. Any method of authentication or identification allowed by the Mississippi Constitution or a rule prescribed by the Mississippi Supreme Court.

MRE 902 Evidence that is self-authenticating:

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official

capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Mississippi Supreme Court pursuant to statutory authority.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Federal or State Statute. A signature, document, or other matter that a Mississippi or federal statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Records of a Regularly Conducted Activity. A record that meets the requirements of Rule 803(6), if a certificate of the custodian or another qualified witness complies with subparagraph (A).

(A) Certificate. The certificate must show:

(i) the custodian's or witness's first hand knowledge of the making, maintenance, and storage of the record; and

(ii) that the record complies with Article X and Rules 803(6)(A)-(C) and 901(a).

A certificate relating to a foreign record must also be accompanied by the final certification required by paragraph (3).

(B) Notice. Before the trial or hearing at which the record will be offered, the proponent must give an adverse party notice of the intent to offer the record--and must provide a copy of the record and certificate--so that the party has a fair opportunity to state any objection. Otherwise, the record is not self-authenticating under this paragraph (11).

(C) Making Objections. An adverse party waives any objection that is not:

(i) stated specifically in writing; and

(ii) served within 15 days after receiving the notice required by subparagraph (B), or at a later time that the parties agree on or that the court allows.

(D) Hearing and Ruling on Objections. The proponent must schedule a hearing on any objection, and the court should determine admissibility of the record before the trial or hearing at which it may be offered. If the court cannot do so, the record is not self-authenticating under this paragraph (11).

(E) Sanctions. In a civil case after the trial or hearing, the proponent may move that the objecting party and attorney pay the expenses of presenting the evidence necessary to have the record admitted. The court must so order, if it determines that the objection raised no genuine question and lacked arguable good cause.

(F) Definitions. In this paragraph “certificate” means:

(i) for a domestic record, a written declaration under oath or attestation given under penalty of perjury; and

(ii) for a foreign record, a written declaration signed in a foreign country that, if falsely made, would subject the maker to criminal penalty under that country's laws.

Complete listing of Article IX rules:

Rule 901. Authenticating or Identifying Evidence
Rule 902. Evidence That Is Self-Authenticating
Rule 903. Subscribing Witness's Testimony

2810 CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

MRE 1001 Definitions that apply to this article:

In this article:

(a) A “writing” consists of letters, words, numbers, or their equivalent set down in any form.

(b) A “recording” consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A “photograph” means a photographic image or its equivalent stored in any form.

(d) An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout--or other output readable by sight--if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.

(e) A “duplicate” means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

MRE 1002 Requirement of the original:

An original writing, recording, or photograph is required in order to prove its content unless otherwise provided by law.

MRE 1003 Admissibility of duplicates:

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

MRE 1004 Admissibility of other evidence of content:

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:
(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
(b) an original cannot be obtained by any available judicial process;
(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
(d) the writing, recording, or photograph is not closely related to a controlling issue.

Complete listing of Article X rules:

Rule 1001. Definitions That Apply to This Article
Rule 1002. Requirement of the Original
Rule 1003. Admissibility of Duplicates
Rule 1004. Admissibility of Other Evidence of Content
Rule 1005. Copies of Public Records to Prove Content
Rule 1006. Summaries to Prove Content
Rule 1007. Testimony or Statement of a Party to Prove Content
Rule 1008. Functions of the Court and Jury

2811 MISCELLANEOUS RULES

MRE 1101 Applicability of the rules:

(a) To Courts and Proceedings. These rules apply to all cases and proceedings in Mississippi courts, except as provided in subdivision (b).

(b) Exceptions. These rules--except for those on privilege--do not apply to the following:

(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) grand-jury proceedings;

(3) contempt proceedings in which the court may act summarily; and

(4) these miscellaneous proceedings:

- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- probable cause hearings in criminal cases and youth court cases;
- sentencing;
- disposition hearings;
- granting or revoking probation; and
- considering whether to release on bail or otherwise.

MRE 1102 Title:

These rules are the Mississippi Rules of Evidence and may be cited as MRE.

MRE 1103 Inconsistent rules repealed:

Any evidentiary rule in a statute, court decision, or court rule that is inconsistent with the Mississippi Rules of Evidence is hereby repealed.

Complete listing of Article XI rules:

Rule 1101. Applicability of the Rules
Rule 1102. Title
Rule 1103. Inconsistent Rules Repealed

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CHAPTER 29

INTERPRETERS

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2900 FOR LIMITED ENGLISH PROFICIENCY INDIVIDUALS

RJC 8 Appointment of interpreter:

(b) Foreign language interpreters. Upon the motion of any party, or upon the judge's own initiative, the judge shall determine whether a foreign language interpreter is needed for a party or witness to ensure the fair administration of justice. Any appointment of a foreign language interpreter shall be pursuant to applicable rules and policies of the Mississippi Supreme Court and the Mississippi Administrative Office of Courts. An appointed foreign language interpreter is entitled to reasonable fees and expenses as set forth in section 9-21-81 of the Mississippi Code.

(c) Interpreter's oath. Any interpreter appointed by the court under this rule shall take an oath to make a true translation pursuant to Rule 604 of the Mississippi Rules of Evidence and section 9-21-77 of the Mississippi Code.

Mississippi Court Interpreter Credentialing Program:

The Administrative Office of Courts has developed the Mississippi Court Interpreter Credentialing Program to ensure equal access to justice for limited English proficiency individuals. Information on the program is on the State of Mississippi Judiciary Website at: http://courts.ms.gov (Open "AOC" then click "Court Interpreter" then click "Resources & Forms").

See also Dianne Molvig, *Overcoming Language Barriers in Court*, 74 Wis. Law. 10, 13 (February 2001) ("Court interpreters must be able to listen and translate back and forth easily, accurately, and quickly in the midst of court proceedings. Qualified interpreters learn how to execute this complex task through memory skills training. Court interpreters also must understand legal terminology and procedures, and be able to convey concepts for which no word may exist in the non-English language. . . . A careless translation can convey an entirely incorrect meaning.").

Rule 1 of the Rules on Standards for Court Interpreters Scope:

These rules shall apply to all courts in Mississippi, including without limitation, municipal court, justice court, youth court, county court, circuit court, chancery court, and grand jury proceedings.
Interpreters for the hearing impaired are not covered by these rules. See Miss. Code Ann. §§ 13-1-301 to 13-1-315 regarding guidelines for interpreters for the hearing impaired.

Complete listing of the Rules on Standards for Court Interpreters:

Rule 1. Scope
Rule 2. Definitions
Rule 3. Determining Need for Interpretation

Rule 4. Appointment of Interpreter
Rule 5. Waiver
Rule 6. Interpreter Oath
Rule 7. Certified and Registered Court Interpreters
Rule 8. Reciprocity
Rule 9. Renewal of Credentials
Rule 10. Removal of an Interpreter in Individual Cases

§ 99-17-7 When judge must appoint an interpreter:

In criminal cases wherein the defendant has been declared indigent, the court may appoint an interpreter who is certified as provided in Section 9-21-73, when necessary, sworn truly to interpret, and allow him a reasonable compensation, as set by the court, payable out of the county treasury.

Mississippi Attorney General's opinions:

Interpreter required when necessary to ensure due process rights.
"Based on Section 99-17-7, a court has the authority to appoint an interpreter, and it is the opinion of this office that a court has the obligation to appoint an interpreter when necessary in order to insure the defendant's due process rights." Op. Atty. Gen. Arnold, September 14, 2000.

§ 9-21-71 Non-English speaker defined:

The following words and phrases shall have the meanings ascribed to them unless the context clearly requires otherwise:
(a) "Non-English speaker" means any party or witness who cannot readily understand or communicate in spoken English and who consequently cannot equally participate in or benefit from the proceedings unless an interpreter is available to assist the individual. The fact that a person for whom English is a second language knows some English does not prohibit that individual from being allowed to have an interpreter.
(b) "Interpreter" means any person authorized by a court and competent to translate or interpret oral or written communication in a foreign language during court proceedings.
(c) "Court proceedings" means a proceeding before any court of this state or a grand jury hearing.

§ 9-21-73 Program to facilitate the use of interpreters:

(1) The Director of the Administrative Office of Courts shall establish a program to facilitate the use of interpreters in all courts of the State of Mississippi.
(2)(a) The Administrative Office of Courts shall prescribe the qualifications of and certify persons who may serve as certified interpreters in all courts of the State of Mississippi in bilingual proceedings. The Director of the Administrative

Office of Courts may set and charge a reasonable fee for certification.
(b) The director shall maintain a current master list of all certified interpreters and shall report annually to the Supreme Court on the frequency of requests for and the use and effectiveness of the interpreters.
(3) In all state court bilingual proceedings, the presiding judicial officer, with the assistance of the director, shall utilize the services of a certified interpreter to communicate verbatim all spoken or written words when the necessity therefor has been determined pursuant to Section 9-21-79.
(4) All state courts shall maintain on file in the office of the clerk of the court a list of all persons who have been certified as interpreters in accordance with the certification program established pursuant to this section.

§ 9-21-75 Compensation:

The court may appoint either an interpreter who is paid or a volunteer interpreter.

§ 9-21-77 Oath, confidentiality and public comment:

(1) Prior to providing any service to a non-English speaking person, the interpreter shall subscribe to an oath that he or she shall interpret all communications in an accurate manner to the best of his or her skill and knowledge.
(2) The oath shall conform substantially to the following form:
INTERPRETER'S OATH
"Do you solemnly swear or affirm that you will faithfully interpret from (state the language) into English and from English into (state the language) the proceedings before this court in an accurate manner to the best of your skill and knowledge?"
(3) Interpreters shall not voluntarily disclose any admission or communication that is declared to be confidential or privileged under state law. Out-of-court disclosures made by a non-English speaker communicating through an interpreter shall be treated by the interpreter as confidential or privileged or both unless the court orders the interpreter to disclose such communications or the non-English speaker waives such confidentiality or privilege.
(4) Interpreters shall not publicly discuss, report or offer an opinion concerning a matter in which they are engaged, even when that information is not privileged or required by law to be confidential.
(5) The presence of an interpreter shall not affect the privileged nature of any discussion.

See also MRE 604 ("An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.").

§ 9-21-79 Determining the need for an interpreter:

(1) An interpreter is needed and a court interpreter shall be appointed when the judge determines, after an examination of a party or witness, that: (a) the party cannot understand and speak English well enough to participate fully in the proceedings and to assist counsel; or (b) the witness cannot speak English so as to be understood directly by counsel, court and jury.
(2) The court should examine a party or witness on the record to determine whether an interpreter is needed if:
(a) A party or counsel requests such an examination;
(b) It appears to the court that the party or witness may not understand and speak English well enough to participate fully in the proceedings; or
(c) If the party or witness requests an interpreter.
The fact that a person for whom English is a second language knows some English should not prohibit that individual from being allowed to have an interpreter.
(3) After the examination, the court should state its conclusion on the record, and the file in the case shall be clearly marked and data entered electronically when appropriate by court personnel to ensure that an interpreter will be present when needed in any subsequent proceeding.
(4) Upon a request by the non-English speaking person, by counsel, or by any other officer of the court, the court shall determine whether the interpreter provided is able to communicate accurately with and translate information to and from the non-English speaking person. If it is determined that the interpreter cannot perform these functions, the court shall provide the non-English speaking person with another interpreter.

§ 9-21-81 Fees and expenses:

(1) Any volunteer interpreter providing services under this act shall be paid reasonable expenses by the court.
(2) The expenses of providing an interpreter in any court proceeding may be assessed by the court as costs in the proceeding, or in the case of an indigent criminal defendant to be paid by the county.

Checklist for facilitating communications:

In limited English proficiency proceedings, the judge should:

- advise everyone in the courtroom of the presence and role of the interpreter.
- instruct all participants to speak loudly and clearly.
- allow only one person to speak at a time.
- allow the interpreter to converse briefly with the non-English speaker to ensure understanding of accents, dialect, or pronunciation differences.
- instruct the non-English speaker to interrupt or raise a hand if something is not understood.

- allow the interpreter to view court files prior to the proceedings to become familiar with names, parties, and technical vocabulary.
- direct attorneys to speak directly to the party or witness, not the interpreter.
- direct the interpreter to interpret in the first person in order for the record to be accurate.
- advise the interpreter to notify the court when breaks are needed.

Julia Bussade, Director of Portugese and Spanish, Modern Languages Department of the University of Mississippi, Remarks at the Mississippi Court Administrators Spring Conference (April 25, 2008).

2901 FOR THE DEAF OR HEARING IMPAIRED:

RJC 8 Appointment of interpreter:

(a) Interpreters for the deaf or hearing impaired. Interpreters for the deaf or hearing impaired shall be appointed pursuant to sections 13-1-301 through 13-1-315 of the Mississippi Code. An appointed interpreter for the deaf or hearing impaired is entitled to reasonable fees and expenses as set forth in section 13-1-315 of the Mississippi Code.
. . .
(c) Interpreter's oath. Any interpreter appointed by the court under this rule shall take an oath to make a true translation pursuant to Rule 604 of the Mississippi Rules of Evidence and section 9-21-77 of the Mississippi Code.

§ 13-1-301 Definitions:

As used in sections 13-1-301 et seq. the following terms shall have the definition ascribed to them herein unless the context requires otherwise:
(a) “Deaf person” means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications when spoken to in a normal conversational tone. The term further includes, but is not limited to, a person who is mute and a person who is both deaf and mute.
(b) “Qualified interpreter” means an interpreter certified by the national registry of interpreters for the deaf, Mississippi Registry of Interpreters for the Deaf or, in the event a qualified interpreter so certified is not available, an interpreter whose qualifications are otherwise determined. Efforts to obtain the services of a qualified interpreter qualified with a legal skills certificate or a comprehensive skills certificate will be made prior to accepting services of an interpreter with lesser certification. No qualified interpreter may be appointed unless the appointing authority and the deaf person make a preliminary determination that the interpreter is able to interpret accurately the statements of the deaf person and interpret the proceedings in which a deaf person may be involved.
(c) “Oral interpreter” means a person who interprets language through facial and lip movements only and who does not use manual communication. An oral interpreter shall be provided upon the request of a deaf person who does not communicate in sign

language. The right of a deaf person to have an interpreter may not be waived except by a deaf person who does not use sign language and who initiates such request for waiver in writing. Such waiver is subject to approval of counsel of such deaf person, if existent, and is subject to approval of the appointing authority.

§ 13-1-303 When judge must appoint an interpreter:

(1) In any case in law or equity before any court or the grand jury, wherein any deaf person is a party to such action, either as a defendant or witness, the court shall appoint a qualified interpreter of the deaf sign language to interpret the proceedings to the deaf person and interpret his testimony or statements and to assist in preparation with counsel.

§ 13-1-303 Interrogation statements:

(3) In the event that a deaf person has been detained in police custody or has been arrested for any alleged violation of a criminal law, a qualified interpreter or, upon request, an oral interpreter shall be provided by the arresting officer and his superiors prior to any interrogation or taking of a statement from the person.
(4) In the event any interrogation statements in writing are made to the arresting officer by the deaf person with the qualified interpreter present, such interrogation and answers thereto shall be preserved and turned over to the court in the event such person is tried for the alleged offense.
(5) Any statement made by a deaf person to a law enforcement officer may be used as evidence against that person only if the statement was made, offered or elicited in the presence of a qualified interpreter of the deaf sign language. No statements taken from such deaf person prior to the presence of a qualified interpreter may be admissible in court.

Compare Shook v. State, 552 So. 2d 841, 848 (Miss. 1989) ("Shook used communicative and cognitive faculties other than hearing, faculties no one suggests were impaired, . . . , upon which he gave a written consent. Because we need not rely on Shook's hearing abilities (or lack thereof) to find a valid and effective consent to search, we hold the violation of § 13–1–303(5), if any, harmless beyond a reasonable doubt.").

§ 13-1-305 Determining extent of hearing impairment:

If the judge, or any other person charged under the provisions of Sections 13-1-305 et seq. with providing an interpreter, believes that a person claiming to be entitled to an interpreter may not actually be deaf or hearing impaired, unable to communicate verbally because of his hearing disability, or otherwise not entitled to such services, the judge may, on good cause shown, hold a hearing to determine the extent of the person's handicap or disability and the bona fide need for interpreting services. If it is determined that the person is not entitled to such services, an interpreter shall not be provided.

§ 13-1-305 Notifying the court of need for interpreter:

Except in a preliminary hearing in a criminal case, every deaf person whose appearance before a proceeding entitles him to an interpreter shall notify the appointing authority of his disability not less than five (5) days prior to any appearance and shall request at such time the services of an interpreter. When a deaf person reasonably expects to need an interpreter for more than a single day, he shall so notify the appointing authority, and such notification shall be sufficient for the duration of his participation in the proceedings. When a deaf person receives notification of an appearance less than five (5) days before such appearance, he shall provide his notification and request for an interpreter as soon thereafter as practicable.

§ 13-1-307 Interpreter's duties:

The duties of the interpreter may include:
(a) Interpreting during court and court-related proceedings, including any and all meetings and conferences between client and his attorney;
(b) Translating or interpreting documents;
(c) Assisting in taking depositions;
(d) Assisting in administering oaths; and
(e) Such other duties as may be required by the judge of the court making the appointment.

§ 13-1-311 Listing of qualified interpreters:

It shall be the responsibility of the appointing authority to channel requests for qualified interpreters through (a) the Mississippi Registry of Interpreters for the Deaf; (b) the community services program at the Mississippi School for the Deaf, or, (c) any community resource wherein the appointing authority or the deaf person is knowledgeable that such qualified interpreters can be found. It shall be the responsibility of the community services program at the Mississippi School for the Deaf to compile and update annually a listing of qualified interpreters and to make this listing available to authorities in possible need of interpreter services as provided in sections 13-1-301 et seq.

§ 13-1-313 Oath of true interpretation:

Before participating in any proceedings subsequent to an appointment under the provisions of Sections 13-1-301 et seq., an interpreter shall make an oath or affirmation that he will make a true interpretation in an understandable manner to the person for whom he is appointed and that he will repeat the statements of such persons in the English language to the best of his skill and judgment. The appointing authority shall provide recess periods as necessary for the interpreter when the interpreter so indicates.

See also MRE 604 ("An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.").

§ 13-1-315 Interpreter's fees:

An interpreter appointed under the provisions of Sections 13-1-301 et seq. shall be entitled to a reasonable fee for such services in addition to actual expenses for travel and transportation. The court or appointing authority may consider standards established by the Mississippi Registry of Interpreters for the Deaf in determining a reasonable fee. When the interpreter is appointed by a court in a criminal case the fee shall be paid out of the general fund of the state, county or municipality, as the case may be. An interpreter's fee in a civil action shall be paid out of funds provided by law or by one or more of the parties as the court may direct and may be taxed ultimately as costs in the discretion of the court. When an interpreter is provided by an appointing authority pursuant to subsection (2) of Section 13-1-303, the fee shall be paid out of funds available to the appointing authority.

2902 WEBSITES

Mississippi Registry of Interpreters for the Deaf: https://msrid.wildapricot.org/

Office on Deaf and Hard of Hearing: http://www.odhh.org/index.php

Federal Interagency Working Group on Limited English Proficiency at www.lep.gov

National Association of Judiciary Interpreters and Translators at www.najit.org

National Center for State Courts at http://www.ncsc.org/

CHAPTER 30

PRO SE DEFENDANTS

3000 GOVERNING LAWS ON PRO SE DEFENDANTS

Sixth Amendment
Article 3 § 26 of the Mississippi Constitution

3001 DEFENDANT MUST ASSERT RIGHT TO PROCEED PRO SE

3002 PROCEDURES IF THE RIGHT TO PROCEED PRO SE IS ASSERTED

Right to counsel; waiver
Pro se defendant to have actual control over case
Pro se defendant must abide by procedures and protocol
Hybrid representation
Opening statements and closing arguments
No "cat and mouse" games
Checklist when conducting pro se proceedings

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3000 GOVERNING LAWS ON PRO SE DEFENDANTS

Sixth Amendment:

In all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.

Article 3 § 26 of the Mississippi Constitution:

In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself;

See also Faretta v. California, 422 U.S. 806, 835 (1975) (landmark decision on pro se defendants); Armstead v. State, 716 So. 2d 576, 580 (Miss. 1998) ("In the landmark case of Faretta v. California, [422 U.S. 806 (1975)], the United States Supreme Court firmly established the Sixth Amendment right of criminal defendants to self-representation."); Taylor v. State, 812 So. 2d 1056, 1058-59 (Miss. Ct. App. 2001) ("The Sixth Amendment to the United States Constitution provides that every defendant has the right to conduct his or her own defense. . . . A refusal to allow a defendant to represent himself is a violation of his constitutional rights and requires reversal."). Note too that Article 3 § 25 of the Mississippi Constitution provides a right to proceed pro se in civil actions: "No person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both."

3001 DEFENDANT MUST ASSERT RIGHT TO PROCEED PRO SE

The right of self-representation requires the defendant to assert a desire of self-representation. *See* Wilson v. State, 821 So. 2d 911, 914 (Miss. Ct. App. 2002) ("What the court never did is to offer to let Wilson represent himself. However, Wilson did not make a request that he be allowed to do so. We find no need for the court to raise that option. Had the court become aware that this defendant desired to act as his own counsel, then specific procedures would have been invoked for determining whether that choice was knowing and voluntary."); Davis v. State, 811 So. 2d 346, 350 (Miss. Ct. App. 2001) ("A waiver of the right to assistance of counsel may occur at any time, before or during the trial, but it must be made with a full understanding of its disadvantages and consequences.").

3002 PROCEDURES IF THE RIGHT TO PROCEED PRO SE IS ASSERTED

MRCrP 7.1 Right to counsel; waiver:

(a) Right to be Represented by Counsel. A defendant shall be entitled to be represented by counsel in any criminal proceeding. The right to be represented shall include the right to consult in private with an attorney or the attorney's agent, without unnecessary delay, after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

(b) Right to Appointed Counsel. An indigent defendant shall be entitled to have an attorney appointed in any criminal proceeding which may result in punishment by loss of liberty, in any other criminal proceeding in which the court concludes that the interests of justice so require, or as required by law. The determination of the right to appointed counsel, and the appointment of such counsel, is to be made no later than at the indigent defendant's first appearance before a judge.

(c) Waiver of Right to Counsel. When the court learns that a defendant desires to act as his/her own attorney, the court shall conduct an on-the-record examination of the defendant to determine if the defendant knowingly and voluntarily desires to act as his/her own attorney. The court shall inform the defendant that:

1. The defendant has a right to an attorney, and if the defendant cannot afford an attorney, then the court will appoint one free of charge to defend or assist the defendant in his/her defense.

2. The defendant has the right to conduct the defense and may elect to do so and allow whatever role (s)he desires to his/her attorney.

3. The court will not relax or disregard the rules of evidence, procedure or courtroom protocol for the defendant and that the defendant will be bound by and have to conduct himself/herself within the same rules as an attorney, that these rules are not simple and that without legal advice his/her ability to defend himself/herself will be hampered.

4. The right to proceed pro se usually increases the likelihood of a trial outcome unfavorable to the defendant.

5. Other matters as the court deems appropriate.

After informing the defendant and ascertaining that the defendant understands these matters, the court will ascertain whether the defendant still wishes to proceed pro se or if the defendant desires an attorney to assist him/her in his/her defense. If the defendant desires to proceed pro se, the court should determine whether the defendant has exercised this right knowingly and voluntarily and, if so, make the finding a matter of record. At the time of accepting a defendant's waiver of the right to counsel, the court shall inform the

defendant that the waiver may be withdrawn and counsel appointed or retained at any stage of the proceedings. Additionally, the court may appoint an attorney to assist the defendant on procedure and protocol, even if the defendant does not desire an attorney. Such advisory counsel shall be given notice of all matters of which the defendant is notified.

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

(e) Unreasonable Delay in Retaining Counsel. If a non-indigent defendant appears without counsel at any proceeding after having been given reasonable time to retain counsel, the cause may proceed. If an indigent defendant who has refused appointed counsel in order to obtain private counsel appears without counsel at any proceeding after having been given reasonable time to retain counsel, the court shall appoint counsel unless the indigent defendant waives the right under section (c). If the indigent defendant continues to refuse appointed counsel, the cause may proceed.

See also Carter v. State, 941 So. 2d 846, 852 (Miss. Ct. App. 2006) ("The right of a defendant to conduct his own defense is not absolute, existing only where the waiver of counsel can be made in a knowing, intelligent and voluntary manner."); Davis v. State, 811 So. 2d 346, 351 (Miss. App. 2001) ("The record reflects the trial judge forewarned Davis of the dangers and responsibilities of self-representation. Davis chose to ignore those warnings and proceed on his own behalf. It is far too late to argue that he lacked the legal knowledge to represent himself.").

Pro se defendant to have actual control over case:

Pro se defendants are entitled to preserve actual control over the case including: making all significant tactical decisions; arguing motions; participating in voir dire; questioning witnesses; making opening and closing statements; and not having standby counsel destroy the jury's perception of a pro se defense. However, the trial court may still appoint, even over objection, standby counsel to assist in explaining rules of procedure and courtroom protocol. *See* McKaskle v. Wiggins, 465 U.S. 168, 178 (1984); Metcalf v. State, 629 So. 2d 558, 562-63 (Miss. 1993).

Pro se defendant must abide by procedures and protocol:

Pro se defendants are not exempt from rules of procedure and courtroom protocol. *See* Faretta v. California, 422 U.S. 806, 834 n.46 (1975) ("[T]he trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.").

Hybrid representation:

A defendant has a right to proceed pro se, but does not have a right to hybrid representation. McKaskle v. Wiggins, 465 U.S. 168, 183 (1984); Metcalf v. State, 629 So. 2d 558, 563 (Miss. 1993). Instead, this type of representation lies within the discretion of the trial court. *See* Henley v. State, 729 So. 2d 232, 236 (Miss. 1998).

What is hybrid representation?

> In order to strike a balance between the right to counsel and the right to self-representation many courts have turned to "hybrid representation" as a middle ground. Hybrid representation is considered to encompass both the participation of the defendant in the conduct of his trial when he has not effectively waived the assistance of an attorney to defend him, and the participation by an attorney in the conduct of the trial when the defendant is defending pro se. Courts commonly refer to the role of the attorney in a situation in which a defendant has not effectively waived assistance of an attorney as that of "co-counsel." The role of the attorney in a situation where the defendant has effectively waived counsel and is proceeding pro se is that of "standby" or "advisory" counsel. The former tends to involve a more active role in the representation of the defendant than the latter.

Metcalf v. State, 629 So. 2d 558, 562 (Miss. 1993).

See also Howard v. State, 701 So. 2d 274, 287 (Miss. 1997) ("The *Faretta* right is not trampled if 'disagreements between counsel and defendant are resolved in the defendant's favor whenever the matter is one which would normally be left to the discretion of counsel.'"); Comment to Rule 5.5 of the Rules of Professional Conduct ("[A] lawyer may counsel nonlawyers who wish to proceed pro se.").

Opening statements and closing arguments:

A pro se or hybrid defendant is permitted to make an opening statement and closing argument without relinquishing the privilege against self-incrimination:

> Our law does not require a defendant to make a choice between proceeding pro se and exercising his constitutional right against self-incrimination. He may conduct his entire defense without ever being sworn in or being subject to any cross-examination.

Armstead v. State, 716 So. 2d 576, 580 (Miss. 1998).

Moreover, refusing a defendant's request to make an opening statement or closing argument is reversible error. *See* Brooks v. State, 763 So. 2d 859, 866 (Miss. 2000); Ballard v. State, 366 So. 2d 668, 668 (Miss. 1979); Gray v. State, 351 So. 2d 1342, 1345 (Miss. 1977). But a pro se or hybrid defendant is not exempt from abiding by rules of

procedure and courtroom protocol. *See* Trunell v. State, 487 So. 2d 820, 826 (Miss. 1986). Delving into material points outside the record, when warned not to do so, constitutes a "partial waiver" of the privilege against self-incrimination. *See* Armstead v. State, 716 So. 2d 576, 580 (Miss. 1998); Duplantis v. State, 644 So. 2d 1235, 1251 (Miss. 1994); Jones v. State, 381 So. 2d 983, 993 (Miss. 1980).

In such instances, the trial court may properly allow the State to comment that the statements were not made under oath:

> The defendant's remarks in this case cannot be dismissed as a failure to grasp "legal niceties." They are unsworn testimony, and as such, constitute a partial waiver of the constitutional privilege against self-incrimination and the prohibition against a district attorney from commenting on his not taking the stand.

Jones v. State, 381 So. 2d 983, 994 (Miss. 1980).

See also Bevill v. State, 556 So. 2d 699, 710-11 (Miss. 1990) ("An accused who does not intend to testify himself under oath cannot be permitted, any more than any other litigant, to have the jury consider as evidence any statements of fact not subject to rigorous cross-examination of the witness under oath.").

No "cat and mouse" games:

A defendant may not employ self-representation as a ruse to disrupt the orderly progress of the case:

> [W]e have recognized a right of a defendant to proceed without counsel and to refuse the representation of assigned counsel. . . . [H]e may not use this right to play a 'cat and mouse' game with the court, . . . or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel.

Brooks v. State, 763 So. 2d 859, 866 (Miss. 2000).

See also Young v. State, 425 So. 2d 1022, 1027 (Miss. 1983) ("[Defendant] delayed and vacillated and the record indicates that he was toying with the court. He was evasive and apparently wanted to act as counsel and have counsel, but when the trial judge pressed him for a decision, [he] expressly told the court that he wanted his counsel to withdraw.").

Checklist when conducting pro se proceedings:

- Do not give legal advice.
- Conduct examination as set forth in the Mississippi Rules of Criminal Procedure.
- Avoid ex parte communications. Explain this rule in open court.
- Act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- Treat pro se defendants with patience, dignity, and courtesy.
- Give a brief synopsis of courtroom protocol–e.g., the expectation of timely proceedings; checking-in procedures; seating arrangements; etc.
- Forewarn that rude conduct or snide remarks will not be tolerated.
- Construe pleadings liberally–i.e., substance over form.
- Decide all motions promptly. Give rationale for your decision in plain language.
- Prior to trial briefly explain the ground rules of trial procedures (e.g., who goes first, the swearing in witnesses, the right to cross-examine, how to make an objection); the elements of the offense, the burden of proof, and that your verdict will be based only upon the evidence presented at trial.
- Call a break if during trial the pro se defendant is becoming confused or agitated.
- Reach your verdict promptly and announce it from the bench.
- Remind the pro se defendant of the right to appeal.

CHAPTER 31

VICTIMS' RIGHTS

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3100 VICTIMS' RIGHTS UNDER THE MISSISSIPPI CONSTITUTION

Article 3 § 26A of the Mississippi Constitution Victim's rights:

(1) Victims of crime, as defined by law, shall have the right to be treated with fairness, dignity and respect throughout the criminal justice process; and to be informed, to be present and to be heard, when authorized by law, during public hearings.
(2) Nothing in this section shall provide grounds for the accused or convicted offender to obtain any form of relief nor shall this section impair the constitutional rights of the accused. Nothing in this section or any enabling statute shall be construed as creating a cause of action for damages against the state or any of its agencies, officials, employees or political subdivisions.
(3) The Legislature shall have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section.

3101 MISSISSIPPI CRIME VICTIMS' BILL OF RIGHTS

§ 99-43-1 Purpose:

This chapter may be cited as the "Mississippi Crime Victims' Bill of Rights." The purpose of this chapter is to ensure the fair and compassionate treatment of victims of crime, to increase the effectiveness of the criminal justice system by affording rights and considerations to the victims of crime, and to preserve and protect victims' rights to justice and fairness in the criminal justice system.

§ 99-43-3 Definitions:

As used in this chapter, the following words shall have the meanings ascribed to them unless the context clearly requires otherwise:
(a) "Accused" means a person who has been arrested for committing a criminal offense and who is held for an initial appearance or other proceeding before trial or who is a target of an investigation for committing a criminal offense.
(b) "Appellate proceeding" means an oral argument held in open court before the Mississippi Court of Appeals, the Mississippi Supreme Court, a federal court of appeals or the United States Supreme Court.
(c) "Arrest" means the actual custodial restraint of a person or his submission to custody.
(d) "Community status" means extension of the limits of the places of confinement of a prisoner through work release, intensive supervision, house arrest and initial consideration of pre-discretionary leave, passes and furloughs.
(e) "Court" means all state courts including juvenile courts.
(f) "Victim assistance coordinator" means a person who is employed or authorized by a public entity or a private entity that receives public funding primarily to provide

counseling, treatment or other supportive assistance to crime victims.
(g) “Criminal offense” means conduct that gives a law enforcement officer or prosecutor probable cause to believe that a felony involving physical injury, the threat of physical injury, a sexual offense, any offense involving spousal abuse or domestic violence has been committed.
(h) “Criminal proceeding” means a hearing, argument or other matter scheduled by and held before a trial court but does not include a lineup, grand jury proceeding or other matter not held in the presence of the court.
(i) “Custodial agency” means a municipal or county jail, the Department of Corrections, juvenile detention facility, Department of Youth Services or a secure mental health facility having custody of a person who is arrested or is in custody for a criminal offense.
(j) “Defendant” means a person or entity that is formally charged by complaint, indictment or information of committing a criminal offense.
(k) “Final disposition” means the ultimate termination of the criminal prosecution of a defendant by a trial court, including dismissal, acquittal or imposition of a sentence.
(l) “Immediate family” means the spouse, parent, child, sibling, grandparent or guardian of the victim, unless that person is in custody for an offense or is the accused.
(m) “Lawful representative” means a person who is a member of the immediate family or who is designated as provided in Section 99-43-5; no person in custody for an offense or who is the accused may serve as lawful representative.
(n) “Post-arrest release” means the discharge of the accused from confinement on recognizance, bond or other condition.
(o) “Post-conviction release” means parole or discharge from confinement by an agency having custody of the prisoner.
(p) “Post-conviction relief proceeding” means a hearing, argument or other matter that is held in any court and that involves a request for relief from a conviction, sentence or adjudication.
(q) “Prisoner” means a person who has been convicted or adjudicated of a criminal offense against a victim and who has been sentenced to the custody of the sheriff, the Department of Corrections, Department of Youth Services, juvenile detention facility, a municipal jail or a secure mental health facility.
(r) “Prosecuting attorney” means the district attorney, county prosecuting attorney, municipal prosecuting attorney, youth court prosecuting attorney, special prosecuting attorney or Attorney General.
(s) “Right” means any right granted to the victim by the laws of this state.
(t) “Victim” means a person against whom the criminal offense has been committed, or if the person is deceased or incapacitated, the lawful representative.

Complete listing of the Mississippi Crime Victims’ Bill of Rights:

§ 99-43-1. Short title; purpose
§ 99-43-3. Definitions
§ 99-43-5. Designation of representative
§ 99-43-7. Notification of victim by law enforcement officials
§ 99-43-8. Right to receive copy of initial incident report
§ 99-43-9. Notification of victim by prosecutor

§ 99-43-11. Conference of prosecutor and victim before disposition
§ 99-43-13. Conference of prosecutor and victim before trial
§ 99-43-15. Victim's right to transcripts
§ 99-43-17. Victim not to direct prosecution
§ 99-43-19. Unreasonable delays; continuances
§ 99-43-21. Victim's right to be present at proceedings
§ 99-43-23. Separate waiting areas
§ 99-43-25. Identification and address of victim; confidentiality
§ 99-43-27. Plea bargaining; victim's rights
§ 99-43-29. Notice to victim of disposition and sentencing
§ 99-43-31. Victim impact statements to probation officers
§ 99-43-33. Victim impact statements at court proceedings
§ 99-43-35. Release, escape and sentencing information
§ 99-43-37. Right of victim to be present and heard at court proceedings
§ 99-43-39. Victim's property
§ 99-43-41. Notice requirements of custodial agencies
§ 99-43-43. Victim statements for prison records; notice of parole or pardon proceedings; notice of change of custodial status
§ 99-43-45. Victim's employment protected
§ 99-43-47. Prosecutor may assert victim's rights
§ 99-43-49. Failure to provide victim's rights or notice

3102 MISSISSIPPI CRIME VICTIMS' COMPENSATION ACT

§ 99-41-3 Legislative intent:

It is the intent of the Legislature to provide a method of compensating those persons who are innocent victims of criminal acts within the state and who suffer bodily injury or death and of assisting victims of crime through information referrals and advocacy outreach programs. To this end, it is the Legislature's intention to provide compensation for injuries suffered as a direct result of the criminal acts of other persons. It is the further intent of the Legislature that all agencies, departments, boards and commissions of the state and political subdivisions of the state shall cooperate with the Attorney General's Office in carrying out the provisions of this chapter.

Complete listing of the Mississippi Crime Victims' Compensation Act:

§ 99-41-1. Short title
§ 99-41-3. Legislative intent
§ 99-41-5. Definitions
§ 99-41-7. Directors; duties; appointment
§ 99-41-9. Powers and duties of division
§ 99-41-11. Investigation and procedures
§ 99-41-13. Appeals

CHAPTER 32

JUSTICE COURT APPEALS

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3200 RULES PREVAIL OVER CONFLICTING STATUTORY PROCEDURES

"A right of appeal is statutory." Bickham v. Department of Mental Health, 592 So. 2d 96, 97 (Miss. 1991). "Once such a right statutorily exists, the Supreme Court has the authority to provide rules of procedure." Mitchell v. Parker, 804 So. 2d 1066, 1070 (Miss. Ct. App. 2001). This authority stems from Mississippi Constitution Article VI section 144, which provides: "The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution." *See also* Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968) ("The phrase 'judicial power' in section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business.").

But legislative suggestions concerning procedural rules will be followed if such do not conflict with judicial rules:

> We are keenly aware of, and measure with great respect, legislative suggestions concerning procedural rules and they will be followed unless determined to be an impediment to justice or an impingement upon the constitution. The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts.

Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

But if there is a conflict, the rules prevail. *See* Jones v. City of Ridgeland, 48 So. 3d 530, 537 (Miss. 2010) ("Procedure is defined as '[t]he mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the rights, and which, by means of the proceedings, the court is to administer; the machinery, as distinguished from its product.' Black's Law Dictionary 1203-04 (6th ed.1990)."); Murray v. State, 870 So. 2d 1182, 1184 (Miss. 2004) ("This Court has held where there is conflict between a statute and a procedural rule created by the Supreme Court, the rule controls and the statute is void and of no effect."); Stevens v. Lake, 615 So. 2d 1177, 1184 (Miss. 1993) ("Given no apparent conflict between the plain language of the statutes and the rule, and the Stevens' failure to identify any alleged conflicts, we find that their argument that the statute is void and of no effect is without merit.").

3201 CRIMINAL APPEALS FROM JUSTICE COURT

MRCrP 29.1 Notice of appeal; contents; defects; dismissal:

(a) Notice of Appeal. Any person adjudged guilty of a criminal offense by a justice or municipal court may appeal to county court or, if there is no county court, to circuit court, by filing simultaneously a written notice of appeal, and both a cost bond and an appearance bond (or cash deposit), as provided in Rules 29.3(a) and 29.4(a), with the clerk of the circuit court having jurisdiction within thirty (30) days of such judgment. This written notice of appeal and posting of the cost bond and the appearance bond (or cash deposit) perfects the appeal. After the filing of the written notice of appeal, cost bond, and appearance bond (or cash deposit), an further correspondence concerning the case snail be mailed directly to the circuit clerk for inclusion in the file.

(b) Contents. The written notice of appeal shall specify the party or parties taking the appeal; specify the current residence address and the current mailing address, if different, of each party taking the appeal; designate the judgment or order from which the appeal is taken; be addressed to county or circuit court, whichever appropriate; and state that the appeal is taken for a trial de novo.

(c) Defects in the Notice of Appeal; Dismissal. Upon a failure of a party to comply with the requirements of this rale as to content of the written notice of appeal, the court, on its own motion or on motion of a party, shall direct the clerk of the court to give written notice to the party in default, apprising the party of the nature of the deficiency. If the party in default fails to correct the deficiency within fourteen (14) days after notification, the appeal shall be dismissed by the clerk of the court. The county or circuit court shall promptly notify the lower court of any such dismissal.

MRCrP 29.2 Record:

Upon receiving written notice of appeal, and upon the defendant's compliance with Rules 29.3(a) and 29.4(a), the circuit clerk shall promptly notify the lower court and the appropriate prosecuting attorney. Within ten (10) days after receipt of such notice, the judge or clerk of the lower court shall deliver to the clerk of the circuit court a certified copy of the record and all original papers in the case.

MRCrP 29.3 Cost bonds:

(a) Cost Bonds. Unless excused by the county or circuit court by the making of an affidavit of poverty like that specified in Mississippi Code Section 99-35-7, every defendant who appeals under this rule shall post a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies) to be approved by the circuit clerk, for all estimated court costs incurred both in the appellate and lower courts (including, but not limited to, fees, court costs, and amounts imposed pursuant to statute). The amount of such cash deposit or bond shall be determined by the judge of the lower court, payable to

the State in an amount of not less than One Hundred Dollars ($100.00) nor more than Twenty-Five Hundred Dollars ($2,500,00). Upon a bond forfeiture, the costs of the lower court shall, be recovered after the costs of the appellate court.
(b) Dismissal for Noncompliance. A defendant's failure to comply with Rule 29.3(a) shall be grounds for the court, on its own motion or on motion of a party, to dismiss the appeal, with costs. The county or circuit court shall promptly notify the lower court of any such dismissal.

MRCrP 29.4 Appearance bonds:

(a) Appearance Bond. Unless excused by the county or circuit court by the making of an affidavit as specified in Mississippi Code Section 99-35-7, a cash deposit, or bond with sufficient resident sureties (or licensed guaranty companies) to be approved by the circuit clerk, shall be given and conditioned on appearance before the county or circuit court from day to day and term to term until the appeal is finally determined or dismissed. The amount of such cash deposit or appearance bond shall be determined by the judge of the lower court.

(b) Failure to Appear. If the defendant fails to appear at the time and place set by the court, the court may dismiss the appeal with prejudice and with costs, and order forfeiture of the appearance bond or cash deposit. The county or circuit court shall promptly notify the lower court of any such dismissal.

(c) Time in Custody Credited. All time the defendant is in custody on the present charge shall be credited against any sentence imposed by the court.

MRCrP 29.5 Proceedings:

Upon the filing with the circuit clerk of the written notice of appeal and bonds or cash deposits required by this Rule, unless excused therefrom, the prior judgment of conviction shall be stayed. The appeal shall proceed as a trial de novo. In appeals from justice or municipal court, when the maximum possible sentence is six (6) months or less, the case may be tried without a jury.

3202 CIVIL APPEALS FROM JUSTICE COURT

RJC 27 Civil appeals from justice court:

(a) Civil appeals from justice court shall be governed by Rules 5.01, 5.04, 5.07, 5.08 and 5.09 of the Uniform Rules of Circuit and County Court. Either party aggrieved by a justice court judgment rendered in a case of unlawful entry and detainer may, after final judgment, appeal to the circuit court of the county pursuant to section 11-51-83 of the Mississippi Code. The availability of writs of certiorari shall be as provided by the Mississippi Constitution and section 11-51-93 of the Mississippi Code.

(b) Exception. Any party aggrieved by the decision of a justice court judge to issue a temporary domestic abuse protection order has the right of a trial de novo on appeal in the chancery court having jurisdiction pursuant to section 93-21-15.1 of the Mississippi Code.

Appeals from justice court shall be governed by the rules approved by the Supreme Court for the governance of appeals to the county or circuit courts.

URCCC 5.01 (Appeals to be on the record/Exceptions)

Except for cases appealed directly from justice court or municipal court, all cases appealed to circuit court shall be on the record and not a trial de novo. Direct appeals from justice court and municipal court shall be by trial de novo.

URCCC 5.04 (Notice of appeal)

The party desiring to appeal a decision from a lower court must file a written notice of appeal with the circuit court clerk. A copy of that notice must be provided to all parties or their attorneys of record and the lower court or lower authority whose order or judgment is being appealed. A certificate of service must accompany the written notice of appeal. The court clerk may not accept a notice of appeal without a certificate of service, unless so directed by the court in writing. In all appeals, whether on the record or by trial de novo, the notice of appeal and payment of costs must be simultaneously filed and paid with the circuit court clerk within thirty (30) days of the entry of the order or judgment being appealed. The timely filing of this written notice and payment of costs will perfect the appeal. The appellant may proceed in forma pauperis upon written approval of the court acting as the appellate court. The written notice of appeal must specify the party or parties taking the appeal; must designate the judgment or order from which the appeal is taken; must state if it is on the record or an appeal de novo; and must be addressed to the appropriate court.

URCCC 5.07 (Procedure on appeals by trial de novo)

In appeals by trial de novo, the circuit court clerk, upon the filing of the written notice of appeal, must enter the case on the docket, noting that it is an appeal with trial de novo. The appeal will proceed as if a complaint and answer had been filed, but the court may require the filing of any supplemental pleadings to clarify the issues. All proceedings on an appeal de novo will be governed by the Mississippi Rules of Civil Procedure, where applicable, the Mississippi Rules of Evidence, and these Rules.

URCCC 5.08 (Supersedeas)

The perfecting of an appeal, whether on the record or by trial de novo, does not act as supersedeas. In cases being appealed that involve a money judgment, the party against whom money judgment was rendered may post with the court clerk of the court acting as the appellate court a bond that is 125% of the money judgment, such bond to be approved by the circuit clerk. The posting of this bond shall automatically act as a supersedeas solely on the money judgment, but not any other part of the order or judgment. Upon application the court may reduce the amount of the supersedeas bond. In appeals from lower authorities, when the statute provides for automatic supersedeas, the statute shall govern. In all other cases the court may grant a supersedeas upon proof of the party requesting the same, applying the same standards as for a preliminary injunction. However, except in those cases in which the statute provides for automatic supersedeas, no supersedeas will be granted on appeals from a denial, revocation or suspension of a license to practice a profession or a trade. The court may grant an expedited hearing, may alter the briefing schedules, and may require the record to be expedited. In all cases in which a discretionary supersedeas is granted, the court may require a bond sufficient to protect the interests of the other parties.

URCCC Rule 5.09 (Cost bond)

In all appeals, unless the court allows an appeal in forma pauperis, the appellant or appellants shall pay all court costs incurred below and likely to be incurred on appeal as estimated by the circuit court clerk. Should a dispute arise, a party may apply to the court for relief.

§ 99-35-1 When appeal is to county court:

In all cases of conviction of a criminal offense against the laws of the state by the judgment of a justice court, or by a municipal court, for the violation of an ordinance thereof, an appeal may be taken . . . to the county court of the county, in counties in which a county court is in existence, or the circuit court of the county, in counties in which a county court is not in existence, which shall stay the judgment appealed from.

See also Miss. Code Ann. § 11-51-81 ("All appeals from courts of justices of the peace, special and general, and from all municipal courts shall be to the county court under the same rules and regulations as are provided on appeals to the circuit court, ...").

§ 83-39-31 Bond fees:

(3) Upon each defendant convicted of a criminal offense who appeals his conviction and posts a bond conditioned for his appearance, there is imposed a fee equal to two percent (2%) of the face value of each bond or Twenty Dollars ($20.00), whichever is greater. If such defendant is released on his own recognizance pending his appeal, there is imposed a fee of Twenty Dollars ($20.00). The fee imposed by this subsection shall be imposed and shall be collected by the clerk of the court when the defendant posts a bond unless subsection (4) applies.
(4) If a defendant is found to be not guilty or if the charges against a defendant are dismissed, or if the prosecutor enters a nolle prosequi in the defendant's case or retires the defendant's case to the file, or if the defendant's conviction is reversed on appeal, the fees imposed pursuant to subsections (1), (2), (3) and (7) shall not be imposed.
(5) The State Auditor shall establish by regulation procedures providing for the timely collection, deposit, accounting and, where applicable, refund of the fees imposed by this section. The Auditor shall provide in the regulations for certification of eligibility for refunds and may require the defendant seeking a refund to submit a verified copy of a court order or abstract by which the defendant is entitled to a refund.
(6) It shall be the duty of the clerk or any officer of the court authorized to take bonds or recognizances to promptly collect, at the time such bonds or recognizances are received or taken, all fees imposed pursuant to this section. In all cases, the clerk or officer of the court shall deposit all fees so collected with the State Treasurer, pursuant to appropriate procedures established by the State Auditor, for deposit into the State General Fund.
(7) In addition to the fees imposed by this section, there shall be an assessment of Ten Dollars ($10.00) imposed upon every criminal defendant charged with a criminal offense who posts a cash bail bond, a surety bail bond, a property bail bond or a guaranteed arrest bond to be collected by the clerk of the court and deposited in the Victims of Domestic Violence Fund created by Section 93-21-117, unless subsection (4) applies.

§ 99-35-7 Appeals without bond:

Any person who shall have been convicted of a criminal offense against the laws of this state, by the judgment of a justice court, or by a municipal court for the violation of an ordinance of the municipality, who by reason of his poverty is not able to give bond as prescribed in Section 99-35-3, may nevertheless appeal from such conviction on his making an affidavit that, by reason of his poverty, he is unable to give bond or other security to obtain such appeal, but the appeal in such case shall not operate as a supersedeas of the judgment, nor discharge the appellant from custody, but the judgment shall be executed as if an appeal had not been taken, unless the presiding judge of the appellate court shall, for good reason, see fit to stay the execution of the judgment rendered by the court below by ordering the release of the defendant on his own recognizance, and this shall not affect the trial of the case anew in the appellate court.

§ 11-9-141 Stay as waiver of errors

A party obtaining a stay of execution shall thereby waive all errors in the judgment and abandon the right of appeal and certiorari.

3204 CASE LAW ON JUSTICE COURT APPEALS

When an appeal is perfected:

See Ray v. State, 124 So. 3d 80, 81 (Miss. Ct. App. 2013) ("Perfecting an appeal from a justice-court criminal conviction requires filing a notice of appeal and two bonds—(1) a 'cost bond' to secure estimate costs, and (2) an 'appearance bond' conditioned on the defendant's appearance pending the appeal's conclusion. Because of the distinct purposes for each bond, failure to file either is grounds for dismissal.").

Defendant may appeal after pleading guilty:

See Jones v. State, 972 So. 2d 579, 580 (Miss. 2008) ("A convicted defendant, although he may have plead guilty, may take an appeal to circuit or county court and be granted a trial de novo."); Fowler v. State, 981 So. 2d 1061, 1063 (Miss. Ct. App. 2008) ("[T]he circuit court erred in finding that Fowler was not entitled to a trial de novo following his guilty plea in justice court.").

Appeal is by trial de novo:

See Boatner v. State, 754 So. 2d 1184, 1191 (Miss. 2000) ("[Boatner's] appeal to the circuit court placed all issues, including the sentence, in the jurisdiction of the circuit court."); Carr v. State, 942 So. 2d 816, 817 (Miss. Ct. App. 2006) ("[T]he law concerning

the constitutionality of enhancing a lower court's sentence following a de novo review by the superior court is clear.").

"Three-court rule" unconstitutional and void:

See Jones v. City of Ridgeland, 48 So. 3d 530, 535 (Miss. 2010) ("[T]he "three-court rule" in Section 11-51-81 [i.e., "there shall be no appeal from the circuit court to the supreme court of any case civil or criminal which originated in a justice of the peace, municipal or police court and was thence appealed to the county court and thence to the circuit court unless in the determination of the case a constitutional question be necessarily involved and then only upon the allowance of the appeal by the circuit judge or by a judge of the supreme court"] is unconstitutional and void.").

Writ of procedendo:

See Ferrell v. State, 785 So. 2d 317, 319-20 (Miss. Ct. App. 2001) ("A writ of procedendo is issued by a court of superior jurisdiction to a court of inferior jurisdiction to enforce the lower court's judgment. . . . Where an appellant fails to appear when he should have, and the circuit court follows the proper procedure, appellant has no right to demand that the circuit court pass upon the question of his guilt.").

3205 CERTIORARI PROCEEDINGS

Applicable to justice courts:

Certiorari proceedings is a backup to the ordinary appeals procedures:

> Oftentimes persons tried in justice court are without counsel and, as here, such persons may not formally perfect an appeal in time. There will on occasion no doubt be cases where no formal appeal has been timely perfected but where injustice may be avoided by allowing a circuit court authority to review errors of law on the face of the record of a justice court proceeding. The six month time period allowed for filing a writ of certiorari does not unduly hamper or undermine the public's interest in finality of criminal adjudications.

Merritt v. State, 497 So. 2d 811, 813 (Miss. 1986).

See also Lott v. City of Bay Springs, 960 So. 2d 525, 527 (Miss. Ct. App. 2006) ("As the statute explicitly states, only a pure question of law is reviewable on certiorari. Merritt, 497 So.2d at 815. Despite the fact that Lott was convicted in municipal court rather than in a justice court, this language still applies to Lott's petition for writ of certiorari through Mississippi Code Annotated § 11-51-95 which provides for '[l]ike proceedings as

provided in Section 11-51-93 . . . to review the judgments of all tribunals inferior to the circuit court[.]'").

§ 11-51-93 Certiorari from justice court:

All cases decided by a [justice court judge], whether exercising general or special jurisdiction, may, within six months thereafter, on good cause shown by petition, supported by affidavit, be removed to the circuit court of the county, by writ of certiorari, which shall operate as a supersedeas, the party, in all cases, giving bond, with security, to be approved by the judge or clerk of the circuit court, as in cases of appeal from [justice court judges]; and in any cause so removed by certiorari, the court shall be confined to the examination of questions of law arising or appearing on the face of the record and proceedings. In case of an affirmance of the judgment of the justice, the same judgment shall be given as on appeals. In case of a reversal, the circuit court shall enter up such judgment as the justice ought to have entered, if the same be apparent, or may then try the cause anew on its merits, and may in proper cases enter judgment on the certiorari or appeal bond, and shall, when justice requires it, award restitution. The clerk of the circuit court, on the issuance of a certiorari, shall issue a summons for the party to be affected thereby; and, in case of nonresidents, he may make publication for them as in other cases.

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APPENDIX: BENCH CARDS

Contempt of Court

Initial Appearances

Judgments

Right to Counsel

Release

Revocation Proceedings

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JUSTICE COURT / MUNICIPAL COURT BENCH CARD ON CONTEMPT OF COURT

PROCEDURES ON CONTEMPT OF COURT ARE SET FORTH IN 32 OF THE MISSISSIPPI RULES OF CRIMINAL PROCEDURE. READ THE RULE!

RULES 26.6 AND 32 GOVERN CONTEMPT PROCEDURES FOR FAILURE TO PAY FINES, FEES, RESTITUTION, AND/OR COURT COSTS.

DIRECT CONTEMPT is a disruptive act occurring within the judge's actual sight or hearing that interferes with the dignified conduct of the court's business. A judge may summarily sanction the violator as set forth in Rule 32.2 of the Mississippi Rules of Criminal Procedure. Punishment may not exceed 30 days in jail *or* a $100.00 fine. FAILURE TO PAY A FINE, FEE, COURT COSTS, OR RESTITUTION IS NOT DIRECT CONTEMPT OF COURT since the reasons for nonpayment involve personal and/or financial circumstances outside the courtroom.

CRIMINAL CONTEMPT is defined in Rule 32.1(d) of the Mississippi Rules of Criminal Procedure.

INDIRECT, CRIMINAL CONTEMPT requires:

- A criminal affidavit.
- A criminal summons to appear.
- An advisement of rights (see BENCH CARD ON INITIAL APPEARANCES) including the right to an attorney and, if indigent, the right to an appointed attorney FREE OF COST.
- A hearing by a judge other than the trial judge.
- Proof beyond a reasonable doubt.

Criminal contempt for failure to pay fines, fees, restitution, and/or court costs requires proof beyond a reasonable doubt that the defendant ***WILFULLY REFUSED*** to pay despite having the financial ability to do so.

CIVIL CONTEMPT is defined in Rule 32.1(e) of the Mississippi Rules of Criminal Procedure.

INDIRECT, CIVIL CONTEMPT for non-payment of fines, fees, restitution, and/or court costs requires:

- A written motion specifying the amount of the fines, fees, restitution, and/or court costs owed.
- A copy of court's sentencing order and an affidavit verifying or supporting the motion.
- A summons to appear and show cause.
- A hearing by the trial judge that allows the defendant a FULL OPPORTUNITY to present testimony, confront and cross-examine adverse witnesses, and to present evidence in his/her defense.

IF INCARCERATION TO COMPEL COMPLIANCE IS SOUGHT, then the judge MUST advise the defendant of the right to an attorney and, if indigent, the right to an appointed attorney FREE OF COST. MRCrP 32.4(d)(4).

AT THE HEARING, the judge may reduce the amount of the remaining fines, fees, restitution, and/or court costs, allow additional time for payments, and/or order community service with credit received at the highest current federal minimum wage.

A JUDGE'S ORDER OF CIVIL CONTEMPT must specify the sanction imposed and how the contempt may be purged. ***DEFENDANTS MAY NOT BE INCARCERATED FOR REASONS OF THEIR FINANCIAL INABILITY TO PAY!*** *See* Bearden v. Georgia, 461 U.S. 660 (1983).

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JUSTICE COURT / MUNICIPAL COURT
BENCH CARD
ON INITIAL APPEARANCES

WHEN CONDUCTING AN INITIAL APPEARANCE, THE JUDGE MUST COMPLY WITH RULE 5 OF THE MISSISSIPPI RULES OF CRIMINAL PROCEDURE. READ THE RULE!

A DEFENDANT IN CUSTODY AFTER AN ARREST, with or without an arrest warrant, MUST be taken before a judge for an initial appearance WITHOUT UNNECESSARY DELAY, and always within 48 hours.

ABSOLUTELY BE SURE TO:

- Give the defendant a copy of the charging affidavit.
- IF THE ARREST WAS MADE WITHOUT A WARRANT, then you must determine whether there was PROBABLE CAUSE for the arrest. NOTE YOUR FINDING FOR THE RECORD.
- If there was NO PROBABLE CAUSE for the warrantless arrest, then you MUST release the defendant without any conditions whatsoever.
- Advise the defendant of the right to an attorney.

APPOINT AN ATTORNEY IF THE DEFENDANT WANTS AN ATTORNEY BUT CANNOT AFFORD TO HIRE ONE.

SEE "BENCH CARD ON RIGHT TO COUNSEL" FOR PROCEDURES ON:

THE RIGHT TO AN ATTORNEY,
THE RIGHT TO AN APPOINTED ATTORNEY,
THE RIGHT TO SELF-REPRESENTATION, AND
KNOWINGLY AND VOLUNTARILY MADE WAIVERS OF THESE RIGHTS.

- ADVISE THE DEFENDANT OF:

  (1) the right to remain silent and that any statements made may be used against the defendant;

  (2) the right to communicate with an attorney, family or friends, and that reasonable means will be provided to enable the defendant to do so; and

  (3) the conditions, if any, under which the defendant may obtain release.

- IF THE DEFENDANT IS CHARGED WITH A FELONY, then advise him/her of the right to a preliminary hearing as set forth in Rule 6 of the Mississippi Rules of Criminal Procedure.
- SIGN THE CERTIFICATE OF INITIAL APPEARANCE showing compliance with the procedures for initial appearances under the Mississippi Rules of Criminal Procedure.

WITH THE DEFENDANT'S CONSENT, initial appearances may be conducted with the use of interactive audiovisual equipment as set forth in Rule 1.8 of the Mississippi Rules of Criminal Procedure.

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JUSTICE COURT / MUNICIPAL COURT BENCH CARD ON JUDGMENTS

PROCEDURES ON JUDGMENTS ARE SET FORTH IN RULE 26 OF THE MISSISSIPPI RULES OF CRIMINAL PROCEDURE. READ THE RULE!

A DETERMINATION OF GUILT means "a verdict of guilty by a jury, a finding of guilt by a court following a non-jury trial, or the acceptance by the court of a plea of guilty or nolo contendere." MRCrP 26.1(a)

AFTER ADJUDICATING A DEFENDANT GUILTY, the judge MUST impose sentencing without unreasonable delay. MRCrP 26.2(b)(3).

PRONOUNCEMENT OF JUDGMENT must be:

- Made in open court.
- Made in the presence of the defendant.
- Recorded in the court's minutes.

A defendant may make a voluntary, knowing, and intelligent waiver of his/her right to be present ***ONLY*** as set forth in Rule 10.1(b) of the Mississippi Rules of Criminal Procedure.

PRONOUNCEMENT OF SENTENCE requires the judge:

- To afford the defendant an opportunity to make a statement before imposing sentence.
- To inform the defendant that credit will be given for time already spent in custody on the offense.
- To explain to the defendant the terms of the sentence.

BEST PRACTICES before imposing fines, fees, court costs, and/or restitution:

- Assess fines, fees, court costs, and/or restitution at an amount, and with a payment schedule, that is reasonable considering the defendant's financial situation, as evidenced by the defendant's "Affidavit of Substantial Financial Hardship" and/or testimony regarding his/her income, assets, liabilities, and financial obligations.
- Fully and clearly explain to the defendant, and provide him/her with a copy of those instructions, on:
  (1) how and where to make payments;
  (2) the consequences of failing to do so;
  (3) how to request a court hearing if the circumstances of the defendant's financial ability to pay changes; and
  (4) how to notify the court if there is a change of address or telephone number.
- Consider for indigent defendants any nonfinancial alternatives allowed by law–e.g., community service. Be aware that some indigent defendants may need accommodations for disabilities, childcare needs, transportation, and/or to prevent conflicts with work or school schedules.

ADDITIONAL FINES, FEES, OR COURT COSTS ARE NOT ALLOWED ON PAYMENT PLANS OR WHEN IMPOSING COMMUNITY SERVICE OR OTHER NON-FINANCIAL ALTERNATIVES.

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JUSTICE COURT / MUNICIPAL COURT BENCH CARD ON THE RIGHT TO COUNSEL

THE RIGHT TO COUNSEL IS SET FORTH IN RULE 7 OF THE MISSISSIPPI RULES OF CRIMINAL PROCEDURE. READ THE RULE!

CHECKLIST OF IMPORTANT CONCERNS:

- THE ACCUSED IS ENTITLED TO AN ATTORNEY AT EVERY CRITICAL STAGE OF THE PROCEEDINGS. *See* Alabama v. Shelton, 535 U.S. 654 (2002); Scott v. Illinois, 440 U.S. 367, 373 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Page v. State, 495 So. 2d 436 (Miss. 1986).

- AT THE DEFENDANT'S FIRST APPEARANCE BEFORE A JUDGE, the judge must advise the defendant of the right to an attorney as required under Rule 7.1 of the Mississippi Rules of Criminal Procedure. An indigent defendant is entitled to an appointed attorney, free of cost, if the matter could result in the loss of liberty or the interests of justice so require.

- IF AN INDIGENT DEFENDANT WANTS AN ATTORNEY, then instruct him/her: (1) to submit a written MOTION FOR APPOINTMENT OF ATTORNEY, and (2) to complete and sign under oath an AFFIDAVIT OF SUBSTANTIAL HARDSHIP.

  (The court shall make these forms available to the defendant at no cost.)

  ADDITIONALLY, you may examine the defendant under oath to clarify his/her financial situation–which is especially important when the defendant has difficulty completing the AFFIDAVIT OF SUBSTANTIAL HARDSHIP.

- Enter an ORDER ON DEFENDANT'S MOTION FOR APPOINTMENT OF ATTORNEY. If denied, specifically state the reasons for not granting the defendant's request.

WAIVER OF RIGHT TO AN ATTORNEY:

Rule 7.1(c) of the Mississippi Rules of Criminal Procedure sets forth the procedures that the judge MUST follow when a defendant desires to act as his/her own attorney.

The BEST PRACTICE is to conduct a Rule 7.1(c) examination whenever the defendant is not represented by an attorney, or an appointed attorney, on a matter that could result in the loss of liberty AND to have the defendant sign a corresponding written waiver that contains the court's advisement.

THE DEFENDANT'S DECISION TO PROCEED WITHOUT AN ATTORNEY MUST BE KNOWINGLY AND VOLUNTARILY MADE.

WITHDRAWAL OF WAIVER:

Rule 7.1(d) of the Mississippi Rules of Criminal Procedure provides:

"A defendant may withdraw a waiver of the right to counsel at any stage of the proceedings but will not be entitled to repeat any proceeding previously held or waived solely on the grounds of the subsequent appointment or retention of counsel."

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JUSTICE COURT / MUNICIPAL COURT BENCH CARD ON RELEASE PROCEDURES

RELEASE PROCEDURES ARE SET FORTH IN RULE 8 OF THE MISSISSIPPI RULES OF CRIMINAL PROCEDURE. READ THE RULE!

CRIMES NOT BAILABLE:

CAPITAL OFFENSES "(a) when the proof is evident or presumption great; or (b) when the person has previously been convicted of a capital offense or any other offense punishable by imprisonment for a maximum of twenty (20) years or more." Miss. Const. art. 3, § 29.

RELEASE PROCEDURES FOR BAILABLE CRIMES:

TO IMPOSE ANY CONDITION OF RELEASE IN ADDITION TO THE MANDATORY CONDITIONS SET FORTH IN RULE 8.4(a), the judge MUST find, after taking into account the factors set forth in Rule 8.2(a)(1) through (15), that releasing a defendant on personal recognizance:

- will not reasonably assure the defendant's appearance, or
- will pose a real and present danger to others or the public at large.

WITHOUT THAT FINDING, the judge is required to release the defendant on his/her personal recognizance ONLY SUBJECT TO the mandatory conditions set forth in Rule 8.4(a) of the Mississippi Rules of Criminal Procedure.

IF THE JUDGE DOES MAKE THAT FINDING, then the judge shall impose the LEAST ONEROUS CONDITION(S) contained in Rule 8.4 that will reasonably assure the defendant's appearance or that will eliminate the risk of harm to others or the public at large.

IN DETERMINING THE LEAST ONEROUS CONDITION(S) FOR RELEASE, the judge must again take into account the factors set forth in Rule 8.2(a)(1) through (15). Allowable additional conditions of release are listed in Rule 8.4(b).

WHEN IMPOSING ADDITIONAL CONDITIONS, keep in mind that every accused person is presumed innocent. Your duty is to ensure that a presumptively innocent person is released under reasonable conditions pending trial.

WHEN ISSUING AN ORDER OF RELEASE, the judge MUST inform the defendant of the conditions of release, the possible consequences for violating them, and that a reported violation may result in the immediate issuance of an arrest warrant.

PROCEDURES FOR THE REVIEW OF CONDITIONS AND REVOCATION OF RELEASE are set forth in Rule 8.6 of the Mississippi Rules of Criminal Procedure.

REQUIRING THE COURT TO CONSIDER THE FACTORS LISTED IN RULE 8.2(a)(1) through (15) WHEN IMPOSING ANY NON-MANDATORY CONDITION(S) OF RELEASE IS "TO ENSURE THAT A JUDGE NOT GIVE INORDINATE WEIGHT TO THE NATURE OF THE PRESENT CHARGE."

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JUSTICE COURT / MUNICIPAL COURT BENCH CARD ON REVOCATION PROCEEDINGS

PROCEDURES ON REVOCATION PROCEEDINGS ARE SET FORTH IN RULE 27 OF THE MISSISSIPPI RULES OF CRIMINAL PROCEDURE. READ THE RULE!

JUSTICE COURT JUDGES may suspend sentences, or the execution of sentences, as set forth in Section 99-19-25.

MUNICIPAL COURT JUDGES may suspend sentences, or the execution of sentences, as set forth in Section 21-23-7(5).

Rule 27.4 of the Mississippi Rules of Criminal Procedures provides: "Proceedings to revoke or modify any other suspended sentence or period of post-release supervision shall be conducted in accordance with Rule 27."

BEFORE REVOKING OR MODIFYING A SUSPENDED SENTENCE, THE JUDGE MUST FOLLOW THE PROCEDURES IN RULE 27.

RULE 27 REQUIREMENTS:

- A petition giving sufficient notice of the alleged violations and the evidence to be relied upon.
- A summons to appear and show cause.
- An advisement on the right to testify, to present witnesses and evidence, and to cross-examine adverse witnesses.
- An advisement that comports with Rule 27.3(d) on the right to an attorney, and if indigent, an appointed attorney FREE OF COST.
- A hearing by the trial judge as set forth in Rule 27.3(f).

REVOCATION HEARINGS:

- Require proof by a preponderance of the evidence.
- Allow the judge to receive any reliable, relevant evidence not legally privileged, including hearsay.
- Allow the defendant a FULL OPPORTUNITY to present testimony, confront and cross-examine adverse witnesses, and to present evidence in his/her defense.

IF THE ALLEGED VIOLATION INVOLVES A CRIMINAL OFFENSE, then the judge must warn the defendant that incriminating statements may be used against him/her at a subsequent proceeding or trial. MRCrP 27.3(2).

IF THE ALLEGED VIOLATION IS THE NONPAYMENT OF A FINE, FEE, RESTITUTION, AND/OR COURT COSTS, then the judge MAY NOT revoke a suspended jail sentence UNLESS he/she examines the reasons for nonpayment and makes a written finding that the defendant could have satisfied payment but refused to do so. *See* Bearden v. Georgia, 461 U.S. 660 (1983).

AT THE HEARING, the judge may reduce the amount of the remaining fines, fees, restitution, and/or court costs, allow additional time for payments, and/or order community service with credit received at the highest current federal minimum wage. All orders revoking a suspended sentence must state the evidence relied upon and the reasons for the decision.

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