Rules of Criminal Procedure

Rule l.

Title, Scope, Purpose and Construction, Computation of Time, Prosecutions in Name of State, Definitions, Effective Date and Application, Criminal Magistrates

Rule 1.1. Title.

These rules shall be known and may be cited as the Arkansas Rules of Criminal Procedure.

Rule 1.2. Scope.

These rules shall govern the proceedings in all criminal cases in the Supreme Court and in circuit courts of the State of Arkansas. They shall also apply in all other courts where their application is practicable or constitutionally required.

Rule 1.3. Purpose and Construction.

These rules are intended to provide for a just, speedy determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, the elimination of unnecessary delay and expense, and to protect the fundamental rights of the individual while preserving the public interest.

Rule 1.4. Computation of Time.

Where these rules, any statute governing procedure in criminal proceedings, or any court order entered in a criminal proceeding prescribes that a period of time of more than twenty-four (24) hours may or must intervene between events or acts, the day on which one (1) only of the events or acts occurs shall be computed as part of the designated period. When the first or last day of a time period is a Saturday, Sunday, or state or federal legal holiday, it shall not be computed as part of the period, which shall run until the end of the next day which is neither a Saturday, Sunday, nor a legal holiday. Whenever a party has the right or is required to take some action within a prescribed period after service of a notice or other paper and such service is allowed and made by mail, five (5) days shall be added to the prescribed period.

Rule 1.5. Prosecutions in Name of State.

All prosecutions for violations of the criminal laws of this state shall be in the name of the State of Arkansas, provided that this rule shall in no way affect the distribution, as provided by law, of moneys collected by district courts.

Rule 1.6. Definitions.

For the purposes of these rules, unless the context otherwise plainly requires:

(a) "Law enforcement officer" and "officer" mean any person vested by law with a duty to maintain public order or to make arrests for offenses.

(b) "Prosecuting attorney" means any person legally elected, appointed, or otherwise designated or charged generally or specially with the duty of prosecuting persons accused of crime or traffic offenses, and includes, but is not limited to:

(i) a prosecuting attorney and any of his deputies or assistants; and

(ii) a city attorney and any of his deputies or assistants.

(c) "Judicial officer" means a person in whom is vested authority to preside over the trial of criminal cases.

(d) "Information" means:

(i) an instrument issued by a prosecuting attorney charging an offense; and

(ii) an indictment.

(e) "Defense counsel" shall include the defendant in a case, as well as his attorney, whenever obligations are imposed upon defense counsel.

(f) "District court" shall mean a court established pursuant to § 7, Amendment 80 to the Arkansas Constitution. The term shall include a city court that ; continues in existence after January 1, 2005, pursuant to § 19 (B)(2), Amendment 80 to the Arkansas Constitution.

Rule 1.7. Effective Date and Application.

(a) These rules shall apply to all criminal proceedings commenced upon or after the effective date hereof, and all appeals and other post-conviction proceedings relating thereto.

(b) These rules shall also apply to (i) all criminal proceedings commenced prior to the effective date hereof but still pending on such date, and (ii) all appeals and other post-conviction proceedings commenced upon or after such effective date which relate to criminal actions and proceedings commenced or concluded prior to such effective date; Provided That, if application of these provisions in any particular case would not be feasible or would work injustice, these rules shall not apply.

(c) The provisions of this chapter do not impair or render ineffectual any proceedings or procedural matters which occurred prior to the effective date thereof.

(d) These rules shall become effective on January 1, 1976.

Rule 1.8. Criminal Magistrates.

(a) With the concurrence of a majority of the circuit court judges of a judicial circuit, the administrative judge of the judicial circuit may designate one or more district court judge(s), with the judge's consent, as a referee or master, who shall be referred to as a "criminal magistrate" for the judicial circuit, and who shall be authorized to perform any of the duties described in subsection (b) of this rule. A criminal magistrate shall be subject at all times to the superintending control of the circuit judges of the judicial circuit, and the criminal magistrate's territorial jurisdiction shall be coextensive to that of the circuit judges of the judicial circuit unless specifically limited by the designating order.

(b) A criminal magistrate may perform the following duties with respect to an investigation or prosecution of an offense lying within the exclusive jurisdiction of the circuit court:

(i) Issue a search warrant pursuant to Rule 13.1.

(ii) Issue an arrest warrant pursuant to Rule 7.1 or Arkansas Code § 16-81-104, or issue a summons pursuant to Rule 6.1.

(iii) Make a reasonable cause determination pursuant to Rule 4.1(e).

(iv) Conduct a first appearance pursuant to Rule 8.1, at which the criminal magistrate may appoint counsel pursuant to Rule 8.2; inform a defendant pursuant to Rule 8.3; accept a plea of "not guilty" or "not guilty by reason of insanity"; conduct a pretrial release inquiry pursuant to Rules 8.4 and 8.5; or release a defendant from custody pursuant to Rules 9.1, 9.2, and 9.3.

(v) Conduct a preliminary hearing as provided in Ark. Code Ann. § 16-93-307(a).

(c) If a person is charged with the commission of an offense lying within the exclusive jurisdiction of the circuit court, a criminal magistrate designated pursuant to this rule may not accept or approve a plea of guilty or nolo contendere to the offense charged or to a lesser included offense.

(d) Nothing in this order shall affect the authority of a district court judge to perform the duties described in subsection (b) as otherwise permitted by these Rules or other law.

(e) Nothing in this rule shall impair or render ineffectual any proceeding or procedural matters which occurred before the effective date of this rule.

HISTORY

Amended and effective by per curiam order Sep. 26, 2013.

Rule 1.9. Compliance with Administrative Order 19–Confidential Information

Administrative Order Number 19 requires that "confidential information" be excluded from the "case record," as those terms are therein defined. Every pleading, motion, response, order, and other paper filed in a case, and any document attached to any of them, must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal.

COMMENT

Reporter's Note: Administrative Order 19 requires that any necessary and relevant confidential information in a case record must be redacted. Unrepresented parties, counsel, and judges must follow the redaction/duplicate-filing-under-seal procedure outlined in Rules of Civil Procedure (5)(c)(2)(A) & (B) and 58 for all case records, as that term is defined by Administrative Order 19

Section III(A)(2), and which includes all pleadings and papers and attached materials. *See* Reporter's Notes, 2009 Amendment to Rules of Civil Procedure 5 and 58.

HISTORY

Added December 11, 2008, effective January 1, 2009.

Rule 2. Pre-Arrest Contacts

Rule 2.1. Definitions.

For the purposes of this Article, unless the context otherwise plainly requires:

"Reasonable suspicion" means a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion.

Rule 2.2. Authority to Request Cooperation.

(a) A law enforcement officer may request any person to furnish information or otherwise cooperate in the investigation or prevention of crime. The officer may request the person to respond to questions, to appear at a police station, or to comply with any other reasonable request.

(b) In making a request pursuant to this rule, no law enforcement officer shall indicate that a person is legally obligated to furnish information or to otherwise cooperate if no such legal obligation exists. Compliance with the request for information or other cooperation hereunder shall not be regarded as involuntary or coerced solely on the ground that such a request was made by a law enforcement officer.

Rule 2.3. Warning To Persons Asked To Appear At A Police Station.

If a law enforcement officer acting pursuant to this rule requests any person to come to or remain at a police station, prosecuting attorney's office or other similar place, he shall take such steps as are reasonable to make clear that there is no legal obligation to comply with such a request.

Rule 3. Detention Without Arrest

Rule 3.1. Stopping and Detention of Person: Time Limit.

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

Rule 3.2. Advice as to Reason for Detention.

A law enforcement officer who has detained a person under Rule 3.1 shall immediately advise that person of his official identity and the reason for the detention.

Rule 3.3. Use of Force.

A law enforcement officer acting under the authority of Rule 3.1 may use such nondeadly force as may be reasonably necessary under the circumstances to stop and detain any person for the purposes authorized by Rules 3.1 through 3.5.

Rule 3.4. Search for Weapons.

If a law enforcement officer who has detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

Rule 3.5. Stop of Witness to Crime.

Whenever a law enforcement officer has reasonable cause to believe that any person found at or near the scene of a felony is a witness to the offense, he may stop that person. After having identified himself, the officer must advise the person of the purpose of the stopping and may then demand of him his name, address, and any information he may have regarding the offense. Such detention shall in all cases be reasonable and shall not exceed fifteen (15) minutes unless the person shall refuse to give such information, in which case the person, if detained further, shall immediately be brought before any judicial officer or prosecuting attorney to be examined with reference to his name, address, or the information he may have regarding the offense.

Rule 4. Arrest: General Provisions

Rule 4.1. Authority to Arrest Without Warrant.

(a) A law enforcement officer may arrest a person without a warrant if:

(i) the officer has reasonable cause to believe that such person has committed a felony;

(ii) the officer has reasonable cause to believe that such person has committed a traffic offense involving:

(A) death or physical injury to a person; or

(B) damage to property; or

(C) driving a vehicle while under the influence of any intoxicating liquor or drug;

(iii) the officer has reasonable cause to believe that such person has committed any violation of law in the officer's presence;

(iv) the officer has reasonable cause to believe that such person has committed acts which constitute a crime under the laws of this state and which constitute domestic abuse as defined by law against a family or household member and which occurred within four (4) hours preceding the arrest if no physical injury was involved or 12 (twelve) hours preceding the arrest if physical injury, as defined in Ark. Code Ann. § 5-1-102, was involved;

(v) the officer is otherwise authorized by law.

(b) A private person may make an arrest where he has reasonable grounds for believing that the person arrested has committed a felony.

(c) An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer or private citizen is unable to determine the particular offense which may have been committed.

(d) A warrantless arrest by an officer not personally possessed of information sufficient to constitute reasonable cause is valid where the arresting officer is instructed to make the arrest by a police agency which collectively possesses knowledge sufficient to constitute reasonable cause.

(e) A person arrested without a warrant shall not be held in custody unless a judicial officer determines, from affidavit, recorded testimony, or other information, that there is reasonable cause to believe that the person has committed an offense. Such reasonable cause determination shall be made promptly, but in no event longer than forty-eight (48) hours from the time of arrest, unless the prosecuting attorney demonstrates that a bona fide emergency or other extraordinary circumstance justifies a delay longer than forty-eight (48) hours. Such reasonable cause determination may be made at the first appearance of the arrested person pursuant to Rule 8.1.

Reporter's Notes, 2001 Amendment: Concerning subsection (a) (iv), see Ark. Code Ann. § 16-81-113 (a)(1), as amended by Act 1421 of 2001. Subsection (a) (v) is intended to incorporate current and future statutes authorizing an arrest without a warrant. Examples of such statutory authority include Ark. Code. Ann. § 5-4-309 (warrantless arrest for violation of probation); Ark. Code. Ann. § 5-36-116 (warrantless arrest for shoplifting); Ark. Code. Ann. § 5-53-134 (warrantless arrest for violation of protective order); Ark. Code Ann. § 16-81-114 (warrantless arrest for gas theft); and Ark. Code. Ann. § 16-93-705 (warrantless arrest for violation of parole).

Rule 4.2. Authority to Arrest with Warrant.

Any law enforcement officer may arrest a person pursuant to a warrant in any county in the state.

Rule 4.3. Arrest Pursuant to Warrant: Possession of Warrant Unnecessary.

A law enforcement officer need not have a warrant in his possession at the time of an arrest, but upon request he shall show the warrant to the accused as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall inform the accused of the fact that the warrant has been issued.

Rule 4.4. Procedures on Arrest.

Upon making an arrest, a law enforcement officer shall

(a) identify himself as such unless his identity is otherwise apparent;

(b) inform the arrested person that he is under arrest; and

(c) as promptly as is reasonable under the circumstances, inform the arrested person of the cause of the arrest.

Rule 4.5. Limitations on Questioning.

No law enforcement officer shall question an arrested person if the person has indicated in any manner that he does not wish to be questioned, or that he wishes to consult counsel before submitting to any questioning.

Rule 4.6. Procedures on Arrest: Prompt Taking to Police Station.

Any person arrested, if not released pursuant to these rules, shall be brought promptly to a jail, police station, or other similar place. The arresting officer may, however, first take the person to some other place, if:

(a) the person so requests; or

(b) such action is reasonably necessary for the purpose of having the person identified:

(i) by a person who is otherwise unlikely to be able to make the identification; or

(ii) by a person near the place of the arrest or near the scene of a recently committed offense.

Rule 4.7. Recording Custodial Interrogations.

(a) Whenever practical, a custodial interrogation at a jail, police station, or other similar place, should be electronically recorded.

(b)(1) In determining the admissibility of any custodial statement, the court may consider, together with all other relevant evidence and consistent with existing law, whether an electronic recording was made; if not, why not; and whether any recording is substantially accurate and not intentionally altered.

(2) The lack of a recording shall not be considered in determining the admissibility of a custodial statement in the following circumstances:

(A) a statement made by the accused in open court at his or her trial, before a grand jury, or at a preliminary hearing,

(B) a statement made during a custodial interrogation that was not recorded because electronic recording was not practical,

(C) a voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the accused as a witness,

(D) a spontaneous statement that is not made in response to a question,

(E) a statement made after questioning that is routinely asked during the processing of the arrest of the suspect,

(F) a statement made during a custodial interrogation by a suspect who requests, prior to making the statement, to respond to the interrogator's questions only if an electronic recording is not made of the statement, provided that an electronic recording is made of the statement of agreeing to respond to the interrogator's question, only if a recording is not made of the statement, or

(G) a statement made during a custodial interrogation that is conducted out-of-state.

(3) Nothing in this rule precludes the admission of a statement that is used only for impeachment and not as substantive evidence.

(c) An electronic recording must be preserved until the later of:

(1) the date on which the defendant's conviction for any offense relating to the statement is final and all direct and post-conviction proceedings are exhausted, or

(2) the date on which the prosecution for all offenses relating to the statement is barred by law.

(d) In this rule, "electronic recording" includes motion picture, audiotape, or videotape, or digital recording.

Reporter's Notes, 2012: This rule was added in 2012 in response to the decision in *Clark v. State*, 374 Ark. 292, 287 S.W.3d 567 (2008). The rule does not mandate the recording of all custodial statements. Instead, it allows the trial court to consider the failure to record a statement in determining the admissibility of the statement.

Rule 5. Release by a Law Enforcement Officer Acting Without an Arrest Warrant

Rule 5.1. Definitions.

For the purposes of this Article, unless the context otherwise plainly requires:

(a) "Citation" means a written order, issued by a law enforcement officer who is authorized to make an arrest, requiring a person accused of violating the law to appear in a designated court or governmental office at a specified date and time.

(b) "Summons" means an order issued by a judicial officer or, pursuant to the authorization of a judicial officer, by the clerk of a court, requiring a person against whom a criminal charge has been filed to appear in a designated court at a specified date and time.

(c) "Order to appear" means an order issued by a judicial officer at or after the defendant's first appearance releasing him from custody or continuing him at large pending disposition of his case but requiring him to appear in court or in some other place at all appropriate times.

(d) "Release on own recognizance" means the release of a defendant without bail upon his promise to appear at all appropriate times, sometimes referred to as "personal recognizance."

(e) "Release on bail" means the release of a defendant upon the execution of a bond, with or without sureties, which may be secured by the pledge of money or property.

(f) "First appearance" means the first proceeding at which a defendant appears before a judicial officer.

Rule 5.2. Authority to Issue Citations.

(a) A law enforcement officer in the field acting without a warrant who has reasonable cause to believe that a person has committed any misdemeanor may issue a citation in lieu of arrest or continued custody.

(b) When a person is arrested for any misdemeanor, the ranking officer on duty at the place of detention to which the arrested person is taken may issue a citation in lieu of continued custody.

(c) Upon the recommendation of a prosecuting attorney, the ranking officer on duty at the place of detention to which the arrested person is taken may issue a citation in lieu of continued custody when the person has been arrested for a felony.

(d) In determining whether to continue custody or issue a citation under (a) or (b) above, the officer shall inquire into and consider facts about the accused, including but not limited to:

(i) place and length of residence;

(ii) family relationships;

(iii) references;

(iv) present and past employment;

(v) criminal record; and

(vi) other relevant facts such as:

(A) whether an accused fails to identify himself satisfactorily;

(B) whether an accused refuses to sign a promise to appear pursuant to citation;

(C) whether detention is necessary to prevent imminent bodily harm to the accused or to another;

(D) whether the accused has ties to the jurisdiction reasonably sufficient to assure his appearance and there is a substantial likelihood that he will respond to a citation;

(E) whether the accused previously has failed to appear in response to a citation.

Rule 5.3. Form of Citation.

(a) Every citation issued to a person shall:

(i) be in writing;

(ii) state the name of the officer issuing it with the title of his office;

(iii) state the date of issuance and the municipality or county where issued;

(iv) specify the name of the accused and the offense alleged;

(v) designate a time, place, and court for the appearance of the accused; and

(vi) except in case of an electronic citation, provide a space for the signature of the accused acknowledging his promise to appear.

(b) Every citation shall inform the accused that failure to appear at the stated time, place, and court may result in his arrest and shall constitute a separate offense for which he may be prosecuted.

Reporter's Notes, 2012 Amendment: Prior to the 2012 amendment, subsection (a)(ii) required the issuing officer to sign a citation. As amended, the subsection requires only that the citation state the name of the issuing officer. This change, as well as addition of the exception clause to subsection (a)(iv), was prompted by Act 908 of 2011, which authorizes the use of electronic citations.

Rule 5.4. Procedure for Issuing Citations.

(a) In issuing a citation the officer shall deliver one (1) copy of the citation to the accused.

(b) The officer shall thereupon release the accused or, if the person appears mentally or physically unable to care for himself, take him to an appropriate medical facility.

(c) As soon as practicable, one (1) copy of the citation shall be filed with the court specified therein, and one (1) copy shall be delivered to the prosecuting attorney. If an electronic citation is issued, (i) either a written or electronic copy of the citation shall be filed with the court specified therein as designated by the clerk of that court, and (ii) either a written or electronic copy of the citation shall be delivered to the prosecuting attorney as designated by the prosecuting attorney.

Reporter's Notes, 2012 Amendment. The 2012 amendment added the final sentence of subsection (c). See Act 908 of 2011 authorizing the use of electronic citations.

HISTORY

Sections 5.3 and 5.4 were amended by per curiam order February 23, 2012—effective April 1, 2012.

Rule 5.5. [Repealed.]

Rule 6. Issuance of Summons in Lieu of Arrest Warrant

Rule 6.1. Authority To Issue Summons.

(a) A judicial officer with the authority to issue an arrest warrant may issue, or authorize the clerk of the court to issue, a criminal summons in lieu thereof in any case in which a complaint, information, or indictment is filed or returned against a person not already in custody.

(b) A prosecuting attorney who files an information or approves the filing of a complaint against a person not already in custody may authorize the clerk of a court to issue a criminal summons in lieu of an arrest warrant.

(c) A summons shall not be issued pursuant to this Rule if:

> (i) the offense, or the manner in which it was committed, involved violence to a person or the risk or threat of imminent serious bodily injury; or
>
> (ii) it appears that the person charged would not respond to a summons. In determining whether the defendant would respond to a summons, appropriate considerations include, but are not limited to:
>
> > (A) the nature and circumstances of the offense charged;
> >
> > (B) the weight of the evidence against the person;
> >
> > (C) place and length of residence;
> >
> > (D) present and past employment;
> >
> > (E) family relationship;
> >
> > (F) financial circumstances;
> >
> > (G) apparent mental condition;
> >
> > (H) past criminal record;
> >
> > (I) previous record of appearance at court proceedings; and
> >
> > (J) any other relevant information.

Reporter's Notes, 2007 Amendments: The 2007 amendments made minor editorial changes to subsection (a) and rephrased subsection (b). Subsection (c), which was added in 2007, is based on language originally found in Rule 7.1. In *Johnson v. State*, 98 Ark. App. 245, 254 S.W.3d 794 (2007), the Court of Appeals held that issuance of a summons is mandatory unless the defendant is charged with a violent offense or it appears that the defendant will not respond to a summons. The 2007 changes to Rule 6.1 and Rule 7.1 were intended to make clear that use of a summons rather than an arrest

Rule 6.2. Form of Summons.

(a) A summons shall:

(i) be in writing;

(ii) be signed by the officer issuing it with the title of his office;

(iii) state the date of issuance and the municipality or county where issued;

(iv) specify the name of the accused and the offense alleged;

(v) designate a time, place, and court for the appearance of the accused; and

(vi) have attached a copy of the information, complaint or indictment.

(b) Every summons shall inform the accused that failure to appear at the stated time, place, and court may result in his arrest and shall constitute a separate offense for which he may be prosecuted.

Rule 6.3. Service of Criminal Summons.

Criminal summons may be served by:

(a) any method prescribed for personal service of civil process; or

(b) certified mail, for delivery to addressee only with return receipt requested.

Rule 7. Arrest with a Warrant

Rule 7.1. Arrest with a Warrant: Basis for Issuance of Arrest Warrant.

(a) A judicial officer may issue an arrest warrant for a person who has failed to appear in response to a summons or citation.

(b) In addition, a judicial officer may issue a warrant for the arrest of a person if, from affidavit, recorded testimony, or other documented information, it appears there is reasonable cause to believe an offense has been committed and the person committed it. A judicial officer may issue a summons in lieu of an arrest warrant as provided in Rule 6.1. An affidavit or other documented information in support of an arrest warrant may be transmitted to the issuing judicial officer by facsimile or by other electronic means. Recorded testimony in support of an arrest warrant may be received by telephone or other electronic means provided the issuing judicial officer first administers an oath by telephone or other electronic means to the person testifying in support of the issuance of the warrant.

(c) A judicial officer who has determined that an arrest warrant should be issued may authorize the clerk of the court or his deputy to issue the warrant.

COMMENT

Reporter's Notes, 2007 Amendments: The 2007 amendments deleted language that addressed at length the issuance of a criminal summons in lieu of an arrest warrant. The amendments were

intended to overturn *Johnson v. State*, 98 Ark. App. 245, 254 S.W.3d 794 (2007), insofar as that case held that issuance of a summons was mandatory in certain cases.

Reporter's Notes 2013 Amendment: The 2013 amendment made it clear that in all situations in which a warrant should issue, the judicial officer may delegate the actual issuance of the warrant to a clerk of deputy clerk.

Reporter's Note, 2014: In 2014, subsection (b) was amended to address the transmission by electronic means of affidavits in support of a warrant. In addition, oaths and recorded testimony may be administered and received by telephone or other electronic means that permit audible communication.

HISTORY

Amended and effective by per curiam order Sep. 26, 2013; amended May 29, 2014, effective July 1, 2014.

Rule 7.2. Form of Warrant.

(a) Every arrest warrant shall:

(i) be in writing and in the name of the state;

(ii) be directed to all law enforcement officers in the state;

(iii) be signed by the issuing official with the title of his office and the date of issuance;

(iv) specify the name of the accused or, if his name is unknown, any name or description by which he can be identified with reasonable certainty;

(v) have attached a copy of the information, if filed, or, if not filed, a copy of any affidavit supporting issuance; and

(vi) command that the accused be arrested and that unless he complies with the terms of release specified in the warrant he be brought before a judicial officer without unnecessary delay.

(b) The warrant may specify the manner in which it is to be executed, and may specify terms of release and requirements for appearance.

Rule 7.3. Return of Warrant And Summons; Execution After Return.

(a) The law enforcement officer executing a warrant shall make return thereof to the court before which the accused is brought, and notice thereof shall be given to the prosecuting attorney.

(b) On or before the date for appearance the officer to whom a summons was delivered for service shall make return thereof to the judicial officer before whom the summons is returnable.

(c) At any time while a complaint, information or indictment is pending, the issuing official may deliver a warrant returned unexecuted and not cancelled, or a summons returned unserved, or a duplicate of either to a law enforcement officer or other authorized person for execution or service.

(d) Upon return of a warrant, whether executed or unexecuted, the warrant along with the affidavit or sworn testimony on application shall be filed with the clerk of the issuing judicial officer, and they shall be publically accessible unless the court for good cause based upon reasonably specific facts orders that any of them should be closed or sealed.

(e) Arrest warrants, affidavits, or sworn testimony on application are filed in the warrant docket as described in Administrative Order Number 2 or 18. Administrative Order Number 19 governs public access to documents in the warrant docket subject to the provisions of this rule (see section (VII)(A)(3); see section (VIII) for obtaining access to documents excluded from public access). Remote electronic access to the warrant docket by the general public, however, shall be governed by and subject to the policies or requirement of the court.

COMMENT

Reporter's Note, 2015 Amendment: This rule was amended by adding subsections (d) and (e) to provide for the filing of arrest warrants upon their return, whether executed or unexecuted, in a warrant docket.

HISTORY

Amended July 2, 2015, effective September 1, 2015.

Rule 8. Release by Judicial Officer at First Appearance

Rule 8.1. Prompt First Appearance.

An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay.

Rule 8.2. Appointment of Counsel.

(a) A judicial officer shall determine whether the defendant is indigent and, if so, appoint counsel to represent him or her at the first appearance, unless the defendant knowingly and intelligently waives the appointment of counsel. The court need not appoint counsel if the indigent defendant is charged with a misdemeanor and the court has determined that under no circumstances will incarceration be imposed as a part of any punishment. A suspended or probationary sentence to incarceration shall be considered a sentence to incarceration if revocation of the suspended or probationary sentence may result in the incarceration of the indigent without the opportunity to contest guilt of the offense for which incarceration is imposed.

(b) Attorneys appointed by district courts courts may receive fees for services rendered upon certification by the presiding judicial officer if provision therefor has been made by the county or municipality in which the offense is committed or the services are rendered. Attorneys so appointed shall continue to represent the indigent accused until relieved for good cause or until substituted by other counsel.

COMMENT

Reporter's Notes: The addition of the last sentence to Rule 8.2(c) is intended to ensure that where counsel is appointed in municipal court, the appointment continues for purposes of this rule even in circuit court proceedings unless and until appointed counsel is relieved or new counsel is appointed.

Reporter's Note, 2003 Amendments: The amendments made two changes to subsection (b). The word "imprisonment" was replaced with the word "incarceration" to avoid any implication that the right to counsel attaches only when the defendant faces confinement in state prison. The final sentence was added to incorporate the United States Supreme Court holding in *Alabama v. Shelton*, 535 U.S. 654 (2002).

Reporter's Note, 2017 Amendments: This change clarifies what Rule 8 has always required: that judges appoint lawyers for indigent defendants to represent them at the first appearance. See *Bradford v. State*, 325 Ark. 278 (1996) ("Rule 8.2 provides that the trial court shall appoint counsel to represent an indigent defendant at the first appearance, if the right is not knowingly and intelligently waived.").

HISTORY

Rule 8.2(c) amended and effective by per curiam order June 22, 2012; amended December 14, 2017, effective January 1, 2018.

Rule 8.3. Nature of First Appearance.

(a) Upon the first appearance of the defendant the judicial officer shall inform him of the charge. The judicial officer shall also inform the defendant that:

(i) he is not required to say anything, and that anything he says can be used against him;

(ii) he has a right to counsel; and

(iii) he has a right to communicate with his counsel, his family, or his friends, and that reasonable means will be provided for him to do so.

(b) No further steps in the proceedings other than pretrial release inquiry may be taken until the defendant and his counsel have had an adequate opportunity to confer, unless the defendant has intelligently waived his right to counsel or has refused the assistance of counsel.

(c) The judicial officer, if unable to dispose of the case at the first appearance, shall proceed to decide the question of the pretrial release of the defendant. In so doing, the judicial officer shall first determine by an informal, non-adversary hearing whether there is probable cause for detaining the arrested person pending further proceedings. The standard for determining probable cause at such hearing shall be the same as that which governs arrests with or without a warrant.

Rule 8.4. Pretrial Release Inquiry: In What Circumstances Conducted.

(a) An inquiry by the judicial officer into the relevant facts which might affect the pretrial release decision shall be made:

(i) in all cases where the maximum penalty for the offense charged exceeds one (1) year and the prosecuting attorney does not stipulate that the defendant may be released on his own recognizance;

(ii) in those cases where the maximum penalty for the offense charged is less than one (1) year and in which a law enforcement officer gives notice to the judicial officer that he intends to oppose release of the defendant on his own recognizance.

(b) In all other cases, the judicial officer may release the defendant on his own recognizance or on order to appear without conducting a pretrial release inquiry.

Rule 8.5. Pretrial Release Inquiry: When Conducted; Nature of.

(a) A pretrial release inquiry shall be conducted by the judicial officer prior to or at the first appearance of the defendant.

(b) The inquiry should take the form of an assessment of factors relevant to the pretrial release decision, such as:

(i) the defendant's employment status, history and financial condition;

(ii) the nature and extent of his family relationships;

(iii) his past and present residence;

(iv) his character and reputation;

(v) persons who agree to assist him in attending court at the proper times;

(vi) the nature of the current charge and any mitigating or aggravating factors that may bear on the likelihood of conviction and the possible penalty;

(vii) the defendant's prior criminal record, including history of violence, if any, and, if he previously has been released pending trial, whether he appeared as required;

(viii) any facts indicating the possibility of violations of law if the defendant is released without restrictions, including the risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any witness, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person; and

(ix) any other facts tending to indicate that the defendant has strong ties to the community and is not likely to flee the jurisdiction.

(c) The prosecuting attorney should make recommendations to the judicial officer concerning:

(i) the advisability and appropriateness of pretrial release;

(ii) the amount and type of bail bond;

(iii) the conditions, if any, which should be imposed on the defendant's release.

History.

Amended by per curiam order November 1, 2023—effective January1, 2024.

Rule 8.6. Time for Filing Formal Charge.

If the defendant is continued in custody subsequent to the first appearance, the prosecuting attorney shall file an indictment or information in a court of competent jurisdiction within sixty days of the defendant's arrest. Failure to file an indictment or information within sixty days shall not be grounds for dismissal of the case against the defendant, but shall, upon motion of the defendant, result in the defendant's release from custody unless the prosecuting attorney establishes good cause for the delay. If good cause is shown, the court shall reconsider bail for the defendant.

Reporter's Notes: This rule is intended to address the problem identified in *State v. Pulaski County Circuit Court*, 326 Ark. 886, 934 S.W. 2d 915 (1996), modified on rehearing, 327 Ark. 287, 938 S.W. 2d 815 (1997), wherein the person was arrested without a warrant, was continued in custody beyond his first appearance in municipal court, but waited over two months before his case was formally filed in circuit court by the filing of an information. This rule contemplates that, in the typical case, formal charges should be filed within a reasonable time following an arrest with sufficient latitude being given for circumstances that are beyond the prosecuting attorney's control and which necessitate a delay in the filing of formal charges. Nothing in this rule shall be construed to abrogate the defendant's privilege to file an application for writ of habeas corpus or any other applicable extraordinary remedy.

Rule 8.7. Use of Video Conferences in Pretrial Proceedings.

(a) If the defendant is confined in a jail, prison, or other detention facility, a first appearance as provided in Rules 8.1 and 8.3 or a pretrial release inquiry as provided in Rule 8.4 may be conducted by video conference as provided in this rule.

(b) Any video conferencing system used under this rule must meet all the following requirements:

(1) All participants in the proceeding must be able to see, hear, and communicate with each other simultaneously during the proceeding.

(2) All participants in the proceeding must be able to see and hear any witnesses who may testify in the proceeding.

(3) All participants in the proceeding must be able to see, hear, and otherwise observe any physical evidence or exhibits presented during the proceeding, either by video, facsimile, or other method.

(4) The video quality of the video conferencing system must be adequate to allow the participants to observe each other's demeanor and nonverbal expressions as well as the demeanor and nonverbal expressions of any witnesses who testify in the proceeding.

(5) If the defendant is represented by an attorney, the attorney shall, upon request, be provided with the opportunity for confidential communication with the defendant.

(c) As used in this rule, the "participants in the proceeding" mean the judicial officer conducting the proceeding, the prosecuting or deputy prosecuting attorney, the defendant, and, if the defendant is represented by an attorney, the attorney.

(d) An attorney representing a defendant during a video conference may elect to be present either in the courtroom with the presiding judicial officer or in the place where the defendant is confined. With the approval of the court, an attorney may represent a defendant during a video conference from a location other than the courtroom or the place of detention.

COMMENT

Reporter's Notes, 2012: This rule was added in 2012 to provide guidance on the use of videoconferencing equipment in pretrial proceedings.

HISTORY

Rule 8.7 adopted by per curiam order November 15, 2012, effective January 1, 2013.

Rule 9. The Release Decision

Rule 9.1. Release on Order to Appear or on Defendant's Own Recognizance.

(a) At the first appearance the judicial officer may release the defendant on his personal recognizance or upon an order to appear.

(b) Where conditions of release are found necessary, the judicial officer should impose one (1) or more of the following conditions:

(i) place the defendant under the care of a qualified person or organization agreeing to supervise the defendant and assist him in appearing in court;

(ii) place the defendant under the supervision of a probation officer or other appropriate public official;

(iii) impose reasonable restrictions on the activities, movements, associations, and residences of the defendant;

(iv) release the defendant during working hours but require him to return to custody at specified times; or

(v) impose any other reasonable restriction to ensure the appearance of the defendant.

Rule 9.2. Release on Money Bail.

(a) The judicial officer shall set money bail only after he determines that no other conditions will reasonably ensure the appearance of the defendant in court.

(b) If it is determined that money bail should be set, the judicial officer shall require one (1) of the following:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by a deposit of cash or securities equal to ten per cent (10%) of the face amount of the bond. Ninety per cent (90%) of the deposit shall be returned at the conclusion of the proceedings, provided the defendant has not defaulted in the performance of the conditions of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash, or by other property, or by obligation of qualified sureties.

(c) In setting the amount of bail the judicial officer should take into account all facts relevant to the risk of willful nonappearance including:

(i) the length and character of the defendant's residence in the community;

(ii) his employment status, history and financial condition;

(iii) his family ties and relationship;

(iv) his reputation, character and mental condition;

(v) his past history of response to legal process;

(vi) his prior criminal record, including history of violence, if any;

(vii) the identity of responsible members of the community who vouch for the defendant's reliability;

(viii) the nature of the current charge, the apparent probability of conviction and the likely sentence, in so far as these factors are relevant to the risk of nonappearance, including the risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any witness, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person; and

(ix) any other factors indicating the defendant's roots in the community.

(d) Nothing in this rule shall be construed to prohibit a judicial officer from permitting a defendant charged with an offense other than a felony from posting a specified sum of money which may be forfeited or applied to a fine and costs in lieu of any court appearance.

(e) An appearance bond and any security deposit required as a condition of release pursuant to subsection (b) of this rule shall serve to guarantee all subsequent appearances of a defendant on the same charge or on other charges arising out of the same conduct before any court, including appearances relating to appeals and upon remand. If the defendant is required to appear before a court other than the one ordering release, the

order of release together with the appearance bond and any security or deposit shall be transmitted to the court before which the defendant is required to appear. This subsection shall not be construed to prevent a judicial officer from:

(i) decreasing the amount of bond, security or deposit required by another judicial officer; or

(ii) upon making written findings that factors exist increasing the risk of willful nonappearance, increasing the amount of bond, security, or deposit required by another judicial officer.

Upon an increase in the amount of bond or security, a surety may surrender a defendant.

Rule 9.3. Prohibition of Wrongful Acts Pending Trial.

If it appears that there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice, the judicial officer, upon the release of the defendant, may enter an order:

(a) prohibiting the defendant from approaching or communicating with particular persons or classes of persons, except that no such order shall be deemed to prohibit any lawful and ethical activity of defendant's counsel;

(b) prohibiting the defendant from going to certain described geographical areas or premises;

(c) prohibiting the defendant from possessing any dangerous weapon, or engaging in certain described activities or indulging in intoxicating liquors or in certain drugs;

(d) requiring the defendant to report regularly to and remain under the supervision of an officer of the court.

Rule 9.4. Notice of Penalties.

(a) When the conditions of the release of a defendant are determined or an order is entered under Rule 9.3, the judicial officer shall inform the defendant of the penalties for failure to comply with the conditions or terms of such order.

(b) All conditions of release and terms of orders under Rule 9.3 shall be recorded in writing and a copy given to the defendant.

Rule 9.5. Violations of Conditions of Release.

(a) A judicial officer shall issue a warrant directing that the defendant be arrested and taken forthwith before any judicial officer having jurisdiction of the charge for a hearing when the prosecuting attorney submits a verified application alleging that:

(i) the defendant has willfully violated the conditions of his release or the terms of an order under Rule 9.3; or

(ii) pertinent information which would merit revocation of the defendant's release has become known to the prosecuting attorney.

(b) A law enforcement officer having reasonable grounds to believe that a released defendant has violated the conditions of his release or the terms of an order under Rule 9.3 is authorized to arrest the defendant and to take him forthwith before any judicial officer having jurisdiction when it would be impracticable to secure a warrant.

(c) After a hearing, and upon finding that the defendant has willfully violated reasonable conditions or the terms of an order under Rule 9.3 imposed on his release, the judicial officer may impose different or additional conditions of release upon the defendant or revoke his release.

["Order for Issuance of Arrest Warrant and Summons/Order for Surety to Appear;" Implementing Act 752 of 2003 Arkansas General Assembly; To be appended to Rule 9.5, Rules of Criminal Procedure. Effective January 1, 2005. [PDF, WP5.1] See per curiam delivered November 18, 2004. [HTML, WP5.1]]

Rule 9.6. Commission of Felony While Awaiting Trial.

If it is shown that any court has found reasonable cause to believe that a defendant has committed a felony while released pending adjudication of a prior charge, the court which initially released him may revoke his release.

Rule 10. General Provisions

Rule 10.1. Definitions.

For the purposes of this Article, unless a different meaning is plainly required:

(a) "Search" means any intrusion other than an arrest, by an officer under color of authority, upon an individual's person, property, or privacy, for the purpose of seizing individuals or things or obtaining information by inspection or surveillance, if such intrusion, in the absence of legal authority or sufficient consent, would be a civil wrong, criminal offense, or violation of the individual's rights under the Constitution of the United States or this state.

(b) "Seizure" means the taking of any person or thing or the obtaining of information by an officer pursuant to a search or under other color of authority.

(c) "Search warrant" means an order issued by a judicial officer authorizing a search or seizure or both.

(d) "Officer" means a law enforcement officer or other person acting under color of authority to search and seize.

(e) "Individual" includes a corporation.

(f) "Vehicle" includes any craft or device for the transportation of persons or things by land, sea or air.

(g) "Property" means real or personal property, including vehicles.

(h) "Reasonable cause to believe" means a basis for belief in the existence of facts which, in view of the circumstances under and purposes for which the standard is applied, is substantial, objective, and sufficient to satisfy applicable constitutional requirements.

(i) "Reasonable belief" means a belief based on reasonable cause to believe.

Rule 10.2. Permissible Objects of Seizure.

(a) Unless prohibited by other express provision, the following are subject to seizure:

(i) evidence of or other information except privileged information concerning the commission of a criminal offense or other violation of law;

(ii) contraband, the fruits of crime, or things possessed in violation of the laws of this state;

(iii) weapons or other things used or likely to be used as means of committing a criminal offense; and

(iv) an individual for whose arrest there is reasonable cause, or who is unlawfully held in confinement or other restraint.

Rule 11. Search and Seizure by Consent

Rule 11.1. Authority to Search and Seize Pursuant to Consent.

(a) An officer may conduct searches and make seizures without a search warrant or other color of authority if consent is given to the search.

(b) The state has the burden of proving by clear and positive evidence that consent to a search was freely and voluntarily given and that there was no actual or implied duress or coercion.

(c) A search of a dwelling based on consent shall not be valid under this rule unless the person giving the consent was advised of the right to refuse consent. For purposes of this subsection, a "dwelling" means a building or other structure where any person lives or which is customarily used for overnight accommodation of persons. Each unit of a structure divided into separately occupied units is itself a dwelling.

Reporter's Notes to 2004 Amendments: The 2004 amendments added subsections (b) and (c). Subsection (b) codifies the burden of proof imposed on the state beginning with such cases as *Scroggins v. State*, 268 Ark. 261, 595 S.W.2d 219 (1980) and *Rodriquez v. State*, 262 Ark. 659, 559 S.W.2d 925 (1978). Arkansas Supreme Court jurisprudence on consensual searches requires the state to prove the voluntary character of consent by "clear and positive evidence" or "clear and positive testimony." Subsection (c) incorporates the holding of *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004), which requires that a home dweller be advised of his or her right to refuse consent to a search of the dwelling.

Rule 11.2. Persons from Whom Effective Consent May Be Obtained.

The consent justifying a search and seizure can only be given, in the case of:

(a) search of an individual's person, by the individual in question or, if the person is under fourteen (14) years of age, by both the individual and his parent, guardian, or a person in loco parentis;

(b) search of a vehicle, by the person registered as its owner or in apparent control of its operation or contents at the time consent is given; and

(c) search of premises, by a person who, by ownership or otherwise, is apparently entitled to give or withhold consent.

Rule 11.3. Search Limited by Scope of Consent.

A search based on consent shall not exceed, in duration or physical scope, the limits of the consent given.

Rule 11.4. Items Seized: Receipt.

After making a seizure, the officer shall make a list of the things seized, and shall deliver a receipt fairly describing the things seized to the person consenting to the search.

Rule 11.5. Withdrawal or Limitation of Consent.

A consent given may be withdrawn or limited at any time prior to the completion of the search, and if so withdrawn or limited, the search under authority of the consent shall cease, or be restricted to the new limits, as the case may be. Things discovered and subject to seizure prior to such withdrawal or limitation of consent shall remain subject to seizure despite such change or termination of the consent.

Rule 12. Search and Seizure Incidental to Arrest

Rule 12.1. Permissible Purposes.

An officer who is making a lawful arrest may, without a search warrant, conduct a search of the person or property of the accused for the following purposes only:

(a) to protect the officer, the accused, or others;

(b)to prevent the escape of the accused;

(c) to furnish appropriate custodial care if the accused is jailed; or

(d) to obtain evidence of the commission of the offense for which the accused has been arrested or to seize contraband, the fruits of crime, or other things criminally possessed or used in conjunction with the offense.

COMMENT

Comment to Rule 12.1

Searches of the person shall be carried out with all reasonable regard for privacy, and unless exceptional circumstances otherwise require, the search of an accused prior to his arrival at a

police station shall be only as extensive as is reasonably necessary to effect the arrest with all practicable safety, or to prevent escape or the destruction of evidence.

Rule 12.2. Search of the Person: Permissible Scope.

An officer making an arrest and the authorized officials at the police station or other place of detention to which the accused is brought may conduct a search of the accused's garments and personal effects ready to hand, the surface of his body, and the area within his immediate control.

Rule 12.3. Search of the Person: Search of Body Cavities.

(a) Search of an accused's blood stream, body cavities, and subcutaneous tissues conducted incidental to an arrest may be made only:

> (i) if there is a strong probability that it will disclose things subject to seizure and related to the offense for which the individual was arrested; and
>
> (ii) if it reasonably appears that the delay consequent upon procurement of a search warrant would probably result in the disappearance or destruction of the objects of the search; and
>
> (iii) if it reasonably appears that the search is otherwise reasonable under the circumstances of the case, including the seriousness of the offense and the nature of the invasion of the individual's person.

(b) Any search pursuant to this rule shall be conducted by a physician or a licensed nurse.

Rule 12.4. Search of Vehicles: Permissible Circumstances.

(a) If, at the time of the arrest, the accused is in a vehicle or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are connected with the offense for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure and discovered in the course of the search.

(b) The search of a vehicle pursuant to this rule shall only be made contemporaneously with the arrest or as soon thereafter as is reasonably practicable.

Rule 12.5. Search of Premises: Permissible Circumstances, Time and Scope.

(a) If at the time of the arrest:

> (i) the accused is in or on premises all or part of which he is apparently entitled to occupy; and
>
> (ii) in view of the circumstances the officer has reason to believe that such premises or part thereof contain things which are:
>
> > (A) subject to seizure; and

(B) connected with the offense for which the arrest is made; and

(C) likely to be removed or destroyed before a search warrant can be obtained and served;

the arresting officer may search such premises or part thereof for such things, and seize any things subject to seizure.

(b) Search of premises pursuant to subsection (a) shall only be made contemporaneously with the arrest, and search of building interiors shall only be made consequent upon an entry into the building made in order to effect an arrest therein. In determining the necessity for and scope of the search to be undertaken, the officer shall take into account, among other things, the nature of the offense for which the arrest is made, the behavior of the individual arrested and others on the premises, the size and other characteristics of the things to be searched for, and whether or not any such things are observed while making the arrest.

Rule 12.6. Custodial Taking of Property Pursuant to Arrest; Vehicles.

(a) Things not subject to seizure which are found in the course of a search of the person of an accused may be taken from his possession if reasonably necessary for custodial purposes. Documents or other records may be read or otherwise examined only to the extent necessary for such purposes, including identity checking and ensuring the physical well-being of the person arrested. Disposition of things so taken shall be made in accordance with Rule 15 hereof.

(b) A vehicle impounded in consequence of an arrest, or retained in official custody for other good cause, may be searched at such times and to such extent as is reasonably necessary for safekeeping of the vehicle and its contents.

Rule 13. Search and Seizure Pursuant to Warrant

Rule 13.1. Issuance of Search Warrant.

(a) A search warrant may be issued only by a judicial officer.

(b) The application for a search warrant shall describe with particularity the persons or places to be searched and the persons or things to be seized, and shall be supported by one (1) or more affidavits or recorded testimony under oath before a judicial officer particularly setting forth the facts and circumstances tending to show that such persons or things are in the places, or the things are in possession of the person, to be searched. If an affidavit or testimony is based in whole or in part on hearsay, the affiant or witness shall set forth particular facts bearing on the informant's reliability and shall disclose, as far as practicable, the means by which the information was obtained. An affidavit or testimony is sufficient if it describes circumstances establishing reasonable cause to believe that things subject to seizure will be found in a particular place. Failure of the affidavit or testimony to establish the veracity and bases of knowledge of persons providing information to the affiant shall not require that the application be denied, if the affidavit or testimony viewed as a whole, provides a substantial basis for a finding of reasonable cause to believe that things subject to seizure will be found in a particular place.

(c) An application for a search warrant and the affidavit in support of the search warrant may be transmitted to the issuing judicial officer by facsimile or by other electronic means. Recorded testimony in support of a search warrant may be received by telephone or other electronic means provided the issuing judicial officer first administers an oath by telephone or other electronic means to the person testifying in support of the issuance of the warrant. After signing a search warrant, the judicial officer issuing the warrant may transmit a copy of the warrant by facsimile or other electronic means to the applicant for the warrant. The original signed search warrant shall be retained by the judicial officer issuing the warrant and shall be filed with the record of the proceeding as provided in Rule 13.4(c).

(d) Before acting on the application, the judicial officer may examine on oath the affiants or witnesses, and the applicant and any witnesses he may produce, and may himself call such witnesses as he deems necessary to a decision. He shall make and keep a fair written summary of the proceedings and the testimony taken before him, except that if sworn testimony alone is offered in support of the application, such testimony shall be recorded pursuant to subsection (b) hereof.

(e) If the judicial officer finds that the application meets the requirements of this rule and that, on the basis of the proceedings before him, there is reasonable cause to believe that the search will discover persons or things specified in the application and subject to seizure, he shall issue a search warrant based on his finding and in accordance with the requirements of this rule. If he does not so find, the judicial officer shall deny the application.

(f) The proceedings upon application for a search warrant shall be conducted with such secrecy as the issuing judicial officer deems appropriate to the circumstances.

COMMENT

Reporter's Note, 2014: In 2014, subsection (c) was added to address the transmission by electronic means of affidavits in support of a warrant. The remaining subsections were redesignated (d)-(f).

HISTORY

Amended May 29, 2014, effective July 1, 2014.

Rule 13.2. Contents of Search Warrant.

(a) A search warrant shall be dated, issued in duplicate, and shall be addressed to any officer.

(b) The warrant shall state, or describe with particularity:

> (i) the identity of the issuing judicial officer and the date and place where application for the warrant was made;
>
> (ii) the judicial officer's finding of reasonable cause for issuance of the warrant;
>
> (iii) the identity of the person to be searched, and the location and designation of the places to be searched;

(iv) the persons or things constituting the object of the search and authorized to be seized; and

(v) the period of time, not to exceed five (5) days after execution of the warrant, within which the warrant is to be returned to the issuing judicial officer.

(c) Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:

(i) the place to be searched is difficult of speedy access; or

(ii) the objects to be seized are in danger of imminent removal; or

(iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy;

the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.

(d) If the warrant authorizes the seizure of documents other than lottery tickets, policy slips, and other nontestimonial documents used as instrumentalities of crime, the warrant shall require that it be executed in accordance with the provisions of Rule 13.5 and may, in the discretion of the issuing judicial officer, direct that any files or other collections of documents, among which the documents to be seized are reasonably believed to be located, shall be impounded under appropriate protection where found.

Rule 13.3. Execution of a Search Warrant.

(a) A search warrant may be executed by any officer. The officer charged with its execution may be accompanied by such other officers or persons as may be reasonably necessary for the successful execution of the warrant with all practicable safety.

(b) Prior to entering a dwelling to execute a search warrant, the executing officer shall make known the officer's presence and authority for entering the dwelling and shall wait a period of time that is reasonable under the circumstances before forcing entry into the dwelling. The officer may force entry into a dwelling without prior announcement if the officer reasonably suspects that making known the officer's presence would, under the circumstances, be dangerous or futile or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. For purposes of this rule, a "dwelling" means a vehicle, building, or other structure (i) where any person lives or (ii) which is customarily used for overnight accommodation of persons whether or not a person is actually present. Each unit of a structure divided into separately occupied units is itself a dwelling.

(c) In the course of any search or seizure pursuant to the warrant, the executing officer shall give a copy of the warrant to the person to be searched or the person in apparent control of the premises to be searched. The copy shall be furnished before undertaking the search or seizure unless the officer has reasonable cause to believe that such action would endanger the successful execution of the warrant with all practicable safety, in which case he shall, as soon as is

practicable, state his authority and purpose and furnish a copy of the warrant. If the premises are unoccupied by anyone in apparent and responsible control, the officer shall leave a copy of the warrant suitably affixed to the premises.

(d) The scope of search shall be only such as is authorized by the warrant and is reasonably necessary to discover the persons or things specified therein. Upon discovery of the persons or things so specified, the officer shall take possession or custody of them and search no further under authority of the warrant. If in the course of such search, the officer discovers things not specified in the warrant which he reasonably believes to be subject to seizure, he may also take possession of the things so discovered.

(e) Upon completion of the search, the officer shall make and deliver a receipt fairly describing the things seized to the person from whose possession they are taken or the person in apparent control of the premises from which they are taken. If practicable, the list shall be prepared in the presence of the person to whom the receipt is to be delivered. If the premises are unoccupied by anyone in apparent and responsible control, the executing officer shall leave the receipt suitably affixed to the premises.

(f) The executing officer, and other officers accompanying and assisting him, may use such degree of force, short of deadly force, against persons, or to effect an entry or to open containers as is reasonably necessary for the successful execution of the search warrant with all practicable safety. The use of deadly force in the execution of a search warrant, other than in self-defense or defense of others, is justifiable only if the executing officer reasonably believes that there is a substantial risk that the persons or things to be seized will suffer, cause, or be used to cause death or serious bodily harm if their seizure is delayed, and that the force employed creates no unnecessary risk of injury to other persons.

Reporter's Notes 2002. A new subsection ("b") was added which incorporates the "knock and announce" requirement into the rules governing the execution of a search warrant. The subsection requires an officer executing a search warrant to "make known the officer's presence and authority" rather than "knock and announce the officer's presence and authority" before forcing entry so as to cover the situation where knocking would be superfluous because the occupant of the dwelling is outside the dwelling when the officer approaches to serve the warrant. The remaining subsections were redesignated.

Rule 13.4. Return of a Search Warrant.

(a) If a search warrant is not executed, the officer shall return the warrant to the issuing judicial officer within a reasonable time, not to exceed sixty (60) days from the date of issuance, together with a report of the reasons why it was not executed. If the issuing judicial officer is unavailable, the warrant may be returned to any judicial officer of a circuit or district court within the county in which the warrant was issued. Upon its return, an unexecuted warrant and report shall be filed with the clerk and be publically accessible unless the court for good cause based upon reasonably specific facts orders them to be closed or sealed. The affidavit or sworn testimony on application shall not be publically accessible.

(b) An officer who has executed a search warrant or, if such officer is unavailable, another officer acting in his behalf, shall, as soon as possible and not later than the date specified in the

warrant, return the warrant to the issuing judicial officer together with a verified report of the facts and circumstances of execution, including an inventory of things seized. If the issuing judicial officer is unavailable, the warrant may be returned to any judicial officer of a circuit or district court within the county in which the warrant was issued.

(c) The judicial officer to whom an executed warrant is returned shall cause the warrant, report, inventory of things seized, and affidavit or sworn testimony on application to be filed with the clerk, and they shall be publically accessible unless the court for good cause base upon reasonably specific facts orders that any of them should be closed or sealed.

(d) If the judicial officer to whom an executed warrant is returned does not have jurisdiction to try the offense in respect to which the warrant was issued or the offense apparently disclosed by the things seized, he or she may transmit copies of the affidavit or sworn testimony on application, warrant, inventory, return, report, and related papers to an appropriate court having jurisdiction to try the offense disclosed, but the issuing judicial . officer's clerk shall keep a copy in the clerk's file.

(e) Affidavits or sworn testimony on application, warrants, inventories, returns, reports, and related papers shall be filed with the clerk of the issuing judicial officer in the warrant docket as described in Administrative Order Number 2 or 18.

(f) Administrative Order Number 19 governs public access to affidavits or sworn testimony on application, warrants, inventories, returns, reports, and related papers subject to the provisions of this rule (see section (VII)(A)(3); see section (VIII) for obtaining access to documents excluded from public access). Remote electronic access to the warrant docket by the general public, however, shall be governed by and subject to the policies or requirement of the court.

COMMENT

Reporter's Notes, 2011 Amendment: The 2011 amendments added the last sentences of subparagraphs (a) and (b) and made conforming amendments to subparagraphs (c) and (d).

Reporter's Note, 2015 Amendment: This rule was amended to provide for the filing of search warrants upon their return, whether executed or unexecuted, in a warrant docket.

HISTORY

Amended by per curiam order October 6, 2011; effective November 1, 2011; amended July 2, 2015, effective September 1, 2015.

Rule 13.5. Execution and Return of Warrants for Documents.

(a) If the warrant authorizes documentary seizure, the executing officer shall endeavor by all appropriate means to search for and identify the documents to be seized without examining the contents of documents not covered by the warrant.

(b) If the documents to be seized cannot be searched for or identified without examining the contents of other documents, or if they constitute items or entries in account books, diaries, or other documents containing matter not specified in the warrant, the executing officer shall not

examine the documents but shall either impound them under appropriate protection where found, or seal and remove them for safekeeping.

(c) An executing officer who has impounded or removed documents pursuant to subsection (b) of this rule shall, as promptly as practicable, report the fact and circumstances of the impounding or removal to the issuing judicial officer. As soon thereafter as the interests of justice permit, and upon due and reasonable notice to all interested persons, a hearing shall be held before the issuing judicial officer or a judicial officer contemplated by Rule 13.4 (d), at which the person from whose possession or control the documents were taken, and any other person asserting any right or interest in the documents, may appear, in person or by counsel, and move either for the return of the documents or for specification of such conditions and limitations on the further search for the documents to be seized as may be appropriate to prevent unnecessary or unreasonable invasion of privacy. If the motion for the return of the documents is granted, in whole or in part, the documents covered by the granting order shall forthwith be returned or released from impoundment. If the motion is not granted, the search shall proceed under such conditions and limitations as the order shall prescribe, and at the conclusion of the search all documents other than those covered by the warrant, or otherwise subject to seizure, shall be returned or released from impoundment.

(d) Documents seized shall thereafter be handled and disposed of in accordance with the other provisions of this rule and Rules 15 and 16 hereof. No statements or testimony given in support of a motion made pursuant to this rule shall thereafter be received in evidence against the witness in any subsequent proceeding, other than for purposes of impeachment or in a prosecution for perjury or contempt in the giving of such statements or testimony.

Rule 13.6. Issuance and Execution of Warrants for Illegally Possessed Pictures and Literature.

If a warrant issued under this rule shall provide for the seizure of tangible instruments of expression, including but not limited to moving or still pictures, recordings, books, or other literature, the warrant shall authorize the seizure only of such instruments or copies thereof as are reasonably necessary for evidentiary use in a proceeding to determine whether the content of such instruments is constitutionally protected. If the effect of seizing such instruments or copies thereof is to stop or substantially impede their showing or distribution, the warrant shall provide that the possessor of such instruments be given a reasonable opportunity to furnish duplicate copies for seizure, or that he may retain possession of them and must display them during an adversary proceeding or at such times and places, including trial, as the court having jurisdiction over the matter may direct.

Rule 14. Vehicular, Emergency and Other Searches and Seizures

Rule 14.1. Vehicular Searches.

(a) An officer who has reasonable cause to believe that a moving or readily movable vehicle is or contains things subject to seizure may, without a search warrant, stop, detain, and search the vehicle and may seize things subject to seizure discovered in the course of the search where the vehicle is:

(i) on a public way or waters or other area open to the public;

(ii) in a private area unlawfully entered by the vehicle; or

(iii) in a private area lawfully entered by the vehicle, provided that exigent circumstances require immediate detention, search, and seizure to prevent destruction or removal of the things subject to seizure.

(b) If the officer does not find the things subject to seizure by his search of the vehicle, and if:

(i) the things subject to seizure are of such a size and nature that they could be concealed on the person; and

(ii) the officer has reason to suspect that one (1) or more of the occupants of the vehicle may have the things subject to seizure so concealed;

the officer may search the suspected occupants; provided that this subsection shall not apply to individuals traveling as passengers in a vehicle operating as a common carrier.

(c) This rule shall not be construed to limit the authority of an officer under Rules 2 and 3 hereof.

Rule 14.2. Search of Open Lands.

An officer may, without a search warrant, search open lands and seize things which he reasonably believes subject to seizure.

Rule 14.3. Emergency Searches.

An officer who has reasonable cause to believe that premises or a vehicle contain:

(a) individuals in imminent danger of death or serious bodily harm; or

(b) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or

(c) things subject to seizure which will cause or be used to cause death or serious bodily harm if their seizure is delayed;

may, without a search warrant, enter and search such premises and vehicles, and the persons therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.

Rule 14.4. Seizure Independent of Search.

An officer who, in the course of otherwise lawful activity, observes the nature and location of things which he reasonably believes to be subject to seizure, may seize such things.

Rule 15. Disposition of Seized Things

Rule 15.1. Custody of Seized Things: Retention by Seizing Officer.

In all cases of seizure the law enforcement officer making the seizure shall provide for the appropriate safekeeping of the things seized.

Rule 15.2. Motions for Return or Restoration of Seized Things.

(a) *Who May File*. Within thirty (30) days after notice of seizure, or at such later date as the court in its discretion may allow:

> (i) the individual from whose person, property, or premises things have been seized may move the court to whom the warrant was returned, or the court having jurisdiction of the offense in question, as the case may be, to return things seized to the person or premises from which they were seized; and
>
> (ii) any other person asserting a claim to rightful possession of the things seized may move the court having jurisdiction of the matter to restore the things seized to such person.

(b) *Grounds*. Motions for return or restoration of seized things shall be based on the ground that the moving party has a valid claim to rightful possession of things seized, because:

> (i) the things had been stolen or otherwise converted, and the moving party is the owner or rightful possessor;
>
> (ii) the things seized were not in fact subject to seizure;
>
> (iii) the moving party, by license or otherwise, is lawfully entitled to possess things otherwise subject to seizure; or
>
> (iv) although the things seized were subject to seizure, the moving party is or will be entitled to their return or restoration on the court's determination that they are no longer needed for evidentiary purposes.

(c) *Custody Order*. When a motion is made for the return or restoration of seized things, the court shall enter a custody order which shall provide for the safekeeping of the things seized, with conditions of appropriate privacy for documents and other records.

(d) *Postponement of Return*. In granting a motion for return or restoration of seized things, the court may postpone execution of the order for return or restoration, until such time as the things need no longer remain available for evidentiary use.

(e) *Appellate Review*. An order granting a motion for return or restoration of seized things shall be reviewable on appeal in regular course as a final order. An order denying such a motion, or entered under Rule 15.2 (f), shall be reviewable on appeal upon certification by the court having custody of such things that they are no longer needed for evidentiary purposes.

(f) *Disputed Possession Rights*. If, upon consideration of a motion or motions for return or restoration of seized things, it appears that the things should be returned or restored, but there is a

substantial question whether they should be returned to the person from whose possession they were seized or to some other person, or a substantial question among several claimants as to rightful possession, the court hearing the matter may, in its discretion, return the things to the person from whose possession they were seized, or impound the things seized and remit the several claimants to appropriate civil process for determination of the claims.

(g) *Disposition of Contraband and Unclaimed Goods*. At such time as the court finds that there is no further need for custody of the seized things, and if no motion for return or restoration of the seized things has been made, the court shall order the things to be delivered to the officials charged with responsibility under the applicable laws for the sale, destruction, or other disposition of contraband and unclaimed goods in official custody.

Rule 15.3. Custody of Seized Things: Freshly Stolen Goods; Perishables.

If the identity of a person having a rightful claim to possession of freshly stolen seized things can be promptly established beyond a reasonable doubt to the satisfaction of the seizing officer, the things may be promptly returned to the rightful possessor. Perishable things seized may be disposed of by the seizing officers as justice and the necessities of the case dictate. A full report of the facts and circumstances of any seizure and the disposition of the things seized pursuant to this rule shall be made to a judicial officer.

Rule 15.4. Custody of Seized Things: Report of Seizure.

(a) In all cases of seizure other than pursuant to a search warrant, the officer making the seizure shall, as soon thereafter as is reasonably possible, report in writing the fact and circumstances of the seizure, with a list of things to the court before which the defendant will be brought for first appearance, or, if no arrest is made to a court having jurisdiction to entertain proceedings respecting the offense disclosed by the seizure.

(b) A copy of the list shall be given to the defendant or his counsel and the list shall be given such public notice as may be directed by a court of competent jurisdiction.

Rule 15.5. Effect on Civil Remedies.

Nothing in this Article shall be construed to abrogate any civil remedy otherwise available.

Rule 16. Evidentiary Exclusion

Rule 16.1. Scope of Rule.

The provisions of Rule 16.2(a) and (b) shall not apply in criminal prosecutions where omnibus hearing procedure is utilized.

Rule 16.2. Motions to Suppress Evidence.

(a) Objection to the use of any evidence, on the grounds that it was illegally obtained, shall be made by a motion to suppress evidence. The phrase "objection to the use of any evidence, on the grounds that it was illegally obtained," shall include but is not limited to evidence which:

1. Consists of tangible property obtained by means of an unlawful search and seizure; or

2. Consists of a record of potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping; or

3. Consists of a record or potential testimony reciting or describing a confession or admission of a defendant involuntarily made; or

4. Was obtained as a result of other evidence obtained in a manner described in subdivisions one, two, and three; or

5. Consists of the prospective in-court identification of the defendant based on an unlawful pre-trial confrontation.

The motion shall be made to the court which is to conduct the trial at which such evidence may be offered in evidence.

(b) The motion to suppress shall be timely filed but not later than ten (10) days before the date set for the trial of the case, except that the court for good cause shown may entertain a motion to suppress at a later time.

(c) Renewal of a motion to suppress which has been denied may be allowed on the ground of newly discovered evidence or as the interests of justice require.

(d) An order granting a motion to suppress prior to trial shall be reviewable on appeal pursuant to Rule of Appellate Procedure–Criminal 3.

(e) Determination. A motion to suppress evidence shall be granted only if the court finds that the violation upon which it is based was substantial, or if otherwise required by the Constitution of the United States or of this state. In determining whether a violation is substantial the court shall consider all the circumstances, including:

(i) the importance of the particular interest violated;

(ii) the extent of deviation from lawful conduct;

(iii) the extent to which the violation was willful;

(iv) the extent to which privacy was invaded;

(v) the extent to which exclusion will tend to prevent violations of these rules;

(vi) whether, but for the violation, such evidence would have been discovered; and

(vii) the extent to which the violation prejudiced moving party's ability to support his motion, or to defend himself in the proceedings in which such evidence is sought to be offered in evidence against him.

Rule 17. Disclosure to Defendant

Rule 17.1. Prosecuting Attorney's Obligations.

(a) Subject to the provisions of Rules 17.5 and 19.4, the prosecuting attorney shall disclose to defense counsel, upon timely request, the following material and information which is or may come within the possession, control, or knowledge of the prosecuting attorney:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant or a codefendant;

(iii) those portions of grand jury minutes containing testimony of the defendant;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations, scientific tests, experiments or comparisons;

(v) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in any hearing or at trial or which were obtained from or belong to the defendant; and

(vi) any record of prior criminal convictions of persons whom the prosecuting attorney intends to call as witnesses at any hearing or at trial, if the prosecuting attorney has such information.

(b) The prosecuting attorney shall, upon timely request, inform defense counsel of:

(i) the substance of any relevant grand jury testimony;

(ii) whether, in connection with the particular case, there has been any electronic surveillance of the defendant's premises or of conversations to which he was a party;

(iii) the relationship to the prosecuting authority of persons whom the prosecuting attorney intends to call as witnesses.

(c) The prosecuting attorney shall, upon timely request, disclose and permit inspection, testing, copying, and photocopying of any relevant material regarding:

(i) any specific searches and seizures;

(ii) the acquisition of specified statements from the defendant.

(d) Subject to the provisions of Rule 19.4, the prosecuting attorney shall, promptly upon discovering the matter, disclose to defense counsel any material or information within his knowledge, possession, or control, which tends to negate the guilt of the defendant as to the offense charged or would tend to reduce the punishment therefor.

Rule 17.2. Prosecuting Attorney's Performance of Obligations.

(a) The prosecuting attorney shall perform his obligations under Rule 17.1 as soon as practicable.

(b) The prosecuting attorney may perform these obligations in any manner mutually agreeable to himself and defense counsel or by:

> (i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, recorded or photographed, during specified reasonable times; or
>
> (ii) making available to defense counsel at a time specified such material and information, and suitable facilities and arrangements for inspection, testing, copying, recording or photographing of such material and information.

(c) The prosecuting attorney may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under this Article.

Rule 17.3. Material Held by Other Governmental Personnel.

(a) The prosecuting attorney shall use diligent, good faith efforts to obtain material in the possession of other governmental personnel which would be discoverable if in the possession or control of the prosecuting attorney, upon timely request and designation of material or information by defense counsel.

(b) If the prosecuting attorney's efforts are unsuccessful, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel where the material or other governmental personnel are subject to the jurisdiction of the court.

Rule 17.4. Discretionary Disclosures.

(a) The court in its discretion may require disclosure to defense counsel of other relevant material and information upon a showing of materiality to the preparation of the defense.

(b) The court may deny disclosure authorized by this Article if it finds there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisal, or unnecessary annoyance or embarrassment, resulting from such disclosure, and that the risk outweighs any usefulness of the disclosure to defense counsel.

Rule 17.5. Matters Not Subject to Disclosure.

(a) *Work Product*. Except as provided in Rule 17.1 (a) (i) and (iv), disclosure shall not be required of research or of records, correspondence, reports or I memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his staff or other state agents.

(b) *Informants*. Disclosure shall not be required of an informant's identity where his identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. This subsection shall not be construed to permit refusal to disclose the identity of witnesses to be produced at any hearing or at trial.

(c) *National Security*. Disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and a failure to disclose will not infringe upon the constitutional rights of the defendant. This subsection shall not be construed to permit refusal to disclose the identity of witnesses to be produced at any hearing or at trial.

Rule 18. Disclosures by Defendant

Rule 18.1. The Person of the Defendant.

(a) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, a judicial officer may require the defendant to:

(i) appear in a line-up or show up;

(ii) speak for identification by witnesses to an offense;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of a scene;

(v) try on articles of clothing;

(vi) permit the taking of specimens of material under his fingernails;

(vii) permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof;

(viii) provide specimens of his handwriting; and

(ix) submit to a reasonable physical or medical inspection of his body.

(b) Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given by the prosecuting attorney to the defendant and his counsel. Provision may be made for appearances for such purposes in an order admitting the defendant to bail or providing for his release.

Rule 18.2. Medical and Scientific Reports.

Subject to constitutional limitations, the trial court may require that the prosecuting attorney be informed of and permitted to inspect and copy or photograph any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

Rule 18.3. Nature of Defense.

Subject to constitutional limitations, the prosecuting attorney shall, upon request, be informed as soon as practicable before trial of the nature of any defense which defense counsel intends to use at trial and the names and addresses of persons whom defense counsel intends to call as witnesses in support thereof.

Rule 19. Regulation of Discovery

Rule 19.1. Investigation Not to Be Impeded.

Subject to the provisions of Rules 17.5 and 19.4, neither the prosecuting attorney, the defense counsel, nor members of their staffs shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or from showing opposing counsel any relevant material.

Rule 19.2. Continuing Duty to Disclose.

If before trial, but subsequent to compliance with these rules, or an order entered pursuant thereto, a party discovers additional material or information comprehended by a previous request to disclose, he shall promptly notify opposing counsel or the other party of the existence of such material or information. If additional material or information is discovered during trial, the party shall notify the court and opposing counsel of the existence of the material or information.

Rule 19.3. Custody of Materials.

Any materials furnished to counsel pursuant to this Article shall remain in his custody and be used only for the purposes of preparation and trial of the case. The court may provide that the material be furnished subject to other reasonable terms and conditions.

Rule 19.4. Protective Orders.

Upon a showing of cause, the court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit his counsel to make beneficial use thereof.

Rule 19.5. Excision.

(a) When some parts of certain material are discoverable under the provisions of these rules, and other parts are not discoverable, the discoverable material shall be made available pursuant to the rules after excision of the remainder.

(b) 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.

Rule 19.6. In Camera Proceedings.

The court may permit any showing of cause in whole or in part for denial or regulation of disclosures to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing 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.

Rule 19.7. Failure to Comply: Sanctions.

(a) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant thereto, the court may order such party to permit the discovery or inspection of

materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems proper under the circumstances.

(b) Willful violation by counsel or a defendant of an applicable discovery rule or an order issued pursuant thereto may subject counsel or a defendant to appropriate sanctions by the court.

Rule 20. Procedure Before Trial Omnibus Hearing

Rule 20.1. General Procedural Requirements: Policy Statement.

(a) In all criminal cases, procedures prior to trial should reflect recognition of the possible need for the following three (3) stages:

(i) an exploratory stage, initiated by counsel and conducted without court supervision to implement discovery required or authorized under these rules;

(ii) an omnibus stage, supervised by the trial court and requiring court appearance when necessary;

(iii) a trial planning stage, requiring pretrial conferences when necessary.

(b) These stages should be adapted to the needs of the particular case and may be modified or eliminated as appropriate.

Rule 20.2. Setting of Omnibus Hearing.

(a) If a plea of guilty is not entered at the time the defendant is first called upon to plead by a court having jurisdiction to try the defendant, the court may set a time for an omnibus hearing.

(b) In determining the date for the omnibus hearing the court shall allow counsel sufficient time:

(i) to initiate and complete discovery required or authorized under these rules;

(ii) to conduct further investigation necessary to the defendant's case; and

(iii) to continue plea discussions.

Rule 20.3. Omnibus Hearing.

(a) At the omnibus hearing, the trial court on its own initiative shall:

(i) ensure that standards regarding provision of counsel have been complied with;

(ii) ascertain whether the parties have completed the discovery required in Rule 17.1, and if not, make orders appropriate to expedite completion;

(iii) ascertain whether there are requests for additional disclosures under Rules 17.3, 17.4, 18.2, and 18.3;

(iv) make rulings on any motions, demurrers or other requests then pending, and ascertain whether any additional motions, demurrers or requests will be made at the hearing or continuations thereof;

(v) ascertain whether there are any procedural or constitutional issues which should be considered;

(vi) upon agreement of counsel, or upon a finding that the trial is likely to be protracted or otherwise unusually complicated, set a time for a pretrial conference; and

(vii) permit a defendant to change his plea.

(b) Unless the court otherwise directs, all motions, demurrers and other requests prior to trial should be reserved for the omnibus hearing and presented orally. All issues presented at the omnibus hearing may be raised without prior notice either by counsel or by the court. If discovery, investigation, preparation, or evidentiary hearing, or a formal presentation is necessary for a fair determination of any issue, the omnibus hearing should be continued until all matters are properly disposed of.

(c) Any pretrial motion, request or issue which is not raised at the omnibus hearing shall be deemed waived, unless the party concerned did not have the information necessary to make the motion or request or raise the issue.

(d) Stipulations by any party or his counsel shall be binding upon the parties at trial unless set aside or modified by the court in the interests of justice.

(e) A verbatim record or comprehensive summary of the omnibus hearing shall be made and preserved. This record shall include the disclosures made, all rulings and orders of the court, stipulations of the parties, and an identification of other matters determined or pending.

Rule 20.4. Pretrial Conference.

(a) Whenever a trial is likely to be protracted or unusually complicated, or upon request by or agreement of counsel, the trial court, whether or not an omnibus hearing has been held, may hold one (1) or more pretrial conferences with trial counsel present to consider such matters as will promote a fair and expeditious trial. Matters which might usefully be considered include, but are not limited to:

(i) stipulations as to facts about which there is no dispute;

(ii) marking for identification various documents and other exhibits of the parties;

(iii) waivers of foundation as to such documents;

(iv) excision from admissible statements of material prejudicial to a codefendant;

(v) severance of defendants or offenses;

(vi) seating arrangements for defendant and counsel;

(vii) use of jurors and questionnaires;

(viii) number and use of peremptory challenges;

(ix) procedure on objections where there are multiple counsel;

(x) order of presentation of evidence and arguments where there are multiple defendants;

(xi) order of cross-examination where there are multiple defendants; and

(xii) temporary absence of defense counsel during trial.

(b) Pretrial conferences should be recorded. At the conclusion of the conference a memorandum of the matters agreed upon should be signed by counsel, approved by the court, and filed. Such memorandum should be binding upon the parties at trial, on appeal and in post-conviction proceedings unless set aside or modified by the court in the interests of justice. However, admissions of fact should bind a defendant only if they are included in the pretrial order and are signed by him and his counsel.

Rule 21. Joinder of Offenses and Defendants

Rule 21.1. Joinder of Offenses.

Two (2) or more offenses may be joined in one (1) information or indictment with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(a) are of the same or similar character, even if not part of a single scheme or plan; or

(b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Rule 21.2. Joinder of Defendants.

Two (2) or more defendants may be joined in one (1) information or indictment

(a) when each of the defendants is charged with accountability for each offense included; or

(b) when each of the defendants is charged with conspiracy and some of the defendants are also charged with one (1) or more offenses alleged to be in furtherance of the conspiracy; or

(c) when, even if conspiracy is not charged and all of the defendants are not charged in each count, it is alleged that the several offenses charged:

(i) were part of a common scheme or plan; or

(ii) were so closely connected in respect to time, place, and occasion that it would be difficult to separate proof of one (1) charge from proof of others.

Rule 21.3. Failure to Join Related Offenses.

(a) Two (2) or more offenses are related offenses for the purposes of this rule if they are within the jurisdiction and venue of the same court and are based on the same conduct or arise from the same criminal episode.

(b) When a defendant has been charged with two (2) or more related offenses, his timely motion to join them for trial shall be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion is granted. A defendant's failure to so move constitutes a waiver of any right of joinder as to related offenses with which the defendant knew he was charged.

(c) A defendant who has been tried for one (1) offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offenses was previously denied or the right of joinder was waived as provided in subsection (b). The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

(d) Entry of a plea of guilty or nolo contendere to one (1) offense does not bar the subsequent prosecution of a related offense. A defendant may enter a plea of guilty or nolo contendere on the basis of a plea agreement in which the prosecuting attorney agrees to seek or not to oppose dismissal of other related charges or not to prosecute other potential related charges.

Rule 22. Severance of Offenses and Defendants

Rule 22.1. Timeliness of Motion; Waiver; Double Jeopardy.

(a) A defendant's motion for severance of offenses of defendants must be timely made before trial, except that a motion for severance may be made before or at the close of all the evidence if based upon a ground not previously known. Severance is waived if the motion is not made at the appropriate time.

(b) If a defendant's pretrial motion for severance was overruled, he may renew the motion on the same grounds before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(c) Unless consented to by the defendant, a motion by the prosecuting attorney for severance of offenses or defendants may be granted only if timely made prior to trial.

(d) If a motion for severance is granted during the trial and the motion was made or consented to by the defendant, the granting of the motion shall not bar a subsequent trial of that defendant on the offenses severed.

Rule 22.2. Severance of Offenses.

(a) Whenever two (2) or more offenses have been joined for trial solely on the ground that they are of the same or similar character and they are not part of a single scheme or plan, the defendant shall have a right to a severance of the offenses.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of offenses:

(i) if before trial, it is deemed appropriate to promote a fair determination of the defendant's guilt or innocence of each offense; or

(ii) if during trial, upon consent of the defendant, it is deemed necessary to achieve a fair determination of the defendant's guilt or innocence of each offense.

Rule 22.3. Severance of Defendants.

(a) When a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court shall determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court shall not use a joint trial with dual juries but shall instead require the prosecuting attorney to elect one (1) of the following courses:

(i) a joint trial at which the statement is not admitted into evidence against any defendant;

(ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the statement will not prejudice the moving defendant; or

(iii) severance of the moving defendant.

(b) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (a), shall grant a severance of defendants:

(i) if before trial it is deemed necessary to protect a defendant's right to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of one (1) or more defendants; or

(ii) if before trial the court determines that one (1) or more of the defendants will not receive a fair trial because of potentially prejudicial publicity against another defendant; or

(iii) if during trial, upon consent of the defendant to be severed, it is deemed necessary to achieve a fair determination of the guilt or innocence of one (1) or more defendants.

(c) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendant which he intends to introduce in evidence at the trial.

Reporter's Note, 2005 Amendment: In *Woolbright v. State*, 357 Ark. 62, 160 S.W.3d 315 (2004), the Supreme Court barred the use of dual juries until development of a rule that specifically addresses the practical considerations necessary to safeguard the rights of defendants. The 2005 amendments modified subsection (a) to incorporate this holding.

Rule 22.4. Failure to Prove Grounds for Joinder of Defendants.

If a defendant moves for severance at the conclusion of the prosecution's case or of all the evidence, and there is not sufficient evidence to support the allegation upon which the moving defendant was joined for trial with the other defendant or defendants, the court shall grant a

severance if, in view of this lack of evidence, severance is deemed necessary to achieve a fair determination of that defendant's guilt or innocence.

Rule 23. Authority of Court to Act on Own Motion

Rule 23.1. Consolidation; Severance of Defendants and Offenses.

(a) The court may order consolidation of two (2) or more charges for trial if the offenses, and the defendants if there are more than one (1), could have been joined in a single indictment or information without prejudice to any defendant's rights to move for severance under preceding provisions.

(b) The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

Rule 24. Receiving and Acting Upon the Plea

Rule 24.1. Scope of Article.

The provisions of this Article shall be applied in all criminal cases in circuit courts of this state and, to the extent constitutionally required and whenever otherwise practicable, in criminal cases in other courts.

Rule 24.2. Aid of Counsel.

A defendant shall not be required to plead until he has had an opportunity to retain counsel, or, if he is eligible for the appointment of counsel, until counsel has been appointed, or, in either case, unless he has waived or refused the assistance of counsel.

Rule 24.3. Pleading by Defendant.

(a) A plea of guilty or nolo contendere shall be received only from the defendant himself in open court, except that counsel may enter a plea of guilty or nolo contendere on behalf of a defendant in misdemeanor cases where only a fine is imposed by the court. If the defendant is a corporation the plea may be received from counsel or an authorized corporate officer.

(b) With the approval of the court and the consent of the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment,

> (i) to review of an adverse determination of a pretrial motion to suppress seized evidence or a custodial statement;
>
> (ii) to review an adverse determination of a pretrial motion to dismiss a charge because not brought to trial within the time provided in Rule 28.1(b) or (c);
>
> or
>
> (iii) to review an adverse determination of a pretrial motion challenging the constitutionality of the statute defining the offense with which the defendant is charged. Click here for conditional plea form.

(c) A defendant may plead nolo contendere only with the consent of the court. The court shall not accept a plea of nolo contendere unless it is satisfied, after due consideration of the views of the parties, that the interest of the public in the effective administration of justice would thereby be served.

(d) No plea of guilty or nolo contendere shall be accepted by any court unless the prosecuting attorney for the governmental unit in which the offense occurred is given the opportunity to be heard at the time the plea is tendered. In any criminal case in which trial by jury is a right, a court shall not accept a plea of guilty or nolo contendere unless the prosecuting attorney has assented to the waiver of trial by jury.

CONDITIONAL PLEA FORM

[For use with Rule 24.3(b), Arkansas Rules of Criminal Procedure]

IN THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS

_____ Division

No. _____

STATE OF ARKANSAS

v.

_____, Defendant

CONDITIONAL PLEA

I, _____ (*name of defendant*), with the approval of the court, and the consent of the Prosecuting Attorney am entering a plea of [guilty] [no contest] to

Count 1. _____

Count 2. _____

Count 3. _____

I understand my plea is conditioned upon the filing of an appeal on the issue of _____ (*describe [motion to suppress seized evidence] [motion to suppress custodial statement] [motion to dismiss a charge because not brought to trial within the time provided in Rule 28.1(b) or (c)] or [challenge to the constitutionality of Ark. Code Ann. § _____] upon which appeal is based*).

I understand that if the judge approves my plea of [guilty] [no contest], a judgment and sentence will be entered and that I may appeal on the issue specified above in the manner provided by the rules of court.

I understand that if I win my appeal on the issue specified above that I may withdraw my plea of [guilty] [no contest].

I have read and understand the above. I have discussed the case and my constitutional rights with my lawyer. I understand that by pleading [guilty] [no contest], if my plea is not later withdrawn, I will be giving up my right to a trial by jury, to confront, cross-examine, and compel the attendance of witnesses, and my privilege against self-incrimination. I agree to enter my plea as indicated above on the terms and conditions set forth herein.

_____ _____

Date Defendant

DEFENSE COUNSEL REVIEW

I have reviewed this conditional plea with my client, and I have discussed with my client its consequences.

_____ _____

Defense Counsel Date

PROSECUTOR APPROVAL

I have reviewed this conditional plea and consent to it.

_____ _____

Prosecutor Date

COURT APPROVAL

This Conditional Plea Agreement is approved, and I direct that it be entered of record in this case.

_____

Circuit Judge

_____

Date

This Conditional Plea Form shall accompany the Sentencing Order and be made a part of the record in the case.

I certify this is a true and correct record of this Court.

Date: _____ Circuit Clerk/Deputy: _____

Addition to Reporter's Notes, 2001 Amendment: The last sentence was added to subdivision (d). It does not change prior practice, but incorporates the requirement found in Rule 31.1 that

the prosecuting attorney must not only be given the opportunity to be heard in response to a plea, but also he must assent if a jury trial is to be waived.

Reporter's Note, 2003 Amendment: Subsection (b) was amended to clarify that a defendant may reserve the right to appeal following an adverse determination on a motion to suppress a custodial statement as well as a motion to suppress seized evidence.

Reporter's Notes, 2012 Amendment: Prior to the 2012 amendments, subsection (a) allowed the court to take a guilty plea to a misdemeanor not involving imprisonment even though the defendant was not present in the courtroom. The 2012 amendment made it clear that the court could also accept a plea of nolo contendere in such circumstances. A plea of guilty or nolo contendere when the defendant is absent is still subject to the requirements of subsections (c) and (d).

The 2012 amendment also broadened conditional pleas to include subsection (b)(iii).

Rule 24.4. Advice by Court.

The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally, informing him of and determining that he understands:

(a) the nature of the charge;

(b) the mandatory minimum sentence, if any, on the charge;

(c) the maximum possible sentence on the charge, including that possible from consecutive sentences;

(d) that if the offense charged is one for which a different or additional punishment is authorized because the defendant has previously been convicted of an offense or offenses one (1) or more times, the previous conviction or convictions may be established after the entry of his plea in the present action, thereby subjecting him to such different or additional punishment; and

(e) that if he pleads guilty or nolo contendere he waives his right to a trial by jury and the right to be confronted with the witnesses against him, except in capital cases where the death penalty is sought.

Rule 24.5. Determining Voluntariness of Plea.

The court shall not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. The court shall determine whether the tendered plea is the result of a plea agreement. If it is, the court shall require that the agreement be stated. The court shall also address the defendant personally and determine whether any force or threats, or any promises apart from a plea agreement, were used to induce the plea.

Rule 24.6. Determining Accuracy of Plea.

The court shall not enter a judgment upon a plea of guilty or nolo contendere without making such inquiry as will establish that there is a factual basis for the plea.

Rule 24.7. Record of Proceedings.

The court shall cause a verbatim record of the proceedings at which a defendant enters a plea of guilty or nolo contendere to be made and preserved.

Rule 24.8. Pleading to Other Offenses.

(a) Upon a plea of guilty or nolo contendere, or after conviction on a plea of not guilty, the defendant may make a written request, indorsed by his attorney, if any, for permission to plead guilty or nolo contendere as to any other offense or offenses he has committed which are within the jurisdiction of other courts of this state.

(b) Upon receipt of written approval of the prosecuting attorney in that governmental unit in which an offense has been or could be charged, together with either a certified copy of the charge filed in the unit or with a statement of that prosecuting attorney describing the offense, the defendant may be allowed to enter the plea.

(c) In making a request for transfer of a charge under the provisions of this rule, the defendant shall be deemed to have waived:

(i) venue as to an offense committed in another governmental unit of the state; and

(ii) return of an indictment or filing of an information as to an offense not yet formally charged.

(d) Before accepting any plea to other offenses contemplated by this rule, the court shall follow the procedure prescribed for any other plea of guilty or nolo contendere.

HISTORY

Section 24.3 was amended by per curiam order February 23, 2012—effective April 1, 2012.

Rule 25. Plea Discussions and Plea Agreements

Rule 25.1. Propriety of Plea Discussions and Plea Agreements.

(a) In cases in which it appears that it would serve the interest of the public in the effective administration of justice, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He shall engage in plea discussions and reach a plea agreement with the defendant only through defense counsel, except when the defendant has waived or refused his right to be represented by appointed or retained counsel.

(b) Similarly situated defendants shall be afforded equal opportunities for plea discussions and plea agreements.

Rule 25.2. Relationship Between Defense Counsel and Defendant.

Defense counsel shall conclude a plea agreement only with the consent of the defendant and shall ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant.

Rule 25.3. Responsibilities of the Trial Judge.

(a) The judge shall not participate in plea discussions.

(b) If a plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that the charge or charges will be reduced, that other charges will be dismissed, or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate whether he will concur in the proposed disposition. If, after the judge has indicated his concurrence with a plea agreement and the defendant has entered a plea of guilty or nolo contendere, but before sentencing, the judge decides that the disposition should not include the charge or sentence concessions contemplated by the agreement, he shall so advise the parties and then in open court call upon the defendant to either affirm or withdraw his plea.

(c) If the parties have not sought the concurrence of the trial judge in a plea agreement or if the judge has declined to indicate whether he will concur in the agreement, he shall advise the defendant in open court at the time the agreement is stated that:

(i) the agreement is not binding on the court; and

(ii) if the defendant pleads guilty or nolo contendere the disposition may be different from that contemplated by the agreement.

(d) A verbatim record of all proceedings had in open court pursuant to subsections (b) and (c) of this rule shall be made and preserved by the court.

Rule 25.4. Discussions, Agreements, Statements, Pleas and Judgments Not Admissible.

(a) No evidence of any discussion between the parties, of any statement made by the defendant, or of the fact that the parties engaged in plea discussions shall be admissible in any criminal, civil, or administrative proceeding, except in a proceeding to:

(i) terminate or modify such an agreement;

(ii) secure concurrence in a plea agreement;

(iii) secure acceptance of a plea;

(iv) secure withdrawal of a plea; or

(v) cause a judgment based upon a plea to be reversed or held invalid.

(b) Irrespective of whether a plea of guilty or nolo contendere is the result of a plea agreement, if it is not accepted or is withdrawn, or results in a judgment which is reversed or held invalid on direct or collateral review, neither the plea nor any judgment resulting therefrom, nor any statement by the defendant in connection with the making or acceptance of the plea or as a basis for sentence or other disposition thereon, is admissible in evidence against the defendant in any criminal, civil, or administrative proceeding.

Rule 26: Plea Withdrawal

Rule 26.1. Plea Withdrawal.

(a) A defendant may withdraw his or her plea of guilty or nolo contendere as a matter of right before it has been accepted by the court. A defendant may not withdraw his or her plea of guilty or nolo contendere as a matter of right after it has been accepted by the court; however, before entry of judgment, the court in its discretion may allow the defendant to withdraw his or her plea to correct a manifest injustice if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of his or her motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea. A plea of guilty or nolo contendere may not be withdrawn under this rule after entry of judgment.

(b) Withdrawal of a plea of guilty or nolo contendere shall be deemed to be necessary to correct a manifest injustice if the defendant proves to the satisfaction of the court that:

(i) he or she was denied the effective assistance of counsel;

(ii) the plea was not entered or ratified by the defendant or a person authorized to do so in his or her behalf;

(iii) the plea was involuntary, or was entered without knowledge of the nature of the charge or that the sentence imposed could be imposed;

(iv) he or she did not receive the charge or sentence concessions contemplated by a plea agreement and the prosecuting attorney failed to seek or not to oppose the concessions as promised in the plea agreement; or

(v) he or she did not receive the charge or sentence concessions contemplated by a plea agreement in which the trial court had indicated its concurrence and the defendant did not affirm the plea after receiving advice that the court had withdrawn its indicated concurrence and after an opportunity to either affirm or withdraw the plea.

(c) The defendant may move to withdraw his or her plea of guilty or nolo contendere to correct a manifest injustice without alleging that he or she is innocent of the charge to which the plea was entered.

Rule 27. The Trial Calendar

Rule 27.1. Priorities in Scheduling Criminal Cases.

All courts of this state having jurisdiction of criminal offenses shall:

(a) except for extraordinary circumstances, give precedence to the trials of criminal felony offenses over other matters before said court; and

(b) in the absence of unusual or exceptional conditions requiring the expeditious trial of an accused person free on bail, or otherwise lawfully set at liberty, give precedence to the trials of

those criminal offenses in which the accused person is incarcerated, whether such incarceration be for the offense awaiting trial or for conviction of another offense.

Rule 27.2. Assignment of Cases.

The court shall control the trial calendar and shall provide for the scheduling of cases upon the calendar.

Rule 27.3. Continuances.

The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.

Rule 28. Limitations, Excluded Periods, and Consequences

Rule 28.1. Limitations and Consequences.

(a) Any defendant charged with an offense and incarcerated in a city or county jail in this state pending trial shall be released on his own recognizance if not brought to trial within nine (9) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(b) Any defendant charged with an offense and incarcerated in prison in this state pursuant to conviction of another offense shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(c) Any defendant charged with an offense and held to bail, or otherwise lawfully set at liberty, including released from incarceration pursuant to subsection (a) hereof, shall be entitled to have the charge dismissed with an absolute bar to prosecution if not brought to trial within twelve (12) months from the time provided in Rule 28.2, excluding only such periods of necessary delay as are authorized in Rule 28.3.

(d) Any defendant who is charged with an offense in circuit court, including a defendant who appeals a district court conviction to circuit court, and who is entitled to a dismissal of the charge because not brought to trial in the circuit court as provided in subsection (b) or (c) hereof may move the circuit court for dismissal of the charge. If the circuit court denies the motion to dismiss, the defendant may raise the denial in a post-trial appeal of a conviction as grounds for reversing the conviction and dismissing the charge. The defendant whose motion 3 is denied by the circuit court shall not be entitled to seek interlocutory review of the denial by appeal or by petition for writ of prohibition, but the defendant may, in appropriate cases, seek interlocutory review by petition for writ of certiorari. The failure of a defendant to seek interlocutory review by petition for writ of certiorari shall not constitute a waiver of the defendant's right to raise the denial of rights under subsection (b) or (c) hereof in a post-trial appeal.

(e) Any defendant charged with an offense in district court who is entitled to dismissal of the charge because not brought to trial in the district court as provided in subsection (b) or (c) may move the district court for dismissal of the charge. If the district court denies the motion for dismissal, there shall be no right to interlocutory review of the denial, but the defendant who

appeals a district court conviction to the circuit court may move the circuit court for dismissal of the charge because not brought to trial in the district court as provided in subsection (b) or (c) hereof. If the circuit court denies the motion for dismissal, there shall be no right to interlocutory review of the denial except by writ of certiorari as provided in subsection (d) hereof, but the defendant who appeals a conviction in the circuit court may raise the denial as grounds for reversing the conviction and dismissing a charge.

(f) The dismissal of a charge pursuant to subsection (b) or (c) hereof shall also be an absolute bar to prosecution for any other offense required to be joined with the charge dismissed.

(g)(1) If the district court denies a defendant's motion to dismiss because not brought to trial in the district court as provided in subsection (b) and (c) hereof, the defendant may thereafter enter a plea of guilty in district court without waiving the right to move the circuit court for dismissal of the charge because the defendant was not brought to trial in the district court as provided in subsection (b) or (c) hereof.

(2) If the circuit court denies a defendant's motion to dismiss because not brought to trial in either the circuit court or the district court as provided in subsection (b) or (c) hereof, the defendant may enter a conditional plea of guilty in the circuit court as provided in Rule 24.3(b).

(3) Failure of a defendant to move for dismissal of a charge pursuant to subsection (b) or (c) hereof prior to a plea of guilty or trial shall constitute a waiver of rights under this rule, (h) This rule shall have no effect in those cases which are expressly governed by the "Interstate Agreement on Detainers Act" (Act 705 of 1971).

Reporter's Notes to 2009 Amendments: The 2009 amendments deleted references to the "circuit court" in subsections (a), (b), and (c) of this rule. The supreme court had previously held that the speedy trial requirements of the rule applied to a proceeding in municipal court, the predecessor of the district court. *Stephens v. State*, 295 Ark. 541, 750 S.W.2d 52 (1988); *Whittle v. Washington County Circuit Court*, 325 Ark. 136, 925 S.W.2d 383 (1996). Prior to the change, a defendant whose speedy trial motion was denied by the circuit court could seek interlocutory supreme court review of the decision by filing a writ of prohibition. *See* former Rule 28.1(d). Similarly, the defendant in district court could file a petition for writ of prohibition in the circuit court, and if the circuit court also denied the speedy trial motion, the defendant could seek supreme court review by writ of prohibition. *Cf. Prine v. State*, 370 Ark. 232, 258 S.W.3d 347 (2007); *McFarland v. Lindsey*, 338 Ark. 588, 2 S.W.3d 48 (1999). As a result of such interlocutory review, a rule designed to encourage prompt disposition of criminal cases often resulted in lengthy delays in the trial of such cases. The 2009 amendments substantially limit the defendant's right to seek interlocutory review of an adverse ruling on a speedy trial motion. Subsection (e) makes it clear that there is no right to interlocutory review of a district court's denial of a speedy trial motion. Under revised subsection (d), a circuit court's denial of a speedy trial motion is not reviewable prior to trial except by writ of certiorari.

It is anticipated that a writ of certiorari will be issued to a circuit court only in extraordinary cases where the record clearly demonstrates that the circuit court has grossly abused its discretion by denying the defendant's speedy trial motion. The standards for determining the propriety of a writ of certiorari are set out in numerous recent supreme court opinions:

1. A writ of certiorari is extraordinary relief.

2. The appellate court will not look beyond the face of the record to ascertain the actual merits of a controversy, or to control discretion, or to review a finding of fact, or to reverse a trial court's discretionary authority.

3. A writ of certiorari lies only where it is apparent on the face of the record that there has been a plain, manifest, clear, and gross abuse of discretion, or that there is a lack of jurisdiction, an act in excess of jurisdiction on the face of the record, or the proceedings are erroneous on the face of the record.

4. Certiorari is available in the exercise of the supreme court's review of a tribunal that is proceeding illegally where no other mode of review has been provided.

5. There can be no other adequate remedy but for the writ of certiorari. *See Evans v. Blankenship*, 374 Ark. 104, 286 S.W.3d 137 (2008); *Helena-West Helena Sch. Dist. #2 of Phillips County v. Phillips County Circuit Court*, 368 Ark. 549, 247 S.W.3d 823 (2007); *Ark. Game & Fish Comm'n v. Herndon*, 365 Ark. 180, 226 S.W.3d 776 (2006); *Ark. Dep't of Human Servs. v. Collier*, 351 Ark. 506, 95 S.W.3d 772 (2003) (writ of certiorari granted when trial court made a decision that was contrary to the plain language of a statute*); Cooper Communities, Inc. v. Benton County Circuit Court*, 336 Ark. 136, 984 S.W.2d 429 (1999); *Oliver v. Pulaski County Circuit Court*, 340 Ark. 681, 13 S.W.3d 156 (2000). Prior to the 2009 amendments, a guilty plea waived the defendant's right to raise an alleged denial of speedy trial. Revised subsection(g)(1) makes it clear that a defendant whose speedy trial motion is denied by the district court may thereafter plead guilty in the district court, file an appeal with the circuit court, and renew the speedy trial motion in the circuit court. A similar procedure does not apply in circuit court, but revised subsection(g)(2) does permit the defendant whose speedy trial motion is denied by the circuit court to enter a conditional plea of guilty and still appeal the speedy trial issue to an appellate court provided the requirements of Rule 24.3(b) are otherwise satisfied.

Rule 28.2. When Time Commences to Run.

(a) The time for trial shall commence running from the date of arrest or service of summons.

(b) When the charge is dismissed upon motion of the defendant and subsequently the dismissed charge is reinstated, or the defendant is arrested or charged with the same offense, the time for trial shall commence running from the date the dismissed charge is reinstated or the defendant is subsequently arrested or charged, whichever is earlier; and when the charge is dismissed upon motion of the defendant and subsequently the charge is reinstated following an appeal, the time for trial shall commence running from the date the mandate is issued by the appellate court.

(c) If the defendant is to be retried following a mistrial, the time for trial shall commence running from the date of mistrial.

(d) If the defendant is to be retried following an order by the trial court granting a new trial, the time for trial shall commence running from the date of the order granting a new trial, unless the

state appeals the order granting a new trial, in which case the time for trial shall commence running from the date the mandate is issued by the appellate court.

(e) If the defendant is to be retried following an appeal of a conviction, the time for trial shall commence running from the date the mandate is issued by the appellate court.

(f) If the defendant is to be retried following a collateral attack of a conviction, the time for trial shall commence running from the date of the order invalidating the conviction, unless the state appeals the order invalidating the conviction, in which case the time for trial shall commence running on the date of remand by the appellate court.

Reporter's Note 2002: Prior to the amendment, subsection (c) applied to retrials following a mistrial, retrials following an order granting a new trial, retrials following an appeal, and retrials following a collateral attack. The amendments split these various proceedings into new separate subsections.

The amendments also change the rule regarding a retrial following an appeal of an order granting a new trial. Under new subsection (d), the time for retrial begins running when the appellate court returns the case to the trial court. This changes the rule applied, but not the result reached in *Cherry v. State*, 347 Ark. 606, 66 S.W.3d 605 (2002) (time for retrial started running when the trial court entered order granting a new trial but the period during which the new trial order was on appeal treated as an excluded period under Ark. R. Crim. P. 28.3).

The amendments were not intended to change the rule that time for trial begins to run without demand by the defendant.

Reporter's Note 2007: Prior to the 2007 amendment, this rule provided that the time for trial began to run on the date the charge was filed, except when the defendant was held in custody or on bail prior to the filing of the charge, in which case the time for trial began to run on the date of arrest. The 2007 amendment changed the speedy trial start date to the date of arrest, whether the charge is filed before or after that date. The reference to "service of summons" applies to those cases in which the defendant is brought before the court via a summons, rather than an arrest. See Rule 6—Issuance of Summons in Lieu of Arrest Warrant.

The 2007 amendment applies to prosecutions initiated after the effective date of the amendment. If a person was charged with an offense before the effective date of the amendment, but arrested after the effective date of the amendment, the time for trial begins to run on the date the charge was filed.

Rule 28.3. Excluded Periods.

The following periods shall be excluded in computing the time for trial. Such periods shall be set forth by the court in a written order or docket entry, but it shall not be necessary for the court to make the determination until the defendant has moved to enforce his right to a speedy trial pursuant to Rule 28 unless it is specifically provided to the contrary below. The number of days of the excluded period or periods shall be added to the time applicable to the defendant as set forth in Rules 28.1 and 28.2 to determine the limitations and consequences applicable to the defendant.

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on the competency of the defendant and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trials of other charges against the defendant. No pretrial motion shall be held under advisement for more than thirty (30) days, and the period of time in excess of thirty (30) days during which any such motion is held under advisement shall not be considered an excluded period.

(b) The period of delay resulting from a continuance attributable to congestion of the trial docket if in a written order or docket entry at the time the continuance is granted:

(1) the court explains with particularity the reasons the trial docket does not permit trial on the date originally scheduled;

(2) the court determines that the delay will not prejudice the defendant; and

(3) the court schedules the trial on the next available date permitted by the trial docket.

(c) The period of delay resulting from a continuance granted at the request of the defendant or his counsel. All continuances granted at the request of the defendant or his counsel shall be to a day certain, and the period of delay shall be from the date the continuance is granted until such subsequent date contained in the order or docket entry granting the continuance.

(d) The period of delay resulting from a continuance (calculated from the date the continuance is granted until the subsequent date contained in the order or docket entry granting the continuance) granted at the request of the prosecuting attorney, if:

(1) the continuance is granted because of the unavailability of evidence material to the state's case, when due diligence has been exercised to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date; or

(2) the continuance is granted in a felony case to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional complexity of the particular case.

(e) The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

(f) The time between a dismissal or nolle prosequi upon motion of the prosecuting attorney for good cause shown, and the time the charge is later filed for the same offense or an offense required to be joined with that offense.

(g) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant acting with due diligence shall be granted a severance so that he may be tried within the time limits applicable to him.

(h) Other periods of delay for good cause.

Reporter's Notes to 1999 Amendments: Subsection (b) has been amended and subsection (i) has been moved to the opening paragraph. These changes have been made to address recurrent problems arising in cases. *E.g.*, *Hicks v. State*, 305 Ark. 393, 808 S.W. 2d 348 (1991).

The opening paragraph was added which includes language formerly in subsection (i), but further provides that the trial court may determine the excluded periods when the defendant has moved for dismissal pursuant to Rule 28.1 rather than at an earlier date although the judge is still free to do so earlier. This finding is a determination of the excluded periods.

Subsection (b) was amended to make more practical a continuance granted because of congestion of the trial docket. The three-pronged finding was substituted for the previous standard which required a finding of "exceptional circumstances." This requirement of the entry of a contemporaneous written order explaining the reasons for the continuance, finding that the defendant is not prejudiced, and scheduling a new trial date is in addition to the finding required as to the periods to be excluded. Typically, the period to be excluded under subsection (b) will be from the date on which the trial was scheduled as specified in (b)(1) to the rescheduled date as specified in (b)(3).

Rule 29. Special Procedures: Person Serving Term of Imprisonment

Rule 29.1. Prosecutor's Obligations.

(a) If the prosecuting attorney has information that a person charged with a crime is imprisoned in a penal institution in the State of Arkansas, he shall promptly seek to obtain the presence of the prisoner for trial, (b) If the prosecuting attorney has information that a person charged with a crime is imprisoned in a penal institution of a jurisdiction other than the State of Arkansas, he shall promptly cause a detainer to be filed with the official having custody of the prisoner and request such officer to advise the prisoner of the filing of the detainer and of the prisoner's right to demand trial, (c) Upon receipt from a prisoner of a demand for trial upon a pending charge, the prosecuting attorney shall promptly seek to obtain the presence of the prisoner for trial.

Rule 30. Consequences of Denial of Speedy Trial

Rule 30.1. Absolute Discharge.

(a) Subject to the provisions of subsection (b) hereof, a defendant not brought to trial before the running of the time for trial, as extended by excluded periods, shall be absolutely discharged. This discharge shall constitute an absolute bar to prosecution for the offense charged and for any other offense required to be joined with that offense.

(b) An incarcerated defendant not brought to trial before the running of the time for trial as provided by Rules 28.1-28.3 shall not be entitled to absolute discharge pursuant to subsection (a) hereof but shall be recognized or released on order to appear.

(c) The time for trial of a defendant released pursuant to subsection (b) hereof shall be computed pursuant to Rules 28.1 (b) and 28.2.

Rule 30.2. Waiver.

Failure of a defendant to move for dismissal of the charges under these rules prior to a plea of guilty or trial shall constitute a waiver of his rights under these rules.

Rule 31. Right to Trial by Jury

Rule 31.1. Waiver of Trial by Jury: Assent by Prosecutor.

No defendant in any criminal cause may waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court.

Rule 31.2. Waiver of Trial by Jury: Personal Request.

Should a defendant desire to waive his right to trial by jury, he may do so either (1) personally in writing or in open court, or (2) through counsel if the waiver is made in open court and in the presence of the defendant. A verbatim record of any proceedings at which a defendant waives his right to a trial by jury in person or through counsel shall be made and preserved.

Rule 31.3. Waiver of Trial by Jury: Waiver by Counsel or Agent.

In misdemeanor cases, where only a fine is imposed by the court, a jury trial may be waived by the defendant's attorney, except that a corporation charged with any crime may waive a jury trial through counsel or authorized corporate officer.

Rule 31.4. Waiver of Trial by Jury: Capital Felonies.

No defendant charged with a capital felony may waive either trial by jury on the issue of guilt or the right to have sentence determined by a jury unless:

(a) the court in which the cause is to be tried determines that the waiver is voluntarily and freely proffered without compulsion or coercion; and

(b) the prosecuting attorney, with the permission of the court, has waived the death penalty; and

(c) the prosecuting attorney has assented to the waiver of trial by jury, and such waiver has been approved by the court.

Rule 31.5. Discretionary Withdrawal of Waiver.

A defendant may not withdraw his voluntary and knowing waiver of trial by jury as a matter of right, but the court, in its discretion, may permit withdrawal of the waiver prior to the commencement of trial.

Rule 32. Selection of Jurors

Rule 32.1. List of Prospective Jurors.

The circuit court may require members of petit jury panels to complete written questionnaires setting forth the following information:

(i) age;

(ii) marital status;

(iii) extent of education;

(iv) occupation of juror and spouse; and

(v) prior jury service.

Upon request, such questionnaires shall be made available by the clerk of the court to the defendant or his counsel and the prosecuting attorney. Upon a showing of good cause, additional information may be furnished regarding jurors by order of the court.

Rule 32.2. Voir Dire Examination.

(a) Voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable the parties to intelligently exercise peremptory challenges. The judge shall initiate the voir dire examination by:

(i) identifying the parties; and

(ii) identifying the respective counsel; and

(iii) revealing the names of those witnesses whose names have been made known to the court by the parties; and

(iv) briefly outlining the nature of the case.

(b) The judge shall then put to the prospective jurors any question which he thinks necessary touching their qualifications to serve as jurors in the cause on trial. The judge shall also permit such additional questions by the defendant or his attorney and the prosecuting attorney as the judge deems reasonable and proper.

Rule 32.3. Alternate Jurors.

(a) The court may direct that additional jurors be called and impanelled in addition to the regular jury to sit as alternate jurors. The number of alternate jurors shall be at the discretion of the court, taking into consideration the estimated length and cost of the trial, the number of witnesses, and the ages and health of the regular jurors. Alternate jurors in the order in which they are called shall replace jurors who are discharged by the court for good cause upon being found unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall take the same oath, and shall have the same functions, powers, facilities and privileges as the regular jurors. Each side shall be entitled to one peremptory challenge for each alternate juror to be impanelled. The additional peremptory challenge may be used against an alternate juror only, and all other peremptory challenges allowed by law shall not be used against an alternate juror.

(b) Any alternate juror, who has not replaced a regular juror prior to the time the jury retires to consider its verdict, shall be further instructed by the court in addition to the usual instruction regarding discussion of the case and not permitting any one to discuss the case with him or her, to remain at the courthouse during deliberation. During deliberation, should any regular juror die, or upon good cause shown to the court be found unable or disqualified to perform his or her

duties, the court may order the juror to be discharged. The court may in its discretion, as an alternative to mistrial, replace such juror with the next alternate. In such event, the court shall instruct the jury to disregard all previous deliberation, and to commence deliberation anew. The trial court in its discretion may seat additional alternates as jurors in this manner as needed.

(c) In the case of a capital murder trial or any other bifurcated trial in which the court cannot fix punishment pursuant to Ark. Code Ann. § 5-4-103(b), and in which there are alternate jurors remaining after the jury has returned a verdict of guilty, the next alternate jurors, not to exceed two, shall be placed in the jury box along with the regular jurors. Any alternate jurors in addition to these two shall be dismissed. The trial will proceed with the penalty phase. When the jury retires to deliberate the penalty, the remaining alternate juror or jurors will again remain at the courthouse during deliberation.

> (1) If at any time after a verdict of guilty, but before a verdict fixing punishment, a juror who participated in the guilt phase of a capital murder trial or other trial described above dies, becomes ill, or is otherwise found to be unable or disqualified to perform his or her duties, such juror shall be discharged. The court may in its discretion, as an alternative to mistrial or any other option available by statute or these rules, replace such juror with the next alternate. However, in such event, the court may first give the defendant, with the agreement of the prosecution, the option to waive jury sentencing, in which case the court shall impose sentence, or to accept a verdict by the remaining jurors. If the defendant does not waive jury sentencing, or agree to accept a verdict by the remaining jurors, the trial will continue with the alternate participating in the penalty phase. In such event, the court shall instruct the jury to commence deliberation anew as to the sentencing phase only.
>
> (2) Notwithstanding Ark. Code Ann. § 5-4-602(3), which requires that the same jury sit in the sentencing phase of a capital murder trial, the court may in its discretion proceed pursuant to this rule and seat an alternate juror.

Rule 33. Motions for Directed Verdict and Other Trial Procedures

Rule 33.1. Motions for Directed Verdict.

(a) In a jury trial, if a motion for directed verdict is to be made, it shall be made at the close of the evidence offered by the prosecution and at the close of all of the evidence. A motion for directed verdict shall state the specific grounds therefor.

(b) In a nonjury trial, if a motion for dismissal is to be made, it shall be made at the close of all of the evidence. The motion for dismissal shall state the specific grounds therefor. If the defendant moved for dismissal at the conclusion of the prosecution's evidence, then the motion must be renewed at the close of all of the evidence.

(c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does

not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense. A renewal at the close of all of the evidence of a previous motion for directed verdict or for dismissal preserves the issue of insufficient evidence for appeal. If for any reason a motion or a renewed motion at the close of all of the evidence for directed verdict or for dismissal is not ruled upon, it is deemed denied for purposes of obtaining appellate review on the question of the sufficiency of the evidence.

Reporter's Notes: The rule was divided into subsections for ease of reference. Subsection (a) applies to jury trials, subsection (b) to bench trials, and subsection (c) to both. In both jury and bench trials, the defendant is required to notify the trial court of the particular reasons why the state's evidence is insufficient in order to preserve that issue for appeal. This requirement in a bench trial is a change in previous procedure and overrules the decision in *Strickland v. State*, 322 Ark. 312, 909 S.W.2d 318 (1995). *See generally* Note, *An Analysis of Arkansas's Exceptional Treatment of the Contemporaneous Objection Rule in Criminal Bench Trials*, 19 U. Ark. Little Rock L.J. 291 (1997).

Rule 33.2. Sentencing and Entry of Judgment.

Upon the return of a verdict of guilty in a case tried by a jury, or a finding of guilty in a case tried by a circuit court without a jury, sentence may be pronounced and the judgment of the court may be then and there entered, or sentencing and the entry of the judgment may be postponed to a date certain then fixed by the court, not more than thirty (30) days thereafter, at which time probation reports may be submitted, matters of mitigation presented or any other matter heard that the court of the defendant might deem appropriate to consider before the pronouncement of sentence and entry of the formal judgment. The defendant may file a written demand for immediate sentencing, whereupon the trial judge may cause formal sentence and judgment to be made of record. At the time sentence is pronounced and judgment entered, the trial judge must advise the defendant of his right to appeal, the period of time prescribed for perfecting the appeal, and either fix or deny bond.

Rule 33.3. Posttrial Motions.

(a) A person convicted of either a felony or misdemeanor may file a motion for new trial or any other application for relief. Such pleadings shall include a statement that the movant believes the action to be meritorious and is not offered for the purpose of delay. A copy of any such motion shall be served on the representative of the prosecuting party. The trial court shall designate a date certain, if a hearing is requested or found to be necessary, to take evidence, hear, and determine all of the matters presented. The hearing shall be held within ten (10) days of the filing of any motion or application unless circumstances justify that the hearing or determination be delayed.

(b) All posttrial motions or applications for relief must be filed within thirty days after the date of entry of judgment. A posttrial motion or application filed before the entry of judgment shall become effective and be treated as filed on the day after the judgment is entered.

(c) Upon the filing of a posttrial motion or application for relief in the trial court, the time to file a notice of appeal shall not expire until thirty (30) days after the disposition of all motions or applications. If the trial court neither grants nor denies a posttrial motion or application for relief

within thirty (30) days after the date the motion or application is filed, the motion or application shall be deemed denied as of the 30th day.

Addition to Reporter's Notes, 2001 Amendment: The rule has been reorganized and divided into three subdivisions. The second sentence of subdivision (b) is new and effectively overturns a line of cases which held that a posttrial motion that is filed prior to the entry of the judgment is untimely and ineffective. *See Brown v. State*, 333 Ark. 698, 970 S.W.2d 287 (1998); *Davies v. State*, 64 Ark. App. 12, 977 S.W. 2d 900 (1998); *Hicks v. State*, 324 Ark. 450, 921 S.W.2d 604 (1996); *Webster v. State*, 320 Ark. 393, 896 S.W.2d 890 (1995). The second sentence of subdivision (c) provides that a motion not ruled on by the court within 30 days of its filing (or within 30 days of the date it is treated as filed) is "deemed denied as of the 30th day." This provision also appears in Rule 2(b)(1) of the Rules of Appellate Procedure–Criminal. The time within which to file a notice of appeal is found in Rule 2 of the Rules of Appellate Procedure–Criminal.

Rule 33.4. Custody and Restraint of Defendants and Witnesses.

Defendants and witnesses shall not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order. If the trial judge orders such restraint, he shall enter into the record of the case the reasons therefor. Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge shall upon request of the defendant or his attorney instruct the jury that such restraint is not to be considered in assessing the proof and determining guilt.

Rule 33.5. Note-Taking by Jurors.

Jurors may take notes regarding the evidence presented to them during the course of a trial and keep the notes when the jury retires for its deliberations. Any notes so taken shall be treated as confidential, disclosure of the notes or their nature being permissible only between the juror making them and his fellow jurors.

Rule 33.6. Instructions and Verdict Forms.

(a) In the trial of all cases in courts of record wherein juries are employed, upon request of counsel for any party, or of a juror, it shall be the duty of the presiding judge to deliver to the jury immediately prior to its retirement for deliberation, a written copy of the oral instructions read to the jury. The written jury instructions shall be returned to the court by the foreman of the jury when the jury is dismissed.

(b) The verdict forms and written jury instructions shall be filed in the clerk's case file at the conclusion of the jury's deliberations.

(c) Any proffered jury instructions, which were requested by parties and rejected by the court, shall be delivered to the court reporter and made an exhibit to the court reporter's transcript.

COMMENT

Reporter's Notes, 2019 Amendment: Subdivisions (b) and (c) were added.

HISTORY

Amended October 18, 2018 and effective January 1, 2019.

Rule 33.7. Additional Instructions.

(a) If, after retiring for deliberation, a jury desires additional instructions it shall be conducted to a court room designated by the judge.

(b) The court shall give additional instructions in response to a jury's request unless:

(i) the jury may be adequately informed by directing its attention to some portion of the original instructions;

(ii) the request concerns matters not in evidence or questions not pertaining to the law of the case; or

(iii) the request would require the judge to express an opinion as to factual matters that the jury must determine.

(c) In order to avoid giving undue prominence to additional instructions, the court in its discretion may repeat instructions previously given.

(d)The judge may recall the jury after it has retired to deliberate and give it additional instructions in order to:

(i) correct or withdraw an erroneous instruction;

(ii) clarify an ambiguous instruction; or

(iii) inform the jury on a point of law which should have been covered by the original instructions.

(e) Should additional instructions be given, the judge in his discretion may allow additional argument by counsel.

Rule 33.8 Questions by Jurors

Jurors shall not be permitted to pose questions to witnesses, either directly or through written questions submitted to the judge or to the parties.

COMMENT

Reporter's Notes, 2007 Addition of Rule 33.8: Permitting jurors to question witnesses may cause delay, prejudice, or error. Rule 33.8 was added in 2007 to bar the practice.

HISTORY

Adopted and effective February 22, 2007.

Rule 33.9 Record of Waiver of Right to Testify.

If in a trial the defendant waives the right to testify in his or her own defense, the court shall determine on the record in the presence of the defendant that the defendant has been advised of the right to testify and has waived that right. Such a determination shall not be made by inquiry directed to the defendant and shall not be made in the presence of the jury.

COMMENT

Reporter's Note, 2014: This rule was added in 2014 in response to the Supreme Court's decisions in *Williams v. State*, 2011 Ark. 489 and *Sartin v. State*, 2012 Ark. 155. The rule is satisfied if defense counsel affirmatively states on the record that he or she has advised the defendant of the right to testify. If defense counsel does not so state, the trial court should determine by inquiry addressed to counsel that the defendant has been so advised.

HISTORY

Adopted by per curiam order May 29, 2014, effective July 1, 2014.

Rule 34. Juror Orientation

Rule 34.1. Juror Orientation.

Prospective jurors shall receive an orientation which informs them of the nature of their duties and introduces them to trial procedure and legal terminology, but which does not include anything to be regarded by the jurors as instructions of law to be applied in any case or anything that may prejudice a party or mislead the jurors. This orientation may be accomplished by the use of juror handbooks and by supplementary oral instruction if and to the extent deemed necessary by the court.

Rule 35. Judicial Comment.

Rule 35.1. Judicial Comment on Verdict.

While it is appropriate for the court to thank the jurors at the conclusion of a trial for their public service, such comments shall not include praise or criticism of their verdict.

Rule 36. Appeals from District Court to Circuit Court

(a) *Right to Appeal*. A person convicted of a criminal offense in a district court, including a person convicted upon a plea of guilty, may appeal the judgment of conviction to the circuit court for the judicial district in which the conviction occurred. The state shall have no right of appeal from a judgment of a district court.

(b) *Time for Taking Appeal*. An appeal from a district court to the circuit court shall be filed in the office of the clerk of the circuit court having jurisdiction of the appeal within thirty (30) days

from the date of the entry of the judgment in the district court. The 30-day period is not extended by the filing of a post-trial motion under Rule 33.3.

(c) *How Taken*. An appeal from a district court to circuit court shall be taken by filing with the clerk of the circuit court a certified record of the proceedings in the district court. Neither a notice of appeal nor an order granting an appeal shall be required. The record of proceedings in the district court shall include, at a minimum, a copy of the district court docket sheet and any bond or other security filed by the defendant to guarantee the defendant's appearance before the circuit court. It shall be the duty of the clerk of the district court to prepare and certify such record when the defendant files a written request to that effect with the clerk of the district court and pays any fees of the district court authorized by law therefor. The defendant shall serve a copy of the written request on the prosecuting attorney for the judicial district and shall file a certificate of such service with the district court. The defendant shall have the responsibility of filing the certified record in the office of the circuit clerk. Except as otherwise provided in subsection (d) of this rule, the circuit court shall acquire jurisdiction of the appeal upon the filing of the certified record in the office of the circuit clerk.

(d) *Failure of clerk to file record*. If the clerk of the district court does not prepare and certify a record for filing in the circuit court in a timely manner, the defendant may take an appeal by filing an affidavit in the office of the circuit clerk, within forty (40) days from the date of the entry of the judgment in the district court, showing (i) that the defendant has requested the clerk of the district court to prepare and certify the record for purposes of appeal and (ii) that the clerk has not done so within thirty (30) days from the date of the entry of the judgment in the district court. The defendant shall promptly serve a copy of such affidavit upon the clerk of the district court and upon the prosecuting attorney. The circuit court shall acquire jurisdiction of the appeal upon the filing of the affidavit. On motion of the defendant or the prosecuting attorney, the circuit court may order the clerk of the district court to prepare, certify, and file a record in the circuit court.

(e) *Bond*. When an appeal is taken from a district court to circuit court, the district court may require the defendant to post a bond or other security to guarantee the appearance of the defendant before the circuit court, provided that an appearance bond originally posted with the district court to guarantee the appearance of the defendant before that court shall serve to guarantee the appearance of the defendant before the circuit court on appeal. The approval of the bond or other security to guarantee the appearance of the defendant before the circuit court shall stay the imposition of the judgment imposed by the district court. The clerk of the district court shall transmit any bond or other security to the circuit court. The failure of the defendant to post a bond or other security with the district court shall not prevent the circuit court from acquiring jurisdiction of the appeal. After acquiring jurisdiction of the appeal, the circuit court may modify the bond or other security.

(f) *Notice*. When the record of the proceeding in the district court is filed in the office of the circuit clerk, the circuit clerk shall promptly give written notice thereof to the prosecuting attorney and to the circuit judge to whom the appeal is assigned.

(g) *Trial De Novo*. An appeal from a judgment of conviction in a district court shall be tried de novo in the circuit court as if no judgment had been rendered in the district court.

(h) *Default Judgment*. The circuit court may affirm the judgment of the district court if (i) the defendant fails to appear in circuit court when the case is set for trial; or (ii) the clerk of the district court fails to prepare and certify a record for filing in the circuit court as provided in subsection (c) of this rule and the defendant fails to move the circuit court for an order to compel the filing of the record within thirty (30) days after filing the affidavit provided in subsection (d) of this rule.

(i) *District court without clerk.* If a district court has no clerk, any reference in this rule to the clerk of a district court shall be deemed to refer to the judge of the district court.

COMMENT

Reporter's Notes: Prior to the adoption of Rule 36 appeals from limited jurisdiction courts to circuit court were governed by District Court Rule 9 (formerly Inferior Court Rule 9) and various statutory provisions in Title 16, Chapter 9, Subchapter 5. Although District Court Rule 1 limited the scope of the rules to "civil actions in district courts and county courts," the Supreme Court ruled that District Court Rule 9 also governed criminal appeals. *Bocksnick v. City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992). Subsection (a) incorporates Ark. Code Ann. § 16-96-501 (shown as superseded) and Arkansas Code Ann. § 16-96-502 (repealed in 2005). *See also*, Amendment 80, § 7(A) of the Arkansas Constitution, which establishes district courts as trial courts of limited jurisdiction, subject to the right of appeal to circuit court. Subsection (b) substantially restates District Court Rule 9(a). Subsection (c) is based on District Court Rule 9(b). Because appearance bonds are unique to criminal appeals, the sentence requiring the record to include any bond or other security to guarantee the defendant's appearance in circuit court is not found in District Court Rule 9(b). Ark. Code Ann. § 16-96-505, which describes the transcript in a criminal case, was not included in this subsection because § 16-96-505 is shown as superseded by the Code Revision Commission. Subsection (d) is based on District Court Rule 9(c). A defendant has two ways to perfect an appeal from district court to circuit court. The usual method will be to file the certified record with the circuit court, as described in subsection (c). Alternatively, if the district court clerk does not prepare and certify the district court record, the defendant can vest the circuit court with jurisdiction by filing the affidavit described in subsection (d). *Velek v. State (City of Little Rock)*, 364 Ark. 531, 222 S.W.3d 182 (2006). If the district court record is not filed within thirty days but is filed within forty days, the circuit court does not acquire jurisdiction of the appeal unless the defendant also files an affidavit to the effect that the record was requested but not prepared and certified within thirty days by the district court clerk. Subsection (e) is derived from on District Court Rule 9(d) and repealed Ark. Code Ann. § 16-96-504. The sentence providing that an appearance bond posted with the district court shall serve to guarantee the appearance of the defendant before the circuit court is consistent with Arkansas Rule of Criminal Procedure 9.2(e). The next to last sentence of the subsection codifies the holding of *Velek, supra.* In that case the Supreme Court ruled that the circuit court acquired jurisdiction upon filing of the affidavit described in subsection (d) even though the district court clerk refused to prepare the record because the defendant failed to post an appeal bond. Subsection (f) ensures that both the prosecuting attorney and the circuit judge are aware that an appeal to circuit court has been filed and should reduce the number of cases in which the defendant fails to receive the speedy trial required by Arkansas Rule of Criminal Procedure 28. There is nothing comparable to this subsection in current law. Subsection (g)'s provision for de novo review of a district court judgment on appeal to circuit court is required by Amendment 80,

§ 7(A) of the Arkansas Constitution. See, also, Ark. Code Ann. § 16-96-507. Subsection (h) is based loosely on Ark. Code Ann. § 16-96-508. The collection and disposition of fines, penalties, forfeitures, or costs in the event of a default judgment in circuit court will continue to be governed by Ark. Code Ann. § 16-96-403.

Addition to Reporter's Notes, 2007 Amendments: The 2007 amendments clarified the contents of the record that must be filed with the circuit court in order to vest that court with jurisdiction of the appeal. *Cf. McNabb v. State*, 367 Ark. 93, 238 S.W.3d 119 (2009). After acquiring jurisdiction of the appeal, the circuit court can, if necessary or desirable, order additional documents or pleadings filed in the district court to be made a part of the record on appeal.

HISTORY

Adopted May 11, 2006, effective June 1, 2006; amended February 22, 2007.

Rule 37. Other Post conviction Proceedings and Relief

Rule 37.1. Scope of Remedy.

(a) A petitioner in custody under sentence of a circuit court claiming a right to be released, or to have a new trial, or to have the original sentence modified on the ground: (i) that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or (ii) that the court imposing the sentence was without jurisdiction to do so; or (iii) that the sentence was in excess of the maximum sentence authorized by law; or (iv) that the sentence is otherwise subject to collateral attack may file a petition in the court that imposed the sentence, praying that the sentence be vacated or corrected.

(b) The petition shall state in concise, nonrepetitive, factually specific language, the grounds upon which it is based. The petition, whether handwritten or typed, shall be clearly legible, and shall not exceed ten pages of thirty lines per page and fifteen words per line, with left and right margins of at least one and one-half inches and upper and lower margins of at least two inches. The circuit court or appellate court may dismiss any petition that fails to comply with this subsection.

(c) The petition shall be accompanied by the petitioner's affidavit, sworn to before a notary or other officer authorized by law to administer oaths, in substantially the following form:

AFFIDAVIT

The petitioner states under oath that (he) (she) has read the foregoing petition for postconviction relief and that the facts stated in the petition are true, correct, and complete to the best of petitioner's knowledge and belief.

_____
Petitioner's signature

Subscribed and sworn to before me the undersigned officer this ___ day of _____, 20____.

_____
Notary or other officer

(d) The circuit clerk shall not accept for filing any petition that fails to comply with subsection (c) of this rule. The circuit court or any appellate court shall dismiss any petition that fails to comply with subsection (c) of this rule.

(e) In addition to filing the petition with the clerk of the court, the petitioner shall (I) send a letter to the judge of the circuit court that imposed the sentence notifying the judge that the petition has been filed and (ii) file with the clerk a copy of the letter notifying the judge that the petition has been filed. The letter to the judge shall enclose all copies of pleadings and documents relating to the petition and shall reflect service on the prosecuting attorney. Filings pursuant to this subsection (e) shall be used solely for purposes of Administrative Order No. 3, and failure to comply with this subsection (e) shall not be grounds for dismissing the petition.

Reporter's Notes to 2006 Amendments: Rule 37.1 formerly stated that a petition for postconviction relief had to be "verified." The 2006 amendments added subsections (c) and (d) to reduce the likelihood that the verification requirement would be overlooked by the petitioner or the courts.

Reporter's Note, 2007 Amendment: Subsection (e) was added in 2007. Administrative Order No. 3 requires circuit judges to report cases under advisement for more than 90 days to the Administrative Office of the Courts. The 90-day period does not start to run on a Rule 37 petition until the judge is notified as provided in subsection (e).

Rule 37.2. Commencement of Proceedings; pleadings.

(a) If the conviction in the original case was appealed to the Supreme Court or Court of Appeals, then no proceedings under this rule shall be entertained by the circuit court while the appeal is pending.

(b) All grounds for relief available to a petitioner under this rule must be raised in his or her original petition unless the petition was denied without prejudice. Any ground not so raised or any ground finally adjudicated or intelligently and understandingly waived in the proceedings which resulted in the conviction or sentence, or in any other proceedings that the petitioner may have taken to secure relief from his or her conviction or sentence, may not be the basis for a subsequent petition. All grounds for postconviction relief from a sentence imposed by a circuit court, including claims that a sentence is illegal or was illegally imposed, must be raised in a petition under this rule.

(c)(i) If a conviction was obtained on a plea of guilty, or the petitioner was found guilty at trial and did not appeal the judgment of conviction, a petition claiming relief under this rule must be filed in the appropriate circuit court within ninety (90) days of the date of entry of judgment. If a petition is filed before the entry of judgment, the petition shall be treated as filed on the day after the entry of judgment.

(ii) If an appeal was taken of the judgment of conviction, a petition claiming relief under this rule must be filed in the circuit court within sixty (60) days of the date the mandate is issued by the appellate court. If a petition is filed after a conviction is affirmed by the appellate court but before the mandate is issued, the petition shall be treated as filed on the day after the mandate is issued.

(iii) In the event an appeal was dismissed, the petition must be filed in the appropriate circuit court within sixty (60) days of the date the appeal was dismissed.

(iv) If the appellate court affirms the conviction but reverses the sentence, the petition must be filed as provided in subsection (ii) within sixty (60) days of a mandate following an appeal taken after resentencing. If no appeal is taken after resentencing, then the petition must be filed as provided in subsection (i) with the appropriate circuit court within ninety (90) days of the entry of the judgment.

(d) The decision of the court in any proceeding under this rule shall be final when the judgment is rendered. No petition for rehearing shall be considered.

(e) Before the court acts upon a petition filed under this rule, the petition may be amended with leave of the court.

(f) Within twenty (20) days after service of a petition under this rule, the state may file a response thereto with evidence of service on opposing counsel or on the petitioner if he or she is acting pro se.

(g) *Inmate filing.* For purposes of subsection (c) of this rule, a petition filed pro se by a person confined in a correctional or detention facility that is not timely under the provisions of subsection (c) of this rule shall be deemed filed on the date of its deposit in the facility's legal mail system if the following conditions are satisfied:

(i) on the date the petition is deposited in the mail, the petitioner is confined in a state correctional facility, a federal correctional facility, or a regional or county detention facility that maintains a system designed for legal mail; and

(ii) the petition is filed pro se; and

(iii) the petition is deposited with first-class postage prepaid, addressed to the clerk of the circuit court; and

(iv) the petition contains a notarized statement by the petitioner as follows:

"I declare under penalty of perjury:

that I am incarcerated in _____ [*name of facility*];

that the petition is being deposited in the facility's legal mail system on _____ [*date*];

that first-class postage has been prepaid; and

that the petition is being mailed to _____ [*list the name and address of each person served with a copy of the petition*].

_____

(Signature)

[NOTARY]"

The envelope in which the petition is mailed to the circuit clerk shall be retained by the circuit clerk and included in the record of any appeal of the petition.

COMMENT

Reporter's Notes, 2011: In addition to minor, nonsubstantive editorial revisions, the 2011 amendments made two major changes to the period within which a Rule 37 petition must be filed. First, the amendments struck confusing language in subsection (c)(i) pursuant to which the 90-day period for filing a petition commenced from the date sentence was "pronounced" when judgment was not entered within 10 days of the date sentence was pronounced. Second, the amendments adopted the "deemed filed" rule that Arkansas Rule of Appellate Procedure–Criminal 2(b)(1) applies to a premature notice of appeal. Thus, the amendment changes the result announced in *Tapp v. State*, 324 Ark. 176, 920 S.W.2d 482 (1996) ("[Rule 37] does not allow for holding allegations in abeyance for future consideration when the [circuit] court obtains jurisdiction.") Note that the "deemed filed" rule only applies to appealed cases if the petition is filed with the circuit court after the conviction is affirmed, but before the mandate is issued. If the Rule 37 petition is filed before the appellate court has issued its decision on the appeal, then the circuit court is limited to dismissing the petition as untimely.

Reporter's Notes, 2015 amendment: The 2015 amendment added subsection (g). The amendment is patterned after the federal "mailbox rule," Fed. R. App. P. 4(c). It is limited to petitions filed by pro se inmates.

HISTORY

Amended June 25, 2015, effective September 1, 2015.

Rule 37.3. Nature of Proceedings; Summary Disposition; Appointment of Counsel; Evidentiary Hearings; Presence of Petitioner.

(a) If the petition and the files and records of the case conclusively show that the petitioner is entitled to no relief, the trial court shall make written findings to that effect, specifying any parts of the files, or records that are relied upon to sustain the court's findings.

(b) If the original petition, or a motion for appointment of counsel should allege that the petitioner is unable to pay the cost of the proceedings and to employ counsel, and if the court is satisfied that the allegation is true, the court may at its discretion appoint counsel for the petitioner for any hearing held in the circuit court. If a petition on which the petitioner was represented by counsel is denied, counsel shall continue to represent the petitioner for an appeal to the Supreme Court, unless relieved as counsel by the circuit court or the Supreme Court. If no

hearing was held or the petitioner proceeded pro se at the hearing, the circuit court may at its discretion appoint counsel for an appeal upon proper motion by the petitioner.

(c) When a petition is filed in the circuit court and the court does not dispose of the petition under subsection (a) hereof, the court shall cause notice of the filing thereof to be served on the prosecuting attorney and the petitioner's counsel of record at the trial court level; and on the petition the court shall grant prompt hearing with proceedings reported. At any hearing ordered by the court the petitioner shall be present, unless the petitioner waives the right to appear or the trial court determines that the issues to be addressed at the hearing can be fairly resolved without the presence of the petitioner or the trial court directs that the testimony of petitioner be taken by deposition. The rules of evidence shall apply at any hearing. The court shall determine the issues and make written findings of fact and conclusions of law with respect thereto.

(d) When an order is rendered on a petition filed under this rule, the circuit court shall promptly mail a copy of the order to the petitioner.

Rule 37.4. Relief [Reinstated and Revised — See Publisher's Notes].

If the circuit court finds that for any reason the petitioner is entitled to relief, then the circuit court may set aside the original judgment, discharge the petitioner, resentence him or her, grant a new trial, or otherwise correct the sentence, as may appear appropriate in the proceedings.

Rule 37.5. Special Rule for Persons Under Sentence of Death.

(a) *Purpose and scope*. This rule shall apply only to persons under a sentence of death. Except as otherwise provided in this rule, the provisions of Rules 37.1, 37.2, 37.3 and 37.4 shall apply to a petition for postconviction relief filed by a person under sentence of death. The intent of this rule is to comply with the provisions of 28 United States Code § 2261 et seq.

(b) *Requirement of Hearing on Appointment of Attorney*.

(1) (A) Upon affirmance of a sentence of death by the Supreme Court of Arkansas, the clerk of the court shall forward a copy of the mandate to the circuit court that imposed the sentence of death and to the Attorney General. The circuit court shall conduct a hearing to consider the appointment of an attorney to represent the person in post-conviction proceedings under this rule. If the Supreme Court affirms a sentence of death, the hearing shall be held not later than twenty-one (21) days after the mandate is issued by the Supreme Court.

(B) If the mandate is recalled within the twenty-one (21) day period, the requirement of a hearing shall be suspended until the mandate is reissued. The hearing shall be held within twenty-one (21) days after the mandate is reissued. If the hearing has already been held when the mandate is recalled, any findings and order entered pursuant to this subsection shall be deemed null and void and a new hearing shall be required within twenty-one (21) days after the mandate is reissued.

(2) The person under sentence of death shall be present at the hearing. At the hearing the circuit court shall inform the person of the existence of possible relief under this rule and shall determine whether the person desires the appointment of an attorney to represent

him in proceedings under this rule. If the person rejects the appointment of an attorney, the waiver shall be made in open court on the record. If the circuit court determines that the person is indigent and that he either accepts the appointment of an attorney or is unable to make a competent decision whether to accept or reject an attorney, the circuit court shall issue written findings to that effect and enter a written order appointing an attorney to represent the person in proceedings under this rule. If the circuit court determines that the person rejects the appointment of an attorney and understands the legal consequences of his decision, or that the person is not indigent, the circuit court shall issue written findings to that effect and enter a written order declining to appoint an attorney to represent the person in proceedings under this rule. In determining whether the person is indigent, the circuit court shall consider the extraordinary cost of postconviction proceedings in a capital case. The written findings and order required by this subsection shall be issued within seven (7) days after the hearing required by this subsection. The circuit clerk shall forward a copy of the order to the Attorney General.

(3) The appointment of an attorney under this rule shall remain effective through an appeal to the Supreme Court from a proceeding under this rule.

(c) *Qualifications of appointed attorney.*

(1) Except as provided in subsection (c)(4) of this rule, an attorney appointed to represent a person under this rule shall meet each of the following standards:

(A) Within ten (10) years immediately preceding the appointment, the attorney shall have:

(i) represented a petitioner under sentence of death in a state or federal postconviction proceeding; or

(ii) actively participated as defense counsel in at least five (5) felony jury trials tried to completion, including one trial in which the death penalty was sought; and

(B) Within ten (10) years immediately preceding the appointment, the attorney shall have:

(i) represented a petitioner in at least three state or federal postconviction proceedings, one of which proceeded to an evidentiary hearing and all of which involved a conviction of a violent felony, including one conviction of murder; or

(ii) represented a defendant in at least three (3) appeals involving a conviction of a violent felony, including one conviction of murder, and represented a petitioner in at least one evidentiary hearing in a state or federal postconviction proceeding; and

(C) The attorney shall have been actively engaged in the practice of law for at least three (3) years; and

(D) Within two (2) years immediately preceding the appointment, the attorney shall have completed at least six (6) hours of continuing legal education or other professional training in the representation of persons in capital trial, capital appellate, or capital postconviction proceedings.

(2) The circuit court may appoint pro hac vice an attorney who is not licensed to practice in Arkansas but who meets the standards of (c)(1) provided the court also appoints as co-counsel an attorney who is licensed to practice in Arkansas. In such case, the attorney who is licensed to practice in Arkansas is not required to meet the standards of (c)(1).

(3) The court shall make findings, either on the record or in the written order required by subsection (b) of this rule, specifying the qualifications of counsel which satisfy the standards for appointment under this rule.

(4) The circuit court may appoint an attorney who does not meet the standards of (c)(1)(A) and (c)(1)(B), but who does meet the standards of (c)(1)(C) and either (c)(1)(A), (B), or (D) if the circuit court determines that the attorney is clearly qualified because of his unique training, experience, and background to represent a person under sentence of death in a postconviction proceeding. The order appointing such an attorney shall contain written findings specifying the unique training, experience, and background that qualify the attorney for appointment.

(5) The circuit court shall not appoint an attorney under this rule if the attorney represented the person under a sentence of death at trial or on direct appeal to the Supreme Court of Arkansas unless the person and the attorney request continued representation on the record. If the circuit court does appoint an attorney who represented the person at trial or on direct appeal, the circuit court shall appoint a second attorney, who did not represent the person at trial or on direct appeal, to assist in the representation of the person. At least one of the attorneys shall meet the standards of (c)(1) or (c)(4).

(6) In accordance with the terms of this rule, the circuit court may appoint the Capital, Conflicts, and Appellate Office of the Arkansas Public Defender Commission, unless otherwise disqualified.

(d) *Access to records*. If a person is under sentence of death, any attorney who represented such person at trial or on appeal in connection with the conviction that resulted in the sentence of death shall make available the complete files in connection with such conviction to the attorney who represents such person in postconviction proceedings under this rule. The attorney who represents such person in postconviction proceedings may inspect and photocopy such files, but the attorneys who represented such person at trial or on appeal shall maintain custody of their respective files, except for material which was admitted into evidence in any trial proceeding, for at least five (5) years following completion of their representation of such person.

(e) *Time for filing postconviction petition*. A petition for relief under this rule shall be filed in the circuit court that imposed the sentence of death within ninety (90) days after the entry of the order required in subsection (b)(2) of this rule.

(f) *Notification of filing of petition*. Upon the filing of a petition under this rule, the petitioner shall immediately forward a copy of the petition to the circuit judge who entered the order required in subsection (b)(2) of this rule, the prosecuting attorney for the district, the Attorney General, the petitioner's counsel of record at the trial resulting in the sentence of death, and the Executive Director of the Arkansas Public Defender Commission.

(g) *Effect on sentence of death*. When the circuit court enters an order under subsection (b) of this rule, the court shall also enter an order staying any sentence of death. The stay of execution shall remain in effect until dissolved by a court with competent jurisdiction. The circuit court shall enter an order dissolving the stay of execution if: (1) A timely petition is not filed under this rule; or (2) A timely petition is filed under this rule but relief is denied by the circuit court under subsection (i) of this rule, and the time for filing an appeal from the denial of relief has expired without the filing of a notice of appeal.

(h) *Hearing on petition*. If the circuit court determines that a hearing is necessary, the hearing shall be held within one hundred eighty (180) days from the date of the filing of the petition, unless continued for good cause shown.

(i) *Decision*. If a hearing on the petition is held, the circuit court shall, within sixty (60) days of the conclusion of the hearing, make specific written findings of fact with respect to each factual issue raised by the petition and specific written conclusions of law with respect to each legal issue raised by the petition. If no hearing on the petition is held, the circuit court shall, within one hundred twenty (120) days after the filing of the petition, make specific written findings of fact with respect to each factual issue raised by the petition and specific written conclusions of law with respect to each legal issue raised by the petition. The time within which the circuit court shall make specific written findings of fact and conclusions of law shall be extended by thirty (30) days if the circuit court requests or permits post-hearing briefs.

(j) *Compensation of appointed attorney*. Compensation to be paid to attorneys appointed under this rule, as well as the fees and expenses to be paid for investigative, expert, and other reasonably necessary services, shall be fixed by the circuit and appellate courts in their respective proceedings at such rates or amounts as the courts determine to be reasonable. All compensation and reasonable expenses authorized by the courts shall be paid pursuant to Ark. Code Ann. § 16-91-202(f), or as otherwise provided by law.

(k) *Effective date*. The effective date of this rule is August 1, 1997. This rule shall apply to all persons under sentence of death who became eligible to file a petition under Rule 37.2(c) on or after March 31, 1997. For persons who were eligible to file a petition between March 31, 1997 and August 1, 1997, the hearing required by subsection (b)(1) of this rule shall be conducted no later than twenty-one (21) days after the effective date of this rule. In all other cases, the hearing shall be conducted within the time set forth in subsection (b)(1) of this rule. In all cases, the time for filing the petition shall be governed by subsection (e) of this rule.

Reporter's Notes to 1998 Amendments: Subsection (b) (1) (B) was added to address the situation where the mandate is recalled. Subsection (b) (1) (A) was amended to require that a copy of the mandate be forwarded to the Attorney General, and subsection (b) (2) was amended to require that a copy of the order with respect to the appointment of counsel be forwarded to the Attorney General.

Reporter's Notes to 2000 Amendment: Subsection (g) (2) was amended to clarify the dissolution of the stay of execution when postconviction relief has been denied and a notice of appeal has not been timely filed. (*See* Ark. R. App. P.–Crim. 10 for dissolution of stays of execution when the denial of postconviction relief is affirmed on appeal.) [Article XI. News Media Coverage of Criminal Cases]

Rule 38 [Broadcasting or Publishing by News Media]

Rule 38.1. [Broadcasting or Publishing by News Media.]

No rule of court or judicial order shall be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.