PURSUANT TO THE REQUEST OF THE RULES COMMITTEE ON CRIMINAL PRACTICE AND PROCEDURE FOR COMMENTS FROM THE BENCH, THE BAR AND THE PUBLIC ON THE PROPOSED AMENDMENT TO **RULE 7.09** OF THE UNIFORM RULES OF CIRCUIT AND COUNTY COURT PRACTICE, COMMENTS FROM SEPARATE JUSTICES HAVE BEEN RECEIVED. TO INSURE FULL DEBATE ON THE PROPOSED AMENDMENT, THE UNDERSIGNED JUSTICES SEEK COMMENTS ON THESE VIEWPOINTS AS WELL.

Comments should be filed with the Clerk of the Supreme Court,
Gartin Justice Building, P.O. Box 249, Jackson, Mississippi 39205-0249.
Deadline: **Tuesday, April 29, 2014.**

Provided below are the Comments from Separate Justices.

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(1)

The Criminal Rules Committee is undertaking to amend URCCC 7.09, which allows an indictment to be amended to include prior convictions for the purpose of enhancing the sentence of a recidivist. I submit the wrong rule was selected for amendment. What legal or practical purpose can be shown for amending indictments (which do not require inclusion of prior convictions or penalty) after the accused has been indicted by a grand jury for the present crime? The proposed rule offers palliative treatment but no cure for the underlying folly – a judicially created fallacy which is the fount for hundreds of motions and appeals.

This fallacy is embodied in URCCC 11.03. Rule 11.03 provides, in pertinent part, "[i]n cases involving enhanced punishment for subsequent offenses under state statutes . . . [t]he indictment must include both the principal charge and a charge of previous convictions." URCCC 11.03(1). Contrast that rule to the United States Supreme Court

holding that "[a]n indictment must set forth each element of the of the crime that it charges . . . . But it need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." ***Almendarez-Torrez v. United States***, 523 U.S. 224, 228, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998). Our has consistently held that recidivist statutes "are not criminal offenses and only affect sentencing." ***Osborne v. State***, 404 So. 2d 545, 548 (Miss. 1981). Additionally, neither our federal or state constitutions mandate that prior convictions which serve exclusively to enhance the sentence for recidivist offenders under Mississippi Code Sections 99-19-81, 99-19-83, and 41-29-147 be included within an indictment. Thus, the issue revolves around this ill-advised rule.

The only plausible explanation for the adoption of such a vacuous rule is that the Court has previously conflated prior convictions which constitute elements of an underlying felony offense with prior convictions which strictly relate to enhanced sentences for recidivists – the former mandated to be in the grand jury's indictment, the latter not. A prior felony conviction is a required element for indictment and conviction of a person for possession of a weapon by a prior-convicted felon. *See* Miss. Code Ann. § 97-37-5 (Rev. 2006).[1] In contrast, a prior conviction, *vel non*, has no bearing on a grand jury's prerogative to indict a person for the present crime. The prior conviction(s) only dictates whether the defendant is eligible to receive an enhanced sentence as a recidivist, upon conviction for the

[1]*See also* Miss. Code Ann. § 97-37-1(c) (Rev. 2006) (third or subsequent conviction for concealment of a deadly weapon a felony); Miss. Code Ann. § 97-23-93(6) (Rev. 2006) (third or subsequent conviction for shoplifting a felony); Miss. Code Ann. 97-31-27(c) (Rev. 2006) (third conviction for sale or possession of intoxicating beverages a felony); Miss. Code Ann. 63-11-30(2)(c) (Rev. 2013) (third or subsequent conviction for DUI a felony).

separately indicted crime. The distinction is one of purpose, and the purpose for which the prior conviction is utilized dictates whether or not it must be included in the indictment.

What we are left with is an unsound judicially created rule which lacks reason or logic, which we blindly follow only because it exists as a "rule" of this Court. The question moving forward is whether we should continue to adhere to a rule solely because this Court has done so, while failing to recognize that it is an unnecessary tinkering with the near sacred powers of a grand jury and its sole right to issue indictments. I submit such interference is constitutionally impermissible.

I agree with Blackstone that "precedents and rules must be followed, unless flatly absurd or unjust."[2] The "absurdity" of Rule 11.03's requirement is readily apparent – the rule has no constitutional support and is vitiated by its reliance on conflated principles concerning the purpose for which prior convictions are utilized. Further, common sense and fairness militate against presenting prior convictions for application of recidivist statutes to a grand jury.[3] A grand jury is called upon to determine whether sufficient facts exist to issue an indictment for the *present* alleged offense. Where the State seeks an indictment, should the State be required to inform the grand jury that the person it seeks to indict has been convicted previously of the same or other crimes? In a borderline factual case, I cannot see how submitting prior convictions to the grand jury for consideration (except those prior

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[2]William Blackstone, 2 Commentaries on the Laws of England 70 (1766).

[3]The Comments to the proposed Rule 7.09 instruct that "allegations that a defendant's sentence should be enhanced because the defendant is a recidivist should be presented to, and included in the indictment returned by the grand jury."

convictions necessary to obtain an indictment at all) is anything other than prejudicial to the indictee.

Rule 11.03(1) is a flawed rule and should be abolished by the Court who created it. Should Rule 11.03(1) be abolished, there would be no need to amend (much less have) the portion of Rule 7.09 which permits amendment of indictments to include habitual-offender status, *in posse* until the accused is found guilty by a jury of (or pleads guilty to) the substantive offense charged in the indictment.

Notice

Although habitual-offender status is not constitutionally mandated to be included within the indictment (nor should this Court require it to be so), there is substantial merit in a portion of today's proposed rule amendment. The current Rule 7.09 prohibits amendments to indictments that would deny the defendant a "fair opportunity to present a defense" or result in "unfair[] surprise" to the defendant. URCCC 7.09. Our Court has recently held that "adequate notice is achieved through formal pleadings . . . filed sufficiently in advance of trial to ensure that a defendant will have a 'fair opportunity to present a defense' and will not be 'unfairly surprised.'" ***Boyd v. State***, 113 So. 3d 1252, 1256 (Miss. 2013) (quoting URCCC 7.09). Whether notice is given sufficiently in advance of trial is factually dependent and must be addressed by this Court "on a case-by-case basis." ***McCain v. State***, 81 So. 3d 1055, 1061 (Miss. 2012). I would join a proposed rule amendment that would establish a thirty-day notice requirement (prior to trial) of the State's intent to seek enhanced sentencing for a recidivist offender, but not by amending the charging document (indictment). Notice can be achieved otherwise. The benefit of a notice rule is quite obvious. It would allow the

defendant time to prepare a defense to the State's claim of habitual-offender status should the defendant be found guilty of the present charged offense. It would also allow the defendant adequate time to reflect upon the ramifications of an enhanced penalty when considering the risks/benefits of any plea offers made by the State.

- Presiding Justice Michael K. Randolph

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(2)

I object to this rule for the following reasons:

First, I find no reason to require habitual-offender status to be presented to a grand jury, or to be in an indictment. It serves no purpose, other than to provide notice to the defendant of the State's intent. This easily could be accomplished in other ways less burdensome to the State and the trial judges.

Second, this requirement that habitual-offender status be in the indictment really is not a requirement at all. The purpose of an indictment is to report the findings of a grand jury. But if trial judges have the power and authority to add habitual-offender status to an indictment without the knowledge and consent of the grand jury, the indictment ceases to be an indictment and becomes a court order, masquerading as an indictment.

Third, there is no constitutional requirement that habitual-offender status be included in an indictment; and there is no practical reason for it. Why should we require trial judges to engage in the fiction of conducting hearings on the State's motions to amend indictments?

Why not avoid this charade and simply require prosecutors to provide defendants reasonable pretrial notice of the State's intent to seek habitual-offender sentencing, and of the prior convictions the State intends to use.

Fourth, this new rule places a new burden on the State to present evidence of, and the trial judge to find, "good cause" for the amendment. There is no need for this docket-clogging waste of time. So long as the State timely notifies defendants of its intent – and I agree with Presiding Justice Randolph that thirty days prior to trial, with additional notice required for good cause shown, is reasonable – I see no need to involve or burden prosecutors and trial judges with motions and hearings on these so-called amendments to indictments.

Finally, this new rule includes the following ambiguous language: "Indictments may be amended as to form but not as to the substance of the offense charged." This language fails to address the troubling fact that amending an indictment to charge a defendant as a habitual offender may not be an amendment "of the offense charged," but it indeed is a substantive amendment, and is certainly not an amendment "as to form."

Deeply rooted in the law is the principle that "[i]ndictments are found upon the oaths of a jury, and ought only to be amended by themselves."[4] And the United States Court of Appeals for the Fifth Circuit has held that "the Fifth Amendment forbids amendment of an indictment by the Court, whether actual or constructive."[5]

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[4] ***Ex parte Bain***, 121 U.S. 1, 6 (1887).

[5] ***United States v. Wacker***, 72 F.3d 1453, 1474 (10th Cir. 1995), petition for cert. filed, (Jun. 10, 1996)(No. 95-9284).

To be clear, I find no fault with prosecutors who file motions to amend indictments, or with circuit judges who grant them. They simply are doing what this Court says they can do. My objection is to this Court's rule which ignores the obvious truth that only grand juries may hand down indictments. This Court either should drop the requirement that defendants must be indicted as habitual offenders, or require that the issue be presented to a grand jury.

- Presiding Justice Jess Dickinson