IN THE SUPREME COURT OF MISSISSIPPI

IN RE:
AMENDMENTS TO THE MISSISSIPPI RULES
OF APPELLATE PROCEDURE **NO. 89-R-99027**

MOTION TO AMEND CERTAIN RULES TO PROVIDE FOR WORD COUNTS

Presently, the Mississippi Rules of Appellate Procedure set page limits on merits briefs and similar pleadings, such as motions for rehearing. This Motion advocates moving to word counts rather than page counts, following the practice of the federal appellate courts and of many state appellate courts. Limiting words rather than pages will be a more accurate length restriction, will discourage gamesmanship, and will result in briefs that are more readable on paper or screen. Pursuant to M.R.A.P. 27(f), the undersigned attorney moves for this honorable Court to adopt word counts.

The Federal Rules of Appellate Procedure were amended in 1998 to supplement page counts with word counts, reflecting the modern practice wherein briefs are created on a word processor, not a typewriter. Federal Rule of Appellate Procedure 32(a)(7) allows either page limits or "type-volume" limits (word or line counts). Computer programs like Microsoft Word or WordPerfect allow a user to easily find how many words are in a given document. Many states have followed the federal example. Such limits make excellent sense: what makes one document longer to read than another is how many words it contains, not how many pages those words occupy.

The wide range of typefaces available in word-processing programs means that lawyers can select fonts to meet their requirements. When a page limit is imposed on briefs, one requirement will be smaller characters on the page. A font like Times New Roman, designed for the constraints of newspaper publishing, squeezes in more words than a font

like Century, used in the *United States Reports* and in pleadings submitted to the Supreme Court of the United States. There can be a tradeoff between how readable a typeface is and how small it is: different "12-point" fonts may have very different sizes in practice, as a few moments' examination on a word processor will demonstrate:

This sentence is in 12-point Century.

This sentence is in 12-point Garamond.

This sentence is in 12-point Verdana.

While it might be possible for a court to police these differences by requiring everyone to use, say, a Century-style font (as does the U.S. Supreme Court), moving to a word-count system will tend naturally to promote more readable fonts, rather than those selected merely because they cram more words onto a page.

Setting limits by word counts also discourages gamesmanship. Lawyers will have no incentive to seek out the tiniest typefaces, or to file briefs with 50-plus footnotes in single-spaced reduced type. Instead, they will be able to choose more legible fonts that make it easier for the justices, judges, and law clerks to read briefs, petitions, and motions. As the Seventh Circuit has observed:

> In the days before Rule 32, when briefs had page limits rather than word limits, a typeface such as Times New Roman enabled lawyers to shoehorn more argument into a brief. Now that only words count, however, everyone gains from a more legible typeface, even if that means extra pages.[1]

For all of these reasons, the undersigned attorney suggests that this Court consider revising its rules to allow for word counts. The Federal Rule 32 is probably the best guide, as using that rule promotes uniformity between state and federal practice. The federal rule

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[1] "Requirements and Suggestions for Typography in Briefs and Other Papers," at page 5 (available at http://www.ca7.uscourts.gov/forms/type.pdf)—a useful guide. The book *Typography for Lawyers* by Matthew Butterick (Houston, TX: O'Connor's, 2d ed. 2015) includes comparable advice.

also still allows for page limits, which may still prove necessary for some parties such as *pro se* parties and those incarcerated without necessarily having access to computers. (The federal rule also includes, as apparently a kind of halfway-measure, a provision for line counts, which the attached rule drafts omit.) The federal rules provide for a certificate of compliance to be attached to a pleading using word counts, certifying that the pleading (excluding tables, etc.) has a certain number of words.[2]

Merits briefs in the Supreme Court of the United States are limited to 15,000 words. In the view of Federal Rule of Appellate Procedure 32, a 30-page brief is roughly equivalent to a 14,000-word brief, but that figure does not match up with this writer's own findings.

In 2014, this writer helped to inflict a 75-page brief upon this Court; it had 25,055 words (16,623 words at the 50-page mark). A 25-page response opposing rehearing in the same case had 8,473 words. This suggests that a limit of 16,000 words on principal briefs and 8,000 words on reply briefs would roughly reflect current practice. Petitions for certiorari, then, would come in around 4,000 words, and Rule 5 petitions, around 6,000 words. Also, Rule 27(b)(5) may be revised to allow for increases up to 24,000 words, or in capital appeals, 40,000. These figures are used in the draft rule changes appended to this Motion.

(In the course of preparing this Motion, the writer noticed a glitch in Rule 40(b): the literal language of the rule sets a 25-page limit on motions for rehearing, but does not specify a length limit for responses. The proposed draft rule corrects this, providing for

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[2]At a CLE, the clerk of the Fifth Circuit stated that his office typically relies on the averments in the certificate; in the event of a suspicious brief, the filing attorney can be asked to supply a copy in the original program, which can then be checked. Evidently, the federal courts of appeals have not found this a significant issue. Different programs have varying ways of counting words, but the differences are not large. The certificate should specify the software used to generate the brief and perform the word count.

responses to have the same limit. Even if this Motion is rejected in other respects, this Court may wish to correct Rule 40(b).)

Finally, now that paper briefs are largely a thing of the past because of this Court's move to electronic filing, the Rule 32(a) margins associated with binding a paper brief should be revised to allow side margins of one inch (minimum), rather than the existing margins of 1.5 inches on the left and 0.5 inches on the right.

The foregoing considerations may appear to be trivial. However, this writer knows from discussions with other appellate lawyers that the persistence of page limits can be frustrating. The example of the state and federal courts that have found this change meritorious also indicates that moving to a word-count basis is worthwhile. The main beneficiaries, after all, will be those whose judicial office requires them to read legal briefs.

Per Rule 27(f), an exhibit is attached hereto with proposed draft rules. The rules to be amended are M.R.A.P. 5(c), 17(b), (d), & (h), 27(b)(5), 28(h), 32(a), and 40(b).

WHEREFORE, PREMISES CONSIDERED, Movant asks that this Court GRANT the foregoing motion, and AMEND M.R.A.P. 5, 17, 27, 28, 32, and 40 as set forth in the attached exhibit, or in such other manner as to implement the option of measuring the length of appellate pleadings using a word count.

Respectfully submitted, this the ***9th*** day of September, 2016.

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EXHIBIT A TO MOTION

Rule 5. Interlocutory appeal by permission.

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(c) Form of papers; number of copies. — Four (4) copies of the petition and answer, if any, shall be filed with the original, but the Court may require that additional copies be furnished. The provisions of Rule 27 concerning motions shall govern the filing and consideration of the petition and answer, except that no petition or answer, including its supporting brief, shall exceed 15 pages or 6,000 words in length.

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Rule 17. Review in the supreme court following decision by the Court of Appeals.

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(b) Time for filing petition for writ of certiorari; content and length of petition. — A party seeking review of a judgment of the Court of Appeals must first seek review of that court's decision by filing a motion for rehearing in the Court of Appeals. If a party seeks review in the Supreme Court, a petition for a writ of certiorari for review of the decision of the Court of Appeals must be filed in the Supreme Court and served on other parties within fourteen (14) days from the date of entry of judgment by the Court of Appeals on the motion for rehearing, unless extended upon motion filed within such time. An untimely petition may be summarily dismissed by a single justice of the Supreme Court. The petition for writ of certiorari may not exceed ten (10) pages or 4,000 words in length and must briefly and succinctly state the precise basis on which the party seeks review by the Supreme Court, and may include citation of authority in support of that contention. No citation to authority or argument may be incorporated into the petition by reference to another document. The petitioner must file an original and ten (10) copies of the petition. The Petitioner must attach, as appendices to the petition, a copy of the opinion and judgment of the Court of Appeals, and a copy of the motion for rehearing filed in the Court of Appeals.

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(d) Response to petition for writ of certiorari. — Within seven (7) days after the filing of a petition for a writ of certiorari, any other party to the case may, but need not, file and serve an original and 10 copies of a written response in opposition to the petition. The response may not exceed ten (10) pages or 4,000 words in length. No citation to authority or argument may be incorporated into the response by reference to another document. The respondent may attach, as an appendix, his or her response to the motion for rehearing filed in the Court of Appeals.

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(h) Supplemental briefs; record on review. — Upon notice of a grant of certiorari, any party may, whether requested by the Court or not, within 10 days, file an original and 10 copies of a supplemental brief not to exceed 10 pages or 4,000 words. No additional time or pages shall be allowed for supplemental briefs. The Supreme Court may require supplemental briefs on the merits of all or some of the issues for review. The Supreme Court's review on the grant of certiorari shall be conducted on the record and briefs previously filed in the Court of Appeals and on any supplemental briefs filed. The Supreme Court may limit the question on review.

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Rule 27. Motions.

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(b) Determination of motions for procedural relief. — Notwithstanding the provisions of Rule 27(a) as to motions generally, motions for procedural relief may be acted upon at any time without awaiting a response. When unopposed, motions for specified types of procedural orders may be disposed of by the clerk of the Supreme Court. The clerk may rule on motions:

(1) for enlargement of time permitted by these rules for periods not to exceed a total of 60 days,

(2) to make corrections in briefs or pleadings filed at the request of counsel filing the brief or pleading,

(3) to withdraw as counsel and/or substitute appearance of counsel, except in appeals from the imposition of a sentence of death,

(4) to voluntarily dismiss appeals where sought by the appellant or the cross-appellant, unless the case has been submitted to the Court for decision,

(5) to increase the page limit for briefs up to 75 pages or 24,000 words, or up to 125 pages or 40,000 words in appeals from the imposition of a sentence of death,

(6) to supplement the record where documents which were included in the designation of, yet omitted from, the record are certified according to Rule 11 and attached to the motion,

(7) to appear *pro hac vice*,

(8) to suspend record preparation or briefing, and

(9) such other motions as the Court may from time to time direct.

Any party adversely affected by such action may by motion to the appropriate appellate court request reconsideration, vacation or modification of such action by the clerk.

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Rule 28. Briefs

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(h) Length of briefs. — Except by permission of the court, ~~principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the statement with respect to oral argument, any certificates of counsel, the table of contents, tables of citations, and any addendum containing statutes, rules, or regulations.~~ principal briefs and reply briefs shall adhere to the following limits.

(1) Page limitation. A principal brief may not exceed 50 pages, or a reply brief 25 pages, unless it complies with Rule 28(h)(2).

(2) Type-volume limitation. A principal brief is acceptable if it contains no more than 16,000 words. A reply brief is acceptable if it contains no more than 8,000 words. Headings, footnotes, and quotations count toward the word and line limitations. The certificate of interested parties, table of contents, table of citations, statement of assignment, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(3) Certificate of compliance. A brief submitted under Rule 28(h)(2) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the brief. The certificate must state the name of the word-processing system used to prepare the brief and the number of words in the brief.

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Rule 32. Form of briefs, record excerpts and other papers.

(a) Form of briefs and record excerpts. — Briefs and record excerpts may be produced by standard commercial printing or by any duplicating or copying process which produces a clear black image on white paper. The text in the body of briefs shall

appear in at least 12 point type; the text of footnotes must appear in at least 11 point type.

Briefs and record excerpts shall be bound in volumes and shall be typed on one side of the page only and shall be in black non-copying ink on white paper without the name of any person or advertising matters on the paper. Pages of briefs shall not exceed 8 ½ by 11 inches with margins of at least 1 ~~½~~ inch~~es~~ on the left, 1 inch on the top, 3/4 of an inch on the bottom, and ~~½~~ inch on the right, with double spacing between each line of text, excluding quotations and footnotes. All pages shall be numbered.

It is preferred that briefs and record excerpts be bound so as to permit them to lie flat when opened, and they must be so bound if the cover is plastic or any material not easily folded.

The cover of the brief of the appellant shall be blue; that of the appellee, red; that of an intervenor or *amicus curiae*, green; that of any reply brief, gray. In cross-appeals, the reply brief of appellant shall be combined with the brief of cross-appellee, and the combined brief shall be red. The reply brief of cross-appellant shall be gray. The cover of the record excerpts shall be white. The front covers of the briefs and of record shall contain: (1) the caption, name of the court and the number of the case; (2) the style (title) of the case [see Rule 13(a)]; (3) the nature of the proceeding (*e.g.*, Appeal; Interlocutory Appeal; Petition for Writ of Prohibition) and the name of the court or commission below; (4) the title of the document (*e.g.*, Brief for Appellant, Record Excerpts); (5) the names, bar numbers, addresses and business telephone numbers of counsel representing the party on whose behalf the document is filed, and (6) a statement on the cover of a brief filed by each party that oral argument is or is not requested. *See* M.R.A.P. 34(b).

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Rule 40. Motion for rehearing

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(b) Form of motion; length. — The motion shall be in a form prescribed by Rule 32 and in cases decided by the Supreme Court an original and ten (10) copies shall be filed with the clerk of the Supreme Court, and in cases decided by the Court of Appeals an original and eleven (11) copies shall be filed. The Supreme Court or the Court of Appeals may require that additional copies be furnished. The motion shall be served as prescribed by Rule 31 for the service and filing of briefs. Except by permission of the appropriate court a motion for rehearing shall not exceed twenty-five (25) pages or 8,000 words. If responses are filed, they shall be filed with like numbers of copies and shall not exceed twenty-five (25) pages or 8,000 words.

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