

## **Alabama Rules of Criminal Procedure**

### **Rule 11. Incompetency and mental examinations.**

*Rule 11.3. Appointment of experts; commitment for examination; reports; costs.*

(a) **GROUNDS FOR APPOINTMENT.** If the circuit court determines that reasonable grounds for an examination exist, it shall either appoint a psychiatrist or psychologist to examine the defendant and to testify regarding the defendant's mental condition, or order that an examination be conducted by a psychiatrist or psychologist appointed by the commissioner of the Department of Mental Health and Mental Retardation.

Evaluations ordered to be performed by a psychiatrist or psychologist under contract with or employed by the Department of Mental Health and Mental Retardation shall be performed on an out-patient basis where feasible, and, where necessary, the sheriff of the county in which criminal charges are pending shall be responsible for the custody, care, and transportation of the defendant during the out-patient visit.

(b) **COMMITMENT FOR EXAMINATION.** The circuit court may order that a defendant be examined in a state institution, and it may commit a defendant to the Department of Mental Health and Mental Retardation for a reasonable period of time necessary to conduct the examination if

(1) the defendant cannot be examined on an out-patient basis; or

(2) examination in an out-patient setting is unavailable; or

(3) the appointed examiner reports that confinement for evaluation is indispensable to a clinically valid diagnosis and report.

Provided, however, that a court may not order a defendant committed to the Department of Mental Health and Mental Retardation for a time longer than that reasonably necessary to conduct the examination.

(c) **REPORTS.**

(1) Any psychiatrist or psychologist appointed by the court or the Department of Mental Health and Mental Retardation pursuant to this rule shall submit to the circuit judge a report containing an opinion of whether the defendant is "incompetent," as that term is defined in Rule 11.1. The report may also include such additional findings and opinions concerning whether the defendant's mental condition creates a present danger to the defendant or to others, as the psychologist or psychiatrist signing the report may deem pertinent.

(2) If the opinion is that the defendant is incompetent, the report shall also state the psychologist's or psychiatrist's opinion of:

(i) The condition causing the defendant's incompetency and the nature thereof;

(ii) The treatment required for the defendant to attain competency;

(iii) The most appropriate form and place of treatment, in view of the defendant's therapeutic needs and potential danger to himself or herself, or to others, and an explanation of appropriate treatment alternatives;

(iv) The likelihood of the defendant's attaining competency under treatment and the probable duration of the treatment; and

(v) The availability of the various types of acceptable treatment in the local geographic area, specifying the agencies or the settings in which the treatment might be obtained and whether the treatment would be available on an out-patient basis.

(3) In addition, if the court so orders, the report shall contain a statement of the psychiatrist's or psychologist's opinion of:

(i) The mental condition of the defendant at the time of the alleged offense;

(ii) If the psychiatrist's or psychologist's opinion is that at the time of the alleged offense the defendant suffered from a mental disease or defect, the relation, if any, of such disease or defect to the alleged offense; and

(iii) Such other matters as the court may deem appropriate.

(d) **ADDITIONAL EXPERT ASSISTANCE.** The circuit court may, in its discretion, appoint additional experts and may order the defendant to submit to physical, neurological, or psychological examinations, when the court is advised by the examining psychologist or psychiatrist that such examinations are necessary for an adequate determination of the defendant's mental condition.

(e) **COSTS.** Reasonable fees and expenses incurred by persons appointed by the court, other than employees of the State of Alabama, shall be assessed as part of the costs of the proceeding. If the defendant is indigent, such expenses shall be paid by the State as provided by law.

[Amended 10-1-96.]

**Committee Comments to Rule 11.3 as Amended  
Effective October 1, 1996**

Rule 11.3(a) provides that where “reasonable grounds” exist, the circuit court must either appoint a psychiatrist or psychologist to examine the defendant and to testify regarding the defendant’s mental condition or order such an examination by a psychiatrist or psychologist appointed by the Department of Mental Health and Mental Retardation. In *Drope v. Missouri*, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975), the Supreme Court recognized the difficulties inherent in making the threshold decision as to what facts constitute “reasonable grounds” sufficient to require a competency examination. In *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), the Court suggested that the judge should consider, among other things, the defendant’s medical history, any evidence of irrational behavior, and the defendant’s demeanor. See *Ex parte Gordon*, 556 So.2d 363 (Ala.1988). The standard set by the Court in *Dusky v. United States*, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), probably means that competency requires only that the defendant be able to confer with counsel and have some appreciation of the proceedings against the defendant and the defendant’s involvement in them. The *Dusky* standard is one of degree, and it recognizes that many defendants have mental or emotional problems that prevent them from functioning normally in society but that the mere existence of an emotional disturbance is not equivalent to incompetency. Inevitably, determinations of competency or incompetency must be made on a case-by-case basis. Cf. *Tillis v. State*, 292 Ala. 521, 296 So.2d 892 (1974).

This rule is consistent with Alabama law as it existed before these criminal rules were adopted, inasmuch as Ala.Code 1975, § 15-16-21, authorized the trial court to make a preliminary determination, without the aid of a jury, as to whether reasonable grounds existed to doubt the defendant’s competency. Under this rule, the trial court continues to act as a “screening agent” for mental examination requests, and the determination of whether a mental evaluation is required is left to the discretion of the trial court. *Reese v. State*, 549 So.2d 148 (Ala.Crim.App.1989), overruled in part on other grounds, *Huntley v. State*, 627 So.2d 1013 (Ala.1992).

The adoption of this rule worked a number of changes in Alabama practice. Under the rule, the circuit court either appoints a psychiatrist or psychologist to examine the defendant and to submit a report to the judge, or it utilizes the personnel and facilities of the Department of Mental Health and Mental Retardation, depending upon the availability of local resources. Subsection (a) requires the appointment of a psychiatrist or psychologist. It is similar to 18 U.S.C. § 4241(b).

Rule 11.3(b) was moved by the October 1, 1996, amendment from Rule 11.2(d) and modified. It ensures that a defendant will not be subjected to confinement in a mental institution, unless a less restrictive alternative (such as local out-patient services of a community mental health center) is unavailable, and it ensures that if a defendant is confined the confinement will be for only the minimum time required to conduct necessary examinations. See 18 U.S.C. § 4244. A court can commit a defendant for only the minimum time required to conduct the necessary examinations. Commitment for a time longer than that reasonably required to conduct the examinations can be ordered only if the same stringent standards for civil commitment provided in Title 22, Chapter 52, Ala.Code 1975, are followed. See *Jackson v. Indiana*, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972), in which the United States Supreme Court struck down an Indiana statute that authorized trial courts to commit a defendant for an indefinite period based upon the defendant's incompetency to stand trial. Given the availability of out-patient services, a defendant may be committed for evaluation only if such confinement is determined to be indispensable to a clinically valid diagnosis and report. Once an examination is completed, the examiner's report shall be returned to the court for the court to determine the conditions of release.

Rule 11.3(c) states the contents of the psychologist's or psychiatrist's report and is patterned after Rule 464(h), Unif.R.Crim.P., and ABA Standards for Criminal Justice, Criminal Justice Mental Health Standards 7-4.5 (2d ed. 1986).

If the psychiatrist's or psychologist's opinion is that the defendant is incompetent to stand trial, then the psychiatrist or psychologist is directed to report on several different items to aid the court or jury in making the complex decisions required by Rule 11.6: the nature of the defendant's incompetence; the likelihood that the defendant may become competent; the professional's recommendations for treatment of the defendant's mental condition, in view of the defendant's therapeutic needs and potential dangerousness; and an explanation of alternative forms of treatment that would be acceptable and available for the defendant.

Because the Rule 11.3 examination is also intended to provide information concerning a possible insanity defense, the psychologist or psychiatrist may be required, pursuant to Rule 11.2(c)(3), to report on the mental status of the defendant at the time of the alleged offense and on the relationship, if any, of any mental defect or disease to the alleged criminal act.

Rule 11.3(c)(3) was not intended to establish a new legal test for insanity. It was not intended to change the tests that were in use before these criminal rules were adopted. It merely requires the psychiatrist or psychologist to describe the defendant's mental condition in broad medical language; the psychiatrist or psychologist should avoid references to any definition of legal insanity. Whether a person is mentally ill is a medical judgment that a psychologist or psychiatrist

should make; whether the defendant is sufficiently ill to be exonerated of criminal responsibility, i.e., whether the defendant is legally insane, is a legal judgment for the jury or trier of fact to make after proper instructions.

In some circumstances, either the psychiatrist or the psychologist or the circuit court may desire the assistance of other experts to carry out physical, neurological, or psychological tests. Subsection (d) authorizes the court to appoint additional psychologists or psychiatrists and to order the defendant to undergo further examinations and tests. The reports of these psychiatrists or psychologists should include the required information and should be submitted to the court along with those of the other appointed examiners.

Subsection (e) expressly provides for payment of the expenses of such professionals by the State in indigency cases, within limits provided by law. See, e.g., Ala.Code 1975, § 15-12-21(d), which authorizes reimbursement of defense counsel for expenses reasonably incurred (which can include expenses related to psychiatrists, experts, mental health professionals, investigators, and others), if approved in advance by the trial court. The exclusion of reimbursement of fees and expenses of State employees, applicable in all cases, is not intended to be discriminatory, but rather presupposes that such services will be rendered as part of their job and that expenses incurred will be reimbursed by the Department of Mental Health and Mental Retardation.

It should be noted that the holding in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), that an indigent defendant is constitutionally entitled to a psychiatrist provided at State expense, is applicable only where the defendant demonstrates to the trial judge that the defendant's sanity (or insanity) at the time of the offense is to be a significant factor at trial or that the defendant's mental state is to be a significant factor. Where a defense consultant psychologist or psychiatrist is constitutionally required, such an expert may be appointed under Rule 11.3(a). *Ake*, supra, 470 U.S. at 86, 105 S.Ct. at 1099, 84 L.Ed.2d at 68; *Isom v. State*, 488 So.2d 12, 13 (Ala.Crim.App.1986); *Holmes v. State*, 505 So.2d 1308 (Ala.Crim.App.1987). See also *Nelson v. State*, 511 So.2d 225 (Ala.Crim.App.1986), aff'd, 511 So.2d 248 (Ala.1987), cert. denied, 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988); and *Whittle v. State*, 518 So.2d 793 (Ala.Crim.App.1987).