Alabama Rules of Criminal Procedure

Rule 18. Trial by jury; waiver; selection and preparation of petit jurors.

Rule18.4. Procedure for selecting a jury.

(a) COMPILATION OF STRIKE LIST; CALLING OF THE CASE. Upon the trial by jury of any person charged with a crime, the court shall require a strike list or lists to be compiled from the names appearing on the master strike list as established in Ala.Code 1975, § 12-16-74, or alternatively, as provided in Ala.Code 1975, §§ 12-16-145 and -146. In compiling the strike list or lists, names of qualified jurors may be omitted on a nondiscriminatory basis. A strike list shall be compiled for the trial of any case at hand, and a copy of that strike list given to each party. The prospective jurors whose names appear on the strike list shall be brought into open court, and the case shall be called.

(b) OATH OF PROSPECTIVE JURORS AND INQUIRY BY THE COURT. Upon calling the case, the court shall administer the following oath:

"Do you and each of you solemnly swear (or affirm) that you will well and truly answer all questions propounded to you touching on your qualifications as a juror, and that you will well and truly try all issues submitted to you and true verdicts render according to the law and evidence, so help you God?"

Following the administration of the oath, the court shall initiate the examination of prospective jurors, i.e., those whose names appear on the "strike list" compiled pursuant to section (a), by identifying the parties and their counsel, briefly outlining the nature of the case, and explaining the purposes of the examination. The court shall ask any questions it thinks necessary touching the prospective jurors' qualifications to serve in the case on trial

(c) VOIR DIRE EXAMINATION. The court shall permit the parties or their attorneys to conduct a reasonable examination of prospective jurors. The court also may conduct an examination of prospective jurors, and the court, in its discretion, may direct that the examination of one or more prospective jurors be separate and apart from the other prospective jurors.

(d) SCOPE OF EXAMINATION. Voir dire examination of prospective jurors shall be limited to inquiries directed to basis for challenge for cause or for obtaining information enabling the parties to knowledgeably exercise their strikes.

(e) CHALLENGE FOR CAUSE. When a prospective juror is subject to challenge for cause or it reasonably appears that the prospective juror cannot or will not render a fair and impartial verdict, the court, on its own initiative or on motion of any party, shall excuse that juror from service in the case. Challenges for cause shall be made before the parties begin striking the jury and may, in the

discretion of the court, be made out of hearing of the prospective jurors but shall be on the record.

(f) STRIKING THE JURY.

(1) *In general.* After voir dire examination of the prospective jurors has been completed and challenges for cause have been exercised, the court shall cause to be compiled a list of names of prospective jurors who are competent to try the defendant, from which list the jury shall be obtained. If, in compiling the list, names of qualified prospective jurors are omitted, such omissions shall be made on a nondiscriminatory basis. Unless the parties consent to the use of a lesser number, the number of names appearing upon the list shall be not less than:

(i) Thirty-six (36), if the offense charged is punishable by death;

(ii) Twenty-four (24), if the offense charged is a felony not punishable by death; or

(iii) Eighteen (18), if the offense charged is a misdemeanor.

The district attorney shall strike first, and shall strike from the list the name of one (1) juror; the defendant shall next strike the name of one (1) juror. They shall continue to strike off names alternately until only twelve (12) jurors remain on the list, and the twelve (12) thus selected shall be the jury charged with the trial of the defendant. If an alternative juror or jurors are deemed necessary or required pursuant to Rule 18.4(a), the minimum number of names required by this subsection to appear upon the list shall be increased accordingly. In the event the list of competent prospective jurors is reduced to fewer than the number required by this subsection, the court shall add prospective jurors in the manner prescribed in section (h).

(2) *Two or more defendants.* If two (2) or more persons are being tried jointly, to the minimum number of names otherwise required for striking there shall be added twelve (12) additional names for each additional defendant; provided, there shall then also be added so many additional names as may be necessary to allow all defendants an equal number of strikes. The district attorney shall strike first, and shall strike one (1) name from the list; then one (1) defendant shall strike one (1) name from the list; then the district attorney shall strike one (1) more name from the list; and then the next defendant shall strike one (1) name from the list. The defendants shall each have a turn in the same order as the filing of the charges against them; or if they were charged in the same instrument, then in the order in which their respective charges appear therein, unless they agree upon a different order. The parties shall continue to strike off names alternately, first the state, then one defendant, in this fashion

until only twelve (12) names remain on the list, and the twelve (12) persons thus selected shall be the jury charged with the trial of the defendants.

(3) *Upon refusal of the defendant to strike.* If any defendant should fail or refuse to exercise a strike to which he is entitled, then the judge presiding shall exercise that defendant's strike for him or her.

(g) ALTERNATE JURORS.

(1) *Number and qualifications.* . The court may in its discretion qualify such alternate jurors as it deems necessary, except that in capital cases the court shall qualify at least two (2) alternate jurors, as required by law. Alternate jurors shall be drawn from the venire in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors, except that they shall not deliberate with the jury or vote upon the verdict unless designated to replace a principal juror.

(2) *Retaining alternate jurors.* The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(3) *Strike list.* If the court determines that more than two (2) alternate jurors should be selected in a capital case, or that one (1) or more alternate jurors should be selected in a noncapital case, then, unless the parties consent to the use of a lesser number, the minimum number of names required by subsection (f)(1) shall be increased by two (2) for each alternate juror to be selected; provided, however, that this increase in the number of names shall not apply for the first two (2) alternate jurors to be selected in a capital case.

(4) *Procedure for selecting.* When alternate jurors are being used, the parties shall strike from the list, according to the procedure provided in subsection (f)(1), until there remain twelve (12) names on the list. The last person or persons struck shall be the alternate or alternates, and if it becomes necessary for an alternate to replace a principal juror, then the last person struck shall be designated. The identity of alternate jurors shall not be divulged to the jurors until the jury retires for deliberation.

(h) INSUFFICIENT NUMBER OF JURORS.

(1) *In empaneling juries*. Whenever there are not enough qualified jurors in attendance to form the juries required, the judge presiding shall draw from the trial court jury box or from a list compiled pursuant to the provisions of Ala.Code 1975, §§ 12-16-145 and 12-16-146, the names of as many prospective jurors as

he may deem necessary to complete the empaneling of all juries then required. The court shall cause to be summoned forthwith all prospective jurors thus selected, to attend court when required, and they may be summoned by personal service or by telephone. The court shall then proceed to empanel or complete the empaneling of the juries.

(2) *In striking juries.* If, prior to the commencement of striking, because of challenges for cause or for any other reason, the number of names on the list from which the parties are to strike is reduced to fewer names than the minimum established in section (f), then unless the parties consent to the use of the lesser number, the court shall fill the deficiency first from the remaining available petit jurors sworn for the week. If the number of available petit jurors sworn for the week is insufficient to fill the deficiency, the remaining deficiency shall, in the discretion of the court, be filled either by waiting until other petit jurors sworn for the week become available, or by randomly drawing or causing to be drawn from the trial court jury box at least twice the number of names needed to fill the deficiency. The court shall cause to be summoned forthwith all prospective jurors thus drawn, either by telephone or by personal service. The names of those persons found competent to hear the case shall be added to the list from which the parties are to strike, in at least the number necessary to fill the deficiency.

[Amended 1-13-2005, eff. 6-1-2005; Amended eff. 11-28-2012.]

Committee Comments Amended,
Effective December 1, 1997

Rule 18.4 supersedes Ala.Code 1975, § 12-16-100, as amended by Act No. 81-788, 1981 Ala.Acts. In doing so, it basically incorporates the provisions of that Code section, with some modification. The fact that Rule 18.4(f)(1)(i) authorizes more prospective jurors to be included on the strike list for the trial of a capital case than for the trial of a noncapital case does not violate the provision in § 12-16-100(a) prohibiting special venires in capital cases. See *Beard v. State*, 661 So.2d 789 (Ala.Crim.App.1995). In *Beard*, the Court of Criminal Appeals held that the trial court did not err in calling 16 additional prospective jurors, in accordance with Rule 18.4(h), to ensure that there was a sufficient number of prospective jurors from which to strike for all trials to be held during the week, including a capital case. The court held that this “supplementing of the jury panel to ensure that the statutory minimum from which to strike is available does not constitute a ‘special venire.’ ” 661 So.2d at 795.

It is important to note that Rule 18.4 must be read in connection with Rule 12, “Selection of Venire; The Grand Jury and Petit Jury Panels,” and with Ala.Code 1975, § 12-16-74, as amended by Act No. 81-788, Acts of Alabama, 1981. Section 12-16-74 provides for the following procedure:

1. All persons summoned as jurors who have not previously been excused, are assembled; excuses are heard, and the court passes upon their qualifications; the court excuses or postpones service.

2. If a grand jury is to be empaneled, the grand jurors are selected and empaneled.

3. All qualified persons remaining are sworn as petit jurors.

4. The names of all persons sworn as petit jurors are put on a "master strike list."

When that "master strike list" has been compiled, Rule 18.4 becomes applicable.

The provisions of § 12-16-74 are for the most part incorporated into Rule 12; however, it is the compilation of the "master strike list" which triggers the operation of Rule 18.4, and Rule 12 does not provide for the compilation of a master strike list.

Section (a) contemplates that the names of all qualified prospective jurors shall appear on a "master strike list." See Ala.Code 1975, § 12-16-74. In actuality, that "master strike list" is merely a list of the names of all persons summoned whose service has not been excused or postponed, and who are then sworn as "petit jurors." Section (a) also contemplates that the "master strike list" will contain many more names than will be necessary for the trial of a particular case. Therefore, section (a) allows the court randomly to omit names from that "master strike list" in order to arrive at a "strike list" for use in a particular case; it also allows the court to make up several "strike lists" from the "master strike list." When the court will not be trying more than one case at a time, it may be customary not to make a separate list, but to use the "master strike list" as the "strike list." Subsection (f)(1), which requires the making of a new list "from which list the jury shall be obtained," contemplates that this new list will be merely the "strike list" minus the names of any jurors excused under section (e).

Rule 18.4 allows two steps at which the lists of prospective jurors may be reduced: section (a), which allows a reduction from the "master strike list" to the "strike list," and subsection (f)(1), which allows the making of a shorter list if the "strike list" contains considerably more names than the minimum required by that subsection.

The first sentence of section (b) allows the court to introduce the prospective jurors to the case to be tried. The second sentence allows the court to make its own inquiry into juror qualifications.

Section (c) allows the parties or their attorneys to conduct the voir dire examination, and is in line with Alabama practice and local custom. See Rule 47(a), A.R.Civ.P. Section (c) permits examination of individual jurors apart from other jurors in appropriate situations, e.g., when a case concerns unusually sensitive subjects or is surrounded by a great deal of publicity, when the prospective juror might be embarrassed to confess his true opinion before others, or when one juror's statements concerning the case might color the entire jury's outlook. The use of this procedure in controversial cases is recommended by ABA, Standards for Criminal Justice, Fa*ir Trial and Free Press* 8-3.6 (2d ed. 1986). The committee which compared the ABA Standards with Alabama law, rules, and legal practice recommended adoption of this rule.

Section (d) defines the scope of the voir dire examination. This section is in keeping with Alabama case law, which leaves the limit of voir dire examination much to the discretion of the trial court. *Smith v. State*, 292 Ala. 234, 292 So.2d 109 (1974); *Redus v. State*, 243 Ala. 320, 9 So.2d 914 (1942); *Massey v. State*, 49 Ala.App. 345, 272 So.2d 271, cert. denied, 289 Ala. 747, 272 So.2d 278 (1972).

Section (e) provides for removal of a juror challenged for cause. The second sentence allows the challenge to be made out of the hearing of the jurors. It is not intended that the jurors necessarily be removed from the courtroom each time counsel wishes to make a challenge for cause, but rather that the challenge may be tried at the bench, out of the jury's hearing, to minimize any personal resentment which might be caused by the challenge or argument upon it.

Ala.Code 1975, § 12-16-150, catalogs ten (10) grounds upon which a juror may be challenged for cause by either party in a criminal case. They are:

> "(1) That the person has not been a resident householder or freeholder of the county for the last preceding six months.
>
> "(2) That he is not a citizen of Alabama.
>
> "(3) That he has been indicted within the last 12 months for felony or an offense of the same character as that with which the defendant is charged.
>
> "(4) That he is connected by consanguinity within the ninth degree, or by affinity within the fifth degree, computed according to the rules of the civil law, either with the defendant or with the prosecutor, or the person alleged to be injured.
>
> "(5) That he has been convicted of a felony.

> "(6) That he has an interest in the conviction or acquittal of the defendant or has made any promise or given any assurance that he will convict or acquit the defendant.
>
> "(7) That he has a fixed opinion as to the guilt or innocence of the defendant which would bias his verdict.
>
> "(8) That he is under 19 years of age.
>
> "(9) That he is of unsound mind.
>
> "(10) That he is a witness for the other party."

Ala.Code 1975, § 12-16-152, provides to the state in a trial for any offense which may be punished capitally or by imprisonment in the penitentiary the challenge "that the person would refuse to impose the death penalty regardless of the evidence produced or has a fixed opinion against penitentiary punishment, or thinks that a conviction should not be had on circumstantial evidence." There is much case law interpreting these statutory grounds for challenge. Cases indicate that the statutory grounds are not exclusive, e.g., *Mitchell v. Vann*, 278 Ala. 1, 174 So.2d 501 (1965), quoting *Citizens' Light, Heat & Power Co. v. Lee*, 182 Ala. 561, 578, 62 So. 199, 205 (1913):

> " 'This court has repeatedly held that the disqualifications of jurors mentioned in the statutes are not the only ones that exist or that will be enforced by the courts of the state, but that there are others which existed at the common law, and which will be observed in passing upon the competency of jurors in both civil and criminal trials.' "

See also *Poole v. State*, 497 So.2d 537 (Ala.1986), and *Wallace v. Alabama Power Co*., 497 So.2d 450 (Ala.1986).

The omission of a list in section (e) is intended to direct the attention of attorneys and judges to the essential question—whether a juror can try a case fairly. This is consistent with prior Alabama law. No case in Alabama has ever limited challenge for cause to the statutory grounds. In Alabama, the test to be applied to a challenge for cause is that "probable prejudice for any reason disqualifies a prospective juror*." Grandquest v. Williams*, 273 Ala. 140, at 146, 135 So.2d 391, at 395 (1961*); Mutual Building & Loan Ass'n v. Watson,* 226 Ala. 526, 147 So. 817 (1933).

The first sentence of section (e) allows either party or the court to challenge a prospective juror for cause. This conforms to prior Alabama law. Ala.Code 1975, § 12-16-150, provides that "either party" may challenge for cause. It is equally clear that prior law allowed the court to challenge for cause. The court in *Williams v. State*, 51 Ala.App. 1, at 4, 282 So.2d 349, at 351, cert.

denied, 291 Ala. 803, 282 So.2d 355 (1973), said, “Regardless of challenge, it is the duty of the court to ascertain juror qualifications, and to disqualify all jurors not possessing those qualifications”; citing Tit. 30, §§ 6 and 55, Code 1940 (Ala.Code 1975, § 12-16-6 and § 12-16-150).

Section (e) provides that a challenge for cause must be made before striking the jury. The Alabama Supreme Court said in *Harris v. State*, 177 Ala. 17, at 20, 59 So. 205, at 206 (1913): “Such challenge for cause may be made at any time before the jury is sworn, but after a juror has been impaneled and sworn to try the issue he cannot be challenged or excused except by consent, or for a cause originating since he was sworn.” The reasoning of the court was that the administration of the oath was the beginning of the trial and the submission of the issue to the jury. Thus, the rule differs from prior Alabama practice.

ABA, Standards for Criminal Justice, *Trial by Jury* 15-2.5 (2d ed. 1986), recommends that a challenge for cause be made before the juror is sworn, but that the court should permit a challenge to be made after the juror is sworn but before jeopardy has attached and the problem of double jeopardy arises. Under the cases, jeopardy attaches when the jury is empaneled and sworn and the indictment has been read to the jury. *Boswell v. State*, 290 Ala. 349, 276 So.2d 592 (1973). Accord, *Morris v. State*, 47 Ala.App. 132, 251 So.2d 629 (1971). Other cases have added the requirement that the defendant have pleaded to the indictment. *Garsed v. State*, 50 Ala.App. 312, 278 So.2d 761 (1973); *Spencer v. State*, 48 Ala.App. 646, 266 So.2d 902 (1972). If a juror were excused for cause upon a challenge arising after the juror had been sworn and there were no alternate available and the parties would not consent to trial by less than 12 jurors, the judge would have to declare a mistrial, but a retrial would not constitute double jeopardy.

Section (f) requires the state to exercise its peremptory challenge first. This follows the prior Alabama practice.

Subsection (f)(1) sets forth the general procedure for striking the jury list. The same basic procedure is to be followed in both capital and noncapital cases. This subsection provides that in the event there are fewer competent prospective jurors than required, the court shall add prospective jurors in the manner prescribed by section (h).

Subsection (f)(2) provides for striking the jury where two or more defendants are tried jointly. This subsection supersedes Ala.Code 1975, § 12-16-101.

Subsection (f)(3) allows the court to strike for the defendant when the defendant has refused to strike.

Section (g) provides the trial court a procedure for selecting alternate jurors. The purpose of this procedure is to rectify the prior time-consuming practice which required that the trial be stopped completely and a new jury empaneled if a juror became incapacitated by illness or had to be discharged for any other valid reason. Under Ala.Code 1975, § 12-16-230, if a juror must be discharged before the jury retires to render a verdict, another juror may be summoned "and the trial commenced anew." Section (g) provides the trial court with the discretionary power to empanel alternate jurors. Section (g) basically incorporates the provisions of § 12-16-100(c) and (d), as amended by Act No. 82-221, Acts of Alabama, 1982. Those statutory provisions are superseded by section (g).

Section (g) does not make unnecessary Rule 18.1(c), which allows the parties to agree to accept a verdict of a jury composed of fewer than twelve (12) members. Since section (g) is discretionary, it may be that the trial court had not exercised its discretion, in which case Rule 18.1(c) might provide the only alternative to a mistrial that neither side wanted.

Subsection (g)(1) provides that no distinction between regular jurors and alternates is to be made until the deliberations are to begin. This method provides maximum assurance that alternates will follow the proceedings with the attention of potential jurors.

Section (h), in prescribing methods for selecting additional prospective jurors when the number available is insufficient, incorporates the provisions of Ala.Code 1975, § 12-16-76, and supersedes that section insofar as it relates to criminal trials.

Committee Comments to the Amendment to Rule 18.4(g)
Effective November 28, 2012

Subsection (g)(2) represents a change in Alabama criminal trial practice and is modeled after Rule 24(c), Federal Rules of Criminal Procedure. When an alternate juror is temporarily excused but not discharged, the trial judge shall take appropriate steps to protect such juror from influence, interference, or publicity that might affect that juror's ability to remain impartial, and the trial judge may conduct brief voir dire to determine the alternate's impartiality before seating the alternate juror for any trial or deliberations. In addition, the trial judge shall instruct the alternate jurors who are retained as to their location while waiting as an alternate. Finally, if an alternate juror replaces a juror after deliberations have begun, the trial judge must instruct the jury to begin its deliberations anew in order to give the new juror the full benefit of the deliberative process.

Note from the reporter of decisions: The order amending Rule 18.4(b), effective June 1, 2005, is published in that volume of *Alabama Reporter* that contains Alabama cases from 890 So. 2d.

Note from the reporter of decisions: The order amending, effective November 28, 2012, Rule 18.4(g) and Rule 32.6 and adopting, effective November 28, 2012, Rule 32.7(e) and the Committee Comments to Rule 18.4(g) Effective November 28, 2012, are published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.