Alabama Rules of Evidence

Article XI. Miscellaneous Rules

Rule 1101.

Rules applicable.

(a) *General applicability.* Except as otherwise provided by constitutional provision, statute, this rule, or other rules of the Supreme Court of Alabama, these rules of evidence apply in all proceedings in the courts of Alabama, including proceedings before referees and masters.

(b) *Rules inapplicable.* These rules, other than those with respect to privileges, do not apply in the following situations:

(1) PRELIMINARY QUESTIONS OF FACT. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) GRAND JURY. Proceedings before grand juries.

(3) MISCELLANEOUS PROCEEDINGS. Proceedings for extradition or rendition; preliminary hearings in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) CONTEMPT PROCEEDINGS. Contempt proceedings in which the court may act summarily.

Advisory Committee's Notes

Most states adopting modern evidence codes have modeled their corresponding rule after the language found in Uniform Rule of Evidence 1101. See G. Joseph & S. Saltzburg, Evidence in America: The Federal Rules in the States § 73.2 (1987). This has been done because the terminology found in Fed.R.Evid. 1101 is so specifically tailored to apply exclusively to federal courts and proceedings. Following the lead of that majority of states adopting modern evidence codes, the committee has based this Rule 1101 upon its counterpart under the Uniform Rules of Evidence.

Section (a). General applicability. This rule does not declare these rules of evidence applicable in proceedings in which evidence rules historically have not been applied. Rather,

the intent is to make the Alabama Rules of Evidence applicable to the same proceedings that were governed by the general law of evidence at the time of their adoption. This means, consequently, that these rules will govern the following illustrative proceedings, just as the general law of evidence did before the adoption of these rules: (1) nonjury cases, see *Arant v. Grier*, 286 Ala. 263, 239 So.2d 188 (1970) (recognizing that evidence rules do apply in nonjury cases even though a presumption of correctness arises on appeal as to the trial court's evidentiary findings); C. Gamble, McElroy's Alabama Evidence § 6.05 (4th ed. 1991); (2) criminal cases, as well as civil cases, see Ala.R.Crim.P. 19.2(a) (providing that, except as otherwise provided by law, the law of evidence relating to civil actions shall apply to criminal proceedings); and (3) workers' compensation cases, see Ala. Code 1975, § 25-5-81 (providing that workers' compensation cases shall be heard and determined in circuit court upon the same basis as a civil tort action). See also Ala. Small Claims R. J (providing that small claims judges may "relax the rules of evidence" and thus implying that the rules of evidence otherwise apply to a small claims proceeding); Ala. Code 1975, § 12-13-12 (stipulating that statutory rules of evidence, "so far as the same are appropriate," are applicable in probate court). These rules in no way change preexisting law regarding the applicability of evidence rules in the probate court.

This rule recognizes that specialized proceedings may arise under statute or rule of court in which these Alabama Rules of Evidence, either in whole or in part, are made inapplicable. Additionally, these rules would not govern in a setting where constitutional rights dictate otherwise.

These rules apply to qualifying proceedings whether presided over by judges, referees, or masters. See Ala. Code 1975, § 12-17-330 (providing for the appointment of referees to serve in connection with juvenile cases); Ala.R.Civ.P. 53(c) (conferring upon standing or special masters the power to rule upon evidence, put witnesses on oath, conduct examination, and, when requested, make a record of the evidence).

Section (b). Rules inapplicable. All evidentiary privileges are applicable at all stages of all proceedings. See Fed.R.Evid. 1101(c). Stated otherwise, section (b) is based upon the premise that "confidentiality once destroyed cannot be restored, and that a privilege is effective only if it bars all disclosure at all times." J. Weinstein & M. Berger, 5 Weinstein's Evidence ¶ 1101[03], at 1101-21 (1993). See also *Armour Int'l Co. v. Worldwide Cosmetics, Inc.*, 689 F.2d 134 (7th Cir.1982) (Rule 501 privileges held applicable to discovery proceedings); *Appeal of Malfitano*, 633 F.2d 276 (3d Cir.1980) (privilege rule continues to apply to grand jury proceedings).

As does Rule 1101(b) of the Uniform Rules of Evidence, section (b) recognizes proceedings in which these rules of evidence do not apply and dedicates a subsection to each. As stated by the Advisory Committee on the Federal Rules of Evidence, these exceptions are not intended "as an expression as to when due process or other constitutional provisions may require an evidentiary hearing." Fed.R.Evid. 1101(d) advisory committee's note.

Subsection (b)(1). Preliminary questions of fact. This subsection is identical to its counterpart under the Federal Rules of Evidence. As a convenience to the users of these rules, this subsection merely restates the principle found in the second sentence of Ala.R.Evid. 104(a). This concept, stated in summary fashion here, is that the rules of evidence do not apply when the judge is determining a fact question that is preliminary to the admissibility of

evidence; this concept is exemplified by such a factual determination as the existence of a privilege. See Ala.R.Evid. 104(a) advisory committee's notes; C. Gamble, McElroy's Alabama Evidence § 464.01 (4th ed. 1991).

Subsection (b)(2). Grand jury. This subsection is identical to Rule 1101(b)(2) of the Uniform Rules of Evidence. It conforms to preexisting Alabama authority standing for the proposition that evidence law is inapplicable to grand jury proceedings. *Wright v. State*, 421 So.2d 1324 (Ala.Crim.App.1982). See C. Gamble, McElroy's Alabama Evidence § 6.03 (4th ed. 1991). There is no intent that this rule should affect the separate statutory rule that the grand jury must have had for its consideration at least one witness who gave testimony or one piece of legal documentary evidence. Ala. Code 1975, § 12-16-200. Indeed, subsection (b)(2) was not drafted to deal with the quantum or quality of evidence required to support a grand jury indictment. The Alabama Rules of Criminal Procedure perpetuate the concept, found in Ala. Code 1975, § 12-16-200, that the grand jury may consider only evidence given by witnesses before it or legal documentary evidence. Such legal evidence, according to Ala.R.Crim.P. 12.8(f)(1), may consist of hearsay. An indictment is not subject to dismissal for being based upon illegal evidence unless such evidence constitutes the sole basis for it. Ala.R.Crim.P. 12.8(f)(2). See *Fikes v. State*, 263 Ala. 89, 81 So.2d 303 (1955) (holding that, if legal evidence is presented to the grand jury, then the indictment is not to be quashed on the basis that there also was illegal evidence presented).

This position, that these Alabama Rules of Evidence do not apply to grand jury proceedings, is consistent with the prevailing federal view. See 1 J. Wigmore, Wigmore on Evidence § 4(5), at 21 (Tillers rev. 1983). Compare Fed.R.Evid. 1101(d)(2).

Subsection (b)(3). Miscellaneous proceedings.

Proceedings for extradition or rendition. This provision reflects the preexisting law that extradition proceedings, in which fugitive rendition warrants are considered, are largely administrative in nature and, consequently, are not governed by rules of evidence. *Rayburn v. State*, 366 So.2d 698 (Ala.Crim.App.), aff'd, 366 So.2d 708 (Ala.1979) (indeed, evidence of guilt or innocence in such proceedings would be irrelevant except insofar as it would assist in identifying the person charged). This, of course, is not to ignore the fact that there are statutory requirements that must be met, as regards the nature of the underlying documents, for there to be probable cause for detaining an alleged fugitive from another state. See Ala. Code 1975, § 15-9-31; *Shirley v. State*, 363 So.2d 104 (Ala.), rev'g 363 So.2d 103, on remand, 363 So.2d 107 (Ala.Crim.App.1978).

Preliminary hearings in criminal cases. Like its counterpart under the Uniform Rules of Evidence, this provision exempts preliminary hearings in criminal cases. While there is little direct authority to reflect it, present practice is that the rules of evidence do not apply to preliminary hearings in criminal cases. See *United States v. Smith*, 577 F.Supp. 1232, 1234 (S.D.Ohio 1983) (Federal Rules of Evidence held not applicable to preliminary hearing); A. Goldenstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 Yale L.J. 1149, 1168 (1960); F. Palmer, Comment, *Preliminary Examination – Evidence and Due Process,* 15 Kan.L.Rev. 374, 379 (1967). While the rules of evidence as a whole are inapplicable to preliminary hearings, selective rules do apply, as otherwise provided in the Alabama Rules of Criminal Procedure. See Ala.R.Crim.P. 5.3(a) (authorizing the accused to introduce evidence in the accused's own behalf relevant to the issue of probable cause);

Ala.R.Crim.P. 5.3(c) (while court's finding must be based on "substantial" evidence, such evidence may be in the form of hearsay). See also Ala. Code 1975, §§ 15-11-6, 15-11-8, 15-11-9.

Sentencing, or granting or revoking probation. Traditionally, rules of evidence have been held not to govern sentencing and probation proceedings except as otherwise provided by statute or rule of court. Rule 1101, except as to the assertion of privileges, is intended to continue that principle of inapplicability. See Ala. Code 1975, § 13A-5-45(d) (providing that any evidence that has probative value and that is relevant to sentencing shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements); Ala.R.Crim.P. 26.6(b)(2) (outlining guiding principles of evidence to be used in sentencing hearing, with ending proviso that the court may receive any evidence it deems probative "regardless of its admissibility under the rules of evidence"); Ala. Code 1975, § 15-22-50 (dealing with a court's power to suspend sentence and grant probation); Ala. Code 1975, § 15-22-54 (regarding the power to extend or terminate probation). See also *Williams v. New York*, 337 U.S. 241 (1949) (observing that due process does not require confrontation or cross-examination in sentencing or passing on probation; trial judge characterized as possessing broad discretion as to the sources and types of information relied upon); *Chandler v. United States*, 401 F.Supp. 658 (D.N.J.1975), aff'd, 546 F.2d 415 (3d Cir.1976), cert. denied, 430 U.S. 986 (1977); *United States v. Francischine*, 512 F.2d 827 (5th Cir.), cert. denied, 423 U.S. 931 (1975) (except for evidentiary privileges, rules of evidence are inapplicable to probation revocation proceedings).

Issuance of warrants for arrest, criminal summonses, and search warrants. Arrest warrants, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause. The nature of these proceedings is not adversarial in the traditional sense. Consequently, it would be both inappropriate and impracticable to apply the formal rules of evidence to such proceedings. In this regard, the Alabama Rules of Evidence continue prior Alabama practice. See *Jackson v. State*, 534 So.2d 689 (Ala.Crim.App.1988). See also C. Gamble, McElroy's Alabama Evidence § 334.01(2) (4th ed. 1991) (search incident to a valid warrant); Ala. Code 1975, § 15-5-1 et seq. (dealing with the prerequisites for issuing a search warrant); Ala.R.Crim.P. 3.9(b) (providing that finding of probable cause for search may be based upon hearsay evidence).

Proceedings with respect to release on bail or otherwise. As does Fed.R.Evid. 1101(d)(3) and Unif.R.Evid. 1101(b)(3), this rule follows present practice to the effect that rules of evidence are inapplicable to proceedings regarding bail. See Ala. Code 1975, § 15-13-4 (generally providing that judges and magistrates should ensure, where the law authorizes bail, that every prisoner has an opportunity to give bail); Ala. Code 1975, § 15-3-2 (right to bail); Ala. Const. Art. I, § 16 (providing that all persons, before conviction, are bailable except for capital offenses). See also Ala.R.Crim.P. 7.2 (describing matters that court may take into account in deciding whether to release an accused on bond or personal recognizance); Ala.R.Crim.P. 7.4 (describing procedure for determination of release conditions).

Subsection (b)(4). Contempt proceedings. This subsection, like its counterpart under the Uniform and Federal Rules of Evidence, recognizes that the rules of evidence apply in all contempt proceedings save those in which the judge may act summarily. See Fed.R.Evid. 1101(b); Unif.R.Evid. 1101(b)(4). Summary action may be taken when the contempt is within

the judge's actual sight and hearing. See Ala.R.Crim.P. 33.2(a); Ala.R.Civ.P. 70A(b). Such contempt is referred to as "direct contempt." Ala.R.Crim.P. 33.1(b) and Ala.R.Civ.App. 70A(a)(2)(A) (defining "direct contempt" and contrasting it with "constructive contempt"). It is said that, in such instances of direct contempt, no further or extrinsic evidence is needed to show the judge what in fact occurred; consequently, application of the rules of evidence is unnecessary). See Ala.R.Crim.P. 33.1 committee comments; *In re Heathcock*, 696 F.2d 1362 (5th Cir.1983) (citing Rule 42(a) of the Federal Rules of Criminal Procedure for principle that policy of summary contempt power is to provide the court with an immediate means of discipline in order to vindicate and preserve the authority of the court); *Graham v. State*, 427 So.2d 998, 1006 (Ala.Crim.App.1983) (recognizing that direct contempt, justifying the court's acting summarily, arises when "the personal knowledge of the trial judge, in whose presence the contemptuous conduct occurred, substitutes for evidence") (emphasis added).