

Serial: **121020**

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99027-SCT

***IN RE: MISSISSIPPI RULES OF
APPELLATE PROCEDURE***

ORDER

This matter is before the Court en banc on its own motion for review of Rule 22 of the Mississippi Rules of Appellate Procedure and its Comments, with particular regard to provisions relating to raising post-conviction issues in direct appeals appearing in Rule 22(b). The Court also addressed a scrivener's error appearing in Rule 22(c)(2)(I). Having considered the matter, the Court finds that the amendment of M.R.A.P. 22 as set forth below will promote the fair and effective administration of justice.

IT IS THEREFORE ORDERED that Rule 22 the Mississippi Rules of Appellate Procedure and the Comments thereto be amended as set forth in Exhibit "A" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and that a true certified copy be forwarded forthwith to West

Publishing Company for publication in *Southern Reporter Second (Mississippi Edition)* and the *Mississippi Rules of Court*.

SO ORDERED, this the 4th day of February, 2005.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR., PRESIDING
JUSTICE, FOR THE COURT

DIAZ AND GRAVES, JJ., NOT PARTICIPATING.

EXHIBIT “A” TO ORDER

MISSISSIPPI RULES OF APPELLATE PROCEDURE

RULE 22. APPLICATION FOR POST-CONVICTION COLLATERAL RELIEF IN CRIMINAL CASES

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(b) Post-conviction issues raised on direct appeal. Issues which may be raised in post-conviction proceedings may also be raised on direct appeal if such issues are based on facts fully apparent from the record. Where the appellant is represented by counsel who did not represent the appellant at trial, the failure to raise such issues on direct appeal shall constitute a waiver barring consideration of the issues in post-conviction proceedings.

(c) Post-conviction Proceedings Filed by Persons Under Sentence of Death. Proceedings on post-conviction applications and motions filed by persons under sentence of death shall be governed by this rule. This sub-part (c) shall apply only to such proceedings filed by persons under sentence of death.

(1) Representation by counsel.

(i) The petitioner shall be represented by qualified counsel unless the petitioner has elected to proceed pro se, and the convicting court finds, after a hearing on the record, that the petitioner's election is informed and voluntary.

(ii) Where a petitioner is sentenced to death the Supreme Court shall, immediately after the announcement of the decision on direct appeal, order that the convicting court determine whether the petitioner is indigent and, if so, whether the petitioner desires appointment of counsel for the purpose of post-conviction proceedings. Such order shall be forwarded to the convicting court and the Office of Capital Post-Conviction Counsel upon entry. The Office of Capital Post-Conviction Counsel shall advise the convicting court of the attorney selected to represent the petitioner pursuant to Section 99-39-23 and these rules.

(iii) Should it be determined upon hearing in the convicting court that the petitioner has retained qualified private counsel, the attorney selected by the Office of Capital Post-Conviction Counsel shall take no further action and shall be discharged. Should it be determined that the petitioner elects to

proceed pro se, the attorney selected by the Office of Post Conviction Counsel shall continue to serve, but only as counselor and advisor to the petitioner.

(2) Proceedings pro se.

(I) The petitioner shall be allowed to proceed pro se only upon findings of the convicting court that the petitioner has made an informed and voluntary election to so proceed under the provisions of subpart (1)(I) above. Such an election shall be deemed informed and voluntary only when the petitioner has been advised of the complexity of post-conviction proceedings and the limitations upon issues which may be raised. The court shall advise the petitioner that:

the stringent filing and other deadlines attendant to ~~attend~~ post-conviction proceedings will not be relaxed for pro se litigants,

ignorance of the law or procedures will not be accepted as an excuse for failure to proceed in accordance with law,

grounds for post-conviction relief, including intervening decisions, are often technical and require knowledge of and skill in the law,

investigation, including discovery and the gathering of evidence can be best pursued by counsel, and incarceration of the petitioner will not be accepted as an excuse for failure to conduct such investigation and gather such evidence,

the court will not relax or disregard the rules of evidence, procedure, or courtroom protocol for the pro se petitioner, and without legal counsel the petitioner's ability to proceed effectively will be hampered, and

a decision to proceed pro se in post-conviction matters usually increases the likelihood of an outcome unfavorable to the petitioner.

(ii) In the event that expenses for litigation are allowed a post-conviction petitioner, they shall be disbursed through the attorney serving as advisor and counselor.

(iii) When the petitioner is proceeding pro se, access to trial and appellate files, prosecution and law enforcement files and the delivery of discovery materials shall be upon such conditions and subject to such restrictions as the conviction court may deem necessary to preserve the integrity and security of the files and materials.

(iv) When the petitioner is proceeding pro se, and the application for leave to file a motion for post-conviction relief is denied, or if the application is granted, relief is denied in the convicting court and such denial is affirmed in the Supreme Court, the attorney appointed as advisor and counselor shall seek appointment of federal habeas corpus counsel in accordance with the provisions of subpart (9) below.

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[Adopted August 21, 1996; amended June 24, 1999 by order entered that date; amended effective July 27, 2000; amended effective February 10, 2005 to specify that post-conviction issues are to be raised on direct appeal only when they are apparent on the record.]

Advisory Committee Historical Note

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Comment

Rule 22 incorporates the comprehensive procedure reflected in the Mississippi Uniform Post-Conviction Collateral Relief Act, codified at Miss. Code Ann. § 99-39-1, *et seq.* (1994). Passed in 1984, the Act requires that when a prisoner's conviction and sentence have been appealed to the Supreme Court, and the appeal is either affirmed or dismissed, the prisoner is to seek leave from that Court before filing a motion for post-conviction collateral relief in the trial court, § 99-39-7. The motion for leave is governed by § 99-39-27, and the provisions of these rules that are consistent with that statute. *See, e.g.*, Rules 25, filing and

service; 26, computation and extension of time; 27, motions; 28(g), length of briefs; 31(c), number of briefs.

Rule 22(b) allows the appellant to raise post-conviction issues on direct appeal where the issues are fully apparent from the record of the trial, and failure to raise such issues constitutes a waiver. Under this provision, issues such as claims of ineffective assistance of counsel for failure to object to evidence offered by the state or to argument by the state must be raised on direct appeal. Other post-conviction issues which cannot be raised at the time of appeal because they involve actions or inaction outside the record are not waived since they cannot practically be raised without further development or investigation.

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[Adopted to govern matters filed on or after January 1, 1995; amended effective January 1, 1999, June 24, 199; amended effective, July 27, 2000; amended effective February 10, 2005.]