

Serial: 141550

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 the petition to amend Rule 6 of the Mississippi Rules of Appellate Procedure filed by the Mississippi Office of Indigent Appeals. After due consideration, the Court finds that the petition should be granted, in part. The Court finds that the amendment, as set forth in Exhibit A to the order, will promote the fair and effective administration of justice.

IT IS THEREFORE ORDERED that the petition to amend Rule 6 of the Mississippi Rules of Appellate Procedure filed by the Mississippi Office of Indigent Appeals is hereby granted, in part.

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 6th day of August, 2007.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR., PRESIDING JUSTICE

TO GRANT, IN PART: ALL JUSTICES.

## EXHIBIT A

### RULE 6. PROCEEDINGS *IN FORMA PAUPERIS* AND APPOINTMENT OF COUNSEL ON APPEAL IN CRIMINAL CASES

#### **(a) Leave to Proceed *In Forma Pauperis* From the Trial Court to the Supreme Court in Criminal Cases.**

(1) *Post-trial Motion in Trial Court.* A defendant in a criminal case in a trial court who desires to proceed on appeal *in forma pauperis* shall file in the trial court a motion for leave so to proceed, together with an affidavit showing the defendant's inability to pay fees and costs. If the motion is granted, the defendant may so proceed without further application to the Supreme Court and without prepayment of fees or costs in either court. If the motion is denied, the trial court shall state in writing the reasons for the denial.

(2) *When In Forma Pauperis Status Previously Granted by Trial Court.* Notwithstanding the provisions of Rule 6(a)(1), a party who has been permitted to proceed *in forma pauperis* in the trial court may proceed on appeal *in forma pauperis* without further authorization unless, before or after the notice of appeal is filed, the trial court shall certify that the party is no longer indigent and is not otherwise entitled to proceed *in forma pauperis*. The court shall state in writing the reasons for such certification or finding. **Where an appeal is taken to the Supreme Court *in forma pauperis*, the certification of compliance required by Rule 11(b)(1) shall indicate that the appeal is taken *in forma pauperis*.**

(3) *Motion in the Supreme Court.* If a motion for leave to proceed on appeal *in forma pauperis* is denied by the trial court, the trial court clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the Supreme Court within 30 days after service of notice of the action of the trial court. The motion shall be accompanied by a copy of the affidavit filed in the trial court, or by the affidavit prescribed by Rule 6(a)(1) if no affidavit has been filed in the trial court, and by a copy of the statement of reasons given by the trial court for its action.

#### **(b) Appointment of Counsel on Appeal in Criminal Cases.**

(1) *When Counsel Appointed in Trial Court.* Appointed trial counsel shall continue as defendant's counsel on appeal unless relieved by order of the trial court, or, if the appeal has been perfected, by order of the Supreme Court or the Court of Appeals. Any motion for such relief filed with the Supreme Court shall be accompanied by a certified copy of a trial court order appointing substitute counsel pending action by the Supreme Court or the Court of Appeals.

Appointed trial counsel may file a motion to substitute the Mississippi Office of Indigent Appeals, in accordance with *Miss. Code Ann.* § 99-40-1. Trial counsel shall remain as the defendant's counsel until relieved by order of the Supreme Court and shall have a continuing duty to cooperate with appellate counsel after relieved by order of the Supreme Court.

(2) *When Appellant Has No Counsel.* Where an appeal is taken to the Supreme Court by a person entitled to appointed counsel, and the appellant is not represented by an attorney, and the existing record does not disclose whether appellant intelligently and competently waived the appointment of an attorney in the Supreme Court, the Supreme Court or the Court of Appeals may request the trial court to determine:

- i. whether the appellant is indigent and unable to employ counsel;
- ii. if indigent, whether the appellant desires counsel to be appointed; and
- iii. if the appellant does not desire counsel, whether the appellant intelligently and competently waives the appointment of counsel on appeal.

A transcript shall be made by the court reporter of the hearing on these issues before the trial court, and such transcript and the order of the trial court shall be certified to the Supreme Court or the Court of Appeals and shall be made a part of the record on appeal.

If the trial judge or the appellate court determines that appellant is indigent and is entitled to the appointment of counsel on appeal, and that he has not intelligently and competently waived the same, the trial court shall, **except for good cause shown**, appoint counsel to represent appellant on his appeal in accordance with the provisions of *Miss. Code Ann.* § 99-15-15 (1994); **the Mississippi Office of Indigent Appeals to represent the appellant on appeal in accordance with the provisions of *Miss. Code Ann.* § 99-40-1.**

**[Amended August 9, 2007, to provide for appointment of the Mississippi Office of Indigent Appeals; Adopted to govern matters filed on or after January 1, 1995.]**

#### **Advisory Committee Historical Note**

Effective January 1, 1995, *Miss.R.App.P.* 6 replaced *Miss.Sup.Ct.R.* 6, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXIII-XXXIV (West Miss.Cases 1994).

[Adopted August 21, 1996.]

## Comment

Rule 6 provides for appeals *in forma pauperis* in criminal appeals. This rule reflects the salient features of Fed. R. App. P. 24 and Ala. R. App. P. 24. See Form 4 for a suggested affidavit to accompany a motion for application to proceed *in forma pauperis*. Rule 6(b)(1) provides that appointed counsel in a criminal case may not be relieved of the responsibility for an appeal absent leave of Court. *Allison v. State*, 436 So. 2d 792 (Miss. 1983).

An accused entitled to counsel at trial is also entitled to counsel in an appeal as of right to the Supreme Court. *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Neal v. State*, 422 So. 2d 747, 748 (Miss. 1982). Under federal law, a defendant is entitled to counsel if a sentence of imprisonment is imposed. *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). See also Miss. Const. of 1890, art. 3, § 26.

The county prepays costs when an indigent criminal defendant appeals *in forma pauperis*. Miss. Code Ann. § 99-35-105 (~~1994~~ Rev. 2000). The Clerk of the Supreme Court charges no fees or costs when a defendant incarcerated at the Mississippi State Penitentiary appeals on pauper's oath. Miss. Code Ann. § 25-7-3 ( ~~Supp. 1994~~ Rev. 2006).

Rule 6(b) provides for the appointment of the Mississippi Office of Indigent Appeals in accordance with Miss. Code Ann. § 99-40-1. An indigent appellant shall be represented by the Mississippi Office of Indigent Appeals absent good cause shown.