

IN THE SUPREME COURT OF MISSISSIPPI

No. 89-R-99027-SCT

IN RE: MISSISSIPPI RULES OF APPELLATE PROCEDURE

ORDER

This matter has come before the Court, en banc, on its own motion for consideration of amendments to Mississippi Rules of Appellate Procedure, Rule 22. Having considered the matter, the Court finds that the interest of the fair and efficient administration of justice will be served by the adoption of the proposed amendments as set forth in Exhibit "A" hereto.

IT IS THEREFORE ORDERED that Rule 22 of the Mississippi Rules of Appellate Procedure be and the same is 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 shall forward a true certified copy hereof to West Publishing Company for publication in the next edition of the *Mississippi Rules of Court* and in the *Southern Reporter, Second Series, (Mississippi Edition)*.

SO ORDERED, this the 26th day of July, 2000.


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

McRAE, J. WOULD DENY
MILLS, J. NOT PARTICIPATING

FILED

JUL 27 2000

CHARLOTTE B. WILLIAMS, CLERK
SUPREME COURT
COURT OF APPEALS

EXHIBIT "A" TO ORDER
AMENDMENT OF M.R.A.P. 22

Note: Additions are indicated by underscoring; deletions by strike through.

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

(a) Filing of Applications. Applications for post-conviction collateral relief in criminal cases may be governed by Miss. Code Ann. § 99-39-1, et seq. (Suppl 1994) as supplemented and modified by this Rule 22. If any application fails to comply substantially with the statute, the clerk of the Supreme Court shall give written notice of the default, appraising the party of the nature of the deficiency. If the deficiencies are not corrected within thirty days, the application may be dismissed.

~~[Adopted to govern matters filed on or after January 1, 1995; amended effective January 1, 1999 and June 24, 1999.]~~

(b) Post-conviction issues raised on direct appeal. Issues which may be raised in post-conviction proceedings may also be raised on direct appeal. Where the appellant is represented by counsel who did not represent ~~him~~ 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.

~~**(b) Post-conviction Applications by Persons Under Sentence of Death.** Within thirty days, the Attorney General, or his designated Assistant Attorney General, shall respond in writing, and pursuant to these rules to each application in criminal cases where post-conviction collateral relief is sought by or on behalf of a person under sentence of death. Within fifteen days following the filing of the response of the Attorney General, the prisoner petition may file a rebuttal to the response of the Attorney General.~~

~~[Amended effective January 1, 1999.]~~

(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 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.

(3) Compensation of appointed counsel and expenses of litigation

Compensation for attorneys appointed under this section and expenses of litigation shall be governed by Miss. Code Ann. § 99-15-18. Prior to the approval of expenses for litigation, the petitioner shall present to the convicting court, with notice to the Attorney General and an opportunity for the Attorney General to be heard, a request estimating the amount of such expenses as will be necessary and appropriate in the matter, and the court will determine and allow such expenses as are justified upon hearing of the request for expenses. In requesting such expenses, the petitioner shall make a preliminary showing that such expenses are necessary to the presentation of his case and that they relate to positions which may reasonably be expected to be beneficial. To the extent that the court may find that the disclosure of identity of experts or other factual matters may hinder a fair preparation of the petitioner's case, the disclosure thereof may be presented in camera without disclosure to the State. All orders initially allowing litigation expenses shall be subject to review and reconsideration from time to time as the court may find necessary, and payment under such order will be approved only upon the submission of specific detailed invoices and review by the court. Should the court find that such invoices contain information which if disclosed to the State would unfairly disclose information detrimental to the petitioner's fair presentation of his case, the court shall consider those portions in camera without disclosure to the State.

(4) Further matters preliminary to proceedings in the Supreme Court

(i) An application for post-conviction relief shall not be filed until proceedings on rehearing of the affirmance of the conviction and sentence are final. However, not later than sixty (60) days following the appointment of post-conviction counsel, or the determination that the petitioner is represented by

qualified private counsel, or elects to proceed pro se, counsel or the pro se petitioner shall examine the record and preliminarily investigate the case and shall file with this Court a statement that having done so, counsel or the pro se petitioner either finds no issues with potential post-conviction merit or finds that there are issues which are believed to be meritorious. In the event that counsel or the pro se petitioner files a statement indicating that post-conviction review is deemed to be meritorious and that counsel or the pro se petitioner intends to file an application for post-conviction review, execution of the sentence shall be stayed until disposition of post-conviction proceedings.

(ii) Upon appointment of counsel, or the determination that the petitioner is represented by private counsel the petitioner's prior trial and appellate counsel shall make available to the petitioner's post-conviction counsel their complete files relating to the conviction and sentence. The State, to the extent allowed by law, shall make available to post-conviction counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed and the prosecution of the petitioner. If the State has a reasonable belief that allowing inspection of any portion of the files by post-conviction counsel for the petitioner would not be in the interest of justice, the State may submit for inspection by the convicting court those portions of the files so identified. If upon examination of the files, the court finds that such portions of the files could not assist the capital petitioner in investigating, preparing, or presenting a motion for post-conviction relief, the court in its discretion may allow the State to withhold that portion of the files. Discovery and compulsory process may be allowed the petitioner from and after the appointment of post-conviction counsel or the determination that the petitioner is represented by private counsel or is proceeding pro se, but only upon motion indicating the purpose of such discovery and that such discovery is not frivolous and is likely to be helpful in the investigation, preparation or presentation of specific issues which the petitioner in good faith believes to be in question and proper for post-conviction relief, and order entered in the sound discretion of the court. Upon determination that the petitioner has elected to proceed pro se, such files and discovery shall be made available as provided in subsection (2)(iii) above.

(5) Proceedings in the Supreme Court on Application for Leave to Seek Relief in the Convicting Court.

(i) An application for leave to file a motion for post-conviction relief shall be filed in the Supreme Court not later than one hundred eighty (180) days after counsel is appointed or sixty (60) days following denial of rehearing on the direct appeal of the conviction and sentence, whichever is later. An application which is filed after such date is presumed untimely unless the petitioner establishes good cause by showing particularized justifying circumstances. Absent extraordinary circumstances, a petitioner may not establish good cause for untimely filing of an application filed later than ninety-one (91) days after the filing due date hereunder. The failure to file an application within the time allowed hereunder constitutes a waiver of all grounds for relief, excepting from such waiver only those matters which are excepting from res judicata or successive writ bar identified in section 99-39-27(9).

(ii) The State shall file a response to the application for leave to file a motion for post-conviction relief not later than thirty (30) days following the date the State receives notice of filing of the application. The State may request additional time upon particularized justifying circumstances. The petitioner may file a rebuttal to the State's response within fifteen (15) days following the date the petitioner receives notice of filing of the response. The petitioner may request additional time for rebuttal upon particularized justifying circumstances.

(6) Proceedings in the Convicting Court

In the event that the application is granted, the Supreme Court shall issue such scheduling orders as it deems appropriate and shall during proceedings in the convicting court monitor such proceedings in order to assure compliance with filing and decision periods established in this section or by order. Such scheduling orders shall require (1) the filing of the motion for post-conviction relief within thirty (30) days following the entry of the order, and, if an evidentiary hearing is to be granted, such hearing to be conducted not more than one hundred eighty (180) days following the filing of the motion for post-conviction relief. The scheduling order shall, in any event, require disposition of all proceedings in the convicting court within two hundred seventy (270) days following the filing of the motion for post-

conviction relief. The preparation of the transcript and record of proceedings shall take precedence over all other duties of the court reporter assigned to the post-conviction proceedings in the convicting court, and in any event, such record shall be transcribed within thirty (30) days following the conclusion of such proceedings unless additional time shall be allowed by the Supreme Court.

(7) To the extent that the procedures set out in this rule may conflict with any other rule of procedure or practice, the procedures set out herein shall control in post-conviction proceedings on behalf of petitioners under a sentence of death.

(8) Appeals from the judgments entered under this rule shall proceed as in other appeals from post-conviction decisions of the convicting courts and in accordance with rules established by the Supreme Court.

(9) If after an application for leave to file a motion for post-conviction relief is filed, the petitioner is denied post-conviction relief in this Court, or is denied such relief in the convicting court after grant of an application for leave to file for post-conviction relief in the convicting court and the Supreme Court affirms such denial by the trial court, an attorney, whether appointed under this section or privately retained, shall not later than fifteen (15) days after such denial becomes final in the Supreme Court, move to be appointed as counsel in federal habeas review under 21 U.S.C. Section 848(q) or equivalent provision or, if necessary, move for the appointment of other counsel under 21 U.S.C. Section 848(q) or equivalent provision.

(c) (d) Standards and qualifications for attorneys appointed or retained to represent those under sentence of death in post-conviction proceedings.

Counsel representing those under a sentence of death seeking post-conviction relief shall,

(1) Be admitted to practice law in Mississippi, being a member in good standing of the Bar for at least five years immediately preceding the appointment, or admitted pro hac vice pursuant to order entered under M.R.A.P. 46 and being a member in good standing of that attorney's home jurisdiction for a like period immediately preceding the appointment,

(2) Be admitted to practice in the federal courts of Mississippi and before the Fifth Circuit, or, in the case of attorneys appearing pro hac vice, admitted to the federal district courts and the circuit court of appeals having jurisdiction in their home areas,

(3) Have practiced in the area of state criminal appeals or post-conviction proceedings for three years immediately preceding appointment,

(4) Have not previously represented the capital petitioner in the case either in the trial court or in the direct appeal, unless the petitioner and counsel expressly request continued representation and waive all potential issues that are foreclosed by continued representation, and

(5) Have within ~~three~~ five years immediately preceding the appointment been ~~lead~~ counsel in an appeal or post-conviction proceeding in a case in which a death sentence was imposed, and have prior experience as counsel in the appeal of at least three felony convictions and at least one post-conviction proceeding; or, in the alternative, have within such period been ~~lead~~ counsel in the appeal of at least six felony convictions, at least two of which were appeals from murder convictions; and ~~lead~~ counsel in at least two post-conviction proceedings.

Provided, however, under exceptional circumstances, and with the consent of the Supreme Court, an attorney may be appointed who does not meet the stated qualifications upon a showing that the attorney's experience, stature and record enable the Court to conclude that the attorney's ability significantly exceeds the standards set forth in the rule.

~~[Adopted effective June 24, 1999 by order entered that date.]~~

~~(d)~~ **(e) Education and training of attorneys appointed or retained to represent those under sentence of death in post-conviction proceedings.** Effective July 31, 2000, an attorney serving as post-conviction counsel in a case wherein the petitioner is under a sentence of death shall have within one year prior to his appointment or employment successfully completed twelve hours training or educational programs in the area of capital defense through a program accredited by the Mississippi Commission on Continuing Legal Education or by the American Bar Association.

[Adopted August 21, 1996; amended June 24, 1999 by order entered that date; amended effective July 27, 2000.]

Advisory Committee Historical Note

Effective January 1, 1995, Miss.R.App.P. 22 replaced Miss.Sup.Ct.R. 22. 644-647 So.2d LVII (West Miss.Cases 1994).

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.

If leave to proceed in the trial court is granted, and proceedings take place there pursuant to §§ 99-39-9 to 99-39-23, an appeal from the trial court's decision is governed by these rules except as otherwise stated in § 99-39-25, which makes specific provision for stays or bail pending such an appeal. Statutory provisions are subject to the requirements of Miss. Const. of 1890, art. 3, § 21.

Following the adoption of new legislation in 2000, the rule was further amended to adopt special procedures governing proceedings on applications for leave to file in the trial court and motions for post-conviction relief in the cases of parties under sentence of death. These amendments are designed to implement the legislation, adopted as H.B. 1228 and signed by the Governor on May 22, 2000, effective on July 1, 2000.

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