

**PURSUANT TO RULE 27(f) OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE, THE SUPREME COURT SEEKS COMMENTS FROM THE BENCH, THE BAR AND THE PUBLIC ON THE PROPOSED AMENDMENT TO RULE 6 OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE**

**Comments should be filed with the Clerk of the Supreme Court, Gartin Justice Building, P.O. Box 117, Jackson, MS 39205, no later than May 28, 2007.**

IN THE MISSISSIPPI SUPREME COURT

IN THE MATTER OF THE MISSISSIPPI  
RULES OF APPELLATE PROCEDURE

NO. 89-R-99027-SCT

PETITION TO AMEND RULE 6 OF THE  
MISSISSIPPI RULES OF APPELLATE PROCEDURE

COMES NOW, the Mississippi Office of Indigent Appeals, and files this Petition to Amend Rule 6 of the Mississippi Rules of Appellate Procedure and in support thereof would show unto this Honorable Court the following, to-wit:

1. The Mississippi Supreme Court has exclusive and inherent jurisdiction to promulgate and amend procedural rules governing the Courts, and more specifically, the Mississippi Rules of Appellate Procedure. *See Newell v. State*, 308 So.2d 71 (Miss.1975); *Hall v. State*, 539 So.2d 1338 (Miss. 1989).

2. In its 2005 session, the Mississippi Legislature created the Mississippi Office of Indigent Appeals. *See* Miss. Code Ann. § 99-40-1.

3. On or about October 20, 2006, Governor Haley Barbour appointed Leslie S. Lee as Director of the Mississippi Office of Indigent Appeals, and the Office is now functional and accepting cases.

4. In order to ensure a smooth transition from trial court counsel, whether appointed or retained, to appointed appellate counsel where the rights of all parties are protected, as well as to promote judicial

economy, the Petitioner seeks certain amendments to Rule 6 of the Mississippi Rules of Appellate Procedure, as the same pertains to appeals *in forma pauperis*, as shown in Exhibit A attached hereto.

5. As will be demonstrated, *infra*, adoption of the new proposed rule will be beneficial to the Bench, Bar and the General Public, and the ends of justice will be served.

6. With one exception, the propose rule will allow appointment of the Mississippi Office of Indigent Appeals only by order of the Mississippi Supreme Court.<sup>1</sup> Such a procedure will assure uniformity in the transition from trial counsel to appointed appellate counsel, and will prevent confusion during substitution of appointed appellate counsel.

7. Under the proposed rule for *in forma pauperis* appeals, trial counsel would be required to file the notice of appeal required by M.R.A.P. 4, a designation of the record, and a certificate of compliance. Trial counsel would also be responsible for reviewing the record under M.R.A.P. 10, and resolving any deficiencies in the record prior to its transmittal to the Mississippi Supreme Court Clerk.

8. Such a procedure will ensure that only the necessary and relevant portions of the record are copied and transcribed, prevent blanket designations of the entire record from becoming a routine practice, save the court reporter from unnecessary transcriptions, and save tax dollars in the process. 9. Upon transmittal of the record to the Clerk of the Supreme Court, trial counsel shall file a motion to substitute counsel of record seeking to substitute the Mississippi Office of Indigent Appeals. The Supreme Court

---

<sup>1</sup>The one exception is where the defendant convicted at trial does not have counsel and desires counsel on appeal. In that event, out of necessity, the trial court would be authorized to appoint the Mississippi Office of Indigent Appeals.

would then make the substitution of counsel absent unusual circumstances. The Petition asserts that this approach would make the most efficient use of judicial resources.<sup>2</sup>

10. The state of Florida adheres to a similar procedure. There, Rule 9.140 of the Florida Rules of Appellate Procedure provides that trial counsel may not withdraw until such time as the time for filing a notice of appeal has expired and no notice of appeal has been filed, or, if a notice of appeal has been filed, only after the equivalent of a statement of the issues, designation of the record and notice to the court reporter have been filed. Then a local public defender is appointed until such time as the record is transmitted to the appellate court.<sup>3</sup> A copy of said Rule 9.140 of the Florida Rules of Appellate Procedure is attached hereto as Exhibit B.

11. The Petitioner asserts that the procedures, as set forth in the proposed rule, will serve to protect the rights of all parties involved, promote judicial economy, provide clear rules, avoid unnecessary

---

<sup>2</sup>Trial counsel is most familiar with the proceedings at trial, the potential issues on appeal, and the motions and other trial proceedings which support the grounds for appeal. An attorney reviewing the record who did not participate in the trial proceedings will be greatly hindered in determining if the appellate record is complete, and will unlikely be able to ascertain if something is missing from the record. Trial counsel already has a good idea of the issues for appeal without an in depth review of the record, thereby making the time spent by trial counsel reviewing the record minimal. Moreover, because trial counsel is in a better position to determine if the appellate record is complete, motions seeking to supplement the record will be reduced.

<sup>3</sup>The proposed procedure here differs slightly from the Florida procedure in that trial counsel, whether appointed or retained, would remain as counsel until such time as the record is transmitted to the Clerk of the Supreme Court, as opposed to having a local public defender appointed in place of retained trial counsel until the record is transmitted to the Supreme Court Clerk. After transmittal of the record to the Supreme Court Clerk, the Supreme Court acting on the motion to substitute counsel filed by trial counsel would relieve trial counsel absent unusual circumstances. Thus trial counsel would be given adequate assurances of being relieved as counsel of record for the rest of the appeal.

confusion from the transition of trial counsel to appointed appellate counsel, and save resources and tax dollars.

12. On or about January 9, 2007, the Petition provided copies of this petition and proposed rule to the Mississippi Circuit Judge's Association, the Mississippi Public Defender's Association, and the Mississippi Attorney General's Office.

WHEREFORE PREMISES CONSIDERED, the Petitioner, the Office of Indigent Appeals, respectfully prays that the Court will adopt the proposed amendment to M.R.A.P. 6 attached hereto as Exhibit A. If the Petitioner has prayed for improper or insufficient relief, then the Petition prays for such relief to which it is entitled in the premises.

RESPECTFULLY SUBMITTED, this the 29<sup>th</sup> day of January, 2007.

MISSISSIPPI OFFICE OF INDIGENT APPEALS

By: \_\_\_\_\_  
Leslie S. Lee, Director

Of Counsel:

Glenn S. Swartzfager (MSB# 9535)  
Mississippi Office of Indigent Appeals  
301 N. Lamar Street, Suite 210  
Jackson, Mississippi 39201  
Telephone (601) 576-4200  
Facsimile (601) 576-4205  
[gswar@oia.ms.gov](mailto:gswar@oia.ms.gov)

**MISSISSIPPI RULES OF APPELLATE PROCEDURE**  
**Adopted Effective January 1, 1995**

**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 ~~Court~~ *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.

(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.~~ shall seek to substitute the Mississippi Office of Indigent Appeals as counsel of record.

(i) Where an appeal is taken to the Supreme court *in forma pauperis* by a person with appointed counsel, the certificate of compliance required by Rule 11(b)(1) shall indicate that the appeal is taken *in forma pauperis*.

(ii) Upon compliance with Rule 11(d)(2) and transmittal of the completed record to the Supreme Court, counsel appointed by the trial court may file a motion to substitute the Mississippi Office of Indigent Appeals with the Supreme Court. Any motion to substitute shall include information about all co-defendants and any potential conflicts of interests. 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 ~~appoint counsel to represent appellant on his appeal in accordance with the provisions of Miss. Code Ann. § 99-15-15 (1994).~~ notify the Mississippi Office of Indigent Appeals who shall assign an attorney to represent appellant on appeal in accordance with the provisions of Miss. Code Ann. § 99-40-1.