

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

1. IN RE: AMENDMENT TO SUPREME COURT RULE 28, Section 9(D)
M2003-01514-SC-RL2-RL

Filed June 19, 2003

ORDER

To address voids in the procedure relating to delayed appeals, this Court hereby proposes to amend Supreme Court Rule 28, Section (9)(D). The proposed amendment is attached hereto as [Exhibit A](#).

The Clerk shall provide a copy of this order and the proposed amendment to the Tennessee Attorney General's Office, the Tennessee District Public Defender's Conference, and the Tennessee District Attorneys General Conference. In addition, this order shall be posted on the Tennessee Supreme Court website.

The Court hereby solicits written comments on the proposed amendment from the bench, bar, and public. The deadline for submitting written comments is August 1, 2003. Comments should be addressed to:

Cecil V. Crowson, Jr., Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

It is so ORDERED.

FOR THE COURT:

Frank F. Drowota, III, Chief Justice

EXHIBIT A

Proposed Amendment to Supreme Court Rule 28, Section 9(D)

Rule 28, Section 9(D) –Grant of Delayed Appeal.

By the Trial Court

(a) Appeal as of Right Pursuant to Rule 3, Tennessee Rules of Appellate Procedure – Upon determination by the trial court that the petitioner was deprived of the right to file an appeal pursuant to Rule 3, Tennessee Rules of Appellate Procedure, the trial court shall apply the procedures set out

in Tennessee Code Annotated section 40-30-213.

(b) Appeal Pursuant to Rule 11, Tennessee Rules of Appellate Procedure –

(i) Upon determination by the trial court that the petitioner was deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, the trial court shall enter an order granting the petitioner a delayed appeal, staying the post-conviction proceedings pending the final disposition of the delayed appeal, and directing the trial court clerk to immediately file in the Appellate Court Clerk's Office a certified copy of the order granting the delayed appeal. Upon receipt of the certified copy of the trial court's order, the clerk of the appellate court shall immediately reinstate the appeal on the docket and serve notice on all parties.

(ii) The petitioner shall have sixty (60) days from the date of entry of the order in the trial court to file an application pursuant to Tennessee Rule of Appellate Procedure 11. If the State does not object to the trial court's granting of the delayed appeal, the State may file an answer to the application pursuant to Tennessee Rule of Appellate Procedure 11(d).

(iii) If the State objects to the trial court's granting of the delayed appeal, within fifteen (15) days after filing of the application, the State shall file a motion to dismiss the application for permission to appeal. The motion shall be supported by an affidavit summarizing the facts supporting dismissal. Within ten (10) days after filing of the motion, the petitioner shall file a response. The response shall be accompanied either by copies of that portion of the record of the post-conviction proceeding relating to the trial court's decision to grant a delayed appeal or by an affidavit summarizing the facts supporting the trial court's decision to grant a delayed appeal. If the motion to dismiss is denied, the State shall have fifteen (15) days from the date of the order denying the motion to file a response to the application.

(2) By the Appellate Court

(a) Appeal as of Right Pursuant to Rule 3, Tennessee Rules of Appellate Procedure – If the trial court determines that the petitioner was not deprived of the right to appeal pursuant to Rule 3, Tennessee Rules of Appellate Procedure, this ruling may be challenged as part of any Rule 3 appeal from the trial court's final judgment in the post-conviction proceedings. The Court of Criminal Appeals shall consider and resolve this issue along with any other issues raised in the post-conviction appeal. Should the Court of Criminal Appeals grant a delayed appeal, the post-conviction appeal shall not be stayed; instead, any party may challenge the decision of the Court of Criminal Appeals, or any portion thereof, by filing an application for permission to appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure.

(b) Appeal Pursuant to Rule 11, Tennessee Rules of Appellate Procedure –

(i) If the trial court determines that the petitioner was not deprived of the right to request an appeal pursuant to Rule 11, Tennessee Rules of Appellate Procedure, this ruling may be challenged as part of any Rule 3 appeal from the trial court's final judgment in the post-conviction proceedings. The Court of Criminal Appeals shall consider first the trial court's denial of the delayed appeal before resolving other issues raised in the post-conviction appeal. If the Court of Criminal Appeals determines that the trial court properly denied the request, the Court of Criminal Appeals shall dispose of the remaining issues in the post-conviction appeal. If, however, the Court of Criminal

Appeals determines that the trial court erred in denying the delayed appeal, the Court of Criminal Appeals shall enter an order granting the petitioner a delayed appeal, staying the post-conviction proceedings pending the final disposition of the delayed appeal, and directing the Appellate Court Clerk's Office to immediately reinstate the appeal on the docket and serve notice on all parties.

(ii) The petitioner shall have sixty (60) days from the date of entry of the order of the Court of Criminal Appeals to file an application pursuant to Tennessee Rule of Appellate Procedure 11. If the State does not object to the order granting the delayed appeal, the State may file an answer to the application pursuant to Tennessee Rule of Appellate Procedure 11(d).

(iii) If the State objects to the order granting the delayed appeal, within fifteen (15) days after filing of the application, the State shall file a motion to dismiss the application for permission to appeal. The motion shall be supported by an affidavit summarizing the facts supporting dismissal. Within ten (10) days after filing of the motion, the petitioner shall file a response. The response shall be accompanied either by copies of that portion of the record of the post-conviction proceeding relating to the delayed appeal or by an affidavit summarizing the facts supporting the order granting a delayed appeal. If the motion to dismiss is denied, the State shall have fifteen (15) days from the date of the order denying the motion to file a response to the application.

(3) New Issues Resulting from Delayed Appeal

(a) Where a delayed appeal is granted and the petitioner is unsuccessful on appeal, and new issues cognizable in a post-conviction proceeding result from the handling of the delayed appeal, the petitioner may amend the original post-conviction petition to include such new issues.

(b) Where the post-conviction appeal has been stayed in the Court of Criminal Appeals, the case may be remanded to the trial court for the taking of evidence on any new issues resulting from an unsuccessful delayed appeal.