

IN THE SUPREME COURT OF ALABAMA
September 15, 2008

ORDER

IT IS ORDERED that Rule 39(d)(5)(A) and (C) and the introductory paragraph in Rule 39(d)(5), and Rule 40(e) and Rule 40(g), Alabama Rules of Appellate Procedure, be amended to read in accordance with Appendices A, C, and E, respectively;

IT IS FURTHER ORDERED that the "Court Comment to Amendments to Rule 39(d)(5) Effective September 15, 2008," and the "Court Comment to Amendment to Rule 40(e) Effective September 15, 2008," be adopted to read in accordance with Appendices B and D, respectively;

IT IS FURTHER ORDERED that these amendments and the adoption of the Court Comments are effective immediately.

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 39 and Rule 40:

"Note from the reporter of decisions: The order amending Rule 39(d)(5)(A) and (C) and the introductory paragraph in Rule 39(d)(5), and Rule 40(e) and Rule 40(g), Alabama Rules of Appellate Procedure, and adopting the Court Comment to Amendments to Rule 39(d)(5) Effective September 15, 2008, and the Court Comment to Amendment to Rule 40(e) Effective September 15, 2008, effective September 15, 2008, is published in that volume of Alabama Reporter that contains Alabama cases from ___ So. 2d."

Cobb, C.J., and See, Lyons, Woodall, Stuart, Smith, Bolin, Parker, and Murdock, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 15th day of Sept., 2008

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

APPENDIX A

Rule 39(d) (5), Alabama Rules of Appellate Procedure

(5) If a party is not satisfied with the facts stated in the opinion or the unpublished memorandum of the court of appeals, or if the court of appeals issued a "no-opinion" decision pursuant to Rule 53, a copy of a concise statement of the facts may be either included in the petition or attached to the petition. If a party is not satisfied with the facts stated in the main opinion or the unpublished memorandum of the court of appeals, but the party is satisfied with the facts as stated in a dissent or a special writing by a judge or judges of the court of appeals, the party shall indicate those facts with which the party is in agreement and indicate in which part of the dissent or special writing the facts are found.

(A) Statement of facts where application for rehearing was filed with court of appeals after an opinion or an unpublished memorandum was issued.

(i) If a court of appeals issues an opinion or an unpublished memorandum containing a statement of facts and the party applying for rehearing is not satisfied with that statement, the party applying for rehearing in that court may include in the application an additional or corrected statement of facts or the applicant's own statement of facts. If an applicant is not satisfied with the facts stated in the main opinion or the unpublished memorandum of the court of appeals, but the applicant is satisfied with the facts as stated in a dissent or a special writing by a judge or judges of the court of appeals, the applicant shall indicate those facts with which the applicant is in agreement and indicate in which part of the dissent or special writing the facts are found. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, in order for the Supreme Court to consider those facts in addition to the facts as stated in the court of appeals' opinion or unpublished memorandum, the proposed statement of additional or corrected facts or the applicant's own statement of facts presented to the court of appeals in the application for

rehearing must be copied verbatim and attached to or included in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript.

(ii) If the petitioner proposes his or her own statement of facts, the petitioner must include a verification that this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing.

(iii) If the petitioner does not present with the petition an additional or corrected statement of facts or the petitioner's own statement of facts, or indicate which part of the dissent or special writing the petitioner agrees with, it will be presumed that the petitioner is satisfied with the facts as stated in the court of appeals' main opinion or unpublished memorandum.

(C) Statement of facts where no application for rehearing was filed with the Court of Civil Appeals.

(i) If the petition for a writ of certiorari seeks review of a decision of the Court of Civil Appeals and the petitioner has not filed an application for rehearing with the Court of Civil Appeals, and if the Court of Civil Appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion that does not contain a statement of facts, the petitioner shall present to the Supreme Court, either in the petition or as an attachment to the petition for the writ of certiorari, the petitioner's statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the Court of Civil Appeals issues an opinion containing a statement of facts and the party petitioning for the writ of certiorari is not satisfied with that statement of facts, the petitioner may present to the Supreme Court, either in the petition or as an attachment to the petition for the writ of certiorari, a proposed additional or corrected statement of facts or the petitioner's own statement

of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If a petitioner is not satisfied with the facts stated in the main opinion of the Court of Civil Appeals, but the petitioner is satisfied with the facts as stated in a dissent or a special writing by a judge or judges of the Court of Civil Appeals, the petitioner shall indicate those facts with which the petitioner is in agreement and indicate in which part of the dissent or special writing the facts are found.

(ii) If the petitioner does not present with the petition an additional or corrected statement of facts or the petitioner's own statement of facts or indicate which part of the dissent or special writing the petitioner agrees with, it will be presumed that the petitioner is satisfied with the facts as stated in the Court of Civil Appeals' main opinion; and

APPENDIX B

Court Comment to Amendments to
Rule 39(d)(5) Effective September 15, 2008

At times, the petitioner may not agree with the facts as stated in the court of appeals' main opinion but agrees with facts stated in a dissent or a special writing. The amendments to Rule 39(d)(5), (d)(5)(A), and (d)(5)(C) provide that, in such a case, the petitioner shall indicate in the petitioner's statement of facts which part of the facts in the dissent or special writing the petitioner agrees with and indicate in which part of the dissent or special writing those facts can be found.

APPENDIX C

Rule 40(e), Alabama Rules of Appellate Procedure

(e) Statement of Facts to be Contained in Application for Rehearing. If a court of appeals issues an opinion or an unpublished memorandum containing a statement of facts and a party applying for rehearing is not satisfied with that court's statement of the facts, the party applying for rehearing may present in the application for rehearing a proposed additional or corrected statement of facts or the applicant's own statement of facts. If the applicant is not satisfied with the facts stated in the main opinion or the unpublished memorandum of the court of appeals, but the applicant is satisfied with the facts as stated in a dissent or a special writing by a judge or judges of the court of appeals, the applicant shall indicate those facts with which the applicant is in agreement and indicate in which part of the dissent or special writing the facts are found. If the applicant does not present in the application an additional or corrected statement of facts or the applicant's own statement of facts, it will be presumed that the applicant is satisfied with the facts as stated in the court of appeals' main opinion or unpublished memorandum. If a court of appeals issues a "no-opinion" decision pursuant to Rule 53 or issues an opinion or an unpublished memorandum that does not contain a statement of facts, the applicant shall include a statement of facts in the application for rehearing. See Rule 39(d)(5).

APPENDIX D

Court Comment to Amendment to
Rule 40(e) Effective September 15, 2008

At times, the applicant may not agree with the facts as stated in the court of appeals' main opinion but agrees with the facts stated in a dissent or a special writing. The amendment to Rule 40(e) provides that, in such a case, the applicant shall indicate in the applicant's statement of facts which part of the facts in the dissent or special writing the applicant agrees with and indicate in which part of the dissent or special writing those facts can be found.

APPENDIX E

Rule 40(g), Alabama Rules of Appellate Procedure

(g) Form of Application; Color of Brief; Length of Argument. Except in criminal cases in which the death penalty is imposed, the application shall not exceed 15 pages. The application for rehearing may be a separate document or may be included at the beginning of the applicant's brief. The brief shall be in a form prescribed by Rules 28 and 32(a), except that because the statement of facts is included in the application for rehearing, a statement of facts will not be included in the brief. Except in criminal cases in which the death penalty is imposed, the brief in support of the application for rehearing shall not exceed 15 pages, unless that page limitation is extended by the court pursuant to Rule 28(j)(3). Copies of the brief shall be served and filed as prescribed by Rule 31 for the service and filing of briefs. The cover of the brief in support of the application for rehearing shall be white. The application, or a brief in support of an application for rehearing, shall be governed by Rule 32(b)(1).