

IN THE SUPREME COURT OF ALABAMA
November 30, 2020

ORDER

IT IS ORDERED that Rule 2(b), Rule 5(b)(2), Rule 21(a)(1)(F), and Rule 28B, Alabama Rules of Appellate Procedure, be amended to read in accordance with Appendices A, C, E, and G, respectively, to this order;

IT IS FURTHER ORDERED that the Committee Comment to the amendment to Rule 2(b), the Committee Comment to the amendment to Rule 5(b)(2), the Committee Comment to the amendment to Rule 21(a)(1)(F), and the Committee Comment to the amendment to Rule 28B be adopted to read in accordance with Appendices B, D, F, and H, respectively, to this order;

IT IS FURTHER ORDERED that the amendments to Rule 2(b), Rule 5(b)(2), Rule 21(a)(1)(F), and Rule 28B and the adoption of the Committee Comments to the amendments to those rules be effective January 1, 2021;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow the Rule 2, Rule 5, Rule 21, and Rule 28B:

"Note from the reporter of decisions: The order amending Rule 2(b), Rule 5(b)(2), Rule 21(a)(1)(F), and Rule 28B and adopting the Committee Comments to those amendments, effective January 1, 2021, is published in that volume of Alabama Reporter that contains Alabama cases from __ So. 3d."

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers,
Mendheim, Stewart, and Mitchell, JJ., concur.

Witness my hand this 30th day of November, 2020.



Clerk, Supreme Court of Alabama

FILED
November 30, 2020
4:26 pm
Clerk
Supreme Court of Alabama

APPENDIX A

Rule 2(b), Ala. R. App. P.

(b) Suspension of Rules. In the interest of expediting decision, or for other good cause shown, an appellate court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction; provided, however, an appellate court may not extend the time for taking an appeal, as provided in Rule 4(a)(1); and the supreme court may not extend the time for filing a petition for certiorari to the courts of appeals as provided in Rule 39; provided, however, that the supreme court may extend the time for filing a petition for certiorari in a criminal case in which the death penalty was imposed as punishment.

APPENDIX B

Committee Comment to Amendment to Rule 2(b) Effective January 1, 2021

Rule 2(b) has been amended to clarify that the prohibition of extending the time for filing a petition for the writ of certiorari applies to petitions to the Court of Civil Appeals and to the Court of Criminal Appeals in non-death-penalty cases.

APPENDIX C

Rule 5(b)(2), Ala. R. App. P.

(2) Appendix. The petition shall have annexed thereto an appendix including (i) a copy of the order or orders from which appeal is sought and of any findings of fact, conclusions of law, and opinion or opinions relating thereto, (ii) a copy of the certification required by Rule 5(a), (iii) all other orders, opinions, and parts of the record that are essential to understanding the matters set forth in the petition, such as all court filings (by any party) directly connected to the order or orders for which permissive appeal is sought, and any transcripts of proceedings that resulted in the order or orders, and (iv) an index listing separately each document in the appendix. The supreme court may, in its discretion, direct any deficiency in documents included in the appendix to be corrected or the petition dismissed. The appendix shall be separated from the petition by a divider or a tab, and each document within the appendix shall be separated by a numbered cover sheet and an appropriate tab to identify and assist in locating the documents.

APPENDIX D

Committee Comment to Amendment to Rule 5(b)(2) Effective January 1, 2021

Consistent with the amendment to Rule 21(a)(1)(F), Rule 5(b)(2) has been amended to clarify that the documents from the trial court's record to be made part of the appendix to the petition include the order or orders for which the petitioner seeks review and all filings by any party directly connected to that order or those orders. The amendment also clarifies that the supreme court may direct that any deficiency in the inclusion of documents in the appendix be remedied or the petition will be dismissed.

APPENDIX E

Rule 21(a)(1)(F), Ala. R. App. P.

(F) Appendix. An appendix including copies of all parts of the record that are essential to understanding the matters set forth in the petition, such as the order or orders of which the petitioner seeks review, all court filings (by any party) directly connected to the order or orders, and any transcripts of proceedings that resulted in the order or orders. The appellate court may, in its discretion, direct any deficiency in documents included in the appendix to be corrected or the petition dismissed. The appendix shall contain an index listing separately each document in the appendix. The appendix shall be separated from the petition by a divider or tab, and each document within the appendix shall be separated by a divider or appropriate tab to identify and assist in locating the documents.

APPENDIX F

Committee Comment to Amendment to Rule 21(a)(1)(F) Effective January 1, 2021

Rule 21(a)(1)(F) has been amended to clarify that the documents from the trial court's record to be made part of the appendix to the petition include the order or orders for which the petitioner seeks review and all filings by any party directly connected to that order or those orders. The amendment also clarifies that the appellate court may direct that any deficiency in the inclusion of documents in the appendix be remedied or the petition will be dismissed.

APPENDIX G

Rule 28B, Ala. R. App. P.

Notice of Supplemental Authority

If pertinent and significant authority comes to a party's attention after the party's brief has been filed -- or after oral argument but before a decision has been rendered by the appellate court -- a party may promptly advise the clerk of the appellate court in which the proceeding is pending by letter, with a copy to all other parties, setting forth the citation or citations of the supplemental authority. The letter must state the reasons for the supplemental citations, referring either to the page of the brief the supplemental authority supports or to a point argued orally. The body of the letter must not exceed 400 words (2 pages for pro se filers) and must otherwise comply with Rule 32(a)(6) and (7), Ala. R. App. P. Any response must be made promptly and shall be similarly limited.

APPENDIX H

Committee Comment to Amendment to Rule 28B

Effective January 1, 2021

By replacing the word "new" with the word "supplemental," the amendment clarifies that counsel may bring to the attention of the appellate court both previously existing authorities that were not included in a brief and authorities issued after a brief is filed. The rule is patterned after Rule 28(j), Fed. R. App. P. A leading treatise explains:

"Two commentators state that '[t]he usual times for sending in new authorities are (a) shortly before argument, when renewed research uncovers something; (b) after a reply brief is filed, when new research provides an answer to a question not theretofore asked; (c) after argument, when the argument suggests another look at the law; and (d) when regular reading of the advance sheets or browsing on Westlaw or LEXIS turns up something.' A good use for a Rule 28(j) letter is to apprise the court of authorities that were previously unavailable. But Rule 28(j) extends to any pertinent and significant authority that comes to the party's attention after briefing (or after argument but before decision); thus, a Rule 28(j) letter can also be used to bring to the court's attention an authority that existed, but was not found by counsel, prior to briefing or argument. A court might permit the parties to use Rule 28(j) letters to address an issue raised by the court during oral argument. ...

"The usual rule that contentions not raised and argued in the party's principal brief are ordinarily deemed abandoned applies with equal force to Rule 28(j) letters, and they are thus not an appropriate vehicle for asserting new contentions. There are of course exceptions to the general rule concerning abandonment, so there are occasional circumstances in which a party may succeed in using a Rule 28(j) letter to present an

issue not previously raised -- for instance, if the issue arises from a late-breaking change in the governing law. ..."

16AA Charles Alan Wright et al., Federal Practice & Procedure § 3974.6 (2020) (footnotes omitted).