J. Y. Interpretation No.306（October 16, 1992）*

ISSUE: Where a defense trial counsel in a criminal action brings an appeal under the Code of Criminal Procedure for the benefit of the accused, but fails to state in the appellate brief to the effect that the appeal is filed in the name of the accused, is such a defect in formality unalterable by amendment and does the court err in dismissing the appeal outright without first ordering an amendment to be made within a fixed time limit?

RELEVANT LAWS:

Article 16 of the Constitution（憲法第十六條）; Article 338 of the Code of Criminal Procedure of the Republic of China promulgated on January 1, 1935 (re-named the Code of Criminal Procedure and re-numbered Article 346 by amendment made on January 28, 1967)（中華民國二十四年一月一日公布之中華民國刑事訴訟法第三百三十八條（五十六年一月二十八日修正時改為刑事訴訟法，條次改為第三百四十六條）; provisos to Articles 362, 367 and 384, respectively, of the current Code of Criminal Procedure（現行刑事訴訟法第三百六十二條但書、第三百六十七條但書、第三百八十四條但書）; J. Y. Interpretation Yuan-Je-Tze No. 3027（司法院院解字第三〇二七號解釋）; Supreme Court Precedent T.S.T. 2617 (Supreme Court 1964)（最高法院五十三年台上

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字第二六一判例）; Supreme Court Precedent T.F.T. No. 20 (Supreme Court, 1980)（最高法院六十九年台非字第二〇號判例）.

KEYWORDS:

accused（刑事被告）, defense counsel at trial below（被告之原審辯護人）, matter of formality（程式問題）, appellate brief（上訴書狀）, unalterable（不可補正）, order an amendment（命為補正）, public defender（公設辯護人）, right of appeal（上訴權）, independent appeal（獨立上訴）, second trial（第二審）, defect in formality（程式欠缺）.**

HOLDING： It is held by our Interpretation Yuan-Je-Tze No. 3027 and by the Supreme Court Precedent T.S.T. 2617 (Supreme Court 1964) that an appeal brought for the benefit of the accused by the defense counsel at trial below must be filed in the name of the accused, and to that extent the holdings are not against the intent of the Constitution in protecting the right of action of the people. It has been pointed out in said holdings, however, that this is an issue of formality. In the event where the defense counsel at trial below has filed an appeal for the benefit of the accused but has only failed to put in the

解釋文： 本院院解字第三〇二七號解釋及最高法院五十三年台上字第二六一七號判例，謂刑事被告之原審辯護人為被告之利益提起上訴，應以被告名義行之，在此範圍內，與憲法保障人民訴訟權之意旨，尚無牴觸。但上開判例已指明此係程式問題，如原審辯護人已為被告之利益提起上訴，而僅未於上訴書狀內表明以被告名義上訴字樣者，其情形既非不可補正，自應依法先定期間命為補正，如未先命補正，即認其上訴為不合法者，應予依法救濟。最高法院與上述判例相關連之六十九年台非字第二〇號判例，認該項程式欠缺之情形為無可補正，與前述意旨不符，應不予

appellate brief such words as state that the appeal is brought in the name of the accused, the situation is not unalterable, and, that being so, the court must first order an amendment to be made within a specified period in pursuance of law. If, without first ordering such an amendment, the appeal is held outright to be non-conformable to law, a legal remedy must be allowed. A priori, the Supreme Court Precedent T.F.T. No. 20 (Supreme Court, 1980), which is related with the aforesaid Precedent, holding that such a defect in formality is unalterable, is inconsistent with the opinion given above and must be rendered unauthoritative.

援用。

REASONING: Article 338 of the Code of Criminal Procedure of the Republic of China promulgated on January 1, 1935 (re-named the Code of Criminal Procedure and re-numbered Article 346 when amended on January 28, 1967) provided: "An agent or counsel for the accused at trial below may appeal for the benefit of the accused unless such appeal is contrary to the clearly expressed intention of the accused." Based on this statute,

解釋理由書：中華民國二十四年一月一日公布之中華民國刑事訴訟法第三百三十八條（五十六年一月二十八日修正時名稱改為刑事訴訟法，條次改為第三百四十六條）規定：「原審之代理人或辯護人得為被告之利益而上訴。但不得與被告明示之意思相反。」司法院據此於三十四年十一月二十二日作成院解字第三〇二七號解釋：「刑事被告之原審辯護人，雖得依刑事訴訟法第三百三十八條，為被告利益提起上訴，但

the Judiciary Yuan delivered its Interpretation Yuan-Je-Tze No. 3027 on November 22, 1945, quoting: "While a counsel for the accused at trial below may appeal for the benefit of the accused under Article 338 of the Code of Criminal Procedure , it is not an independent appeal. Thus, the appeal must be filed in the name of the accused irrespective of whether the counsel is a public defender." Additionally, the Supreme Court held in its Precedent T.S.T. 2617 (Supreme Court, 1964): "While a counsel for the accused at trial below may appeal for the benefit of the accused, it is not an independent appeal. Thus, the appeal must be filed in the name of the accused. An appeal filed by the counsel in his own name is one non-conformable to the legally required formality." To that extent, the accused is not only subject to no restraint on his right of appeal, but may also save efforts and expenses and minimize the possibility of unnecessary delay by the appeal filed on his behalf by the counsel at trial below. It is therefore not against the intent of the Constitution in protecting the right of action of the people. Nevertheless, such an

既非獨立上訴，無論是否為公設辯護人，其上訴均應以被告名義行之。」最高法院五十三年台上字第二六一七號判例要旨亦謂：「刑事被告之原審辯護人雖得為被告利益提起上訴，但既非獨立上訴，其上訴應以被告名義行之。若以自己名義提起上訴，即屬違背法律上之程式。」在此範圍內，被告之上訴權，非僅未受限制，且因有原審辯護人之代為上訴，而可節省勞費、減少貽誤，與憲法保障人民訴訟權之意旨，尚無牴觸。但此種由原審辯護人以被告名義提起之上訴，係該辯護人之行為，而非被告之行為。其上訴書狀已否表明以被告名義上訴字樣，非被告所能注意。如上訴書狀未為此表明，上開判例亦指明乃係違背程式，其情形既非不可由原為上訴行為之該辯護人補正，依現行刑事訴訟法第三百六十二條但書、第三百六十七條但書、第三百八十四條但書等有關規定，法院或審判長，自仍應定期間先命補正。以免僅因辯護人對於上訴程式之疏忽，而使被告之上訴權受不測之損害。如未先命補正，即認其上訴為不合法而逕予駁回者，自應予以依法救濟。最高法院與上開判例相關連之六十九年台非字第二〇號判例謂：「原第二審選任之辯護律師，雖得為被告利益提起上

appeal, being filed by the counsel at trial below, albeit in the name of the accused, is an act of the counsel rather than of the accused, who has no way of examining the brief to see if it contains such words as indicate an appeal filed in his name. If the appellate brief contains no such words, it constitutes a noncompliance with the statutory formality as clearly indicated by the precedent cited above, and, to the extent that the situation is not unalterable by amendment to be made by the counsel initiating the act of appeal, it goes without saying that the court or the presiding judge must first order an amendment to be made within a specified time limit under the provisos to Articles 362, 367 and 384, respectively, of the current Code of Criminal Procedure , to avoid unexpected infringements upon the right of appeal of the accused simply because of the counsel's negligence in the form of the appeal. If, without first ordering such an amendment, the appeal is dismissed outright on the ground of non-compliance with law, a legal remedy must be allowed. A priori, the Supreme Court Precedent T.F.T. No.20 (Supreme Court, 1980), which is

訴，但其上訴係本於代理權作用，並非獨立上訴。乃竟不以被告名義行之，而以其自己名義提起，其上訴即難謂為合法。既無可補正，原第二審法院未定期間先命補正，亦難謂於法有違。」其中認該項程式欠缺之情形為無可補正部分，與前述意旨不符，應不予援用。

related with the aforesaid Precedent, holding that "while counsel at the second trial below is entitled to institute an appeal for the benefit of the accused, such an appeal is one based on agency rather than an independent appeal. Since the appeal in question was filed in the counsel's own name instead of in the name of the accused, it was not cognizable as a lawful appeal. As the defect is unalterable, the court of the second trial below did not err in law despite its having not first ordered an amendment to be made within a specified time limit" is inconsistent with the opinion given above insofar as the part of the decision holding that such defect in formality is unalterable is concerned and must therefore be rendered unauthorittive.