IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Misc. Docket No. 15-006

ORDER ADOPTING AMENDMENTS TO
TEXAS RULES OF APPELLATE PROCEDURE 73.5 and 79.2
and TEXAS RULE OF EVIDENCE 615

ORDERED that:

1. Pursuant to section 22.108 of the Texas Government Code, the Court of Criminal Appeals amends Rules of Appellate Procedure 73.5 and 79.2 and Texas Rule of Evidence 615, effective January 1, 2016.

2. These rules may be changed in response to public comments received before January 31, 2016. Any interested party may submit written comments directed to Abel Acosta, Clerk of the Court, at abel.acosta@txcourts.gov.

3. The Clerk is directed to:

   a. file a copy of this order with the Secretary of State;

   b. cause a copy of this order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*;

   c. send a copy of this order to each elected member of the Legislature; and

   d. submit a copy of the order for publication in the *Texas Register*.

Dated: December 7, 2015.

Sharon Keller, Presiding Judge

Elsa Alcala, Judge

Lawrence E. Meyers, Judge

Bert Richardson, Judge

Cheryl Johnson, Judge

Kevin P. Yeary, Judge

Michael Keasler, Judge

David Newell, Judge

Barbara Hervey, Judge

<u>Texas Rules of Appellate Procedure</u>

73.4. Filing and Transmission of Habeas Record

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(b) In addition to the duties set out in Article 11.07, the clerk shall do the following:

> (1) If the convicting court enters an order designating issues, the clerk shall immediately transmit to the Court of Criminal Appeals a copy of that order and proof of the date the district attorney received the habeas application.
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> (2) When any pleadings, objections, motions, affidavits, exhibits, proposed or entered findings of fact and conclusions of law, or other orders are filed or made a part of the record, the district clerk shall immediately send a copy to all parties in the case. A party has ten days from the date he receives the trial court's findings of facts and conclusions of law to file objections, but the trial court may, nevertheless, order the district clerk to transmit the record to the Court of Criminal Appeals before the expiration of the ten days.
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> (5) On the 181st day from the date of receipt of the application by the State of a postconviction application for writ of habeas corpus under Article 11.07, the district clerk shall forward the writ record to this Court unless the district court has received an extension of time from the Court of Criminal Appeals pursuant to Rule 73.5.

79.2. Contents

(a) The motion must briefly and distinctly state the grounds and arguments relied on for rehearing.
(b) A motion for rehearing an order that grants discretionary review may not be filed.
(c) A motion for rehearing an order that refuses a petition for discretionary review may be grounded only on substantial intervening circumstances or on other significant circumstances which are specified in the motion. Counsel must certify that the motion is so grounded and that the motion is made in good faith and not for delay.
(d) A motion for rehearing an order that denies habeas corpus relief or dismisses a habeas corpus application under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may on its own initiative reconsider the case.

<u>Texas Rules of Evidence</u>

Rule 615. Producing a Witness's Statement in Criminal Cases

(a) Motion to Produce. After a witness other than the defendant testifies on direct examination, the court, on motion of a party who did not call the witness, must order an attorney for the state

or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that:

(1) is in their possession;
(2) relates to the subject matter of the witness's testimony; and
(3) has not previously been produced.

(b) Producing the Entire Statement. If the entire statement relates to the subject matter of the witness's testimony, the court must order that the statement be delivered to the moving party.

(c) Producing a Redacted Statement. If the party who called the witness claims that the statement contains information that does not relate to the subject matter of the witness's testimony, the court must inspect the statement in camera. After excising any unrelated portions, the court must order delivery of the redacted statement to the moving party. If a party objects to an excision, the court must preserve the entire statement with the excised portion indicated, under seal, as part of the record.

(d) Recess to Examine a Statement. If the court orders production of a witness's statement, the court, on request, must recess the proceedings to allow the moving party time to examine the statement and prepare for its use.

(e) Sanction for Failure to Produce or Deliver a Statement. If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the state disobeys the order, the court must declare a mistrial if justice so requires.

(f) "Statement" Defined. As used in this rule, a witness's "statement" means:

(1) a written statement that the witness makes and signs, or otherwise adopts or approves;
(2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or
(3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

Comment to 2015 Amendment: The Michael Morton Act, codified at Texas Code of Criminal Procedure art. 39.14, affords defendants substantial pre-trial discovery, requiring the state, upon request from the defendant, to produce and permit the defendant to inspect and copy various items, including witness statements. In many instances, therefore, art. 39.14 eliminates the need, after the witness testifies on direct examination, for a defendant to request, and the court to order, production of a witness's statement.

But art. 39.14 does not entirely eliminate the need for in-trial discovery of witness statements. Art. 39.14 does not extend equivalent discovery rights to the prosecution, and so prosecutors will still need to use Rule 615 to obtain witness statements of defense witnesses. Moreover, some defendants may fail to exercise their discovery rights under art. 39.14 and so may wish to obtain a witness statement under Rule 615. In addition, the Michael Morton Act applies only to the

prosecution of offenses committed after December 31, 2013. Defendants on trial for offenses committed before then have no right to pre-trial discovery of the witness statements of prosecution witnesses.

Consequently, Rule 615(a) has been amended to account for the changed pre-trial discovery regime introduced by the Michael Morton Act. If a party's adversary has already produced a witness's statement – whether through formal discovery under art. 39.14 or through more informal means – Rule 615(a) no longer gives a party the right to obtain, after the witness testifies on direct examination, a court order for production of the witness's statement. But if a party's adversary has not already produced a witness's statement, the party may still use Rule 615(a) to request and obtain a court order requiring production of the witness's statement after the witness finishes testifying on direct examination.