

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

Misc. Docket No. 06-101

FINAL APPROVAL OF REVISIONS TO THE TEXAS RULES OF APPELLATE PROCEDURE AND TEXAS RULES OF EVIDENCE

ORDERED that:

1. The Texas Rules of Appellate Procedure are amended as follows:

Rules 21.1, 21.3, 21.8, 21.9, 25.2, 35.3, and 42.2 are amended without comments;

2. The Texas Rules of Evidence are amended as follows:

Rules 412 and 504 are amended without comments.

3. These amendments take effect January 1, 2007.

4. The Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to 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*.

SIGNED AND ENTERED this 13th day of December, 2006.

Sharon Keller, Presiding Judge

Lawrence E. Meyers, Judge

Tom Price, Judge

Paul Womack, Judge

Cheryl Johnson, Judge

Michael Keasler, Judge

Barbara Hervey, Judge

Charles Holcomb, Judge

Cathy Cochran, Judge

RULE 21. NEW TRIALS IN CRIMINAL CASES

Rule 21.1 **Definitions**

- (a) *New trial* means the rehearing of a criminal action after the trial court has, on the defendant's motion, set aside a finding or verdict of guilt.
- (b) *New trial on punishment* means a new hearing of the punishment stage of a criminal action after the trial court has, on the defendant's motion, set aside an assessment of punishment without setting aside a finding or verdict of guilt.

Rule 21.3 **Grounds**

The defendant must be granted a new trial, or a new trial on punishment, for any of the following reasons:

[No further change]

Rule 21.8 **Court's Ruling**

- (a) *Time to rule*. [No change]
- (b) *Ruling*. In ruling on a motion for new trial, the court ~~must not summarize, discuss, or comment on evidence~~ may make oral or written findings of fact. The granting of a motion for new trial must be accomplished by written order. A docket entry does not constitute a written order.
- (c) *Failure to rule*. [No change]

Rule 21.9 **~~Effect of Granting a New Trial~~**

- (a) A court must grant a new trial when it has found a meritorious ground for new trial, but a court must grant only a new trial on punishment when it has found a ground that affected only the assessment of punishment.
- (b) Granting a ~~motion for~~ new trial restores the case to its position before the former

trial, including, at any party's option, arraignment or pretrial proceedings initiated by that party.

- (c) Granting a new trial on punishment restores the case to its position after the defendant was found guilty. Unless the defendant, State, and trial court all agree to a change, punishment in a new trial shall be assessed in accordance with the defendant's original election under article 37.07, § 2(b) of the Code of Criminal Procedure.
- (d) A finding or verdict of guilt in the former trial ~~The prior conviction~~ must not be regarded as a presumption of guilt, nor may it be alluded to in the presence of the jury that hears the case on retrial of guilt. A finding of fact or an assessment of punishment in the former trial may not be alluded to in the presence of the jury that hears the case on retrial of punishment.

RULE 25. PERFECTING APPEALS

Rule 25.2 Criminal Cases.

- (a) Rights to Appeal.
- (1) [No change]
- (2) *Of the Defendant.* A defendant in a criminal case has the right of appeal under Code of Criminal Procedure article 44.02 and these rules. The trial court shall enter a certification of the defendant's right of appeal ~~in every case in which~~ each time it enters a judgment of guilt or other appealable order. In a plea bargain case--that is, a case in which a defendant's plea was guilty or nolo contendere and the punishment did not exceed the punishment

recommended by the prosecutor and agreed to by the defendant--a defendant may appeal only:

[No further change]

(b) *Perfection of Appeal.*[No change]

(c) *Form and Sufficiency of Notice.*

(1) Notice must be given in writing and filed with the trial court clerk. If the notice of appeal is received in the court of appeals, the clerk of that court shall immediately record on the notice the date that it was received and send the notice to the trial court clerk.

(2) [No change]

RULE 35 TIME TO FILE RECORD; RESPONSIBILITY FOR FILING RECORD.

Rule 35.3 Responsibility for Filing Record

(a) *Clerk's record.* The trial court clerk is responsible for preparing, certifying, and timely filing the clerk's record if:

(1) a notice of appeal has been filed, and in criminal proceedings, the trial court has certified the defendant's right of appeal, as required by Rule 25.2(d); and

[No further changes]

RULE 42. DISMISSAL; SETTLEMENT

Rule 42.2 Voluntary Dismissal in Criminal Cases.

(a) At any time before the appellate court's decision, the appellate court may dismiss the appeal upon the appellant's motion. ~~if the party that appealed withdraws its notice~~

~~of appeal by filing a written withdrawal. The appellant and his or her attorney must sign the written motion to dismiss and file it in duplicate with the appellate clerk, who must immediately send the duplicate copy to the trial court clerk. An appellant must personally sign the written withdrawal.~~

- (b) ~~After the court of appeals hands down its opinion, an appellant may not withdraw the notice of appeal. It may not grant an appellant's motion to dismiss the appeal unless the other parties consent and the court of appeals approves the withdrawal. If the other parties consent and the court of appeals grants the appellant's motion to dismiss the appeal, if consent and approval are obtained, the appellate opinion must be withdrawn and the appeal dismissed. The appellate clerk must send notice of the dismissal to the trial court clerk.~~

RULE 412 EVIDENCE OF PREVIOUS SEXUAL CONDUCT IN CRIMINAL CASES

- (a) **Reputation or Opinion Evidence.** [No change]
- (b) **Evidence of Specific Instances.** [No change]
- (c) **Procedure for Offering Evidence.** [No change]
- (d) **Record Sealed.** [No change]
- (e) ~~**Sexual Conduct of Child as Defense.** --This rule does not limit the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to sexual assault, aggravated sexual assault, indecency with a child or an attempt to commit any of the foregoing crimes. If such evidence is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.~~

RULE 504 HUSBAND-WIFE PRIVILEGES

(a) **Confidential Communication Privilege.**

- (1) *Definition.* [No change]
- (2) *Rule of privilege.* [No change]
- (3) *Who may claim the privilege.* [No change]
- (4) *Exceptions.* There is no confidential communication privilege:
 - (A) *Furtherance of crime or fraud.* [No change]
 - (B) *Proceeding between spouses in civil cases.* [No change]
 - (C) *Crime against spouse or minor child.* --In a proceeding in which the party is accused of conduct which, if proved, is a crime against the person of the spouse, any minor child, or any member of the household of either spouse, or, in a criminal proceeding, when the offense charged is under Section 25.01, Penal Code (Bigamy).
 - (D) *Commitment or similar proceeding.* [No change]
 - (E) *Proceeding to establish competence.* [No change]

(b) **Privilege Not to Testify in Criminal Case.**

- (1) *Rule of privilege.* [No change]
- (2) *Failure to call as witness.* [No change]
- (3) *Who may claim the privilege.* [No change]
- (4) *Exceptions.* --The privilege of a person's spouse not to be called as a witness for the state does not apply:
 - (A) *Certain criminal proceedings.* --In any proceeding in which the person is charged with a crime against the person's spouse, a

member of the household of either spouse, or any minor, or in an offense charged under Section 25.01, Penal Code (Bigamy).

(B) *Matters occurring prior to marriage.* [No change]