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## **Motions for New Trial**

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## MOTIONS FOR NEW TRIAL

### I. Process and Critical Issues

#### A. Overview:

A new trial is the rehearing of a criminal action after conviction. It can only be made at the Defendant's request. On the defendant's motion, the trial court sets aside the finding or verdict of guilt. TRAP 21.1 The case is then returned to the position it was in prior to the original trial. The scope of this "do-over" opportunity depends on the nature of the underlying reason creating the need for new trial. For example, if the Defendant's meritorious claim affected only the assessment of punishment, then the new trial goes only to the question of punishment and the initial finding of guilt is left undisturbed. TRAP 21.9

At the trial court level there is a strict window of time during which a request for new trial can be made and must be ruled upon by the trial judge. Once that time passes, the trial court lacks jurisdiction. *State v. Moore*, 225 S.W.3d 556 (Tex. Crim. App. 2007). This is a "critical stage" in a criminal action and so Sixth Amendment right to counsel protections are applicable. Because it is a critical stage, the Defendant is entitled to the effective assistance of counsel. *Cooks v. State*, 240 S.W.3d 906 (Tex. Crim. App. 2007).

A new trial is a "do-over" of epic proportion. As such, it is not lightly granted by the trial court. In turn, the trial judge's decision whether to grant or deny a new trial is largely deferred to by reviewing courts, who review it under the highly deferential abuse of discretion standard. *Smith v. State*, 286 S.W.3d 333 (Tex. Crim. App. 2009).

#### B. Critical Issues

The key strategic issues surrounding motion for new trial practice can be grouped into four major categories:

- when must such a motion be filed as a predicate to seeking relief from a higher court,
- are there strategic reasons not to request new trial,
- are certain claims better presented via another legal vehicle, and
- when should a hearing be held on the Defendant's motion.

### II. The Basics

Texas Rules of Appellate Procedure [TRAP] govern the motion for new trial practice; in the past, new trial was governed by the Texas Code of Criminal Procedure. TRAP Rule 21 is both short and straightforward.<sup>1</sup>

#### A. Who

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<sup>1</sup> New trial practice is controlled by Rule 21. However, prior statutes and appellate rules have governed in the past: Article 40.03, Tex. Code of Criminal Procedure and Rule 30(b), Texas Rules of Appellate Procedure. Cases decided under the prior statute and rule remain viable sources of illustration.

Consideration of “who” can pursue a motion for new trial involves both which party to the criminal prosecution can avail itself of this procedure and the type of underlying action for which it is available.

### **1. Defendant Request**

Defendant has to request a new trial. The State may not seek one. The Defendant makes this request by filing a motion for new trial.

### **2. Conviction Requirement**

The purpose of a motion for new trial is to request the trial judge to “set aside a finding or verdict of guilt”, or to “set aside an assessment of punishment without setting aside a finding or verdict of guilt.” TRAP 21.1(a) and (b). Thus, a motion for new trial is not applicable to scenarios in which the Defendant is placed on deferred adjudication since there is no “finding of guilt” and no conviction or judgment. There is nothing to “set aside” so as to create an opportunity to implement TRAP 21. *Donovan v. State*, 68 S.W.3d 633 (Tex. Crim. App. 2002).

**Discussion:** The Defendant in *Donovan* filed a motion for new trial claiming his plea was involuntary. The trial court correctly concluded it lacked authority to consider the motion before adjudication. There are, however, other avenues open to the Defendant seeking relief on a claim of involuntary plea: (1) The Defendant could have moved for adjudication of guilt, placing himself in the same position as if he had pled guilty, and then asking to withdraw his plea. If the trial court refused and proceeded to sentencing, the defendant could then file motion for new trial. (2) The Defendant could pursue a post-conviction writ of habeas corpus challenge alleging involuntary plea. Article 11.07, Tex. Code Crim. Proc.

### **B. Why**

The only time a motion for new trial is a *prerequisite* to presenting a point of error on appeal is when needed to gather facts not yet in the trial record. *Oldham v. State*, 977 S.W.2d 354 (Tex. Crim. App. 1998) (Except to adduce facts of a matter not otherwise shown on the record, motion for new trial is not a requisite for presenting a point of error on appeal). TRAP 21.2 In this way, Texas criminal appellate practice differs radically from its civil cousin. It is **not** necessary to file a motion for new trial in order to preserve a point of error for appeal. *State v. Herndon*, 215 S.W.3d 901 (Tex. Crim. App. 2007).

Typically, the motion for new trial is used as a vehicle to develop “extra-record” evidence that would not be present in the transcript and statement of facts from the convicting court. *Vidaurri v. State*, 49 S.W.3d 880 (Tex. Crim. App. 2001). These “new facts” not contained in existing trial record are not limited only to “evidentiary” facts.

**Illustration:** Vidaurri did not file motion for new trial. His complaint on appeal was that he was denied a punishment hearing prior to sentencing when his deferred adjudication was revoked. Court of Criminal Appeals held that Defendant needed to have filed motion for new trial because “fact” that he had objection to having been prevented from offering punishment evidence was “fact” not in record. Rule 21.2 is not limited to “evidentiary facts” not in the record.

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