

THE COURTS

Title 234—RULES OF CRIMINAL PROCEDURE

[234 PA. CODE CH. 6]

Order Amending Rules 644 and 646; Criminal Procedural Rules; No. 367; Doc. No. 2

Order

Per Curiam:

Now, this 7th day of August, 2008, upon the recommendation of the Criminal Procedural Rules Committee; the proposal having been published before adoption at 38 Pa.B. 1816 (April 19, 2008), and in the Atlantic Reporter (Second Series Advance Sheets, Vol. 865), and a *Final Report* to be published with this *Order*:

It Is Ordered pursuant to Article V, Section 10 of the Constitution of Pennsylvania that Rule of Criminal Procedure 644 is amended and the *Comment* to Rule 646 is revised in the following form.

This *Order* shall be processed in accordance with Pa.R.J.A. No. 103(b), and shall be effective immediately.

Annex A

TITLE 234. RULES OF CRIMINAL PROCEDURE

PART I. GENERAL

CHAPTER 6. TRIAL PROCEDURES IN COURT CASES

PART C(2). CONDUCT OF JURY TRIAL

Rule 644. Note Taking by Jurors.

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[(C) This rule is rescinded three years from the effective date.]

Comment

This rule was adopted in 2005 to permit the jurors to take notes during the course of any trial that is expected to last more than two days. Pursuant to this rule, except for trials expected to last two days or less, the jury may take notes as a matter of right without the permission of the court. See, e.g., ABA Standards For Criminal Justice, Second Edition, Standard 15-3.2 (Note taking by jurors) (1980). [**This is a temporary rule promulgated for the purpose of assessing whether juror note taking in criminal cases is beneficial to the system of justice in Pennsylvania.**] This rule was originally adopted as a temporary rule for the purpose of assessing whether juror note taking in criminal cases is beneficial to the system of justice in Pennsylvania. As the rule has found favor with the bench, bar, and public, the sunset provision of paragraph (C) has been rescinded and the rule has been made permanent.

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Official Note: Rule 1113 adopted January 24, 1968, effective August 1, 1968; renumbered Rule 644 and Comment revised March 1, 2000, effective April 1, 2001. Rule 644 rescinded June 30, 2005, effective August 1,

2005. New Rule 644 adopted June 30, 2005, effective August 1, 2005; **amended August 7, 2008, effective immediately.**

Committee Explanatory Reports:

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Final Report explaining the provisions of new Rule 644 allowing note taking by jurors published with the Court's Order at 35 Pa.B. [3919] 3917 (July 16, 2005).

Final Report explaining the August 7, 2008 amendments making permanent the provisions of Rule 644 allowing note taking by jurors published with the Court's Order at 38 Pa.B. 4606 (August 23, 2008).

Rule 646. Material Permitted in Possession of the Jury.

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Comment

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The 1996 amendment adding "or otherwise recorded" in paragraph (B)(2) is not intended to enlarge or modify what constitutes a confession under this rule. Rather, the amendment is only intended to recognize that a confession can be recorded in a variety of ways. See *Commonwealth v. Foster*, 425 Pa. Super. 61, 624 A.2d 144 (1993).

Nothing in this rule is intended to preclude jurors from taking notes during testimony related to a defendant's confession and such notes may be in the jurors' possession during deliberations.

Paragraph (C) was added in 2005 to make it clear that the notes the jurors take pursuant to Rule 644 may be used during deliberations.

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Official Note: Rule 1114 adopted January 24, 1968, effective August 1, 1968; amended June 28, 1974, effective September 1, 1974; Comment revised August 12, 1993, effective September 1, 1993; amended January 16, 1996, effective July 1, 1996; amended November 18, 1999, effective January 1, 2000; renumbered Rule 646 March 1, 2000, effective April 1, 2001; amended June 30, 2005, effective August 1, 2005[, 35 Pa.B. 3917.]; **amended August 7, 2008, effective immediately.**

Committee Explanatory Reports:

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Final Report explaining the **June 30, 2005** amendment concerning jurors' notes published with the Court's Order at 35 Pa.B. [3919] 3917 (July 16, 2005).

Final Report explaining the August 7, 2008 revision to the Comment concerning jurors' notes related to a defendant's confession published with the Court's Order at 38 Pa.B. 4606 (August 23, 2008).

FINAL REPORT¹

Amendment to Pa.R.Crim.P. 644 and Revision of the Comment to Pa.R.Crim.P. 646

NOTE TAKING BY JURORS

On August 7, 2008, effective immediately, upon the recommendation of the Criminal Procedural Rules Com-

¹ The Committee's *Final Reports* should not be confused with the official Committee *Comments* to the rules. Also note that the Supreme Court does not adopt the Committee's *Comments* or the contents of the Committee's explanatory *Final Reports*.

mittee, the Court amended Rule 644 (Note Taking by Jurors) to make permanent the procedures permitting jurors to take notes in criminal cases. The Court also approved a revision to the *Comment* to Rule 646 (Materials Permitted in Possession of the Jury) to clarify that jurors may take notes during testimony related to a defendant's confession.

Permanent Juror Note Taking Rule

Rule 644 was adopted on June 30, 2005, effective August 1, 2005, as a temporary measure, with an expiration date of August 1, 2008², three years after the effective date. During the time since the adoption of this temporary rule, the Committee has received nothing but positive comments on the procedure from several sources. First, during the three-year trial period, as part of the regularly scheduled Committee meetings, the Committee hosted several "Meet the Judges" sessions. All the judges who participated in these sessions were asked about their experience with juror note taking. Their comments were uniformly positive and in favor of making the rule permanent. Additionally, the Committee members reported anecdotally that communications with the bench and bar have been uniformly positive. The Committee also has tracked press reports regarding cases using juror note taking and these too have been positive. Finally, the Committee published for comment a *Report* explaining the proposal to make the juror note taking provisions of Rule 644 permanent and received almost universally positive responses. *See* 38 Pa.B. 1816 (April 19, 2008).

The Court therefore has made the rule permanent. This has been accomplished by deleting paragraph (C) that contained the original "sunset" provision. Additional language comparable to the 2005 Explanatory Comment to Civil Rule 223.2, added when juror note taking in civil cases was made permanent, has been added to the *Comment* to elaborate on this point.

Note Taking During Confession Testimony

In 2007, the Committee was alerted to an unreported Allegheny County Common Pleas case in which the trial judge refused to permit the jurors to take notes during the testimony of a police officer relating a confession made by the defendant. The trial judge's position was based on Rule 646(B)(2) that states the jury may not have in its possession for deliberations "a copy of any written or otherwise recorded confession by the defendant." The trial judge interpreted the "otherwise recorded" provision to include notes by the jurors recording portions of the confession related testimony.

Subsequent to the Allegheny County decision, a Berks County Court of Common Pleas judge approved of note taking during testimony related to a defendant's confes-

sion, at least by implication. In *Commonwealth v. Boyd-Tolver*, 2007 WL 5004356, the trial judge addressed the question of whether there was error in permitting the Commonwealth to publish to the jury the defendant's written statements by way of a Power Point presentation because the presentation allowed the jury to copy the written statements while taking notes and thus have access to them during deliberation. The judge held that notes taken during such a presentation did not rise to the level of providing a "copy" of the confession.

As a result of these cases, the Committee examined the history of the Rule 646(B)(2) prohibition that was added to then-Rule 1114 in 1974. The rationale for this preclusion was a series of cases in which the courts were concerned that the physical presence of the written confession in the jury room would be weighted too heavily over the other testimony that jurors heard only from the witness stand. This prohibition was extended to a confession recorded by other means. In *Commonwealth v. Foster*, 425 Pa.Super. 61, 624 A.2d 144 (1993), the Superior Court held that allowing the jurors to have a videotape of the defendant's confession during deliberations was an abuse of discretion since the concern that the possibility of overemphasis on this type of evidence was the same or greater than that of a written confession. The rule was ultimately amended by including the phrase "or otherwise recorded" to reflect the holding in this case.

From this rule history, the Committee reasoned that the main concern of the Rule 646(B)(2) prohibition is that the presence of the defendant's confession, which in written form bears the defendant's signature, is of such an overpowering authority that it would outweigh other evidence in trial. A videotape or audiotape bears the defendant's image and voice and would be of even greater danger of outweighing other evidence. Notes of a witness's testimony describing the defendant's confession do not rise to this level of impact. Such notes, in most cases, are not likely to be verbatim and therefore they are not "a copy" of the confession but rather are the note taker's impression of the testimony related to the confession. As such, notes of one juror based on testimony heard by all jurors would not have the same impact as a written or taped confession.

Therefore, the Court has approved the revision of the Rule 646 *Comment* to clarify that note taking during testimony related to a defendant's confession is permissible and that these notes may be used during deliberations.

[Pa.B. Doc. No. 08-1520. Filed for public inspection August 22, 2008, 9:00 a.m.]

² On July 31, 2008, the Court temporarily suspended the expiration provisions contained in paragraph (C) of Rule 644 until further order of the Court.