EXHIBIT A: Minutes

TO: **Judge David Newell**

FROM: **Holly Taylor**

RE: **Minutes of the May 18, 2018 Court of Criminal Appeals Rules Advisory Committee Meeting**

DATE: **Prepared June 6, 2018; revised August 1, 2018**

MEMBERS IN ATTENDANCE: Judge David Newell (Chair), Judge Barbara Hervey, Chief Justice Tom Gray, Judge Jefferson Moore, Professor Steve Goode, Emily Johnson- Liu, Donna Kay McKinney, Chris Prine, John Rolater, Sian Schilhab, Holly Taylor, Joseph Varela, Deana Williamson, and Ben Wolff. OTHERS IN ATTENDANCE: Melissa Stryker, Clint Morgan

1. Welcome

Committee Chair Judge David Newell called the meeting to order and welcomed everyone.

2. Review of minutes from March 2018 Court of Criminal Appeals (CCA) Rules Advisory Committee meeting (See Exhibit A).

The members reviewed the minutes from the March meeting. Judge Newell noted that the March meeting minutes omitted a compliment to the previous meeting's minutes. Professor Goode pointed out a typographical error. Ms. Holly Taylor apologized for the error and said she had corrected it. Chief Justice Tom Gray had also pointed out a few typos to Ms. Taylor off the record. Chief Justice Gray moved to approve the minutes with the suggested corrections. The motion was seconded and the members approved the minutes via a voice vote with no votes in opposition.

3. Update on the CCA orders related to matters discussed at the last meeting (See Exhibits A.1, A.2, A.3—Misc. Docket Nos. 18-006, 18-007, 18-010)

Judge Newell discussed three proposed orders recently signed by the CCA, which resulted from matters discussed by the rules advisory committee: orders containing amendments to Texas Rules of Appellate Procedure (TRAP) 73.4 and 25.2 and new TRAP 4.6 (Misc. Docket nos. 18-006, 18-007, 18-010). He also explained that the CCA has changed its rulemaking format so that initial rule orders are merely proposed for public comment and do not go into effect unless the CCA issues another (final) rulemaking order. Ms. Taylor mentioned that committee member Professor Steve Goode has submitted comments regarding proposed TRAP 4.6. The CCA will wait to see whether others submit comments by the end of the time period. At that point, the CCA might opt to have the committee consider the comments received. Judge Newell discussed some of Professor Goode's comments and indicated that they may help clarify the intended meaning of the rule.

4. Proposed amendments to TRAP 31 limiting the scope of the rule mandating accelerated appeals in habeas corpus proceedings (revisions following discussion at last two meetings) (See Exhibits B, B.1)

Judge Newell mentioned that the CCA received input regarding the proposed changes to TRAP 31 from some appellate court clerks. This input was compiled in a spreadsheet (Exhibit B.2) which was distributed to committee members via email. Judge Newell summarized the input received: some clerks reacted negatively to the proposal and others reacted positively, indicating, "Just tell us what the rule is and we will do it."

Ms. Melissa Stryker from the Harris County DA's Office said that there was a lot of discussion at the last meeting about whether appellate courts would be able to determine the appropriate track for the habeas appeals. She said that the only "concrete edit" that she made as a result of that conversation was the yellow highlighted portion of the current proposed rule (Exhibit B.1). Judge Newell asked about the purpose of the first highlighted section in Rule 31.1(a): "On motion of any party, or on its own initiative, the appellate court may impose a more expedited timeline or submit the case without briefing, if necessary to do substantial justice to the parties." Ms. Stryker said that, at the last meeting, the committee seemed to want this highlighted language added in order to clarify that an appellate court will have the ability to submit a case without briefing if it decides to, even though the case may not be automatically expedited. Judge Newell asked for the committee members' thoughts on the proposed change and no one expressed any concerns.

Judge Newell asked Ms. Stryker to explain the next highlighted portion in the first paragraph of Rule 31.2: "The applicant need not personally appear. ~~and the appeal will be heard and determined upon the law, and the facts shown by the record, and the briefs of the parties, if any.~~" Ms. Stryker explained that this language was originally in the rule (not a proposed change) but committee members, including Ms. Kathy Schneider, said at the last meeting that they felt that the language was unnecessary. For this reason, Ms. Stryker chose to omit the language. Ms. McKinney noted that Ms. Stryker had not struck through the second period. Judge Newell said that the punctuation would be corrected. He asked if anyone had a problem with this proposed change. No one responded with any concerns.

Ms. Stryker next discussed the proposed change to Rule 31.2(a): "On motion of any party, or on its own initiative, the appellate court may impose a more expedited timeline or submit the case without briefing, if necessary to do substantial justice to the parties." She said that the purpose of this change was to make Rule 31.2(a) consistent with Rule 31.1(a).

Judge Newell said that the language really had not changed much and asked what the controversial subjects were at the last meeting. Ms. Stryker responded that, at the March meeting, the committee discussed how courts of appeals would be able to distinguish between the types of Rule 31 appeals. She said that the committee did not really come up with a solution for that, but some members felt that there would not be a problem (as did some of the survey respondents). Ms. Stryker noted that she would typically designate the type of appeal in her statement of the case. Judge Newell observed that the statement of the case does not occur until briefs are filed and might not be useful

for the appellate court clerk. Ms. Stryker suggested that this requirement to designate the type of appeal could be added to Rule 31 as a responsibility of the appellant. She expressed concern that courts might see such a requirement as abridging the right of appeal. Mr. John Rolater stated that the requirement could be included in the docketing statement. Ms. Stryker pointed out that Mr. Prine had observed that parties often fail to file docketing statements. Mr. Prine concurred. Chief Justice Gray said that they have penalties that they can apply in civil proceedings (e.g., dismissal) if no docketing statement is filed, but they cannot dismiss a criminal case for this reason. Chief Justice Gray said that he thinks the proposed rule amendment is fine as it is written. Professor Goode offered some drafting suggestions to make the rule language clearer (his proposed changes to the proposed rule are highlighted in green below):

Rule 31.1.

(a) For an appeal from a habeas corpus proceeding challenging a conviction or an order placing the defendant on community supervision, ~~,~~ but not challenging any particular condition ~~or conditions~~ of community supervision, ~~,~~ the appellate court should use the same briefing rules, deadlines, and schedule ~~as~~ that apply to direct appeals from criminal cases. On motion of any party, or on its own initiative, the appellate court may impose a more expedited timeline or submit the case without briefing, if necessary to do substantial justice to the parties.

(b) For an appeal from a bail proceeding or any other habeas corpus proceeding, including one that challenges a particular condition ~~or conditions~~ of community supervision, the court will—if it desires briefs—set the time for filing briefs.

Rule 31.2.

(a) In an appeal from a habeas corpus proceeding challenging a conviction or an order placing the defendant on community supervision, ~~,~~ but not challenging a particular condition ~~or conditions~~ of community supervision, ~~,~~ the appellate court should use the same submission and hearing schedules ~~as~~ that apply to direct appeals from criminal cases. On motion of any party, or on its own initiative, the appellate court may impose a more expedited timeline or submit the case without briefing, if necessary to do substantial justice to the parties.

(b) An appeal in any other habeas corpus or bail proceeding, including a challenge to a particular condition ~~or conditions~~ of community supervision, shall be submitted and heard at the earliest practicable time.

Committee members expressed approval for these proposed changes. Judge Newell asked what action the committee should take at this point—should the committee send the proposed rule to the CCA with the drafting changes made today? No one expressed opposition to this move. Ms. Stryker asked if she should make the changes or if Ms. Taylor should make the changes. Ms. Taylor said that she could make the changes and send them to Ms. Stryker for review.

5. Proposed amendments to TRAP 73.1, 73.4, and Rule 73 comment to update technology reference, comply with an applicable statute regarding unsworn declarations, and add clerk's certification of compliance with TRAP 73.4 (See Exhibit C, Exhibit E.2, and Exhibit A.1—Misc. Docket No. 18-006)
6. Proposed amendments to the Clerk's Summary Sheet to clarify language and add a certification of compliance with TRAP Rule 73.4 (See Exhibit F—proposed amendments to TRAP Appendix F)

Judge Newell moved on to discuss the proposed amendments to TRAP 73.1, 73.4, and Rule 73. He asked Ms. Taylor if the CCA had passed an order proposing changes to TRAP 73.4. Ms. Taylor agreed that the CCA had just proposed changes to Rule 73.4 (see Misc. Docket 18-006), but the changes proposed in Exhibit C are different changes. The proposed changes to TRAP 73.1(b) dovetail with proposed changes to the Article 11.07 writ application form (Exhibit E). The proposed addition of a reference to the CCA website was proposed because the Court periodically changes the application form and applicants need to have access to the most current form. The rule now refers filers only to district clerks for the form, but some district clerks might not have the most current version of the form. Another change to Rule 73.1(g) incorporates proposed changes to the verification section of the application form to comply with 2011 amendments to the unsworn declaration section of the Civil Practice and Remedies Code (see TEX. CIV. PRAC. & REM. CODE Sec. 132.001). The form will now provide the option of an unsworn declaration in lieu of a notarized sworn statement for all filers (not just inmates).

The proposed changes to TRAP 73.4(b)(3) clarify that it is the *district* clerk who must submit the summary sheet for writ records in compliance with this rule. The proposed amendment adding subsection (b)(3)(F) imposes a new requirement that clerks sign a certification to state that the clerk has complied with Rule 73.4.[1] CCA staff had noted that some clerks are not filling out the form correctly and do not seem to be aware of Rule 73.4's requirements. Further, the CCA has passed an order proposing new changes to the Rule. The changes include a definition of "all parties in the case" to include inmate filers and their attorneys. Rule 73.4 requires that clerks serve all parties in the case with pleadings, findings, and other writ filings and notify all parties upon sending the record to the CCA. Requiring this certification will ensure that clerks are aware of all the Rule 73.4 requirements. Ms. Taylor noted that she made the exhibit designations and TRAP appendices consistent for this meeting to avoid confusion, e.g., the proposed changes to TRAP Appendix F (the clerk's summary sheet) are designated as "Exhibit F" for this meeting and the proposed changes to TRAP Appendix E (the Article 11.07 writ application form) are designated as "Exhibit E" for this meeting.

[1] The proposed certification reads:

> By signature of the district clerk or his or her authorized representative on the record in this writ of habeas corpus proceeding, the undersigned party certifies that the clerk or his or her authorized representative has complied with all applicable requirements of Texas Rule of Appellate Procedure 73.4 in this habeas proceeding, including the requirement to serve on all the parties in the case any objections, motions, affidavits, exhibits, proposed findings of fact and conclusions of law, findings of fact and conclusions of law entered by the trial court, and any other trial court orders entered or parties' pleadings filed in the case.

Ms. Donna Kay McKinney asked about the items on Exhibit F (the clerk's summary sheet), specifically the terms "trial court" and "habeas judge." Judge Newell, Mr. Ben Wolff, and others agreed that the terminology in the summary sheet and the rule should be consistent and refer to the court as the "habeas judge." Ms. Emily Johnson-Liu asked that the rule refer to counsel as "habeas counsel." Ms. McKinney noted that, on the recommendation section of the summary sheet (Exhibit F), it says "Trial court's recommendation" and it should say "Habeas judge's recommendation." Other committee members agreed that this language should be changed to be consistent with the rest of the form. Mr. Rolater suggested that we include a "____ Dismiss" option in the line that currently reads: "RECOMMENDATION: _____GRANT_____DENY_____NONE." Other committee members agreed.

Judge Newell focused the committee's attention on the big picture presented by the proposed changes to Appendix F—do these proposed changes impose an additional requirement? Ms. Taylor acknowledged that, though the requirement to provide the summary sheet already exists, the proposed changes would add a new requirement that the clerk sign the certification. She said that this could be changed to a statement of compliance that would not have to be signed. Judge Newell asked if there are other circumstances where the clerk must provide a certification. Ms. McKinney (a district clerk) and Mr. Chris Prine (an appellate court clerk) said that district clerks sign and verify appellate records. Ms. McKinney noted that the Clerk's Summary Sheet with the proposed changes is easy to understand. She said she would have no problem signing it.

Ms. Schilhab noted that the rule will be submitted for public comment and we will need help getting the word out to district clerks so that they can provide feedback. Ms. McKinney said that the clerks will have their annual meeting on June 10 in San Antonio and she will make a short presentation on this subject and encourage them to read the proposed rule changes.

Chief Justice Gray suggested changing the certification as follows:

> The undersigned certifies that all applicable requirements of TRAP 73.4 in this habeas proceeding have been complied with, including the requirement to serve on all the parties in the case any objections, motions, affidavits, exhibits, proposed findings of fact and conclusions of law, findings of fact and conclusions of law entered by the habeas judge, and any other trial court orders entered or pleadings filed in the case.

Judge Newell asked whether committee members generally liked the language suggested by Chief Justice Gray. Judge Newell said he thought that the suggested language improved the certification and other committee members agreed. Professor Goode suggested that the certification begin with "I certify…" rather than "The undersigned certifies…" Ms. Taylor said that was a great idea. No one expressed opposition.

Ms. McKinney, Judge Newell, Ms. Schilhab and other committee members discussed whether to label the orders "trial court orders" or something else in the rule. The committee reached a consensus to remove the reference to the "trial court" but to specify "in the habeas case." Ms. Taylor read aloud the language upon which she thought the committee had reached consensus:

> I certify that all applicable requirements of TRAP 73.4 have been complied with in this habeas proceeding, including the requirement to serve on all the parties in the case any objections, motions, affidavits, exhibits, proposed findings of fact and conclusions of law, findings of fact and conclusions of law, and any other orders entered or pleadings filed in the habeas case.

Judge Newell and Ms. McKinney said that the language sounds correct. Ms. Deana Williamson noted that the trial court often will sign the proposed findings and wondered if any changes to this certification needed to be made to accommodate that practice. Committee members agreed that this was an important consideration but decided that the proposed language accommodated that scenario. Ms. Taylor noted that not every item on the list of documents will be present in every habeas case. She stated that she would insert the agreed-upon language into the clerk's summary sheet and also into Rule 73.4. She asked if all members were "OK" with the language she just read. Committee members expressed assent and none expressed opposition.

Judge Newell asked if the other proposed changes to TRAP 73.1 and 73.4 in Exhibit C were otherwise fine with the committee members. No one expressed opposition.

Judge Newell asked about the purpose and necessity for the comment.[2] Ms. Taylor said that the primary purpose of the proposed comment is to call attention to the changes being made to the appendices in conjunction with the rule changes. Judge Newell observed that the comment's reference to the Civil Practice and Remedies Code could be a helpful signal to interpret the rule in a manner consistent with the Civil Practice and Remedies Code.

Chief Justice Gray remarked that he hoped that the word "[month]" in "Comment to [month] 2018 change" would not be necessary because we would not be changing the rule more than once in one year. Ms. Taylor pointed out that the CCA has already signed one order proposing changes to Rule 73 in 2018. Judge Newell observed that the CCA could delay the various proposed changes to Rule 73 and implement them through a single final order.

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[2] In Exhibit C, the proposed comment stated:

> Comment to [[month]] 2018 change: Rules 73.1 and 73.4 are amended in conjunction with amendments to the form for applications filed under Article 11.07 of the Code of Criminal Procedure (Appendix E to these rules) and the Clerk's Summary Sheet (Appendix F to these rules). The amendments clarify the terminology and procedures for filing Article 11.07 writ applications and update the application form to incorporate current technologies and filing procedures. In addition, the amendments bring the application and filing procedures into conformity with Civil Practice and Remedies Code chapter 132, which permits both inmates and non-inmates to file unsworn declarations in lieu of notarized oaths. Further, the rules amendments and changes to the clerk's summary sheet clarify the information that district clerks must provide to the Court of Criminal Appeals and add a new requirement that clerks certify that they have complied with all the requirements of Rule 73.4, including the requirement to serve on all parties in the case all objections, motions, affidavits, exhibits, proposed findings of fact and conclusions of law, findings of fact and conclusions of law entered by the trial court, and any other trial court orders entered or parties' pleadings filed in the habeas case.

Chief Justice Gray suggested that the comment will also be a signal to district clerks to discard the previous clerk summary sheets and use the new one. Ms. McKinney said that the last few lines of the comment need to be changed to match the previous changes the committee just discussed with regard to Appendix F and Rule 73.4. Ms. Taylor agreed to make changes to the comment consistent with the other changes made to the clerk's summary sheet and Rule 73.

Ms. Taylor asked for a consensus vote on Exhibit C with the modifications discussed by the committee. Judge Newell asked if there are any more "comments on how we might tweak the comment." He noted that this inquiry was very "meta." Mr. Wolff asked whether the CCA would want to bind itself in the language in the rule to provide the form on its website, rather than putting this website note in the comment of the rule. Judge Newell said that we should put this language in the rule itself because the CCA should commit to providing a current version of the application form on its website. Ms. Taylor noted that this portion of the rule already points applicants to district clerks to obtain the form, and so we want to also point them to the CCA's website. She suggested that the Court could discuss this issue when deciding whether to adopt the proposed language approved by the committee. Ms. McKinney asked whether we would, in the future, need to amend Rule 73 to change the "website" reference to "virtual cloud" or whatever new technology evolves. Committee members briefly discussed possible new technologies but did not decide on any additional changes. Committee members expressed consensus approval for the proposed rule changes with the proviso that corresponding changes would be made to the appendix.

7. Proposed amendments to certification of right to appeal form to incorporate recent changes to TRAP 25.2 and cite to current rule text (See Exhibits D, D.1—Proposed amendments to TRAP Appendix D, with and without mark-ups, and Exhibit A.2—Misc. Docket No. 18-007)

Ms. Taylor explained that the CCA has signed an order proposing changes to TRAP 25.2 based on this committee's discussion at the last meeting (see Misc. Docket no. 18-007). The order signed by the court proposes an amendment removing the requirement to certify the right to appeal on Chapter 64 forensic DNA testing orders. The CCA's order also adds the language "the specific appeal is expressly authorized by statute" to the defendant's-right-to-appeal section in the rule (TRAP 25.2(a)(2)). The proposed changes to the certification of Defendant's Right to Appeal form (TRAP Appendix D) represent an attempt to implement the changes to Rule 25.2, correct a quotation of out-of-date rule language, and also update the form with some stylistic changes and corrections. For example, the new amendments employ check boxes instead of double brackets and remove the extra "or" at the end of each item in the list of options.[3] Ms. Taylor noted that, if the

[3] The current form contained in TRAP Appendix D reads in relevant part:

> [] is not a plea-bargain case, and the defendant has the right of appeal, [or]
>
> [] is a plea-bargain case, but matters were raised by written motion filed and ruled on before trial and not withdrawn or waived, and the defendant has the right of appeal. [or]
>
> [] is a plea-bargain case, but the trial court has given permission to appeal, and the defendant has the right of

CCA makes additional changes to Rule 25.2, the quoted language on this form would need to be updated to reflect those changes.

Judge Newell asked first if any members had objections to the stylistic/form changes. Judge Jefferson Moore, a district judge, observed that, if more than one item on the form applies in a case, he will check both items. He suggested using "and/or" instead of "or" to connect the items on the list. Committee members discussed the possibility of using "and/or" or stating "check all that apply." Mr. Rolater said that, in Collin County, this form is filled out automatically by a computer or by the defense attorney. He objected to the addition of the blank for the judge's name because the attorney does not necessarily know which judge they will get in a guilty plea situation, and guilty pleas constitute about 95% of the cases in which this form is used. Judge Moore agreed. Committee members thought it would be best to just say, "I certify..." and not have a blank to insert the judge's name. Ms. Taylor agreed to remove the blank for the judge's name and the words "judge of the trial court."

Committee members continued to discuss whether to include the words "check all that apply." Chief Justice Gray said that he did not think that this change was necessary because trial judges routinely check all that apply without being told to do so. Ms. Taylor agreed, noting that the addition of these words in the rule might result in an assumption that the CCA intended that the trial judges' normal practice needed to change, when it does not. Judge Newell asked whether taking out the "or" on each line would unintentionally signal to trial judges that they could not check more than one item. He and Chief Justice Gray concluded that it would not give an incorrect impression. Chief Justice Gray suggested taking out the last "or." Professor Goode said that he thought that, if we want judges to check all the boxes that apply, we should take out all the "or's" and, if we want them to only check one box, one "or" would be fine. Judge Newell favored taking out all the "or's" remarking, "less is more."

Judge Moore suggested taking out blanks asking for fax numbers and replacing them with blanks asking for email addresses. He said that no one uses fax machines anymore. Ms. McKinney concurred and said that the clerks need email addresses. Mr. Prine agreed and so did Judge Newell. Committee members reached consensus to take out "fax number" and replace it with "email address" and to take out the "(if any)" under defendant's counsel because attorneys are required to have email addresses. Ms. Taylor glanced at the rules and did not see any impediment to changing "fax number" to "email address." Ms. McKinney observed that defendants are more likely to have an email address than a fax number these days.

Judge Newell asked for the committee members' thoughts about the changes proposed to the asterisk footnote containing text taken from Rule 25.2(a)(2). Chief Justice Gray commented that the difference between a "trial" and a "plea hearing" has become an issue. He said that some

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appeal. [or]

[] is a plea-bargain case, and the defendant has NO right of appeal. [or]

[] the defendant has waived the right of appeal.

people believe that the term "trial" does not encompass a "plea hearing." Ms. Taylor observed that this language in the certification form merely quotes from existing TRAP 25.2, so changing this part would mean changing Rule 25.2. Mr. Varela said a plea proceeding is a trial. Judge Newell said that we should, "put a pin in this" for now and wait until later to see what happens with regard to this subject.

Mr. Rolater asked whether we could delete the asterisk footnote altogether. Ms. Taylor liked that idea, noting that it was very hard to fit all of the form content on the same page. Judge Newell observed that the asterisk footnote was probably originally added at a time when practitioners had never seen a certification of the right to appeal. The footnote explained the source of the requirement. He said that we may not need it anymore. Ms. Schilhab suggested merely retaining a reference to Rule of Appellate Procedure 25.2. Other committee members agreed with that approach. Ms. Taylor noted that this change would prevent the problem we had just encountered of the footnote language in Appendix D not being updated when Rule 25 was amended. Ms. McKinney moved that we limit the footnote to a reference to the rule, as suggested, and Judge Newell seconded her motion. Judge Moore suggested putting the citation at the top of the page. Judge Newell thought that change might make the title more cumbersome. Judge Moore and others agreed with simply shortening the asterisk footnote to say, "*See* TEX. R. APP. P. 25.2." No one expressed opposition.

Ms. Williamson noted that the blanks for filling in information and signatures are not even/justified. Ms. Johnson-Liu wondered if trial judges will choose "the specific appeal is expressly authorized by statute" instead of another option because all appeals are theoretically authorized by statute. Ms. McKinney wanted to include the language, "check all that apply." Chief Justice Gray suggested changing the language to: "the specific appeal is expressly authorized by the following statute: _____." Judge Newell remarked that judges might then be reticent to choose that option. The committee members again discussed whether we needed to say "check all that apply." Professor Goode asked why the language "the specific appeal is expressly authorized by statute" was added. Judge Newell explained that it was proposed as a countermeasure to removing the requirement of certification of Chapter 64 appeals, so that no one would assume that defendants no longer had the right to appeal a ruling on a Chapter 64 motion for DNA testing. Judge Hervey remarked that it might confuse practitioners into thinking that Chapter 64 appeals do require a certification of the right to appeal. Chief Justice Gray recalled that there were types of appeals—other than Chapter 64 orders—which did not fall into the other categories on the certification form. Some committee members mentioned appeals under Code of Criminal Procedure Article 11.072.[4]

Professor Goode suggested referring to the specific statute. Judge Newell observed that the proposed changes to Rule 25.2 have not become final yet. He suggested that we wait to see what happens with the proposed rule changes before making this particular change to Appendix D. Ms.

[4] Article 11.072 governs applications for writs of habeas corpus in community supervision cases. Article 11.072, Section 8 provides for the right to appeal the trial court's ruling on the writ application: "If the application is denied in whole or part, the applicant may appeal under Article 44.02 and Rule 31, Texas Rules of Appellate Procedure. If the application is granted in whole or part, the state may appeal under Article 44.01 and Rule 31, Texas Rules of Appellate Procedure."

Schilhab noted that, if we take it out, even Chapter 64 appeals could potentially be covered by the first box ("is not a plea-bargain case, and the defendant has the right of appeal"). Mr. Varela said that, as a trial attorney, he would assume that "is not a plea-bargain case, and the defendant has the right of appeal" would apply to criminal cases that went to trial and not to Chapter 64 appeals. Ms. Schilhab suggested omitting the proposed language, "the specific appeal is expressly authorized by statute" from the certification form.

Mr. Varela asked what box a judge should check in a Chapter 64 appeal. Ms. Schilhab and Judge Newell responded that trial judges will no longer need to certify the right to appeal in Chapter 64 cases. Mr. Varela asked how trial judges all over the state are going to get the news that they no longer need to certify Chapter 64 appeals. He suggested including that notification in the asterisk footnote. Judge Newell suggested that we should not include the new rule language ("the specific appeal is expressly authorized by statute") in the certification form at this time. Ms. Taylor asked about Article 11.072 appeals. Judge Moore suggested that the certification of appeals in Article 11.072 cases be added to another rule and accomplished on a different form. Judge Newell suggested that we might eventually need to refer to Article 11.072 on the certification form (Appendix D). Judge Moore said that we would then be "putting too much on the form." He opined that we should just use this form for what we normally use it for: pleas and trials. We should create another form for writs, etc. Other committee members expressed disagreement. Chief Justice Gray said that his recollection was that we recommended adding this language to the certification section because we were struggling with Chapter 64 appeals and Judge Keller suggested exempting Chapter 64 appeals from the certification requirement. If that rule is approved, the original impetus for this language ("the specific appeal is expressly authorized by statute") will no longer be an issue. Chief Justice Gray said that he sees these certification forms routinely in Article 11.072 appeals and the form does what it needs to do in those cases. He could not think of any other type of appeal that they routinely see that would be a problem. He also said that they can deal with the "non-routine" cases. He said that, if the changes to the rule are promulgated, then we don't need to add this language to the certification form. Judge Newell agreed. Ms. Taylor asked if we could take a consensus vote on whether to remove the language "the specific appeal is expressly authorized by statute" from the proposed changes to the certification form (not from Rule 25.2). No members expressed opposition.

Chief Justice Gray noted that his court routinely sees certification forms where a trial judge has struggled to fill out the form because the judge has granted a limited right to appeal. He suggested editing the third check box ("is a plea-bargain case, but the trial court has given permission to appeal, and the defendant has the right of appeal") to read: "is a plea-bargain case, but I have given specific permission to appeal the following: _____." Judge Hervey asked whether trial judges know which pretrial motions have merit and whether this handwritten note on the certification would be a comment on the merit or appealability of the claim. Mr. Varela noted that he would review the form before the trial judge would sign it. Judge Newell asked whether putting a line on the form would invite judges to fill it in and perhaps provide more information than needed on the form.

Mr. Varela asked what circumstances would fit into existing choice 3 ("is a plea-bargain case, but the trial court has given permission to appeal, and the defendant has the right of appeal") that

would not also fit on line two ("is a plea-bargain case, but matters were raised by written motion filed and ruled on before trial and not withdrawn or waived, and the defendant has the right of appeal"). Judge Newell said he would be reticent to remove one of the existing options on the certification form. In answer to Mr. Varela's question, Chief Justice Gray offered two scenarios: (1) the plea was to guilt only, there was a sentencing issue that the defendant wanted to appeal, and the trial court gave the defendant permission to appeal the sentence; and (2) the defendant waived the pretrial issues, but reserved the right to appeal some other trial matter such as the testimony of a particular expert witness. Chief Justice Gray said that trial judges do not ordinarily appear to feel constrained by the form because they "scrawl all over it." A member suggested that we move on to the next topic on the agenda. Ms. Taylor said that this certification form issue is tied up with an order that the Court has already signed and it would be ideal for all the related changes to happen at the same time.

Judge Newell summarized the committee's present stance on amending the certification form:

(1) Table the issue of whether to add "the specific appeal is expressly authorized by statute" and any language pertaining to Article 11.072;
(2) Get rid of the "or's";
(3) Change "I, judge of the trial court, certify" to "I certify";
(4) Get rid of everything except "*See* TEX. R. APP. P. 25.2" in the asterisk footnote;
(5) Add email address instead of fax number; and
(6) Fix the lines and format problems.

8. Proposed amendments to the Article 11.07 Application for Writ of Habeas Corpus Form to clarify & simplify language, correct errors, comply with relevant statutes, and add new items, such as email address & petitioner's statement (See Exhibits E, E.1, & E.2—Proposed amendments to TRAP Appendix E, with and without mark-ups, and related legal research)

Ms. Taylor noted that Exhibit E is the proposed amended Appendix E (the Code of Criminal Procedure Article 11.07 writ application form) without mark-ups and Exhibit E.1 is the proposed amended Appendix E with the proposed changes marked. The committee talked about some of the changes a little bit at the last meeting, e.g., putting a glossary at the beginning of the instructions to the form, correcting grammatical errors. Ms. Taylor also consulted with CCA writs staff about recurring problems with the form and made some changes in response to those comments. For example, writs staff said that the form should emphasize that attorneys must use the form, not just pro se applicants.

Judge Newell asked first what members thought about having definitions at the beginning of the form. Ms. Johnson-Liu remarked that we had discussed defining the term "discharged" at the last meeting and it is not included in the definitions. Ms. Taylor responded that she consulted with the writs staff and they said that applicants seem to know what that term means and do not often misuse it.

Ms. McKinney pointed out that the definition of "Applicant" on the first page of the application form uses the phrase "his or her." She suggested rewording this sentence: "An applicant can be an

inmate or a non-inmate who is restrained in *his or her* liberty." Judge Newell suggested changing the sentence to read "An applicant can be an inmate or a non-inmate *whose liberty is restrained*." Ms. McKinney and others expressed approval of this proposed change. Ms. Schilhab said that we should not take "his or her" from the first sentence in that definition: "'Applicant' means a person seeking relief in an application for a writ of habeas corpus from *his or her* felony conviction imposing a sentence other than the death penalty" (emphasis added). She explained that such a change could alter the meaning.

The committee then discussed the following sentence in the definition of "petitioner": "However, the person presenting the application must sign and attest that he or she has consulted with the applicant concerning the application and the applicant has given his or her informed consent to the filing of this application." Ms. Taylor explained that this sentence refers to a new attestation requirement for petitioners in the verification section of the form. Mr. Varela expressed some concern, asking what would happen if a defendant/client is "rotting in jail" in El Paso and her attorney wants to submit a writ of habeas corpus on her behalf from another county. Mr. Varela said that, under the proposed application changes, the attorney would have to swear under penalty of perjury that he consulted with the jailed client but might not have had an opportunity to do so. Mr. Wolff remarked that he has a concern about using the term "informed consent" in the application because of the possibility of a mentally incompetent applicant. Ms. Taylor explained that the writ staff has seen the situation where a petitioner files an application on behalf of an applicant—without obtaining the applicant's consent to do so—and thereby causes the applicant to be subject to the subsequent writ bar when he or she later files an application. Ms. Schilhab described some of the factual scenarios where this has happened. Mr. Wolff asked whether this had been a problem in cases where there was a lawyer involved. Ms. Schilhab said that it had been a problem even in some cases where a lawyer filed the application. Mr. Varela acknowledged that his previous example contemplated the filing of an original writ, not a post-conviction writ pursuant to Article 11.07.

Ms. Taylor stated that she agreed with Mr. Wolff's concerns about the "informed consent" language in the context of an incompetent defendant. She asked if there was a way to reword this statement while still protecting against the possibility of a petitioner filing a writ without the applicant's consent. Ms. Schilhab suggested changing "informed consent" to "approval" or "permission." Judge Newell said we could just change the language to "consent" instead of "informed consent." Several members expressed agreement with this idea. The committee briefly discussed the abuse of the writ doctrine and the subsequent writ bar exceptions in Article 11.07. Professor Goode suggested leaving out "his or her" so that the sentence would read, "However, the person presenting the application must sign and attest that he or she has consulted with the applicant concerning the application and the applicant has given consent to the filing of this application."

Chief Justice Gray said that possibly we could omit everything other than the first sentence of the definition of petitioner ("'Petitioner' means a person, including an attorney or a non-attorney, presenting an application for a writ of habeas corpus on behalf of another person (the applicant).") The other parts of the proposed definition could be moved to the instructions. Ms. Taylor said she thought that proposal was fine. Judge Newell asked whether others agreed with this idea. No one

responded so Judge Newell and Chief Justice Gray both indicated that the language should remain where it is given that no one else felt strongly about moving it.

Judge Newell asked about whether anyone had any other comments about the instructions section. Ms. Schilhab said that she worried about including the CCA's web address/URL on item number 2 because of "link rot." Ms. McKinney suggested striking "at http://www.txcourts.gov/cca/practice-before-the-court/forms/" and leaving the reference to the "Court of Criminal Appeals' website" without specifying the URL. Other committee members expressed agreement.

The committee next discussed the proposed changes to application form instruction number 4.[5] Ms. Schilhab explained that the purpose of these changes is to help applicants understand that there must be only one case number per writ application.

The changes to instruction number 5 seek to consistently refer to the form as "application form" and to explain that, though applicants cannot include more than one ground in each two-page ground section of the form, they can include additional grounds beyond the capacity of the form by making copies of pages 16 and 17. Judge Newell asked if we should reverse the order of instructions 5 and 6. No one disagreed with this idea. Mr. Wolff suggested that we should not use the term "item" for "ground."

Chief Justice Gray suggested that we should not use the term "print" for additional copies because some may use a copy machine. Judge Newell suggested the word "include" instead and committee members expressed agreement. The committee discussed the appropriate wording for number 5. Ms. McKinney suggested, "However, if you have more than four grounds, you may include additional copies of pages 16 and 17." Ms. Taylor said that there are actually five grounds in the form (the fifth ground is labeled "Ground ___"). Judge Hervey asked whether applicants might be confused by the combination of the language stating that the applicant must not "attach any additional pages for any item" and the language allowing "additional copies of pages 16 and 17." Ms. Schilhab indicated that inmates tend to comply with the two-pages-per-ground requirement and attorneys sometimes fail to comply. The committee discussed this issue and ultimately decided on the following language for former item 5 (now item 6): "Answer every item that applies to you on the application form. Do not attach any additional pages for any ground. However, if you have more than five grounds for relief, you may include additional copies of pages 16 and 17 to add more grounds for relief."

Ms. Taylor stated that she proposed changes to item 8 to conform to the current version of the Civil Practice and Remedies Code, Chapter 132, which allows anyone, including attorneys, to use

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[5] The proposed changes read:

> You must make a separate application on a separate form for each ~~judgment of conviction~~case number from which you seek relief ~~from~~. Even if the judgments were entered in the same court on the same day, you must complete ~~make~~ a separate application form for each case number~~one~~. If a case number has multiple counts, you must include all the counts on one application form.

an unsworn declaration.[6] Item 8 contains a warning that any person who signs and verifies the application may be subject to prosecution for perjury if he or she lies. Mr. Varela stated that there are three ways to swear to the truth of a document in Texas: (1) a notarized statement; (2) an unsworn declaration under Chapter 132; and (3) an inmate's unsworn declaration. He asked whether we are removing the inmate unsworn declaration from this form. Ms. Taylor said that, at the end of the application form, we have retained an inmate unsworn declaration form in addition to a generic Chapter 132 unsworn declaration form. Mr. Rolater suggested putting the inmate unsworn declaration before the generic unsworn declaration.

Chief Justice Gray asked whether—if an inmate uses the unsworn declaration for a non-inmate—the CCA would dismiss his writ. Ms. Schilhab stated that such a writ application would potentially be "non-compliant." Mr. Wolff said that the only difference between the inmate and non-inmate declarations is the nature of their address. Ms. Taylor said that, if the inmate accidentally filled out the wrong one, the inmate would probably include a TDCJ number and prison unit, which would arguably comply with Chapter 132. Judge Newell said that there were only two CCA judges present so they could not answer that question. He said that we could avoid putting a lot of detail about the unsworn declarations in the general instructions because we have specific verification

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[6] *See* TEX. CIV. PRAC. & REM. CODE Sec. 132.001. Unsworn Declaration.

(a) Except as provided by Subsection (b), an unsworn declaration may be used in lieu of a written sworn declaration, verification, certification, oath, or affidavit required by statute or required by a rule, order, or requirement adopted as provided by law….

(c) An unsworn declaration made under this section must be:

(1) in writing; and

(2) subscribed by the person making the declaration as true under penalty of perjury.

(d) Except as provided by Subsections (e) and (f), an unsworn declaration made under this section must include a jurat in substantially the following form:

"My name is (First) _____ (Middle) _____ (Last) _____, my
date of birth is _____ , and my address is
(Street) _____, (City) _____, (State) _____, (Zip Code) _____,
and (Country) _____. I declare under penalty of
perjury that the foregoing is true and correct.
Executed in _____ County, State of _____, on the _____ day of (Month) _____, (Year) _____.

_____
Declarant"

(e) An unsworn declaration made under this section by an inmate must include a jurat in substantially the following form:

"My name is (First) _____ (Middle) _____ (Last) _____, my
date of birth is _____, and my inmate
identifying number, if any, is _____. I
am presently incarcerated in (Corrections unit name) _____
in (City) _____, (County) _____, (State) _____, (Zip Code) _____. I
declare under penalty of perjury that the foregoing is true and correct.
Executed on the _____ day of (Month) _____, (Year) _____.

_____
Declarant"

instructions at the end. Ms. Taylor pointed out that the verification instructions state that, in order to verify the application, "the applicant must sign either the 'Oath Before a Notary Public' before a notary public or the appropriate 'Unsworn Declaration' (the unsworn declaration for inmates or the one for non-inmates depending on whether the applicant is an inmate)." Chief Justice Gray echoed Mr. Rolater's suggestion and expanded upon it, recommending that the application form lead with a reference to the inmate unsworn declaration before the non-inmate declaration and before the notarized oath. Ms. Schilhab suggested searching for the term "application" and replacing it with "application form" to be consistent within the document.

Ms. Williamson asked why the reference to the notarized oath says "before a notary" twice. Ms. McKinney and others responded that the first use of the term, "Oath Before a Notary Public," is the formal title of the oath.

At Judge Newell's request, Ms. Taylor summarized her understanding of the changes being made to instruction number 8: (1) move the reference to the unsworn declaration to before the notary oath; and (2) remove the redundant "before a notary public."

No members had any problems with the proposed changes to instruction number 9, which allows for electronic filing of the application form. With regard to instruction number 10, Ms. McKinney emphasized the importance of notifying the district clerk of any change in address or email. She said that it is good that we put this requirement in the form but expressed doubt that all applicants will comply.

The committee next discussed instruction number 11. Ms. Johnson-Liu asked if we could replace "set forth" with "include." Members liked this proposal. Mr. Wolff suggested the following language: "If you do not include all available grounds for relief in this application, you may be barred from raising additional claims at a later date." Ms. Schilhab and Ms. Taylor warned that an applicant might potentially think that, though he could not bring the claims at a later date, another petitioner could. Judge Newell said we use the "you" format in other instructions. He said that the filers who come up with those loopholes are "trying to be sneaky." Ms. Schilhab said, if we change the language, we should say "you, or anyone on your behalf." Judge Newell liked that idea. Other members said, "more words." Chief Justice Gray pointed out that Item 18 contains a similar warning. He suggested changing the language to read: "Generally, you are allowed only one [Article] 11.07 writ, if you fail to set forth all of your grounds for relief in this application, you may not be able to raise additional grounds in the future [or may be procedurally barred from raising additional grounds in the future]." Ms. Schilhab said that this could be confusing because an inmate who has ten convictions is allowed one writ application per conviction. Ms. Taylor said that she liked the language now proposed for instruction number 11 and suggested that it could just be repeated on item 18. "If the application does not include all of the grounds for relief, you, or anyone filing on your behalf, may be barred from raising additional grounds at a later date. *See* Article 11.07." Ms. Schilhab thought Mr. Wolff's proposed language ("If you do not include") was strong. Mr. Wolff explained that he was trying to use language more understandable for non-lawyers. Judge Newell observed that, if we do repeat the same language in two places, applicants are more likely to retain the information.

The committee discussed the following proposed language for this warning: "If you, or anyone filing on your behalf, do not include all of the grounds for relief in this application form, you may be barred from raising additional grounds at a later date. *See* Article 11.07." Chief Justice Gray pointed out that the person filing the form may be a petitioner filing on the applicant's behalf and so "you" may not be the person whose liberties are infringed. Judge Newell said that we need to be thinking about the inmate applicant's perspective. Chief Justice Gray suggested the language: "If the application does not include all grounds for relief…" Ms. McKinney pointed out that that was the language that was originally proposed, we just changed "set forth" to "include." Ms. Schilhab, Judge Hervey, and others said that they favored language similar to that originally proposed: "If the application form does not include all of the grounds for relief, additional grounds brought at a later date may be procedurally barred. *See* TEX. CODE CRIM. PROC. Art. 11.07 § 4."

The committee next took up the questions portion of the form. Judge Newell asked why we added the question about the warden. Ms. Schilhab responded that it is required by the statute. Mr. Wolff said that the inmate may not know the name of the correct warden. Ms. Schilhab said that we just need a name in the blank. Mr. Rolater said that the line below needs to be bolded like the rest. Judge Newell asked why we changed "entered" to "signed" on question number 2. Ms. McKinney said that on that question, "What district court…" should be "Which district court…" She said that orders are entered by the district clerk and signed by the judge. Chief Justice Gray asked whether we are looking for the trial judge's name or the district court number. Ms. Schilhab said that the parenthetical states that we are asking for the court number and the county and question number 4 askes for the name of the judge. Ms. McKinney urged that "signed" be replaced with "entered." Chief Justice Gray asked why not just expressly ask for the district court number and the county. Judge Newell and Mr. Varela suggested language something like: "What is the court number and county of the court in which you were convicted?" The committee decided to table this issue and see if Ms. Taylor could come up with better language on this question.

Judge Newell asked whether or not the additional proposed instructions on question number three[7] make the question more confusing. Members thought the instructions clarified the question. Judge Newell pointed out that the page number footer has been revised to reflect the date of the form. Members liked this change. Ms. Johnson-Liu asked whether we want to include a blank at the top to indicate whether something is an amended or supplemental application. Mr. Varela pointed out that many lawyers do not understand the difference between amended and supplemental pleadings. Ms. Taylor noted that we would probably not reach the proposed changes to TRAP 73.8 (governing amended and supplemental applications) today.

On question number 12, members thought that the question should read, "Has your sentence been discharged?" Sian said that applicants generally know what this term means, but saying "*been* discharged" would change the meaning from ordinary prison parlance. She said that the second sentence should read: "If you answered yes, when did your sentence discharge."

[7] These additional instructions read: "(You should only put one case number here. You must make a separate application on a separate form for other case numbers you seek relief from, even if the judgments were entered in the same court on the same day.)"

Regarding question 13(A) (“What court of appeals did you appeal to?”), Chief Justice Gray asked whether we want the court of appeals that first received the applicant’s appeal or the court of appeals that decided the applicant’s appeal? Ms. Schilhab pointed out that an inmate is unlikely to know which court of appeals referred the case if it was transferred to another court of appeals. Mr. Prine said that he did not see why we need to know which court of appeal had the case first—we just need to know which court of appeals decided the appeal. The committee decided that they preferred the question phrased as: “Which court of appeals decided the appeal?”

Regarding question 13(D) appeal from judgment of conviction (“What was the decision and the date of the decision?”), Ms. Johnson-Liu remarked that the line provided may be too short for the amount of information requested. Members thought that we should add an additional line. Ms. McKinney remarked that there is not enough room for the applicant’s first name on the first page, unless the name is “Sal.”

On question number 14(B) regarding petitions for discretionary review (“What was the decision and the date of the decision?”), members thought that a second line should be added. On question 14(A), they felt that the line should be bolded and lengthened.

On question number 15(B) regarding previous applications for writs of habeas corpus (“What was the decision and the date of the decision?”), members thought that a second line should be added. On question 15(A) (“What was the CCA writ number?”), they felt that the line should be lengthened to be even with others.

On question 15(C) (“Please explain why the current claims were not presented and could not have been presented in your previous application”), the committee thought that the lines should be justified. Mr. Wolff thought that “Please explain why” might call for a lengthier response than the previous language (“identify the reason”). Judge Newell asked whether we need more lines in this section for the explanation. Ms. Schilhab said that the applicant could always provide more information in a memorandum of law if he or she ran out of room on this question. Chief Justice Gray suggested that we could insert the term “briefly.” The committee reached consensus to add “briefly.” Ms. Taylor stated that she would justify the lines.

Committee members asked Ms. Taylor to do a search-and-replace for “claim” and replace it with “ground” where appropriate. Ms. Williamson said that the questions should fall on the same pages as the lines/blanks.

On item number 18, Judge Newell pointed out that the committee has already decided to duplicate the warning from the instructions (number 11). Chief Justice Gray noted that there is a page number reference that needs to be corrected. Committee members discussed how to rephrase the sentence on the first few lines of number 18: “Beginning on page 6, state concisely every legal ground for your claim that you are being illegally confined or restrained.” The committee decided that this sentence should be rephrased as: “Beginning on page 8, state concisely every legal basis for why you think that you are being illegally confined or restrained.” “Form application” needs to be changed to “application form.” Chief Justice Gray asked whether the footer is different for this page than the others. Ms. Taylor responded that only the first page has the additional information

in the footer, and all the other pages have the same footer: “Article 11.07 Writ Application Form; [page number]; Revised June 2018.”

The committee then turned its attention to the verification section of the form. Ms. McKinney did not like the use of “he or she’ in the bolded title: “WHEREFORE, APPLICANT PRAYS THAT THE COURT GRANT APPLICANT RELIEF TO WHICH HE OR SHE MAY BE ENTITLED IN THIS PROCEEDING.” After some discussion about non-applicant petitioners and other matters, committee members favored changing the title to read: “WHEREFORE, THE UNDERSIGNED PRAYS THAT THE COURT GRANT RELIEF TO WHICH APPLICANT MAY BE ENTITLED IN THIS PROCEEDING.” Later, after further discussion and upon a suggestion by Chief Justice Gray, the committee favored changing the title to read: “WHEREFORE, I PRAY THAT THE COURT GRANT THE RELIEF TO WHICH APPLICANT MAY BE ENTITLED IN THIS PROCEEDING.”

Ms. Taylor explained that she started the editing process in order to bring the verification section into compliance with Civil Practice and Remedies Code Chapter 132. The modifications also sought to simplify the language used in the verification instructions concerning applicants and petitioners. As suggested by committee members at the last meeting, she placed definitions of “applicant” and “petitioner” at the beginning of the form to ensure that the filer understands the meanings of those terms. She added headings to the verification section to make its content clearer. She suggested that committee members might want to review the version of Appendix E that does not have redlining.

Committee members asked about the purpose of the signature line for the petitioner on the first page (separate from the notarized oath and unsworn declaration parts). Ms. Taylor explained that this section was added to ensure that a petitioner is not filing the application without the applicant’s consent. The committee discussed some changes to the language of this petitioner’s statement earlier in the meeting. Judge Moore suggested that the petitioner’s signature be moved to the end of the form. Judge Newell also wondered whether the current placement might cause confusion. Ms. Taylor agreed with Judge Moore’s suggestion to move the petitioner’s statement and signature to the end of the form after “Petitioner’s Information.”

Ms. Williamson asked whether we had previously decided to omit the redundant “before a notary public” in the sentence: “In order to verify this application form, the applicant must sign either the appropriate ‘Unsworn Declaration’ (the unsworn declaration for inmates or the one for non-inmates depending on whether the applicant is an inmate) or the ‘Oath Before a Notary Public’ before a notary public.” Ms. McKinney observed that we omitted the redundant language earlier in the form, but the language is not redundant here because “Oath Before a Notary Public” is a title in quotation marks. Ms. Schilhab agreed with this approach because it emphasizes that, if the applicant chooses to do the oath, he or she must do it before a notary public.

Ms. McKinney asked whether we planned to move the applicants’ and petitioners’ paragraphs to later in the application form next to the relevant verification form. Ms. Taylor noted that the oath before a notary public form and both of the unsworn declarations apply to both applicants and petitioners. Therefore, we would have to repeat information within the form to

separate applicants' verifications from petitioners' verifications. She said her preference would be to keep the verification instructions for applicants and petitioners in their current location and move the petitioner's statement/signature to the last page, as we discussed. Committee members expressed agreement.

Mr. Prine observed that the last sentence of the petitioners' paragraph says, "In addition, all petitioners, including attorneys, must complete "Petitioner's Information" and *sign and attest to the following statement*" (emphasis added). Therefore, if we move the petitioner's statement and signature line, we need to change this language. He asked whether the petitioner's statement needs to be notarized. Committee members indicated that they thought it did not. Ms. Johnson-Liu suggested giving the petitioner's statement a title/heading and then we can refer to that title. Ms. Taylor concurred and suggested that the last line of the petitioners' paragraph on page 18 would read: "In addition, all petitioners, including attorneys, must complete "Petitioner's Information" and sign "Petitioner's Statement."

Chief Justice Gray asked where the applicant has to sign this application form other than on the unsworn declaration. Ms. Taylor agreed that an applicant only has to sign the unsworn declaration. Ms. Taylor stated that, under Chapter 11 of the Code of Criminal Procedure, the applicant does not have to sign the form at all—the petitioner can sign for the applicant. Judge Newell asked whether we need to make it clear to applicants that they only need to sign the unsworn declaration and not sign in the other places. Chief Justice Gray suggested changing the first sentence of the verification section to read: "This application must be verified <u>in one of the following ways</u> or it may be dismissed for non-compliance." He said that, as an applicant, he would be looking for a place to sign the application right after the prayer on page 18. Ms. Taylor showed Chief Justice Gray a copy of an actual Article 11.07 writ application form. (On the existing form, the inmate's declaration appears after the oath before a notary public and petitioner's information sections.)

Mr. Prine asked whether, since we have decided to move the petitioner's statement and signature to the end of the form after the oath and unsworn declaration (which refer to "the foregoing"), could a petitioner lie without consequence in the final signature section? Mr. Varela said that falsifying a government record represents a state jail felony regardless of the location of the false statement within the document. Ms. Williamson said that the CCA clerk's office receives calls from attorneys who are concerned about signing the form because they don't know if the information is true. These attorneys rely on their inmate clients regarding the facts alleged. She said that these attorneys will fill out the petitioner's information and let the inmate swear to the truth of the application. Ms. Taylor and Mr. Varela indicated that that is still an acceptable option. Ms. Williamson asked how an attorney would do that on the application as amended. Ms. Taylor stated that, theoretically the inmate could personally verify the application by signing the inmate unsworn declaration. The attorney-petitioner would then complete the petitioner's information section at the end. The attorney-petitioner would still have to sign the petitioner's statement, but that statement just states that the attorney is filing the application with the applicant's consent. It does not state that the attorney-petitioner personally verifies the truth of all the facts contained in the application. Mr. Varela said that he would choose to have his client verify/swear to the application.

Members felt that the oath before a notary public section should be positioned after the unsworn declaration sections because filers will be less likely to choose the oath as a verification option. The inmate unsworn declaration should come first. The non-inmate unsworn declaration should come second. And the oath before a notary public should be third. Mr. Rolater agreed with this ordering of these sections. Judge Newell said we need to make those changes.

Ms. Johnson-Liu suggested that the unsworn declarations should refer to the "foregoing application form" in the sentence: "I declare under penalty of perjury that the foregoing is true and correct." Ms. Taylor said that she felt constrained by the required text set out in TEX. CIV. PRAC. & REM. CODE Chapter 132. Ms. Johnson-Liu noted that the statute only requires that the declaration be in "substantially the following form"[8] Mr. Varela stated that he routinely names the document that the inmate is swearing to in the unsworn declaration. The suggestion received support from other committee members, as well.

Judge Newell said that we would not have time to reach the last item on the agenda (proposed amendments to TRAP 73.7 and the proposed addition of TRAP 73.8). Judge Newell announced that the meeting was adjourned. The next rules advisory committee meeting will probably be held in August or September when this room is available. Ms. Williamson said that the annual clerks' meeting will be held on September 3rd.

[8] *See* TEX. CIV. PRAC. & REM. CODE Sec. 132.001(d) excerpted in footnote 3, *supra*.