EXHIBIT A: Minutes

TO: **Judge David Newell**

FROM: **Holly Taylor**

RE: **Minutes of the March 1, 2018 Court of Criminal Appeals Rules Advisory Committee Meeting**

DATE: **Prepared March 8, 2018, edited April 16, 2018**

MEMBERS IN ATTENDANCE: Judge David Newell (Chair), Judge Barbara Hervey, Judge Kevin Yeary, Chief Justice Tom Gray, Judge Jefferson Moore, Michael Gross, Emily Johnson-Liu, Jaclyn Lynch, Donna Kay McKinney, Chris Prine, John Rolater, Sian Schilhab, Kathleen Schneider, Holly Taylor, Joseph Varela, Deana Williamson, and Ben Wolff.

1. Welcome

Committee Chair Judge David Newell called the meeting to order and welcomed everyone. The committee members introduced themselves.

2. Review of minutes from November 2017 Court of Criminal Appeals (CCA) Rules Advisory Committee meeting (See Exhibit A).

The members reviewed the minutes from the November meeting. Chief Justice Tom Gray pointed out three typos that needed to be corrected. Judge Newell asked if anyone had any objection to accepting the minutes as corrected. No members expressed any opposition.

3. Electronic Filing Update

Sian Schilhab mentioned that we have received a couple of calls relating to problems with the way that the electronic filing system is working. An attorney called and reported that he or she was not allowed to electronically file an application for writ of habeas corpus in Tarrant County. Ms. Schilhab called Tarrant County to ask about this and they reported that they are not accepting electronic filing of case initiation documents and they considered the writ application to be a case initiation document. Ms. Schilhab noted that originally the electronic filing rules were written to exclude case initiation documents, such as charging instruments, but subsequently in light of a statute allowing electronic filing of charging instruments, the rules were changed. The emphasis is that attorneys should file everything electronically. Ms. Schilhab asked members of the committee to keep an eye out for electronic filing issues such as this one. We may need to make a change to the comments or the electronic filing rules. Ms. Donna Kay McKinney said she more frequently hears complaints that litigants are not electronic filing when they should be.[1] She asked whether

[1] Ms. McKinney is the Bexar County District Clerk.

indictments should be electronically filed. Ms. Schilhab said that indictments are not filed by attorneys, so the electronic filing rules do not mandate that they be electronically filed. On the other hand, the electronic filing rules may apply to informations, which are filed by attorneys.

Ben Wolff stated that they have been encountering electronic filing challenges in post-conviction writ of habeas corpus cases.[2] They routinely get items kicked back by district clerks and they are forced to paper file. He estimated that this occurs about 25% of the time. Ms. Schilhab asked him to notify her via email anytime that an electronic filing is erroneously rejected. Ms. McKinney noted that district clerks are elected officials and they have their own processes. Also, in smaller counties, the clerk's judge tells the clerk what to do and the clerk complies.

Ms. Schilhab said that the CCA's order should override inconsistent procedures promulgated by district judges or district clerks. She said that we must make sure that the system is working the way that it was designed to work. Ms. McKinney said that in Bexar County they have been encountering problems with their computers and must sometimes go to great lengths to successfully electronically file documents. Ms. Schilhab suggested that Ms. McKinney contact the Office of Court Administration (OCA) for assistance.

Judge Newell asked if this was the only matter to consider. Ms. Schilhab said that another county was using an old set of electronic filing rules. That was an easy problem to fix. She noted that we are still in transition and we must determine whether we will need to clarify some of the comments or the rules. Holly Taylor observed that we have also had a question arise with regard to pre-charging instrument litigation and whether that should be electronically filed.

Judge Jefferson Moore said that he was aware of an issue in Dallas County where a clerk instructed attorneys that they were required to electronically file case-initiation documents in a contempt of court matter. Ms. Schilhab noted that documents can always be filed directly with the judge. Judge Moore explained that the judge was in a different town than the clerk's office. Chief Justice Tom Gray said that he found out that some prosecutors were not filing their briefs electronically, but this problem appears to be resolved.

4. Proposed amendments to Texas Rule of Appellate Procedure (TRAP) Rule 31 limiting the scope of the rule mandating accelerated appeals in habeas corpus proceedings (revisions based on discussion at last meeting) (See Exhibits B, B.1)

Judge Newell noted that this agenda item concerning proposed amendments to TRAP Rule 31 has been before the committee before and ADA Clint Morgan has prepared a memo (Exhibit B.2) regarding the matter. ADA Melissa Stryker is present and has prepared proposed rule language. Judge Newell asked Ms. Stryker to explain the proposed changes to TRAP 31. Ms. Stryker said that the changes to Rule 31 presented today incorporate the text changes that the committee discussed at the last meeting. She stated that the purpose of the proposed amendment was to split Rule 31 into two tracks because not all writ appeals need to be expedited. Habeas appeals for post-

[2] Mr. Wolff is the Director of the Office of Capital and Forensic Writs.

conviction cases, such as *Padilla*[3] writs, do not necessarily need expedited treatment compared with a pre-trial writ, such as a writ challenging bail. The two tracks would clarify that some habeas appeals need to be expedited and others can follow a normal briefing and submission schedule like other direct appeals, with the proviso that the parties or the court can expedite matters if they choose to pursue that option. The second part of the changes helps to ensure that the courts will allow briefing. Ms. Stryker stated that, for the cases that do not need to be expedited, there is no reason that the parties should not be allowed to file briefs.

Ms. Stryker explained that Mr. Morgan tried to look at every habeas appeal filed in all of the courts of appeals in 2016. He created a big spreadsheet and his data can be made available. She said that his memo does a good job of running through his findings. In short, his research showed that the first and second courts of appeals have been prohibiting briefing. Other courts tend to allow briefing pretty regularly. There are several instances where parties were completely denied the opportunity to file briefs (detailed in original letter reviewed at last rules meeting). Mr. Morgan's sample size was not very large. He was only looking at the year 2016. There is a lot of variation in the way the rule is applied. It appears from the data that pretrial matters can take the longest amount of time to resolve.

Chris Prine said that Mr. Morgan should look at the time when each case is set "at issue." The data needs to account for the parties delay in filing their briefs. Kathy Schneider stated that she does not think that we need to change the rule. There are only about 100 cases spread across all fourteen courts of appeals in 2016. She noted that some of the Article 11.072[4] writ appeals that the CCA considers do not really need to be briefed. She said that pretrial writs might take longer in some cases where more substantive issues are raised, such as double jeopardy. She is concerned that we are just complicating things by asking the courts to make a determination of whether each case needs to be accelerated.

Chief Justice Gray stated that the effort to split them into two tracks is admirable but there is going to be a problem because when the court of appeals gets a notice of appeal, they don't know the substance or intent. Some of the 11.072 writs necessitate obtaining very old records, which can take some time. Once the record and briefs are obtained, however, often these cases can be decided relatively quickly and there are higher-priority cases that the court of appeals needs to decide. There are a lot of these cases that could be on the "normal track." Chief Justice Gray said that, as long as he has been on the Tenth Court of Appeals, they have never had a case submitted without briefs if the parties wanted to file briefs. He said that, if we split these appeals into two tracks, we need a very clear demarcation—perhaps a separate rule. He suggested that Rule 31 could state that it does not apply to Article 11.072 writs of habeas corpus.

John Rolater responded that carving out Article 11.072 writs from Rule 31 would be problematic

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[3] *See Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding that criminal defense counsel must inform his or her client whether the client's plea "carries a risk of deportation.")

[4] *See* TEX. CODE CRIM. PROC. Art. 11.072 (establishing the procedures for filing an application for a writ of habeas corpus in a felony or misdemeanor case in which the applicant seeks relief from an order or a judgment of conviction ordering community supervision).

because the statute (Article 11.072) invokes the rule.[5] Mr. Rolater said that he testified on Article 11.072 when it was being considered in the Legislature and he does not think that the legislators were thinking about *Padilla* appeals when they passed the law. He said that Article 11.072 has most often been used in *Padilla* cases, where the applicants may not even want the appeal accelerated. He estimated that about a quarter of the Rule 31 writs he sees are pretrial writs involving bail and some involve double jeopardy. The other three-quarters of them are Article 11.072 appeals and those are almost exclusively *Padilla* claims. The Fifth Court of Appeals sends out a scheduling order and allows a chance to brief the cases within a limited time frame. He said that, "[f]rom a litigant's point of view, an accelerated appeal is a docket killer." The attorney may have a murder case pending and is forced to put it aside to deal with the Rule 31 appeal.

Chief Justice Gray said that he was not aware that Article 11.072 specified that the appeal would be accelerated. He averred that you could still "drop it under Rule 28 of the TRAP."[6] He said that he has never seen an appeal of a probation condition. Ms. Stryker stated that Mr. Morgan only found one such appeal and it was dismissed. Chief Justice Gray said he believes that it would be beneficial to move portions of Rule 31 to other pre-existing rules with a working body of knowledge rather than create new rules.

Judge Newell suggested that we look at the proposed rule (Exhibit B) to see how it works in light of members' comments. Presiding Judge Keller asked Chief Justice Gray if he was suggesting moving Rule 31.1(a)[7] to another rule. He said that he was thinking about some way of moving the cases for which we want to have an ordinary briefing schedule to another rule. He again mentioned the problem that, when a party files a notice of appeal, the precise nature of the appeal is not evident to the appellate court.

Judge Moore asked whether there would be a way to get appellants to designate the nature of their appeals in their notices of appeal? Chief Justice Gray said that, if people would follow the rules, that would work, but he thought that people would not be likely to follow the rules. Emily Johnson-Liu suggested that the requirement to designate the nature of the appeal could be added to the docketing statement procedures. She noted that, in civil cases, the appellant must specify in the docketing statement whether the appeal is accelerated. Mr. Prine said that his courts[8] often do not receive docketing statements. Presiding Judge Keller suggested that the rules could provide a default mechanism whereby, if the appellant did not designate that the appeal was accelerated, then the appeal would default to the normal appeal briefing rules and submission schedule.

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[5] *See* TEX. CODE CRIM. PROC. Art. 11.072 Sec. 8 ("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.")

[6] *See* TEX. R. APP. P. Rule 28 ("Accelerated, Agreed, and Permissive Appeals in Civil Cases").

[7] Proposed Rule 31.1(a) (from Exhibit B) read:

> 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 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, if necessary to do substantial justice to the parties.

[8] Mr. Prine is Court Clerk for the First and Fourteenth Courts of Appeals.

Judge Newell expressed concern about changing the requirements for a notice of appeal in light of existing case law. Ms. Taylor said she would be concerned about adding any requirement to the notice of appeal, but the docketing statement would be a different matter, especially if the failure to designate as accelerated results in a mere default to normal briefing and submission rules. Judge Newell asked where such a requirement could be placed in the TRAP rules.

Chief Justice Gray suggested that Rule 25.2(c) would be a good place to add this requirement. He liked Presiding Judge Keller's idea that there should be a default result that the appeal would not be accelerated (i.e., the appeal would follow the normal track) if no designation is included. He said that his court dismisses civil cases if they do not file a docketing statement. He acknowledged that they cannot enforce this consequence in criminal cases. The consequence for criminal appellants would be that they end up on the normal track rather than the fast track if they do not designate the appeal as accelerated.

Judge Newell asked if we are fine with the text of proposed Rule 31.1(a) or are there concerns with the way it is worded? Do we want to move it to a different rule? Ms. Schneider asked if the intention is that the proposed Rule 31.1(a) will mandate briefing. Ms. Stryker stated that the more expedited timeline language in proposed Rule 31.1(a) allows the court to disallow briefing: "On motion of any party, or on its own initiative, the appellate court may impose a more expedited timeline, if necessary to do substantial justice to the parties." Ms. Schneider said that this language does not seem to convey that message. Presiding Judge Keller suggested that language be added to this sentence to make it clear that the court can refuse briefing in expedited cases, such as, "the appellate court may impose a more expedited timeline or disallow briefing." Another member suggested the phrase: "decide without briefs." Committee members generally liked this language. Ms. Schilhab asked if a court can already decide a case without briefs under TRAP Rule 2.[9] Mr. Prine explained that his office has to give parties time to file a brief and then the court warns them, if they don't file a brief, that they will decide the appeal based on the record without briefs. Mr. Varela stated that he thinks that TRAP Rule 2 should be an extraordinary remedy and not a regular course of action or preconceived path. Judge Newell asked if PJ Keller's suggestion of a default procedure solves this dilemma. Mr. Varela said that the suggestion "does not damage anything that we are trying to do."

Chief Justice Gray suggested referring to the accelerated briefing rule (TRAP Rule 28). Ms. Schilhab stated that Rule 28 only applies to civil cases. She said we would have to rework the whole rule to make sure that there were no adverse consequences in criminal cases. Mr. Rolater stated that Article 11.072 refers only to TRAP Rule 31. Chief Justice Gray asked him what the normal briefing rules are for accelerated criminal cases. Mr. Rolater said that most of his practice is in the Fifth Court of Appeals where the parties usually get twenty days to file their briefs in Rule 31 cases. Ms. Schneider said that she has seen twenty-day briefing deadlines from across the state on accelerated appeals. Chief Justice Gray said that there is a local rule providing for a twenty-day

[9] *See* TEX. R. APP. P. Rule 2 (providing in relevant part, "On a party's motion or on its own initiative an appellate court may - to expedite a decision or for other good cause - suspend a rule's operation in a particular case and order a different procedure").

briefing period in the Tenth Court of Appeals, but they don't often follow it. He said that Rule 31 references an accelerated process when there really is not a defined process. Ms. Schneider said there is benefit in letting the individual courts of appeals decide the accelerated-appeal time period and there is no need to spell it out in the TRAP rules. Judge Newell said that Rule 31 is meant to provide guidance to the courts of appeals and not to mandate specific conduct.

The committee turned to Rule 31.1(b)[10] and Judge Newell asked if there were any concerns about the way it is drafted. No one expressed any concerns.

Judge Newell then addressed proposed Rule 31.2 and asked for feedback. Chief Justice Gray remarked that the use of "if any" in the first sentence of 31.2[11] is ambiguous. He suggested moving this phrase to clarify the meaning of the sentence. The committee eventually reached consensus that the language should be changed to read: "and the parties' briefs, if any…" However, Ms. Schneider asked if the last part of that sentence should be eliminated because it is unnecessary. Judge Newell, Chief Justice Gray and others discussed amending the sentence as follows: "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.~~" No members expressed any objections to this course of action.

Members then discussed making changes to the proposed Rule 31.2(a)[12] to make it parallel with Rule 31.1. Judge Newell stated that language could be added to make it clear that the court may submit a case without briefing, as follows: "On motion of any party, or on its own initiative, the appellate court may impose a more expedited timeline or submit a case without briefing, if necessary to do substantial justice to the parties." Judge Newell then asked if there were any comments concerning Rule 31.2(b).[13] No members expressed any suggestions or comments.

5. Proposed amendments adding TRAP Rule 4.6—a procedure to allow additional time when defendant receives late notice in Ch. 64 case—& making a change to TRAP Rule 25.2 (revisions following discussion at last meeting) (See Exhibits C.1, C.2, C.3, C.4, C.4.1, & C.5)

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[10] Proposed Rule 31.1(b) (from Exhibit B) read: "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."

[11] Proposed Rule 31.2 (from Exhibit B, first paragraph) read:

> 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. The appellate court will not review any incidental question that might have arisen on the hearing of the application before the trial court. The sole purpose of the appeal is to do substantial justice to the parties.

[12] Proposed Rule 31.2(a) (from Exhibit B) read:

> 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 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, if necessary to do substantial justice to the parties.

[13] Proposed Rule 31.2(b) (from Exhibit B) read:

> 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.

Judge Newell and Holly Taylor explained the related exhibits (Exhibits C.1, C.2, C.3, C.4, C.4.1, and C.5) and gave a brief history of the discussion of proposed TRAP Rule 4.6 in previous rules committee meetings. Most of the current changes were made in response to Chief Justice Gray's letter (Exhibit C.1) and the discussion at previous rules committee meetings. The current proposed changes contemplate **either** choosing the proposed language in Exhibit C.4 **or**, if the changes to TRAP Rule 25.2 in Exhibit C.5 are implemented, Exhibit C.4.1.

Judge Newell said we should look at first at Exhibit C.5 (proposed amendments to TRAP Rule 25.2) and our decision on that will determine whether we work with Exhibit C.4 or Exhibit C.4.1. Ms. Taylor explained that the first part of Rule 25.2 at issue in C.5 is the portion dealing with a defendant's right to appeal after a plea-bargained guilty plea. Rule 25.2 limits the defendant's right to appeal to matters that the defendant raised by written motion filed and ruled on before trial, or where the defendant obtains the trial court's permission to appeal.[14] On the other hand, Chapter 64 provides that a defendant who pled guilty can file a motion for DNA testing and there appears to be no requirement that the defendant raise the DNA issue in a motion filed before trial or obtain the judge's permission to appeal.[15] Therefore, the proposed change allows a third option for a defendant who pleaded guilty to appeal "where the appeal is authorized by statute." On the other hand, Ms. Taylor explained, the amendment to Rule 25.2(d) is proposed to address the quandary presented by the certification of right to appeal requirements when applied to Chapter 64 appeals. Specifically, Rule 25.2(d) requires that the trial court include in the certification of the right to appeal a notice to the defendant of his rights concerning appeal and discretionary review. Rule 25.2(d) currently requires that this notification must be signed by the defendant. However, in most cases, a Chapter 64 movant/defendant will not be present in the courtroom when the judge signs an order relating to the defendant's chapter 64 motion. The proposed change provides, "This notification shall be signed by the defendant, ~~with a copy given to him~~ unless the defendant is not present in the courtroom when the trial court executes the certification. Whether or not the defendant is present, the trial court must provide a copy of the certification to the defendant and comply with the notice and advice requirements contained in this rule."

Judge Newell first asked for comments about the proposed change to 25.2(a)(2). Committee

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[14] See TEX. R. APP. P. 25.2(a)(2), which reads:

> 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 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:
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> (A) those matters that were raised by written motion filed and ruled on before trial, or
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> (B) after getting the trial court's permission to appeal.

[15] See TEX. CODE CRIM. PROC. Art. 64.03(b), which provides:

> A convicted person who pleaded guilty or nolo contendere or, whether before or after conviction, made a confession or similar admission in the case may submit a motion under this chapter, and the convicting court is prohibited from finding that identity was not an issue in the case solely on the basis of that plea, confession, or admission, as applicable.

See also TEX. CODE CRIM. PROC. Art. 64.05 ("An appeal under this chapter is to a court of appeals in the same manner as an appeal of any other criminal matter…").

members asked for the language to be further limited as follows: "where the specific appeal is expressly authorized by statute." Presiding Judge Keller suggested that Rule 25.2(a)(2) could exclude DNA appeals from the certification requirement altogether. Judge Moore said that, in Chapter 64 matters, the defendants are typically not in front of the judge when the judge rules on the motion and the appellate court may send the case back due to the failure to do the certification. He said that this slows down the process. Mr. Varela asked whether certifications of appeal are really necessary at all. Other committee members responded that the certification requirement provides a method of handling the plea-bargained guilty plea situation. Mr. Rolater said that most guilty pleas now usually involve a waiver of appeal. Mr. Varela asked why we need a certification requirement in non-guilty plea situations. Judge Newell suggested that, by requiring the certification, we are making sure that the defendant finds out about the appealable order.

Chief Justice Gray remarked that the certification of the right to appeal serves a very helpful function for his court. He said he would hate to see a defendant bench-warranted back just to sign the certification, but the proposed change addresses that problem. He said he has no problem with excepting in some fashion Chapter 64 appeals from the certification requirement. Mr. Varela proposed eliminating the certification of the right to appeal requirement in every case except a plea-bargained sentence where the court follows the plea bargain. Chief Justice Gray did not agree with this suggestion. Mr. Prine remarked that the certification is a useful screening tool for the appellate court clerk. Another member remarked that, although certifications are not always done properly, the certification is beneficial because it informs defendants of their rights. Judge Newell asked what removing the certification requirement would look like.

Ben Wolff suggested adding the language "unless a defendant, who is incarcerated, is not present in the courtroom when the certification is executed." He described a hypothetical scenario where a defendant is not incarcerated and just does not come to court. Judge Newell suggested the alternative language that the defendant is not present "due to incarceration." Ms. Schneider pointed out that there are situations where the defendant is not present for legitimate reasons and yet is not incarcerated.

Judge Moore commented that, when he signs Chapter 64 orders, he is typically not in the courtroom. He is in his office and the defendant is not present. He suggested getting rid of the phrase "in the courtroom." Mr. Rolater pointed out that there are other types of cases where the defendant is not present when the trial judge signs an appealable order, for example, Article 11.072 writs and bail writs. The rule would apply to those, too. Ms. Taylor asked how these cases are handled now. Members said that the cases get sent back if a certification has not been signed. Judge Moore stated that he usually makes a note if the defendant is incarcerated. Mr. Prine noted that his office accepts certifications without the defendant's signature in those situations.

Ms. Taylor asked whether the members wanted to omit the proposed sentence, "Whether or not the defendant is present, the trial court must provide a copy of the certification to the defendant and comply with the notice and advice requirements contained in this rule." Judge Moore suggested omitting the previous sentence: "This notification shall be signed by the defendant, with a copy given to him." Members cautioned that omitting that sentence would get rid of the signing of the certification in all cases. Ms. Johnson-Liu said that the purpose of the requirement is to make sure

that the defendant has been told of his right to appeal. Ms. Schneider said that she did not think that we rely on certification to provide that notice to the defendant. Judge Newell said that the practical effect of the certification notice requirement is that the defendant is told of his appellate rights. Judge Moore suggested that the courts through their clerks could notify the defendant. Members remarked that the proposed amendment accomplishes this intent.

Judge Newell said he is hearing two schools of thought: (1) just find way to state that judges do not have to do certifications on Rule 64 appeals; and (2) if we are going to require certification on Chapter 64 appeals, we need to decide whether we want to require that a defendant be incarcerated for the exception to the signing requirement to apply. Mr. Wolff and Judge Moore both stated that we should not require that the defendant be incarcerated and wanted to leave the language as "not present." Judge Moore noted that he does not always know whether the defendant is incarcerated when he is ruling on these motions. Ms. Schilhab noted that, if we do not want to change Rule 25.2, we can reach these issues by implementing the changes to proposed Rule 4.6 in Exhibit C.4.

Ms. Taylor read through the proposed changes to make sure that she understood the language upon which the committee had reached consensus. Ms. Taylor asked whether the committee wanted to change subsection (a)(2)(C) to "or where the specific appeal is expressly authorized by statute"? Committee members generally expressed agreement. Ms. Taylor asked if, with regard to subsection (d), whether the committee intended to delete "with a copy given to him" and add "unless the defendant is not present when the trial court executes the certification. Whether or not the defendant is present, the trial court must provide a copy of the certification to the defendant and comply with the notice and advice requirements contained in this rule." Judge Newell asked if, assuming we are going to make a change, there was any problem with that change. No one responded negatively.

Judge Newell asked whether we really need to make any change to Rule 25.2 or should we handle it through Rule 4.6. Ms. Schilhab stated that Exhibit C.4 incorporates the certification requirement material into proposed Rule 4.6, but we would need to take out "in the trial court" in the proposed rule[16] for the same reason we opted to omit "in the courtroom" in Exhibit C.5.

Chief Justice Gray said he liked Presiding Judge Keller's idea of exempting Chapter 64 appeals from the certification requirement. However, the proposed change to 25.2(d) is broader than Chapter 64 appeals and could result in unintended consequences. Judge Newell asked whether everyone is OK with getting rid of the certification requirement for Chapter 64 appeals. Judge Moore and Ms. Schneider agreed with this approach. No members expressed any opposition.

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[16] *See* Exhibit C.4 containing proposed Tex. R. App. P. Rule 4.6(c):

> The Court's Order. After hearing the motion for additional time, the trial judge must sign a written order that determines the date when the defendant or the defendant's attorney first either received notice or acquired actual knowledge that the trial judge signed the appealable order and must enter a certification regarding the defendant's right to appeal pursuant to Rule 25.2, if the court has not already entered such a certification. However, if the defendant is not present **in the trial court** when the trial judge executes the certification, the trial judge need not comply with Rule 25.2(d)'s requirement that the defendant personally sign the notification regarding his appellate rights.

Presiding Judge Keller and Judge Newell suggested that we modify the second sentence of Rule 25.2(a)(2) to read something like: "The trial court shall enter a certification of the defendant's right of appeal each time it enters a judgment of guilt or other appealable order other than an order appealable under Code of Criminal Procedure Chapter 64." Members raised no objection to this language.

Ms. Taylor asked about the committee's current view of proposed Rule 25.2(a)(2)(C) "where the specific appeal is expressly authorized by statute." Mr. Varela stated that all appeals must have some statutory authorization, so he did not see why we need this language. Judge Hervey agreed and said that she did not think that adding "specific" or "expressly" adds anything. Ms. Taylor said that the purpose of the proposed rule change is to address is an existing tension between Rule 25.2 and Chapter 64. Specifically, Rule 25.2 provides that, when a defendant enters a plea-bargained guilty or nolo contendere plea, he can only appeal matters raised before trial or when the trial judge has given him permission. On the other hand, Chapter 64 provides that a defendant can file a DNA motion even if he pled guilty at trial and a defendant who pled guilty can appeal an adverse ruling on a DNA motion. Members discussed the idea of changing the proposed language to specifically refer to Chapter 64. Judge Newell asked if the change we made to the certification requirement fixes this problem. Ms. Taylor said that the certification requirement was a different sentence in the rule and was not tied to the language limiting a guilty-plea defendant's right to appeal.

Mr. Wolff said that he does not see the harm in adding surplusage to Rule 25.2 because the surplusage seems harmless and it may accomplish the intended goal. Presiding Judge Keller expressed support for limiting the language to Chapter 64 appeals. Ms. Taylor articulated some language to give effect to the committee's concerns: "except where the appeal is expressly authorized by chapter 64." Mr. Rolater objected to this narrowing of the language because there are other situations where a defendant can plead guilty and still retain a right to appeal, such as pursuant to Article 11.072. Judge Newell suggested that we go with the "where the specific appeal is expressly authorized by statute" because, as Mr. Wolff stated, this language may be surplusage, but it is harmless and it may make it clear that the guilty-plea restriction in Rule 25.2 cannot trump a statutorily defined right of appeal. At Judge Newell's request, Ms. Taylor then read the final language that the committee decided upon, i.e., to recommend the following changes to Rule 25.2(a) (additions underlined and deletions struck through):

Rule 25.2. (a) Rights to Appeal.

> . . . (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 each time it enters a judgment of guilt or other appealable order other than an order appealable under Code of Criminal Procedure Chapter 64. 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:
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> > (A) those matters that were raised by written motion filed and ruled on before trial, ~~or~~
> >
> > (B) after getting the trial court's permission to appeal, or

(C) where the specific appeal is expressly authorized by statute.

Mr. Prine asked what the committee intended to do about the situation where the defendant is not present in the courtroom to sign the certification of appeal in other types of cases. Judge Newell said that we will not address that problem right now because it is not directly related to the Chapter 64 issues that we are trying to address today.

Judge Newell indicated that we should move on to discuss the proposed Rule 4.6 (See Exhibit C.4.1). Ms. Taylor clarified that the mark-ups on the exhibit are changes made to a previous draft of the proposed rule, not to an existing rule. There is not currently a Rule 4.6 in the TRAP rules. She walked through the proposed changes to the new rule. First, in accordance with committee discussion at the last meeting, the title of the rule has been changed to "No Notice of Trial Court's Appealable Order on a Motion for Forensic DNA Testing." Judge Keller suggested adding the word "timely" (i.e., "no timely notice") to the title of the rule. Judge Newell and Ms. Taylor said that Rule 4.2, the model for this rule, uses the phrase "no notice" and does not use the word "timely." The committee reached a consensus to recommend the language modeled on Rule 4.2 and not use the word "timely."

Ms. Taylor then discussed the proposed changes to Rule 4.6(a) (additions underlined and deletions struck through):

> (a) *Additional Time to File Notice of Appeal*. If an adversely affected defendant or his attorney did not receive notice or acquire actual knowledge of the signing of an order appealable under Code of Criminal Procedure Chapter 64 —within twenty days after the signing, ~~a trial judge signs an order appealable under Code of Criminal Procedure Chapter 64 an adversely affected defendant or his attorney neither received notice nor acquired actual knowledge of the signing,~~ then the time periods under these rules which ordinarily run from the signing of an appealable order will begin to run on the earliest date when the defendant or his attorney received notice or acquired actual knowledge of the signing. But in no event shall such periods begin more than 120 days after the day the trial judge signed the appealable order.

Mr. Wolff asked about the justification for the last sentence (the 120-day limit) and whether it was based on some notion of laches. Judge Newell explained that the proposed rule is based on Rule 4.2 which contains a similar 90-day limit.[17] With Chapter 64 appeals, the defendant can always re-file his motion if he misses the 120-day limit. Ms. Taylor noted that the staff determined that a 120-day limit would allow for relief in the longest delay period that the Court of Criminal Appeals has seen in cases where the defendant did not receive timely notice of the Chapter 64 order. She recalled that committee members at a previous meeting expressed a desire to retain such a limit.

[17] *See* TEX. R. APP. P. Rule 4.2(a)(1) ("But in no event may the period begin more than 90 days after the judgment or order was signed.")

Chief Justice Gray asked whether we could implement gender neutral language and replace "his" with "the defendant's" throughout the rule. Ms. Taylor agreed to make such substitutions. When asked whether there was any opposition to such changes, committee members expressed none.

The committee then discussed proposed Rule 4.6(b) (additions underlined and deletions struck through):

> (b) *Procedure to Gain Additional Time*. In order to establish the application of paragraph (a) of this rule, the defendant adversely affected must prove in the trial court~~, on sworn motion and notice,~~ the earliest date on which the defendant or his attorney first either received notice or acquired actual knowledge that the trial judge signed the appealable order, and he must prove that this date was more than twenty days after the signing. The motion must be in writing and sworn, state the defendant's desire to appeal from the appealable order, state the earliest date when the defendant or his attorney first received notice or acquired actual knowledge of the signing, be filed within 120 days of the signing, and comply with Rule 10.5(b)(2).

Mr. Rolater asked why "on sworn motion and notice" was deleted from the proposed rule. Ms. Taylor explained that the committee felt that the language was redundant in light of the language farther down requiring the motion to be "in writing and sworn."

Chief Justice Gray noted that, in the third line, he would omit the word "either" and we should remove the use of a gender-specific pronoun. No one objected. He expressed support for proposed language to address some of the problems he had identified in his letter (see Exhibit C.1).

Ms. Taylor asked if, in light of the changes proposed to Rule 25.2, the committee believed that we could omit the language about the certification regarding the defendant's right to appeal in proposed Rule 4.6(c) (proposed additions underlined and deletions struck through):

> (c) *The Court's Order*. After hearing the motion for additional time, the trial judge must sign a written order that determines ~~finds~~ the date when the defendant or the defendant's attorney first either received notice or acquired actual knowledge that the trial judge signed the appealable order ~~and must enter a certification regarding of the defendant's right to appeal pursuant to Rule 25.2, if the court has not already entered such a certification~~.

Committee members discussed the meaning of the word "hearing" in the phrase "After hearing the motion" and whether this phrase mandated that the trial judge hold a live hearing. Ms. Taylor stated that the language was modeled on the civil rule. Chief Justice Gray stated that there is a wealth of case law providing that the term "hearing" in this context can simply mean that the court considers the motion. Judge Moore concurred in light of his usual practice.

Chief Justice Gray thought that the language in 4.6(c) should be consistent with the current proposed language in 4.6(b). The committee agreed on the following proposed Rule 4.6(c) language: "after hearing the motion for additional time, the trial judge must sign a written order that determines the earliest date when the defendant or the defendant's attorney first ~~either~~

received notice or acquired actual knowledge that the trial judge signed the appealable order."

Ms. Taylor then asked for feedback concerning proposed Rule 4.6(d) ("Clerk's Duties"), which read (additions underlined and deletions struck through):

> (d) *The Clerk's Duties*. Upon the filing of a motion for additional time, ~~T~~the trial court clerk must immediately (as they are filed or entered in the record) forward copies of the defendant's motion for additional time, the trial judge's written order and certification under subsection (c), ~~the defendant's motion for additional time,~~ the order the defendant seeks to appeal, and any exhibits and related documents to the clerk of the appropriate court of appeals designated to handle the appeal of the order and to the State's attorney.

Judge Newell pointed out that we needed to remove the reference to the certification of right to appeal, i.e., "the trial judge's written order ~~and certification~~ under subsection (c)."

Chief Justice Gray said that, until the appellate court receives a notice of appeal, they do not know where to put the filings in that case, so there may not be a good reason to forward documents to the appellate court as they are filed until a notice of appeal has been filed. Mr. Prine concurred that the documents do not need to come to the court of appeals until the notice of appeal has been filed. Ms. Taylor asked if the committee wished to delete the parenthetical in line two ("as they are filed or entered in the record"). Ms. Johnson-Liu pointed out that the State's attorney does need to receive the documents as they are filed. Ms. McKinney remarked that she wants some clarification about what the district clerk is going to be expected to do. Judge Newell asked how the civil rules handled this issue. Chief Justice Gray said that it is the timing of the notice of appeal that generates the docket schedule for the appeal. There is already a rule that provides that when the notice of appeal is filed with the trial court clerk, they must send the case up to the court of appeals. Chief Justice Gray said he may later send a letter to the trial court asking the court to explain why a late notice of appeal should be considered timely. Ms. McKinney agreed that the district clerk sends the notice of appeal to the appellate court clerk right away and they have everything together when they send it.

Mr. Wolff asked that we add a requirement that the clerk send the trial court's order and other documents, except the defendant's motion, to the defendant and the defendant's attorney.

Chief Justice Gray asked if the State can appeal Chapter 64 rulings. Judge Newell acknowledged that it is possible that the State might not get notice of an appealable Chapter 64 ruling, but that is not the problem that we are trying to address right now. Ms. Taylor stated that the State does have the right to appeal Chapter 64 orders,[18] but she was not aware of anyone reporting a problem with the State not receiving notice of appealable Chapter 64 orders. The CCA has been encountering the notice problem specifically with regard to incarcerated defendants.

CCA Court Clerk Deana Williamson wondered if we should use the term "the State's prosecuting

[18] *See* TEX. CODE CRIM. PROC. Art. 44.01(a)(6) (proving that the State is entitled to appeal an order in a criminal case that "is issued under chapter 64").

attorney." The committee decided to change the reference to the "attorney representing the State" to avoid any confusion with the State Prosecuting Attorney.

Ms. Taylor, with input from Judge Newell and other committee members, described the changes to subsection (d) that she understood the committee to have agreed upon:

> (d) *The Clerk's Duties.* Upon the filing of a motion for additional time, the trial court clerk must immediately (as they are filed or entered in the record) forward copies of the defendant's motion for additional time, the trial judge's written order ~~and certification~~ under subsection (c), the order the defendant seeks to appeal, and any exhibits and related documents to the attorney representing the State. ~~the clerk of the appropriate court of appeals designated to handle the appeal of the order and to the State's attorney.~~ Also upon the filing of a motion for additional time, the trial court clerk must immediately (as they are filed or entered in the record) forward copies of the trial judge's written order under subsection (c), the order the defendant seeks to appeal, and any exhibits and related documents to the defendant and the attorney representing the defendant.

Chief Justice Gray stated that the rule needs to provide somewhere that the defendant who proves that he did not get timely notice still needs to file his notice of appeal within 30 days of getting notice. Ms. Schneider pointed to the language in subsection (a) that provides that the ordinary appellate time period begins to run when the defendant receives notice. The committee discussed adding a sentence in Rule 4.6(a) that would emphasize that the defendant needs to file a notice of appeal. Chief Justice Gray said that litigants commonly receive additional time on their Rule 4.2 motions and then fail to timely file their notices of appeal.

Ms. Schneider pointed out that proposed Rule 4.6's comment contemplates that the motion for additional time itself can serve as the defendant's notice of appeal. Ms. Taylor said that, based on discussion in the committee today, it seems that considering the motion for additional time as the notice of appeal will not work for clerks and courts of appeals because they view the notice of appeal itself as the initiation of the case in the appellate system. Judge Newell asked if we will need to omit the sentence in the proposed Rule 4.6 comment that reads, "If a trial judge grants a defendant's motion for additional time filed under this rule, the court of appeals may treat the defendant's late-filed notice of appeal as timely or treat the motion for additional time itself as a sufficient notice of appeal for the purpose of determining compliance with Rules 25.2 and 26.2."

Mr. Gross remarked that the above-proposed change is inconsistent with part (b) of the rule. His understanding was that the intent of the rule was to make the motion for additional time itself satisfy the requirements of a notice of appeal by specifying in 4.6 (b) that the motion must "state the defendant's desire to appeal." He does not think that it is fair to put another requirement on the defendant to file a separate notice of appeal. Judge Newell pointed out that what has happened a few times is that the defendant has filed a notice of appeal but he has filed it late. Ms. McKinney observed that the clerk's office may have trouble with trying to interpret what the defendant's motion really does and whether it satisfies the requirements of a notice of appeal. The clerks do not read the motions. Mr. Varela said that the rules concerning notices of appeal are not very strict. Anything that is in writing and states the defendant's desire to appeal will qualify as a

notice of appeal. The committee discussed competing ideas about requiring the attachment of a notice of appeal to the motion for additional time, requiring the notice of appeal to be filed separate from the motion for additional time, or treating the motion for additional time as the notice of appeal. The committee reached a preliminary consensus to add a new subsection (e) requiring the defendant to file a separate notice of appeal. However, Mr. Gross warned that an incarcerated defendant, such as a defendant in lock-down, might not get notice of the ruling on the motion for additional time, which would cause more trouble. Chief Justice Gray advocated for clarity by labeling the document as a "notice of appeal," but said he also understands the concern that the defendant may not be able to file the notice of appeal within 30 days because he may not receive notice that his motion for additional time has been granted.

Judge Newell proposed that we talk about two options: (1) whether we should treat the motion for additional time as a notice of appeal; and (2) whether we should require a separate notice of appeal in a separate subsection. Mr. Gross favored incorporating the language into Rule 4.6(b) and treating the motion for additional time as the notice of appeal. Judge Moore proposed that, if the motion is granted, the trial court could generate a document that says at the top: "notice of appeal." Mr. Prine said that they could consider the motion for additional time as a notice of appeal if it is forwarded to them by the district court and if the rule provides for that. Ms. McKinney asked, since we will know why the defendant is filing a motion for additional time, i.e., the desire to file an appeal, why not acknowledge that fact? She said that attaching the notice of appeal to the motion would not work due to the way the clerk's offices process attachments. She said that we should probably just treat the motion for additional time as a notice of appeal.

Judge Newell asked committee members to please assume that the Court will be requiring a separate notice of appeal and think about whether the requirement should be included in Rule 4.6(b) or 4.6(e). Ms. Schilhab stated that, if we are considering the motion to be the notice of appeal, we should include an express statement of that in subsection (b). Judge Newell again asked what the rule should look like assuming that the Court is requiring a separate notice of appeal to be filed, observing that Ms. Taylor will need to rework the rule language.

Ms. Taylor suggested that we take a vote on the options that the committee is discussing now and send the options to the Court to make a decision on what is best. She noted that the committee has discussed some version of this rule multiple times and the rule will only affect a handful of defendants in the state. She said there are several other items on our agenda that we may not get to today that affect many more defendants. She said that the CCA judges can choose their preferred language and pass a rule. If the rule does not work well, the Court can adjust it later, if needed.

Judge Newell then called for two votes. He first asked for a vote on the question of whether to treat the motion as a notice of appeal or require the appellant to file a separate notice of appeal: only three people voted to require a separate notice of appeal.

Judge Newell secondly asked for a vote—assuming that the Court chooses to require a separate notice of appeal—to indicate whether members think that the notice of appeal requirement should appear in subsection (b) or in a new subsection (e). Crafting a separate subsection (e) was the clear winner in this vote.

6. Proposed changes to TRAP Appendix E (the Article 11.07 Application for Writ of Habeas Corpus Form) to clarify language, correct clerical errors, eliminate redundancy, and add a few new items, such as email address (See Exhibit D)

Ms. Taylor explained that the proposed changes to the Article 11.07 writ application form (Appendix E to the TRAP Rules and Exhibit D of the packet) originated with CCA writs staff. The impetus for making changes stemmed from the need to update some items on the form, such as adding a blank for the email address. She said that, when staff started looking closely at the form, they found other things that needed to be corrected and clarified. Judge Newell said that this is the first time that we have looked at this agenda item and we may not be able to get into too much detail today. He asked whether the members had any criticisms of the proposed changes. Ms. McKinney said she wants number 4 of the instructions page (page 40 of packet) to reflect correct grammar and suggested changing "You must make a separate application on a separate form for each case number you seek relief from" to "You must make a separate application on a separate form for each case number from which you seek relief."

Ms. Williamson asked why Number 10 of the instructions does not mandate that the CCA be notified about an address change. Ms. Schilhab explained that this information will be kept by the district clerk and then forwarded with all the other case materials to the CCA. Ms. Schneider observed that, if the applicant's address changes after the writ is filed, he must notify the district clerk. Ms. Schilhab said that any rules amendment requiring the clerk to update the CCA on such changes need not be included in the instructions for the writ application.

Mr. Wolff asked whether it would be useful to include definitions in the instructions to help the pro se applicants understand the language used. For example, the definitions could explain what it means to discharge a sentence. Ms. Taylor explained that there are some definitions/explanations of the terms on page 57, but just with regard to the verification process.

Mr. Varela suggested that the inmate declaration in the writ application form (on page 58 of the exhibit packet) needs to be updated to comply with the current version of the statute governing unsworn declarations (Chapter 132, Civil Practice and Remedies Code).[19] Ms. Taylor made a note to update the inmate declaration section to comply with the statute.

Chief Justice Gray discussed an ongoing problem. He said that, even if there are multiple counts/convictions, in some counties there will be only one judgment and cause number. But this practice is not consistent across the state. He said that there may need to be a way—other than by the cause number—for the applicant to identify problems with multiple convictions which may fall under the same cause number. Ms. Taylor stated that the CCA assigns a single writ number for

[19] *See* TEX. CIV. PRAC. & REM. CODE § 132.001(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.")

each cause number, even if there are multiple counts under that cause number. Therefore, applicants must include all claims related to that cause number on the same writ application form. The problem staff has encountered is that applicants are trying to challenge multiple cause numbers in one writ application. For the CCA's bookkeeping purposes, the Court needs an applicant to file a different application for each cause number, even if they were tried together. Applicants' applications can be struck if they do not comply with this rule. However, the application form allocates two pages to describe each claim of error. Mr. Varela asked, in the scenario where the defendant has been found guilty on all counts in a multi-count indictment, how does anyone determine which charge he is complaining about on the application form? Judge Moore said that the applicants must describe each of the claims that they have and he usually can pretty easily determine the conviction about which they are complaining. Judge Moore also said that sometimes you have no clue what they are complaining about because it is so unclear. He said the staff attorneys in Bexar County and at the CCA are able to read the applications very closely and make these determinations.

Chief Justice Gray pointed out that question number 2 (on page 41 of the exhibits packet) asks the applicant which district court entered the judgment of conviction, but the district judge does not enter the judgment. The judge signs the judgment and the clerk enters it. The committee discussed which language to use here. Members agreed that the form should ask which district court *signed* the judgment. Ms. McKinney critiqued the grammar used. The committee agreed to change the question as follows: "What district court signed the judgment of the conviction from which you want relief?"

Chief Justice Gray asked why we need to know the name of the district judge (question 4 on the form). Judge Moore pointed out that they have visiting judges. Ms. Williamson said that this information is helpful when CCA judges need to scan the docket for case recusal purposes.

In response to further grammar correction suggestions, Judge Newell said that we need to move quickly through this agenda item so we should focus on the big picture and not spend too much time on grammar issues in this meeting.

Chief Justice Gray said that we should add a definition of "discharged" on or near question number 12 on page 43, which asks whether the applicant's sentence has been discharged. The committee discussed whether we should use the term "completed." Mr. Rolater said that he worked on writs for several years and the inmates seemed pretty well versed in this type of terminology. Judge Newell suggested that we could add a glossary later if we learn that certain terms are causing confusion.

Ms. Taylor discussed the proposed changes on page 45 of the packet (Exhibit D, page 5). These are the instructions for the section in which the applicant must state the specific legal grounds. The new sentence at the bottom reads, "Also, if you fail to set forth all of your grounds for relief in this petition, you may be barred from presenting additional grounds at a later date." This sentence is similar to the language used on the federal form. It warns applicants that this writ application is their one "bite at the apple." Ms. Johnson-Liu asked whether we should add a citation to Code of Criminal Procedure Article 11.07 Section 4. Ms. Taylor said that staff discussed that and decided

to avoid code citations if possible because it adds a layer of complexity. She acknowledged that the committee may have a different view. Mr. Varela noted that code sections could change. Judge Newell said he had wondered whether we should cite the code provision but thought, if we start down that road, we will need to add other citations. Mr. Rolater said he would omit "also" in this sentence and use all-caps or enlarge the font for emphasis. He also suggested repeating this statement in the instructions as number 11. Judge Newell suggested including a citation to Article 11.07 Sec. 4 on the instructions page, but not later in the packet. The committee discussed whether to put the warning at the beginning or end of the paragraph in item number 17 (on page 45 of the exhibits packet). The committee ultimately reached a consensus to keep it at the end of this section, which is consistent with the federal form. Members opted against using all caps for emphasis because it is hard to read and favored enlarging the font size instead, noting that the whole section is already bolded on the form.

Ms. Taylor discussed another problem with the form. In the rule book, the form is not printed in the same format as it is here. The publisher has compressed the form to take up fewer pages. If inmates copy the version of the form from the rule book, their applications will be noncompliant. When the amended form is published next time, we hope to arrange for it to be printed in the correct format. Ms. McKinney said that her office and other clerks can put the CCA's form on their websites or can provide a link on their websites to the form on the CCA website.

Ms. Taylor explained that the bold font was proposed on the first instruction on the first page of the form for the phrase "including attorneys" to emphasize that attorneys must use the form. She explained that the purpose of the proposed changes to the verification instructions in the application (on page 57 of the exhibits packet) is to more clearly explain who the "applicant" is, the different types of "petitioners" (i.e., attorneys, non-inmate, and inmate petitioners), and what each of these filers need to do to verify the application. Mr. Wolff pointed out that Civil Practice and Remedies Code Sec. 132.001 provides that an unsworn declaration can be used in lieu of a notarized verification. He wondered whether we should insert a reference to this provision or change the text to permit the use of an unsworn declaration by a petitioner. Ms. Williamson noted that the CCA gets calls about that issue all the time.

Ms. McKinney remarked that the language in the verification instructions referring to petitioners vs. applicants is confusing. She referred to language such as, "An applicant is a person filing the application on his or her own behalf. A petitioner, for example, an applicant's attorney, is a person filing the application on behalf of another person (the applicant)." She asked why the applicant needs to circle applicant or petitioner on the signature line if the reviewing court can determine who they are. She suggested that a list of definitions would be clearer. Judge Newell thought the proposed language was clear. Ms. Taylor suggested that we need to re-evaluate this whole section to ensure compliance with the Civil Practice and Remedies Code and we can try to clarify the terminology during the drafting process. Mr. Prine suggested breaking out the verification process for each type of filer (e.g., applicants, non-attorney petitioners, and attorney petitioners).

7. Proposed amendment to TRAP 73.4 to implement a requirement in habeas cases to forward filings to applicants' attorneys (See Exhibits E & E.1)

Ms. Taylor next discussed the proposed changes to TRAP Rule 73.4(b)(2) submitted by Gary Udashen and Brett Ordiway (see Exhibit E). The purpose of the proposed amendment is to address the problem that applicants and their attorneys are not receiving notice of court filings in writ cases. Mr. Udashen and Mr. Ordiway proposed the following (underlined) additions to Rule 73.4(b)(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 and, if represented, their counsel. A party has ten days from the date he receives the trial court's findings of fact 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. Upon transmission of the record, the district clerk shall immediately send a copy to all parties in the case and, if represented, their counsel.

CCA writs staff members discussed the proposed changes and offered an alternative proposal (see Exhibit E.1). The staff suggested simply adding a sentence requiring that the district clerk immediately notify all the parties in the case upon transmission of the record: "Upon transmission of the record, the district clerk shall immediately notify all parties in the case." The rule already requires the district clerk to immediately send a copy of all pleadings, objections, motions, affidavits, findings of fact, and orders to "all parties in the case." Staff suggested adding language to the rule comment to emphasize that the term "all parties in the case" includes the applicants and their attorneys: "The phrase 'all parties in the case' as used in Rule 73.4 includes the State's attorney, the applicant (including pro se and inmate applicants), and, if the applicant is represented by counsel, applicant's attorney." Ms. Taylor sent the alternative proposed language to Mr. Udashen and he replied this week. He stated that "the proposed alternate amendment to our proposal looks fine and we think either version will be helpful at solving this problem." He also said that clerks are continuing to fail to send lawyers and applicants documents filed in writ cases.

Mr. Wolff said that they have encountered the same problem. He says he loves the proposed revision. Ms. Williamson said that this is not just a problem for attorneys. The CCA receives letters from inmates who have not received the required notice. Ms. McKinney asked whether this requirement applies to anything filed in an appeal after the clerk has sent the appeal up to the CCA. She asked whether the person filing the documents has an obligation to serve the other parties. Ms. Schilhab noted that many times the issue is with the judge's findings and the clerk is serving the parties on behalf of the judge. Members clarified that the rule applies only to filings in post-conviction writs, not direct appeals.

Chief Justice Gray asked if petitioners who are non-attorneys should receive this notice as well. Other committee members stated that the rule should provide some mechanism for non-attorney petitioners to receive copies of filings and the required notice. Ms. Schilhab indicated that the term "State's attorney" should be replaced with "attorney representing the State" as we discussed with regard to Rule 4.6.

Ms. Johnson-Liu asked if we should use the wording from Rule 4.6 "as they are filed or entered in

the record" to indicate that items should be sent as they are filed. Members pointed out that the first part of the rule already requires that pleadings, affidavits, and findings of fact be sent "immediately" to the parties as they are filed. Members discussed the fact that the proposed addition to the second part of the rule entails a second duty for the clerk. Ms. Taylor read from Mr. Udashen's email discussing his concerns about clerks not sending documents to the parties or their attorneys and not notifying the parties that the record has been sent to the CCA. She noted that an applicant might want to file objections to the trial court's findings but cannot do so in a timely manner if he does not know that the trial judge has signed findings.

Judge Newell stated that it is time to adjourn. He announced that the next meeting will be held on May 18 at 9:00 a.m. The committee adjourned at 12:29 p.m.