EXHIBIT A: Minutes

TO: **Judge David Newell**

FROM: **Holly Taylor**

RE: **Minutes of the August 24, 2018 Court of Criminal Appeals Rules Advisory Committee Meeting**

DATE: **Prepared October 2, 2018**

MEMBERS IN ATTENDANCE: Judge David Newell (Chair), Judge Barbara Hervey, Judge Kevin Yeary, Chief Justice Tom Gray, Judge Jefferson Moore, Professor Steve Goode, Emily Johnson- Liu, Donna Kay McKinney, Chris Prine, Sian Schilhab, Kathy Schneider, Holly Taylor, Joseph W. Varela, Deana Williamson, and Ben Wolff. Nonmember: Michael Stauffacher, Bexar County District Clerk staff.

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1. Welcome

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

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

The members reviewed the minutes from the May meeting. Chief Justice Gray "formally complained" that he reached page ten of the minutes before finding an error to mark and found errors only on page ten. He moved to approve the minutes. Mr. Varela asked about a point in the minutes where Judge Newell used the word "meta" and asked if the word was actually "beta." Judge Newell confirmed that he did say "meta." Judge Newell asked if there were any objections to approving the minutes. No members expressed objections.

3. Update on the CCA orders related to matters discussed at the last meeting and minor proposed changes (See Exhibits A.1, A.1.1, A.1.2, A.2, A.3, A.3.1)

Ms. Taylor discussed Exhibit A.1, which is an order signed by the CCA proposing amendments to Texas Rule of Appellate Procedure (TRAP) Appendix D discussed at our last CCA rules committee meeting (Misc. Docket No. 18-014). After the CCA signed the order, we discovered that some of the rule text within the order (not text being amended) which was taken from the Office of Court Administration (OCA) website's version of the Rules of Appellate Procedure, did not contain an amendment that the Court had passed back in 2011. Specifically, Ms. Taylor suggests correcting the text to state that a petition for discretionary review is filed in the Court of Criminal Appeals and to cite to TRAP 68.3.

Ms. Williamson remarked that Mr. Jeff Kyle, Clerk of the Third Court of Appeals, said that his court requires this form for any appeal that is filed, even if it is not appealable. He thought that a line could be added to the form to reflect when it is not an appealable case. Mr. Kyle said that he would talk to the Third Court justices about it but he has not contacted Ms. Williamson about the matter since then. Mr. Prine said that his courts require the form in every case. If the case is not appealable, they will send it back to the trial court and the judge will just write on the form that it was not appealable. Judge Newell said that he thinks that this is something that we talked about at the last meeting. Chief Justice Gray said that, if his court doesn't receive the form, they just dismiss the case. Chief Justice Gray moved that we approve the changes to this provision and recommend that the Court pass the rule amendment. The committee voted in favor of this motion via a voice vote. Judge Newell said we could look at the matter again if Mr. Kyle contacts Ms. Williamson about it.

Ms. Taylor next discussed Exhibit A.2, which is Misc. Docket 18-013, proposing amendments to TRAP 31.1 & 31.2. Ms. Taylor said that she inadvertently created a typo in this order ("that that" on page 28 of the packets) and it needs to be corrected. The Texas Bar Journal editor spotted the problem. Ms. Taylor did not receive any other comments on this rule. However, the Texas Bar Journal does not have an August issue so the comment period will not end until sometime in October. She said that, if the committee recommends the adoption of the (corrected) rule amendment today, then, if we receive no comments, the committee will not have to consider the matter again. Chief Justice Gray moved that we approve the language as corrected. Ms. McKinney seconded his motion. No committee member expressed any opposition to the motion.

Ms. Taylor next discussed Exhibit A.3, which is Misc. Docket 18-015. It was signed by the Court on June 18, 2018. Ms. Schilhab noticed that the heading of the form should mention Article 11.071 because this clerk's summary sheet must be used for both Article 11.07 and Article 11.071 writs. Chief Justice Gray asked about the term "trial date" and asked whether the term is precise enough. He asked whether the trial date is when evidence is first presented, when voir dire commences, or when jeopardy attaches. Judge Newell asked what the committee members thought about this question. Ms. McKinney said that she assumed that the trial date is the day was when the sentence was handed down or the date of the jury verdict. Ms. Schilhab said that this item is not one that is usually filled out incorrectly. Judge Moore noted that he keeps a log of each trial. On the form, he lists the day that jury is selected, then a dash, then the date of the conviction/sentence. Judge Newell asked what the information on the form is supposed to accomplish. Sian said that the specific day is not as important as the year and the Court can usually determine the judgment date. A different year might mean different law governing the claim. Mr. Varela said that sometimes the judgment does not occur on the same day as the jury verdict. Ms. Taylor noted that the Code of Criminal Procedure requires the judgment to be entered immediately.

Judge Newell refined his question to ask whether someone would lose rights if the trial date listed on the form is off by a few days. Committee members generally agreed that that level of precision is not critical. Judge Newell said that we generally need to be accurate as to the year. Ms. Schilhab agreed and said maybe to the month in some situations. Mr. Wolff observed that this is just a cover sheet and the Court can look at the briefs and the record to clear up any confusion. This form is just for bookkeeping.

Chief Justice Gray moved that—subject to the public comment period—the committee recommend that the Court adopt this rule as corrected. The motion was seconded and the committee approved it with a voice vote.

4. Update on order proposing TRAP 4.6; comments submitted by Professor Goode (See Exhibits A.4, A.4.1)

Judge Newell moved on to discuss Exhibit A.4 (Misc. Docket 18-010 proposing TRAP 4.6) and A.3.1 (Professor Goode's proposed amendments to TRAP 4.6). Judge Newell said that he first volunteered to work with this committee in order to work on the passage of this rule. Ms. Schneider asked how long the committee has been working on this proposed rule. Ms. Taylor suggested that it had been three years. Judge Newell said that he is excited that it is finally going to happen. Ms. Taylor noted that the public comment on this proposed rule is over. However, we did receive extensive public comments—which were very helpful suggestions—from Professor Goode. Professor Goode provided three alternate versions of proposed Rule 4.6. Professor Goode initially noted that, in the second line of Rule 4.6(a), "acquire" should be "acquired." And, on page 40 and 41 in both versions of subsection (d), "the trial judges written order" should be "the trial judge's written order." Ms. Taylor discussed Professor Goode's three proposals for changes. Judge Newell said that Professor Goode's suggestion of adding the word "neither" and other words in the first sentence on page 37—"If neither an adversely affected defendant nor the defendant's attorney ~~did not~~ received notice or acquired actual knowledge of the signing of an order appealable under Code of Criminal Procedure Chapter 64…" –was a substantive change. He said that this proposed change might do a better job of saying what the provision was supposed to say. No one expressed disagreement.

Professor Goode said that he noticed that a "motion" is first mentioned in the middle of subsection (b). For this reason, he moved the part about making a motion to the front of subsection (b). In version 2, he separated out the various parts of (b) into subparts. Other committee members thought that was a good idea. Judge Moore said this would make the rule easier to follow on the record. Professor Goode suggested that this sentence from subsection (b)(2) be separated out to a new (b)(3): "If the defendant's motion ~~for additional time~~ meets these ~~above~~ requirements, the motion may serve as the defendant's notice of appeal." Ms. Taylor agreed with these changes.

Professor Goode commented about the requirement that the motion be sworn : "What about unsworn declarations under TEX. CIV. PRAC. & REM. CODE Chap. 132?" Ms. Taylor responded that we were modeling the criminal rule on civil rules, including TRAP 4.2 and TRCP 306a. She said that these civil rules also require the motion to be sworn. However, applicable case law permits parties to use an unsworn declaration in lieu of a sworn statement under TEX. CIV. PRAC. & REM. CODE Sec. 132.001. She said that the question is whether we would like our criminal rule to go a step farther than the civil rules and expressly provide that an unsworn declaration will suffice. She said this language seemed somewhat cumbersome to implement. Judge Newell stated that, because we are modeling the criminal rule on the civil rule, we could rely on the civil case law that allows an unsworn declaration in lieu of a sworn statement. Professor Goode said that, if the rule we are modeling our rule on was drafted before the Civil Practice and Remedies Code chapter was passed,

why should we continue the archaic phrasing after the effective date of the Civil Practice and Remedies Code provision?

Chief Justice Gray said that the statute defines an unsworn declaration as a substitute for a sworn requirement. He says this is exactly why the statute was written the way it was—any time that the word "sworn" is used, an unsworn declaration will suffice. He thinks that "sworn" says what we need it say and the inmate is going to know that he can use an unsworn declaration. Judge Newell agreed with Chief Justice Gray that inmates would know what to do. Judge Hervey expressed doubt. Judge Moore suggested that we could just refer to the Code. Professor Goode suggested looking at the language in the Article 11.07 form. Ms. Schneider said that the form is a bit wordy. Professor Goode said he does not feel strongly about this. Judge Newell said that, if this becomes a problem with the rule, then we can fix it later. He asked for the general consensus. Professor Goode said that, in the rules of evidence for self-authenticating affidavits, they added a note about the unsworn declaration in the comments section. Committee members said they liked this idea. Professor Goode suggested that Ms. Taylor look at the 2014 comment under Rule of Evidence 902.

Ms. Taylor mentioned that Rule 4.6 requires that the movant comply with TRAP Rule 10.5(b)(2) but that requirement does not appear in the civil rules upon which the rule is modeled, such as TRAP Rule 4.2. She said that Rule 10.5(b)(2) requires that a motion to extend time for briefs must comply with Rule 10.5(b)(1)(A) and (1)(C). The rule requires the movant to identify the trial court, state the date of the trial court's appealable order, state the case number, and state the style of the case in the trial court. She thinks that the Rule 10.5(b)(2) compliance requirement may unnecessarily complicate what could be a very simple motion. Judge Newell asked what Ms. Taylor is proposing to omit. Ms. Taylor clarified that she is proposing to omit the following from the top line of page 40 of the packets: ", and comply with Rule 10.5(b)(2)." She said that this proposed change would not affect the previous decision to break the rule content into subparts. Other committee members pointed out that the "and" in the sentence would need to be moved.

Ms. Johnson-Liu said that, if this rule is to be used by pro se defendants, it could be helpful to ask them to provide the kind of information in Rule 10.5(b)(2) (i.e., "what is it that you are trying to appeal from?"). Ms. Schneider said that, because this rule only applies to the DNA statute, we will not need all of that detail. Mr. Varela said that we should try to envision what this motion should look like and work backwards. Ms. Schneider said that the versions of this motion we have already received are very easy to understand. The defendant just explains what happened and it is simple for the staff attorney to figure out what happened. Judge Moore asked if we are adding anything to this proposed rule that would add more complexity to that basic motion. Ms. Schneider responded that she did not think so.

Chief Justice Gray said, as a practical matter, they are filing a motion "with us" and they have to comply with Rule 10.5 anyway. He noted that he did not know what was contained in TRCP 306a, which is another basis for this new rule. He said that the only question is whether we want to point them to the rule. Judge Newell said that the reference to Rule 10.5 could add another level of confusion. Chief Justice Gray said that this is a requirement that anyone doing a motion should know. The committee members discussed to what degree the movants can be expected to know what rules apply to them. Ms. Taylor stated that, though these movants may have to comply with

the general rules governing all motions, Rule 10.5 specifically applies to motions to extend time. She said that she did not think that these Chapter 64 movants would need to comply with that rule unless we require them to do so. Ms. Johnson-Liu asked if the movants are filing in the trial court. Other committee members answered "yes." She asked why Rule 10 would apply to them at all if they are filing in the trial court, not an appellate court. Ms. Taylor said she did not know that it would apply. She said that we modeled the motion in part on TRCP 306a, which applies when a person does not receive notice of the signing of an appealable judgment or order. That is what has happened to these movants.

Judge Newell asked whether this reference to Rule 10.5 is something that has been around since the previous draft in which the motion had to be filed in the appellate court. Ms. Taylor said that she could not remember when this language was added, but that it was possible that it was a vestige of that earlier draft. Judge Newell said that, given that the motion will be filed in the trial court, we could probably omit this language. He asked for the committee's opinion. Judge Moore said that no trial court judge is going to pick up the TRAP Rules and look up this rule before ruling on this motion. Judge Moore said that trial judges will give people the benefit of the doubt when reviewing their motions. If the judge can figure out what the pro se movant is asking for, the judge will generally rule on the motion. Ms. Taylor said that the trial judge just needs to determine whether the defendant received timely notice of the appealable ruling. Professor Goode said that we should just figure out if there is any requirement in Rule 10.5 that we think ought to be in Rule 4.6. If so, we should write that particular requirement into Rule 4.6. Judge Newell asked what we originally wanted to include from Rule 10.5. Chief Justice Gray said that he liked the idea that, when this part was originally drafted, it was intended to inform the appellate court and it does not make sense in the context of a motion filed in the trial court.

Judge Yeary suggested that Ms. Taylor make a motion to strike the language under discussion from Rule 4.6. Ms. Taylor then moved that the committee strike from proposed Rule 4.6 the language: ", and comply with Rule 10.5(b)(2)". Chief Justice Gray asked to bring a "friendly amendment" adding the divisions to Rule 4.6 that Professor Goode has recommended. Ms. Taylor agreed to include this addition in her motion before the committee Professor Goode's proposed division of Rule 4.6 into subparts, moving the "and," and adding a comment about Chapter 132 of the Civil Practice and Remedies Code. Her motion was seconded and approved by a unanimous voice vote.

The committee moved on to discuss Rule 4.6(d) and then Judge Yeary pointed out that we skipped subsection (c). The only change proposed to subsection (c) was to omit the word "first" in the sentence, "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~~ received notice or acquired actual knowledge that the trial judge signed the appealable order." No one objected to omitting the word "first."

Judge Newell asked what the difference was between versions 1 and 2 of subsection (d). Professor Good indicated that version 2 basically does the same thing as version 1 with about half the number of words. Ms. Johnson-Liu said that she understood subsection (d) to serve two different purposes. One of those purposes is to require the clerk to serve the State immediately with the

motion so that the State's attorney knows that the motion has been filed and has time to respond. This effectively takes the place of a service requirement for pro se movants. She expressed concern about version 2 of subsection (d) because it omits the duty for the clerk to send the motion and materials "(as they are filed or entered in the record)." She expressed concern that clerks might think that they can wait until everything is done to send the materials to the State. Ms. McKinney said that she thinks that clerks serve the State and the defendant immediately. Mr. Prine said that he understands Ms. Johnson-Liu's concern. Ms. Taylor said that she thought that we discussed this issue before and she thinks that is why we included the language, "(as they are filed or entered in the record)."

Judge Newell asked if we could add the phrase "(as they are filed or entered in the record)" back into the rule and still keep the rule streamlined. He said he liked the idea of keeping the rule more succinct. Judge Hervey noted that Ms. McKinney said that the clerks know what to do. Ms. McKinney said that she could not speak for all 466 clerks. Judge Yeary pointed out that version 2 of subsection (d) has the word "immediately" in it. Ms. Taylor asked if it is common sense that a clerk need not serve the State's response on the State. Ms. McKinney responded: "yes." Ms. Schneider said that she thought that we should keep the word immediately and the parenthetical. Judge Hervey asked how much time the State has to respond to the defendant's motion. The committee discussed the fact that the rule does not specify a time frame. Judge Newell said that this is a rule designed to address the situation where the defendant did not get timely notice of the trial court's ruling. He said that the question of what needs to be done if the State is not given an adequate amount of time to respond to the defendant's motion may be something that must be dealt with in a separate avenue. Judge Moore said that the State can file a boilerplate response disputing the assertions. And he noted that the State will be present at the hearing on the motion and will get a chance to respond at that time. The committee voted via a unanimous voice vote to proceed with version 2 of subsection (d), but to add back in "(as they are filed or entered in the record)" and to correct "judges" to "judge's."

The committee discussed whether to recommend that the CCA adopt this as the final rule or to do another proposed rule for public comment because the changes are substantial. Chief Justice Gray said that he did not think that the Court needed to do another formal comment period and he does not want to see this rule again. Judge Newell said that the CCA's procedure is a little different from the SCOT because the CCA passes a proposed rule that will only become effective upon a subsequent final order. He said it is an open question that the Court will have to address whether this rule as modified is seen as the end result of a comment period or whether we should start another comment period. Judge Newell asked whether any committee members objected to recommending that the CCA adopt this as a final order and work with the SCOT to make it a new rule. No one expressed any opposition.

[The committee took a short break].

5. Proposed amendments to the Article 11.07 Application for Writ of Habeas Corpus Form updated based on discussion at last meeting (See Exhibits B, B.1)

Judge Newell said that the committee has talked about the changes to the writ application form

before and we decided to bring the changes back to the committee for a final review. Ms. Taylor explained that Exhibit B.1 is a clean copy of the application form with the proposed amendments. Exhibit B is the application form with the proposed amendments marked/redlined. The mark-ups in Exhibit B refer to the existing form, not the version of the form that we last discussed. Ms. Taylor also circulated a copy of the existing language used in the introductory instructions and verification instructions sections of the form. Judge Newell said he liked the idea of looking at the clean form. Mr. Varela asked about the instruction: "Improper formatting may cause your entire application to be dismissed as non-compliant." He said that he does not know what "improper formatting" means. Other members agreed and thought that it could include font size or margins. Members suggested changing the wording to something like "failing to follow these instructions may cause your application to be dismissed as noncompliant." Other members said that this sentence might make more sense in instruction three.[1] Ms. McKinney suggested that this would be redundant with the existing text of number three and suggested omitting the sentence about improper formatting. Other members agreed.

Ms. Schneider asked why we are stating in instruction one that "All applicants and petitioners, including attorneys, must use the complete form." She asked whether this is necessary given that we have now included a definition of the term "petitioner" that includes attorneys. Ms. Taylor responded that the CCA writs staff had requested that this point be emphasized in bold.

Judge Newell pointed out that we might want to include some version of the sentence about improper formatting for the same reason—to emphasize the point. Ms. Williamson suggested expanding the content of instruction three to emphasize this point. Judge Hervey said that there are so many things that the applicant has to do. If we were to attempt to list everything, it would be too wordy. She said that the warning in instruction two is basic and clear.

Mr. Wolff suggested rephrasing instructions three, four and five to direct the applicants concerning what they should and should not do. For example, he suggested the wording: "Do not omit any pages from the form. Do not renumber any questions on the form." Judge Newell said that he thought that this was a good idea. Other members agreed.

Ms. Schneider suggested a slight change to the wording of some of the instructions to make them more affirmative. Chief Justice Gray said that he sympathized with Ms. Schneider's observation. Chief Justice Gray said that he had edited the form to remove references to "you" and "applicant." He said that we should say at the beginning that the term "applicant" in this form will mean "applicant or petitioner." He said that the term "you" could mean the applicant or the petitioner but, by definition, it is the person completing the application. Ms. Schilhab cautioned that our target audience is the inmates and that sort of language could confuse them. Judge Newell said that there is a danger of going too far from the existing form. He asked how different the proposed changes are from the form that we have now. He said he kind of likes the "you must file" because it is unambiguous. Chief Justice Gray said that that was why he wanted to make the change in a

[1] Instruction three under discussion provided: "You must file the entire ~~writ~~ application form, including those sections that do not apply to you. If any pages are missing from the form, or if the questions have been renumbered or omitted, your entire application may be dismissed as non-compliant."

single place to explain what the term "you" means. Ms. Schilhab asked what would happen if the person completing the application (the petitioner) is another inmate but the inmate-applicant signs the application? Chief Justice Gray said that he does not practice in this area. He said he was "reading it cold as a person with legal training." He said that, if the form works the way it is, then "so be it."

Mr. Varela said that we need to make the application simple so the inmate applicant can understand it. Ms. Taylor pointed to the existing language which is phrased in terms of "you must do this." She said that this aspect of the application is not one of the parts that we viewed as "broken." Chief Justice Gray asked why we are looking at the application at all. Ms. Taylor stated that we began the process of revising the application because the verification section of the form did not comply with the Civil Practice and Remedies Code. Also, we needed to add a line for email address and some other items that are statutorily required. Judge Newell wondered if there was a way to say, "'you' means you." Ms. Taylor asked whether, by adding the definitions at the beginning of the form, we have "muddied the waters" and clarification is needed.

Mr. Varela said he likes having the definitions at the beginning of the form. Judge Newell wondered if the inmates will just ignore the definitions and follow the instructions. He said that the definitions may be more helpful to the lawyers. Judge Moore wondered if we should add an instruction that "you must first determine whether you are an applicant or a petitioner." Ms. Taylor said that most of the uses of "you" apply to both applicants and petitioners. "You" means whoever is filling out the form.

Judge Yeary expressed support for the definitions section and suggested that we find a way to say, no matter who you are, you have to fill out all the of the form. Ms. Schneider asked where the verification problems originate—with attorneys or with inmates. A few committee members said "inmates." Ms. Williamson said that most of the questions that the clerk's office receives are from non-attorney petitioners. They do not know where to sign.

Ms. Taylor noted that Mike Stauffacher had entered the room and he is head of the CCA's writs staff. Judge Newell said that most of what we have talked about so far is possibly adding to the first item something like "'you' means you." We have also discussed changing the last sentence of instruction two to "a failure to follow these instructions may cause your entire application to be dismissed."

Mr. Stauffacher said that this form's purpose is to make sure that folks who are not knowledgeable about the law can get their claims down and fill it out properly. That should be our aim. It would be beneficial to bold important instructions. The main noncompliance problem is with pro se filers. The main problem that they have with lawyers is with filing the wrong writs. He said that providing more explanation would be beneficial. He talked about the history of writ applications. When the Legislature added Article 11.07 section 4, "it changed the whole game. We did not want to miss any claims." He said that the form is a great tool because it helps to make sure that the CCA does not miss any claims. Judge Newell asked if Mr. Stauffacher had any concerns about "you" meaning applicant or petitioner. Mr. Stauffacher said he did not. He did not have any problem with the definitions at the front. He said that the CCA's case law has been incorporated

into the form. He said that the changes have made it clearer. He said that we could move the definitions to right before the verification section. He did not have a strong opinion about the location but he thought that the definitions make the form clearer. He said that usually a petitioner is a lawyer, but sometimes it is an applicant's mother.

Mr. Varela asked what mistakes the writs staff sees. Mr. Stauffacher said the inmates do make mistakes on verification, but the inmate unsworn verification makes it very simple for them. Sometimes they will say "see attached memorandum" for the facts. But the facts and the grounds need to be on the form. Mr. Wolff asked whether failing to plead the facts on the form is an inmate problem or a lawyer problem. Mr. Stauffacher said the staff gives the claims a "liberal reading" and they take *Haynes v. Kerner* to heart.[2] He said that the application must contain some brief summary of the facts. The memorandum of law cannot allege a new ground not included on the form. Judge Moore suggested having two Article 11.07 forms—one for inmates and one for petitioners. Mr. Stauffacher responded that the only difference in the two forms would be the verification section.

Judge Newell said he was concerned about getting bogged down in our discussion. He said that what he was hearing from Mr. Stauffacher was that these new instructions have not strayed too far from what we have now. Mr. Stauffacher said Ms. Taylor had "run the changes by [him] and [he] thought that they were great." He agreed with the bolding of important language and thinks there is a good argument for moving the definitions section right above the verification section. Judge Newell said that he thought that we should make the small changes that we are talking about to the instructions section and move on to other parts of the form. No one objected.

Ms. Taylor asked if there was a consensus about moving the definitions section immediately before the verification section. Ms. McKinney said that the verification section says "unworn declaration—inmate" and "unsworn declaration—non-inmate." She said that this language ought to be clear to attorneys. Ms. Taylor pointed out that, by simplifying the verification instruction section, we were able to include the inmate unsworn declaration on the same page. Thus, if an inmate applicant stopped filling in the form at the end of that page, the inmate would have completed everything necessary for the application.

Ms. Taylor said that there were not very many changes proposed to the body of the form itself. We have added the "warden" question due to statutory language. She tweaked the grammar in some of the questions. Question three was an item that the writs staff wanted to emphasize—only one case number per writ application. She made the requested formatting changes. We had a lot of discussion at our last meeting about the term "discharged." She replaced "claim" with "ground" in many places. She went back through the recording of the last meeting many times and she said she was pretty sure that she made all the changes that the committee discussed at that meeting.

Ms. Taylor suggested the committee might want to look at item number 18 (the directions for filling out the grounds). She pointed out the following bolded sentence: "A factual summary that

[2] In *Haines v. Kerner*, the United States Supreme Court stated that it would hold a pro se complaint to less stringent standards than it would hold formal pleadings drafted by lawyers. 404 U.S. 519, 520 (1972).

merely references an attached memorandum or another ground for relief will not constitute a sufficient summary of the facts."

Professor Goode observed that, on the first line of number 18, Ms. Taylor had changed "ground" to "basis." He felt that this was inconsistent with other changes. Ms. Taylor agreed that this change was confusing and could not remember why it was favored by the committee at the last meeting. Judge Newell asked if we should change the word back to "ground." Ms. Schilhab said that, if you have one ground of ineffective assistance of counsel, you may have multiple legal bases for the ground of ineffective assistance. Ms. Schneider said that the rest of the paragraph uses the term "ground." Ms. Taylor suggested that the distinction between legal "bases" and "grounds" might be too subtle for this form. The committee reached a consensus to change the term back to "ground."

Ms. Taylor pointed out that the form uses "claim" instead of "ground" in another place—question 17 concerning the Time Credit Resolution System. She said that she thought that we left that one "claim" because that is what an allegation is called when brought to the Time Credit Resolution System. The committee expressed support for leaving this item as "claim," rather than "ground." Mr. Stauffacher said that the inmates call these "time credit claims" and the application form should be consistent about how it refers to these claims.

Chief Justice Gray suggested that we take out the word "legal" in "legal ground" in item 18. Then, after some discussion, he moved to strike his own comment. Ms. Schilhab agreed that we should take out the word "legal." Ms. Schneider asked if this form applies to lawyers, too? Ms. Taylor said that it does. Ms. Schneider said that we should leave the word "legal" in item 18 because the lawyers will notice if we take it out and speculate about the reason. Judge Newell said that leaving it in is not going to limit the inmates. Ms. Taylor asked whether lawyers will interpret removing the word "legal" to mean something significant. The committee voted by holding up their hands to keep "legal" in item 18 and to change "basis" to "ground."

Judge Yeary asked about the parenthetical in question number 3[3]and indicated that using the word "should" makes it sound like a suggestion. He suggested changing "should" to "may" or "must." Chief Justice Gray suggested changing it to "put only one case number." Judge Newell recommended "you may only." Professor Goode suggested "Put only one case number."

Ms. Taylor said that Mr. Stauffacher had noted that there is often confusion when applicants and even lawyer petitioners do not know what to do when they have a cause number with multiple counts. He was thinking that we could put an emphasis here that, even if the case number involves multiple counts, it should be on one form. Mr. Varela observed that this confusion is understandable because each count results in a separate judgment. Ms. Taylor said that we have a sentence about this on item 4 in the instructions.[4] We could just repeat this sentence here or refer

[3] This parenthetical 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.)".

[4] This sentence read: "If a case number has multiple counts, you must include all the counts on one application form."

back to instruction 4. Judge Newell said he thought that we should just repeat the language. Mr. Stauffacher said that the lawyers often do not read the instructions and instead call the CCA staff and ask a question. Ms. McKinney said that they call the clerk's office staff all the time. Ms. Taylor asked whether—in the parenthetical on question 3—we should include this sentence: "If a case number has multiple counts, you must include all the counts on one application form." Judge Yeary asked whether this sentence should be the second sentence in the parenthetical. Other committee members said to make it the third sentence. Judge Newell agreed that it should be the second sentence.

Chief Justice Gray observed that we have talked about case numbers, judgments, and counts. This is a problem that results in multiple appeal numbers. He said it is confusing that many judgments can result from that case number. He said that counts need to be judgments in instruction 4. He said that the question is what language the inmates will use and understand. Mr. Stauffacher said that lawyers are the ones asking these questions. The inmates "just throw in the kitchen sink." Sometimes they have the wisdom to narrow their attacks to one of the counts. Then later they can file another application against another count and it will not be procedurally barred. Chief Justice Gray said that he wanted to make sure that the filer understands that they can be barred if they do not put everything they need to on this form. Ms. Schilhab remarked that sometimes a judgment may contain more than one count. Chief Justice Gray said he had seen that too. The committee briefly discussed the effect of Article 11.07 Section 4 in cases involving multiple counts/judgments. Judge Newell said that the original form says "judgment." Ms. Taylor said that the change to "counts" was at the suggestion of writs staff. Mr. Stauffacher said that the questions are mainly from lawyers who think that they need a separate form for each judgment. Mr. Varela said that, though he does not do post-conviction work, he would assume that he needed a separate form for each judgment and each sentence. Mr. Stauffacher said that you would still be compliant if you did that, but this solution is more efficient. Professor Goode suggested the language: "Put only one case number here, even if it includes multiple counts. But you must make a separate application on a separate form for other case numbers." Judge Newell said he liked that suggestion. Judge Hervey asked if we should say in instruction 4 that you must include all counts. Chief Justice Gray remarked that, apparently, you do not have to include all counts. He said that he was ready to move on to Exhibit C. Judge Newell observed that, though we used to say "judgments," writs staff wanted to change it to "counts." Judges Hervey and Newell observed that, if the change causes further confusion, more questions will go to Mr. Stauffacher.

Judge Moore said that they had just completed a trial where the defendant was charged with four offenses (and four cause numbers) stemming from a drink driving accident in which two people were killed and two were injured. Judge Moore called all four cause numbers for the trial. If there is any complaint about the trial, it would need to include all four cause numbers. He asked if all four could be included on the same form. Ms. Taylor said that her understanding is that the defendant would need to do four separate writ applications. Ms. Schilhab said that the person could fill out one form and make photocopies of it and put a different cause number on each copy. Mr. Wolff said that they see this on capital murder cases where the defendant is convicted of a noncapital offense at the same time. The death penalty murder appeal proceeds in the CCA and a separate appeal proceeds in the intermediate court of appeals for the noncapital case. Mr. Stauffacher said that a similar thing happens in multi-count cases where one of the counts is

probated. The prison sentence writ application comes to the CCA, but the probated case must proceed on an Article 11.072 writ in the trial court.

Ms. Taylor noted that, upon conversion to a pdf format, the lines on the grounds pages became compressed and were no longer evenly spaced. She indicated that she would fix this problem.

Judge Yeary asked whether the unsworn declaration statute requires the person to be an inmate. Ms. Taylor responded that the statute used to require that the person be an inmate, but the statute has been amended. Mr. Varela explained that, after the amendments to Civil Practice and Remedies Code Chapter 132, there are now three ways to do an oath: (1) a traditional oath before a notary; (2) an unsworn declaration for everyone who is not an inmate; and (3) an unsworn declaration for inmates. The only exception is that an oath affecting an interest in land must still be a notarized oath. He said that, in his practice, he has moved to using unsworn declarations for business records for "mom and pop" businesses.

Judge Newell asked what the observations are about the verification section. Judge Moore suggested putting each of these verification forms on a separate page. Ms. Taylor asked that everyone please look at the unmarked version of the application form (Exhibit B.1). She directed committee members to page 79 of the exhibits packet. Judge Moore said, on page 80 of the packet, he thought that we should put a page break in between the unsworn declaration for non-inmates and the oath before a notary public. He speculated that petitioners might erroneously think that they had to do both. Other members expressed agreement. Ms. Taylor noted that the last page (p. 81 of the packet) contains both the petitioner's information and petitioner's statement. Because a petitioner needs to fill out both of those sections, she did not think that we should put a page break between these sections, though we should put a page break between this page and the oath before a notary public.

The committee discussed whether to include a special instruction before the notary oath and whether to add an additional instruction stating that the person does not have to sign the oath. Ms. Taylor observed that we are introducing the entire verification section with the statement, "This application form must be verified in one of the following ways." She said that we could reposition this statement or bold it. Judge Newell thought that it should be bolded.

Judge Yeary asked whether the inmate and non-inmate unsworn declarations are identical. The committee members discussed the differences between these two forms. Judge Moore suggested that we break the paragraph under the heading, "Applicants," into numbered choices separated by "or" so that the applicant is told that he must choose verification method (1) or (2) or (3). Judge Moore said that the sentence is too long and needs to be divided. Judge Newell and Ms. Taylor expressed approval of the suggestion. Ms. Taylor asked whether we should make the same change for the "Petitioners" section. Ms. Williamson asked whether we would put them on separate pages.

Ms. Taylor asked if, with the changes suggested by Judge Moore, the wording of the verification section is otherwise acceptable. No one expressed any reservations. Ms. Taylor reminded the members that the "Petitioner's Statement" is a new section. The committee discussed it at the last meeting. The reason for adding the petitioner's statement was that the CCA staff has seen

situations arising where a petitioner brings a writ application on behalf of an applicant, but the applicant does not know about it. The applicant can potentially be procedurally barred under Article 11.07 Section 4. Judge Hervey asked whether we need to have some sort of signature line for the applicant to show that the applicant has actually consented. Ms. Taylor said that we had discussed this option and she thought that Mr. Varela had some concerns about the logistics of counsel getting a signature from an incarcerated client. Judge Hervey asked how we would "get around the problem" of a petitioner signing the statement without the inmate's knowledge. Ms. Taylor said that the lying petitioner would have tampered with a governmental record. Judge Hervey said that that does not mean that it will not happen. Judge Newell remarked that it could be a felony. Mr. Varela said that, if an inmate can demonstrate that the petitioner has filed the writ application without his authorization, he should get relief. The inmate should then still be able to file an initial writ without the bar. Judge Hervey remarked that that could take a while. Ms. Taylor agreed that this is a quandary. Judge Newell agreed.

Mr. Wolff suggested moving the petitioner's information and petitioner's statement before the oath and/or unsworn declarations. These forms could incorporate by reference the veracity of the petitioner's statement. Others responded that the problem with that suggestion is that the inmate's unsworn declaration would not come immediately after the verification instructions.

Ms. Taylor asked whether the notary oath is even necessary anymore. Committee members discussed whether a filer can be prosecuted for perjury. Ms. Taylor and Mr. Varela stated that the person who executes an unsworn declaration for a document can be prosecuted for perjury in the document. Judge Hervey said that she likes oaths. Other members mentioned that some may have notaries on staff and may want to use the oath method.

Judge Newell summed up the changes that the committee has agreed upon so far: (1) insert page breaks between verification methods; and (2) list out the verification methods separately in the "Applicants" section and the "Petitioners" section of the verification instructions. Mr. Varela said that the petitioner's information and the petitioner's statement should appear on the same page as the petitioner's oath. Ms. Taylor stated that either an applicant or a petitioner could use any one of these three methods of verification, depending on the circumstances presented. Judge Newell said he, too, would like to do something different with the petitioner's statement but he cannot figure out a better place to put it.

Ms. Johnson-Liu questioned the language: "I declare under perjury that the foregoing application form is true and correct." She said that this could be interpreted to literally refer only to the form, not the information contained within it. She suggested changing the language to refer to information or "the facts stated." Members discussed changing the unsworn declaration language to include "the contents of the above application." Mr. Wolff suggested taking out the word "foregoing." Mr. Prine suggested taking out "the above" from the notary oath. Other members agreed. Judge Newell said we should include "contents of the application" in both places. Professor Goode observed that the oath has two things in it: (1) the contents of the above application and (2) the facts stated in the application form. The members briefly discussed what these terms meant. Ms. Taylor said that the basic language in the unsworn declarations was taken from Chapter 132. Judge Newell said that, since the unsworn declaration is taking the place of the

oath, it should match the oath. Ms. Taylor asked Judge Newell to help clarify what the language in the unsworn declarations would be. Judge Newell said that we would essentially replicate in the unsworn declarations the following language from the notary oath: "contents of application for a writ of habeas corpus and, according to my belief, the facts stated in the application form are true."

Judge Newell asked the committee if all members were comfortable recommending that the CCA adopt the form with the changes the committee agreed upon today. Several committee members expressed verbal agreement and none objected. Ms. Taylor indicated that she would make the changes and the CCA could begin discussing this matter.

[The committee took a ten minute break.]

6. Discussion of concern about proposed amendments to TRAP 73.1, 73.4, and Rule 73 comment discussed at last meeting (See Exhibit C)

Exhibit C consists of a collection of proposed changes to TRAP 73. Judge Newell said that the CCA considered this proposal and some had a concern with language that required the CCA to put the writ application form on the Court's website. Because the Supreme Court of Texas (SCOT) would be co-signing the order, it would effectively cause the SCOT to order the CCA to put the form on its website. He said that an alternate proposal was to put language in a comment to the rule stating that the CCA would make the form available online. Ms. Williamson observed that the form is not actually on the CCA's website. It is on the TXCOURTS.GOV website linked from the CCA website. No members expressed a problem with moving this language to a comment to Rule 73 stating that the form would be made available online.

7. Proposed amendments to TRAP 73.7 and addition of TRAP 73.8 (governing amended or supplemental Article 11.07 writ applications) and a comment, in light of *Ex parte Saenz* (CCA 2016) and *Ex parte Speckman* (CCA 2017) (See Exhibits D, D.1, D.2)

Ms. Taylor said that this item has been on the agenda for prior meetings but we have not reached it. Most of the proposed amendments to TRAP 73.7 (an existing rule) are not substantive. For example, the rule refers to the full name of "The Court of Criminal Appeals" several times in a paragraph. The proposed change changes some subsequent references to read "the Court." The only real substantive change suggested is to omit the service requirement for inmates because it seems unlikely and onerous to require inmates to serve additional evidence on other parties. Ms. Taylor explained the proposed change to TRAP 73.7(a)(1), (a)(2) and (b): "The moving party, if the party is not an inmate, must immediately serve copies of the motion and the evidence the party seeks to file on the other party or parties in the case." Ms. McKinney said that the clerk should make sure that those parties are served. An inmate may not be able to do it. Ms. Schneider said that, if a lawyer is doing it for the inmate, the inmate is the party. The committee discussed possible ways to rephrase this language. Chief Justice Gray suggested that we just delete the service requirement altogether. He said that attorneys will serve the documents because they are required to and unrepresented inmates may not be able to comply. Ms. Johnson-Liu said that sometimes the inmates do serve the State Prosecuting Attorney. She asked why we would want to discourage that. Ms. McKinney said that, if the sentence is not there, we are not discouraging it, we

are just not addressing it. Ms. Johnson-Liu agreed, stating that she favored removing the sentence over the proposed amendment to the sentence. Ms. Taylor agreed to omit reference to service of the motion in the proposed amendments to the rule.

Chief Justice Gray said that he felt compelled to note that this rule may be the only place in the history of the law where a law says that a party "wishes the court to consider." He clarified that he was just remarking on the language and he did not want it removed.

Mr. Wolff said that, under subsection (a), the rule draws a distinction between cases that have been "filed and set" and those that have not been "filed and set." He said that the problem is that, in practice, no one actually knows what "filed and set" means or when something has been filed and set. He says that the language is somewhat redundant. He suggests getting rid of the "filed and set" language because it does not really add anything. Ms. Schilhab said that, if a case has not been filed and set, the movant has to file a motion to stay the proceedings in the CCA. Ms. Taylor said that a separate process for filed and set cases comes from the *Pena* case on which the rule is based.[5] She said that it may be true that people do not know about whether a case is "filed and set" and that is unfortunate because it is s distinction drawn in the CCA's cases. Judge Newell asked if TRAP 73.7 is an existing rule. Ms. Taylor confirmed that it is an existing rule. Judge Newell said that these are small changes. If this provision is already in the rule and has not caused problems, he would leave it there. No one objected.

Judge Newell asked what the committee had decided on the service issue. Ms. McKinney said we decided to take out that sentence. Ms. Taylor agreed, stating that it does not add much value because filers that need to do it will already do it and filers who cannot do it should not be required to do so.

Judge Moore suggested that we restructure the rule and separate out the contents of part(a)(1) into smaller parts (e.g., by adding a., b., c.) to make it easier to read. Other members agreed with this idea.

Ms. Taylor directed a question to Ms. Williamson. Ms. Taylor said that the rule currently sets out two different options for filed and set cases based on whether the party wants to file the supplemental evidence in the CCA ((a)(1)) or in the convicting court ((a)(2)). If the party files the

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> If we have filed and set an application for submission, a party has two options. First, the party may file evidence directly in this Court with a motion for this Court to consider the evidence. . . . Second, the party may file in this Court a motion to supplement in the trial court. . . . After we have filed and set an Article 11.07 application for submission, we will not consider evidence that was not filed in the trial court unless a party follows these procedures and we grant the appropriate motion. These procedures are not required when an Article 11.07 application has been received and is pending before this Court but has not been filed and set for submission. In these circumstances, if a party wishes this Court to consider evidence not filed in the trial court, the party must file in this Court a motion to stay the proceedings pending the filing of the evidence in the trial court.

Ex parte Pena, 484 S.W.3d 428, 431 (Tex. Crim. App. 2016)

evidence in the convicting court, the rule requires the district clerk to immediately send a copy of the filed materials to the trial judge assigned to the habeas case and to the parties. However, part (a)(1) does not contain this requirement. Ms. Taylor asked how the other party would see the evidence. Ms. Williamson said that, according to their rules, everything must be filed with the district clerk because the district clerk is the keeper of the writ records. So the CCA clerk will tell the party to file the supplemental evidence with the district clerk. Ms. McKinney said that the clerk would then send the evidence to the parties. Ms. Taylor asked whether the first part of this rule ((a)(1)) is actually helpful, noting that it comes from the *Pena* case. Ms. Schneider asked why you would say that you can file directly in the CCA when you are actually forced to file it both places. Committee members remarked that the amended rule, if modified, could overrule or modify the *Pena* case. Chief Justice Gray said that the most common way of overruling case law by the SCOT is through rulemaking. He said that rule revisions are frequently used to avoid a procedural problem created by precedent. The SCOT does this through its rules committee to avoid the Legislature needing to write a law to address a problem.

Ms. Taylor said that, in light of the committee's discussion today, it looks like Rule 73.7 needs more work. She said that we need to sit down with the clerk's office and the writs staff and see if the rule accurately models the current practice with regard to the filing of supplemental evidence. If it does not, perhaps we should change the rule to reflect the CCA's current practice. Chief Justice Gray said that we should keep "wishes." Judge Newell said that we should table Rule 73.7 and move on to Rule 73.8.

Judge Newell said that Rule 73.8 is a proposed new rule. Ms. Taylor said that this rule is also modeled on case law. *Ex parte Saenz*[6] and *Ex parte Speckman*[7] are provided as Exhibits D.1 and D.2. Judge Newell described the holding of *Speckman*. Ms. Taylor explained that *Speckman* discusses "suitable alternatives" to moving to dismiss a writ application. Two of these "suitable alternatives"—filing a supplemental or amended writ application and moving to stay the writ proceedings to allow for more investigation—form the subject matter of Rule 73.8. This proposed rule first appeared on our committee agenda a long time ago—before the *Speckman* case came down. Proposed Rule 73.8 was originally based only on the *Saenz* case, which held that supplemental and amended applications are permissible. In the meantime, the CCA issued *Speckman*, which contained language describing amended and supplemental habeas applications and motions to stay habeas proceedings. Accordingly, Ms. Taylor "reworked" the Rule 73.8 language to incorporate the new procedures set out in *Speckman*. Ms. Taylor remarked that *Saenz* stated that it was permissible to supplement or amend an Article 11.07 habeas application prior to "final disposition." However, *Speckman* clarified that the CCA does not favor supplementing or amending a habeas application after the case has been "filed and set." She suggested that we might want to consider clearing up that inconsistency in the proposed Rule 73.8. The new rule could clarify whether it is permissible to supplement or amend a habeas application after it has been filed and set and under what circumstances.

Judge Newell said that the committee was running out of time and we would not have time to go

[6] *Ex parte Saenz*, 491 S.W.3d 819 (Tex. Crim. App. 2016).
[7] *Ex parte Speckman*, 537 S.W.3d 49 (Tex. Crim. App. 2017).

into detail on Rule 73.8. He asked if any committee members had any high level observations/concerns about the proposed rule. Professor Goode said that it mixes up various procedures. For example, the proposed rule says in subsection (b) that the applicant shall file and talks about what the Court should do and what the clerk must do. He said that we should restructure the rule to sort out the applicant's duties, the Court's duties, and the clerk's duties. Professor Goode said that this observation applies to Rule 73.7 as well. Ms. Taylor said that she could use the suggestions that Professor Goode made with regard to Rule 4.6 to reorganize Rule 73.8 in the manner suggested. She asked any committee members with thoughts about changes to these rules to email those thoughts to her prior to the next meeting. She said that whatever we decide to do with the organization of Rule 73.8, we should probably do to Rule 73.7, if possible. Chief Justice Gray suggested gender neutral pronouns. Ms. McKinney said that there are a lot of uses of the word "may" in the rule. In subsection (c), the use of "may" seems to make the meaning vague.

8. Discussion of sensitive data concerns regarding TRAP 9.10 (See Exhibit E)

Judge Newell said that the committee would briefly discuss TRAP 9.10. This sensitive data rule is an issue with which the CCA is wrestling. Mr. Prine said that everything in Rule 9.10 applies to parties, which is why clerks are not redacting materials. Ms. Schilhab said that the Courts are looking at the Electronic Filing Rules and Rule of Civil Procedure 21[8] as well. The CCA discovered a court of appeals opinion which named minor witnesses throughout the opinion. We thought that it must be a violation of the sensitive data rule but technically it was not a violation. Mr. Prine said that there was an easy fix to that question because there is already a rule for family law cases (TRAP 9.8).[9] He asked, with regard to the court of appeals records: "What has changed now from years ago when we had the big paper volumes?" Chief Justice Gray said that the Supreme Court Advisory Committee has "beaten this to death." He said that, in the past, we had a world where you had to go down to the court house and look in a bound paper volume and now you can sit at home in your bathrobe at your computer. He said, "It is a changed world." Judge Newell said that we need to discuss how court records will be redacted. Ms. McKinney said that the rules assign the task of redaction to the attorneys but very few of them do it. She said that her office cannot take on the job of redacting all of these materials. Ms. Taylor mentioned that CCA staff just had a meeting with Casey Kennedy with the OCA. He talked about technology advancement in the area of sensitive data redaction that may be a "game changer." She said that the technology may become available to filers in the electronic filing portal and possibly through the district clerk portal, as well. Ms. McKinney said that they are going to try to make the clerks go into the e-filing system and redact their records and that is not "going to happen."

The Judge Newell adjourned the meeting shortly before 12:30. He reminded members to submit their reimbursement forms.

[8] Texas Rule of Civil Procedure 21c ("Privacy Protection for Filed Documents") defines sensitive data, requires redaction of sensitive data in filed documents, and contains other requirements regarding sensitive data.

[9] Texas Rule of Appellate Procedure 9.8 ("Protection of Minor's Identity in Parental-Rights Termination Cases and Juvenile Court Cases") provides in part that, in parental-rights termination cases and juvenile court cases, "the court must, in its opinion, use an alias to refer to a minor and to the minor's parent or other family member."