EXHIBIT A: Minutes

TO: **Judge David Newell**

FROM: **Holly Taylor**

RE: **Minutes of the November 3, 2017 Court of Criminal Appeals Rules Advisory Committee Meeting**

DATE: **Prepared November 14, 2017; edited January 29, 2018; corrected March 2, 2018**

MEMBERS IN ATTENDANCE: Judge David Newell (Chair), Judge Barbara Hervey, Judge Kevin Yeary, Judge Jefferson Moore, Donna Kay McKinney, Joseph Varela, Emily Johnson-Liu, Sian Schilhab, Deana Williamson, Martha Newton, Kathleen Schneider, and Holly Taylor.

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1. Welcome

Judge Newell called the meeting to order and thanked everyone for coming.

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

The members reviewed the minutes from the August meeting. Ms. McKinney moved that the minutes be approved. Judge Hervey seconded that motion. The committee voted to accept the minutes.

3. Supreme Court Advisory Committee Subcommittee's proposed amendments to the Code of Judicial Conduct and policies of assistance to court patrons by court and library staff (See Exhibits B, B.1)

Judge Newell said that he has already taken this issue to the CCA because the Supreme Court Advisory Committee (SCAC) discussed it at their meeting last Friday (October 27, 2017). The general consensus of the CCA was that whatever changes are made should be applicable only to civil cases, rather than criminal cases. Judge Newell said he wanted to bring the matter before the committee, as well, to obtain input from as many stakeholders as possible. Judge Newell explained that the SCAC has only thus far discussed the proposed changes to Code of Judicial Conduct Canon 3.B(8) and the proposed comment. The SCAC will discuss the proposed policies for clerks and court personnel at their December meeting. Judge Newell explained that the justice gap presented by the presence of many unrepresented litigants is a serious problem. However, parties disagree on how to best address the problem.

Ms. Taylor walked through the contents of Exhibits B and B.1. Exhibit B–discussed by the SCAC at its August 2017 meeting–contains excerpts from a report prepared by an access to justice commission, which has recommended that changes be made to Canon 3.B(8). The

proposed amendment to Canon 3.B(8) is small, but significant. The amendment would add to the sentence "A judge shall afford to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law" the following language: "and may make reasonable accommodations to afford litigants, including self-represented litigants, that right." The proposed change to the canon is accompanied by a proposed comment. The comment lists measures a judge may take to accommodate the needs of unrepresented litigants. For example, the comment states that a judge can construe pleadings to facilitate consideration of the issues raised; ask neutral questions to elicit or clarify information; modify the traditional manner of taking evidence; and permit narrative testimony. The commission also recommended a set of policies for district and county clerks and court personnel/law librarians. There are two separate proposed policies for these groups but they appear to be effectively identical.

At the SCAC's August meeting, a majority of the committee voted to change the canon and add a comment, but they did not decide on any specific language. At the meeting on October 27, the SCAC addressed specific proposed language presented by the SCAC's Judicial Administration Subcommittee–a subcommittee on which Judge Newell serves. Judge Newell explained that the Supreme Court of Texas (SCOT) has broad rulemaking authority and the CCA has more narrow rulemaking authority. In this instance the SCOT is asking for the CCA's input because they are wrestling with a change that could have a potentially big effect. There was a lot of heated discussion in the SCAC meeting about this proposal.

Ms. Taylor described the subcommittee's proposed version of the Canon 3.B(8) comment with the changes to that subcommittee language discussed by the SCAC:

> A judge does not violate the duty to remain impartial by making reasonable accommodations to ensure litigants the right to be heard. By way of illustration, a judge may ~~(either directly or though court personnel subject to the judge's direction and control)~~:
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> (1) construe pleadings liberally ~~to facilitate consideration of the issues raised~~;
> (2) provide information about the proceeding and procedural requirements;
> (3) attempt to make legal concepts understandable;
> (4) ask neutral questions to elicit or clarify information outside the presence of the jury;
> (5) modify the mode and order of evidence as permitted by the rules of procedure and evidence, including allowance of narrative testimony;
> (6) ~~refrain from using legal jargon by~~ explain~~ing~~ legal concepts in everyday language;
> (7) explain the basis for a ruling;
> (8) make referrals to any resources, such as legal services or interpretation and translation services, available to assist the litigant in the preparation of the case;
> (9) invite or appoint an amicus curiae to present a particular issue in accordance with Canon 3.B(8)(c); and/or

(10) inform litigants what will be happening next in the case and what is expected of them.

In making reasonable accommodations to afford a litigant the right to be heard, the judge may consider many factors, including the type of case, the nature of the proceeding, the stage of the proceeding, the totality of the circumstances, and the training, skill, knowledge and experience of the persons involved.

Ms. Taylor explained that these changes, even if approved by the SCAC, must then be considered and voted on by the SCOT. Judge Newell said that one of the primary concerns of SCAC members was that these permissible measures would become mandatory. A justice on the SCAC suggested some language that would limit these measures to civil proceedings, but the committee did not take a vote on that language.

Judge Moore said that justices of the peace and municipal judges are the experts on pro se litigants and he asked if there were any of these judges involved in the SCAC discussions. Judge Newell said that there was some discussion of whether this change would apply to justices of the peace and municipal judges.

Mr. Varela observed that he served as a municipal judge for almost ten years in Houston. This experience provided him with perspective. Mr. Varela said he did not see why unrepresented litigants are a problem in criminal cases, given that defendants have a right to have counsel appointed. He said of those defendants who choose to represent themselves despite receiving the *Faretta*[1] warnings: "That is on you."

Judge Moore asked what will happen regarding defendants who choose to represent themselves despite the *Faretta* warnings if the canons are changed. Will these defendants then say that the judge has a duty to take actions to help them, even though they declined to accept an appointed attorney?

Mr. Varela asked what will happen if a judge gives a defendant bad advice? Judge Newell noted that he voiced these concerns to the committee, but the subcommittee researched across the country and found no instance where judges had been sanctioned for making these types of accommodations. Judge Newell remarked that some of the actions listed here are things that judges are already able to do.

Mr. Varela said that most of the litigants in his municipal courtroom were unrepresented and many were uneducated. Yet the municipal judges were trained not to give legal assistance to the

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[1] A criminal defendant who wishes to represent himself "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" *Faretta v. California*, 422 U.S. 806, 835 (1975) (internal citation omitted).

litigants. He said that, “once you cross that line” of judicial neutrality, you are changing the historical role of the judge. Mr. Varela said a judge will “no longer know the limits of his power.” Mr. Varela said he thinks this proposed change is very dangerous, and he feels uncomfortable with it.

Judge Newell said many judges agree with Mr. Varela and feel that this is not the appropriate role of a judge. That being said, in some cases the outcome can be unjust where the judge does nothing to aid an unrepresented litigant. For example, an unrepresented litigant in a family law case can be ‘run over’ by a spouse who is represented by a lawyer.

Ms. Newton said that the biggest problem with unrepresented litigants is in family law cases where 75% of the cases have at least one unrepresented party. In justice of the peace courts there are already some policies that allow courts to take actions on behalf of unrepresented litigants, but these are not present in family law.

Judge Moore recalled instances in which he felt compelled to give additional warnings to pro se litigants in his courtroom who were making serious mistakes while representing themselves. Members asked whether the State would complain about the judge advising a defendant under these circumstances. Mr. Varela again asked what happens if a judge gives bad advice to an unrepresented litigant and what will the standard on appeal be?

Judge Newell said that the sponsors emphasized that these proposed rule changes just mean that the judge will not be sanctioned and they do not prevent the judge from being reversed on appeal. Judge Newell suggested that the list of approved measures in the comment should be tied to existing caselaw permitting those actions.

Judge Moore asked whether the rule could be rewritten to say that the judge can effectively “tap” an unrepresented litigant and nudge him to “get back in the lane” without giving legal advice. Judge Newell asked how you would limit that language.

Ms. Taylor shared some language used in the Louisiana rules (from Exhibit B):

> A judge may make reasonable efforts consistent with the law and court rules to facilitate the abilities of all litigants, including self-represented litigants, to be fairly heard, provided, however, that in so doing, a judge should not give self-represented litigants an unfair advantage or create an appearance of partiality to a reasonable person.

Ms. Taylor explained that some of the other States have passed similar language indicating that a judge cannot ‘tip the scales’ in providing assistance to unrepresented litigants.

Mr. Varela said that he saw thousands of people come through his municipal court, most of them not represented by counsel, with limited education, and many who did not speak English. He

cautioned that, if the SCOT makes a rule that a judge must try to figure out what all of these unrepresented litigants' strengths and weaknesses are and guide them through the process, it will represent a "terrible burden to put on the judge." He opined that this plan is "unworkable in a criminal context" and "theoretically dangerous."

Judge Moore said that he has informed unrepresented litigants that they need to file an application for probation. He indicated that he had notified lawyers of this application, as well. Judge Newell said it is those simple measures that they are trying to target. He said that our committee is talking about a lot of the same issues that came up in the SCAC.

Judge Newell asked whether, if the SCOT added language limiting the canon change and comment to civil cases, it might appear that criminal court judges can no longer help unrepresented litigants in the manner that they are permitted to do under current law. Judge Newell suggested that the comment could say something like, "Judges in criminal cases should continue to apply existing law," perhaps citing to the authority authorizing the enumerated actions.

Judge Hervey said that it seems like a lot of judges are already doing these things. Judge Yeary suggested that the comment could include an additional statement at the end that provides that, in a criminal case, a judge should also consider *Faretta* and the fact that a criminal defendant is making a conscious choice when he declines to accept appointed counsel and chooses to represent himself.

Judge Moore also favored citing *Faretta* in a comment. Judge Newell said that perhaps the comment could merely refer to a criminal defendant's constitutional right to represent himself. Judge Hervey suggested that the comment could set out the *Faretta* warnings, which are designed to scare potential *pro se* litigants about the dangers of proceeding without counsel. Ms. Taylor remarked that there seems to be a consensus that the comment should include some kind of warning of caution to courts with regard to criminal cases and a reference to the *Faretta* warnings.

<u>Proposed Policies on Assistance to Court Patrons by Court Staff, etc.</u>

Ms. McKinney said that her staff is warned daily not to give legal advice. She explained that, in Bexar County, there were so many unrepresented litigants, especially in family law cases, that the county retained a staff attorney to review the family law filings of pro se litigants. This staff attorney makes sure that the pro se litigants have all the required forms they need and reviews the forms for "legal sufficiency." Ms. McKinney stated that, as far as she knows, no one has complained that the staff attorney did not advise them correctly. Ms. Newton said Travis County has a staff attorney, too, who works in the law library. She helps litigants gather all the paperwork for the case and does not act as an advocate. Judge Newell said that Fort Bend County moved to a lawyer-for-a-day system.

Ms. McKinney said that there are many clerks in medium-sized counties who are afraid to say anything to pro se litigants because they think they will get in trouble. She thinks these proposed policies will help those clerks understand what is permissible.

Judge Newell suggested that clerks and court staff interact most with pro se litigants on a regular basis. These proposed policies might help inform judges so that they do not instruct their court staff not to assist pro se litigants in ways that are actually legally permissible. Ms. Taylor noted that, in addition to specifying actions the clerks and staff can take to assist pro se litigants, the policies set out a list of actions that step over the line and are not permitted.

Mr. Varela offered a hypothetical situation in which someone helps a pro se litigant fill out a one-page application for probation. He noted that, even on such a simple form, a party can inadvertently commit perjury if the defendant is mistaken about his conviction history. Mr. Varela said that he will not sign such an application without reviewing the defendant's pen packet first–which constitutes legal work provided by an attorney.

Judge Newell said that the distinction between legal information and legal advice can be a slippery one. He said that it would be ideal to get lawyers involved in helping the unrepresented litigants, but this proposal may not be feasible in all counties.

Mr. Varela said that he is a "hard-liner" on this issue. He said that he believes that rule makers should not tamper with centuries of precedent defining the judge's role as a neutral arbiter. He said he also thinks that, if the judge cannot do it, then his staff should not be able to do it either. He said that there is a law library in the jail in Harris County. Inmates routinely go into the library and get forms to help their cases. He said that the inmates sometimes also receive bad advice from the librarians. They will ask their attorneys to file motions that don't really exist.

Judge Moore said he has witnessed the staff in his courtroom telling defendant's family members that they need to file a motion to reduce bond. He said it helps him to have them acting as a buffer and sometimes these interactions actually encourage the families to hire a lawyer.

Ms. Johnson-Liu said that there may be a lot of turnover in some counties. Having these guidelines would allow new staff to be informed about what they can and cannot say to court patrons.

Judge Newell said that it seems like these measures are already occurring and no one is being sanctioned for them. He asked whether we need a change. He also asked whether language needs to be included that would limit the new policies to civil cases? Judge Yeary said that many of these guidelines already apply in criminal cases–such as explaining the basis for a ruling.

Ms. Taylor asked whether, if the SCOT passes these recommended changes and includes language limiting the new provisions to civil cases, does the new language create a quandary in

which measures that were previously considered to be permissible conduct by criminal court judges to help unrepresented litigants suddenly become impermissible?

Ms. Schilhab suggested that they could add language providing that the new provisions apply to criminal cases only to the extent that they do not conflict with existing law.

Judge Newell said that criminal defendants might argue that these guidelines are mandatory. Judge Hervey said that they need to make it clear that they are intended as guidance and are not mandatory.

Judge Moore felt that the canon itself should not be changed. Ms. Schneider asked whether it makes sense to add a comment if no change is being made to the canon? Judge Newell said that normally you would anchor a new comment to a change in the rule. However, the comment could be used to explain what types of measures do not violate the existing language in the canon.

Ms. McKinney asked why add the phrase "including self-represented litigants" when self-represented litigants are already included in the phrase "any person with an interest in the proceeding." Judge Newell explained that some people were reluctant to take any actions to help self-represented litigants. Ms. McKinney said that she will remind her staff of the existing rules. She did not see why the canon needed to be changed simply because people do not understand the rule as it exists now.

Mr. Varela asked what a judge should do when faced with an incompetent defense attorney? Should the trial court afford an inept attorney the same courtesies as pro se litigants?

Judge Yeary pointed out that there is nothing in the SCAC proposed comments that is similar to Louisiana's language (discussed above) that balances the instruction to help unrepresented litigants with a warning not to accord such litigants an unfair advantage. Judge Newell and other committee members agreed that such 'balancing' language would be a helpful addition to the comment.

4. Proposed amendment to TEX. R. APP. P. 31 limiting the scope of the rule mandating accelerated appeals in habeas corpus proceedings (See Exhibits D & D.1)

This committee discussed a proposed change to TEX. R. APP. P. 31 at our August meeting. The committee members thought that certain language needed more work, so Melissa Stryker graciously agreed to rework the proposal. Ms. Stryker and Clint Morgan were present at the November meeting to discuss the new proposed rule changes. Ms. Taylor helped members find the relevant exhibits in the packet and Judge Hervey suggested that we add page numbers to the packet for the next meeting. Ms. Stryker discussed the proposed changes. One big change was to move discussion of "submission" from Rule 31.1 to Rule 31.2 to make it easier to understand

(See Exhibit D.1). The original language in the rule about the 15-day time line was retained. Other proposed language tracked language in Article 42.12.[2] Mr. Morgan said that appellate courts are not expediting these types of cases as much as you might think that they would. Mr. Morgan recently had a pretrial habeas appeal take over a year. He said that he thought that the new proposed changes will do a better job of drawing the line between things that need to be expedited and things that do not. Ms. Stryker said that one of the priorities in making the changes was to make it clear that, for cases that do not need to be expedited, the parties would have an opportunity to file briefs.

Ms. Schilhab stated that an appellate court can deny the ability to file a brief in any case, so the proposed language in Rule 31.1(a) stating that an appellate court cannot deny briefing ("The appellate court shall not deny the parties an opportunity to file a brief on the merits in appeals under this subsection") essentially creates a special right for those cases.

Ms. Schneider asked the extent of the problem of not allowing briefing by courts of appeals across the State. Ms. Stryker and Mr. Morgan said that they are aware of the problem occurring in the First and Second Courts of Appeals.

Judge Yeary suggested that, instead of forbidding the court of appeals from denying the opportunity to file a brief, the rule could simply state that the ordinary briefing rules that apply to direct appeals for criminal cases will apply to non-accelerated habeas appeals under Rule 31. Ms. Schilhab indicated general agreement with this idea.

Judge Newell observed that taking away the rule mandating the expediting of these types of cases might alleviate the problem by removing the courts of appeals' need to resolve them quickly without briefs. He also remarked that Rule 31.1(a) includes a very, very long sentence:

> For an appeal from a habeas corpus proceeding challenging the legal validity of either 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 deadlines and schedule as apply to direct appeals from criminal cases, unless the appellate court determines that a more expedited timeline is required to do substantial justice to the parties.

Judge Yeary expressed concern about the phrase "the legal validity of either." He suggested that this language be removed and the rule simply state "proceeding challenging a conviction or an order placing the defendant on community supervision."

Ms. Schneider asked what would happen if the appellant challenged *both* the conviction or order

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[2] All references to articles refer to the Texas Code of Criminal Procedure.

placing the defendant on community supervision and a particular condition of community supervision. She said that we may be making it more complicated for appellate courts than it needs to be. Mr. Morgan asserted that the CCA sees very few of these Article 11.072 writs. Ms. Schneider disagreed, stating "we see a bunch," noting that the Court does accelerate these appeals. Ms. Schneider indicated that she supported leaving Rule 31 alone.

Judge Yeary asked whether we could give the CCA the option to decide whether or not certain cases need to be expedited. Ms. Schneider said that the CCA does assign different stages of acceleration to the cases and the Court has discretion regarding how that acceleration is implemented.

Judge Newell said that he thought that the problem that triggered the suggested rule change was that appeals are being expedited that do not need to be expedited. Ms. Stryker agreed, stating that most of the Article 11.09 and Article 11.072 appeals that they see do not really need to be expedited. She said the current Rule 31 essentially allows these cases to "skip the line" and go ahead of appeals where the appellants may be incarcerated and waiting for a ruling.

Mr. Morgan said he had personally seen a half dozen of these Rule 31 appeals go "off the rails." For example, he said the First Court of Appeals once denied the State the opportunity to file a brief and then ordered oral argument.

Judge Newell asked the committee to assume for the sake of argument that the CCA wants to change Rule 31, and talk about what we would like the change to look like. There was general agreement with this approach. Judge Newell said that, so far he was hearing that:
(1) people want to change the "legal validity" language; and
(2) Judge Yeary suggested that in Rule 31.1 (a) we should replace this sentence: "The appellate court shall not deny the parties an opportunity to file a brief on the merits in appeals under this subsection" with a statement that normal briefing rules will apply.

Ms. Schilhab suggested that the above sentence about not denying the parties an opportunity to file a brief be deleted and Rule 31.1(a) be changed to the following:

> 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, unless the appellate court determines that a more expedited timeline is required to do substantial justice to the parties.

A short discussion of grammar followed.

Ms. Schneider noted that Article 11.072 has a section providing for appeal that refers to Rule 31[3] and she wondered whether splitting Rule 31 in the manner proposed would have any impact on this statute. She indicated that it is probably not a problem. Judge Newell said he wondered whether the Legislature's reference to Rule 31 is a reference to the process that the rule provided for at that time.

Judge Yeary noted that the proposed rule gives discretion to the appellate court to expedite an appeal even when a conviction is being challenged. Ms. Schneider expressed the thought that there could be a claim of inconsistent treatment if different courts of appeals implement the rule in different ways. Judge Yeary said it sounds reasonable to him that appeals of Article 11.072 writs challenging convictions don't necessarily need to be expedited, but if defendants are challenging the conditions of probation that they are suffering under, then it makes sense to expedite their appeals. He pointed out that defendants who are sitting in prison would like the Court to hurry up on their appeals, too.

Judge Hervey said that she thought that there are other instances where rules have been changed even though code provisions refer to those rules. Judge Yeary said that the Legislature can always change the statute in the next session if they do not like the change to the rule. Judge Newell said that his only concern is whether this would be seen as the Court using its rulemaking authority to enlarge or shrink substantive rights, which the CCA has held is not permissible. *See Flowers v. State*, 935 S.W.2d 131, 132-33 (Tex. Crim. App. 1996) ("[W]e explained that appellate rules could not abridge, enlarge, or modify the substantive rights of a litigant.") (internal citations omitted). Judge Yeary said that the amendment to the rule only appears to impact procedural rights, not substantive rights. Ms. Stryker stated that this concern was one of the reasons why they included language allowing the court of appeals the ability to decide which matters should be expedited and which should not.

Judge Yeary noted that a party filing a writ challenging both his conviction and a condition of his probation could simply file a motion to have the matter expedited. Ms. Schneider expressed the opinion that parties should not be required to file an additional motion.

Mr. Varela shared with the committee his handwritten edit to proposed Rule 31.1(a):

> For an appeal from a habeas corpus proceeding challenging a conviction or an order placing the defendant on community supervision, but not challenging any particular condition or conditions of community supervision, the appellate court should use the same briefing deadlines as apply to direct appeals in criminal

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[3] *See* Article 11.072, Section 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.")

> cases. On motion of any party or on the appellate court's own motion the court may impose a more expedited timeline if necessary to do substantial justice to the parties.

Mr. Varela explained that this version would allow either party or the appellate court to move for a case to be expedited.

Ms. McKinney pointed out that Rule 31.2(a) has the "legal validity" language, as well. Judge Newell remarked that we would want to take that language out of that subsection, too. No one objected.

Ms. McKinney asked whether we needed to add the 'rules and deadlines' language to Rule 31.2(a), as well. Ms. Schilhab noted that the subject matter of Rule 31.1(a) is different from Rule 31.2(a), which talks about submission and hearing schedules. There was general agreement that the 'rules and deadlines' language need not be added to Rule 31.2.

Judge Newell said he would like to see the proposed changes typed up for the next meeting for discussion. This would allow us to have input from our courts of appeals members. Judge Yeary suggested that we could add a comment providing more explanation.

Ms. Schilhab said that TEX. R. APP. P. 2[4] allows an appellate court to change the timelines even without some of this language. She said that Rule 31.2(a) should be consistent with Rule 31.1(a), as proposed by Mr. Varela.

Judge Newell said that we will review a second amended draft at our next meeting and hopefully we will have a court of appeals justice present to "weigh in."

5. Proposed amendment to the Rules of Appellate Procedure to add TEX. R. APP. P. 4.6 providing a procedure to allow additional time when a defendant receives late notice of appealable orders in Chapter 64 proceedings (See Exhibits C, C.1, C.2, C.3, C.4, & C.5)

Ms. Taylor explained that Exhibit C is the rule that was passed by the CCA in June. There were other proposed changes in August. Exhibit C.1 is Chief Justice Gray's letter containing many

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[4] Rule 2 provides:

> 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; but a court must not construe this rule to suspend any provision in the Code of Criminal Procedure or to alter the time for perfecting an appeal in a civil case.

comments about the proposed rule. This letter was discussed at our August meeting along with Exhibit C.2, which is the August proposed rule incorporating some changes in response to the comment. Exhibit C.5 is Ms. Taylor's response to Chief Justice Gray's comments and explains the changes she made to the proposed rule to try to address the identified issues. The new proposed rule is Exhibit C.3. This exhibit contains two parts: the June (Exhibit C) rule with November mark-ups to respond to Chief Justice Gray's comments and the new proposed November Rule clean (with no mark-ups).

Ms. Taylor said that one of Chief Justice Gray's main concerns was that our June rule (Exhibit C) assigned the factual determination and ruling on the motion for additional time to the court of appeals. He suggested that a defendant would be more likely to know which trial court to file in and the trial court is better equipped to make factual findings. Therefore, the new proposed rule (Exhibit C.3) mandates that the motion be filed in the trial court. In response to Chief Justice Gray's suggestion, Ms. Taylor modeled the new language on the corresponding civil rules: TEX. R. CIV. PROC. 306a and TEX. R. APP. P. 4.2 (see Exhibit C.4). However, the proposed rule is still limited to appealable rulings on Chapter 64 motions.

Judge Newell asked Ms. Taylor to walk through the changes in Exhibit C.3. She explained that the title was changed to "No Notice of Trial Court's Appealable Order in a Texas Code of Criminal Procedure Chapter 64 Matter" to indicate that the rule covers anything that is appealable under Chapter 64. Judge Newell said that this title is unnecessarily broad. He does not like the term "matter." He suggested making the title simpler because you cannot appeal the denial of counsel. Ms. Schilhab stated that we could change it to "appealable orders on motions for DNA testing." Ms. Johnson-Liu pointed out that a defendant can appeal the trial court's findings. Ms. Schilhab stated that the findings are related to the motion for DNA testing, so an appeal of the findings is still an appealable order on the motion for DNA testing. Ms. McKinney asked if you can have an order without a motion. Judge Newell pointed out that this is just the title to the rule. We can provide more detail within the rule. Ms. Schilhab said that the CCA can interpret the reach of the rule. After much discussion, the committee reached a consensus that the title of the rule should be changed to "No Notice of Trial Court's Appealable Order on a Motion for Forensic DNA Testing."

Ms. Taylor read through the proposed subsection (a) in Exhibit C.3:

> (a) Additional Time to File Notice of Appeal. If–within twenty days after 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 trial judge signed the appealable order.

Ms. Taylor described Chief Justice Gray's comments about the June proposal (Exhibit C). Chief Justice Gray said that the June proposal did not allow additional time if the defendant received notice at any point within the thirty-day period. However, if a defendant does not receive notice until the last day of the period, that would not be sufficient time to file the requisite documents. Chief Justice Gray suggested that the rule be modeled on the civil rule, which allows a defendant to move for additional time if he does not receive notice within the first twenty days of the thirty-day period. Proposed subsection (a) in Exhibit C.3 is modeled on the civil rule and entitles a defendant to receive additional time if he did not receive notice within twenty days after the trial court signed the appealable order.

Judge Yeary asked whether the rule provides for twenty days because the orders are appealable within twenty days. Judge Newell said that the civil rule provided for twenty days to allow ten days for the defendant to take action.

Ms. Taylor also explained that, as far as she knew, Chapter 64 appeals would always be a thirty-day time period. If a defendant gets notice in the last ten days of the thirty-day period, he can avail himself of this rule. She also noted that the "or his attorney" language was added to address another of Chief Justice Gray's concerns: the question of what happens if the defendant's attorney receives notice, rather than the defendant himself. Also, the proposed rule contains a 120-day cap on filing the motion for additional time, which corresponds to the 90-day cap in the civil rule.

Ms. Schilhab noted that an exception to these rules will occur if the motion is filed within twenty days of an execution. In that event, the CCA would need to invoke Rule 2 and suspend the rules.

Ms. Schneider suggested that the committee re-work subsection (a) to make it clearer. A discussion followed amongst the members and the following amended language emerged:

> (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 trial judge signed the appealable order.

Ms. Taylor asked if anyone had any problems with the substantive content of the provision, including the 120-day restriction. No one expressed reservations.

Ms. Taylor then described the proposed changes to subsection (b), which now places the filing and determination of the motion for additional time in the trial court:

> (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 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).

Ms. Taylor mentioned that Justice Goodwin had expressed some concerns about moving the filing of the motion to the trial court (Justice Goodwin was not present at this meeting). The members discussed the potential reasons for the original proposed rule requiring the motion to be filed in the appellate court. Judge Newell said that the need for this rule emerged because courts of appeals were dismissing defendant's Chapter 64 appeals for want of jurisdiction. However, one reason for placing the filing in the trial court is that the trial court is the only place where the defendant may know to file a motion. Judge Newell remarked that everyone at the previous meeting was saying that the motion should be filed in the trial court. He asked if the committee was now favoring the appellate court. Ms. Schneider said "no" and indicated that she thought the motion should be filed in the trial court. Other members did not disagree.

The committee discussed the "on sworn motion and notice" language in subsection (b) (see third line of about indented text). Committee members expressed the concern that, although the State needs to receive notice of the defendant's motion, it is not reasonable to expect a potentially incarcerated defendant-movant to serve the State and complete a certificate of service. The committee reached agreement that the court/clerk should provide notice to the State and the notice requirement should be removed from subsection (b) (see redline above) and moved to subsection (d): "The Clerk's Duties."

After additional discussion, the committee also decided that subsection (d) ("The Clerk's Duties") should be reworded to make it clear that a motion for additional time must be forwarded as it is received (and not after the trial court holds the hearing and signs the order). The committee reached a consensus that subsection (d) should be reworded as follows:

> (d) The Clerk's Duties. Upon the filing of a notice of appeal or 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.

Some members expressed concern that the above language would lead to a court of appeals potentially receiving a motion for additional time that does not correspond to a pending appeal.

Ms. Schilhab asked if the language "trial judge's written order" and "the order defendant seeks to appeal" were redundant phrases in subsection (d). Ms. Taylor answered that "the order defendant seeks to appeal" refers to the appealable order under Chapter 64 that the defendant intends to appeal. The "trial judge's written order," on the other hand, refers to the trial court's order rendered under subsection (c). The committee reached a consensus that "under subsection (c)" should be added to the rule to clarify this distinction (added to excerpt above).

Ms. Taylor further explained the changes that had been made in subsection (b). No one expressed any further concerns about subsection (b).

Ms. Taylor explained that Chief Justice Gray was concerned about the fact that the rule triggers the time period for filing the defendant's notice of appeal when the appellate court rules on a motion for additional time. Chief Justice Gray observed that running the time period for filing a notice of appeal from the date the appellate court rules on the motion creates a new opportunity for the defendant to fail to receive notice of a court's ruling and to miss a deadline. Chief Justice Gray remarked that the civil rule prevents this "endless loop of missed deadlines" by requiring that the notice of appeal be filed within thirty days from the earliest date that the defendant or his attorney receives notice or acquires actual knowledge. Ms. Taylor said that the new proposed rule triggers the time period for filing the notice of appeal from the moment the defendant or his attorney receives notice of the signing of the appealable order. The new proposal also contemplates that the appellate court could treat the motion for additional time itself as the defendant's notice of appeal if it satisfies the legal requirements set out in the rules of appellate procedure, thereby obviating the need for the defendant to file a separate notice of appeal.[5]

Judge Newell asked what "motion" the rule refers to in the phrase, "After hearing the motion . . ." in proposed subsection (c). Ms. Taylor answered that this phrase refers to the motion for additional time. Mr. Varela suggested that language be added to clarify the rule. Judge Newell agreed:

> (c) The Court's Order. After hearing the motion for additional time, the trial judge must sign a written order that finds the date when the defendant or the defendant's attorney first either received notice or acquired actual knowledge that the trial

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[5] *See* TEX. R. APP. P. 25.2(c) ("Notice must be given in writing and filed with the trial court clerk. . . . Notice is sufficient if it shows the party's desire to appeal from the judgment or other appealable order.").

judge signed the appealable order and must enter a certification of the defendant's right to appeal pursuant to Rule 25.2.

Ms. Taylor observed that Chief Justice Gray had noted that Texas law requires the trial court to complete a certification of the defendant's right to appeal, but the certification of the right to appeal rule requires the signature and therefore the presence of the defendant at the time the judge signs the DNA ruling.[6] Chief Justice Gray asked whether this issue should be addressed by amendment of another rule.

Ms. Taylor summarized her research on this issue (See Exhibit C.5). She said that Texas courts of appeals have held that TEX. R. APP. P. 25.2(d) requires a trial court to comply with the certification requirement in a Chapter 64 appeal, despite the fact that the defendant is commonly not present in the courtroom. Accordingly, she included in subsection (c) of the proposed rule (see above) a reference to the certification requirement. However, Ms. Taylor stated that her research indicated that courts have not applied the TEX. R. APP. P. 25.2(a)(2) restriction (regarding a defendant's right to appeal plea-bargained cases) in the context of Chapter 64 appeals.[7] Judge Moore said that there is a Chapter 64 block on the certification form he uses in his courtroom, indicating that it is a special type of proceeding.

Judge Newell said that Ms. Taylor should draft up the changes to the proposed rule that have been discussed at the meeting and bring the amended proposed rule back for discussion at the next meeting. He said the committee will discuss the proposed comment at the next meeting.

Judge Newell announced that we will no longer hold our meetings in the CCA courtroom. He said that the next meeting will be held on March 2, 2018, in a conference room on the first floor

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[6] *See* TEX. R. APP. P. 25.2(d) ("If the defendant is the appellant, the record must include the trial court's certification of the defendant's right of appeal under Rule 25.2(a)(2). The certification shall include a notice that the defendant has been informed of his rights concerning an appeal, as well as any right to file a pro se petition for discretionary review. This notification shall be signed by the defendant, with a copy given to him.")

[7] *Compare* TEX. R. APP. P. 25.2(a)(2) ("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: (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.") and Article 64.03(b) ("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.")

of the Tom C. Clark Building. The meeting after the March meeting will be held on May 18, 2018, in the same conference room. Ms. Schilhab said that March 2 is a State Holiday. Judge Newell said that some members are finishing their terms on the committee and the CCA will be doing orders to establish committee members' new two-year terms. He said if any members want to be removed from the committee, they should contact him. Judge Newell suggested that members should contact him if they can think of people who would be good representatives of stakeholder groups, such as prosecutors, defense attorneys, and appellate court justices. Judge Newell mentioned that, if Professor Goode steps down from the committee, we should try to add another member who is a university professor and/or who is skilled at drafting rules. The meeting was adjourned.

After the meeting, Judge Newell confirmed that March 2 is a State holiday. He rescheduled the next meeting for March 1, 2018.