Memorandum

TO: Judge David Newell

FROM: Holly Taylor

RE: Minutes of April 21, 2017 Court of Criminal Appeals Rules Advisory Committee Meeting

DATE: May 3, 2017

MEMBERS IN ATTENDANCE: Judge David Newell (Chair), Judge Kevin Yeary, Justice Melissa Goodwin, Judge Jefferson Moore, Professor Steve Goode, Sian Schilhab, Abel Acosta, Donna Kay McKinney, Brian Walker, Martha Newton, Kathleen Schneider, and Holly Taylor.

Committee Chair Judge David Newell called the meeting to order at 9:33 a.m. He thanked everyone for coming and noted that we had new members present. Judge Newell said that Holly Taylor is the CCA's rules attorney and he has always thought of her as a member of the committee. The members introduced themselves.

1. Update on proposed amended Electronic Filing Rules published in April 2017 State Bar Journal and discussion of comments received.

Judge Newell asked if all committee members had had a chance to read the comment we received from District Attorney Jeri Yenne concerning the application of the e-filing rules to charging instruments. Ms. McKinney said that, if charging instruments are not being e-filing, the clerk's office will need another method to obtain the email addresses of prosecutors and believes that this should be written on the indictment. Ms. Newton asked if Article 21.011 provided that charging instruments may be e-filed. Judge Newell clarified that the e-filing rules do not require charging instruments to be e-filed; the e-filing of charging instruments is merely permissive. He expressed that this clarification might best be expressed through a comment to the e-filing rules. Mr. Walker agreed that a clarification is needed because DA Yenne was confused about the application of the rules. Ms. McKinney said that, in Bexar County, true-billed indictments are hand-delivered to the clerk's office by an assistant district attorney and then they are assigned a number. The e-filing rules require that parties that e-file documents provide an email address. If indictments do not have to be e-filed, then the email address does not have to be on the indictment. Consequently, when a defense attorney gets served with an indictment, he will not know who to serve with his responsive filings through electronic service. Judge Yeary asked if the district clerk's office considers the indictment to have been filed by the DA. Ms. McKinney said, "yes." Judge Yeary asked if a statute requires that an indictment be filed by the DA. Ms. McKinney said that the DA's office brings the indictment to them because the case will not get a criminal case number until the indictment is handed down and filed with the clerk's office. Ms. Taylor stated that the Texas Constitution states that indictments are

presented to a court by a grand jury. Ms. Schilhab stated that the DA is merely the delivery system. Judge Newell mentioned that this committee had discussed that the CCA did not need to put charging instruments into the rules because they were not filed by an attorney. Charging instruments were specifically addressed in the permissive rules, but the CCA struck this language in the mandatory rules because there are statutory provisions that govern the e-filing of charging instruments. Ms. Taylor noted that informations are presented to a court by an attorney for the state, so the application of the rules is less clear for that type of charging instrument. DA Yenne stated in her comment that it is not clear whether the rules require charging instruments to be efiled.

Judge Newell asked whether we need to insert a clarification concerning the applicability of the rules to charging instruments in Rule 1.3 itself or just in the comments to the rules. Ms. Newton suggested that the clarification that charging instruments need not be electronically filed should be incorporated into the rule itself. She noted that people do not always read the comments and they do not always make it into the publication. Ms. McKinney again indicated that, if e-filing of indictments is not required, then the defense attorney will not have the email address of the specific prosecutor assigned to the indictment/case. She further stated that the defense attorney will have the district court number and he could use the court number to look up information about the case. She asked if the CCA would have to post this change in the Texas Register. Ms. Taylor & Judge Newell explained that the final versions of these rules would be posted in the Texas Register and the Texas Bar Journal, but there would not be a second public comment period. Ms. McKinney reiterated her concerns about not having prosecutors' email addresses. Mr. Walker indicated that there would most likely be a central email address on file for the DA's office to use for service of documents.

Justice Goodwin stated that we seemed to be getting a little sidetracked and, though the mechanics of applying the rules may be challenging, that is a separate question from the one we are addressing now. Ms. Taylor stated that it appeared that we have two proposals on the table: (1) a proposed change to the comment to Part 1 to clarify that the e-filing of charging instruments is not mandatory; and (2) Ms. Newton's proposal to add a subsection (b) to Rule 1.3 stating that the e-filing of charging instruments is permissive, but not mandatory. Ms. Taylor asked whether Ms. Newton's proposed subsection (b) would list all of the types of documents that do not have to be electronically filed or just charging instruments. Judge Newell stated that we will end up with double negatives and confusing content. Ms. Schilhab stated that we cannot include all the things in the list because the courts need originals of trial exhibits. They simply cannot be efiled.

Judge Yeary said that we are talking about two issues: (1) the filings of documents; and (2) the notice of the email address of the prosecuting attorneys. He asked whether we could institute a separate rule to require the prosecuting attorney to provide an email address and contact information for the attorney assigned to the case. Ms. Schilhab said that this is a good idea but it belongs in rules of criminal procedure so it will apply to all filings, even those that are not efiled. The e-filing rules already require efilers to provide an email address. Judge Newell said that this might implicate another section of the rules applying to notice and right now we need to address

what needs to be done to Rule 1.3 or the comment to Part 1 concerning charging instruments. Professor Goode said that it seems that it would not terribly difficult to communicate this message to prosecutors because it is a finite group of people. He said this is a good kind of statement to put in a comment. Judge Newell agreed. He said, if we were to modify the rule itself, it should only list charging instruments and not the other items mentioned in the comment, but he would prefer to only modify the comment.

A vote was taken. A majority of the members preferred to put the clarification regarding charging instruments in the comment to Part 1 of the e-filing rules.

Judge Newell asked whether we should add a separate rule concerning email addresses. Ms. Schilhab and Justice Goodwin pointed out that Rule 2.4 already requires that any person who electronically files must provide an email address. Mr. Walker stated that he has been a prosecutor and a defense attorney and has found that most of the time the attorney who files the indictment will never touch that case again. The bigger counties' prosecutors will figure out that they need a general in-box for email. They will not use the individual attorney's email address because the turn-over is so high that the emails concerning a case would be sent to the wrong place. Mr. Acosta stated that the CCA clerk's office prefers to send a copy of documents to a general DA email address in case the individual attorney is no longer on the case. Judge Moore agreed that the DA who handled the indictment will not want his name assigned to it and the DA's office will have to have a general email inbox and someone should be assigned to process those emails. Judge Yeary stated that each DA must decide how they want to handle this problem.

Judge Newell said this sounds like a discussion of how to make DA's offices work better. He asked if this is the kind of issue where we really need to make a change to the rules right now. Judge Yeary said the real problem that we are facing is that, after receiving a charging instrument, defense counsel does not know who to electronically serve on behalf of the State. Justice Goodwin asked how did we know in earlier days how to get a paper filing to the State's attorney?

Ms. McKinney expressed concern about service of electronic process going into a general DA email address where it will get lost in the system, citing potential speedy trial issues. Ms. Newton said that the language of the rules may already address this problem. She explained that the e-filing rules require the other party to be served electronically only if the email address of the party is on file. If it is not, the party must serve them through another method of service. So a defense attorney would just send the paper filing to the DA's mailing address if the email address is not on file. Professor Goode said the rules are just the electronic equivalent of what is already being done – there is not more work here, it is just a different form of work.

Justice Newell wondered if we need to modify the rules at this stage to address this potential problem, noting that the CCA could address any problems that develop in the implementation of the rules later through amendments. Ms. Taylor pointed out that whatever the committee recommends today, even if approved by the CCA, would not be subject to the public comment

process. She noted that, if we are recommending that the CCA add a completely new rule to the e-filing rules, it should go through the public comment process. Judge Yeary expressed concern about electronic filings being lost in the process on important cases. Justice Goodwin said that Judge Yeary's concerns show that we do need to address these issues, possibly through future rules of criminal procedure, because the electronic filing rules only apply to electronically-filed documents. The problem can manifest itself with non-electronic filings, as well, such as with pro se filers. Mr. Acosta stated that the DA's offices can develop a system for distributing these filings to their many attorneys.

Judge Newell suggested that Judge Yeary draft a proposed rule to address these issues for discussion at the next meeting. Judge Yeary agreed to write a proposed rule for the next meeting. Judge Moore suggested that we pick a county to use as a test county to observe how the e-filing rules are working in that county. Judge Newell stated that we already did that and Hidalgo County was the test county. **Judge Yeary suggested that we invite someone from Hidalgo County to come talk to us at the next meeting about how e-filing is going and any problems with the rules. There was general agreement with this proposal**.

Ms. McKinney also expressed her thoughts about the redaction rule – Rule 4.3. She opined that filers will never comply with the rule. But, if they do comply, they are required to keep the original, un-redacted documents for three years. Ms. McKinney asked why three years was chosen, because in civil cases it is only six months. Judge Newell said he did not think six months would be long enough, given the amount of sensitive data in some of these cases and the time the cases spend approaching trial and in appellate orbit. Judge Moore mentioned that he served on the grievance committee and, as he recalled, attorneys are required to hold on to their client's files for five years. Ms. Schneider suggested that three years was based on a provision in the Government Code. **The committee members discussed the appropriate number of years and developed a general consensus that no change was needed**.

2. Review of minutes from February 2017 Rules Advisory Committee Meeting.

Judge Newell distributed hard copies of the minutes from the last meeting. **There was consensus that the minutes should be accepted**.

3. Discussion of new rewrite of proposed amendment to TEX. R. EVID. 615 (amendment to subsection (c)) to ensure compliance with TEX. CODE CRIM. PROC. art. 39.14.

Ms. Taylor explained that various changes to Rule of Evidence 615 (governing the production of a witness's statement in a criminal case) were discussed at our previous rules advisory meeting. The only change that the committee members felt was needed was an amendment to the sentence in subsection (c) concerning the redaction of "unrelated portions" of the witness's prior statement. The purpose of the amendment would be to clarify that the rule cannot authorize the trial judge to redact any content that must be disclosed under TEX. CODE CRIM. PROC. Art. 39.14, the "Michael Morton Act."

In Exhibit F, Professor Goode suggested two alternative ways to change Rule 615 to accomplish this objective. Justice Goodwin preferred option 1. Mr. Walker felt that option 2 was easier to understand. Professor Goode explained that option 1 is the lesser change to the rule. He explained that Rule 615 in its current form does not clearly mandate that the trial judge must excise unrelated portions of the statement and simply implies that the trial court will redact such content. The proposed Option 1 amendment retains that slight ambiguity within the rule and simply provides that no content that must be disclosed pursuant to Article 39.14 can be redacted. **Committee members discussed the fact that option 1 appeared to provide the trial court with more flexibility and reached a consensus to recommend that the CCA adopt the language in option 1**.

4. Discussion of TRAP Rules:

(a) Discussion of new rewrite of proposed amendment to TRAP 4.5 to deal with issue of late notice to defendant RE orders in Chapter 64 proceedings.

Judge Newell explained that the proposed new Rule of Appellate Procedure 4.5 ("No Notice of Trial Court's Judgment or Order on Motion for Forensic DNA Testing") was discussed at the prior meeting and has been modified to address committee members' concerns. Members crafted the proposed rule to address a particular problem that the CCA has been seeing in which a defendant files a Chapter 64 motion for DNA testing while he is in prison and does not receive timely notice of the trial court's denial of his motion. Such a defendant cannot file his notice of appeal in a timely manner and is thereby deprived of his right to appeal the trial court's ruling on his motion for DNA testing.

The committee had two different proposals before it: Exhibit B-2 (Professor's Goode's proposal) and Exhibit B-3 (Ms. Taylor's proposal). (The members were asked to disregard Exhibit B-1). Both proposed rules allow the defendant to move for additional time to file his notice of appeal. Both proposals provide for a 30-day extension of the deadline for filing the notice of appeal upon a properly filed motion for additional time where a defendant has received notice or actual knowledge of the trial court's ruling denying his Chapter 64 motion outside the time period for filing a notice of appeal.

Ms. Taylor walked through the parts of the proposed rules and the ways in which the two proposals differ from each other. Option B-2 has a 120 day cap on the applicability of the rule and B-3 does not. Ms. Schneider and other committee members favored option B-2's language on this point, observing that we should not allow a defendant to come in and make this motion five years later. Option B-2 also has a subsection that B-3 does not have, which provides that notice to – or actual knowledge of – a defendant's attorney is imputed to the defendant.

Mr. Walker observed that prison writ writers often write these Chapter 64 DNA motions and they often do a good job. The defense attorney might get appointed but might not

have much to do because the writ writer has done such a good job. Justice Goodwin asked why we are limiting this to DNA motions and not including other types of appealable orders such as Article 11.072 proceedings and the new time credit ruling appeals. Judge Newell stated that we should see how this proposal works on Chapter 64 motions first and then consider extending it to other types of appealable orders. Ms. Schneider noted that Article 11.072 is a little different because the problem can be raised in a writ.

Ms. Taylor stated that there seemed to be several subsidiary questions that have developed through our discussions about which language should be included in the proposed rule and then there is the larger question of whether the committee should recommend that the CCA adopt the proposed rule. The committee then discussed the following subsidiary questions concerning the language that should be included in the proposed rule:

A. Whether to use "the defendant" or "the defendant and his attorney" in subsections (a) and (b). Professor Goode pointed out that a comparable civil rule uses the term "party." Members opined that the term "party" would not work as well here – the movant is the defendant. **The committee reached a consensus to use the term "the defendant," rather than "the defendant and his attorney."**

B. In subsections (a) and (d) of B-2, Professor Goode provided two optional terms: "before" or "until after," e.g., "... if the defendant neither received notice nor acquired actual knowledge that the trial judge signed a judgment or appealable order [before] [until after] the time for filing a notice of appeal had expired." **The committee members preferred use of the term "before" in two places in the proposed rule.**

C. Professor Goode pointed out that B-2 omitted the word "date" in subsection (b) and this error needed to be corrected, i.e., "A motion for additional time must be in writing and sworn, state the <u>date</u> when the defendant first received notice or acquired actual knowledge that the judgment or appealable order had been signed, and comply with Rule 10.5(b)(2)." **No members expressed any opposition to inserting the word "date."**

D. The committee discussed B-2 subsection (c), which provided:

> A motion for additional time must be filed within 120 days after the date the judgment or appealable order was signed and within 30 days of the date upon which the defendant first received notice or acquired actual knowledge of the trial court's signing of the judgment or appealable order.

Ms. Schneider suggested that we break up and simplify the above language as

follows:

> (c) When and Where to File.
>
> (1) A motion for additional time must be filed within 30 days of the date upon which the defendant first received notice or acquired actual knowledge of the trial court's signing of the judgment or appealable order. But in no event may the motion for additional time be filed more than 120 days after the date the judgment or appealable order was signed.
>
> (2) A motion for additional time to file a notice of appeal must be filed in the proper court of appeals.

The committee reached a general consensus favoring the above change to the proposed rule.

E. Judge Newell suggested that the new rule should be 4.6, rather than 4.5, so that we do not have to renumber existing civil rule 4.5. **The committee favored changing the rule number to 4.6**.

F. The committee discussed whether subsection (e) "Deadline for Filing Notice of Appeal" needs to be modified. Ms. Newton asked if the notice of appeal would usually be filed with the motion for additional time. Justice Goodwin suggested that the motion for additional time could be treated as an out of time notice of appeal. Ms. Schneider observed that another rule states that the time for filing notice of appeal begins to run on the day that the appellate court grants the motion for additional time. Judge Yeary asked if the court of appeals had unlimited discretion to grant a lengthy time period for filing the notice of appeal. Ms. Schneider noted that, in a normal DNA case, the defendant has 30 days to file his notice of appeal under TRAP Rule 26.2. So, assuming this rule is followed, the defendant would have 30 days from the date that the court of appeals grants his motion. Professor Goode suggested that this rule pertains to late notice of a trial court judgment and subsection (e) pertains to notice from the court of appeals. He stated that this provision seems out of place and unnecessary in this rule. **There was general agreement with his suggestion that subsection (e) of Option B-2 was not needed and should be omitted.**

G. **The committee also reached a consensus that subsection (f) in Option B-2 was not needed.**

The committee then voted to recommend that the CCA adopt proposed Rule of Appellate Procedure 4.6 with the modifications described above. There were no votes in opposition to this measure.

(b) Discussion of whether a new subsection in TRAP 73 is needed to cover the situation where an applicant wishes to bring an amended writ application or supplemental claims before the final disposition in the CCA of an Article 11.07 habeas application. The rule would essentially codify the CCA's holding in *Ex parte Saenz*, 491 S.W.3d 819 (Tex. Crim. App. 2016).

Judge Newell explained that the purpose of this item on the agenda is to determine whether the committee favors writing a rule to set out the process for amending a writ application as set out in *Ex parte Saenz*. He wondered whether such a rule was necessary. Ms. Taylor stated that she had spoken with a few writ attorneys about this issue. One expressed a feeling that writ law is a "black box" to practitioners and favored the codification of more writ procedures to inform applicants. A staff member's memo distributed to the committee explains that not only pro se filers but also attorneys have been confused about the procedures necessary to bring supplemental claims in a writ that is before the court. Ms. Taylor stated that she would be happy to put together proposed language for discussion at the next meeting, if the committee desires. Judge Newell said he would be happy to look at proposed language and stated that this is why we need rules of criminal procedure. **No committee members expressed any objection to considering proposed *Ex parte Saenz* rule language at our next meeting.** Ms. Taylor will prepare proposed language for the committee's consideration at the next meeting.

(c) Discussion of proposal to amend TRAP 31 to make the rule mandating accelerated appeals of habeas corpus proceedings not apply to appeals from Article 11.072 and Article 11.09 writs.

Judge Newell explained that Rule of Appellate Procedure 31 providing for accelerated appeals on writs was written years ago before Article 11.072 was passed and appears to have been intended to apply to pretrial writs. Ms. Taylor noted that the person who submitted this proposed rule change had submitted a proposed change to this rule before and then withdrew his proposal before the committee meeting. She stated that the proposed rule language is a bit confusing. Judge Newell stated that he would craft the change differently to prioritize bail and pretrial habeas appeals. He asked whether the committee members wanted to change Rule 31 or not. Ms. Schneider noted that Article 11.072 cases are not necessarily old cases and, for the appeal to be meaningful, it must be resolved before the defendant completes his probation. She favored leaving the rule alone. Justice Goodwin stated that their court does not have any problem following the accelerated procedure. Justice Newell stated that the commenter asserted that some writ appeals are so accelerated that the individual is not even given a chance to file briefs. Justice Goodwin said that her court does not stop the parties from filing briefs, they accelerate their own processing of the appeal. Judge Yeary noted that the rules prioritize some things and accelerate some things and at some point we should do a full review of these categories and their meanings. Justice Goodwin stated that her court prioritizes all criminal cases over civil cases and described the categories of accelerated cases handled by her court.

Judge Newell said that he did not know whether the committee should get into the weeds on the particular language of this proposal unless the CCA desires the rule to be changed. He suggested that the committee ask the CCA if the Court wants the committee to tinker with this rule. If so, we will do so. If no, we will leave it alone. No one objected to this approach. **The committee will seek guidance from the CCA on whether to consider changes to TRAP 31.**

(d) Discussion of proposal to delete TRAP 21.6 requiring presentment of motion for new trial.

Mr. Walker initially expressed support for this proposal. Ms. Taylor noted that there have been several CCA cases in recent years involving the presentment of a motion for new trial requirement embodied in Rule of Appellate Procedure 21.6, including a case decided in February. Judge Yeary stated that he had experience with this rule and he believed that the point of the rule was to prevent the ambush of the trial court judge. A trial judge needs time to consider whether to have a hearing on a motion for new trial and whether witnesses will be needed. Mr. Walker asked why the trial court should not be required to just review all of the motions for new trial. Judge Yeary stated that the rules allow a motion for new trial to essentially be used to prolong the deadline for filing a notice of appeal, so judges do not look at many of these motions as they are not substantive. Judge Moore stated that attorneys will often file motions for new trial as a safety measure, but, in those instances, they don't really expect the judge to sit down and look at the motions. He said the trial attorney will come in with a stack of documents after the trial and he will include a motion for new trial. Filing a motion for new trial is kind to the court reporter because it extends the court reporter's deadline. Thus, a trial judge will not automatically assume that the mere filing of a motion for new trial necessitates a hearing unless the movant affirmatively asks for one through his presentment.

Judge Newell stated that the requirement to show presentment is pretty low in most cases. He asked whether e-filing complicates this rule. Ms. Taylor suggested that e-filing may make the requirement of presentment more important because, if the motion for new trial is electronically filed, the judge may not be aware of it until the defense attorney presents the motion to him in person. Ms. Newton asked why requesting the hearing in the motion is not sufficient to put the court on notice. Why does the movant need to separately appear in front of the judge to ask again for a hearing? Ms. Schneider stated that it does look like a trap, but it is a process documented in our precedent. Ms. Taylor referred to the CCA's case law stating that this presentment requirement is necessary for error preservation on certain claims. Mr. Walker asked what a movant can do if a trial court refuses to acknowledge that the movant has presented the motion to him. He said most judges will write a note on the motion indicating that it has been presented, but some may be reluctant. He noted that some appellate attorneys will throw an appellate issue into a motion for new trial so that the court of appeals cannot say that it was not raised at trial.

Judge Newell stated that it sounds like there is more to this rule than meets the eye – it seems like it is merely a formality but it appears to serve a purpose. Ms. McKinney stated that we should not change the way things work in the courtroom just because a document may be efiled. **No committee members objected to taking no action to change the rule at this time**.

5. Discussion of committee membership and schedule.

Judge Newell has reached out to another defense attorney and prosecutor inviting them to join the committee. He said he will reach out to Hidalgo County to send a representative. The e-filing rules will go into effect on May 1 and the first wave of counties must comply with the CCA's e-filing mandate starting July 1. The committee tentatively decided to have the next meeting some time in July. Judge Newell stated that members will be notified via email following the regular process. Mr. Acosta mentioned that the writ form in the rules of appellate procedure does not have a line for the attorney to fill in an email address. Also, the cover page that the district clerk prepares should also have a place for the email address. Mr. Acosta stated that these items will need to be added. The committee can discuss the proposal at the next meeting.

Judge Newell adjourned the meeting at approximately 11:54 a.m.