EXHIBIT A: Minutes

TO: **Judge David Newell**

FROM: **Holly Taylor**

RE: **Minutes of the October 26, 2018 Court of Criminal Appeals Rules Advisory Committee Meeting**

DATE: **Prepared October 31, 2018; revised February 27, 2019**

MEMBERS IN ATTENDANCE: Judge David Newell (Chair), Judge Barbara Hervey, Judge Kevin Yeary, Chief Justice Tom Gray, Judge Jefferson Moore, Jaclyn Daumerie, Michael Gross, Emily Johnson-Liu, Donna Kay McKinney, Chris Prine, John Rolater, Sian Schilhab, Kathleen Schneider, Holly Taylor, Joseph W. Varela, Deana Williamson, and Ben Wolff. NONMEMBERS PRESENT: Michael Stauffacher and Michael Falkenberg, Court of Criminal Appeals (CCA) writs staff, Bexar County District Clerk staff, Stacey Soule, State Prosecuting Attorney.

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1. Welcome

Committee Chair Judge David Newell called the meeting to order.

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

Chief Justice Gray moved to approve the minutes. Ms. McKinney seconded the motion. The motion was approved by a voice vote.

3. Proposal concerning bills of exception and offers of proof in habeas corpus proceedings

Judge Newell stated that the next item on our agenda was "Proposal concerning bills of exception and offers of proof in habeas corpus proceedings." He said that attorney Randy Schaffer suggested this item and Judge Newell had invited him to be here for the meeting. Mr. Schaffer was not present. Judge Newell noted that we would postpone Mr. Schaffer's issue to give him time to arrive.

4. Update on the CCA orders related to matters discussed at previous meeting (See Exhibits A.1, A.2, A.3)

Ms. Taylor stated that this agenda item was provided "informationally" to let the committee know the result of its past actions. The CCA signed three orders as a result of committee recommendations. Judge Newell mentioned that the Court has recently signed the final order for new Texas Rule of Appellate Procedure (TRAP) 4.6 and the Court was planning to sign several

proposed rules orders next week based on matters considered recently by the committee.

Chief Justice Gray asked whether the Court intended to do something to TRAP 25.2 in connection with the Rule 4.6 amendment. Judge Newell responded affirmatively, stating that an amendment to TRAP 25.2 to remove the requirement for certification in Code of Criminal Procedure (CCP) Chapter 64 cases is one of the rules that the Court will be considering next week.

Judge Newell reminded committee members about the boil-water notice in Austin. He stated that he was not able to purchase hot coffee for the meeting. Instead, Judge Newell provided access to a Keurig machine with bottled water, hot tea, and hot chocolate with marshmallows.

5. Proposed amendments to TRAP 73.7 (See Exhibit C)

Judge Newell asked Ms. Taylor if we had seen this agenda item before. She responded that the committee had briefly discussed this agenda item at the last meeting. She displayed the document on the overhead display. Committee members asked to view the version with markups. She said that this TRAP rule is referred to as the "*Pena* Rule." It covers the situation where a party wants to supplement the record with additional evidence in a habeas case after the case has been sent up to the CCA. The rule was originally modeled on the procedure the CCA set out in *Ex parte Pena*, 484 S.W.3d 428 (Tex. Crim. App. 2016). At the last meeting, Professor Goode and Judge Moore suggested changes to the proposed rule to improve its organization, such as separating the party's duties from the CCA's duties and the clerk's duties. Further, Ms. Taylor met with CCA writs staff regarding the proposed changes. The existing rule contains three different ways of moving to supplement the record: (1) a motion for the CCA to consider the evidence directly (a rare situation covered in the *Pena* case); (2) a motion to supplement the record in the convicting court; and (3) a motion to stay proceedings in the CCA and file the evidence in the trial court applicable to situations where a party wants to supplement the record before the case is filed and set. She said that Mr. Michael Stauffacher (chief of the CCA's writs division) noted that the motion to stay to file additional evidence set out in proposed Rule 73.7 is effectively the same thing as the motion to stay proceedings for additional investigation contained in the proposed TRAP 73.8 (agenda item 6). Thus, Mr. Stauffacher suggested combining all of the motion-to-stay materials in Rule 73.8. Accordingly, Ms. Taylor has altered the proposed amendment to Rule 73.7 so that the "motion to stay" section merely informs the party to follow the motion-to-stay procedure in Rule 73.8, if the case has not been filed and set.

Judge Newell asked whether the district clerk's duties section should be moved ahead of the CCA's duties section. Ms. Taylor said we could move it, however, since the motion would be filed in the CCA, the CCA would likely rule on the motion before the district clerk received the evidence. Ms. McKinney and other committee members pointed out formatting problems on the exhibit being displayed on the overhead. The formatting problem was not evident on the pdf exhibit and appeared to be a function of Microsoft Word's automatic formatting feature. Ms. Taylor struggled to correct the problem for a short time while the application continued to reformat the section incorrectly. Ms. Taylor stated that she would highlight the change in blue and correct the formatting problem later.

Mr. Rolater asked what "filed and set" really means. He said that a lot of writs never seem to be "filed and set" but if the Court wants briefing, then it "files and sets" and orders briefing. Ms. Schilhab explained that a writ is traditionally disposed of with a simple order or no order at all. If the Court is going to write an opinion on the writ, then the Court will "file and set" the writ. That allows the Court to order briefing and write an opinion. Ms. Schilhab and Mr. Stauffacher said that writs are ordinarily not "filed." They are merely "received" and ruled upon unless the Court intends to write an opinion on the case. Mr. Wolff asked whether litigants should check the CCA website to see whether the case has been filed and set. Ms. Schilhab said that the applicant should receive notice when the habeas case is filed and set. Judge Moore asked what the practical distinction is between receiving and filing a writ. Judge Newell responded that the distinction concerns whether the Court has considered the case on its merits, which may be important in later determining the application of the subsequent writ bar contained in CCP Article 11.07 §4. Ms. McKinney said that writs are process issued by the clerk and the Court is "served with" them. Ms. Schilhab noted that this is a statutorily defined process.

Judge Newell asked whether the "filed and set" distinction is needed in the rule. He asked whether this is the first time that we have seen the term "filed and set" in the rules. Mr. Stauffacher said that he believes that the distinction originated with a case. Usually filed-and-set cases have a briefing order unless it is a case involving immediate relief. Ms. Schneider said that filing and setting a writ is like granting discretionary review of a petition for discretionary review (PDR).

Mr. Gross noted that some district clerk offices immediately send filed writs up to the CCA. The CCA will respond that this is a "properly filed writ—go ahead and respond." Mr. Gross expressed concern that a party might take that process as evidence that a writ had been "filed and set." Judge Newell asked whether situations exist where a party might take advantage of this rule and whether we need the term "filed and set" in the rule. Mr. Gross suggested relying on the presence of the trial court's findings of fact and conclusions of law (FOF/COL). He said that, when the trial court has completed its review of the writ, there will be FOF/COL. Ms. Schilhab and Mr. Stauffacher said that the CCA does not always receive FOF/COL. Mr. Stauffacher said that the clerk should not just turn it around within the 35-day window defined by the statute. The clerk should wait through the statutory time period. He said that Rule 73.8 covers the situation that the committee members are discussing—writs where the case has *not* been filed and set. Judge Newell asked if that was the purpose of having the reference in Rule 73.7 to "filed and set." Mr. Stauffacher agreed.

Mr. Wolff said that another difference between the two rules is that Rule 73.8 doesn't really apply to CCP Article 11.071 (death penalty) writ proceedings because the rules of procedural default in Article 11.071 are different. Mr. Stauffacher agreed that the procedures are different in Article 11.071 proceedings. Mr. Wolff noted that Rule 73.7 would apply to the capital cases but Rule 73.8 would not because a new claim would be considered a subsequent writ. *See* CCP Article 11.071 §5. Ms. Schilhab cautioned that this was not always true. She said that Article 11.071 writs are usually filed on the last possible day. In the cases where the writ is not filed on the last possible day, a party could possibly supplement the writ application with additional claims before the deadline. In that situation, the CCA will consider all of the claims together as one initial writ. She said that Rule 73.8 would apply to 11.071 writs in that circumstance.

Judge Newell asked whether we should keep the phrase "filed and set" in the title of Rule 73.7: "are we confident that the parties will have some notice that the case has been filed and set (whether they know what "filed and set" means or not)?" Committee members expressed assent. Ms. Johnson-Liu noted that there were two tracks for the "filed and set" writs. She asked why, if an applicant wants the habeas court to consider her evidence in a non-filed-and-set writ, is she not required to file the same motion as the second option in Rule 73.7 for filed-and-set writs? Mr. Stauffacher said that, after a writ has been filed and set, "the hay is in the barn." The Court has reviewed the case and decided to look closer at certain legal issues. On the other hand, Rule 73.8 writs are in a different posture. The CCA has not made a decision yet. If an applicant wants to file new evidence, it is not as big of a deal. It is a lot harder to ask the Court to change its analysis after the case has been filed and set –you may be effectively asking the Court to change the legal question. Ms. Johnson-Liu again asked why the motion would be different. Ms. Taylor explained that, when the Court files and sets a case, the Court has identified a legal issue to examine based on the arguments and materials the applicant has already submitted. Mr. Stauffacher said that, if an applicant waits until that point to bring new evidence, the Court wants to know why she didn't bring that evidence earlier in the process. And, if the applicant wants to submit it directly to the CCA, the applicant "better have a really, really, really good reason." The second Rule 73.7 option is to file the evidence with the county. Mr. Stauffacher said that you have to explain why you "sat on it." Ms. Schilhab explained that these requirements are taken from a CCA case.

Chief Justice Gray said that he had "marked all over this draft." He said that he does not practice in this area and he was trying to make the rule make sense to him. He completely rewrote the structure of the rule. He said we should not write rules from the opinion. He said we should ignore the case law, figure out what the CCA wants, and write the rule to accurate set out the procedure the Court wants parties to use. He was confused by the "filed and set" issue. He said his comment about "wishes" last time was "in jest." He thought we should remove "wishes" and replace it with "may move."

Judge Newell again asked whether drawing the distinction in Rule 73.7 to "filed and set" writs would accomplish anything. He asked how the rule would impact cases that were not filed and set. Mr. Rolater asked what "compelling and extraordinary circumstances" really means. Mr. Stauffacher said the trial court acts as an intermediary for fact-finding in a habeas case. If a party wants to bypass that process, she must have a very compelling reason. However, he said that this would be a better question for Judges Newell, Hervey, or Yeary. Judge Newell said that we need language that matches other meaningful legal standards.

Mr. Gross said that an applicant can file a writ and "get hometowned." In such cases, the trial court makes FOF/COL on the writ quickly and the writ is sent up to the CCA. The applicant receives the card from the CCA and then he is at a procedural disadvantage on his "Section 2254." *See* 28 U.S.C.S. § 2254. Mr. Gross said that the applicant will not be able to get a hearing. He said that it is hard to litigate an Article 11.07 writ and he is horrified to hear that the Court is getting Article 11.07 writs with no FOF/COL.

Judge Newell asked whether the committee is saying that we need to come up with a unified

system for supplementing all writs or that we should come up with a different method for distinguishing among them. Mr. Gross said that the distinction should be on whether the CCA has received any FOF/COL from the trial judge. He said that there are cases where the trial court receives an affidavit and then Mr. Gross sends the affidavit to his client in TDC. The client responds that the affidavit contains untrue statements and can produce evidence to controvert it. However, it's too late to take any action because the case has "already been boxed up and sent to the [CCA]."

Judge Newell asked Mr. Gross whether the procedure set out in the rule would work if we replaced "filed and set" with the filing of FOF/COL. Mr. Gross indicated that he understood the Court's frustration with late-filed materials, but he thought it should be less onerous to bring new evidence in the CCA. He said that, if there are no FOF/COL, an applicant is just out-of-luck on a Section 2254 because there is no transcript or record. Mr. Stauffacher said that Mr. Gross is talking about FOF/COL that get entered without the habeas attorney's knowledge. He pointed to the ten-day time period set out in TRAP 73.4(b)(2). He said that perhaps applicants ought to have 30 days to respond to the FOF/COL. He said that rewording that rule might address the problem identified by Mr. Gross. He said that this fact pattern does not implicate Rule 73.7, though it might implicate Rule 73.8.

Judge Hervey stated that she has heard reports that parties are not receiving notice when the trial court has made FOF/COL. Judge Newell suggested that perhaps we should reverse the order of Rule 73.7 and 73.8. Rule 73.8 now covers the majority of habeas cases while Rule 73.7 is a limited group of cases. CCA writs staff member Michael Falkenberg asked to address Mr. Gross's concerns. He said that writs are only "filed and set" on rare occasions and after extensive factfinding. In most situations—covered by the next rule (Rule 73.8)—you can supplement the record and you can ask the Court to "stop the train." Mr. Gross agreed that filing and setting was rare.

Judge Moore addressed the concern about district judges "hometowning" an applicant. He said that his colleagues don't really understand writs very well because that is not what they normally do. The judge on the bench may not have been the judge at the trial and may not be familiar with the procedures. If the DA hands them an affidavit and it looks good, they are likely to go with that. The staff attorneys will come to him and ask him to "sign here." He said that rural judges are handling several counties and all different kinds of cases. They are not trained to handle writs. Mr. Stauffacher concurred, stating that he gets calls from district judges who don't understand the writ procedures. He said that the Legislature has provided that judges can resolve writs through affidavits, even though that is a one-sided process. And it is expensive and time consuming to hold a hearing. But, if you look at the Court's case law, if you have recantations and facts like that, the case will be remanded for a hearing. He mentioned the other statutory options of depositions and interrogatories. He said you could address a lot of the concerns by extending the time period in Rule 73.4.

Mr. Wolff said that his office also gets "hometowned" in terms of having no opportunity to respond. The judge will sign the State's proposed FOF/COL on the spot or within a few days. Unlike in the federal rules, there is nothing in the rules that provides an applicant with an

opportunity to respond. The rules do not set out a procedure for filing objections to FOF/COL or what needs to be included in them.

Ms. Taylor said Rule 73.7 is not a new rule. She said that the language that the committee is discussing is already in the rule. The proposed amendment basically rearranges the content of the rule, changes the heading, and moves one of the sections over to Rule 73.8. There are not any substantive changes proposed to Rule 73.7 and the operative language in the rule comes from the CCA's *Pena* case. She noted that this does not mean that the Court cannot change the language, it just means that the language at issue is not new. With regard to Rule 73.8, although it is a new proposed TRAP rule, it is based on existing case law: *Ex parte Saenz*[1] and *Ex parte Speckman*.[2] The operative language in the rule comes from these cases and it is already the law, though, again, the Court could change it. Ms. Taylor said that she liked Judge Newell's idea of switching Rules 73.7 and 73.8. She said that Mr. Stauffacher had presented some interesting ideas about amending Rule 73.4. She pointed out that the Court recently signed an order proposing amendments to TRAP 73.4(b)(3). The public comment period on that order ended this week. We did not receive any comments about that proposed amendment or any suggestion to amend Rule 73.4(b)(2). The Court has not yet done the final order on that proposed amendment.

Judge Newell asked what the committee's action item should be on Rule 73.7 (soon to be 73.8). He said that the proposed changes to Rule 73.7 appear to be primarily labeling and organization. He asked committee members to assume that we can designate a sufficiently restrictive category. What do the members think about the way that the rule is phrased?

Chief Justice Gray suggested that the phrase "and a party wishes" be removed and the sentence read simply "a party may move the Court to consider new evidence as follows:[.]" Judge Newell asked whether "new evidence" accomplishes the same thing as what we already have. Judge Yeary asked what would happen if evidence was filed in the trial court. He suggested that the best solution was to use the term "new evidence" and construe it as situations arise. Judge Moore pointed out that removing "or the new evidence will not be considered" might not make the point clear to applicants. Judge Newell said that the phrase seems redundant. Ms. Taylor said that the writs staff encouraged the bolding and underlining of important text to emphasize important points. Judge Hervey remarked "the new evidence will not be considered" may not be accurate if they file a supplement/subsequent writ down the road. We do not want to inappropriately foreclose the applicants from ever raising certain evidence. Judge Newell took a vote on whether to remove or retain the phrase "or the new evidence will not be considered." The majority—including at least two CCA judges—voted to remove the language.

Judge Newell moved to discuss proposed subsections (a) and (a)(1). Ms. Johnson-Liu asked whether we need subsection (a) now that the language about filing a motion has been moved to the introductory paragraph. Mr. Rolater said that "has two options" seems unusual language for a rule. Judge Yeary suggested that "if the Court has received . . ." might cause confusion with remanded cases. Judge Hervey remarked that the cases are received before we remand them. Judge Yeary

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

and Judge Newell agreed that "has been received" is redundant to the language in the preceding section concerning "filed and set." Chief Justice Gray said that when we make the changes we will find that the "lead in" for subsection (a) is no longer necessary. Judge Newell suggested moving the introductory paragraph into section (a). After further discussion, the committee members reached consensus to change the rule proposal for subsection (a) to read:

> If the Court of Criminal Appeals has filed and set an Article 11.07 or 11.071 application for submission, a party may move that the Court consider new evidence as follows:

Ms. Taylor tried to implement the committee's suggestions but struggled with the automatic formatting and computer equipment.

[[The committee took a brief recess while Ms. Williamson worked out a solution to the formatting issues and Ms. Taylor brought the digital document in line with the committee's discussion.]]

Judge Newell called the committee to order. He said that the digital document now reflected the changes that the committee had discussed. The preamble to the rule is now section (a). Judge Hervey said that we had not resolved Mr. Rolater's question about the term "compelling and extraordinary." Mr. Varela asked if the phrase "compelling and extraordinary" came from the *Pena* case. Other committee members answered "yes." Mr. Varela said, "*Pena* is the fundamental law here. We have to make the rule comport with *Pena*. Otherwise we . . . are usurping the Court's opinion in *Pena*. . . . We need to . . . let 'these guys' [gesturing to the CCA judges] decide what is 'compelling and extraordinary.'" Chief Justice Gray responded, "we can recommend anything. The Court—when they sign the rule—are making the rule. We are not making the rule. . . . the rule just overrule[s] *Pena* if it conflicts with *Pena*. They can do that because they are the Court. . . . Once the rule is changed, it controls." Mr. Wolff said he does not think litigants "have any clue" what different standards mean. He said that the parties make their best arguments and "it is ultimately up to the Court what the different standards mean." Judge Newell said "compelling and extraordinary" is already in the rule. He asked whether we want to change anything in (a)(1). Chief Justice Gray noted the "may file" language. He did not understand why the litigant has an option regarding where to file the evidence. Mr. Stauffacher said that the litigant has two options. If you want to file it in the CCA, you must have a really, really, really good reason. Chief Justice Gray said that he understood the rule better now. He suggested that we do not need the word "alternatively" in subsection (a)(2). Ms. Taylor agreed that the term "may file" could be removed because we have already said a party "may move." The committee discussed the specific language needed and where to place the prepositional phrases. Judge Newell asked whether we even have two options if they always file the motion in the CCA. Other members explained that the motions have different requirements.

After much debate in the committee, Ms. Taylor read the language that she had drafted so far based on the committee's discussion.

> If the Court of Criminal Appeals has filed and set an Article 11.07 or 11.071 application for submission, a party may move that the Court consider new evidence

as follows:

> (1) Motion for Court of Criminal Appeals to Consider New Evidence. File the new evidence directly in the Court of Criminal Appeals with a motion for the Court to consider the evidence. In this motion, the party must:
>
> (A) describe the new evidence;
> (B) explain its evidentiary value; and
> (C) state why compelling and extraordinary circumstances [or alternative language such as "absolutely necessary"] exist for the Court to consider the evidence directly; or
>
> (2) Motion to Supplement Habeas Record in the Convicting Court. File in the Court of Criminal Appeals a motion to stay proceedings in order to supplement the record in the convicting court. In this motion, the party must:
>
> (A) describe the new evidence that the party intends to file in the convicting court;
> (B) explain its evidentiary value; and
> (C) state why the evidence could not have been filed in the convicting court before the Court of Criminal Appeals filed and set the application for submission.

Mr. Varela pointed out that, if the party goes with the first motion option, the party must file the evidence at the same time in the CCA. If the party uses the second motion option, the party can seek a stay and does not need to file the evidence at the same time in the convicting court. Ms. Taylor explained that the second type of motion tells the CCA to stop its work on the habeas case and wait for the new record to come up from the trial court.

Ms. McKinney said that phrases like "compelling and extraordinary" are matters for the judges to decide. Every case is different. Judge Newell agreed and said the value of terms like this one is that it signals to the parties to look to other situations in the law where the same standard is used. He said that the problem with "compelling and extraordinary" is that "it is a standard that no one has ever heard of." Chief Justice Gray echoed Mr. Rolater's observation that this is not a commonly used standard. However, he noted that this standard is in the current rule and if the Court changes it now, it will arguably send a signal to litigants that the Court intended to lower the standard. Other committee members agreed that this was a problem. Mr. Gross said he thought that the committee should lower the standard. He suggested that the Court use the language used in TRAP 10.5 for extensions of time: "the facts relied on to reasonably explain the need for the extension."[3] Judge Hervey remarked that the Court could employ an "absolutely necessary" standard. Mr. Stauffacher said that he thought that the Court would like to avoid having to remand cases after the case has been filed and set. He believed that the Court would like to have all the evidence—the "whole

[3] *See* TRAP 10.5(b)(providing that motions to extend time for filing must state: "the facts relied on to reasonably explain the need for an extension").

enchilada"—collected in the convicting court before the case is sent to the CCA. He said that "absolutely necessary" is a reasonable suggestion. Ms. McKinney agreed.

Judge Newell said that, at this point, the standard is in the existing rule and—as Chief Justice Gray observed—litigants will assume that the Court has lowered the standard if the Court changes the wording of the rule. Judge Newell said that it would be easier for the Court to do that in a future case concerning the meaning of "compelling and extraordinary circumstances." Chief Justice Gray disagreed. He said it would be easier to tackle the standard now through the rulemaking process if the Court really wants to lower the standard. He said that the committee should just flag this issue as something about which the Court should have "an internal conversation." Judge Yeary said that prior to now he had not heard anyone propose alternative language. If the committee wants to suggest alternative language, the Court can discuss it.

Mr. Rolater asked why it is harder to supplement in the CCA than to stay proceedings and file the evidence in the trial court. Judge Newell agreed that the "compelling and extraordinary" standard does not appear in section (a)(2). Mr. Stauffacher said that the reason that they have that really strong language is so that the Court does not reopen the case and discover that it needs to be remanded to the county. All of that could be avoided if the party had filed the evidence in the county in the first place. He guesses that the Court intended the "compelling and extraordinary" language to discourage parties from filing the evidence directly in the CCA and possibly or probably necessitating a remand to the trial court in a filed-and-set case. Ms. Schilhab noted that the CCA's jurisdiction over an Article 11.07 writ is based on the case being filed in the trial court. Chief Justice Gray said that it sounds like the Court's preference is, if the case has been filed and set and there is new evidence, the motion in the CCA should be a motion to stay so that the Court can stop working and allow the trial court time to deal with the evidence. Mr. Stauffacher agreed.

Judge Newell asked why, if the preferred option is number two, we have not placed it first. The committee members liked the idea of "flipping" subsections (1) and (2). Ms. Taylor agreed to do that later but said that she was not going to attempt it in the meeting due to the ongoing document formatting issues.

Mr. Gross said that, in federal court, the party has to file a "motion to stay and abate." Judge Yeary pointed out that the CCA, unlike the Fifth Circuit Court of Appeals, acts as a factfinder. Thus, he posited, it makes sense for there to be an option to file the evidence directly with the CCA under exceptional circumstances.

Ms. Johnson-Liu asked to talk about section (b), which, as proposed in the exhibit, reads:

> (b) Motion to Stay Proceedings. If the Court of Criminal Appeals has received an Article 11.07 or 11.071 application from the district clerk of the county of conviction but has not yet filed and set the application for submission, a party that wishes to file new evidence must file a motion to stay proceedings pursuant to Rule 73.8(c).

Ms. Taylor explained that subsection (b) is a place holder for the motion to stay process. This

section was in the rule before the rule was limited to "filed and set" cases. Section (b) in the proposed amended rule merely points the movant to the procedure set out in Rule 73.8 for motions to stay proceedings in cases that have *not* been filed and set. Ms. Taylor opined that, if we "flip" 73.7 and 73.8, section (b) of Rule 73.7 could probably be omitted.

Judge Newell expressed agreement. Ms. Johnson-Liu expressed concern because the language in Rule 73.8 focuses on amended and supplemental grounds. Mr. Wolff expressed a similar concern about Article 11.071 writs. Mr. Stauffacher said that new claims often have new evidence with them and the two sides of Rule 73.8 are intertwined.

Ms. Taylor agreed that they are interlinked. However, she acknowledged that Ms. Johnson-Liu's remarks and Mr. Wolff's remarks helped her realize two problems with the current rule formulation: (1) the only part of Rule 73.8 that really applies to Article 11.071 in most instances is the motion to stay for additional investigation because a supplemental 11.071 writ will usually be found to be a subsequent writ; and (2) the State can file a motion to stay to file new evidence, but the State cannot amend or supplement a writ application. She suggested leaving section (c) in Rule 73.7 as a pointer for the State and Article 11.071 applicants to direct these filers to the motion to stay procedures set out in Rule 73.8.

Ms. Schneider suggested changing the title of the rules. Mr. Varela said that these cases create a sharp division between cases that are filed and set and everything else. He said that separation needs to be preserved. Judge Newell liked the idea of getting rid of section (b). He said that we are straying to Rule 73.8 prematurely. That rule can handle the State's motions.

Judge Newell said that we should move on to the Court of Criminal Appeals' ruling section. Ms. Taylor stated that the existing rule is like a page out of a Faulkner novel. The changes to this subsection divided it into subsections to make it easier to read and understand. Chief Justice Gray said that we really don't need this section. He said the CCA can tell the movant what the Court will do and how much time the movant will have in an order disposing of the motion. Judge Newell agreed. Mr. Falkenberg explained that the verbiage is aimed at pro se applicants—to inform them of the CCA's process. Mr. Stauffacher said that, at this stage, after the case has been filed and set, the applicants should be represented by counsel. Counsel should understand the steps that the CCA will take in processing the motion. Nevertheless, the inmate applicant could look at this rule in the prison law library. Judge Newell said that the language of the order, combined with the fact that the applicant will probably be represented by counsel, obviates the need for this section of the rule. He asked if everyone agreed with this move. No one objected.

The committee moved to discuss the "District Clerk's Duties" section, which will now be subsection (b). Ms. McKinney said that this rule—which requires the district clerk of the county of conviction to send a copy of filed materials to the judge and the other party—is "fine with me." Ms. Taylor changed the reference to subsection (a)(2) to (a)(1). Ms. Taylor read back the rule to make sure that committee members were comfortable with the language as amended:

(d) *District Clerk's Duties*. If the Court of Criminal Appeals grants a motion under subsection (a)(1) and the party then files new evidence in the convicting court, the

district clerk of the county of conviction shall:

(1) immediately send a copy of the filed materials to the judge assigned to the habeas case, to the other party in the case, and to the Court of Criminal Appeals; and

(2) otherwise comply with the procedures set out in Rule 73.4(b) of these rules.

Judge Newell asked about the process where the clerk sends the material to the habeas judge. Ms. McKinney explained how it would work. Ms. Taylor stated that a habeas judge might not know about the new evidence until the clerk sends it to her. The judge might want to make supplemental findings in response. Ms. Johnson-Liu asked whether the judge knows that she can make additional findings: "How will the judge know it? Will it say this in the order? Will it say it in the rules?" Judge Newell said that, conceptually, the trial judge's duties would fall under a different heading. Judge Yeary suggested a new section entitled "Judge's Duties." Mr. Wolff agreed. He postulated that the motion and evidence might be sitting in the trial court with no action taken, necessitating another motion. Mr. Stauffacher said that the instructions to the trial judge could be accomplished in the CCA's order granting the motion. The CCA could spell out what it wants the trial court to do. This might vary from case to case. Ms. Schneider noted that the CCA can also expedite certain cases in the order. Chief Justice Gray said he was uncertain whether the habeas court could modify anything under the rule. Judge Newell said that spelling out the habeas judge's duties in the rule would necessitate a new section.

Ms. McKinney asked whether a habeas judge can change a jury verdict. Other committee members responded "no." Judge Newell noted that the habeas judge may change his original FOF/COL. Chief Justice Gray asked whether there is a point in the habeas proceedings where the CCA could return the parties to the point where the habeas record has just been filed with the court. Judge Newell asked whether we want the habeas judge to be able to unravel the habeas proceedings. He said that, if the case has been filed and set, there has already been so much work done on the case that there is an incentive not to redo all the habeas proceedings. Ms. Schneider said that that seems like a good reason to tailor the directions to the trial judge in each individual order. Mr. Rolater said that the CCA needs to prepare an order in each filed and set case. The order should script what needs to happen next and how to obtain an extension of time so that the parties and the judge know what to do. The committee members analogized this type of order to setting out the details of a custom home.

Judge Newell asked whether there will be a situation where the CCA just grants the motion. Mr. Falkenberg said that this had only happened one time and the Court filed and set the case and wrote an opinion. Mr. Wolff pointed out that, if an applicant plans to present the kind of substantive new evidence that might unravel the habeas case, the party will set that out in the motion. The CCA will understand the import of the evidence and can draft the order accordingly. Judge Newell suggested that, if we later decide that we need a rule section on judicial duties, the Court can add it at that time. He asked what the other committee members thought. No one expressed any objections.

6. Proposed amendment adding TRAP 73.8 (governing amended or supplemental Article 11.07 writ applications & motion to stay) and a comment (See Exhibit D)

The committee discussed the fact that Rule 73.8 will become Rule 73.7 because it does not define the rule for the rare circumstance. Judge Newell said that this rule currently encompasses supplementing facts and supplementing issues. He asked whether this rule is too unclear in that respect and should we separate those two things into different rules.

Mr. Stauffacher pointed out that the definition of "Supplemental Application" (Rule 73.8(a)(2)) states that "[a] supplemental application adds grounds or content to a previously filed application . . ." Other committee members noted that we need to change the title of the rule to include adding new evidence. Judge Newell clarified that this is a new rule. Ms. Taylor agreed that it is a new rule, but it is based on case law. Ms. Taylor said that this committee has seen a previous version of this rule at the last meeting. She changed the proposal substantially based on criticism at the last meeting.

Chief Justice Gray suggested changing the rule title to: "supplementing with new grounds or new evidence." Ms. Taylor said that the applicant can instead amend applicant's existing grounds and not add any new grounds or evidence. Mr. Stauffacher explained that the "amended application" will completely replace the old application. Chief Justice Gray commented that there are judges who do not understand the distinction between "amended" and "supplemental." Mr. Stauffacher responded that that is why the terms are defined in the proposed rule. He said that the applicants need to understand that the Court will treat an amended application differently from a supplemental application. Ms. Taylor asked whether, if an applicant does not specify whether the application is amended or supplemental, the CCA staff will follow *Haines v. Kerner*[4] and try to determine what applicant intends to accomplish. Mr. Stauffacher agreed and indicated that staff will consider all properly filed writs.

Judge Newell asked why we need to add the new language in the title about supplementing with new evidence. Mr. Wolff pointed out that the change is needed to include Article 11.071 writ applicants who may need to file new evidence without amending or supplementing the application. Other committee members mentioned that the State might also want to file new evidence.

Judge Newell indicated understanding and then asked, "Does this work?" Chief Justice Gray said, "No."

Mr. Wolff suggested that we might need to change section (b) ("Motion to Supplement or Amend an Application") to include supplementing an application with new evidence. Ms. Schneider suggested that the proposed section (c) ("Motion to Stay Proceedings for Additional Investigation") already encompasses this option.

Mr. Prine suggested that the definition of "Movant" in section (a)(3) defines "movant" only in

[4] 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).

terms of Article 11.07 and needs to be changed. That proposed definition reads:

> (3) *Movant*. A movant is usually an applicant or petitioner who seeks the Court of Criminal Appeals' permission to file a supplemental or amended Article 11.07 application or seeks a stay of proceedings to allow time to investigate legal claims or collect evidence that might serve as the basis for a supplemental or amended application. When the State seeks to stay habeas proceedings in order to supplement the habeas record with additional evidence, the State is the movant.

Ms. Taylor asked if the phrase "or seeks a stay of proceedings to allow time to investigate legal claims" addresses the problem identified by Mr. Prine. She suggested that the Court could omit the phrase "that might serve as the basis for a supplemental or amended application." Mr. Wolff suggested that we should remove any reference to Article 11.07 because the rule cannot change what the statute requires. Ms. Taylor agreed. Judge Newell said we are only defining "movant."

Judge Newell asked if the committee agreed with the title language change. Judge Hervey asked why we are taking out the phrase "that might serve as the basis for a supplemental or amended application." Ms. Taylor responded that it might be the State that wants to file the additional evidence. She said that, for example, the State was the party seeking to file the supplemental evidence in *Ex parte Pena*. Ms. Schneider asked why the rule defines "movant" as "usually an applicant or petitioner." Ms. Taylor said that the focus was on an inmate-applicant trying to understand the rule but noted that we do not have to include that language.

Judge Newell asked why not get rid of the definition of "movant" altogether. He said that everyone will assume that a "movant" is someone who is "moving" for something. Judge Newell again drew the committee's attention to the title of the rule as currently stated: "Rule 73.7~~8~~. Supplementing or Amending Application Grounds or Providing New Evidence after Case Forwarded to the Court of Criminal Appeals; Motion to Stay Proceedings." No one expressed a problem with the title.

Judge Newell then asked for the committee's thoughts about the first and second definitions:

> (1) *Amended Application*. An amended application revises a previously filed application that may be deficient or incorrectly stated. Courts will consider an amended application as a complete substitute for the previously filed application, disregarding the previously filed application.
> (2) *Supplemental Application*. A supplemental application adds grounds or content to a previously filed application but will not cure any procedural deficiencies in the previously filed application. Courts will consider a supplemental application in addition to the previously filed application.

No one expressed any objections to these definitions.

Judge Newell then turned to section (b), which, as proposed, reads:

(b) Motion to Supplement or Amend an Application. If an Article 11.07 application has been forwarded to the Court of Criminal Appeals and a movant wishes the Court to consider a supplement or amendment to the application, the movant must file in the Court of Criminal Appeals a motion to supplement or amend the application. In this motion, the movant must satisfy the following requirements:

(1) the motion must describe the supplemental or amended grounds the movant intends to raise in the supplemental or amended application;
(2) the supplemental or amended grounds described by the movant must be cognizable and ripe for review; and
(3) the movant must state why the supplemental or amended grounds could not have been raised in the convicting court before the application was forwarded to the Court of Criminal Appeals.

Ms. Schneider suggested replacing "movant" with "party." She pointed out that the rest of the rule uses the term "party." This suggestion received support. The committee debated whether to replace "movant" with "party" or "applicant." The committee also discussed replacing "wishes" with "may move" and other options. Ms. McKinney said that the rule contains unnecessary language about the movant's intentions. Judge Newell agreed that the rule seems to ask how the person feels about the motion, not just what the motion must contain. The committee reached consensus to replace "movant" with "party."

Ms. Johnson-Liu suggested the following language: "If an application has been forwarded to the CCA, a motion to supplement or amend must: . . ." Chief Justice Gray asked whether you "raise in" or "raise by" and "present in" in reference to proposed section (b)(1), which reads, "the motion must describe the supplemental or amended grounds the movant intends to raise in the supplemental or amended application." Ms. Johnson-Liu and Mr. Prine suggested shortening this language to read: "describe the supplemental or amended grounds." The committee then discussed ways to shorten section (b)(2) concerning whether the new grounds are "cognizable and ripe for review." The committee also discussed whether the second item should be included in the motion requirement at all given that the CCA must ultimately decide whether the grounds are cognizable and ripe for review. Mr. Prine said that we should change "raised" to "presented" in proposed section (b)(3): "the movant must state why the supplemental or amended grounds could not have been raised in the convicting court before the application was forwarded to the Court of Criminal Appeals." The committee discussed ways to shorten (b)(3). Judge Yeary asked if there is a difference between "state" and "explain" or are we just using different words to say the same thing. Judge Newell agreed. He suggested that we introduce items (b)(1)-(3) with the phrase "must explain" and then each subsection would not need to include a verb:

(b) Motion to Supplement or Amend an Application. If an application has been forwarded to the Court of Criminal Appeals, a party must file in the Court of Criminal Appeals a motion to supplement or amend that describes:

(1) the supplemental or amended grounds;

(2) why these grounds are cognizable and ripe for review; and
(3) why the supplemental or amended grounds could not have been presented previously.

The committee members speculated about what (absent committee member) Professor Steven Goode might say about the proposed language. Mr. Rolater asked whether an applicant should have to show "good cause" or "extraordinary circumstances" for delay with regard to subsection (b)(3). Committee members said that the Court will make that determination. Mr. Stauffacher said that this language is to assist inmates. Ms. Taylor stated that, under *Ex parte Saenz*, in Article 11.07 cases, if the Court has not disposed of the writ application yet or filed and set it, the Court tends to default to considering an applicant's new claims. She said that the Court has recognized the role of laches, but there must be an extreme situation for laches to come into play. Mr. Stauffacher said that, as long as the applicant gets multiple writ applications to the Court before the writ is disposed, the Court will look at them.

Judge Newell said that the Court could include in the motion a requirement that the party set out reasons for the delay. Mr. Rolater said that he thinks that the "good cause" standard is ideal. He said that the Court should encourage applicants to bring all of their claims at one time. He said that this approach is consistent with the Legislature's directive expressed through Article 11.07 Section 4, conservation of judicial resources, and fairly litigating the writs. As a practitioner, Mr. Rolater is frustrated when applicants—after full and fair litigation of their claims—then amend and supplement their writs.

Judge Newell asked whether the motion should require the supplemental or amended grounds to be described. Mr. Rolater said that he thought this should be a requirement of the motion so that the State has enough information about the new claims to respond to the motion.

Judge Newell asked if we should move subsection (b)(3) before (b)(1) or (b)(2) in order to emphasize the need to include this information. But then he changed his mind and said that it might not make sense to state why the new grounds were not previously presented before describing the new grounds. Mr. Rolater said that the proposed order of the subsections is consistent with current pleading practices. Mr. Stauffacher said that the applicant might not make it past subsection (b)(2) if the new grounds are not cognizable and ripe and then there would be no reason to look at (b)(3).

Judge Yeary asked whether the rule requires the applicant to use the writ form. Ms. Taylor said that the rule does require the use of the form. She pointed out the language in subsection (e). Chief Justice Gray found Mr. Rolater's argument compelling and feels that the rule should have the words "good cause." Ms. Taylor said that "good cause" is not the standard defined by the CCA in the case law for laches. He said that the rule could spell out a different standard. Ms. Schilhab said that the statute does not put a limitation on bringing new grounds until a certain point. She speculated that changing the rule as suggested might be interpreted as an abridgment of the right to habeas corpus. Mr. Rolater pointed out that laches is not in the statute. Judge Newell said that laches is an equitable doctrine that dates back many years. Ms. Schilhab said that adding "good cause" to the rule might be creating a standard that the law does not allow. Ms. Taylor called the

committee's attention to a passage in *Ex parte Saenz* about laches:

> We do not discount the State's interest in the orderly disposition of Article 11.07 applications; this is a legitimate interest that we have acknowledged when an applicant abuses the writ process. *See, e.g., Ex parte Jones*, 97 S.W.3d 586, 588 (Tex. Crim. App. 2003) ("We still should not and will not tolerate the filing of perjurious or forged material in writs of habeas corpus. Particularly in this era of governmental budgetary restraint, we cannot condone the waste of scarce judicial and fiscal resources that frivolous filings cause."). However, this interest is not necessarily infringed upon merely because an applicant properly files an amended or supplemental claim before we dispose of his pending application. Without more than that the amended application necessitates redundant effort or extra time on the part of the State, we cannot find that the State is prejudiced.

491 S.W.3d at 826. Ms. Schneider said that the Court will follow the law and wondered whether we need a standard in the rule. Judge Newell asked whether there is an existing standard or disincentive in the law, "besides laches." Ms. Taylor said that the subsequent writ bar in Article 11.07 Section 4 does not "kick in" until final disposition, though it is a different question with regard to Article 11.071. Judge Newell said that it seems that this would be a substantive change that the Court is going to have to address. Ms. Schilhab said that, under the law as it exists, an 11.07 applicant could potentially file a writ every month until final disposition of his application and there is no disincentive "other than possibly laches in an extreme circumstance." Mr. Stauffacher pointed out the proposed circumstances could implicate the common law "abuse of the writ" doctrine. He pointed out that, in the *Saenz* case, Nueces County was attempting to block writ applications.

Judge Newell stated that we would need to include a note that the CCA should consider whether to have a "good cause" requirement. Judge Hervey said that she thinks that making the applicant describe the reason that the supplemental application could not have been previously presented is enough. Judge Newell noted that the standard will be part of the Court's decision. He said that Mr. Rolater made a good point that the Court might want to consider a "good cause" standard. Judge Hervey said that this inquiry might be something that "we should talk to the Legislature about" because it could be seen as abridging statutory rights. She said that she understood Mr. Rolater's dilemma but noted that the Court tries to address these concerns through its current processes.

Mr. Gross called attention to the beginning of the rule where the committee had struck the language about filing the motion in the CCA. He said inmates need the direction to file the motion in the CCA. The committee agreed to reinstate language requiring the party to file the motion in the CCA. Ms. Taylor edited the language on the overhead.

Judge Newell moved on to section (c) governing the motion to stay proceedings, which—as proposed—read:

> (c) Motion to Stay Proceedings for Additional Investigation. In the event that a movant needs additional time to investigate legal claims or collect additional

> evidence that might serve as the basis for a supplemental or amended application, the movant must file a motion to stay proceedings with the Clerk of the Court of Criminal Appeals. In this motion, the movant must:
>
> > (1) state the reason that the movant believes that additional evidence or grounds for relief exist and could be developed through further investigation;
> > (2) if the movant seeks to stay proceedings for the purpose of filing additional evidence, describe the evidence and explain its evidentiary value;
> > (3) explain why this investigation was not completed before the application was filed; and
> > (4) state a reasonable period of time that the movant believes is necessary to conduct the investigation.

Judge Newell said that this section will apply in many cases. Ms. Johnson-Liu and Mr. Stauffacher indicated that the language needs to be expanded to clearly encompass parties—including the State—who are merely filing additional evidence and are not amending or supplementing a writ application. Chief Justice Gray suggested: "If the party needs additional time to investigate legal claims or collect additional evidence, the party must file a motion to stay proceedings in the Court of Criminal Appeals." Mr. Prine continued Chief Justice Gray's proposed language: "—that states [or describes]:[.]" Chief Justice Gray said that he ended the sentence and then started a new sentence: "The motion must:[.]"

Ms. Johnson-Liu asked whether this rule would apply to her if she wanted to file evidence that she already possessed—in other words, no further investigation was needed. Mr. Stauffacher said that the rule would apply to her. He noted that this rule lets the Court know to stop the proceedings—"throws the wooden shoe into the machinery"—while the party files the materials in the convicting court. Ms. Taylor explained that it will take time for the convicting court to review the new evidence and the CCA should not unknowingly move to resolve the case in the interim. Ms. Schilhab said that we should amend the rule so that it does not limit the motion to stay to situations where additional "investigation" is needed. In Ms. Johnson-Liu's hypothetical, she would not need to conduct additional investigation, instead she would need the CCA to stay the writ proceedings to allow time for the evidence to be filed and considered in the convicting court. Committee members discussed changing this language and decided on "additional time to investigate or present legal claims or additional evidence."

Ms. Johnson-Liu asked what the difference is between staying the case to allow evidence to be filed below and remanding the case to the trial court to consider the new evidence. Ms. Schilhab said that you are not necessarily relitigating the grounds or materials already presented to the CCA. Instead, "you are putting in new stuff." Ms. Taylor asked Mr. Stauffacher, isn't it easier for the Court to grant a motion to stay than to craft a remand order? Mr. Stauffacher agreed, stating that before a remand order can be issued, the case must go to conference. Mr. Stauffacher clarified that there would be an order issued on a grant of a motion to stay stating how much time the party gets

(the order is discussed out in section (d) of the proposed rule[5]), but this order would be easier to do than a remand order. Ms. Taylor noted that a remand order would typically identify particular issues that need to be resolved. Granting this motion to stay would not involve analysis of the legal issues in the case. Mr. Stauffacher said that this would be a standard remand order that allows the trial court a certain amount of freedom to identify the issues.

Ms. Taylor read back the following section (c) language for the committee's review:

> In the event that a party needs additional time to investigate or present legal claims or additional evidence, the party must file a motion to stay proceedings in the Court of Criminal Appeals. In this motion, the party must:

Ms. Schneider pointed out that—in keeping with the changes made to this section—we should change the heading from "Motion to Stay Proceedings for Additional Investigation" to "Motion to Stay Proceedings." Ms. Johnson-Liu asked whether we should title the section "Motion to Stay for Additional Proceedings in the Convicting Court." She said that, though the proposed heading was longer, it would inform the party that the evidence would be filed in the convicting court. Ms. Schilhab cautioned that putting the convicting court in the heading and yet requiring the motion to be filed in the CCA might confuse movants.

Judge Newell moved to discuss subsection (c)(1): "(1) state the reason that the movant believes that additional evidence or grounds for relief exist and could be developed through further investigation[.]" Committee members discussed changing this language. Judge Yeary suggested introducing the list of subsections with "[t]he motion must" instead of "[i]n this motion, the party must:[.]" Other members liked this proposal. Ms. Schilhab suggested "The motion must describe:[.]" The committee struggled to adjust the subsections to work with this introductory phrase. Chief Justice Gray suggested that the committee look ahead to subsection (4): "state a reasonable period of time that the movant believes is necessary to conduct the investigation." He said that "describe" would not work with this language. The committee discussed whether section (c)(2)—"if the movant seeks to stay proceedings for the purpose of filing additional evidence, describe the evidence and explain its evidentiary value"—should be changed to include a materiality standard, whether it should be combined with subsection (c)(1), and whether subsection (c)(2) was even necessary. The committee grappled with the problem that using an introductory phrase containing "describe" or "state" did not comport with the ideal language in the following subsections. Ms. McKinney and Ms. Johnson-Liu suggested that the committee return the introductory phrase to "[t]he motion must:" which would allow the subsections to include the appropriate verbs, e.g., "describe" or "state." Ms. Taylor rewrote subsection (1) to read: "describe

[5] Section (d) of the proposed rule read:

> *Court of Criminal Appeals' Ruling*. If the Court of Criminal Appeals grants a motion to supplement or amend an Article 11.07 application or a motion to stay proceedings, the Court will designate a time frame in which the movant must file a supplemental or amended application and any memorandum of law and other supporting materials or additional evidence with the district clerk of the county of conviction.

the additional evidence or grounds for relief that could be developed through further investigation[.]" She suggested that subsection (2) read simply: "explain its evidentiary value." Committee member expressed agreement.

Judge Newell said that it was time to adjourn the meeting. He observed that the committee members "seemed punchy." Ms. Schilhab said that she would work with Ms. Taylor on the revisions. Judge Newell said that, at our next meeting, the committee would start from this point in this rule. Ms. McKinney asked for a "hear, hear" for Ms. Taylor's minutes. Ms. Taylor asked whether projecting the changes onto the overhead screen was facilitating the committee's discussion or "bogging it down." Committee members remarked that the process was helpful and allowed members to visualize the changes.

Judge Newell said that the next committee meeting would occur towards the end of February or the beginning of March. The meeting will again be on a Friday and will run from 9:00 a.m. to 12:30 p.m. Ms. Williamson notified committee members who are submitting forms for reimbursement that the forms should be sent to her. She said that the reimbursement amount may be slightly different than what members expect because the Court has decided to reimburse mileage at the rate of $.45 per mile rather than $.55 per mile used by other State entities. Ms. Taylor stated that, if committee members have thoughts or concerns about parts of the rule that we did not reach, they should email them to her. Judge Newell thanked everyone for coming.