EXHIBIT A: Minutes

TO: **Judge David Newell**

FROM: **Holly Taylor**

RE: **Minutes of the February 22, 2019 Court of Criminal Appeals Rules Advisory Committee Meeting**

DATE: **Prepared March 20, 2019, and edited May 21, 2019**

MEMBERS IN ATTENDANCE: Judge David Newell (Chair), Chief Justice Tom Gray, Judge Jefferson Moore, Jaclyn Daumerie, Michael Gross, Emily Johnson-Liu, Chris Prine, John Rolater, Sian Schilhab, Kathleen Schneider, Holly Taylor, Joseph W. Varela, Deana Williamson, and Ben Wolff. NONMEMBERS PRESENT: Michael Falkenberg (Court of Criminal Appeals (CCA) writs staff), John Messinger (Office of the State Prosecuting Attorney), Randy Schaffer.

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1. Welcome

Committee Chair Judge David Newell called the meeting to order. Ms. Taylor said that our committee now has a webpage.[1] Ms. Taylor created a template for the webpage and Diana Norman made it happen. The webpage has links to past agendas and minutes.

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

Ms. Taylor apologized because she found 5-6 typos in the minutes as she was preparing for the meeting. She said that she would correct these typos. Chief Justice Gray said that he found three typos on one page. Ms. Taylor confirmed that she found multiple typos on one page. Chief Justice Gray moved to approve the minutes. The motion was approved by a voice vote. Judge Newell thanked Ms. Taylor for her work on the minutes.

3. Update on the CCA orders related to matters discussed at previous meeting (See Exhibits A.1 – A.6)

Judge Newell asked Ms. Taylor to update the committee on the Court of Criminal Appeals' (CCA's) rules orders issued since our last meeting. Judge Newell discussed an issue we encountered: the revised Code of Criminal Procedure Article 11.07[2] application form contains several pages consisting only of blank lines, and the form had to be published in the Texas Bar Journal in the exact format of the CCA's order. This led to several pages in the Bar Journal containing only blank lines, which may have been confusing to some readers. Ms. Taylor then

[1] See http://www.txcourts.gov/cca/rules-advisory-committee/.

[2] All future references to articles refer to the Texas Code of Criminal Procedure unless otherwise noted.

discussed the rules orders issued by the CCA since the committee's last meeting. She said that all of these orders were based on matters previously discussed by the committee and the CCA "went with" what the committee had recommended in most cases:

Exhibit A.1—An order amending Texas Rule of Appellate Procedure 25.2. This amendment exempted orders appealable under Chapter 64 of the Code of Criminal Procedure (DNA appeals) from the requirement that the trial court certify the defendant's right to appeal and added Rule 25.2(a)(2)(C): ". . . a defendant may appeal only: . . . (C) where the specific appeal is expressly authorized by statute."

Exhibit A.2—An order amending Rules 73.1 and 73.4.[3] These changes are 'tied in' to the other changes to the appendices to the appellate rules that the committee has discussed. One change requires a district clerk to include a certification on the cover sheet submitted with habeas records to an appellate court, certifying that all applicable requirements of Rule 73.4 have been complied with including the requirement to serve filings on all the parties in the case. Ms. Taylor also called the committee's attention to the amendment at the top of page 29 of their packets which allows applicants to verify an Article 11.07 habeas application using an unsworn declaration, even if they are not inmates. This change was made to bring the form into compliance with Chapter 132 of the Texas Civil Practice and Remedies Code.

Exhibit A.3—An order amending Appendix E of the Rules of Appellate Procedure, which is the application form for an Article 11.07 Application for Writ of Habeas Corpus. This includes the many changes recommended by the committee, such as: changes to the instructions and some of the questions; clarifications to the wording of the verification section to make the meaning clearer; adding the option of using an unsworn declaration to verify the application for non-inmates (inmates already had that option) in lieu of an oath with a notary public.

Judge Newell clarified that these orders are all final rules changes and asked if the new form was being distributed. Ms. Taylor said that she thought it was and said that the order has been uploaded to the CCA website. Mr. Wolff said that, at the clerks' conference, he mentioned the changes to the Article 11.07 form, the forwarding of documents provision, and the changes to the verification process. Judge Newell said that, at an event that he attended, a clerk stood up and said that she was not receiving copies of the CCA orders. Ms. Williamson said that for the last two years she sends the orders to the Legislature, the Bar Journal, the court of appeals clerks, TDCAA,[4] and TCDLA.[5] She said she later started reaching out to the president of the District and County Clerks Association and asking them to forward the orders to their membership/list serve, but she cannot guarantee that they are doing this. She noted that she discovered that the version of the "TRAP" Rules[6] on the

[3] Rule 73 is the Rule of Appellate Procedure governing the procedures for postconviction applications for writs of habeas corpus.

[4] The Texas District and County Attorneys Association.

[5] The Texas Criminal Defense Lawyers Association.

[6] The Texas Rules of Appellate Procedure.

Court's website was incorrect and this problem was corrected quickly.

Mr. Falkenberg said that the Writs Section of CCA staff have already seen some of the new forms filed. Further, the State has already filed pleadings faulting applicants for failing to use the new form and asking the Court to dismiss the applications on the old form as noncompliant. Ms. Taylor asked Mr. Falkenberg if the Court was still accepting applications filed on the old form. He agreed, stating that the Staff's position is that the recent amendments to the form do not constitute substantive changes that would render a writ filed on the old form to be noncompliant.

Exhibit A.4—An order amending Appendix D of the Rules of Appellate Procedure, which is form for certification of a defendant's right of appeal. Ms. Taylor said that the committee originally looked at making changes to this form to omit a reference to "fax number" and add a reference for an email address. But then we discovered that the form had out-of-date rule language in it, so we corrected that language and added check boxes. She described the changes as relatively minor.

Exhibit A.5—An order amending Appendix F of the Rules of Appellate Procedure, which is the Clerk's Summary Sheet for Post-Conviction Applications for Writ of Habeas Corpus under Article 11.07 and Article 11.071. Ms. Taylor said that the changes "cleaned up" this form—which is a cover sheet attached to the clerk's records—and added a requirement that the clerk certify compliance with Rule 73.4 (discussed earlier).

Exhibit A.6—An order amending Rules 31.1 and 31.2. This amendment was something that Melissa Stryker and Clint Morgan from Harris County had originally proposed. The changes to these rules pertain to whether habeas corpus appeals are accelerated and under what circumstances.

Ms. Taylor said that all of the above rules orders are final and have been through the public comment process. She said that, for a period of time, the rules comments email address (TxCCARulesComments@txcourts.gov) did not function correctly. Ms. Taylor said that we don't know how the problem happened, but it was quickly corrected after we discovered it. She said that people can always contact the CCA clerk's office if they have comments about the rules or proposed amendments.

Judge Newell commented that Rule 4.6 appears to have not yet been used by anyone.

4. Proposal concerning bills of exception and offers of proof in habeas corpus proceedings (See Exhibit B)

Judge Newell said that Attorney Randy Schaffer requested a change to the TRAP Rules in order to ensure that bills of exception can be used in habeas proceedings. He introduced Mr. Schaffer to speak about his proposal. Mr. Schaffer said that the broader question is whether the Rules of Evidence apply to habeas corpus proceedings. He said that Rule of Evidence 103 states that the Rules of Evidence shall apply "except," followed by a list of exceptions that does not include

habeas corpus.[7] Rule of Evidence 103(c) permits the proponent to make a bill of evidence/offer of proof when evidence is excluded at trial.[8] Mr. Schaffer said that he has encountered a situation where, in a habeas hearing, the judge excludes evidence that he has offered. When Mr. Schaffer has tried to make a bill of exception, the judge has asked for authority justifying the use of a bill of exception/offer of proof in a habeas proceeding. He said that this has happened about half the time when he has attempted to make an offer of proof. He said that he has been dealing with this problem for five years. Mr. Schaffer said that the excluded evidence should be in the record so that the CCA—as the ultimate finder of fact in habeas proceedings—can consider the evidence if the Court thinks that it is relevant. He said that trial judges have often said that, if the CCA thinks that the excluded evidence should have been admitted, the CCA can remand the matter to the trial court to reconvene the hearing and admit the evidence. However, he noted, the hearing may be convened in a remote location requiring a great expenditure of time and resources for habeas counsel. Typically, the witness at issue is present at the hearing when the trial judge excludes the evidence and the most efficient thing to do would be to make the offer of proof at that time. Mr. Schaffer contends that the State "plays both sides of the coin," by arguing that the Rules of Evidence apply in habeas hearings when it suits their needs, and then arguing that the Rules should

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[7] Rule of Evidence 101 provides in relevant part:

> (b) Scope. --These rules apply to proceedings in Texas courts except as otherwise provided in subdivisions (d)-(f).
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> * * *
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> (d) Exception for Constitutional or Statutory Provisions or Other Rules. --Despite these rules, a court must admit or exclude evidence if required to do so by the United States or Texas Constitution, a federal or Texas statute, or a rule prescribed by the United States or Texas Supreme Court or the Texas Court of Criminal Appeals. If possible, a court should resolve by reasonable construction any inconsistency between these rules and applicable constitutional or statutory provisions or other rules.
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> (e) Exceptions. --These rules - except for those on privilege - do not apply to:
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> > (1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
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> > (2) grand jury proceedings; and
> >
> > (3) the following miscellaneous proceedings:
> >
> > > (A) an application for habeas corpus in extradition, rendition, or interstate detainer proceedings;
> > >
> > > (B) an inquiry by the court under Code of Criminal Procedure article 46B.004 to determine whether evidence exists that would support a finding that the defendant may be incompetent to stand trial;
> > >
> > > (C) bail proceedings other than hearings to deny, revoke, or increase bail;
> > >
> > > (D) hearings on justification for pretrial detention not involving bail;
> > >
> > > (E) proceedings to issue a search or arrest warrant; and
> > >
> > > (F) direct contempt determination proceedings.
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> (f) Exception for Justice Court Cases. --These rules do not apply to justice court cases except as authorized by Texas Rule of Civil Procedure 500.3.

TEX. R. EVID. 101(b), (d)-(f).

[8] Rule of Evidence 103(c) provides:

> Court's Statement About the Ruling; Directing an Offer of Proof. --The court must allow a party to make an offer of proof outside the jury's presence as soon as practicable - and before the court reads its charge to the jury. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. At a party's request, the court must direct that an offer of proof be made in question-and-answer form. Or the court may do so on its own.

not apply when that suits their needs. To his knowledge, the CCA has never remanded a habeas case to fill in gaps when evidence has been excluded. He said that would take about six months each time. He said that there is inconsistency statewide and there should be a uniform rule concerning: (1) whether the Rules of Evidence apply; and (2) whether, if the proponent's evidence is excluded, the proponent should have the right to make an offer of proof to establish what the testimony would have shown. He said that this is especially important when a witness is hostile.

Ms. Schilhab said that, ideally, the Legislature should clarify this matter. She said that Article 11.071 (governing the procedure to be followed in death penalty writs) specifically states that the Texas Rules of Evidence apply in hearings held under that statute.[9] But, when the Legislature added Article 11.071, they did not amend Article 11.07 to clarify whether the Rules of Evidence apply in hearings in other types of writ proceedings. She said that it is not a bad idea to add a provision clarifying that the Rules of Evidence should apply in Article 11.07 habeas proceedings.

Mr. Schaffer pointed out that Rule 103(c) refers to the "jury": "The court must allow a party to make an offer of proof outside the jury's presence as soon as practicable . . ." He said that prosecutors have seized on this "jury's presence" language to argue that there is no jury present in a habeas hearing. Mr. Schaffer noted that there is also no jury present in a trial before the court and yet Rule 103 applies in that context. He viewed this "jury's presence" language as a flaw in the rule.

Mr. Varela asked whether the proponent of the evidence could file a written offer of proof in question-and-answer format. Mr. Schaffer said that, if the witness is a friendly witness, he typically just obtains an affidavit from the witness and files the affidavit with the clerk so that it will be in the record for the CCA. However, if the witness is a hostile witness, he cannot take this approach because the witness will not provide an affidavit or talk to him. He can only assert what he hopes that the witness would say, but he really does not know what the witness would say.

Chief Justice Gray asked why this has only been a problem for five years. Mr. Schaffer said that recently he has had a lot more habeas cases statewide and he has been involved in a lot more habeas hearings, so he has become aware of this problem. Judge Newell asked whether we need to address the potential problem that the bill of exception might range beyond the scope of the claims being addressed at the hearing. Ms. Schilhab stated that she does not think that we should specifically state in the amendment that bills of exception are allowed. She said that we should do an amendment stating that the Rules of Evidence apply, just as Article 11.071 does. That change should notify trial courts that Rule 103 and bills of exception and relevancy rules apply in these habeas hearings. Ms. Taylor asked whether Ms. Schilhab was proposing an amendment to TRAP 73, since the CCA does not have the ability to amend Article 11.07. Ms. Schilhab said that the Court could amend the Rules of Evidence.

Mr. Varela asked how Mr. Schaffer would prefer for Rule 103 to read. Mr. Schaffer read his

[9] *See* Article 11.071 §10 ("The Texas Rules of Criminal Evidence apply to a hearing held under this article."). Ms. Schilhab also pointed out that Article 11.071 refers to the "Texas Rules of *Criminal* Evidence," and there have not been separate rules of criminal evidence for some time.

proposal from his (Mr. Schaffer's) earlier email to Judge Newell:

> I request that the CCA enact a rule that, when the trial court sustains an objection to a question in a habeas corpus proceeding, the party proffering the question is entitled to obtain the answer on a bill of exceptions or make an offer of proof. Alternatively, the CCA could clarify that Rule of Evidence 103(c) applies in a habeas corpus evidentiary hearing.

See Exhibit B. Mr. Schaffer said that, in either case, the amendment should be pretty simple. He said that the habeas attorney has a reason to ask each question that he asks in a habeas hearing, and it is not in the attorney's best interest to "go way beyond the issues in the writ." Judge Moore said that a writ hearing is kind of like a trial.

Judge Newell said that he was hearing two lines of discussion: (1) whether to add a provision somewhere clarifying that the Rules of Evidence should apply in writ hearings; and (2) whether we need to fix a flaw in the rule about bills of exception. He asked whether any committee members thought that it was a bad idea to add a blanket rule similar to the provision in Article 11.071 providing that the Rules of Evidence apply in writ proceedings. Ms. Taylor said that she thought that this was a good idea, and that she believed that the place for that amendment would be Rule of Evidence 101. She read from Rule 101(b) and (e) (see footnote 7). She noted that Rule 101 provides that the Rules of Evidence do not apply to "an application for habeas corpus in extradition, rendition, or interstate detainer proceedings." *See* TEX. R. EVID. 101(e)(3)(A). She said that she had not seen any other type of habeas corpus proceeding listed with these exceptions. She asked why, if Article 11.07 habeas proceedings were not governed by the Rules of Evidence, they were not listed with these other writs in Rule 103(e)? Mr. Schaffer agreed and said that he has made that argument to trial judges. He pointed out that habeas proceedings are different because Article 11.07 allows the judge to consider and make findings based on affidavits and other documents that are filed with the clerk. He said that trial judges look at that part of the statute and argue that it means that the Rules of Evidence do not apply to writ proceedings. Mr. Schaffer said that he thought that we needed to add a provision clarifying that the Rules of Evidence do apply when there is an evidentiary hearing in a habeas case.

Judge Newell remarked that it might be odd to have a provision in the general scope rule (Rule of Evidence 101) stating that the rules of evidence apply across the board and a list of exceptions to that rule, and then a separate section stating that the rules *do* apply to Article 11.07 habeas proceedings. He said that the general scope rule already does not exclude habeas proceedings. Ms. Schilhab said that we could still make the rule clearer. Mr. Varela asked, "why not have a counter-exception?" He suggested the example language: "If an evidentiary hearing is conducted in a habeas corpus proceeding, the Rules of Evidence do apply." Judge Newell discussed putting this provision in Rule 73, since Rule of Evidence 101 already does not appear to foreclose the application of the Rules of Evidence in habeas hearings. Ms. Taylor pointed out that, if a practitioner looked up this question in Texas Practice: Criminal Practice and Procedure,[10] he or she would find this entry: "Whether the rules of evidence apply by their own terms is not clear." She

[10] Dix & Schmolesky December 2017 Update, §34:23.

observed that this entry suggests that the law in this area is not clear.

Judge Newell said that there is already a specific reference to certain types of habeas proceedings in Rule of Evidence 101 and asked whether we need to be more specific about the type of habeas proceedings at issue. Chief Justice Gray observed that we could use the language "but not to" in the exceptions section. Mr. Schaffer remarked that we should be cautious about crafting a rule that would broadly apply to all habeas proceedings without limiting it to evidentiary hearings because Article 11.07 allows the trial court resolve habeas cases via affidavits, etc. Assistant State Prosecuting Attorney John Messinger asked whether stating that the Rules of Evidence will apply will fix the problem. He said that he had the impression that most of the objections are not to hearsay or privilege, but to scope/relevance. Mr. Schaffer responded, "Not really."

Ms. Johnson-Liu asked why the proponent could not get the evidence in through the use of an interrogatory. Mr. Gross stated that, in his years of habeas practice, he had never encountered a judge who would let him present interrogatories. Judge Moore and Mr. Wolff commented on the problems with using interrogatories in habeas proceedings.

Ms. Schilhab said that it sounds like we should use the sentence from Article 11.071 ("The Texas Rules of Criminal Evidence apply to a hearing held under this article") and put it in TRAP 73. Mr. Gross said that he thought the language should go in Rule of Evidence 101(b) to make it clear to trial judges. Judge Newell suggested a more targeted rule in Rule 73 and a notice/marker in the Rules of Evidence referring to Rule 73. He observed that no one looks at the scope rule. Mr. Wolff shared Mr. Schaffer's concern about the rule being misinterpreted to apply to every aspect of habeas proceedings and prohibit a party offering non-hearing exhibits. Mr. Wolff said that he would not like the Rules of Evidence to be applied to exclude exhibits attached to habeas applications. He liked Sian's proposed language but had concerns about putting the language in the scope rule.

Ms. Johnson-Liu asked what would happen if a hearing is designated for a relatively narrow issue and the trial court excludes evidence because the evidence exceeds the scope of the hearing. She postulated that some defense attorneys might use the proposed new provision to allow a "fishing expedition" to get on the record matters outside the scope of the hearing. Mr. Wolff discussed this matter further—delving into the distinction between questions concerning the relevance of proffered evidence and whether such evidence would exceed the scope of a habeas hearing.

Mr. Schaffer said that he thinks this is "a tempest in a teapot" because, in his experience, lawyers do not use these hearings to go on a "fishing expedition." He provided an example of a case where the issue for the hearing was whether a trial lawyer had a conflict of interest because he was receiving payments from the county to plead his clients guilty on the first setting. If the case got reset, the lawyer's pay would be cut. Mr. Schaffer obtained the lawyer's record showing that he had pled 110 felony clients guilty on their first settings and got paid double for those cases. Mr. Schaffer was challenging the whole system. He said that the lawyer at issue was a cocaine addict who got arrested and posted bond right around the time that Mr. Schaffer obtained the report. The lawyer then jumped bond. They arrested the lawyer and brought him back to the courthouse and led him through the courthouse in jail clothes and handcuffs in front of the other attorneys to

embarrass him. Mr. Schaffer said that they forced the arrested lawyer to write an affidavit addressing Mr. Schaffer's writ of habeas corpus concerning the double-pay for guilty pleas on the first setting matter. They would not give the lawyer a bond until he signed the affidavit. The lawyer did the affidavit and then received his bond. Mr. Schaffer was involved in an evidentiary hearing and all the sitting district judges recused themselves from the case. Mr. Schaffer said that a big part of the writ litigation was that the lawyer's motive in signing the affidavit was to get his bond in the POCS case—in other words, a bias issue. The habeas judge let this evidence in and the CCA later granted relief. Mr. Schaffer asked what would have happened if the State had objected that the circumstances under which the attorney signed his affidavit and was paraded through the courthouse were irrelevant? Mr. Schaffer also asked, what if the judge had—as has happened in recent cases—refused to allow him to make an offer of proof? Mr. Schaffer said that this was the type of situation where the CCA would not have seen the "backstory" revealing the trial lawyer's bias.

Judge Newell said that he liked Sian's idea of adopting the language from Article 11.071. Judge Newell asked whether this has been a problem in Article 11.071 writ proceedings—are they using the Rules of Evidence to inappropriately exclude evidence? Mr. Wolff said that they are having no problem offering the evidence that they need. He said that the parties are constantly litigating the scope of the hearings (the controverted issues), but they are not using the Rules of Evidence to do so.

Judge Moore suggested modifying the TRAP Rules to say, "Notwithstanding Rule of Evidence 103(c) . . ." Mr. Gross said that he has never had a problem in litigating death penalty writs in the valley because "Article 11.071 is clear." Chief Justice Gray said that all we really need to address Mr. Schaffer's problem is something for the proponent to point to in order to show the judge that he is entitled to "make this bill." He wondered why we could not just add a comment to the scope rule that basically contains the content of Mr. Schaffer's last paragraph from his email. Chief Justice Gray said that this would limit the rule to situations in which the trial court has sustained an objection to a question in a habeas corpus hearing. He thought that we should consider adding a sentence stating, "The trial court retains the ability to control the scope and extent of the offer of proof." Ms. Taylor asked whether Chief Justice Gray was talking about adding a comment to Rule 101(b) of the Rules of Evidence. He agreed. She asked him to read his proposal again. He referred her to the third paragraph of Mr. Schaffer's email (page 71 of the exhibits for today's meeting). Chief Justice Gray's proposed comment to Rule of Evidence 101 would read:

> When the trial court sustains an objection to a question in a habeas corpus proceeding, the party offering the question is entitled to obtain the answer on a bill of exceptions or make an offer of proof. The trial court retains the authority to control the scope and extent of the offer of proof.

Committee members discussed whether that comment should go with Rule 103 of the Rules of Evidence. Ms. Schilhab expressed concern that, if the comment was placed with Rule 103, there could still be a question about whether the Rules of Evidence as a whole apply to habeas hearings. She also suggested that more specific language could result in unintended consequences. Judge Newell said he liked the idea of the comment, but he also liked the idea of making it clear that the

Rules of Evidence apply in Article 11.07 evidentiary hearings—perhaps through a reference in TRAP 73. The committee discussed whether the word "jury" in Rule of Evidence 103 causes confusion with regard to writ hearings (that are before the court) and whether that language should be amended. Ms. Schilhab said that the rules attorney for the Supreme Court of Texas (SCOTX) was present and noted that such an amendment to Rule of Evidence 103 would be a broader question for both high courts to address.

Judge Newell asked whether anyone thought it was a bad idea to clarify that the Rules of Evidence apply to habeas evidentiary hearings. No one expressed any problem with that idea. Judge Newell then asked what such an amendment should look like. He said we have had suggestions of putting language similar to Article 11.071 into the scope rule (Rule of Evidence 101), a suggestion to put the language into TRAP 73, and a suggestion of only adding a comment. Chief Justice Gray said that Mr. Schaffer could bring an issue in a petition for discretionary review or a writ of habeas corpus and the CCA could rule on it and write an opinion. He said that that is the way that the courts are supposed to make rules in the judicial branch according to the separation of powers, but he would not "go there." He said that, dealing with "the realities of the situation" and in light of the fact that the CCA has "been delegated rulemaking authority" and the practitioners need guidance, he voted for "just the comment." Ms. Daumerie agreed with the comment-only suggestion.

Mr. Wolff asked what would happen if a habeas attorney offered the testimony of a witness and the trial court barred the testimony as "duplicative," but the habeas attorney disagreed. He felt that Chief Justice Gray's comment would not address that situation. He said that the "scope and extent" language addresses that situation. Mr. Wolff said that his objection was to the word "question" in the proposed language—in other words, he asked, what if the exclusion of evidence occurs before the attorney asks any questions? Mr. Gross said that the attorney could just offer the witness's affidavit as the offer of proof.

Judge Newell introduced Michael Falkenberg, a guest at the meeting who is a member of the CCA's writs staff. He asked Mr. Falkenberg what he thought about this discussion. Mr. Falkenberg said that he thought it was important to make it clear that the Rules of Evidence do apply because it is a matter that is "very much up in the air" and it depends on who is litigating the hearing. He said that this question needs to be settled and he thinks that that will address this problem. Judge Newell asked whether that meant that Mr. Falkenberg was "not a comment person." Mr. Falkenberg agreed, stating that we need to make it clear to practitioners that the Rules of Evidence apply.

Mr. Varela said that his proposal is a "counter-exception," and he then read his proposal into the record—he proposed that Rule of Evidence 101(e)(3)(A) be modified to read:

> (e) These rules--except for those on privilege--do not apply to: . . .
> (3) the following miscellaneous proceedings:
> (A) an application for habeas corpus in extradition, rendition, interstate detainer proceedings **but, in an evidentiary hearing in a post-conviction habeas proceeding, these rules shall apply**;

Judge Moore pointed out that we still have the problem that Rule of Evidence 103 appears to contemplate a jury trial. Mr. Schaffer said that the word "jury" needs to be eliminated from Rule of Evidence 103(c). He said he does not usually object at habeas hearings but the State objects because they do not want the judge to know about the evidence he is offering. He does not have an opinion about whether a rule change or a comment change would be better. He said you could make the change in multiple places.

Ms. Schilhab suggested amending Rule of Evidence 103 to simply clarify that it applies in bench trials and writ hearings. She noted that the phrase "outside the jury's presence" is necessary in the rule because, in a jury trial, the offer of proof needs to occur outside the jury's presence. She then suggested adding a comment to Rule of Evidence 101 that states that the Rules of Evidence do apply in Article 11.07 habeas hearings.

Mr. Falkenberg cautioned that trial judges often consider a "paper hearing" to be a hearing under the statute. He said that we might want to consider further narrowing the rule language to apply to a "live" evidentiary hearing. Ms. Schilhab and Mr. Schaffer said that the problem should not arise with paper evidentiary hearings.

Judge Newell said that we should move toward drafting a proposal. He said that he has heard discussion about adding a comment, about changing Rule of Evidence 103, and about adding an exception to Rule of Evidence 101. Ms. Taylor asked whether we should take a vote on each of these ideas. There has also been discussion about changing the "jury's presence" language in Rule of Evidence 103.

Judge Newell asked for votes for the "comment only" approach. Mr. Gross said that he supported the Chief Justice's approach on the comment. Ms. Taylor said that she was not opposed to the comment idea, but she agreed with Mr. Falkenberg that we do not currently have clarity about whether the Rules of Evidence apply in post-conviction habeas hearings. Mr. Schaffer said that he thought that the hard copy volume of criminal codes and rules that he used did not include the comments. Chief Justice Gray said that the comments should be included with the rules. Ms. Taylor said that some of the books do not include the comments to the Rules of Evidence. Mr. Schaffer said that, if a habeas judge's rule book does not include the comments to the rules, the comments will not benefit him in a hearing. Chief Justice Gray remarked that the CCA could order that the comments be included.

Mr. Rolater said that this is an informative conversation. Ms. Taylor asked Mr. Rolater if, in his experience, the Rules of Evidence have been applied in habeas hearings. He said that, in Collin County, they generally abide by the Rules of Evidence in habeas hearings but the parties seldom object unless "it seems like it has gone on long enough." He said that, if he objects and the trial judge sustains his objection, he does not object to defense attorneys making an offer of proof because he thinks that is what the rules require. He said that the problem may be caused by the "jury's presence" language in Rule of Evidence 103. He said that this rule could benefit from clarifying that it applies to a non-jury trial. Chief Justice Gray said that this issue is a "red herring." He said that, if the judge is acting as the fact finder, he or she will not consider the

inadmissible evidence. He said that he did not see the need to "tinker with Rule 103." Judge Newell pointed out that "tinkering with Rule 103" would necessitate coordinating with the SCOTX.

Mr. Schaffer said that, if a judge decides that he will not listen to the evidence, after the judge hears a bill of exception, the judge might change his mind because he did not originally understand where habeas counsel "was going with" that evidence. Chief Justice Gray said it is really clear when that happens in a jury trial but not as clear when it happens in a bench trial. Mr. Schaffer pointed out that, in a habeas case, the CCA is the ultimate finder of fact and they may wish to consider the excluded evidence even if the trial judge did not consider it to be relevant. He observed that, "a lot of times in these small counties, you get some 'home cooking' when you show up" and "you are beaten before you have started." Judge Newell noted that changing Rule 103 of the Rules of Evidence would be a more involved process because of the need to coordinate with the SCOTX. He said that we might be able to get something started if we can clarify what we are looking at for the proposal.

Judge Newell asked if anyone liked the counter-exception idea. Chief Justice Gray said, "I am good with it as an alternative." He said he has dealt with a similar issue in summary judgments where there is a defense and a counter-defense. He observed that, if the Rules of Evidence apply globally to writ hearings, we have the problem of how to handle paper hearings. He said that he thought that the comment he proposed handled this issue because it used the phrase "when the trial court sustains an objection."

Ms. Taylor suggested that, for the next meeting, she could prepare some alternative proposals: (1) the counter-exception language proposed by Mr. Varela; (2) the comment language proposed by Chief Justice Gray; and (3) a proposal based on the language taken from Article 11.071. She said that the committee could have a more concrete discussion if members had these proposals on paper in front of them. Judge Newell liked the idea of the comment and also of putting language similar to Article 11.071 into TRAP 73. Some committee members expressed agreement. Ms. Taylor said that she would prepare the three proposals for discussion at the next meeting.

[The committee took a break and then returned to discuss the next agenda items.]

5. Proposed amendments to TRAP 73.7 (revised, now TRAP 73.8; New Evidence after Application forwarded to CCA in Filed and Set Case) (See Exhibits C, C.1-C.4)

6. Proposed amendment adding TRAP 73.8 (revised, now TRAP 73.7; Supplementing or Amending Application Grounds or Providing New Evidence after Case Forwarded to the Court of Criminal Appeals; Motion to Stay Proceedings) and a comment (See Exhibit D & Exhibits C.1-C.4)

Upon the committee's return, Ms. Taylor reminded all in attendance to sign in.
She remarked that the blue highlighting on the exhibits was very dark and suggested that the committee members review the "clean" (no highlighting) version of the proposed rule language in Exhibit C. She explained that the committee at the last meeting had reviewed proposed Rule 73.7.

The committee decided to narrow this rule's focus and renumber it as Rule 73.8, which is Exhibit C on page 72 of the packets. She said that Exhibit C.1 was the current Rule 73.7. The existing rule pertains to when new evidence is being presented after an application for writ of habeas corpus has been forwarded to the CCA. She mentioned the committee's discussion at the last meeting about the phrase "filed and set." She said that the CCA has drawn a distinction between filed and set cases and those that have not been filed and set. The rule that was TRAP 73.7 has been narrowed to cases that have been filed and set and renumbered to 73.8 (See Exhibit C). New proposed TRAP 73.7 (Exhibit D) covers a much larger group of cases and situations, including motions to amend or supplement an application and motions to stay a case for additional investigation or to file new evidence. She said that she appended caselaw pertaining to these two rules.[11] She asked Judge Newell whether we should start off where we left off at the last meeting (in the middle of reviewing the proposed rule that is now 73.7 (Exhibit D) at subsection (b)). Judge Newell agreed with this approach. Ms. Taylor noted that Chief Justice Gray seemed to have made a lot of notes on his copy of the exhibit.

Chief Justice Gray asked about the terms "amended" and "supplemental." He said that he was not familiar enough with these documents to fully understand the difference between a supplement to and an amendment in the context of the Article 11.07 form. He said that we tell applicants that they must use the Article 11.07 form, so what is the real difference between an amendment and a supplement? Ms. Schilhab said that a supplement can add new claims. Chief Justice Gray asked whether an amendment can add new claims. Other committee members agreed that an amendment can add new claims. Ms. Schilhab said that we try to treat the terms "amended" and "supplemental" the same with regard to briefs or habeas applications or another type of document. An amended document just replaces the original document and can be used to correct mistakes. A supplemental document can add to the original document and raise new claims. We know to look for something new with a supplement. An amended document should not be raising anything new and should be just correcting and fixing things.

Ms. Taylor said that she thought that the most important distinction between amended and supplemental applications is that an amended application will completely replace the original application and a supplement will not. Mr. Wolff said that an important distinction concerns procedural default and when new claims will be considered to represent a subsequent application. Ms. Schilhab explained that, if an Article 11.071 applicant files an amended writ after the deadline, it could be considered a subsequent writ. Chief Justice Gray asked, if he were filling out the Article 11.07 form, what difference would there be in his application based on whether the application is supplemental versus amended? Judge Newell said that it seemed that Chief Justice Gray was saying that we should treat all supplemental and amended applications the same and only have an "amended" writ in the rule. Ms. Taylor explained that, if an applicant were filing a *supplemental* application to raise one additional ground, and the applicant had filed a previous application raising ten grounds, the applicant could just include the one new ground in the supplemental application. The applicant would not have to again list all the previous ten grounds raised in the original application. However, if the applicant were to label the new application with

[11] *See* Exhibits C.2, C.3, and C.4 (*Ex parte Pena*, 484 S.W.3d 428 (Tex. Crim. App. 2016); *Ex parte Saenz*, 491 S.W.3d 819 (Tex. Crim. App. 2016); and *Ex parte Speckman*, 537 S.W.3d 49 (Tex. Crim. App. 2017)).

the one additional ground as "amended," then the CCA could decide that the applicant intended to *waive* all the previous ten grounds that he had raised in his original application and proceed only with the one new ground. (Although the Court might not interpret the application this way for a pro se applicant because they interpret pro se filings liberally.) Chief Justice Gray said that he now understood the difference between these two uses of the form. He said that the applicant can "leave a lot of stuff blank" in a supplemental writ. Ms. Taylor noted that an applicant would still need to fill out the general information at the beginning of the form for a supplemental application—because the applicant might have moved to a new unit, etc.—but the applicant would not have to repeat all the original legal grounds urged in the first application. Mr. Falkenberg said that this can come up when an inmate has filed a pro se writ application and then receives representation by an attorney. The attorney may seek to file new claims, but the inmate does not want to abandon the claims he originally raised in his pro se application. For this reason, his lawyer may choose to raise the new claims in a *supplemental* writ application, rather than an *amended* application.

Chief Justice Gray then moved on to other comments about the proposed rule. He said that he considers himself to be a "serial reader." He explained: "When you tell me something, I think that the order that you are telling me that information is important." He said that the proposed rule defines "amended" first and then everywhere else in the proposed rule, the text talks about "supplement" before "amended." Ms. Taylor said that she would be happy to flip the definitions or the subsequent references within the proposed rule to be internally consistent. She asked if any members objected to her changing the proposed rule to make sure that it is internally consistent with regard to the order of the terms "amended" and "supplemental." No members objected, and Judge Newell said that he thought that that was a good idea.

Chief Justice Gray then commented that the title to Rule 73.7 included the phrase, "after Case Forwarded to the Court of Criminal Appeals." He said that this phrase is repeated in subsection (b): "If an application has been forwarded to the Court of Criminal Appeals." He noted that we did not repeat it in subsection (c), and he wondered why the phrase was not repeated in that subsection. Ms. Taylor said that we never finished talking about subsection (c) at the last meeting, so we never finalized the language of subsection (c). Judge Newell asked what this language refers to. Ms. Taylor said that this whole rule (Rule 73.7) applies to a case that has been forwarded to the CCA. She said that she did not know whether we needed this phrase in subsection (b). She said that, if we retain the language for clarity in (b), then we should probably include it in (c), as well. The committee discussed the wording of the title of the rule, the use of a semicolon before the motion to stay language, and whether this language about forwarding to the CCA is needed in the text of the rule. The committee also discussed whether the motion to stay provisions should apply to habeas cases that have not yet been forwarded to the CCA and whether this might allow a trial court to circumvent procedural deadlines. Ms. Taylor pointed out a portion of the proposed comment to the rule, which states that a party can file a motion to stay in the convicting court, but that motion is not governed by this rule:

> Rule 73.7 provides the procedure for filing a supplemental or amended application, a stay of proceedings, and/or submission of additional evidence after a habeas application has been forwarded to the Court of Criminal Appeals. If the clerk of the

> convicting court has not yet forwarded the initial application to the Court of Criminal Appeals, a party need not obtain the permission of the Court or a stay of proceedings before filing a supplemental or amended application or additional evidence in the convicting court. However, if a party is concerned that the convicting court will order the clerk to forward the habeas case to the Court of Criminal Appeals before the party can file a supplemental or amended application or new evidence in the convicting court, the party may file a motion for stay of proceedings in the convicting court.

Mr. Gross noted that, sometimes when a writ application is first filed, the trial court clerk will immediately send the writ up to the CCA without waiting for the trial court to sign an "ODI" (Order Designating Issues). He said, in those cases, the CCA will then respond that it is a "good writ" and will remand the case for action by the trial court. He said that he is worried that "some folks" will interpret this rule to say that initial premature forwarding of the writ by the clerk has then been "forwarded to the Court of Criminal Appeals" under the rule. He thought that this rule was designed to apply to situations where the trial court has already completed an ODI and made findings of fact and conclusions of law. Ms. Taylor asked whether Mr. Gross thought that we should delete or amend that portion of the comment. Mr. Gross said that he thought that the comment is a good clarification, if we add language stating that the rule applies after the trial court has made a recommendation on the habeas application. Ms. Schilhab said that this suggestion would work for Article 11.07 writs but asked whether it works for Article 11.071 writs. Mr. Gross said that he thought that it did apply just as well to Article 11.071 writs. In both types of cases, the trial judge is supposed to sign an ODI and then you have a hearing. The committee discussed ways to amend the comment, as Mr. Gross suggested, and reached a consensus to add language to subsection (c) to indicate that it applies after the application has been forwarded to the CCA.

Chief Justice Gray said that "the only comment I have on the comments" is that he wondered whether the CCA fundamentally agrees with the policy followed by the SCOTX that the Court may choose to overrule a case or clarify a holding via rulemaking. He postulated that, if so, citations may not be needed in the rule comment. He would prefer not to confuse the reader by sending them to case authority, which may be modified or mooted by adoption of the rule. He said that we should also duplicate whatever comment appears here after Rule 73.7 at the end of Rule 73.8. Ms. Taylor clarified that the comment would be printed at the end of Rule 73 as a whole. Chief Justice Gray said that that resolved most of his other comments. She said that his observation about case citations was "well taken." She said that she felt uncertain about whether to include the citations and asked the committee for input. Judge Newell said that the comment should just explain how the rule is supposed to work and does not need to justify the rule. He said that putting the case citations is an "appellate habit" that is not necessary here in the rule comment. Judge Newell asked if any members disagreed and wanted the citations included. Ms. Taylor asked for the opinion of the SCOTX rules attorney, Ms. Daumerie. Ms. Daumerie said that she agreed with Chief Justice Gray and thought that the case citations might "confuse the issue." Judge Moore said that including the case citations could be problematic if a cited case were later overturned. Judge Newell compared the citations to "link rot."

Mr. Rolater suggested alternative comment language conveying that the Court "is codifying its

prior caselaw" on these points. Judge Newell thought that Mr. Rolater's suggestion was a good idea. Chief Justice Gray said that Mr. Rolater's language could be a footnote. Ms. Schneider remarked that we should keep the comments as brief as possible. Ms. Taylor remarked that the proposed comment is lengthy and asked for feedback. Judge Newell said that the lengthy comment could be justified here because this is a big process that the rule is setting out. He said that, a few years from now, the Court can go back and delete the comment content if it is no longer necessary.

He asked the committee to return to reviewing the text of the rule. Ms. Taylor asked whether any amendment to the proposed rule subsections (c)(3) or (c)(4) was needed to address the situation where a person seeks a stay of the proceedings just to present additional legal claims or evidence but not to conduct additional investigation. Ms. Schilhab observed that this language could create a problem with regard to Article 11.071 writs because, if you present legal claims, you cannot get around the statutory time limits for bringing new claims: "Investigation is a different matter." Ms. Taylor responded that this language does not foreclose the Court from making appropriate legal rulings. Judge Newell said that this just governs what is in the motion. Ms. Taylor agreed. She indicated that an applicant could ask for a stay of proceedings using a motion filed pursuant to this rule and the CCA could still deny the motion because the applicant has exceeded the statutory time period. Ms. Schilhab objected that the proposed rule language implies that the applicant can present an additional claim. Ms. Taylor said that she thought that Ms. Schilhab had previously stated that an applicant could bring a supplemental Article 11.071 claim if the applicant brought the supplemental claim prior to the deadline. Mr. Wolff said that he would not read this rule to allow a party to get around rules of procedural default.

Judge Newell said that the intent of this part of the rule seemed to be to ascertain the reason that the party is making the motion at this time. He asked if there is some way that we could, for example, ask for the reason for any delay without specifying whether it is the delay of "X, Y, or Z." Ms. Taylor suggested that, for subsection (c)(4), we could change the proposed language to "state a reasonable period of time that the movant party believes is necessary." Judge Newell expressed agreement, stating that we just need the applicant to explain how much time he needs in his motion. He said that we should focus on the content of the motion.

Ms. Taylor asked for suggestions for how to broaden and simplify subsection (c)(3). Ms. Johnson-Liu suggested: "explain why this has not been done before the application was filed." The committee members discussed alternative wording for this subsection. Some members suggested dropping the word "investigation," so that the subsection would read: "explain why this was not completed before the application was filed." Judge Newell asked for members' thoughts about this and no one objected to this approach.

Ms. Taylor apologized that the print in the comments is very tiny and hard to read. She joked that, as a very nearsighted person, her "super power" is reading small print. She then read the proposed rule language at issue (the first sentence in subsection (b)) and alternative language suggested by Ms. Johnson-Liu. Ms. Taylor said that the text agreed upon by the committee at the last meeting read, in relevant part: "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:[.]" Ms. Taylor said that Ms. Johnson-Liu suggested changing this language to read: "Motion to Supplement or Amend an Application. To supplement or amend an application after it has been forwarded to the Court of Criminal Appeals, a party must file a motion in the Court of Criminal Appeals that describes:[.]" Ms. Taylor, Judge Newell, and other members said that they liked Ms. Johnson-Liu's proposed language better.

Chief Justice Gray asked why we used the term "a party" in subsection (b). Ms. Taylor recalled that the proposed language originally used the term "movant." She said that the committee had discussed the fact that the rest of Rule 73 used the term "party." Chief Justice Gray noted that the State could move for a stay of proceedings. Ms. Taylor agreed and noted that the State could also file new evidence, thus the proposed rule uses the term "party," rather than the term "applicant."

Judge Newell asked about the other comment in tiny type on Exhibit D. Ms. Taylor read this comment aloud: "Committee members suggested that the CCA discuss whether to add a good cause or other standard for justification for delay. Other committee members expressed concern that this would contradict caselaw and could be seen as abridging the statutory rights under Article 11.07. *Cf. Ex parte Saenz*, 491 S.W.3d 819, 824-26 (Tex. Crim. App. 2016)." She said that the committee had discussed this issue at length at the last meeting and members had a difference of opinion. The committee had decided to flag this issue for the CCA to decide. Judge Newell said that that made sense and directed discussion back to the proposed language in subsection (c).

Ms. Johnson-Liu asked whether the proposed subsection (c)(2) ("explain its evidentiary value") is relevant to motions which simply seek a stay to merely bring new grounds for relief. Committee members discussed this question. A consensus was reached to change the language in this subsection to: "explain the value of any additional evidence." Ms. Johnson-Liu asked, if the movant is just doing a motion to supplement the application, why does the movant have to file a motion to stay? Ms. Taylor said that people often do file a motion to stay in practice but, if the applicant does not need much additional time to prepare the additional claims and just wants to file them, the applicant could just file a motion under subsection (b). A motion to stay under subsection (c) would be necessary in a situation where the person needs additional time to research and/or write the new claims.

Judge Newell focused the committee's attention on subsection (d). Ms. Taylor asked Mr. Falkenberg to say something if the committee discussed something that he felt did not mesh with the CCA's regular procedures. Chief Justice Gray said that this is the time to fix any problems that have developed in the implementation of the caselaw. Judge Newell agreed that such issues should be flagged and discussed by the CCA. Mr. Falkenberg said that the CCA does receive a lot of motions now that (existing) rule 73.7 exists. He said the purpose of the rulemaking process is to codify the CCA's procedures and put people "on notice" of the way the CCA will handle these things. He said that this has been more complicated, but they have not had any problems with the "granular bits" yet. He said, "It's fine." Judge Newell asked whether Mr. Falkenberg was "not happy" with the rule language and said that his concerns could be heard. Mr. Falkenberg did not audibly respond. No members had comments about proposed subsection (d).

Judge Newell then asked for input concerning subsection (e). Mr. Rolater asked whether subsection (e)(2)(A)[12] would also apply to filing an additional ground. Members discussed what changes should be made to subsection (e)(2)(A) to accommodate the possibility that a person might file a motion to stay simply to research and file a new legal ground. Judge Newell asked if we could just state, "if the CCA grants a motion to stay the proceedings, the party must comply with the terms of the stay." He alternatively asked whether we should not include this provision. Ms. Taylor said that, since the rule contains a section dealing with what a party must do if a motion to supplement or amend is granted, then we should have a "placeholder" section setting out what the party must do if the CCA grants their motion to stay. She agreed with Judge Newell's suggestion to simplify subsection (e)(2) to a directive to "just comply with the terms" of the order granting the stay of proceedings. Ms. Schneider and other committee members remarked that it was self-evident that the party must comply with the terms of the Court's order. The committee members discussed whether the committee should omit this part.

Chief Justice Gray asked whether we ever encounter a problem where multiple individuals are filing such motions—such as an inmate and an attorney—and it is not clear which motion is authorized. Mr. Falkenberg answered that such situations occur, but the inmates usually let the CCA know how they feel about it clearly and the Court is able to "sort it out." Ms. Schilhab said that the situation is "rare enough" that the Court can deal with the incidents individually. Ms. Taylor noted that the CCA just added a sworn statement on the application that the petitioner has to sign if the person is not the applicant.

Judge Newell asked if we could just omit this subsection altogether. Ms. Taylor said that we need subsection (e)(1) because, for example, this subsection is the only place where we tell applicants that they must use the application form. No one objected to deleting subsection (e)(2) altogether. The committee discussed the title wording and formatting changes that were necessary to accomplish this goal. The committee decided on a format similar to subsection (f).

Judge Newell moved on to discuss subsection (f) governing the district clerk's duties. He asked if anything was missing in the proposed language. No one offered any comments initially. Ms. Taylor said that she recalled that, at a previous meeting, Ms. McKinney, who was the district clerk representative on the committee, said that a similar subsection in Rule 73.7 was "fine." Judge Newell noted that Ms. McKinney was not re-elected to her clerk position and has resigned from the committee. He said that the committee is looking for a replacement committee member who is a clerk. Ms. Johnson-Liu observed that a motion to supplement may be filed without a motion to stay proceedings. She asked what proceedings happen in the convicting court in that situation. Ms. Schilhab said that the supplemental application must be filed in the trial court and sent to the opposing party and, ideally, the motion to supplement should be served on the opposing party. Mr. Prine noted that the proposed rule (in what is now subsection (e)(3)) requires that the supplement be filed in the convicting court. Ms. Johnson-Liu asked why there is not always a stay when a motion to supplement is filed. Committee members noted that a stay is not always necessary. For

[12] As proposed, this subsection read, "If the Court of Criminal Appeals grants a motion to stay proceedings under subsection (c), the party must: (A) complete any additional investigation and file any additional evidence in the convicting court within the time frame designated by the Court of Criminal Appeals[.]"

example, the applicant may file a motion to supplement and the supplemental application at the same time. The movant must file the motion simply to let the CCA know about the supplement (because the case has been sent up to the CCA). Ms. Johnson-Liu asked what happens when the State has filed a response and the trial court has already filed findings and conclusions and they have been sent to the CCA. Ms. Schneider explained that the supplement must be filed in the trial court. Ms. Taylor said that the rule requires that the supplement be served on "all parties in the case," which includes the State.

Judge Newell asked for Mr. Falkenberg's input concerning what would happen in that situation. Mr. Falkenberg said, in general, we want it to come up to the CCA. The Court will look at the supplement and see if it raises a viable claim. If it's something that the trial court "needs to deal with," the Court will send the case back to the trial court for the trial judge's consideration. The CCA will order the trial court to make additional findings, if needed. If the trial court or the State wants to "say something," that is "fine." Judge Newell observed that the trial judge may decide to wait to see if the CCA is going to order additional findings and that is "okay with us." Ms. Taylor observed that the requirement that these motions be filed in the CCA allows the Court to know what new claims are being brought. That way the CCA can spot issues that need to be "looked into" and prepare an order telling the trial court what to do and setting an appropriate time limit. Judge Newell said this rule does not foreclose the trial court from taking action on its own when receiving the new application, but it is "okay" if the trial court waits for the CCA's directions.

Judge Newell determined that there were no more comments relative to subsection (f) and moved on to subsection (g) ("Late Motions").[13] Ms. Schilhab wondered whether the word "finally" in "finally disposed" was necessary. Ms. Taylor said that the proposed rule text is based on the case law—"finally disposed" is a term of art. Ms. Schilhab could see an argument that, because the CCA can reopen a writ, it is not ever finally disposed. Judge Newell asked for input on whether we should change the wording. Chief Justice Gray said that, as stated, it seems to imply that a party cannot file a motion for rehearing or a motion for reconsideration and he did not think that was what was meant. Other members confirmed that a party could not file a motion for rehearing on a denial or dismissal of an application for a writ of habeas corpus, but the CCA can reconsider the case on its own motion.[14] Chief Justice Gray then moved that the committee remove subsection (g) entirely from the proposed rule. Committee members discussed this idea and also contemplated the idea of leaving this language in the proposed rule for clarity. Ms. Taylor also added that the "finally disposed" language originates in Section 4 of Article 11.07. Mr. Varela pointed out that abating a case is a disposition, but not a final disposition. Judge Newell eventually decided the best approach was to leave this language in the rule even though it does not ultimately accomplish anything. Mr. Wolff suggested that we include the entire name of the Court in the first reference to the Court in this subsection. Other committee members agreed. The committee briefly discussed whether to change this subsection to the passive voice.

Judge Newell directed the committee to discuss the proposed comment. Judge Newell remarked

[13] As proposed, subsection (g) read: "(g) Late Motions. If the Court has finally disposed of the application, the Court will not entertain any motions to supplement or amend the application or stay proceedings."
[14] *See* Rule 79.2(d).

that we have already discussed removing the case citations from the proposed comment. Chief Justice Gray remarked that the term "new application" in the third line[15] "seems to pop up out of nowhere." He said the meaning is unclear. The committee discussed changing "new application" to "supplemental or amended application."

Ms. Johnson-Liu asked what the first paragraph adds that is not already present in the rule. Judge Newell said that he imagined that the first paragraph could "go away" and be replaced by a sentence stating that this rule is codifying existing caselaw. Mr. Varela said that this paragraph explains what the 2019 amendments are. Ms. Taylor said that some rules publications do not interlineate the changed portions of the rule. This comment will appear at the very end of Rule 73 and will explain which parts of Rule 73 were changed in 2019. Committee members offered no further remarks regarding the proposed comment.

[The committee took a break.]

The committee returned to discussing proposed Rule 73.8 (formerly Rule 73.7—Exhibit C on page 72 of the packets). Judge Newell said that the committee members made some suggestions for changes at the last meeting. He asked for any general comments on the new language. Ms. Johnson-Liu remarked that the existing rule covers both filed and set and not filed and set applications, but the new Rule 73.7 just covers filed and set applications. Ms. Taylor responded that the procedure for writs that have not been filed and set is set out in Rule 73.7. Ms. Johnson-Liu asked how practitioners will know that. Ms. Taylor said that this is one of the things that is explained in the 2019 comment. Judge Newell said also, if readers are "serial readers," they will read the rule for non-filed-and-set writs (Rule 73.7) first. He asked for further input on whether any further explanation is needed. Ms. Taylor focused the committee's attention on page 100 of the packets (in the 2019 comment). She read this text aloud: "Rule 73.7, in turn, is amended and renumbered to become Rule 73.8. This rule explains the procedures for submitting new evidence after a habeas application has been filed and set." Ms. Johnson-Liu felt that more clarification was needed. The committee discussed the particular language needed and decided to add the following sentence to the second paragraph of the comment: "If the application has not been filed and set, new Rule 73.7 prescribes the procedure for submitting new evidence."

The committee again returned to discussing Rule 73.8. Committee members offered no input regarding subsection (a). With regard to subsection (b)(1), Mr. Rolater suggested changing "the other party" to "opposing party" to be consistent with other parts of the rule. Other members agreed with this idea. Judge Newell preferred the term "opposing party." The committee discussed the phrase "the judge assigned to the habeas case" but did not reach a consensus that any change was needed. Judge Newell asked for any further discussion on parts (a) and (b) of Rule 73.8. No committee members offered any additional remarks.

Judge Newell then asked if the committee was okay with presenting both Rules 73.7 and 73.8, as modified, to the CCA. No committee member objected.

[15] The proposed phrase read: "the Court of Criminal Appeals will consider the merits of the new application with certain caveats."

7. Discussion of sensitive data concerns regarding TRAP 9.10 (See Exhibits E.1, E.2)

Judge Newell said that he wanted to generally discuss the sensitive data topic today. Ms. Taylor said that she could bring more specific proposals for the committee's discussion at the next meeting, if desired, but she needed feedback on whether the identified issues are a problem that needs resolution. Judge Newell asked Ms. Taylor to explain how this issue developed. Ms. Taylor said that staff members at the CCA had run across a court of appeals opinion which included the names of minors who were siblings of a child victim. The staff member who spotted the problem thought that it must violate the TRAP but, upon further examination, discovered that it did not violate the TRAP. This is one issue that the committee needs to discuss. Ms. Taylor said that for Family Code "SAPCR" cases (Suits Affecting the Parent-Child Relationship), the court of appeals must use an alias for juveniles (TRAP Rule 9.8). However, although the corresponding criminal sensitive data rule (TRAP Rule 9.10) defines the names of minors as sensitive data, the rule only requires redaction of sensitive data in documents that are "filed." Thus, the criminal rule does not appear to require redaction of the appellate court's opinion and it is debatable whether it applies to the reporter's record, which is not filed by the parties. She said that, in most cases, we find that the courts of appeals are voluntarily applying the family law redaction requirements in criminal cases.

Ms. Taylor said that a second problem that we have discovered is that there are some inconsistencies across the law in the definitions of sensitive data. The Supreme Court Advisory Committee (SCAC) has discussed making some amendments to the definition of sensitive data in the Texas Rules of Civil Procedure (TRCP) and the TRAP rule applicable to civil cases. She referred the members to the table contained in Exhibit E.2 which compares the various definitions of sensitive data and provides the proposed changes to the sensitive data definition in the TRCP discussed by the SCAC about a year and a half ago. Ms. Taylor said that we already have a difference in our definitions of sensitive data in the criminal electronic filing rules versus Rule 9.10 of the TRAP. Ms. Taylor said that there might be a rationale for the sensitive data definitions to differ a bit for civil and criminal cases but the sensitive data definitions in rules applicable to criminal cases "probably ought to be the same." She averred that it may be confusing to litigants to encounter differing definitions of what constitutes sensitive data and must be redacted. Ms. Taylor walked through the sensitive data definitions in the various bodies of rules which are summarized in Exhibit E.2. Ms. Daumerie clarified that the SCAC's recommended changes to the sensitive data definition (summarized in the last column in Exhibit E.2) were no longer under consideration by the SCAC and were now before the SCOTX. Ms. Daumerie indicated that the Supreme Court has not taken any action yet on the SCAC's recommendations. She confirmed that the SCOTX wanted the sensitive data definition in the TRCP to be consistent/parallel with the definition for civil cases in the TRAP (Rule 9.9). Ms. Taylor said that our committee might want to discuss whether we want to make parallel changes to the sensitive data definition in the criminal electronic filing rules and the criminal TRAP rule (Rule 9.10). She said she also thought that we might want to look at adapting a version of Rule 9.8 for criminal cases to handle the minor-names-in-appellate-opinions issue. Ms. Taylor offered to come up with draft language for purposes of the committee's discussion at the next meeting.

Judge Newell indicated that he shared some of Ms. Taylor's concerns, but asked whether the

committee members felt that these were problems that the committee should address. Ms. Taylor said that she has seen sensitive data in appellate records. Mr. Prine (the Clerk of the First and Fourteenth Courts of Appeals) said that appellate records are a different question than what the parties are filing. He said that the CCA may wish to protect this information, but the Court is not going to get the court reporters or clerks to do the redaction. He said that all of Rule 9 does not apply to clerks or reporters. Judge Newell said that he is focused on the appellate opinions because it is not likely that at this time a case record will be posted online. Ms. Schilhab pointed out that, with the new Re:SearchTX service, appellate records may eventually be posted online. Judge Newell said that our Court will not be linking to these things online and our job is to make sure that appellate opinions do not contain the names of children. Mr. Varela said that, before the federal trial record is made public, the draft of the record is submitted to the lawyers and it is their responsibility to mark any necessary redactions.

Judge Newell said that our committee needs to focus on the problem involving children's names appearing in appellate opinions. He said that the larger problem of Re:SearchTX and appellate records appearing online gets into a "gray area of what our rulemaking authority encompasses." The next step down the road will be to work with the SCOTX to solve the problem involving records containing sensitive data and whether they are posted on Re:SearchTX. Ms. Daumerie said that Casey Kennedy (with the Office of Court Administration) had informed her that reporter's records were not being posted online in Re:SearchTX. Ms. Schilhab said that she was trying to "look down the road" and anticipate problems that might arise in the future.

Ms. Taylor asked whether, for the next meeting, she should prepare proposals to address the appellate-opinions-containing-minor-names matter and the sensitive-data definitions issue. Judge Newell agreed with this approach—where Ms. Taylor will focus on proposed language to address those discreet issues. Mr. Prine said to be sure to retain subsection (e) of Rule 9.10. He said that the Supreme Court took this language out of their rule. Chief Justice Gray said that his court of appeals is the only one that does not post everything on the web. He remarked that the appellate-opinion-minor-names issue may not affect very many people. Ms. Taylor said that it may be devastating to the few people that it does affect.

Judge Newell then invited Mr. Schaffer to discuss some rule changes that he (Mr. Schaffer) would like to see. Mr. Schaffer described four proposed rules changes:

1. The TRAP rules should include a little more clarification on when an evidentiary hearing is required on a writ of habeas corpus. Mr. Schaffer said that he finds it "totally unacceptable" that judges decide issues involving credibility on affidavits alone without holding a hearing. He said that the affidavit at issue is often not written by the lawyer who signed it, but by a prosecutor or even by a civil law firm. In the latter case, a habeas judge told Mr. Schaffer, "Who cares who wrote the affidavit, [the lawyer] signed it." Judge Newell asked Mr. Schaffer to come up with a concrete suggestion for a rule amendment to address this problem so that the committee could discuss it at a future meeting.
2. Mr. Schaffer said that he does not think that the doctrine of laches should be addressed

on an "ad hoc, floating" basis. He said that there should be legislation or rules that govern the application of laches. He said that there is no inmate who intentionally sits in prison for years before bringing a meritorious claim. He said sometimes they wait because they did not have the money to hire an attorney or because they paid an attorney who 'sat on' the case and did not do anything for a long time. Mr. Schaffer suggested that it would be preferable to have a statute of limitations on habeas as they do in the federal system.

3. Mr. Schaffer thought it was good that the CCA created the 180-day rule.[16] But, without any consequences for the judge for a breach of the 180-day rule, the rule has little meaning. He indicated that trial judges don't know about or care about this rule. They apply for repeated extensions and try to avoid ruling on the matter. He suggested that, when pressed for a ruling by a habeas attorney, some judges will say, "You want me to rule? Fine. State, give bring me some findings. Boom! There's your answer." Judge Newell said that Mr. Schaffer seemed to be suggesting "an abuse of extension doctrine." Ms. Schilhab said that the burden on the 180-day rule is actually on the clerk. She suggested that Mr. Schaffer could file a petition for a writ of mandamus directed to the clerk. Then the CCA can set up a time frame in an order. He expressed frustration with having to take the time to do this "ministerial stuff" to get other people to do their jobs. He said that, using the mandamus process, it can take years to move the case out of the trial court. Ms. Schilhab said that, "for what it's worth," when Court staff go to clerks' conferences, they try to inform the clerks regarding their duties. Mr. Schaffer expressed doubt that there is a clerk in Harris County that knows this rule.
4. Mr. Schaffer said that there is a "disconnect" between the electronic filing system and the judge. He said that they formed a committee in Harris County to address this issue, but the judge in charge of the committee was defeated. Mr. Schaffer explained that the judges in Harris County have an electronic queue with orders that need to be signed and they can "hit a button and sign like 20 orders at once." He said that sometimes they erroneously sign many orders at once, even including signing both the State's and the Defendant's findings at the same time. Ms. Schilhab said that this sounds like an electronic filing problem. Ms. Taylor said that it could be a case management system problem. Judge Newell said that we need some kind of action item (in writing) identifying a change that could be made related to this problem.

Judge Newell said that the next meeting will be May 17 at 9:00 a.m. in the CCA courtroom again. He expressed appreciation for all the committee members' work.

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[16] *See* TRAP 73.5:

> Time Frame for Resolution of Claims Raised in Application. Within 180 days from the date of receipt of the application by the State, the convicting court shall resolve any issues that the court has timely designated for resolution. Any motion for extension of time must be filed in the Court of Criminal Appeals before the expiration of the 180-day period.