IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

JUN 01 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

IN THE MATTER OF THE CREATION OF A COMMISSION ON NEVADA RULES OF APPELLATE PROCEDURE

ADKT 0580

RESPONSE TO ORDER SCHEDULING PUBLIC HEARING AND REQUESTING PUBLIC COMMENT

COMES NOW Chief Deputy Public Defender DEBORAH L. WESTBROOK and hereby responds to the Nevada Supreme Court's Order Scheduling Public Hearing and Requesting Public Comment filed on May 20, 2021. I write in support the Petition filed by Chief Justice Hardesty on May 19, 2021 to create a Commission on Nevada Rules of Appellate Procedure that will review and consider recommendations for comprehensive amendments to the Rules. To that end, I would like to propose some amendments for the Court's consideration, as set forth in the attached Memorandum of Points and Authorities and offer my assistance to the Court in connection with the Commission.

DATED this 1st day of June, 2021.

DARIN F. IMLAY
CLARK COUNTY PUBLIC DEFENDER

By: */s/ Deborah L. Westbrook*
DEBORAH L. WESTBROOK, #9285
Chief Deputy Public Defender

21-15558

MEMORANDUM OF POINTS AND AUTHORITIES

Proposed Change to Rule 3C. Fast Track Criminal Appeals

When a court reporter or recorder requests and receives an extension of time to prepare transcripts, it reduces the amount of time that a party has access to those transcripts to prepare their briefing. Because fast track statements, by their very nature, have a shortened briefing schedule, a delay in producing transcripts will necessarily interfere with briefing. Because this circumstance is not the fault of the party that requested the transcripts, that party should automatically receive an equal extension of time whenever the Court grants a court reporter's or recorder's request for an extension. Therefore, NRAP 3C(i) should be revised as follows:

> **(i) Extensions of Time.**
> (1) *Preparation of Rough Draft Transcript.*
> (A) Seven-Day Telephonic Extension. A court reporter or recorder may request by telephone a 7-day extension of time to prepare a rough draft transcript if the preparation requires more time than is allowed under this Rule. If good cause is shown, the clerk or a designated deputy may grant the request by telephone or by written order of the clerk.
> (B) Additional Extensions by Motion. Subsequent extensions of time for filing rough draft transcripts shall be granted only upon motion to the court. The motion shall justify the requested extension in light of the time limits provided in this Rule, and shall specify the exact length of the extension requested. Extensions of time for the filing of rough draft transcripts shall be granted only upon demonstration of good cause. Sanctions may be imposed if a motion is brought without reasonable grounds.

(C) If the Court grants a court reporter or recorder's request for an extension of time for the preparation of a rough draft transcript under this subsection, the Court shall grant an equal extension of time to the party that requested the rough draft transcript to submit their briefing.

Proposed Change to Rule 4. Appeal—When Taken

As this Court has repeatedly held, "the proper and timely filing of a notice of appeal is jurisdictional." In re Duong, 118 Nev. 920, 922, 59 P.3d 1210, 1212 (2002). If a party fails to file a notice of appeal within the time period proscribed by statute or court rule, the Court "never obtains jurisdiction over an appeal and has no power to consider the issues raised, no matter how much merit they may have." Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998); accord Lozada v. State, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994).

Unlike the analogous Federal Rule 4, Nevada's existing Rule 4 does not provide a "good cause" mechanism for extending the time for filing a notice of appeal. As a result, this Court regularly dismisses appeals that may otherwise have had merit, without consideration of whether the appellant may have had good cause for failing to timely file the notice. See, e.g., Morgan v. Hometown Health Plan, No. 78574, 2019 WL 4511424 (Nev. Sept. 18, 2019) (unpublished); Commission on Ethics v. Hansen, 134 Nev.304, 419 P.3d 140 (2018).

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The analogous Federal Rule 4 provides that this jurisdictional period may be extended in both civil and criminal cases, as follows:

> **Rule 4. Appeal as of Right—When Taken**
> **(a) Appeal in a Civil Case**
> . . . .
> (5) Motion for Extension of Time.
> (A) The district court may extend the time to file a notice of appeal if:
> (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
> (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.
> (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
> (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.
> . . . .
> **(b) Appeal in a Criminal Case**
> . . . .
> (4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

FRAP 4.

Incorporating similar language in Rule 4 of the Nevada Rules of Appellate Procedure would help ensure that important issues are not defaulted as a result of a party's excusable neglect, or when the party had

good cause for their failure to timely file a notice of appeal. Additionally, because the Federal Rule sets a 30-day limit on any extension of time for filing the notice of appeal, it would continue to bar most untimely appeals, while protecting the most deserving parties from default. Adopting this change would require a conforming revision to NRAP 26(b)(1) as well.

Proposed Additional Changes to Rule 4. Appeal—When Taken

Rule 4(b)(5) addresses the time for entry of judgment and the content of judgment or order in postconviction matters. As currently drafted, the rule assumes that the district court will make an oral pronouncement of a final decision in postconviction matters. However, it is common for district court judges to issue a written order without making any oral pronouncement. Therefore, I propose the following revision:

> **(5) Time for Entry of Judgment; Content of Judgment or Order in Postconviction Matters.**
>
> **(A) Judgment of Conviction**. The district court judge shall enter a written judgment of conviction within 14 days after sentencing.
>
> **(B) Order Resolving Postconviction Matter**. The district court judge shall enter a written judgment or order finally resolving any postconviction matter. **If the district court judge first makes an oral pronouncement of a final decision in such a matter, the written judgment or order shall be issued** within 21 days after the district court judge's oral pronouncement ~~of a final decision in such a matter~~. The judgment or order in any postconviction matter must contain specific findings of fact and conclusions of law supporting the district court's decision.
>
> **(C) Sanctions; Counsel's Failure to Timely Prepare Judgment or Order.** The court may impose sanctions on any counsel instructed by the district court judge to draft the judgment or order and who does not submit the proposed judgment or order to the district court judge within the applicable time periods specified in Rule 4(b)(5).

Additionally, Rule 4(c)(1) allows an untimely direct appeal from a judgment of conviction and sentence to be filed in the event that a district court enters an order containing specific findings related to an appellant's appeal deprivation claim. But as currently drafted, Rule 4(c)(1) has the potential to deprive a postconviction appellant of his or her right to a direct appeal if the district court judge fails to enter a written order that complies with this section. The right to an untimely appeal should be tied to the district court's *finding* that the appellant has stated a valid appeal deprivation claim, not whether the district court has issued a compliant order. This section should clarify that the district court is obligated to enter a compliant order in the event that the court has found a valid appeal deprivation claim. Additionally, this section should incorporate the time-limitations set forth in NRAP 4(b)(5) for issuing that order (*e.g.*, "21 days after the district court judge's oral pronouncement of a final decision"). The following proposed amendment to Rule 4(c) would address these issues:

> **(c) Untimely Direct Appeal From a Judgment of Conviction and Sentence.**
> **(1) When an Untimely Direct Appeal From a Judgment of Conviction and Sentence May Be Filed**. An untimely notice of appeal from a judgment of conviction and sentence may be filed only under the following circumstances:
> (A) A postconviction petition for a writ of habeas corpus has been timely and properly filed in accordance with the provisions of NRS 34.720 to 34.830, asserting a viable claim that the petitioner was unlawfully deprived of the right to a

timely direct appeal from a judgment of conviction and sentence; and

(B) The district court in which the petition is considered **finds that the petitioner has established a valid appeal deprivation claim and is entitled to a direct appeal. In compliance with Rule 4(b)(5), the district court shall enter** ~~enters~~ a written order containing:

(i) specific findings of fact and conclusions of law finding that the petitioner has established a valid appeal-deprivation claim and is entitled to a direct appeal with the assistance of appointed or retained appellate counsel;

(ii) if the petitioner is indigent, directions for the appointment of appellate counsel, other than counsel for the defense in the proceedings leading to the conviction, to represent the petitioner in the direct appeal from the conviction and sentence; and

(iii) directions to the district court clerk to prepare and file--within 7 days of the entry of the district court's order--a notice of appeal from the judgment of conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms.

(C) If a federal court of competent jurisdiction issues a final order directing the state to provide a direct appeal to a federal habeas corpus petitioner, the petitioner or his or her counsel shall file the federal court order within 30 days of entry of the order in the district court in which petitioner's criminal case was pending. The clerk of the district court shall prepare and file--within 30 days of filing of the federal court order in the district court--a notice of appeal from the judgment of conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms.

Proposed Change to Rule 9. Transcript; Duty of Counsel; Duty of the Court Reporter or Recorder

When a court reporter or recorder requests and receives an extension of time to prepare transcripts, it reduces the amount of time that a party has access to those transcripts to prepare their briefing. A delay in producing transcripts will necessarily interfere with briefing. Because this circumstance is not the fault of the party that requested the transcripts, that party should automatically receive an equal extension of time whenever the Court grants a court reporter's or recorder's request for an extension. Thus, NRAP 9(c)(4) should be revised as follows:

> **(c) Duty of the Court Reporter or Recorder.**
> . . . .
> **(4) Extension of Time to Deliver Transcript.**
> **(A) Motion Required**. If the court reporter or recorder cannot deliver a transcript within the time provided in Rule 9(c)(1)(A), the reporter or recorder shall seek an extension of time by filing a written motion with the clerk of the Supreme Court on or before the date that the transcripts are due.
> **(B) Supporting Documentation and Affidavits.** A motion to extend the time for delivering a transcript shall be accompanied by the affidavit of the court reporter or recorder setting forth the reasons for the requested extension and the length of additional time needed to prepare the transcript.
> **(C) Service.** The motion must be served on the party requesting the transcript.
> **(D) Standard for Granting.** Requests for extensions of time to prepare a transcript will be closely scrutinized and will be granted only upon a showing of good cause.
> **(E) If the Court grants a court reporter or recorder's request for an extension of time for the preparation of a**

transcript, it shall grant an equal extension of time to the party that requested the transcript to submit their briefing.

Proposed Changes to Rule 10. The Record

Nevada's Rule of Appellate Procedure 10 does not contain any provision to address accidental or erroneous omissions or misstatements of the record. The following proposed revision to NRAP 10(c)—which comes from Rule 10(e) of the analogous Federal Rule of Appellate Procedure—would provide a mechanism to allow the parties to cure accidental or erroneous misstatements or omissions from the record:

> **(c) Correction or Modification of the Record.**
>
> (1) If any difference arises about whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly.
>
> **(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:**
>
> **(A) on stipulation of the parties; or**
>
> **(B) by the district court before or after the record has been forwarded.**
>
> (3) Questions as to the form and content of the appellate court record shall be presented to the Clerk.

Proposed Change to Rule 29. Brief of an Amicus Curiae

NRAP 29 (a) currently allows the following entities to file an amicus curiae brief without consent of court: "The United States, the State of Nevada, an officer or agency of either, a political subdivision thereof, or a state, territory or commonwealth." Under this rule, county district attorneys' offices are permitted to submit amicus briefs in any case that implicates criminal law issues because they represent the State of Nevada. However, county public defender's offices must file a motion and request permission to submit a similar amicus brief. In the interests of justice and fundamental fairness, county public defender's offices should also be entitled to file amicus curiae briefs without the consent of court in any criminal matter that implicates their clients' interests.

Proposed Change to Rule 36. Entry of Judgment

NRAP 36(e) currently provides, "Where a judgment is reversed or modified, a certified copy of the opinion or other disposition shall be transmitted with the remittitur to the court below." However, in criminal cases where an incarcerated defendant's judgment of conviction has been reversed, a certified copy should also be transmitted to the Nevada Department of Corrections facility where the appellant is incarcerated. In practice, the Nevada Department of Corrections will not release a criminal defendant from confinement (not even to a county detention facility) unless the Department has received a certified copy of the Court's opinion or order directly from the Clerk of the Supreme Court. In my experience, the Department of Corrections has been unwilling to accept a certified copy of such opinion or order from defense counsel when we have provided it. As a result of this practice, defendants whose convictions have been reversed are often confined in Nevada Department of Corrections facilities long after this Court's final disposition of their cases. Therefore, Rule 36(e) should be amended as follows:

> **(e) Reversal, Modification; Certified Copy of Opinion to Lower Court.** Where a judgment is reversed or modified, a certified copy of the opinion or other disposition shall be transmitted with the remittitur to the court below **and, when applicable, to the warden of the facility where the appellant is incarcerated**.

Proposed Change to Rule 40A. Petition for En Banc Reconsideration

NRAP 40A allows any party to petition for en banc reconsideration of a Supreme Court panel's decision "within 14 days after written entry of the panel's decision to deny rehearing." NRAP 40A(b). The Rule further provides, "[i]f no petition for rehearing of the Supreme Court panel's decision is filed, then no petition for en banc reconsideration is allowed." Id. However, this rule creates a catch-22 for parties, because in many cases that would warrant en banc reconsideration, a petition for rehearing under NRAP 40 would be inappropriate.

A petition for rehearing is only permissible in the following circumstances:

> (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or
>
> (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case.

NRAP 40(c)(2). However, a petition for en banc reconsideration is available when "the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a). In cases where a panel of the Nevada Supreme Court has announced a new rule that implicates important policy

issues,[1] but has not overlooked any material facts or questions of law, and has not misapplied a directly controlling statute, rule or regulation, a party runs the risk of sanction for filing a petition for rehearing. See, e.g., NRAP 40(g). Under existing NRAP 40A, parties in this situation are required to file a meritless petition for rehearing of a panel decision to avail themselves of the benefits of NRAP 40A. The following revision would remedy this problem:

> **(b) Time for Filing; Effect of Filing on Finality of Judgment.** Any party may petition for en banc reconsideration of a Supreme Court panel's decision within 14 days after **the filing of the appellate court's decision under Rule 36 or** written entry of the panel's decision to deny rehearing. The 3-day mailing period set forth in Rule 26(c) does not apply to the time limits set by this Rule. No petition for en banc reconsideration of a Supreme Court panel's decision to grant rehearing is allowed; however, if a panel grants rehearing, any party may petition for en banc reconsideration of the panel's decision on rehearing within 14 days after written entry of the decision. ~~If no petition for rehearing of the Supreme Court panel's decision is filed, then no petition for en banc reconsideration is allowed.~~

This revision would comport with the Federal Rule of Appellate Procedure 35(c), which allows for a petition for rehearing en banc to "be filed within

[1] See, e.g., Dixon v. State, 137 Nev. Adv. Op. 19 (2021) (where a panel of this Court ruled, as a matter of first impression, that harmless-error review should be applied to Batson violations that involve alternate jurors in cases where no alternates joined in deliberations).

the time prescribed by Rule 40 for filing a petition for rehearing." FRAP 35(c).

DATED this 1st day of June, 2021.

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