10/28/21 – NRAP 4 Criminal Subcommittee Meeting

Chair: Deborah Westbrook
John Petty
Alex Chen
Charlie Finlayson
[JoNell Thomas submitted comments & Jenny Noble reviewed these notes and accompanying proposals]

- Group initially discussed **Ninth Circuit Rule 4-1** (Counsel in Criminal Appeals) and whether to try to incorporate some of the language from the circuit rule into NRAP 4, specifically the following from CR 4-1(a): "Counsel in criminal cases, whether retained or appointed by the district court, shall ascertain whether the defendant wishes to appeal and file a notice of appeal upon the defendant's request."

    - John had pointed out that the benefits of including this language would be to reduce the need for appeal deprivation claims under NRAP 4(c)(1), and to assure client/counsel communication regarding an appeal.
    - Charlie wondered if the rule might be better suited for a supreme court rule rather than a rule of appellate procedure.
    - After comparing the Ninth Circuit rule with *Lozada v. State*, 110 Nev. 349, 356, 871 P.2d 944, 948 (1994) (which has a similar general rule), and *Toston v. State,* 127 Nev. 971, 977, 267 P.3d 795, 799 (2011) (which creates an exception to the general rule in guilty plea cases), group determined that it would be preferable to let the case law speak for itself.

- **NRAP 4(b)(1) – Time for Filing a Notice of Appeal.**
    - Group consensus was that the existing 30-day time-frame for filing a notice of appeal under NRAP 4(b) is preferable to the shorter 14-day period provided by the Federal Rule.
    - Deborah suggested that we adopt FRAP 4 language which allows appeals to be filed within 30 days after "the later of: (i) the entry of either the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant." She explained that there are cases where one party may not want to appeal unless/until the other party has appealed, and that including this language will give a party time to make that decision. Offered as an example the Jeremias case, where the district court granted one aspect of the defendant's habeas petition but denied the others. Only after the State appealed did it become necessary for the defendant to cross-appeal the aspects of the habeas petition that were denied.
    - Group discussed whether this rule would impact habeas cases, to the extent they can be deemed civil matters.
    - John said that the revision would be useful by alerting practitioners to the possibility that they can cross-appeal, where they might not otherwise know this is an option.

- Alex said he did not think this rule change will impact a lot of cases but did not see a problem with revising the rule to reflect the FRAP on this issue.
- Group agreed to the proposal.

- **NRAP 4(b)(2) – Filing Before Entry of Judgment.**
  - Group agreed this language is identical to FRAP and no need to change.

- **NRAP 4(b)(3) – Effect of a Motion on a Notice of Appeal.**
  - Deborah proposed revising this rule to make it identical to FRAP 4(b)(3), but keeping the current 30-day timeframes in our existing rule.
  - Deborah pointed out that unlike the federal rule, our NRAP 4(b)(3) is split into two sub-paragraphs (A) for "motions in arrest of judgment and motions for new trial on any ground other than newly discovered evidence" and (B) for "motions for new trial on ground of newly discovered evidence" and asked if anyone knew why our language differs from the federal rule.
  - Alex pointed out that both subsections of our rule address filing before a JOC is entered, while the second addresses filings *both* before and after because motions based on newly discovered evidence can be filed later.
  - Charlie indicated he would check Westlaw and see how the federal rule is used
  - John searched Westlaw to see how the NSC has utilized the existing rule and did not find anything requiring that we keep our current language; he circulated the unpublished case of Vontress v. State, No. 62057, 130 Nev. 1259 (Nev. March 13, 2014) (unpublished disposition), to give a flavor for how the rule has been used in the past.
  - Consensus: Deborah will draft up a version of the rule that looks more like federal rule w/our timeframes, and see what everyone thinks.

- ***FRAP* (4)(b)(4)—Motion for Extension of Time**
  - This rule would allow the court (with or without a motion) to extend the time for filing a notice of appeal for "excusable neglect or good cause."
  - Our Rule 4 currently does not have this provision, but the group consensus was that we would like to add it, with the hope that it could reduce the number of postconviction appeal deprivation claims that have to be filed, to simplify matters.
  - Charlie indicated he would research the effect of adding this language to the jurisdictional nature of Rule 4; after the meeting Charlie found a NV case indicating that the reason NSC had previously denied appeals that were outside the 30-day period was because "the district court lacked authority to extend the thirty-day period within which Walker could file his notice of appeal" rendering the appeal untimely, and as a result of *that*, the court was "without jurisdiction" to entertain the appeal. Walker v. Scully, 99 Nev. 45, 46, 657 P.2d 94, 94 (1983).
  - We all agree to add this provision, omitting the federal-specific language.

- **NRAP(4)(b)(4) – Entry Defined**
    - JoNell made the following proposal via email: "Under subsection 4, the rule should be amended to require service of the Judgment of Conviction ["on counsel for the parties"] before commencing the 30 day appeal period. This is essential because Odyssey is not always updated in a timely fashion, so our time could be running before we receive notice that the JOC has been filed or can view the entry on Odyssey. It's a simple operation with e-filing to provide notice. I believe this issue could be of even more importance in those judicial districts that do not have efiling."
    - John and Charlie both raised the issue of *who* would be responsible for serving the JOC. The court? The clerk? Concern was raised that the clerk's office would be opposed to having to effect service of every JOC entered.
    - Alex indicated that if a defendant did not receive notice that the JOC was filed, it could be remedied under the new "excusable neglect" provision we're adopting and did not see a compelling reason for the change.
    - Charlie pointed out that years after the fact, people could allege, "I didn't appeal because I didn't get service" and this will create huge problems down the line in postconviction cases.
    - John pointed out that in Washoe, the parties do get served. Also, that defense counsel is obligated under ADKT 411 to compare the JOC with their notes of sentencing, so counsel should be aware of when the JOC is filed.
    - Charlie pointed out that NRAP (5)(A) provides for entering JOC w/in 14 days, which also alerts counsel.
    - Alex pointed out that typically there is no counsel in postconviction cases so JoNell's proposed language opens up some practical issues.
    - Group consensus was that this proposal should not be adopted.
    - Group did agree to *move* this provision, and renumber it Rule 4(b)(6), like the analogous federal rule. The current differences between this rule and the analogous federal rule are minor and tailored to Nevada practice.

***FRAP* 4(b)(5) – Jurisdiction**

- Nevada does not currently have this provision.
- JoNell made the following proposal via email: "FRAP 4(b)(5) provides that the filing of a notice of appeal does not divest the district court of jurisdiction to correct a sentence under FRAP 35(a). A similar rule should be adopted in Nevada as courts often enter a judgment of conviction which does not reflect restitution or credit for time served, setting a subsequent date to deal with these matters. The conflicting jurisdictional situation creates confusion."
- Group consensus: The proposal makes sense, and we can add FRAP 4(b)(5) with minor revisions, replacing references to FRCP 35 with references to NV's comparable statutes.
    - FRCP 35(a) – deals with correcting a sentence for "arithmetical, technical, or other clear error."
    - NRS 176.555 provides, "The court may correct an illegal sentence at any time."

        - NRS 176.565 provides, "Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."
    - Adopting this rule would likely mean that the Court would no longer need to follow the Huneycutt process outlined in Foster v. Dingwall, 126 Nev. 49, 228 P.3d 453 (2010), in criminal cases involving motions to correct illegal sentences, etc., which has sometimes been done. See, e.g., Lofthouse v. State, No. 70587, Dkt No. 17-16658 (filed, May 18, 2017).

- **NRAP 4(b)(5) – Time for Entry of Judgment; Content of Judgment or Order in Postconviction Matters.**
    - This rule does not have a FRAP analogue but is necessary in Nevada. Deborah requested a minor revision to the rule, set forth in her ADKT 0580 submission (Dkt. No. 21-15558):
        - A minor fix for the following problem identified by the FPD's office: "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."

        - Group did not object to the minor revision and indicated the rule already presumes the oral pronouncement comes first.

    - JoNell pointed out via e-mail: "NRAP 4(b)(5) provides for timelines for the filing of a Judgment of Conviction and Orders Resolving Post-Conviction Matters. There appears to be no remedies for violations of these rules."

        - Group consensus was that rule already provides for sanctions on a party who fails to timely submit a proposed order; mandating judicial sanctions here would be inappropriate; it would be better handled under judicial discipline rules; group agreed there should be something done about a judge that keeps doing something bad, but it's not for these rules.

- **NRAP 4(b)(6) – Withdrawal of Appeal.**
    - There is no analogous FRAP 4 provision addressing this; however, the group consensus was to keep this rule.

- **NRAP 4(c) – Untimely Direct Appeal from a Judgment of Conviction and Sentence.**
    - This rule does not have a FRAP analogue but is necessary in Nevada. Deborah requested a minor revision to the rule, set forth in her ADKT 0580 submission (Dkt. No. 21-15558):

        - "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").

- Group agreed and Charlie suggested an additional revision, creating a new subsection (C) to NRAP 4(c)(1):

(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.
(C) 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.

(D) 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.

- JoNell raised the following issue via e-mail: "NRAP 4(c) – Untimely direct appeal from a judgment of conviction. It's great that this Court recognizes this problem, but the current remedy creates problems. The procedure makes it difficult to process claims on ineffective assistance of appellate counsel. Allowing an untimely direct appeal would streamline the process for some defendants. It is unclear as to whether the untimely appeal and other claims of post-conviction petitions should proceed at the same time."
    - Alex pointed out that he has a case, Marlon Brown, where he was proceeding concurrently. Thinks these can be done at the same time.
    - Charlie thinks it would constitute good cause for subsequent appellate counsel to raise claims; if her concern is that it is not clear when you would litigate your appellate counsel claims, you would do it after your direct appeal ended, and then say that you have good cause for doing it out of time, successive.

- **NRAP 4(d) – Appeal by an Inmate Confined in an Institution.**
    - NRAP 4(d) is similar to FRAP 4(c) but much less complicated and onerous for inmates. Under FRAP 4(c) a notice of appeal is timely if deposited in the internal mail system on the last day for filing *and* it contains a declaration/notarized statement setting out the date of the deposit and that first-class postage is prepaid, or bears evidence that it was deposited/prepaid, or the court accepts a late-filed declaration/notarized statement.
    - Group consensus was that the Nevada rule is preferable to the more onerous federal rule (our rule merely requiring the inmate to use the notice-of-appeal log).
    - JoNell raised the following issue via email: "NRAP 4(d) – There should be a provision requiring the prison to accept documents and to timely mail them. They should also make the log public upon request by a party or the court."
        - Alex indicated that this request seems to be beyond the rule.
        - Charlie pointed out that you can request the log or the court can order the AG to provide it; this happens all the time. To the extent JoNell is talking about what to do when they want to know when they mailed the notice,

the way they do it is to ask the AG to file the notice-of-appeal log in federal cases. Rule is fine as is.
    - Per Charlie, defense can reach out to AG and reach out to the prison and they would be happy to provide the documents.
    - John agrees rule does not need this amendment.

- **NRAP 4(e) – Mistaken Filing in the Supreme Court.**
    - Group consensus was that NRAP(4)(e) is basically the same as FRAP4(d) and needs no revision.

- **NRAP 4(f) – Expediting Criminal Appeals.**
    - JoNell proposed the following via e-mail: "NRAP 4(f) allows the court to expedite appeals, but it does so at the court's direction. Parties should be able to request this relief by motion and the court should adopt internal mechanisms to make sure such motions are timely considered."
        - John indicated that the Court has never denied a request of this nature in his experience. He also pointed out that on the docketing statement, you can indicate that the appeal should be expedited and then file a motion. See NRAP 14(a)(4) (indicating that the purpose of the docketing statement is, in part, to "classify[] cases for expedited treatment and assignment to the Court of Appeals.")
        - Deborah suggested that it might be more obvious to practitioners that they can file this kind of motion if we referenced the ability to file a motion in the rule.
        - Charlie suggested adding to the rule that: "The court may, with or without motion by the parties, by a majority of its members, make orders to expedite the handling of criminal appeals…" Group liked that proposal.
        - John pointed out that Charlie's language was similar to the "with or without motion and notice" language in FRAP 4(b)(4), and that this rule doesn't necessarily need to be a stand-alone rule.
        - Alex pointed out that Rule 2 already allows the court on its own or parties motion to expedite decision; had a case with our office where attorney filed a motion to expedite based on Rule 2, instead. So, this rule is not really necessary.
        - Charlie indicated that this section seems to be a weird placement for the rule, and wondered whether is there a better rule that this language could be put in? Charlie suggested it might be possible to add this to Rule 27 on Motions, indicating that a party may move to expedite.
        - Deborah indicated that this rule may become more important to the extent the commission decides to get rid of Fast Track criminal appeals.
        - For now, group consensus was to include Charlie's proposed language in this rule, but group can revisit the other options later.

Finally, group discussed JoNell's proposal to get rid of NRAP 3C – Fast Track Criminal Appeals – and the consensus was that this was a good idea.

- Charlie is unaware of any pushback against the proposed elimination of Rule 3C.

- John does not disagree with getting rid of fast tracks now that we have 7 Supreme Court Justices and a Court of Appeals. When the fast track system was created, there was a 5 member Supreme Court that heard everything and had a huge backlog of cases, with important cases that couldn't get decided in a timely manner. Justice Young tried to create a system to expedite things. Everything except A& B felonies were fast track originally.