



**WASHOE COUNTY**  
**PUBLIC DEFENDER**  
ADVOCACY INTEGRITY COMMUNITY

P.O. BOX 11130  
RENO, NEVADA 89520-0027  
(775) 337-4800  
(800) 762-8031  
FAX (775) 337-4856

December 1, 2015

Tracie K. Lindeman  
Clerk of the Supreme Court  
The Nevada Supreme Court  
201 South Carson Street  
Carson City, Nevada 89701-4702

**FILED**

**DEC 04 2015**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

Re: ADKT No. 0510 (Petition to Amend NRAP 3C)

Dear Ms. Lindeman:

In response to the Supreme Court's invitation to submit written comments on Chief Justice Hardesty's and Justice Cherry's petition to amend Rule 3C of the Nevada Rules of Procedure, I offer the following:

The proposed amendment is fairly modest. Presently Rule 3C(a)(3)(A) exempts category A felonies (as described in NRS 193.130(2)(a)) in which "a sentence of death or imprisonment in the state prison for life with or without the possibility of parole is actually imposed." The proposed amendment replaces this exemption by removing the sentence identifier and in its place puts a type-of-conviction identifier—exempting all category A and B felonies that are "based on a *jury verdict* or an order resolving a post-conviction petition" (italics added).<sup>1</sup> The net change is that category A and B felony jury-verdict-convictions will receive full briefing, but category A guilty-plea-based convictions will be subject to the fast track rules (where presently all category A convictions regardless of conviction type are subject to full briefing). I think this tradeoff is reasonable. Generally, briefing direct appeals from jury trials require more time than guilty-plea-based direct appeals (regardless of the offense category). And if additional time is needed in the latter case, the Nevada Rules of Appellate Procedure provides for requesting additional time to file briefs. So I support this proposed amendment.

Rumor has it though that this proposed amendment is a first step toward the elimination or repeal of the fast track rules. The Court may wish to do just that, thereby returning all criminal appeals to a full-briefing process. While I am not categorically opposed to eliminating fast track briefing, I wonder if it is necessary. That is, rather than a complete repeal of NRAP 3C maybe some additional amendments to the existing rules would work.

<sup>1</sup> The Washoe County Public Defender's Office does not handle post-conviction petitions so my comments are limited to direct appeals.

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As the Court knows the fast track briefing rules were adopted in July 1996 to deal with the Court's increasing criminal caseload. One of the goals was to create a system by which certain criminal appeals (*i.e.* non-life sentence appeals) could come before the Court for decision "within 60 days after the notice of appeal [was] filed." Because at that time "200 to 250 days often pass[ed] before an appeal [could] be considered." Paul Taggart, Criminal Appeals in the Nevada Supreme Court, *Nevada Lawyer* 24 (August 1996). This time frame seemed unfair for many criminal defendants. And the concern was that in some cases a defendant's sentence could expire before any meaningful appellate review of the defendant's trial or sentence could take place. Perhaps today—with a seven-member Supreme Court sitting in three-member panels (as well as sitting en banc) coupled with the recent addition of the three-member Court of Appeals—this concern no longer exists. The petition seems to suggest this: "2. This court has recently experienced procedural and caseload changes, in part due to the establishment of the Court of Appeals." But if not, the rules of appellate procedure must provide a process for the timely review and disposition of such direct criminal appeals; and that would be some sort of modified fast track system or at least an amendment to NRAP 31 establishing a shorten briefing schedule for certain types of appeals.<sup>2</sup>

Over the years some objections to the fast track rules have been addressed. Recently for example, the Court adopted amendments to Rule 3C that (1) provided for the filing of a reply fast track brief; (2) eliminated the "condensed format" of the rough draft transcript; and (3) provided for full briefing upon a timely motion. See Order Adopting Amendments to Nevada Rules of Appellate Procedure Pertaining to Fast Track Appeals (ADKT 381 filed November 3, 2010). Prior to these amendments the appellant did not have a right to file a reply fast track brief and it was difficult, sometimes impossible, to obtain full briefing in a fast track appeal. The ability to motion a specific case out of fast track briefing where warranted has improved the rule.

In addition to the amendments mentioned above, page limitations on fast track briefs—a major complaint—have been modified to instead allow for word count limitations—7267 words for a fast track statement, 4,845 words for a fast track response, and 2,333 words for a fast track reply. NRAP 3C(h)(2) (as amended by ADKT 0501 (Order Amending the Nevada Rules of Appellate Procedure filed on December 18, 2014)). Word limitations in the place of page limitations, has been a major improvement to fast track briefing.

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<sup>2</sup> For example, appeals where the principle issue grows out of a sentencing hearing—breach of plea bargain, restitution, abuse of sentencing discretion, etc.—or appeals from probation revocation orders. Or more broadly, appeals from guilty plea based judgments.

This type of flexibility could be applied to other objections if warranted. For example, some say that the fast track brief is not a “real” brief because of the introductory information that must be provided before actual “briefing” starts. Part of this objection may also be that the required introductory material uses up page and word limitations of the fast track brief. True enough. Of course this introductory material is of the nature of a docketing statement, which presently is not filed in fast track appeals. It would be easy for the Court to amend Rule 3C to remove this material from the fast track statement and require that all fast track briefs conform to the format associated with full briefing, *i.e.* NRAP 28 (Briefs). But then the Court would also need some sort of docketing statement filed as required in other appeals.

Some say that the major problem of the fast track rules is that it keeps *trial* counsel on as the *appellate* counsel—adding that not every trial counsel wants to be (or is competent to be) appellate counsel. It would be foolish to deny that claim; it is clear that not every trial attorney wants to write appeals. However the Court wishes to address this problem it should bear in mind at least two things: First, the rule presently ensures (in most cases—*cf.* NRAP 4(c)(1) (providing a remedy for untimely direct appeals from a judgment of conviction)) that a notice of appeal will be filed. See NRAP 3C(b)(2) (“[t]rial counsel shall file the notice of appeal”). Thus if the Court repeals Rule 3C it should also consider retaining some language in a rule requiring trial counsel—in those cases where the “convicted defendant expresses a desire to appeal or indicates dissatisfaction with a conviction.” *Lozada v. State*, 110 Nev. 349, 354, 871 P.2d 944, 947 (1994)—to file a notice of appeal before he or she is allowed to withdraw from the case.

Second, the appeals currently being handled by private counsel because of NRAP 3C’s requirement that trial counsel remain as appellate counsel will have to go somewhere after counsel is allowed to withdraw. And in all likelihood those appeals will come to institutional defender organizations in the absence of a rule directing them elsewhere. (This is what was happening before the adoption of NRAP 3C.) Those appeals will be in addition to the appeals institutional defenders currently handle, which will require additional full-time employees—attorneys and support staff—and office work space. This will have a fiscal impact on every county that provides for indigent appellate defense, unless other arrangements are made.

That said, I support the instant petition to amend NRAP 3C. I plan on attending the public hearing scheduled for December 10, 2015 in Carson City.

Sincerely,



JOHN REESE PETTY  
Chief Deputy