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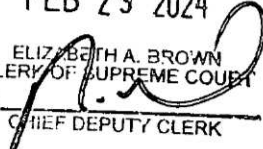
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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

February 29, 2024

Elizabeth A. Brown
Clerk of the Supreme Court
201 South Carson Street
Carson City, Nevada 89701

Sent via email only to nvscclerk@nvcourts.nv.gov

Re: ADKT 0580
Proposed Changes to the Nevada Rules of Appellate Procedure

Dear Ms. Brown:

Attorneys at the Federal Public Defender for the District of Nevada have reviewed the proposed changes to the Nevada Rules of Appellate Procedure. We write to express our appreciation for the incredible work performed by the Commission on Nevada Rules of Appellate Procedure and offer modest feedback on two topics.

Guidance for Cases Uncategorized under Rule 17

Proposed Rule 17, regarding division of cases between the Supreme Court and the Court of Appeals, adopts three categories of cases: those “always retained” by the Supreme Court, those “ordinarily retained” by the Supreme Court, and those “ordinarily assigned” to the Court of Appeals.¹ Rule 28(a)(5), in turn, requires appellants to provide a routing statement “setting forth whether the matter” falls into one of the three categories.² However, the three categories in proposed Rule 17 do not describe all cases or matters that come before our appellate courts. For

example, appeals from a judgment of convictions for category A or B felonies and postconviction appeals for category A felonies are both uncategorized.³ In these cases, neither Rule 17 nor Rule 28(a)(5) provide explicit guidance on what the routing statement should say.

We request either that Rule 17 provide guidance for these “other” cases, or that Rule 28(a)(5) provide guidance on how attorneys should describe these “other” cases. We propose the following language be added to Rule 28(a)(5):

(5) a routing statement, setting forth whether the matter is always retained by the Supreme Court, ordinarily retained by the Supreme Court, or ordinarily assigned to the Court of Appeals under Rule 17, and citing the subparagraph(s) under which the matter falls. If the matter does not fall under any of the categories listed under Rule 17, the appellant may set forth that no Rule 17 category applies. If the appellant believes that the Supreme Court should retain the case despite its ordinary assignment to the Court of Appeals, based on a principal issue raised in the matter, the routing statement must include a clear statement of the relevant issue, citations to the record where the issue was raised and resolved, and an explanation of the importance of the issue.⁴

Stays of Remittitur under Rule 41

Proposed Rule 41(d)(3), regarding stays of remittitur, imposes new requirements for a party seeking a stay of remittitur to allow for the filing of a petition for writ of certiorari before the U.S. Supreme Court.⁵ Specifically, the proposed rule requires a party to:

- Show good cause for a stay;
- Identify the question(s) the party expects to present to the United States Supreme Court; and
- Include a citation to where the question(s) identified were raised and resolved in the Nevada State courts, and if not, state why the motion should not be denied.⁶

This change, in effect, would require a party to identify, with some specificity, the subject of their petition for writ of certiorari within 21 days of dispositive order or opinion in their case. This is much less time than the 90 days given by the U.S. Supreme Court to file the petition for writ of certiorari.⁷ And the nature of legal research related to petitions for writ of certiorari is itself time-consuming because it requires comparing questions of federal law across U.S. courts of appeal or state courts of last resort.⁸ We are concerned that 21 days is not a sufficient number of

days to identify the question or questions a party expects to present to the United States Supreme Court, and that the proposed rule prematurely commits a party to a position about the contents of their petition. Notably, this Court’s Docketing Statement Rule, which similarly requires a party to identify the issues on appeal, is explicit that the statement is “not binding on the court, and the parties’ briefs will determine the issues on appeal.”⁹

Moreover, this change, ostensibly based on Fed. R. App. P. 41(d), requires substantially more information than the federal rule, which merely requires a showing that “the petition would present a substantial question and that there is good cause for a stay.”¹⁰

We request that the Court decline to adopt the changes proposed to Rule 41(d)(3)(A), and instead adopt the same language as Fed. R. App. P. 41(d). So, using the proposed rule as the base, NRAP 41(d)(3)(A) would read:

(A) A party may file a motion to stay the remittitur pending application to the United States Supreme Court for a writ of certiorari. The motion must be served on all parties and must show there is good cause for a stay and that the petition would present a substantial question. ~~{identify the question(s) the party expects to present to the United States Supreme Court. The motion should include a citation to where the question(s) identified were raised and resolved in Nevada state courts and, if not, state why the motion should not be denied.}~~¹¹

Conclusion

We thank the Commission on Nevada Rules of Appellate Procedure for the important work performed in studying and proposing changes to the rules; we also thank this Court for the opportunity to provide written comment.

Very truly yours,

/s David Anthony
Chief, Capital Habeas Unit

/s Jonathan Kirshbaum
Chief, Non-Capital Habeas Unit

/s Randolph M. Fiedler
Assistant Federal Public Defender

¹ See Ex. B at 92–97.

² See Ex. B at 125.

³ See generally Proposed R. 17(a), (b), (c); see Proposed R. 17(c)(3)(A) & Proposed R. 17(c)(4); Ex. B at 92–94.

⁴ Compare with Ex. A at 99 and Ex. B at 125.

⁵ See Ex. B at 187.

⁶ Ex. B at 187.

⁷ See S. Ct. R. 13(1).

⁸ S. Ct. R. 10(a)–(c).

⁹ See Ex. B at 83.

¹⁰ Fed. R. App. P. 41(d).

¹¹ See Ex. A at 144; Ex. B at 187; see also Fed. R. App. P. 41(d).