Supreme Court of Nevada
ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

MEETING NOTICE AND AGENDA

Commission on Statewide Rules of Criminal Procedure
Videoconference

Date and Time of Meeting: March 21, 2019 at Noon
Place of Meeting:

Carson City	Las Vegas	Washoe
Supreme Court Library Room 107 201 S. Carson Street Carson City, Nevada	Nevada Supreme Court Building Conference Room A/B 408 E. Clark Avenue Las Vegas, NV	Second Judicial District Court Room 220B 75 Court Street Reno, NV
Teleconference Access:	Dial-In # 1-408-740-7256	Meeting ID 1110011234

All participants attending via teleconference should mute their lines when not speaking; it is highly recommended that teleconference attendees use a landline and handset in order to reduce background noise.

AGENDA

I. Call to Order
   A. Call of Roll and Determination of a Quorum
   B. Opening Remarks

II. Public Comment

III. Review and Approval of the February 25, 2019 Meeting Summary* **(Tab 1)**

IV. Work Group Updates
   A. Jury Instructions Work Group **(Tab 2)**
   B. Life/Death Pretrial Practice Work Group
      i. Settlement Conferences – Research/Follow-Ups **(Tab 3)**

V. Proposed Statewide Rules: Discussion
   A. Draft Rules Discussion **(Tab 4)**
      i. Boyd Law School White Paper **(Tab 5)**
      ii. Local Rules of Practice

- Second Judicial District
- Eighth Judicial District

B. Federal Rules of Criminal Procedure: 2018 Edition available at https://www.federalrulesofcriminalprocedure.org/

VI. Additional Potential Areas for Commision Review **(Tab 6)**

VII. Other Items/Discussion

VIII. Next Meeting Date and Location

IX. Adjournment

- Action items are noted by * and typically include review, approval, denial, and/or postponement of specific items. Certain items may be referred to a subcommittee for additional review and action.
- Agenda items may be taken out of order at the discretion of the Chair in order to accommodate persons appearing before the Commission and/or to aid in the time efficiency of the meeting.
- If members of the public participate in the meeting, they must identify themselves when requested. Public comment is welcomed by the Commission but may be limited at the discretion of the Chair.
- The Commission is pleased to provide reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If assistance is required, please notify Commission staff by phone or by email no later than two working days prior to the meeting, as follows: Jamie Gradick, (775) 687-9808 - email: jgradick@nvcourts.nv.gov
- This meeting is exempt from the Nevada Open Meeting Law (NRS 241.030)
- At the discretion of the Chair, topics related to the administration of justice, judicial personnel, and judicial matters that are of a confidential nature may be closed to the public.
- **Notice of this meeting was posted in the following locations**: Nevada Supreme Court website: www.nevadajudiciary.us; Carson City: Supreme Court Building, Administrative Office of the Courts, 201 South Carson Street; Las Vegas: Nevada Supreme Court, 408 East Clark Avenue.

TAB 1

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Commission on Statewide Rules of Criminal Procedure
February 25, 2019
Noon
Summary prepared by: Jamie Gradick

Members Present
Justice James Hardesty, Chair
Justice Abbi Silver, Co-Chair
Justice Lidia Stiglich, Co-Chair
John Arrascada
Chief Judge Scott Freeman
Judge Douglas Herndon
Christopher Hicks
Darin Imlay
Mark Jackson
Lisa Rasmussen
Judge Jim Shirley
John Springgate
JoNell Thomas
Steve Wolfson

Guests Present
Sharon Dickinson
Steve Ellis
Chris Lalli
Robert O'Brien
Luke Prengaman

AOC Staff Present
Jamie Gradick
John McCormick

I. Call to Order
- Justice Hardesty called the meeting to order at 12:03 pm.
- Ms. Gradick called roll; a quorum was present.
- Justice Hardesty explained that, while only Commission members may vote on Commission matters, others are still encouraged to participate and provide input as appropriate.

II. Review and Approval of January 23, 2019 Meeting Summary
- The January 23, 2019 meeting summary was approved pending a spelling correction,

III. January 23, 2019 Meeting Follow-Ups
- Life/Death Pretrial Practice Work Group Recommendations: Rule 250

- Mr. Lalli presented proposed language to amend SCR 250(4)(c). *(Please see meeting materials for additional information)*
  - Mr. Lalli explained that, oftentimes, the defense has not had time to compete mitigation; extending the filing time could provide the defense with more time to complete at least a portion of the mitigation process.
  - Mr. Lalli informed attendees that a group of capital litigators worked together to draft this proposed language.
  - Attendees discussed the process currently in place; concern was expressed regarding the role of the death penalty screening committee; Mr. Lalli explained that his office would not alter its current processes under this change.
  - A comment was made that the defense would still need to be notified when there is a potential death filing.
- Justice Stiglich asked for clarification regarding how the process would work if the 30 days period ran simultaneously.
  - Mr. Lalli explained the death penalty assessment committee process and commented that there would need to be coordination between the state and the defense during/following the assessment committee meeting.
  - If there is a possible mitigating circumstance, the committee meets to assess whether death will be sought.
  - Mr. Wolfson explained that some cases are clear in terms of whether notice of intent will or will not be filed; however, on the tougher cases, fewer notices will be filed if the defense has more mitigation time.
- Concern was expressed regarding notice to defense counsel; potentially, the time period could run before the defense has time to file the waiver.
  - Mr. Hicks and Mr. Jackson explained that Washoe County and Douglas County both involve defense counsel in the process as soon as possible; this change could be workable in their counties.
- A suggestion was made that language be added to clarify that in a district in which there is not a death penalty committee, that DA must provide notice to defense counsel prior to filing notice of intent.
  - Concern was expressed regarding cases in which the DA knows they are going to file; would the DA still be required to notify the defense in these cases? This adds another "hurdle" to the Rule 250 requirements.
- Justice Hardesty asked whether the notice should be filed 180 after the indictment, rather than requiring the "back-and –forth" notices/waivers.
  - Judge Herndon expressed concern regarding how this would impact the right to a speedy trial.
  - Ms. Thomas explained that this would place a burden on defense because every murder cases would be treated as a potential death case.
  - Attendees discussed the notification to defense counsel; currently it is an informal process. Requiring it as part of the rule takes away a degree of flexibility and make notice a litigable issue.
- Attendees discussed the extent of the problem; the process works fine as is but making these changes could save county resources. Mr. Wolfson explained that the state is going to "lean towards filing" on the "cases in the middle" because of a lack of mitigation information.

- Judge Herndon suggested the judge make the inquiry (as to whether the case is going before the death review committee) during the arraignment; this would provide notice to ten defense.
- Justice Stiglich expressed concern regarding how this impacts deployment of defense resources.
  - A comment was made that the entire mitigation process does not have to be completed; the 180 period is only to allow the defense enough time to obtain information on mental health issues, etc.
  - Ms. Rasmussen commented that she has seen this process work in other jurisdictions.
- Justice Stiglich asked for clarification regarding how many murder cases go into death review.
  - Mr. Lalli commented that its every case where there's an arguable aggravating circumstance; this is about 70-80% of cases.
- Attendees discussed whether there is harm in filing a waiver and death notice of intent at the same time. Each side expresses its intention; a death notice can be withdrawn at a later date if necessary.
  - Ms. Thomas commented on the rigidity of the 30-day rule and suggested "tweaking" the timing to give the defense 25 days and the state 30; this would create a buffer.
- Justice Hardesty asked Commission members for a motion to accept the proposal as tendered.
  - Mr. Wolfson made the motion.
  - Ms. Thomas seconded the motion.
  - A roll-call vote was taken; all attending members voted "yes" with the exception of a "no" vote from Justice Stiglich.
  - The motion passed.

- Life/Death Pretrial Practice Work Group Recommendations: Settlement Conferences
  - Attendees briefly discussed the law review article provided by Judge Herndon *(Please see meeting materials for additional information)*
  - Justice Hardesty suggested the work group research settlement conference rules in other jurisdictions.
    - Mr. Lalli commented that the work group has been looking at settlement conferences rules in other jurisdictions and has been working on drafting language but has not had an opportunity to put anything formal together; it's a complicated area that requires additional time.
    - Justice Hardesty asked Ms. Gradick and Mr. McCormick to work with the work group to research settlement conference rules/statutes from other jurisdictions.
- Judicial Training Report
  - Mr. McCormick provided attendees with a brief overview of judicial trainings available in this area. *(Please see meeting materials for additional information)*
    - A suggestion was made that the group research what training is available to attorneys in this area; it is important that judges be aware of what attorneys are doing and what is required of attorneys.
    - Judge Herndon commented that jury selection and ineffective assistance of counsel seem to be two areas where issues arise on appeal.

- Justice Hardesty informed attendees that the Nevada Supreme Court has seen appeal issues that could possibly be addressed through training at the judicial level.

➢ Attendees discussed whether judges outside the eighth judicial district have received training in this area.
- Ms. Gradick will survey the rural district court judges to see what education they have received in this area.

IV. Eighth Judicial District Court's Homicide Case Program Update *(Please see meeting materials for additional information)*

- Judge Herndon provided an overview of the latest program statistics.

V. Proposed Statewide Rules: Structure/Outline Discussion

- Justice Hardesty asked attendees for input regarding the best method to approach the revision/development process and explained the intent is to adopt rules that help fill in gap areas in our exiting statutes; we do not want to "regurgitate" the statutes we already have.
  - ➢ Mr. Jackson provided a brief background on how the Motions Practice Work Group arrived at the draft rules document.
    - There are procedural issues with the rules that are in place, particularly in the rural jurisdictions. Each jurisdiction is applying different rules, or applying rules differently.
    - Mr. Jackson cautioned against developing procedural rules without addressing the underlying issues of how rules are applied.
  - ➢ Attendees expressed concern regarding adopting rules that conflict with statute and how to proceed.
    - A comment was made that there's no point in only "fixing" or "drafting" what rules we can; the statewide issues won't be addressed unless the Commission is willing to make comprehensive changes (due to conflicts within the statutes, incompatibilities in the federal rules, etc.).
    - Judge Shirley commented on inconsistencies within the statutes that need to be addressed; there is a "home field" advantage for prosecutors in the rural counties because they know how their jurisdiction applies the rules while the defense attorney may not.
  - ➢ Justice Stiglich suggested the Commission use the federal rules as a framework and organizational guideline of which to compare Nevada rules. This would help illuminate gaps and areas where our rules need work.
    - Local practice rules could be used to fill gaps.
  - ➢ Attendees discussed the need for statutory modifications, particularly in the area of timeframes.
    - A comment was made that this was the purpose behind SB 5; at this point, any statutory changes could be another session away.
    - Mr. McCormick informed attendees that the LCB had significant concerns regarding SB 5; in its current form, the bill is not going to move. The Nevada Supreme Court needs to approach the legislature with something more collaborative in order to be successful.
  - ➢ Attendees briefly discussed the UNLV Boyd Law School White Paper; Ms. Gradick will distribute this to the group.

- Mr. Prengaman suggested that the group "zero in" on areas of concern rather than go through rule-by-rule and addressing rules that already overlap.
- Attendees discussed local rules; the rural jurisdiction have very little in the way of local criminal procedure rules.
- Justice Hardesty commented that there are problem areas within existing statues, there are issues in local rules, and there is a question as to whether any of these approaches qualify as best practices.
- Mr. Prengaman commented that the many of the issues are procedural; it is a policy decision: is it better to have uniformity or should jurisdictions be allowed to develop procedures fitting their individual needs, requiring practitioners to know the differences in each jurisdiction in which they practice?
  - Justice Hardesty commented that the Nevada Supreme Court would like to see a uniform set of rules/procedures statewide.
- Mr. Prengaman suggested that the Commission consider developing rules of practice instead of procedure.
  - Justice Hardesty asked for feedback regarding feasibility of developing practice norms around the state and commented that this needs to be accomplished on a full-Commission basis, rather than in work groups.
  - Justice Silver reiterated the need for a standard set of rules and pointed out that this has been accomplished in the civil arena; it should be possible to do the same in criminal.
- Justice Hardesty suggested that the Commission move forward by first developing a uniform set of practice areas not in conflict with statute, and then identifying statutes that need updating and/or amending.
  - Those practices not requiring legislative involvement would be presented to the Nevada Supreme Court; legislative changes to the statutes would be addressed during the 2021 Legislative Session.
  - The most productive approach would be to start by identifying and filling in gaps.

VI. Other Items/Discussion

- Attendees briefly discussed possible areas, beyond the four topics the work groups have been working on, that the Commission should consider reviewing.
  - Mr. O'Brien suggested the Commission revisit discovery and also look at rules governing appearances before a magistrate following arrest or initial appearance.
  - Justice Hardesty suggested the addition of post-conviction procedures/rules.
    - Justice Hardesty asked attendees to review post-conviction practice rules and Rule 16 in the Federal Rules of Criminal Procedure in preparation for the next meeting.

VII. Next Meeting

- Justice Hardesty requested that Ms. Gradick, survey the Commission membership for availability and schedule a meeting for next month.

VIII. Adjournment

- The meeting was adjourned at 2:00 p.m.

TAB 2

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*Note: Because this meeting focused on developing/editing a working document, this summary will only include the relevant discussion and action item portions of the meeting. Please see the edited jury instruction sections for work product completed during the meeting.

Commission on Statewide Rules of Criminal Procedure
Jury Instructions Work Group
February 27, 2019
Summary prepared by: Jamie Gradick, AOC

Attendees

Chief Judge Scott Freeman, Chair
Gina Bradley
Scott Coffee
Luke Prengaman
Judge Connie Steinheimer
Pierron Tackes
Deborah Westbrook
Judge Nathan Tod Young

Meeting Summary

- Chief Judge Freeman welcomed attendees.
- Ms. Gradick called roll; a quorum was present.
- Attendees revisited "assignments" from the previous meeting.
  - Section 13.12(a): Invasion of the Home
    - Ms. Westbrook informed attendees that she and Mr. Prengaman worked together to research the supporting authority and draft the new, proposed version of this instruction.
    - Attendees briefly discussed the language required for the definition of "inhabited dwelling" per case law.
  - Section 14.01(a): Forgery…
    - Attendees reviewed changes made during the previous meeting and subsequent revisions/comments.
    - Chief Judge Freeman read the section with suggested revisions.
    - Attendees discussed the use of brackets to make applicability of the instruction case-specific. A suggestion was made that each individual paragraph be bracketed; attendees agreed to this suggestion.
    - Attendees discussed whether "written instrument" should be included with the definitions and accepted the revisions.

- Section 14.01(a)(2)
  - Discussion was held regarding ordering; during the last meeting, the instruction was divided up and the work group did not address this particular section.
  - Ms. Westbrook explained that two separate instructions were created under NRS 205.090: one for "uttering" and one for "forgery".
  - Attendees discussed moving the bracketed language to follow the "defraud" definition and using the same definitions that were used in the prior section.
  - Chief Judge Freeman read the section with suggested revisions.
  - Attendees discussed bracket placement; Chief Judge Freeman briefly recapped bracketing determinations the work group made during the last meeting.
  - Attendees approved inclusion of the instruction.
- Section 14.01(b)(1)
  - Chief Judge Freeman read the section with suggested revisions; attendees reviewed bracketed language.
  - Attendees approved inclusion of the instruction.
- Section 14.01(b)(2)
  - Chief Judge Freeman read the section with suggested revisions.
  - Ms. Westbrook suggested the use of "injured" over "damaged".
  - Attendees discussed bracket placement as a means of "working around" outdated language; Mr. Prengaman suggested bracketing to deal with confusing "or" language in the elements.
  - Attendees approved inclusion of the instruction.
- Section 14.01(b)(3)
  - Attendees reviewed Mr. Prengaman's proposed revisions.
  - Chief Judge Freeman read the section with suggested revisions.
  - Attendees approved inclusion of the instruction.

- Section 14.01(c) *(Portions of this discussion were inaudible)*
  - Chief Judge Freeman read the section with proposed changes.
  - Ms. Westbrook presented her version and commented that it tracks NRS 205.100 more closely than the currently proposed language.
  - Ms. Westbrook commented that the work group previously agreed to not include presumption or inference language in the instructions so this type of language would need to be removed from Mr. Prengaman's proposed version. 14.03(a) would be a better location for this element.
    - Mr. Prengaman commented that NRS 205.110 works in conjunction with NRS 205.100; attendees discussed whether these statutes work together or should be separated into their own instructions. After discussion, attendees agreed to separate the statutes into individual instructions.
    - Ms. Westbrook suggested splitting element 2 into separate elements; attendees discussed whether these are separate elements that the state would need to prove. Mr. Prengaman commented that the elements are not separate and come from the same statute (NRS 205. 101).
    - A suggestion was made to use brackets to apply only the case-specific parts of the instruction for the jury.
  - Ms. Westbrook commented that language from NRS 205.100 (2) is a presumption under NRS 47.230; the language proposed in this section conflicts with the statute and the work group previously decided not to instruct the jury on presumption.
    - Chief Judge Freeman commented that these types of check forgery crimes are distinguishable because of the legislative intent behind their creation.

    - Ms. Westbrook presented her proposed language to comport with NRS 47.230.
    - Attendees discussed the legal authority behind the language.
    - Chief Judge Freeman presented the section with proposed changes; attendees approved instruction.
    - Ms. Westbrook commented that, based on the approval of this language, the work group should reconsider breaking the second element into separate elements. Attendees, with the hesitant concession of Ms. Westbrook, agreed to leave this as a single element since that is how the statute presents it.
  - After discussion on the topic, the language/structure of the statute, and the risk of juror confusion, Mr. Prengaman incorporated the work group's suggested edits and uploaded the revised draft into DropBox.
    - Chief Judge Freeman presented the section with proposed changes; pending a change to the location of bracketed language, attendees approved the instruction.
- Chief Judge Freeman provided attendees with an update on the changes to the full Commission.
  - The new leadership is happy with the work group's efforts.

Additional Action Items

- Work group members will review through Section 16 for the next meeting; comments will need to be submitted to the drop box a week prior to the next teleconference meeting.
- Ms. Gradick will survey the work group members for availability and will schedule another work group teleconference for next month.

TAB 3

Alaska

Alaska Rules of Civil Procedure - Rule 16 Pretrial Conferences: Scheduling: Management
https://public.courts.alaska.gov/web/rules/docs/civ.pdf

- Rule 16(a)(5) "facilitating the settlement of the case, including use of alternative dispute resolution procedures such as mediation, early neutral evaluation, arbitration, and settlement conferences."

- Rule 16(c)(9) "settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule;" and

- Rule 16(c)(16) "such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

  At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute."

Alaska Rules of Civil Procedure - Rule 100 Mediation and Other Forms of Alternative Dispute Resolution
https://public.courts.alaska.gov/web/rules/docs/civ.pdf

- Rule 100(i)(3) "Settlement Conference. At any time after a complaint is filed, a party may file a motion with the court requesting a settlement conference with a judge for the purpose of achieving a mutually agreeable settlement. The court may order a settlement conference in response to such a motion or on its own motion."

Alaska Rules of Probate Procedure - Rule 4.5 Mediation and Other Forms of Alternative Dispute Resolution
https://public.courts.alaska.gov/web/rules/docs/prob.pdf

- Rule 4.5(j)(2) "Settlement Conference. At any time after a complaint is filed, a party may file a motion with the court requesting a settlement conference with a judge for the purpose of achieving a mutually agreeable settlement. The court may order a settlement conference in response to such a motion or on its own motion."

Alaska Rules of Appellate Procedure - Rule 221 Settlement Discussions in Civil Appeals
https://public.courts.alaska.gov/web/rules/docs/app.pdf

Alaska Rules of Appellate Procedure - Rule 222 Settlement Conferences in Civil Appeals
https://public.courts.alaska.gov/web/rules/docs/app.pdf

Arizona

Rules of Civil Procedure for the Superior Courts of Arizona - Rule 16.1 Settlement Conferences
https://govt.westlaw.com/azrules/Document/N95909EC086E311E68563C91A46D8D763?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

Justice Court Rules of Civil Procedure - Rule 130 Mediation Conference
https://govt.westlaw.com/azrules/Document/N724E48900DDE11E2A626EF9DD6EFA1DD?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

Justice Court Rules of Civil Procedure - Rule 131 Settlement Conference
https://govt.westlaw.com/azrules/Document/N6DEE97F00DDE11E28A628CD7CECCD897?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

Arizona Rules of Civil Appellate Procedure - Rule 30 Arizona Appellate Settlement Conference Program
https://govt.westlaw.com/azrules/Document/NA5BAAD703FB611E4B4D7C67CCE44C05C?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

Colorado

Colorado Rules of Civil Procedure - Rule 16 Case Management and Trial Management
https://leg.colorado.gov/sites/default/files/images/olls/crs2017-court-rules.pdf

- CRCP Rule 16(7) Initial Exploration of Prompt Settlement and Prospects for Settlement. The proposed order shall confirm that the possibility of settlement was discussed, describe the prospects for settlement and list proposed dates for any agreed upon or court-ordered mediation or other alternative dispute resolution.

Colorado Revised Statutes Annotated §13-22-301 to 13-22-313 - Dispute Resolution Act (NOTE: see Title 13 Courts and Court Procedure, Contracts and Agreements, Article 22 Age of Competence – Arbitration – Mediation, Part 3 Dispute Resolution)
https://advance.lexis.com/container?config=0345494EJAA5ZjE0MDIyYy1kNzZkLTRkNzktYTkxMS04YmJhNjBlNWUwYzYKAFBvZENhdGFsb2e4CaPI4cak6laXLCWyLBO9&crid=60e23993-f7cd-427a-b17b-ff4572519b74&prid=431918bb-8051-4d1d-bf09-3e1d640abb00

- §13-22-302 Definitions
  https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=3935bba9-301e-463e-a4b0-b139aa2e3fec&nodeid=AANAAIAABAADAAC&nodepath=%2FROOT%2FAAN%2FAANAAI%2FAANAAIAAB%2FAANAAIAABAAD%2FAANAAIAABAADAAC&level=5&haschildren=&populated=false&title=13-22-302.+Definitions&config=014FJAAyNGJkY2Y4Zi1mNjgyLTRkN2YtYmE4OS03NTYzNzYzOTg0OGEKAFBvZENhdGFsb2d592qv2Kywlf8caKqYROP5&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5TYF-BJW0-004D-10BT-00008-00&ecomp=k3579kk&prid=60e23993-f7cd-427a-b17b-ff4572519b74
  - §13-22-302(7) "Settlement conference" means an informal assessment and negotiation session conducted by a legal professional who hears both sides of the case and may advise the parties on the law and precedent relating to the dispute and suggest a settlement.

Colorado Revised Statutes Annotated §8-43-201 to 8-43-220 – Settlement and Hearing Procedures
(NOTE: see Title 8 Labor and Industry, Labor II – Workers' Compensation and Related Provisions, Article 43 Procedure, Part 2 Settlement and Hearing Procedures)
https://advance.lexis.com/container?config=0345494EJAA5ZjE0MDIyYy1kNzZkLTRkNzktYTkxMS04YmJhNjBlNWUwYzYKAFBvZENhdGFsb2e4CaPI4cak6laXLCWyLBO9&crid=60e23993-f7cd-427a-b17b-ff4572519b74&prid=431918bb-8051-4d1d-bf09-3e1d640abb00

- §8-43-204 Settlements – rules
  https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=ec61daed-0636-4221-b22c-8734592af945&nodeid=AAIAACAAEAACAAE&nodepath=%2FROOT%2FAAI%2FAAIAAC%2FAAIAACAAE%2FAAIAACAAEAAC%2FAAIAACAAEAACAAE&level=5&haschildren=&populated=false&title=8-43-204.+Settlements+-+rules&config=014FJAAyNGJkY2Y4Zi1mNjgyLTRkN2YtYmE4OS03NTYzNzYzOTg0OGEKAFBvZENhdGFsb2d592qv2Kywlf8caKqYROP5&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5TYF-BJC0-004D-1012-00008-00&ecomp=k3579kk&prid=60e23993-f7cd-427a-b17b-ff4572519b74

- §8-43-206 Settlement conference procedures
  https://advance.lexis.com/documentpage/?pdmfid=1000516&crid=ab2742fd-d667-4d27-899b-2a4dc495cc81&config=014FJAAyNGJkY2Y4Zi1mNjgyLTRkN2YtYmE4OS03NTYzNzYzOTg0OGEKAFBvZENhdGFsb2d592qv2Kywlf8caKqYROP5&pddocfullpath=%2Fshared%2Fdocument%2Fstatutes-legislation%2Furn%3AcontentItem%3A5TYF-BJC0-004D-1014-00008-00&pddocid=urn%3AcontentItem%3A5TYF-BJC0-004D-1014-00008-00&pdcontentcomponentid=234176&pdteaserkey=sr0&pditab=allpods&ecomp=kgw7kkk&earg=sr0&prid=db7c7b78-5e65-42ac-a73c-d3f18ae52906

Idaho

Idaho Appellate Rules - Rule 49 - Appellate Settlement Conference https://isc.idaho.gov/iar49

Idaho Rules of Criminal Procedure - Rule 18 Felony Pretrial Conference https://isc.idaho.gov/icr18

Rule 18.1 - Mediation in Criminal Cases https://isc.idaho.gov/icr18-1

Idaho Rules of Civil Procedure - Rule 16 Pretrial Conferences; Scheduling; Management https://isc.idaho.gov/ircp16-new

Se. 7 – Pre-Trial and Trial Procedure – Rule 701, 702, 703

Montana

Montana Rules of Appellate Procedure – Rule 7 – Mandatory appellate Alternative Dispute Resolutionhttps://leg.mt.gov/bills/2014/mca/25/21/25021001070.htm

Montana Uniform District Court Rules – Rule 5 – Pre-trial Order and Pre-trial Conferencehttps://leg.mt.gov/bills/mca/title_0250/chapter_0190/part_0010/section_0050/0250-0190-0010-0050.html

Montana Justice and City Court Rules of Civil Procedure – Rule 14 – Pretrial Conferenceshttps://leg.mt.gov/bills/mca/title_0250/chapter_0230/part_0010/section_0140/0250-0230-0010-0140.html

Montana Rules of Civil Procedure – Rule 16 – Pretrial Conferenceshttps://leg.mt.gov/bills/mca/title_0250/chapter_0200/part_0030/section_0160/0250-0200-0030-0160.html

Montana statute – Title 25 – Civil Procedure, Chapter 40 – Alternative Dispute Resolutionhttps://leg.mt.gov/bills/mca/title_0250/chapter_0400/part_0010/sections_index.html

New Mexico

New Mexico Rules of Civil Procedure for the District Courts – Rule 1-016 – Pre-trial Conferences; Scheduling; Management

https://1.next.westlaw.com/Document/N8EB13DC091DA11DB9BCF9DAC28345A2A/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

New Mexico Rules of Civil Procedure for the Magistrate Courts – Rule 2-805 – Mediation

https://1.next.westlaw.com/Document/NCA9029D0D5D811DC925CE61187F6E832/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

New Mexico Rules of Civil Procedure for the Metropolitan Courts – Rule 3-306 – Pretrial Conference; Scheduling Order

https://1.next.westlaw.com/Document/NCE89153091DA11DB9BCF9DAC28345A2A/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

New Mexico Rules of Appellate Procedure – 12-313 – Mediation

https://1.next.westlaw.com/Document/NBFAB154091DA11DB9BCF9DAC28345A2A/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

Rules of the District Court of the Second Judicial District – LR2-602 – Settlement Facilitation Program

https://1.next.westlaw.com/Document/NA85D1A5091DF11DB9BCF9DAC28345A2A/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

Rules of the District Court of the Third Judicial District - LR3-601 – Settlement Facilitation Program

https://1.next.westlaw.com/Document/NAE5F094091DF11DB9BCF9DAC28345A2A/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

Rules of the District Court of the Fifth Judicial District – LR5-206 – Settlement Conference

https://1.next.westlaw.com/Document/NB6F02E9091DF11DB9BCF9DAC28345A2A/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

Rules of the District Court of the Thirteenth Judicial District – LR13-602 – Settlement Facilitation

https://1.next.westlaw.com/Document/NCBEA5C3091DF11DB9BCF9DAC28345A2A/View/FullText.html?originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)

Oregon

- Oregon Rule of Civil Procedure 54F:
    - **F Settlement conferences.** A settlement conference may be ordered by the court at any time at the request of any party or upon the court's own motion.

Unless otherwise stipulated to by the parties, a judge other than the judge who will preside at trial shall conduct the settlement conference.
        - https://www.oregonlegislature.gov/bills_laws/Lists/ORCP/DispForm.aspx?ID=54
- **ORAP 15.**05 – Appellate Settlement Conference Program & ORAP 15.10 (Appellate Settlement Conference Program in the Supreme Court)
    - https://www.courts.oregon.gov/rules/ORAP/ORAP%20Effective%202019-01-01.pdf
- No comparable criminal rule of procedure, but according to https://www.osbar.org/public/legalinfo/1220_JudicialConferences.htm, settlement conferences are available in certain criminal cases.
- ORS § 21.215 – Fees for settlement conferences: https://www.oregonlaws.org/ors/21.215
- Local Rules
    - Linn County – Rule 6.012 – Settlement Conferences
        - https://www.courts.oregon.gov/rules/Documents/Linn_SLR_2017.pdf
    - Douglas County
        - Rule 6.012 – Settlement Conferences in Civil Cases
        - Rule 12.105 – Court Annexed Mediation/Arbitration/Settlement Conference Program)
        - Both rules: https://www.courts.oregon.gov/rules/Documents/Douglas_SLR_2019.pdf
    - Columbia County – Rule 6.012 – Settlement Conferences
        - https://www.courts.oregon.gov/rules/Documents/Columbia_SLR_2019.pdf
    - Crook/Jefferson Counties –
        - Rule 6.012 – Optional Settlement Conference
        - Rule 6.014 – Voluntary Settlement Conference
        - Rule 7.016 – Settlement Conferences in Criminal Proceedings
        - All rules: https://www.courts.oregon.gov/rules/Documents/Crook-Jefferson_SLR_2019.pdf
    - Clatsop County
        - Rule 6.012 – Settlement Conferences
        - Rule 11.057 (Mandatory Settlement Conferences in Juvenile Court Proceedings)
        - Both rules: https://www.courts.oregon.gov/rules/Documents/Clatsop_SLR_2019.pdf
    - Benton County
        - Civil Rule 6.012 – Settlement Conference Procedures
        - Criminal Rule 7.015(4) (Criminal Case Scheduling; incorporates procedures set forth in Rule 6.012)
        - Both rules: https://www.courts.oregon.gov/rules/Documents/Benton_SLR_2019.pdf
    - Coos/Curry Counties: Rule 6.012 (Pretrial Settlement Conferences)
        - https://www.courts.oregon.gov/rules/Documents/Coos-Curry_SLR_2019.pdf
    - Baker County – Rule 6.012 (Mandatory Settlement Conference)
        - https://www.courts.oregon.gov/rules/Documents/Baker_SLR_2019.pdf

- Yamhill County
  - Criminal Rule 4.005 – Settlement Conferences
  - Civil Rule 6.012 – Settlement Conferences
  - Both rules: https://www.courts.oregon.gov/rules/Documents/Yamhill_SLR_2019.pdf
- Polk County – Rule 6.012 – Pretrial Settlement Conferences for Civil Cases
  - https://www.courts.oregon.gov/rules/Documents/Polk_SLR_2019.pdf
- Deschutes County – Rule 6.012 – Settlement Conferences
  - https://www.courts.oregon.gov/rules/Documents/Deschutes_SLR_2019.pdf
- Lake County
  - Civil Rule 6.012 – Mandatory Settlement Conference
  - Criminal Rule 7.011 – Pretrial Conferences in Criminal Proceedings
  - Both rules: https://www.courts.oregon.gov/rules/Documents/Lake_SLR_2019.pdf
- Jackson County
  - Civil Rule 6.012 – Settlement Conferences
  - Criminal Rule 7.014 – Pretrial Conference Settings in Criminal Cass; Duty to Confer
  - Both rules: https://www.courts.oregon.gov/rules/Documents/Jackson_SLR_2019.pdf
- Malheur County
  - Rule 6.012 – Settlement Conferences—Civil
  - Rule 6.013 – Settlement Conferences—Criminal
  - Both rules: https://www.courts.oregon.gov/rules/Documents/Malheur_SLR_2019.pdf
- Washington County
  - Rule 6.201 – Civil ADR and Judicial Settlement Conferences
  - Rule 8.012 (Family Law Case Settlement Conferences)
  - Both rules: https://www.courts.oregon.gov/rules/Documents/Washington_SLR_2019.pdf
- Marion County – Rule 6.012 – Settlement Conferences
  - https://www.courts.oregon.gov/rules/Documents/Marion_SLR_2019.pdf
- Klamath County
  - Rule 6.012 – Mandatory Settlement Conference
  - Rule 7.011 – Pretrial Conferences in Criminal Proceedings
  - Both rules: https://www.courts.oregon.gov/rules/Documents/Klamath_SLR_2019.pdf
- Lane County – Rule 6.012 – Settlement Conferences
  - https://www.courts.oregon.gov/rules/Documents/Lane_SLR_2019.pdf
- Tillamook County
  - Rule 6.012 – Settlement Conferences
  - Rule 11.057 (Mandatory Settlement Conferences in Juvenile Court)
  - Both rules: https://www.courts.oregon.gov/rules/Documents/Tillamook_SLR_2019.pdf

- Union/Wallowa Counties
  - Rule 6.012 – Settlement Conferences
  - Domestic Relations: Rule 8.005
  - Both rules: https://www.courts.oregon.gov/rules/Documents/Union-Wallowa_SLR_2019.pdf
- Clackamas County – Rule 6.012 – Conferences in Civil Proceedings
  - https://www.courts.oregon.gov/rules/Documents/Clackamas_SLR_2019.pdf
- Umatilla/Morrow Counties
  - Rule 6.005 – Domestic Relations Pretrial Settlement Conferences
  - Rule 6.012 – Pretrial Settlement Conference Procedures – Civil Cases
  - Rule 8.012 – Settlement Conferences in Dom Relations Cases
  - All rules: https://www.courts.oregon.gov/rules/Documents/Umatilla-Morrow_SLR_2019.pdf
- Josephine County
  - Rule 6.012 – Pre-Trial Settlement Conference Procedures
  - Rule 7.013 – Pretrial Conferences Criminal/Civil
  - Both rules: https://www.courts.oregon.gov/rules/Documents/Josephine_SLR_2019.pdf
- Multnomah County – Rule 6.012 – Pre-Trial Settlement Conference Procedures
  - https://www.courts.oregon.gov/rules/Documents/Multnomah_SLR_2019.pdf

Utah

Settlement conferences are mentioned in various places throughout the state's court rules and statutes, but are nowhere defined, nor are procedures for handling settlement conferences set forth anywhere.

Pre-trial conferences are covered by URCP 16, but these appear to be discretionary generally, and almost mandatory in family law issues:

https://www.utcourts.gov/resources/rules/urcp/view.html?title=Rule%2016%20Pretrial%20conferences.&rule=urcp016.html

- Utah Code § 78B-6-207: Minimum Procedures for mediation

https://le.utah.gov/xcode/Title78B/Chapter6/78B-6-S207.html?v=C78B-6-S207_1800010118000101

Wyoming

Settlement conferences are mentioned in various places throughout the state's court rules and statutes, but are nowhere defined, nor are procedures for handling settlement conferences set forth anywhere.

- Pre-trial conferences are covered by WRCP 16

https://www.courts.state.wy.us/wp-content/uploads/2017/05/WYOMING-RULES-OF-CIVIL-PROCEDURE-UPD-9-4-18.pdf

Kansas

- Kansas Rule of Civil Procedure 60-216: Pretrial conferences; case management conference
  - http://kslegislature.org/li_2014/b2013_14/statute/060_000_0000_chapter/060_002_0000_article/060_002_0016_section/060_002_0016_k/
- Kansas Rule of Civil Procedure 60-3413: Settlement Conferences (Professional Liability Actions)
  - http://www.kslegislature.org/li/b2019_20/statute/060_000_0000_chapter/060_034_0000_article/060_034_0013_section/060_034_0013_k/
- Kansas Rule of Criminal Procedure 22-3217: Pretrial conference
  - http://www.kslegislature.org/li/b2019_20/statute/022_000_0000_chapter/022_032_0000_article/022_032_0017_section/022_032_0017_k/
- Kansas Rules of Civil Procedure for Limited Actions, Rule 61-3201(d): Pretrial hearing
  - http://www.kslegislature.org/li/b2019_20/statute/061_000_0000_chapter/061_032_0000_article/061_032_0001_section/061_032_0001_k/
- Local Rules
  - Rules of Court for the Eighteenth Judicial District (Sedgwick County):
    - Rule 213 – Voluntary Settlement Conferences Except Medical Malpractice
      - http://www.dc18.org/rules/cvrules.shtml#Rule%20213
    - Rule 412 – Settlement Conferences (Family)
      - http://www.dc18.org/rules/flrules.shtml#412a
  - Rules of Court for the Seventh Judicial District (Douglas County)
    - Rule 20 – Settlement Conferences
      - https://www.douglascountyks.org/sites/default/files/media/depts/clerk-district-court/pdf/rulesofcourt.pdf#page=20
  - Rules of Court for the Fourteenth Judicial District (Montgomery and Chautauqua Counties)
    - Rule 24 (Family) – Domestic Relations Mediation
    - Rule 31 (Criminal) – Pretrial Conference and Proposed Jury Instructions
    - Rule 40 (Civil) – Settlement Conferences
    - http://www.kscourts.org/kansas-courts/district-courts/14thJDLocalRules.pdf
  - Rules of Court for the Sixth Judicial District (Miami, Linn, and Bourbon Counties)

        - Rule 15 – Settlement Conferences
            - http://www.kscourts.org/dstcts/6ctrulesPart1.htm#Rule15

    - Rules of Court for the Twenty-Sixth Judicial District (Grant, Haskell, Morton, Seward, Stanton and Stevens Counties)
        - Rule 121 – Settlement Conferences
            - http://www.mtcoks.com/court/rules.pdf

    - Rules of Court for the Fourth Judicial District (Anderson, Coffey, Franklin and Osage Counties)
        - Rule 4.204 – Pretrial Conference
            - http://www.franklincoks.org/DocumentCenter/View/299
            - Medical malpractice settlement conferences discussed in subsection (8)

    - Rules of Court for the Sixteenth Judicial District (Clark, Comanche, Ford, Gray, Kiowa and Meade Counties)
        - Rule 1 – Pretrial Conferences
            - http://www.kscourts.org/dstcts/16_Judicial_District/16thDistrictLocalCourtRules.pdf

TAB 4

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Incorporation of Statutory Provisions Into Rules With Footnotes

MARCH 8, 2018

ELEVENTH JUDICIAL DISTRICT COURT
P.O. Box H, Lovelock, NV 89419

Page

Table of Contents

Contents

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE I. APPLICABILITY

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 1 General Provisions and Scope

(a) **General Provisions.**

1. *Title.* This chapter shall be known and may be cited as the "Nevada Rules of Criminal Procedure" and may referenced as "Nev. Rules of Crim. Pro." and cited to as "NRCRP".
2. *Intended Purpose.* These rules shall govern the procedure in all criminal cases in the courts of this state except juvenile court cases. These rules are intended and shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unnecessary expense and delay.
3. *Effective.* These rules shall take effect on July 1, 2019. Thereafter, they shall govern all criminal proceedings commenced and, so far as just and practicable, all proceedings then pending. All statutes and rules in conflict therewith are repealed.

(b) **Scope.**

1. *In General.* These rules govern the procedure in all criminal proceedings in the Municipal Courts, Justice Courts, District Courts, Court of Appeals, and Supreme Court of the State of Nevada.
2. *Excluded Proceedings:* Proceedings not governed by these rules include:
    i. The extradition and rendition of a fugitive (governed by NRS);
    ii. Civil property forfeiture for violating a state or local law;
    iii. Juvenile delinquency and dependency proceedings; and
    iv. Other civil proceedings.

Rule 2 Interpretation

These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 3 Preliminary Provisions

(a) **"Bonds and undertakings in criminal actions."**[1] In all criminal actions or proceedings, the following provisions apply:

1. Where a bond or other undertaking is required by the provisions of the Nevada Revised Statutes or by the Nevada Rules of Civil Procedure or the Nevada Rules of Appellate Procedure, the bond or undertaking shall be presented to the clerk, of the court in which the action or proceeding is pending, for the clerk's approval before being filed or deposited.
2. The clerk of the court may refuse approval of a surety for any bond or other undertaking if a power of attorney-in-fact, which covers the agent whose signature appears on the bond or other undertaking, is not on file with the clerk of the court.

(b) **"Jurisdiction over criminal offenses."** These rules do not attempt to define jurisdiction of criminal offenses. Jurisdictional requirements are governed by the Nevada Revised Statutes.[2]

(c) **"Signature by mark."** When a signature of a person is required by this title, the mark of a person, if the person cannot write, shall be deemed sufficient, the name of the person making the mark being written near it, and the mark being witnessed by a person who writes his or her own name as a witness.[3]

(d) **"Statutes of Limitation."** These rules do not govern the Statutes of Limitations for bringing a criminal action. Statutes of Limitation are governed by the Nevada Revised Statutes.[4]

(e) **"Statutory Revisions."** Superseding of criminal law is not a bar to punishment unless specifically expressed. The superseding of any law creating a criminal offense shall not be held to constitute a bar to the prosecution and punishment of a crime already committed, or to bar the trial and punishment of a crime where a prosecution has been already begun, for a violation of the law so superseded, unless the intention to bar such prosecution and punishment, or trial and punishment where a prosecution has been already begun is expressly declared in the superseding act.[5]

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[1] NRS 169.245
[2] *E.g., see* NRS 171.010-171.020
[3] NRS 169.225
[4] *E.g., see* NRS 171.080-171.100
[5] NRS 169.235

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 4 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 5 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE II. PRELIMINARY PROCEEDINGS

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 6 Prosecution Upon Citation

(a) **Filing of Citation.**[6] The filing of a citation in the justice's court or municipal court initiates a criminal action for only misdemeanor offense(s). The citation shall be issued and served in conformance with the requirements of NRS 171.1771 *et. seq.*

(b) **Citation filed with court deemed complaint for purpose of prosecution.**[7] If the form of citation:

1. Includes information whose truthfulness is attested as required for a complaint charging commission of the offense alleged in the citation to have been committed; or
2. Is prepared electronically, then the citation when filed with a court of competent jurisdiction shall be deemed to be a lawful complaint for the purpose of prosecution.

(c) **Electronic Filing.**[8] A court clerk may accept a citation filed pursuant to this chapter that is filed electronically. The following governs the filing of an electronic Complaint in a criminal proceeding:

1. A citation that is filed electronically must contain an image of the signature of the law enforcement officer who issued the citation.
2. If a court clerk accepts a citation that is filed electronically pursuant to subsection 1, the court clerk shall acknowledge receipt of the citation by an electronic time stamp and shall electronically return the citation with the electronic time stamp to the prosecuting attorney.
3. A citation that is filed and time-stamped electronically pursuant to this section may be converted into a printed document and shall be treated in the same manner as a citation that is not filed electronically.

[6] The issuance of a citation is governed by NRS 171.177
[7] NRS 171.1778.
[8] NRS 171.103.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 7 Prosecution By Complaint

(a) **Filing of Complaint.**[9] The filing of a Complaint in the Justice's Court or Municipal Court initiates a criminal action for a misdemeanor, gross misdemeanor, and/or felony offense(s). The Complaint shall:

1. Be signed by a prosecuting attorney;
2. Be made upon: Oath before a magistrate or a notary public; or By Declaration which is made subject to the penalty for perjury;
3. Set forth facts that establish that probable cause exists to believe that an act was committed by the defendant which is a public offense under the laws of the State of Nevada.

(b) **Electronic Filing.**[10] A court clerk may accept a complaint filed pursuant to this chapter that is filed electronically. The following governs the filing of an electronic Complaint in a criminal proceeding:

1. A complaint that is filed electronically must contain an image of the signature of the prosecuting attorney.
2. If a court clerk accepts a complaint that is filed electronically pursuant to subsection 1, the court clerk shall acknowledge receipt of the complaint by an electronic time stamp and shall electronically return the complaint with the electronic time stamp to the prosecuting attorney.
3. A complaint that is filed and time-stamped electronically pursuant to this section may be converted into a printed document and served upon a defendant in the same manner as a complaint that is not filed electronically.

[9] NRS 171.102.
[10] NRS 171.103.

Rule 8 Charged Multiple Offenses - To Be Filed In Single Court

(a) **Filed in Single Court.** Unless otherwise provided by law, complaints, citations, or informations charging multiple offenses, which may include violations of state laws, county ordinances, or municipal ordinances and arising from a single criminal episode, shall be filed in a single court that has jurisdiction of the charged offense with the highest possible penalty of all the offenses charged.

(b) **When separation may occur.** The offenses within the filed complaint, citation, or information may not be separated except by order of the court and for good cause shown.

(c) **Jurisdiction.** For purposes of this section, the court that is adjudicating the complaint, citation, or information has jurisdiction over all the offenses charged, and a single prosecutorial entity shall prosecute the offenses.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 9 Warrants, Summons & Arrest

(a) **Issuance of Warrant or Summons.**[11] If it appears from the complaint or a citation issued pursuant to NRS 484A.730, 488.920 or 501.386, or from an affidavit or affidavits filed with the complaint or citation that there is probable cause to believe that an offense, triable within the county, has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall be issued by the magistrate to any peace officer. Upon the request of the district attorney a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint or citation. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) **Content of Warrant:**[12] The warrant of arrest is an order in writing in the name of the State of Nevada which shall:

1. Be signed by the magistrate with the magistrate's name of office;
2. Contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty;
3. State the date of its issuance, and the county, city or town where it was issued;
4. Describe the offense charged in the complaint; and
5. Command that the defendant be arrested and brought before the nearest available magistrate.

(c) **Content of Summons:**[13] The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a magistrate at a stated time and place. Upon a complaint against a corporation, the magistrate must issue a summons, signed by the magistrate, with the magistrate's name of office, requiring the corporation to appear before the magistrate at a specified time and place to answer the charge, the time to be not less than 10 days after the issuing of the summons.

(d) **Execution and Service of Warrant or Summons.** The execution and service of a warrant is governed by NRS 171.114 *et. seq.*

(e) **Magistrate may order arrest for committing or attempting to commit offense in magistrate's presence.**[14] A magistrate may orally order a peace officer or private person to arrest anyone committing or attempting to commit a public offense in the presence of the magistrate, and may thereupon proceed as if the offender had been brought before the magistrate on a warrant of arrest.

(f) **Warrant of arrest by telegram authorized.**[15]

1. A warrant of arrest may be transmitted by telegram. A copy of a warrant transmitted by telegram may be sent to one or more peace officers, and the copy is as effectual in the

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[11] NRS 171.106
[12] NRS 171.108
[13] NRS 171.112
[14] NRS 171.128
[15] NRS 171.148

hands of any officer, and the officer must proceed in the same manner under it, as though the officer held an original warrant issued by the magistrate before whom the original complaint in the case was laid.

2. Every officer causing a warrant to be transmitted by telegram pursuant to subsection 1 must certify as correct a copy of the warrant and endorsement thereon, and must return the original with a statement of the officer's action thereunder.
3. As used in this section, "telegram" includes every method of electric or electronic communication by which a written as distinct from an oral message is transmitted.

(g) **Return of warrant after execution by arrest or issuance of citation; return of summons after service; cancellation by district attorney before execution or service; reissuance.**

1. The peace officer executing a warrant by arrest shall make return thereof to the magistrate before whom the defendant is brought pursuant to NRS 171.178 and 171.184. At the request of the district attorney any unexecuted warrant must be returned to the magistrate by whom it was issued and must be cancelled.
2. The peace officer executing a warrant by issuance of a citation pursuant to subsection 2 of NRS 171.122 shall:
    i. Record on the warrant the number assigned to the citation issued thereon;
    ii. Attach the warrant to the citation issued thereon; and
    iii. Return the warrant and citation to the magistrate before whom the defendant is scheduled to appear.
3. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the magistrate before whom the summons is returnable.
4. At the request of the district attorney made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the magistrate to a peace officer for execution or service.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 10 Appearance Before Magistrate Following Arrest

(a) **Appearance before magistrate.**[16]

1. An arrested person shall be brought before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada. The magistrate must make a probable cause determination within 48 hours of arrest based upon a probable cause statement prepared by the arresting officer. If the magistrate determines that probable cause for the arrest existed, the magistrate may hold the individual for further proceedings after determining if the bail set in the matter is appropriate. If the magistrate determines that probable cause for the arrest did not exist, the magistrate shall release the individual.
2. If the magistrate determines that probable cause existed to justify the arrest, within 72 hours, excluding nonjudicial days, of that determination, the following shall occur: (1) The prosecuting agency, unless excused by the following subsection, must file a complaint before the magistrate setting forth the crime or crimes with which the person is charged; and (2) The person must be brought before the magistrate for an advisement hearing in which the person is advised of the person's right to counsel and the nature of the charges contained in the Complaint.
3. If the complaint is not filed within the 72 hours after arrest, excluding nonjudicial days, the magistrate:
    i. Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay and may allow additional time to file a Complaint; and
    ii. May release the arrested person if the magistrate determines that the person was not brought before a magistrate without unnecessary delay.
4. When a person arrested under the terms of a warrant for arrest is brought before a magistrate, a complaint must be filed forthwith.
5. Except as otherwise provided in NRS 178.484 and 178.487, where the defendant can be admitted to bail without appearing personally before a magistrate, the defendant must be so admitted with the least possible delay, and required to appear before a magistrate at the earliest convenient time thereafter.
6. When a summons is issued in lieu of a warrant of arrest, the defendant shall appear before the court as directed in the summons.

(b) **Proceedings before another magistrate.**[17] If the defendant is brought before a magistrate in the same county, other than the one who issued the warrant, the affidavits and depositions on which the warrant was granted, if the defendant insists upon an examination, must be sent to that magistrate, or, if they cannot be procured, the prosecutor and the prosecutor's witnesses must be summoned to give their testimony anew.

(c) **Proceedings upon complaint for offenses triable in another county.**[18]

1. When a complaint is laid before a magistrate of the commission of a public offense triable in another county of the State, but showing that the defendant is in the county where the complaint is laid, the same proceedings must be had as prescribed in these

[16] NRS 171.178.
[17] NRS 171.182.
[18] Mirrors the language in NRS 171.184.

Rules except that the warrant must require the defendant to be taken before the nearest or most accessible magistrate of the county in which the offense is triable, and the depositions of the complainant or prosecutor, and of the witnesses who may have been produced, must be delivered by the magistrate to the officer to whom the warrant is delivered.

2. The officer who executed the warrant must take the defendant before the nearest or most accessible magistrate of the county in which the offense is triable, and must deliver the depositions and the warrant, with the officer's return endorsed thereon, and the magistrate must then proceed in the same manner as upon a warrant issued by the magistrate.
3. If the offense charged in the warrant issued pursuant to subsection 1 is a misdemeanor, the officer must, upon being required by the defendant, take the defendant before a magistrate of the county in which the warrant was issued, who must admit the defendant to bail, and immediately transmit the warrant, depositions and undertaking to the justice of the peace or clerk of the court in which the defendant is required to appear.

(d) **Proceedings upon discovery of another arrest warrant outstanding in another county.**[19]

1. If a person is brought before a magistrate under the provisions of NRS 171.178 or 171.184, and it is discovered that there is a warrant for the person's arrest outstanding in another county of this State, the magistrate may release the person in accordance with the provisions of NRS 178.484 or 178.4851 if:
    i. The warrant arises out of a public offense which constitutes a misdemeanor; and
    ii. The person provides a suitable address where the magistrate who issued the warrant in the other county can notify the person of a time and place to appear.
2. If a person is released under the provisions of this section, the magistrate who releases the person shall transmit the cash, bond, notes or agreement submitted under the provisions of NRS 178.502 or 178.4851, together with the person's address, to the magistrate who issued the warrant. Upon receipt of the cash, bonds, notes or agreement and address, the magistrate who issued the warrant shall notify the person of a time and place to appear.
3. Any bail set under the provisions of this section must be in addition to and apart from any bail set for any public offense with which a person is charged in the county in which a magistrate is setting bail. In setting bail under the provisions of this section, a magistrate shall set the bail in an amount which is sufficient to induce a reasonable person to travel to the county in which the warrant for the arrest is outstanding.
4. A person who fails to appear in the other county as ordered is guilty of failing to appear and shall be punished as provided in NRS 199.335. A sentence of imprisonment imposed for failing to appear in violation of this section must be imposed consecutively to a sentence of imprisonment for the offense out of which the warrant arises.

Commented [TW1]: Need to check all of these references to ensure that they align with provisions that will still be in place.

[19] NRS 171.1845.

Rule 11 Proceedings Before Justice of the Peace or Municipal Court Judge

(a) **Rights of defendant at the advisement hearing.**[20] The magistrate or master shall inform the defendant of the complaint and of any affidavit filed therewith, of the right to retain counsel, of the right to request the assignment of counsel if the defendant is unable to obtain counsel, and of the right to have a preliminary examination if any charge alleges a gross misdemeanor or felony crime or of the right to an arraignment if the charge or charges involve any misdemeanor crime. The magistrate shall also inform the defendant that the defendant is not required to make a statement and that any statement made may be used against him or her. The magistrate shall allow the defendant reasonable time and opportunity to consult counsel, and shall admit the defendant to bail as provided in these rules.

(b) **Procedure for appointment of attorney for indigent defendant.**[21]

1. Any defendant charged with a public offense who is an indigent may, by oral statement to the district judge, justice of the peace, municipal judge or master, request the appointment of an attorney to represent the defendant.
2. The request must be accompanied by the defendant's affidavit, which must state:
    i. That the defendant is without means of employing an attorney; and
    ii. Facts with some particularity, definiteness and certainty concerning the defendant's financial disability.
3. The district judge, justice of the peace, municipal judge or master shall forthwith consider the application and shall make such further inquiry as he or she considers necessary. If the district judge, justice of the peace, municipal judge or master:
    i. Finds that the defendant is without means of employing an attorney; and
    ii. Otherwise determines that representation is required, the judge, justice or master shall designate the public defender of the county or the State Public Defender, as appropriate, to represent the defendant. If the appropriate public defender is unable to represent the defendant, or other good cause appears, another attorney must be appointed.
4. The county or State Public Defender must be reimbursed by the city for costs incurred in appearing in municipal court. If a private attorney is appointed as provided in this section, the private attorney must be reimbursed by the county for appearance in Justice Court or the city for appearance in municipal court in an amount not to exceed $75 per case.

(c) **Certification of bail; discharge of defendant.**[22] On admitting the defendant to bail, the magistrate shall certify on the warrant the fact of having done so, and deliver the warrant and recognizance to the officer having charge of the defendant.

(d) **Preliminary examination: Waiver; time for conducting; postponement; burden of proof, introduction of evidence and cross-examination of witnesses by defendant; admissibility of hearsay evidence.**[23]

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[20] NRS 171.186.
[21] NRS 171.188.
[22] NRS 171.192.
[23] Taken primarily from NRS 171.196.

1. If an offense is not triable in the Justice Court, the defendant must not be called upon to plead. If the defendant waives preliminary examination, the magistrate shall immediately hold the defendant to answer in the district court.
2. The magistrate may require the appearance of the defendant at the preliminary hearing.
3. If the defendant does not waive examination, the magistrate shall hear the evidence within 15 days of the advisement hearing, unless for good cause shown the magistrate extends such time.
4. Unless the defendant waives counsel, reasonable time must be allowed for counsel to appear.
5. Except as otherwise provided in this rule, if the magistrate postpones the examination at the request of a party, the magistrate may order that party to pay all or part of the costs and fees expended to have a witness attend the examination. The magistrate shall not require a party who requested the postponement of the examination to pay for the costs and fees of a witness if:
    i. It was not reasonably necessary for the witness to attend the examination; or
    ii. The magistrate ordered the extension pursuant to subsection 4.
6. If application is made for the appointment of counsel for an indigent defendant, the magistrate shall postpone the examination until:
    i. The application has been granted or denied; and
    ii. If the application is granted, the attorney appointed or the public defender has had reasonable time to appear.
7. Unless otherwise provided, a preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. The preliminary examination is confined to the issues relevant to the determination as to whether there is probable cause to believe that a crime was committed and that the defendant committed said crime. These rules do not abrogate the established case law of the appellate courts of this state regarding preliminary hearings.
8. The defendant may cross-examine witnesses against him or her and may introduce evidence in his or her own behalf.
9. Hearsay evidence consisting of an out of court statement made by the alleged victim of the offense is admissible at a preliminary examination conducted pursuant to this section only if the defendant is charged with one or more of the following offenses:
    i. A sexual offense committed against a child who is under the age of 16 years if the offense is punishable as a felony. As used in this paragraph, "sexual offense" has the meaning ascribed to it in NRS 179D.097;
    ii. Abuse of a child pursuant to NRS 200.508 if the offense is committed against a child who is under the age of 16 years and the offense is punishable as a felony; and
    iii. An act which constitutes domestic violence pursuant to NRS 33.018, which is punishable as a felony and which resulted in substantial bodily harm to the alleged victim.

Commented [TW2]: I added this paragraph

(e) **Discovery by defendant before preliminary examination; material subject to discovery; effect of failure to permit discovery.**[24]

1. At the time a person is brought before a magistrate pursuant to NRS 171.178, or as soon as practicable thereafter, but not less than 5 judicial days before a preliminary examination, the prosecuting attorney shall provide a defendant charged with a felony or a gross misdemeanor with copies of any:
    i. Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness or witnesses, or any reports of statements or confessions, or copies thereof, within the possession or custody of the prosecuting attorney;
    ii. Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession or custody of the prosecuting attorney; and
    iii. Books, papers, documents or tangible objects that the prosecuting attorney intends to introduce in evidence during the case in chief of the State, or copies thereof, within the possession or custody of the prosecuting attorney.
2. The defendant is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
    i. An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case; and
    ii. A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this State or the Constitution of the United States.
3. The provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the Constitution of this State or the Constitution of the United States to disclose exculpatory evidence to the defendant.
4. The magistrate shall not postpone a preliminary examination at the request of a party based solely on the failure of the prosecuting attorney to permit the defendant to inspect, copy or photograph material as required in this section, unless the court finds that the defendant has been prejudiced by such failure.

(f) **Use of affidavit at preliminary examination: When permitted; notice by district attorney; circumstances under which district attorney must produce person who signed affidavit; continuances.**[25]

1. If a witness resides outside this State or more than 100 miles from the place of a preliminary examination, the witness's affidavit may be used at the preliminary examination if it is necessary for the district attorney to establish as an element of any offense that:

[24] NRS 171.1965.
[25] NRS 171.197.

i. The witness was the owner, possessor or occupant of real or personal property; and
ii. The defendant did not have the permission of the witness to enter, occupy, possess or control the real or personal property of the witness.

2. If a financial institution does not maintain any principal or branch office within this State or if a financial institution that maintains a principal or branch office within this State does not maintain any such office within 100 miles of the place of a preliminary examination, the affidavit of a custodian of the records of the financial institution or the affidavit of any other qualified person of the financial institution may be used at the preliminary examination if it is necessary for the district attorney to establish as an element of any offense that:
   i. When a check or draft naming the financial institution as drawee was drawn or passed, the account or purported account upon which the check or draft was drawn did not exist, was closed or held insufficient money, property or credit to pay the check or draft in full upon its presentation; or
   ii. When a check or draft naming the financial institution as drawee was presented for payment to the financial institution, the account or purported account upon which the check or draft was drawn did not exist, was closed or held insufficient money, property or credit to pay the check or draft in full.
3. If a specific rule or statute allows for the use of an affidavit, the prosecutor may use the affidavit in accordance with the specific rule or statute.
4. The district attorney shall provide either written or oral notice to the defendant's attorney, not less than 10 days before the scheduled preliminary examination, that the district attorney intends to use an affidavit described in this section at the preliminary examination.
5. If, at or before the time of the preliminary examination, the defendant establishes that:
   i. There is a substantial and bona fide dispute as to the facts in an affidavit described in this section; and
   ii. It is in the best interests of justice that the person who signed the affidavit be cross-examined,

   the magistrate may order the district attorney to produce the person who signed the affidavit and may continue the examination for any time it deems reasonably necessary in order to receive such testimony.

(g) **Use of audiovisual technology to present live testimony at preliminary examination: Requirements.**[26]

1. If a witness resides more than 100 miles from the place of a preliminary examination or is unable to attend the preliminary examination because of a medical condition, or if good cause otherwise exists, the magistrate must allow the witness to testify at the preliminary examination through the use of audiovisual technology.
2. If a witness testifies at the preliminary examination through the use of audiovisual technology:

[26] NRS 171.1975.

i. The testimony of the witness must be transcribed by a certified court reporter; and
ii. Before giving testimony, the witness must be sworn and must sign a written declaration, on a form provided by the magistrate, which acknowledges that the witness understands that he or she is subject to the jurisdiction of the courts of this state and may be subject to criminal prosecution for the commission of any crime in connection with his or her testimony, including, without limitation, perjury, and that the witness consents to such jurisdiction.

3. Audiovisual technology used pursuant to this section must ensure that the witness may be:
   i. Clearly heard and seen; and
   ii. Examined and cross-examined.
4. As used in this section, "audiovisual technology" includes, without limitation, closed-circuit video and videoconferencing.

(h) **Reporting testimony of witnesses.**[27]

1. Except as otherwise provided in subsection 2, a magistrate shall employ a certified court reporter to take down all the testimony and the proceedings on the preliminary hearing or examination and, within such time as the court may designate, have such testimony and proceedings transcribed into typewritten transcript.
2. A magistrate who presides over a preliminary hearing in a justice court, in any case other than in a case in which the death penalty is sought, may employ a certified court reporter to take down all the testimony and the proceedings on the hearing or appoint a person to use sound recording equipment to record all the testimony and the proceedings on the hearing. If the magistrate appoints a person to use sound recording equipment to record the testimony and proceedings on the hearing, the testimony and proceedings must be recorded and transcribed in the same manner as set forth in NRS 4.390 to 4.420, inclusive. Any transcript of the testimony and proceedings produced from a recording conducted pursuant to this subsection is subject to the provisions of this section in the same manner as a transcript produced by a certified court reporter.
3. When the testimony of each witness is all taken and transcribed by the reporter, the reporter shall certify to the transcript in the same manner as for a transcript of testimony in the district court, which certificate authenticates the transcript for all purposes of this title.
4. Before the date set for trial, either party may move the court before which the case is pending to add to, delete from or otherwise correct the transcript to conform with the testimony as given and to settle the transcript so altered.
5. The compensation for the services of a reporter employed as provided in this section are the same as provided in NRS 3.370, to be paid out of the county treasury as other claims against the county are allowed and paid.
6. Testimony reduced to writing and authenticated according to the provisions of this section must be filed by the examining magistrate with the clerk of the district court of

[27] NRS 171.198.

the magistrate's county, and if the prisoner is subsequently examined upon a writ of habeas corpus, such testimony must be considered as given before such judge or court. A copy of the transcript must be furnished to the defendant and to the district attorney.

7. The testimony so taken may be used:
    i. By the defendant; or
    ii. By the State if the defendant was represented by counsel or affirmatively waived his or her right to counsel,

upon the trial of the cause, and in all proceedings therein, when the witness is sick, out of the State, dead, or persistent in refusing to testify despite an order of the judge to do so, or when the witness's personal attendance cannot be had in court.

(i) **District attorney to prosecute at preliminary examination where felony or gross misdemeanor charged.** The district attorney of the proper county shall be present at and conduct the prosecution in all preliminary examinations where a felony or gross misdemeanor is charged.

(j) **Exclusion of persons; exceptions.**[28]

1. Except as otherwise provided in subsection 2, the magistrate may, if good cause is shown and upon the request of any party or on the magistrate's own motion, exclude from the examination every person except:
    i. The magistrate's clerk;
    ii. The Attorney General;
    iii. The prosecuting attorney;
    iv. An investigating officer, after the investigating officer has testified as a prosecuting witness and the investigating officer's cross-examination has been completed;
    v. Any counsel for the victim;
    vi. The victim, after the victim has testified as a prosecuting witness and the victim's cross-examination has been completed;
    vii. The defendant and the defendant's counsel;
    viii. The witness who is testifying;
    ix. The officer having the defendant or a witness in the officer's custody;
    x. An attendant to a witness designated pursuant to NRS 178.571; and
    xi. Any other person whose presence is found by the magistrate to be necessary for the proper conduct of the examination.
2. A person who is called as a witness primarily for the purpose of identifying the victim may not be excluded from the examination except in the discretion of the magistrate.
3. As used in this section, "victim" includes any person described in NRS 178.569.

(k) **Procedure following preliminary examination.**[29] If from the evidence it appears to the magistrate that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate shall forthwith hold the defendant to answer in the district court; otherwise the magistrate shall discharge the defendant. The magistrate shall admit the

[28] NRS 171.204.
[29] NRS 171.206.

defendant to bail as provided in this title. After concluding the proceeding the magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail.

Rule 12 Appointment of Counsel

(a) **Right to Counsel.**[80] A defendant charged with a public offense has the right to self-representation, and if indigent, has the right to court-appointed counsel if the defendant faces a substantial probability of deprivation of liberty.

(b) **Appointment of attorney other than public defender prohibited unless public defender disqualified.**[81] A magistrate, master or a district court shall not appoint an attorney other than a public defender to represent a person charged with any offense or delinquent act by petition, indictment or information unless the magistrate, master or district court makes a finding, entered into the record of the case, that the public defender is disqualified from furnishing the representation and sets forth the reason or reasons for the disqualification.

(c) **Counsel in Capital Case.**[82] In all cases in which counsel is appointed to represent an indigent defendant who is charged with an offense for which the punishment may be death, the court shall appoint two or more attorneys to represent such defendant and shall make a finding on the record based on the requirements set forth below that appointed counsel is proficient in the trial of capital cases. In making its determination, the court shall ensure that the experience of counsel who are under consideration for appointment have met the minimum requirements under SCR 250.

(d) **Attorney Selection in Capital Case.**[83] In making its selection of attorneys for appointment in a capital case, the court should also consider at least the following factors:

1. whether one or more of the attorneys under consideration have previously appeared as counsel or co-counsel in a capital case;
2. the extent to which the attorneys under consideration have sufficient time and support and can dedicate those resources to the representation of the defendant in the capital case now pending before the court with undivided loyalty to the defendant;
3. the extent to which the attorneys under consideration have engaged in the active practice of criminal law in the past five years;
4. the diligence, competency and ability of the attorneys being considered; and
5. any other factor which may be relevant to a determination that counsel to be appointed will fairly, efficiently and effectively provide representation to the defendant.

(e) **Counsel for Capital Case Appeal.**[84] In all cases where an indigent defendant is sentenced to death, the court shall appoint one or more attorneys to represent such defendant on appeal and shall make a finding that counsel is proficient in the appeal of capital cases. To be found proficient to represent on appeal persons sentenced to death, the combined experience of the appointed attorneys must meet the following requirements:

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[31] NRS 7.115, NRS 260.065.

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1. at least one attorney must have served as counsel in at least three felony appeals; and
2. at least one attorney must have attended and completed within the past five years an approved continuing legal education course which deals, in substantial part, with the trial or appeal of death penalty cases.

(f) **Counsel for Post-Conviction.**[35] In all cases in which counsel is appointed to represent an indigent petitioner, the court shall appoint one or more attorneys to represent such petitioner at post-conviction trial and on post-conviction appeal and shall make a finding that counsel is qualified to represent persons sentenced to death in post-conviction cases. To be found qualified, the combined experience of the appointed attorneys must meet the following requirements:

1. at least one of the appointed attorneys must have served as counsel in at least three felony or post-conviction appeals;
2. at least one of the appointed attorneys must have appeared as counsel or co-counsel in a post-conviction case at the evidentiary hearing, on appeal, or otherwise demonstrated proficiency in the area of post-conviction litigation;
3. at least one of the appointed attorneys must have attended and completed or taught within the past five years an approved continuing legal education course which dealt, in substantial part, with the trial and appeal of death penalty cases or with the prosecution or defense of post-conviction proceedings in death penalty cases;
4. at least one of the appointed attorneys must have tried to judgment or verdict three civil jury or felony cases within the past four years or ten cases total; and
5. the experience of at least one of the appointed attorneys must total not less than five years in the active practice of law.

(g) **Grounds not Created by Rule.**[36] Mere noncompliance with this rule or failure to follow the guidelines set forth in this rule shall not of itself be grounds for establishing that appointed counsel ineffectively represented the defendant at trial or on appeal.

(h) **Fees of appointed attorney other than public defender.**[37]

1. Except as limited by subsections 2, 3 and 4, an attorney, other than a public defender, who is appointed by a magistrate or a district court to represent or defend a defendant at any stage of the criminal proceedings from the defendant's initial appearance before the magistrate or the district court through the appeal, if any, is entitled to receive a fee for court appearances and other time reasonably spent on the matter to which the appointment is made of $125 per hour in cases in which the death penalty is sought and $100 per hour in all other cases. Except for cases in which the most serious crime is a felony punishable by death or by imprisonment for life with or without possibility of parole, this subsection does not preclude a governmental entity from contracting with a private attorney who agrees to provide such services for a lesser rate of compensation.
2. Except as otherwise provided in subsection 4, the total fee for each attorney in any matter regardless of the number of offenses charged or ancillary matters pursued must not exceed:

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37 NRS 7.125.

i. If the most serious crime is a felony punishable by death or by imprisonment for life with or without possibility of parole, $20,000;
ii. If the most serious crime is a felony other than a felony included in paragraph (a) or is a gross misdemeanor, $2,500;
iii. If the most serious crime is a misdemeanor, $750;
iv. For an appeal of one or more misdemeanor convictions, $750; or
v. For an appeal of one or more gross misdemeanor or felony convictions, $2,500.

3. Except as otherwise provided in subsection 4, an attorney appointed by a district court to represent an indigent petitioner for a writ of habeas corpus or other postconviction relief, if the petitioner is imprisoned pursuant to a judgment of conviction of a gross misdemeanor or felony, is entitled to be paid a fee not to exceed $750.
4. If the appointing court because of:
   i. The complexity of a case or the number of its factual or legal issues;
   ii. The severity of the offense;
   iii. The time necessary to provide an adequate defense; or
   iv. Other special circumstances,

   deems it appropriate to grant a fee in excess of the applicable maximum, the payment must be made, but only if the court in which the representation was rendered certifies that the amount of the excess payment is both reasonable and necessary and the payment is approved by the presiding judge of the judicial district in which the attorney was appointed, or if there is no such presiding judge or if he or she presided over the court in which the representation was rendered, then by the district judge who holds seniority in years of service in office.
5. The magistrate, the district court, the Court of Appeals or the Supreme Court may, in the interests of justice, substitute one appointed attorney for another at any stage of the proceedings, but the total amount of fees granted to all appointed attorneys must not exceed those allowable if but one attorney represented or defended the defendant at all stages of the criminal proceeding.

(i) **Reimbursement for expenses; employment of investigative, expert or other services.**[38] The attorney appointed by a magistrate or district court to represent a defendant is entitled, in addition to the fee provided by NRS 7.125 for the attorney's services, to be reimbursed for expenses reasonably incurred by the attorney in representing the defendant and may employ, subject to the prior approval of the magistrate or the district court in an ex parte application, such investigative, expert or other services as may be necessary for an adequate defense. Compensation to any person furnishing such investigative, expert or other services must not exceed $500, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is:

1. Certified by the trial judge of the court, or by the magistrate if the services were rendered in connection with a case disposed of entirely before the magistrate, as necessary to provide fair compensation for services of an unusual character or duration; and
2. Approved by the presiding judge of the judicial district in which the attorney was appointed or, if there is no presiding judge, by the district judge who holds seniority in years of service in office.

[38] NRS 7.135.

(j) **Claim for compensation and expenses.**[39]

1. A claim for compensation and expenses made pursuant to NRS 7.125 or 7.135 must not be paid unless it is submitted within 60 days after the appointment is terminated to:
    i. The magistrate in cases in which the representation was rendered exclusively before the magistrate; and
    ii. The district court in all other cases.
2. Each claim must be supported by a sworn statement specifying the time expended in court, the services rendered out of court and the time expended therein, the expenses incurred while the case was pending and the compensation and reimbursement applied for or received in the same case from any other source. Except as otherwise provided for the approval of payments in excess of the statutory limit, the magistrate or the court to which the claim is submitted shall fix and certify the compensation and expenses to be paid, and the amounts so certified must be paid in accordance with NRS 7.155.

(k) **Payment of compensation and expenses from county treasury or money appropriated to State Public Defender.**[40] The compensation and expenses of an attorney appointed to represent a defendant must be paid from the county treasury unless the proceedings are based upon a postconviction petition for habeas corpus, in which case the compensation and expenses must be paid from money appropriated to the Office of State Public Defender, but after the appropriation for such expenses is exhausted, money must be allocated to the Office of State Public Defender from the reserve for statutory contingency account for the payment of such compensation and expenses.

(l) **Payment of compensation and expenses by defendant.**[41] If at any time after the appointment of an attorney or attorneys the magistrate or the district court finds that money is available for payment from or on behalf of the defendant so that the defendant is financially able to obtain private counsel or to make partial payment for such representation, the magistrate or the district court may:

1. Terminate the appointment of such attorney or attorneys; or
2. Direct that such money be paid to:
    i. The appointed attorney or attorneys, in which event any compensation provided for in NRS 7.125 shall be reduced by the amount of the money so paid, and no such attorney may otherwise request or accept any payment or promise of payment for representing such defendant; or
    ii. The clerk of the district court for deposit in the county treasury, if all of the compensation and expenses in connection with the representation of such defendant were paid from the county treasury, and remittance to the Office of State Public Defender, if such compensation and expenses were paid partly from moneys appropriated to the Office of State Public Defender and the money received exceeds the amount of compensation and expenses paid from the county treasury.

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[39] NRS 7.145.
[40] NRS 7.155.
[41] NRS 7.165.

(m) **Compensation and expenses on new trial.**[42] For the purposes of compensation and other payments authorized by NRS 7.125 to 7.165, inclusive, an order by a court granting a new trial shall be deemed to initiate a new case.

[42] NRS 7.175.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 13 Hearings With Contemporaneous Transmission From A Different Location.[43]

(a) The court, in its discretion, may conduct the arraignment, bail hearing, and/or initial appearance with a defendant attending by contemporaneous transmission from a different location without the agreement of the parties or waiver of the defendant's attendance in person.

(b) For any other type of hearing, the court may conduct the hearing with a defendant attending by contemporaneous transmission from a different location only if the parties agree and the defendant knowingly and voluntarily waives attendance in person.

(c) For good cause and with appropriate safeguards the court may permit testimony in open court by contemporaneous transmission from a different location if the party not calling the witness waives the right to confront the witness in person.

(d) Nothing in this rule precludes or affects the procedures in rule ***.

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Rule 14 [Reserved]

Rule 15 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 16 Arraignment

(a) **Remand for preliminary examination.**[44] If the case involves any felony or gross misdemeanor, a preliminary examination has not been had, and the defendant has not unconditionally waived the examination, the district court may for good cause shown at any time before a plea has been entered or an indictment found remand the defendant for preliminary examination to the appropriate justice of the peace or other magistrate, and the justice or other magistrate shall then proceed with the preliminary examination as provided in this chapter.

(b) **Representation by Counsel, Additional time.** Upon arraignment, unless the defendant makes knowing and voluntary waiver in open court, the following applies: (1) A defendant may be represented by counsel on all misdemeanors; (2) A defendant shall be represented by counsel in all misdemeanor cases in which jail time is mandatory or likely to be imposed; and (3) The defendant shall be represented by counsel in all gross misdemeanor or felony cases. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

(c) **Conduct of arraignment.**[45] ***District Court:*** Upon the return of an indictment or upon receipt of the records from the magistrate following a bind-over, the defendant shall be arraigned in the district court in the following manner:

1. Except as otherwise provided in subsection 3, arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating the substance of the charge and calling on the defendant to plead thereto. The defendant may waive the formal reading after being advised of the right.
2. The Court will take the plea to the charge or charges contained in the Information and enter the pleas upon the records of the Court;
3. The Court shall canvass the Defendant to ensure the Defendant understands the rights associate with trial, to wit: (1) The speedy trial right; (2) The right to use the subpoena power of the court to compel witnesses to appear; (3) The right of confrontation; (4) The right to remain silent; and (5) The right to waive the right to remain silent and to give testimony;

Justice/Municipal Court: In the justice court or municipal court, an arraignment on all complaints alleging misdemeanor offenses must be held within 30 days of the advisement hearing. At the arraignment, the magistrate shall conduct the arraignment in open court and shall provide the Defendant an opportunity to have the complaint read in open court and shall call on the Defendant to enter a plea to each offense of the complaint. The defendant may waive the formal reading after being advised of the right. The Court shall also

1. The Court will take the plea to the charge or charges contained in the Complaint and enter the pleas upon the records of the Court; and

[44] NRS 171.208.
[45] NRS 174.015.

2. The Court shall canvass the Defendant to ensure the Defendant understands the rights associate with trial, to wit: (1) The speedy trial right; (2) The right to use the subpoena power of the court to compel witnesses to appear; (3) The right of confrontation; (4) The right to remain silent; and (5) The right to waive the right to remain silent and to give testimony;
3. Before the defendant is called upon to plead, the court shall determine whether the defendant is eligible for assignment to a preprosecution diversion program pursuant to NRS 174.031.

(d) **Proceedings respecting name of defendant; entry of true name in minutes; subsequent proceedings in true name.**[46] When the defendant is arraigned, the defendant must be informed that if the name by which the defendant is prosecuted is not his or her true name the defendant must then declare his or her true name, or be proceeded against by the name in the indictment, information or complaint. If the defendant gives no other name, the court may proceed accordingly; but, if the defendant alleges that another name is his or her true name, the court must direct an entry thereof in the minutes of the arraignment, and the subsequent proceedings on the information, indictment or complaint may be had against the defendant by that name, referring also to the name by which the defendant was first charged therein.

(e) **Additional Time.** If upon arraignment the defendant requests additional time in which to plead or otherwise respond, a reasonable time may be granted.

(f) **Failure to Appear.** If a defendant has been released on bail, or on his own recognizance, prior to arraignment and thereafter fails to appear for arraignment or trial when required to do so, a warrant of arrest may issue and bail may be forfeited.

[46] NRS 174.025.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 17 Assignment to Preprosecution Diversion Program

(a) **Determination of eligibility; court may order defendant to complete program.**[47]

1. At the arraignment of a defendant in justice court or municipal court, but before the entry of a plea, the court shall determine whether the defendant is eligible for assignment to a preprosecution diversion program established pursuant to NRS 174.032. The court shall receive input from the prosecuting attorney and the attorney for the defendant, if any, whether the defendant would benefit from and is eligible for assignment to the program.
2. A defendant may be determined to be eligible by the court for assignment to a preprosecution diversion program if the defendant:
    i. Is charged with a misdemeanor other than:
        A. A crime of violence as defined in NRS 200.408;
        B. Vehicular manslaughter as described in NRS 484B.657;
        C. Driving under the influence of intoxicating liquor or a controlled substance in violation of NRS 484C.110, 484C.120 or 484C.130; or
        D. A minor traffic offense; and
    ii. Has not previously been:
        A. Convicted of violating any criminal law other than a minor traffic offense; or
        B. Ordered by a court to complete a preprosecution diversion program in this State.
3. If a defendant is determined to be eligible for assignment to a preprosecution diversion program pursuant to subsection 2, the justice court or municipal court may order the defendant to complete the program pursuant to subsection 5 of NRS 174.032.
4. A defendant has no right to complete a preprosecution diversion program or to appeal the decision of the justice court or municipal court relating to the participation of the defendant in such a program.

(b) **Establishment of program; terms and conditions.**[48]

1. A justice court or municipal court may establish a preprosecution diversion program to which it may assign a defendant if he or she is determined to be eligible pursuant to NRS 174.031.
2. If a defendant is determined to be eligible for assignment to a preprosecution diversion program pursuant to NRS 174.031, the justice or municipal court must receive input from the prosecuting attorney, the attorney for the defendant, if any, and the defendant relating to the terms and conditions for the defendant's participation in the program.
3. A preprosecution diversion program established by a justice court or municipal court pursuant to this section may include, without limitation:
    i. A program of treatment which may rehabilitate a defendant, including, without limitation, educational programs, participation in a support group, anger management therapy, counseling or a program of treatment for veterans and members of the military, mental illness or intellectual disabilities or the abuse of alcohol or drugs;

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[47] NRS 174.031.
[48] NRS 174.032.

ii. Any appropriate sanctions to impose on a defendant, which may include, without limitation, community service, restitution, prohibiting contact with certain persons or the imposition of a curfew; and

iii. Any other factor which may be relevant to determining an appropriate program of treatment or sanctions to require for participation of a defendant in the preprosecution diversion program.

4. If the justice court or municipal court determines that a defendant may be rehabilitated by a program of treatment for veterans and members of the military, persons with mental illness or intellectual disabilities or the abuse of alcohol or drugs, the court may refer the defendant to an appropriate program of treatment established pursuant to NRS 176A.250, 176A.280 or 453.580. The court shall retain jurisdiction over the defendant while the defendant completes such a program of treatment.

5. The justice court or municipal court shall, when assigning a defendant to a preprosecution diversion program, issue an order setting forth the terms and conditions for successful completion of the preprosecution diversion program, which may include, without limitation:

i. Any program of treatment the defendant is required to complete;

ii. Any sanctions and the manner in which they must be carried out by the defendant;

iii. The date by which the terms and conditions must be completed by the defendant, which must not be more than 18 months after the date of the order;

iv. A requirement that the defendant appear before the court at least one time every 3 months for a status hearing on the progress of the defendant toward completion of the terms and conditions set forth in the order; and

v. A notice relating to the provisions of subsection 3 of NRS 174.033.

6. A defendant assigned to a preprosecution diversion program shall pay the cost of any program of treatment required by this section to the extent of his or her financial resources. The court shall not refuse to place a defendant in a program of treatment if the defendant does not have the financial resources to pay any or all of the costs of such program.

7. If restitution is ordered to be paid pursuant to subsection 5, the defendant must make a good faith effort to pay the required amount of restitution in full. If the justice court or municipal court determines that a defendant is unable to pay such restitution, the court must require the defendant to enter into a judgment by confession for the amount of restitution.

(c) **Discharge of defendant upon fulfillment of terms and conditions; termination of participation of defendant and order to appear for arraignment.**[49]

1. If the justice court or municipal court determines that a defendant has successfully completed the terms and conditions of a preprosecution diversion program ordered pursuant to subsection 5 of NRS 174.032, the court must discharge the defendant and dismiss the indictment, information, complaint or citation.

2. Discharge and dismissal pursuant to subsection 1 is without adjudication of guilt and is not a conviction for purposes of employment, civil rights or any statute or regulation or license or questionnaire or for any other public or private purpose. Discharge and

[49] NRS 174.033.

dismissal restores the defendant, in the contemplation of the law, to the status occupied before the indictment, information, complaint or citation. The defendant may not be held thereafter under any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge the indictment, information, complaint or citation in response to an inquiry made of the defendant for any purpose.

3. If the justice court or municipal court determines that a defendant has not successfully completed the terms or conditions of a preprosecution diversion program ordered pursuant to subsection 5 of NRS 174.032, the court must issue an order terminating the participation of the defendant in the preprosecution diversion program and order the defendant to appear for an arraignment to enter a plea based on the original indictment, information, complaint or citation pursuant to NRS 174.015.

(d) **Sealing of records after discharge.**[50]

1. If the defendant is discharged and the indictment, information, complaint or citation is dismissed pursuant to NRS 174.033, the justice court or municipal court must order sealed all documents, papers and exhibits in the record of the defendant, minute book entries and entries on dockets, and other documents relating to the case in the custody of such other agencies and officers as are named in the order of the court. The court shall order those records sealed without a hearing unless the district attorney petitions the court, for good cause shown, not to seal the records and requests a hearing thereon.
2. If the justice court or municipal court orders the record of a defendant sealed, the defendant must send a copy of the order to each agency or officer named in the order. Each such agency or officer shall notify the court in writing of its compliance with the order.

[50] NRS 174.034.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 18 Pleas

(a) **Types of pleas; procedure for entering plea.**[51]

1. A defendant may plead not guilty, guilty, guilty but mentally ill or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of nolo contendere, guilty or guilty but mentally ill. In all cases involving a misdemeanor, the prosecution and defense may also agree to a plea in abeyance, wherein the defendant pleads guilty to the offense or offenses in the Complaint.
2. A plea in abeyance means that an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement. In accordance with the order, the proceedings are suspended allowing the defendant to comply with terms and conditions set forth in the plea and abeyance agreement. Any such agreement requires that the defendant waive the right to a speedy trial while the agreement is in place. If at the end of the agreement, the defendant has completed the terms and conditions of the agreement, the agreement shall bind the parties to the terms of the agreement. If the defendant fails to successfully complete the agreement within the timeframe agreed to by the parties, the prosecuting attorney may request that the plea be entered and sentencing proceed. The Court shall require the prosecutor to put on evidence of a violation of the agreement or non-completion of the agreement by the defendant before proceeding to sentencing and shall allow the defendant to contest the prosecutors evidence. In such a hearing, the rules of evidence applicable to a sentencing hearing are applicable.
3. If a plea of guilty or guilty but mentally ill is made in a written plea agreement, the agreement must be in substantially the form prescribed in NRS 174.063. If a plea of guilty or guilty but mentally ill is made orally, the court shall not accept such a plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and consequences of the plea.
4. With the consent of the court and the district attorney, a defendant may enter a conditional plea of guilty, guilty but mentally ill or nolo contendere, reserving in writing the right, on appeal from the judgment, to a review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal must be allowed to withdraw the plea.
5. Upon an unconditional waiver of a preliminary hearing, a defendant and the district attorney may enter into a written conditional plea agreement, subject to the court accepting the recommended sentence pursuant to the agreement.
6. A plea of guilty but mentally ill must be entered not less than 21 days before the date set for trial. A defendant who has entered a plea of guilty but mentally ill has the burden of establishing the defendant's mental illness by a preponderance of the evidence. Except as otherwise provided by specific statute, a defendant who enters such a plea is subject to the same criminal, civil and administrative penalties and procedures as a defendant who pleads guilty.

[51] NRS 174.035.

7. The defendant may, in the alternative or in addition to any one of the pleas permitted by subsection 1, plead not guilty by reason of insanity. A plea of not guilty by reason of insanity must be entered not less than 21 days before the date set for trial. A defendant who has not so pleaded may offer the defense of insanity during trial upon good cause shown. Under such a plea or defense, the burden of proof is upon the defendant to establish by a preponderance of the evidence that:
    i. Due to a disease or defect of the mind, the defendant was in a delusional state at the time of the alleged offense; and
    ii. Due to the delusional state, the defendant either did not:
        A. Know or understand the nature and capacity of his or her act; or
        B. Appreciate that his or her conduct was wrong, meaning not authorized by law.
8. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or guilty but mentally ill or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.
9. A defendant may not enter a plea of guilty or guilty but mentally ill pursuant to a plea bargain for an offense punishable as a felony for which:
    i. Probation is not allowed; or
    ii. The maximum prison sentence is more than 10 years,

    unless the plea bargain is set forth in writing and signed by the defendant, the defendant's attorney, if the defendant is represented by counsel, and the prosecuting attorney.
10. If the court accepts a plea of guilty but mentally ill pursuant to this section, the court shall cause, within 5 business days after acceptance of the plea, on a form prescribed by the Department of Public Safety, a record of that plea to be transmitted to the Central Repository for Nevada Records of Criminal History along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System.
11. As used in this section:
    i. "Disease or defect of the mind" does not include a disease or defect which is caused solely by voluntary intoxication.
    ii. "National Instant Criminal Background Check System" has the meaning ascribed to it in NRS 179A.062.

(b) **Proceedings on plea of guilty or guilty but mentally ill in justice court or municipal court.**[52] In a justice court or municipal court, if the defendant pleads guilty or guilty but mentally ill, the court may, before entering such a plea or pronouncing judgment, examine witnesses to ascertain the gravity of the offense committed. If it appears to the court that a higher offense has been committed than the offense charged in the complaint, the court may order the defendant to be committed or admitted to bail or to answer any indictment that may be found against the defendant or any information which may be filed by the district attorney.

(c) **Plea bargaining: General requirements; prohibited agreements.**[53]

1. If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty,

[52] NRS 174.055.
[53] NRS 174.061.

guilty but mentally ill or nolo contendere to a lesser charge or for a recommendation of a reduced sentence, the agreement:

i. Is void if the defendant's testimony is false.

ii. Must be in writing and include a statement that the agreement is void if the defendant's testimony is false.

2. A prosecuting attorney shall not enter into an agreement with a defendant which:

i. Limits the testimony of the defendant to a predetermined formula.

ii. Is contingent on the testimony of the defendant contributing to a specified conclusion.

(d) **Written plea agreement for plea of guilty or guilty but mentally ill: Form; contents.**[54]

1. If a plea of guilty or guilty but mentally ill is made in a written plea agreement, the agreement must be substantially in the following form:

Case No. .....
Dept. No. .....

IN THE ..... JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF.....,

The State of Nevada,
PLAINTIFF,

v.

(Name of defendant),
DEFENDANT.

GUILTY OR GUILTY BUT MENTALLY ILL PLEA AGREEMENT

I hereby agree to plead guilty or guilty but mentally ill to: (List charges to which defendant is pleading guilty or guilty but mentally ill), as more fully alleged in the charging document attached hereto as Exhibit 1.

My decision to plead guilty or guilty but mentally ill is based upon the plea agreement in this case which is as follows:

(State the terms of the agreement.)

CONSEQUENCES OF THE PLEA

I understand that by pleading guilty or guilty but mentally ill I admit the facts which support all the elements of the offenses to which I now plead as set forth in Exhibit 1.

I understand that as a consequence of my plea of guilty or guilty but mentally ill I may be imprisoned for a period of not more than (maximum term of imprisonment) and that I (may

[54] NRS 174.063.

or will) be fined up to (maximum amount of fine). I understand that the law requires me to pay an administrative assessment fee.

I understand that, if appropriate, I will be ordered to make restitution to the victim of the offenses to which I am pleading guilty or guilty but mentally ill and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for expenses relating to my extradition, if any.

I understand that I (am or am not) eligible for probation for the offense to which I am pleading guilty or guilty but mentally ill. (I understand that, except as otherwise provided by statute, the question of whether I receive probation is in the discretion of the sentencing judge, or I understand that I must serve a mandatory minimum term of (term of imprisonment) or pay a minimum mandatory fine of (amount of fine) or serve a mandatory minimum term (term of imprisonment) and pay a minimum mandatory fine of (amount of fine).)

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I understand that information regarding charges not filed, dismissed charges or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the court within the limits prescribed by statute. I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the court, the court is not obligated to accept the recommendation.

I understand that the Division of Parole and Probation of the Department of Public Safety may or will prepare a report for the sentencing judge before sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. I understand that this report may contain hearsay information regarding my background and criminal history. My attorney (if represented by counsel) and I will each have the opportunity to comment on the information contained in the report at the time of sentencing.

WAIVER OF RIGHTS

By entering my plea of guilty or guilty but mentally ill, I understand that I have waived the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial, the State would bear the burden of proving beyond a reasonable doubt each element of the offense charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035.

VOLUNTARINESS OF PLEA

I have discussed the elements of all the original charges against me with my attorney (if represented by counsel) and I understand the nature of these charges against me.

I understand that the State would have to prove each element of the charge against me at trial.

I have discussed with my attorney (if represented by counsel) any possible defenses and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights and waiver of rights have been thoroughly explained to me by my attorney (if represented by counsel).

I believe that pleading guilty or guilty but mentally ill and accepting this plea bargain is in my best interest and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney (if represented by counsel) and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of intoxicating liquor, a controlled substance or other drug which would in any manner impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

My attorney (if represented by counsel) has answered all my questions regarding this guilty or guilty but mentally ill plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

Dated: This ..... day of the month of ..... of the year .....

.....
Defendant.

Agreed to on this ..... day of the month of ..... of the year .....

.....
Deputy District Attorney.

2. If the defendant is represented by counsel, the written plea agreement must also include a certificate of counsel that is substantially in the following form:

CERTIFICATE OF COUNSEL

I, the undersigned, as the attorney for the defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the defendant the allegations contained in the charges to which guilty or guilty but mentally ill pleas are being entered.

2. I have advised the defendant of the penalties for each charge and the restitution that the defendant may be ordered to pay.

3. All pleas of guilty or guilty but mentally ill offered by the defendant pursuant to this agreement are consistent with all the facts known to me and are made with my advice to the defendant and are in the best interest of the defendant.

4. To the best of my knowledge and belief, the defendant:

(a) Is competent and understands the charges and the consequences of pleading guilty or guilty but mentally ill as provided in this agreement.

(b) Executed this agreement and will enter all guilty or guilty but mentally ill pleas pursuant hereto voluntarily.

(c) Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time of the execution of this agreement.

Dated: This ..... day of the month of ..... of the year .....

.....
Attorney for defendant.

(e) **When plea may specify degree of crime or punishment.**[55] Except as otherwise provided in NRS 174.061:

1. On a plea of guilty or guilty but mentally ill to an information or indictment accusing a defendant of a crime divided into degrees, when consented to by the prosecuting attorney in open court and approved by the court, the plea may specify the degree, and in such event the defendant shall not be punished for a higher degree than that specified in the plea.
2. On a plea of guilty or guilty but mentally ill to an indictment or information for murder of the first degree, when consented to by the prosecuting attorney in open court and approved by the court, the plea may specify a punishment less than death. The specified punishment, or any lesser punishment, may be imposed by a single judge.

[55] NRS 174.065.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 19 Pleadings before Trial

(a) **Pleadings and motions.**[56]

1. Pleadings in criminal proceedings are the indictment, the information and, in justice court, the complaint, and the pleas of guilty, guilty but mentally ill, not guilty, not guilty by reason of insanity and nolo contendere.
2. All other pleas, demurrers and motions to quash are abolished, and defenses and objections raised before trial which could have been raised by one or more of them may be raised only by motion to dismiss or to grant appropriate relief, as provided in Rule **.

(b) **Proceedings not constituting acquittal; effect of acquittal on merits; proceedings constituting bar to another prosecution; retrial after discharge of jury; effect of voluntary dismissal.**[57]

1. If a defendant was formerly acquitted on the ground of a variance between the indictment, information or complaint and proof, or the indictment, information, or complaint was dismissed upon an objection to its form or substance, or in order to hold a defendant for a higher offense without a judgment of acquittal, it is not an acquittal of the same offense.
2. If a defendant is acquitted on the merits, the defendant is acquitted of the same offense, notwithstanding a defect in the form or substance in the indictment, information, or complaint on which the trial was had.
3. When a defendant is convicted or acquitted, or has been once placed in jeopardy upon an indictment, information or complaint, except as otherwise provided in subsections 5 and 6, the conviction, acquittal or jeopardy is a bar to another indictment, information or complaint for the offense charged in the former, or for an attempt to commit the same, or for an offense necessarily included therein, of which the defendant might have been convicted under that indictment, information or complaint.
4. In all cases where a jury is discharged or prevented from giving a verdict by reason of an accident or other cause, except where the defendant is discharged during the progress of the trial or after the cause is submitted to them, the cause may be again tried.
5. The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss a complaint:
    i. Before a preliminary hearing if the crime with which the defendant is charged is a felony or gross misdemeanor; or
    ii. Before trial if the crime with which the defendant is charged is a misdemeanor,

   without prejudice to the right to file another complaint, unless the State of Nevada has previously filed a complaint against the defendant which was dismissed at the request of the prosecuting attorney. After the dismissal, the court shall order the defendant released from custody or, if the defendant is released on bail, exonerate the obligors and release any bail.
6. If a prosecuting attorney files a subsequent complaint after a complaint concerning the same matter has been filed and dismissed against the defendant:

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[56] NRS 174.075

[57] NRS 174.085.

i. The case must be assigned to the same judge to whom the initial complaint was assigned; and
ii. A court shall not issue a warrant for the arrest of a defendant who was released from custody pursuant to subsection 5 or require a defendant whose bail has been exonerated pursuant to subsection 5 to give bail unless the defendant does not appear in court in response to a properly issued summons in connection with the complaint.

7. The prosecuting attorney, in a case that the prosecuting attorney has initiated, may voluntarily dismiss an indictment or information before the actual arrest or incarceration of the defendant without prejudice to the right to bring another indictment or information. After the arrest or incarceration of the defendant, the prosecuting attorney may voluntarily dismiss an indictment or information without prejudice to the right to bring another indictment or information only upon good cause shown to the court and upon written findings and a court order to that effect.

Rule 20 Motions

(a) **In General**

1. *Requirement of writing and signature.* A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party. Pretrial motions shall be filed within the time set forth in subdivision (d) of this rule. The writing and signature requirements may be waived by: (1) The opposing party; or (2) by Order of the Court after the moving party has demonstrated good cause as to why the Motion could not have been made in writing with the required notice to the opposing party[58].
2. *Grounds and Affidavit.* A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.
3. *Service and Notice:* A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision may be waived by the court and the time for notice may be shortened.[59]
4. *Memoranda of Law:* The court may require the filing of a memorandum of law, in such form and within such time as the court may direct, as a condition precedent to a hearing on a motion or interlocutory matter. A dispositive motion may not be filed unless accompanied by a memorandum of law, except when otherwise ordered by the court.
5. *Renewal:* Upon a showing that substantial justice requires and good cause similar to the require showing for a Rule 60(b) Motion under the Nevada Rules of Civil Procedure, the court may permit a pretrial motion which has been heard and denied to be renewed.
6. *Certificate of Good Faith:* A certificate of good faith ("certificate") must be filed with any motion, any opposition to a motion, or any reply to an opposition. The certificate shall be signed by the attorney representing the party. If the party is self-represented, the self-represented party must personally sign the certificate. The certificate must indicate that the pleading is filed in good faith and, to the best of the signer's

[58] Based upon NRS 174.125
[59] Based upon NRS 174.125

knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

i. The Motion is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
ii. The claims asserted within the Motion are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; and
iii. The allegations and other factual contentions within the Motion have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

In the event that the Court or a party believes that the party/attorney has violated the representations in the certificate, the court may follow the procedure under Rule 11(c) of the Nevada Rules of Civil Procedure ("NRCP") in relation to sanctions and may impose such sanctions identified in NRCP Rule 11(c) against the party who violated the representations set forth in the certificate in filing a Motion, Opposition, or Reply.

(b) **Procedure for Submission Of Motions**

1. *Response/Opposition to Motion*: Unless otherwise ordered by the court, any response to a motion filed under NRS 174.105 shall be filed on or before the first business day which falls 10 calendar days, excluding holidays, after service of the motion.
2. *Reply*: Unless otherwise ordered by the court, any reply shall be filed on or before the judicial day which falls 5 calendar days after service of the response.
3. *Request for Submission*: If neither party has advised the court of the filing nor requested a hearing, when the time for filing a response to a motion and the reply has passed, either party may file a request that the motion be submitted for decision ("Request to Submit for Decision"). If a Request to Submit for Decision is filed, the pleading shall be a separate pleading so captioned. The Request to Submit for Decision shall state the date on which the motion was filed, the date on which any response was filed and the date on which any reply was filed. If no party files a written Request to Submit, or the motion has not otherwise been brought to the attention of the court, the motion will not be considered submitted for decision.

(c) **Timing of Motions.**

1. *Thirty Days Rule:* Unless otherwise ordered by the Court or set forth in these rules, all motions in a criminal prosecution that if granted will delay or postpone the time of trial, must be made at least 30 days before trial or prior to the pre-trial conference whichever occurs earlier, or at such time as otherwise order by the court, unless an opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds for the motion at least 45 days prior to the first day of trial.[60]
2. *Motion for Leave to file Untimely Motion:* In the event that an opportunity to make such a motion before trial did not exist or the moving party was not aware of the grounds for the motion at least 45 days prior to the first day of trial:

[60] Based upon NRS 174.095 and replaces the distinction between single and multiple judge districts in NRS 174.125.

i. If the basis or grounds for such a Motion are discovered prior to trial, a written Motion seeking leave to file the Untimely Motion, which complies with Rule 16, must be filed setting forth the justification for not raising the issue at an earlier date, together with the Motion; or

ii. If the basis or grounds for such a Motion are discovered at trial, a verbal motion for leave may be made, which shall be supported by a statement made under oath, setting forth the justification for not filing a written Motion prior to trial.

3. *Ruling on Motion for Leave to file Untimely Motion:* In ruling on a Motion for Leave, the Court shall determine if the grounds exist to allow the untimely Motion by determining: (1) If the moving party exercised reasonable due diligence prior to seeking leave to file the motion[61]; and (2) Good cause exists which justifies the proposed Motion being brought in an untimely manner. In analyzing the good cause grounds, the Court shall examine the adequacy of the moving party's reasons for failure to comply with applicable rules of procedure and whether the opposing party will be unfairly or unduly prejudiced by the untimely motion.

(d) **Pre-Trial Motions For Self-Represented Defendants.** Whenever an issue concerning the constitutionality of the use of specific evidence against the defendant raises before trial, and the defendant is not represented by counsel, the court shall inform the defendant that:

1. The defendant may, but need not, testify at a pretrial hearing regarding the circumstances surrounding the acquisition of the evidence;
2. If the defendant testifies at the hearing, he or she will be subject to cross-examination by the opposing party;
3. If the defendant does testify at the hearing, he or she does not waive his or her right to remain silent by so testifying; and
4. If the defendant does testify at the hearing, neither this fact nor his or her testimony at the hearing shall be mentioned to the jury unless he or she testifies at trial concerning the same matter.

(e) **Defense Motions[62].**

1. All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.
2. Any defenses and objections based on defects in the institution of the prosecution or in the indictment, information, or complaint must be raised by motion before entry of

[61] The good cause justification required by the rule are soundly based. A defendant waives the right to make certain motions (i.e. Motions to Suppress) if the Motion is not brought before trial commences. The purpose behind such a rule is centered on due process for the State and Defendant to have the issue properly before the Court and considered on its merits. For example, if the court grants a suppression motion and excludes evidence, the rule avoids having the prosecution's appeal rights inadvertently extinguished by double jeopardy protections. Trial courts must adjudicate any suppression issues prior to trial, absent good cause for delaying such rulings until trial. Cf. *Jones v. State*, 395 Md. 97, 909 A.2d 650, 659 (2006) (noting the Maryland procedural rule providing that suppression motions "shall be determined before trial" (citation omitted)). See also *Hill v. State*, 67862, 2016 WL 1616577, at *2 (Nev. App. Apr. 20, 2016) discussing that due diligence must be exercised.

[62] Based upon NRS 174.105.

plea, unless the Court permits the defendant to make file a written motion within a reasonable time thereafter.[63] This provision is subject to the following[64]:

i. If a motion is determined adversely to the defendant, the defendant shall be permitted to plead if the defendant had not previously pleaded. A plea previously entered shall stand.
ii. If the court grants such a motion, the court may also order that bail be continued for a reasonable and specified time pending the filing of a new indictment, information, or complaint.
iii. Nothing in this provision shall be deemed to permit the relating back of a newly filed indictment, information, or complaint to the original filing date of the indictment, information, or complaint for purposes of a statute of limitations.

3. Any other defenses, objections or motions that are capable of determination without trial of the general issue must be raised by motion at least 30 days prior to the commencement of the trial, unless the moving party can demonstrate good cause in that either: (1) An opportunity to make such a motion before trial did not exist; or (2) The moving party was not aware of the grounds for the motion prior to trial.
4. Failure to present any such defense or objection as herein provided constitutes waiver thereof, but the court may, for good cause shown, grant relief from the waiver and permit them to be raised within a reasonable time thereafter.
5. Lack of jurisdiction or the failure of the indictment, information or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.
6. **TBD

(f) **Amendment of Charging Document.** If prior to the close of the State's Case In Chief, the prosecution discovers that the Information or Complaint needs to be amended because there exists a material variance between the evidence and the allegations of the pleading, the prosecutor may move to amend the pleadings to conform to the evidence. The Court may order that the Complaint or Information be amended to conform to the evidence or grant such other relief as justice requires.

(g) **Dispositive Motions.**

1. The following are considered Dispositive Motions and shall be raised by motion at least 30 days prior to trial, or at such time as otherwise ordered by the court if good cause exists to allow the Motion to be raised later:
   i. Motions to suppress evidence on the grounds that the evidence was illegally obtained;
   ii. Requests for a severance of charges or defendants;
   iii. Matters which go to legality of arrest;
   iv. All motions in limine to exclude or admit evidence;
   v. Motions to dismiss based on former jeopardy;

[63] NRS 174.105 and NRS 174.115.
[64] NRS 174.145 *Effect of Determination.*

vi. Motion for the withdrawal of counsel;
vii. Motions to admit other act evidence under NRS 48.035 or 48.045;
viii. Motion to declare that Defendant is intellectually disabled; or
ix. Motions which by their nature, if granted, delay or postpone the time of trial.

2. *Motion to Suppress Evidence:* A motion to suppress evidence under shall:
   i. Describe with particularity the evidence and/or testimony sought to be suppressed;
   ii. Set forth the standing of the movant to make the motion; and
   iii. Provide specific sufficient legal and factual grounds for the motion to give the opposing party reasonable notice of the issues and enable the court to determine what proceedings are appropriate to address the issues and grounds so raised.
3. *Motions to admit other act evidence under NRS 48.035 or 48.045.* A Motion seeking to have a defendant declared intellectually disabled shall:
   i. The party seeking to introduce the evidence must file a Motion which states with particularity the evidence and/or testimony sought to be introduced;
   ii. The motion must state why the evidence is relevant to the crime charged and the particular portion of the statute that would allow its admission;
   iii. At the hearing on the Motion, the party seeking to introduce the evidence must prove by clear and convincing evidence the particular act(s); and
   iv. The motion and evidence must establish that the probative value is not substantially outweighed by the danger of unfair prejudice.
4. *Motion to declare that Defendant is intellectually disabled.*[65] A Motion seeking to have a defendant, who is charged with murder in the first degree and the State is seeking to impose the death penalty, declared intellectually disabled shall be subject to the following:
   i. Be filed not less than 60[66] days prior the date set for the pre-trial conference[67], file a motion to declare that the defendant is intellectually disabled.
   ii. If a defendant files a motion pursuant to this section, the court shall:
      A. Stay the proceedings pending a decision on the issue of intellectual disability; and
      B. Hold a hearing within a reasonable time before the trial to determine whether the defendant is intellectually disabled.
   iii. The court shall order the defendant to:
      A. Provide evidence which demonstrates that the defendant is intellectually disabled not less than 30 days before the date set for a hearing conducted pursuant to subsection (d)(ii); and

[65] NRS 174.098. ***This portion of the rule should be decided by the committee that is analyzing these issues and maybe a section of special death penalty case provisions should be created by a separate rule.***

[66] This was originally set for ten days. Given the reality of death penalty cases and the time it takes to get to a trial, it would seem that this issue could and should be resolved at a much earlier stage than in the last days before a trial.

[67] Statute provides trial. One of the goals of the Motion committee was to have these issues addressed at earlier dates.

B. Undergo an examination by an expert selected by the prosecution on the issue of whether the defendant is intellectually disabled at least 15 days before the date set for a hearing pursuant to subsection (d)(ii).

iv. For the purpose of the hearing conducted pursuant to subsection (d)(ii), there is no privilege for any information or evidence provided to the prosecution or obtained by the prosecution pursuant to subsection (d)(iii).

v. At a hearing conducted pursuant to subsection (d)(ii):

A. The court must allow the defendant and the prosecution to present evidence and conduct a cross-examination of any witness concerning whether the defendant is intellectually disabled; and

B. The defendant has the burden of proving by a preponderance of the evidence that the defendant is intellectually disabled.

vi. If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is intellectually disabled, the court must make such a finding in the record and strike the notice of intent to seek the death penalty. Such a finding may be appealed pursuant to NRS 177.015.

vii. For the purposes of this section of the Rule, "intellectually disabled" means significant subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior and manifested during the developmental period.

Rule 21 Joinder/Consolidation of Cases and Relief Therefrom

(a) **Trial together of indictments or informations.**[68] The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

(b) **A motion to consolidate cases.**[69] A motion to consolidate cases shall be heard by the judge assigned to the first case filed. Notice of a motion to consolidate cases shall be given to all parties in each case. The order denying or granting the motion shall be filed in each case.

(c) **Case number.**[70] If a motion to consolidate is granted, the case number of the first case filed shall be used for all subsequent papers and the case shall be heard by the judge assigned to the first case. The presiding judge may assign the case to another judge for good cause.

(d) **Relief from prejudicial joinder.**[71]

1. If it appears that a defendant or the State of Nevada is prejudiced by a joinder of offenses or of defendants in an indictment or information, or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.
2. In ruling on a motion by a defendant for severance the court may order the district attorney to deliver to the court for inspection in chambers any statements or confessions made by the defendants which the State intends to introduce in evidence at the trial.

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[68] NRS 174.155.

[69]

[70] .

[71] NRS 174.165.

Rule 22 Depositions

(a) **Applicability.**[72] The provisions of NRS 174.171 to 174.225, inclusive, do not apply to a deposition taken pursuant to NRS 174.227 or used pursuant to NRS 174.228, or both.

(b) **When taken.**[73]

1. If it appears that a prospective witness is an older person or a vulnerable person or may be unable to attend or prevented from attending a trial or hearing, that the witness's testimony is material and that it is necessary to take the witness's deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information or complaint may, upon motion of a defendant or of the State and notice to the parties, order that the witness's testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If the motion is for the deposition of an older person or a vulnerable person, the court may enter an order to take the deposition only upon good cause shown to the court. If the deposition is taken upon motion of the State, the court shall order that it be taken under such conditions as will afford to each defendant the opportunity to confront the witnesses against him or her.
2. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court, on written motion of the witness and upon notice to the parties, may direct that the witness's deposition be taken. After the deposition has been subscribed, the court may discharge the witness.
3. This section does not apply to the prosecutor, or to an accomplice in the commission of the offense charged.
4. As used in this section:
   (a) "Older person" means a person who is 70 years of age or older.
   (b) "Vulnerable person" has the meaning ascribed to it in NRS 200.5092.

(c) **Notice of taking.**[74] The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(d) **Defendant's counsel and payment of expenses.**[75] If a defendant is without counsel the court shall advise the defendant of his or her right and assign counsel to represent the defendant unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of the court reporter and of travel and subsistence of the defendant's attorney for attendance at the examination must be paid as provided in NRS 7.135.

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[72] NRS 174.171.
[73] NRS 174.175.
[74] NRS 174.185.
[75] NRS 174.195.

(e) **How taken.**[76] A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(f) **Use of deposition.**[77]

1. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears:
    i. That the witness is dead;
    ii. That the witness is out of the State of Nevada, unless it appears that the absence of the witness was procured by the party offering the deposition;
    iii. That the witness cannot attend or testify because of sickness or infirmity;
    iv. That the witness has become of unsound mind; or
    v. That the party offering the deposition could not procure the attendance of the witness by subpoena.
2. Any deposition may also be used by any party to contradict or impeach the testimony of the deponent as a witness.
3. If only a part of a deposition is offered in evidence by a party, an adverse party may require the party to offer all of it which is relevant to the part offered and any party may offer other parts.

(g) **Objections to admissibility.**[78] Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

(h) **Videotaped depositions: Order of court; notice to parties; cross-examination; use.**[79]

1. A court on its own motion or on the motion of the district attorney may, for good cause shown, order the taking of a videotaped deposition of:
    i. A victim of sexual abuse as that term is defined in NRS 432B.100;
    ii. A prospective witness in any criminal prosecution if the witness is less than 14 years of age; or
    iii. A victim of sex trafficking as that term is defined in subsection 2 of NRS 201.300. There is a rebuttable presumption that good cause exists where the district attorney seeks to take the deposition of a person alleged to be the victim of sex trafficking.

   The court may specify the time and place for taking the deposition and the persons who may be present when it is taken.
2. The district attorney shall give every other party reasonable written notice of the time and place for taking the deposition. The notice must include the name of the person to be examined. On the motion of a party upon whom the notice is served, the court:
   (a) For good cause shown may release the address of the person to be examined; and
   (b) For cause shown may extend or shorten the time.
3. If at the time such a deposition is taken, the district attorney anticipates using the deposition at trial, the court shall so state in the order for the deposition and the accused

[76] NRS 174.205.
[77] NRS 174.215.
[78] NRS 174.225.
[79] NRS 174.227.

must be given the opportunity to cross-examine the deponent in the same manner as permitted at trial.

4. Except as limited by NRS 174.228, the court may allow the videotaped deposition to be used at any proceeding in addition to or in lieu of the direct testimony of the deponent. It may also be used by any party to contradict or impeach the testimony of the deponent as a witness. If only a part of the deposition is offered in evidence by a party, an adverse party may require the party to offer all of it which is relevant to the part offered and any party may offer other parts.

(i) **Videotaped depositions: Use.**[80] A court may allow a videotaped deposition to be used instead of the deponent's testimony at trial only if:

1. In the case of a victim of sexual abuse, as that term is defined in NRS 432B.100:
    i. Before the deposition is taken, a hearing is held by a justice of the peace or district judge who finds that:
        A. The use of the videotaped deposition in lieu of testimony at trial is necessary to protect the welfare of the victim; and
        B. The presence of the accused at trial would inflict trauma, more than minimal in degree, upon the victim; and
    ii. At the time a party seeks to use the deposition, the court determines that the conditions set forth in subparagraphs (1) and (2) of paragraph (a) continue to exist. The court may hold a hearing before the use of the deposition to make its determination.
2. In the case of a victim of sex trafficking as that term is defined in subsection 2 of NRS 201.300:
    i. Before the deposition is taken, a hearing is held by a justice of the peace or district judge and the justice or judge finds that cause exists pursuant to paragraph (c) of subsection 1 of NRS 174.227; and
    ii. Before allowing the videotaped deposition to be used at trial, the court finds that the victim is unavailable as a witness.
3. In all cases:
    i. A justice of the peace or district judge presides over the taking of the deposition;
    ii. The accused is able to hear and see the proceedings;
    iii. The accused is represented by counsel who, if physically separated from the accused, is able to communicate orally with the accused by electronic means.
    iv. The accused is given an adequate opportunity to cross-examine the deponent subject to the protection of the deponent deemed necessary by the court; and
    v. The deponent testifies under oath.

(j) **Videotaped testimony.**[81] If a prospective witness who is scheduled to testify before a grand jury or at a preliminary hearing is less than 14 years of age, the court shall, upon the motion of the district attorney, and may, upon its own motion, order the child's testimony to be videotaped at the time it is given.

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[80] NRS 174.228.
[81] NRS 174.229.

(k) **Effect of NRS 174.227, 174.228 and 174.229.**[82] The provisions of NRS 174.227, 174.228 and 174.229 do not preclude:

1. The submission of videotaped depositions or testimony which are otherwise admissible as evidence in court.
2. A victim or prospective witness from testifying at a proceeding without the use of his or her videotaped deposition or testimony.

[82] NRS 174.231.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 23 Discovery

(a) **Disclosure by defendant of intent to claim alibi; defendant to disclose list of alibi witnesses; prosecuting attorney to disclose list of rebuttal witnesses; continuing duty to disclose; sanctions.**[83]

1. In addition to the written notice required by NRS 174.234, a defendant in a criminal case who intends to offer evidence of an alibi in his or her defense shall, not less than 10 days before trial or at such other time as the court may direct, file and serve upon the prosecuting attorney a written notice of the defendant's intention to claim the alibi. The notice must contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as are known to defendant or the defendant's attorney, the names and last known addresses of the witnesses by whom the defendant proposes to establish the alibi.
2. Not less than 10 days after receipt of the defendant's list of witnesses, or at such other time as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and last known addresses, as particularly as are known to the prosecuting attorney, of the witnesses the State proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause.
3. Both the defendant and the prosecuting attorney have a continuing duty to disclose promptly the names and last known addresses of additional witnesses which come to the attention of either party after filing their respective lists.
4. If a defendant fails to file and serve a copy of the notice required by this section, the court may exclude evidence offered by the defendant to prove an alibi, except the testimony of the defendant. If the notice is given by a defendant, the court may exclude the testimony of any witness offered by the defendant to prove an alibi if the name and last known address of the witness, as particularly as are known to the defendant or the defendant's attorney, are not stated in the notice.
5. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as required by this section, the court may exclude evidence offered by the State in rebuttal to the defendant's evidence of alibi. If the list is filed and served by the prosecuting attorney, the court may exclude the testimony of any witness offered by the prosecuting attorney for the purpose of rebutting the evidence of alibi if the name and last known address of the witness, as particularly as are known to the prosecuting attorney, are not stated in the notice. For good cause shown the court may waive the requirements of this section.

(b) **Reciprocal disclosure of lists of witnesses and information relating to expert testimony; continuing duty to disclose; protective orders; sanctions.**[84]

1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:
    i. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:
        A. The defendant shall file and serve upon the prosecuting attorney a written notice containing the names and last known addresses of all witnesses the defendant intends to call during the case in chief of the defendant; and

[83] NRS 174.233.
[84] NRS 174.234.

B. The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.

ii. If the defendant will not be tried for any offenses that are punishable as a gross misdemeanor or felony:

A. The defendant shall file and serve upon the prosecuting attorney a written notice containing the name and last known address of any witness the defendant intends to call during the case in chief of the defendant whose name and last known address have not otherwise been provided to the prosecuting attorney pursuant to NRS 174.245; and

B. The prosecuting attorney shall file and serve upon the defendant a written notice containing the name and last known address or place of employment of any witness the prosecuting attorney intends to call during the case in chief of the State whose name and last known address or place of employment have not otherwise been provided to the defendant pursuant to NRS 171.1965 or 174.235.

2. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:
   i. A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;
   ii. A copy of the curriculum vitae of the expert witness; and
   iii. A copy of all reports made by or at the direction of the expert witness.
3. After complying with the provisions of subsections 1 and 2, each party has a continuing duty to file and serve upon the opposing party:
   i. Written notice of the names and last known addresses of any additional witnesses that the party intends to call during the case in chief of the State or during the case in chief of the defendant. A party shall file and serve written notice pursuant to this paragraph as soon as practicable after the party determines that the party intends to call an additional witness during the case in chief of the State or during the case in chief of the defendant. The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1.
   ii. Any information relating to an expert witness that is required to be disclosed pursuant to subsection 2. A party shall provide information pursuant to this paragraph as soon as practicable after the party obtains that information. The court shall prohibit the party from introducing that information in evidence or shall prohibit the expert witness from testifying if the court determines that the party acted in bad faith by not timely disclosing that information pursuant to subsection 2.
4. Each party has a continuing duty to file and serve upon the opposing party any change in the last known address, or, if applicable, last known place of employment, of any witness

that the party intends to call during the case in chief of the State or during the case in chief of the defendant as soon as practicable after the party obtains that information.

5. Upon a motion by either party or the witness, the court shall prohibit disclosure to the other party of the address of the witness if the court determines that disclosure of the address would create a substantial threat to the witness of bodily harm, intimidation, coercion or harassment. If the court prohibits disclosure of an address pursuant to this subsection, the court shall, upon the request of a party, provide the party or the party's attorney or agent with an opportunity to interview the witness in an environment that provides for protection of the witness.
6. In addition to the sanctions and protective orders otherwise provided in subsections 3 and 5, the court may upon the request of a party:
    i. Order that disclosure pursuant to this section be denied, restricted or deferred pursuant to the provisions of NRS 174.275; or
    ii. Impose sanctions pursuant to subsection 2 of NRS 174.295 for the failure to comply with the provisions of this section.
7. A party is not entitled, pursuant to the provisions of this section, to the disclosure of the name or address of a witness or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

(c) **Disclosure by prosecuting attorney of evidence relating to prosecution; limitations.**[85]

1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the request of a defendant, the prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:
    i. Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;
    ii. Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; and
    iii. Books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce during the case in chief of the State and which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.
2. The defendant is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
    i. An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case.

[85] NRS 174.235.

ii. A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

3. The provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the Constitution of this state or the Constitution of the United States to disclose exculpatory evidence to the defendant.

(d) **Disclosure by defendant of evidence relating to defense; limitations.**[86]

1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, at the request of the prosecuting attorney, the defendant shall permit the prosecuting attorney to inspect and to copy or photograph any:
   i. Written or recorded statements made by a witness the defendant intends to call during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant;
   ii. Results or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant; and
   iii. Books, papers, documents or tangible objects that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant.
2. The prosecuting attorney is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:
   i. An internal report, document or memorandum that is prepared by or on behalf of the defendant or the defendant's attorney in connection with the investigation or defense of the case.
   ii. A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.

(e) **Protective orders.**[87] Upon a sufficient showing, the court may at any time order that discovery or inspection pursuant to NRS 174.234 to 174.295, inclusive, be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the defendant or prosecuting attorney, the court may permit the defendant or prosecuting attorney to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in chambers. If the court enters an order granting relief following a showing in chambers, the entire text of the written statement must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

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[86] NRS 174.245.
[87] NRS 174.275.

(f) **Time limits.**[88]

1. A request made pursuant to NRS 174.235 or 174.245 may be made only within 30 days after arraignment or at such reasonable later time as the court may permit. A subsequent request may be made only upon a showing of cause why the request would be in the interest of justice.
2. A party shall comply with a request made pursuant to NRS 174.235 or 174.245 not less than 30 days before trial or at such reasonable later time as the court may permit.

(g) **Continuing duty to disclose; failure to comply; sanctions.**[89]

1. If, after complying with the provisions of NRS 174.235 to 174.295, inclusive, and before or during trial, a party discovers additional material previously requested which is subject to discovery or inspection under those sections, the party shall promptly notify the other party or the other party's attorney or the court of the existence of the additional material.
2. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with the provisions of NRS 174.234 to 174.295, inclusive, the court may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

[88] NRS 174.285.
[89] NRS 174.295.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 24 Subpoena

(a) **Subpoena for attendance of witnesses; form; issuance.**[90] Except as provided in NRS 172.195 and 174.315:

1. A subpoena must be issued by the clerk under the seal of the court. It must state the name of the court and the title, if any, of the proceeding, and must command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank, to a party requesting it, who shall fill in the blanks before it is served.
2. A subpoena must be issued by a justice of the peace in a proceeding before the justice of the peace under the seal of the court.

(b) **Issuance of subpoena by prosecuting attorney or attorney for defendant; promise to appear; informing witness of general nature of grand jury's inquiry; calendaring of certain subpoenas.**[91]

1. A prosecuting attorney may issue subpoenas subscribed by the prosecuting attorney for witnesses within the State, in support of the prosecution or whom a grand jury may direct to appear before it, upon any investigation pending before the grand jury.
2. A prosecuting attorney or an attorney for a defendant may issue subpoenas subscribed by the issuer for:
    i. Witnesses within the State to appear before the court at which a preliminary hearing is to be held or an indictment, information or criminal complaint is to be tried.
    ii. Witnesses already subpoenaed who are required to reappear in any Justice Court at any time the court is to reconvene in the same case within 60 days, and the time may be extended beyond 60 days upon good cause being shown for its extension.
3. Witnesses, whether within or outside of the State, may accept delivery of a subpoena in lieu of service, by a written or oral promise to appear given by the witness. Any person who accepts an oral promise to appear shall:
    i. Identify himself or herself to the witness by name and occupation;
    ii. Make a written notation of the date when the oral promise to appear was given and the information given by the person making the oral promise to appear identifying the person as the witness subpoenaed; and
    iii. Execute a certificate of service containing the information set forth in paragraphs (a) and (b).
4. A peace officer may accept delivery of a subpoena in lieu of service, via electronic means, by providing a written promise to appear that is transmitted electronically by any appropriate means, including, without limitation, by electronic mail transmitted through the official electronic mail system of the law enforcement agency which employs the peace officer.
5. A prosecuting attorney shall orally inform any witness subpoenaed as provided in subsection 1 of the general nature of the grand jury's inquiry before the witness testifies. Such a statement must be included in the transcript of the proceedings.

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[90] NRS 174.305.
[91] NRS 174.315.

6. Any subpoena issued by an attorney for a defendant for a witness to appear before the court at which a preliminary hearing is to be held must be calendared by filing a motion that includes a notice of hearing setting the matter for hearing not less than 2 full judicial days after the date on which the motion is filed. A prosecuting attorney may oppose the motion orally in open court. A subpoena that is properly calendared pursuant to this subsection may be served on the witness unless the court quashes the subpoena.

(c) **Production of prisoner as witness.**[92]

1. When it is necessary to have a person imprisoned in the state prison brought before any district court, or a person imprisoned in the county jail brought before a district court sitting in another county, an order for that purpose may be made by the district court or district judge, at chambers, and executed by the sheriff of the county when it is made. The order can only be made upon motion of a party upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.
2. When a person required as a witness before a district court is imprisoned, the judge thereof may order the sheriff to bring the prisoner before the court at the expense of the State or, in the judge's discretion, at the expense of the defendant.

(d) **Subpoena for production of documentary evidence and of objects.**[93]

1. Except as otherwise provided in NRS 172.139, a subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein.
2. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.
3. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time before the trial or before the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(e) **Service of subpoena.**[94]

1. Except as otherwise provided in NRS 174.315 and subsection 2, a subpoena may be served by a peace officer or by any other person who is not a party and who is not less than 18 years of age. Except as otherwise provided in NRS 289.027, service of a subpoena must be made by delivering a copy thereof to the person named.
2. Except as otherwise provided in NRS 174.315, a subpoena to attend a misdemeanor trial may be served by mailing the subpoena to the person to be served by registered or certified mail, return receipt requested from that person, in a sealed postpaid envelope, addressed to the person's last known address, not less than 10 days before the trial which the subpoena commands the person to attend.
3. If a subpoena is served by mail, a certificate of the mailing must be filed with the court within 2 days after the subpoena is mailed.

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92 NRS 174.325.
93 NRS 174.335.
94 NRS 174.345.

(f) **Place of service.**[95] A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the State of Nevada.

(g) **Subpoena for taking depositions; place of examination.**[96]

1. An order to take a deposition authorizes the issuance by the clerk of the court for the county in which the deposition is to be taken of subpoenas for the persons named or described therein.
2. A resident of this state may be required to attend an examination only in the county wherein the resident resides or is employed or transacts business in person. A nonresident of this state may be required to attend only in the county where the nonresident is served with a subpoena or within 40 miles from the place of service or at such other place as is fixed by the court.

(h) **Contempt.**[97] Failure by any person without an adequate excuse to obey a subpoena of a court, a prosecuting attorney or an attorney for a defendant served upon the person or, in the case of a subpoena issued by a prosecuting attorney or an attorney for a defendant, delivered to the person and accepted, shall be deemed a contempt of the court from which the subpoena issued or, in the case of a subpoena issued by a prosecuting attorney or an attorney for a defendant, of the court in which a preliminary hearing is to be held, an investigation is pending or an indictment, information or complaint is to be tried.

[95] NRS 174.365.
[96] NRS 174.375
[97] NRS 174.385

Rule 25 Attendance of Witness Outside State

(a) **Definitions.**[98] As used in NRS 174.395 to 174.445, inclusive:

1. "State" shall include any territory of the United States and the District of Columbia.
2. "Summons" shall include a subpoena, order or other notice requiring the appearance of a witness.
3. "Witness" shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

(b) **Summoning witness in this State to testify in another state.**[99]

1. If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this State certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this State is a material witness in such prosecution, or grand jury investigation, and that the person's presence will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.
2. If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence (and of any other state through which the witness may be required to pass by ordinary course of travel), will give the witness protection from arrest and the service of civil and criminal process, the judge shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.
3. If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure the witness's attendance in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before the judge for hearings; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability, may, in lieu of issuing subpoena or summons, order that the witness be forthwith taken into custody and delivered to an officer of the requesting state.
4. If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the amount required by NRS 50.225 for subsistence and travel expenses, fails without good cause to attend and testify as directed in the

[98] NRS 174.405.
[99] NRS 174.415.

summons, the witness shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State.

(c) **Witness from another state summoned to testify in this State.**[100]

1. If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this State, is a material witness in a prosecution pending in a court of record in this State, or in a grand jury investigation which has commenced or is about to commence, a judge of such a court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this State to ensure the witness's attendance in this State. This certificate must be presented to a judge of a court of record in the county in which the witness is found.
2. If the witness is summoned to attend and testify in this State the witness is entitled to receive the amount required by NRS 50.225 for subsistence and travel expenses. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this State a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court. If such witness, after coming into this State, fails without good cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this State.

(d) **Exemption from arrest and service of process.**[101]

1. If a person comes into this state in obedience to a summons directing the person to attend and testify in this state the person shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before the person's entrance into this state under the summons.
2. If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, the person shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before the person's entrance into this state under the summons.

(e) **Uniformity of interpretation.**[102] NRS 174.395 to 174.445, inclusive, shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of the states which enact them.

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100 NRS 174.425.
101 NRS 174.435.
102 NRS 174.445.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 26 Pre-trial Conference[103]

(a) **Pre-trial Conference.** Unless otherwise ordered by the trial court, the trial court shall hold a scheduled mandatory pre-trial conference with trial counsel present at least 30 days prior to a trial to consider such matters as will promote a fair and expeditious trial. The defendant shall be present unless he waives his right to appear and the Court orders that the Defendant not be required to appear.

(b) **Dispositive Motions.** Any motion, defense or objection not previously raised by motion prior to the pre-trial conference as required under the Nevada Rules of Criminal Procedure shall be precluded, unless the basis thereof was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises the issue promptly upon learning of it.

(c) **Issues, Jury Instructions.** The parties shall identify the issues of fact which must be determined at trial by the trier of fact and, if a jury trial is to be held, provide the Court with written jury instructions for consideration.

(d) **Pretrial Order.** At the conclusion of the conference, a pretrial order shall set out the matters ruled upon. Any stipulations made shall be signed by counsel, approved by the court and filed, and shall be binding upon the parties at trial, on appeal, and in postconviction proceedings unless set aside or modified by the court.

[103] Partly replaces NRS 174.135.

Rule 27 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 28 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE V. VENUE

Rule 29 Disability/Disqualification Of A Judge

(a) **Disability After Start Of Trial.** If, by reason of death, sickness, or other disability, the judge before whom a trial has begun is unable to continue with the trial, any other judge of that court or any judge assigned by the Administrative Office of the Courts, upon certifying that the judge is familiar with the record of the trial, may, unless otherwise disqualified, proceed with and finish the trial, but if the assigned judge is satisfied that neither he nor another substitute judge can proceed with the trial, the judge may, in his discretion, grant a new trial.

(b) **Disability After Trial Completed, Prior To Sentencing.** If, by reason of death, sickness, or other disability, the judge before whom a defendant has been tried is unable to perform the duties required of the court after a verdict of guilty, any other judge of that district or township or any other judge assigned by the Administrative Office of the Courts may perform those duties.

(c) **Disqualification of Judge:**

1. Disqualification of a Judge is governed by NRS 1.230 *et. seq.* and the Nevada Code of Judicial Conduct ("NCJC"). The party seeking disqualification must file a Motion to Disqualify and shall comply with the provisions in Rule ** pertaining to Motions.
2. If a Motion to Disqualify is filed, the other parties to the action may not file an opposition to the motion and if any response is filed it will not be considered. The moving party need not file a Request to Submit for Decision. The motion will be submitted for decision upon filing in accordance with the NRS 1.235 and may be decided under the statutory provision in chapter 1 of the NRS or under NCJC.
3. Should the assigned judge file an answer in response to the Motion for Disqualification in accordance with NRS 1.235(6), no party is allowed to file a responsive pleading to the Answer filed by the judge.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 30 Change of Judge As A Matter of Right[104]

(a) **Notice of change.** In any criminal action commenced after July 1, 2019 in any district or justice court, all parties joined in the action may, by unanimous agreement and without cause, change the judge assigned to the action by filing a written notice of a peremptory challenge and request for change of judge.

(b) **Contents of Notice.** The parties shall send a copy of the notice to the assigned judge, and, in districts with more than one judge, to the presiding judge. The notice shall be signed by: The district attorney or assigned deputy district attorney; The Defendant(s) personally; and By each attorney appearing in the action as a representative of a defendant to the action. The notice shall state in separate clearly identified sections:

1. The name of the assigned judge;
2. The date on which the action was commenced through the filing of a complaint in the justice's court;
3. That all parties joined in the action have agreed to the change;
4. That no other persons are expected to be named as parties;
5. Either:
    i. The date of the advisement/arraignment of the charges on a misdemeanor in justice's court;
    ii. The date of the bindover/indictment on a felony or gross misdemeanor charge in a single judge district; or
    iii. The date of arraignment in a multiple judge district; and

That a good faith effort has been made to serve all parties named in the pleadings.

Failure to follow the exact requirements of this subsection renders the notice invalid and precludes any change of judge under this rule.

(c) **Restrictions.** The notice shall not specify any reason for the change of judge. Under no circumstances shall more than one change of judge be allowed under this rule in any action. A change of judge under this rule is available only after a judge has been assigned to the case for arraignment or for preliminary hearing. A notice of change may not be filed during a preliminary examination.

(d) **Time.** The notice shall be filed: (1) To remove the assigned justice of the peace: (i) Ten days after the filing in the Justice's Court of a complaint alleging a felony or gross misdemeanor charge; or (ii) Within ten calendar days after the arraignment on a misdemeanor in the justice's court; and (2) To remove the assigned district judge: (i) No later than fourteen (14) days after bind-over from justice's court to the district court, or the indictment, in a single judge district; and (ii) No later than ten (10) days after arraignment in a district with more than one judge. Failure to file a timely notice renders the notice invalid and precludes any change of judge under this rule.

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(e) **Assignment of Action.** Upon the filing of a timely, valid, and complete notice of change, the assigned judge shall take no further action in the case and shall transfer the case accordingly. If the assigned judge determines that the notice is invalid, the judge shall make specific findings as to the assigned judge's determination as to why the notice is invalid. The judge shall refer the matter for ruling as to whether the notice is invalid to another judge. In a single judge district court, the referral shall be to a consenting judge in another district. In multi-judge district court or justice's court, the matter shall be referred to another judge in either the district or township. In a single judge justice's court, the referral shall either be referred to the district judge or to a justice of the peace in another township. If the second judge determines that the notice is valid, the matter shall be assigned to another judge. If the second judge determines that the notice is invalid, the matter shall continue to be heard by the judge assigned prior to the notice being filed.

(f) **Nondisclosure to Court.** No party shall communicate to the court, or cause another to communicate to the court, the fact of any party's seeking consent to a notice of change.

(f) **Rule ** Unaffected.** This rule does not affect any rights under Rule **.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 31 Transfer of Venue

(a) **Transfer of Venue:** In the District Courts, if a party believes that a fair and impartial jury trial cannot be had in the court location or in the county where the action is pending, that party may move to have the trial of the case take place with a jury from another county or the case transferred to a court location in a county where a fair trial may be held.[105] Such motion may not be granted until after the voir dire examination of the jury has concluded and it is apparent to the court that the selection of a fair and impartial jury cannot be had in the county where the indictment, information or complaint is pending.[106]

(b) **Application for removal:** Making and service; hearing and determination in absence of defendant.[107]

1. The application for removal must be made in open court, and in writing, verified by the affidavit of the defendant or district attorney, and a copy of the affidavit must be served on the adverse party, at least 1 day prior to the hearing of the application.
2. The application may be supported or opposed by other affidavits or other evidence, or other witnesses may be examined in open court.
3. Whenever the affidavit of the defendant shows that the defendant cannot safely appear in person to make such application, because popular prejudice is so great as to endanger the defendant's personal safety, and such statement is sustained by other testimony, such application may be made by the defendant's attorney and must be heard and determined in the absence of the defendant, notwithstanding the charge then pending against the defendant be a felony, and the defendant has not, at the time of such application, been arrested or given bail, or been arraigned, or pleaded to the indictment or information.

(c) **Grounds.** The party seeking a change of venue must prove to the judge at a hearing on the motion, through competent and admissible evidence, that:

1. The community hosting the trial will not yield a jury qualified to deliberate impartially, and solely upon competent trial evidence, the guilt or innocence of the accused;[108]
2. The extent of inflammatory pretrial publicity and demonstrate that such publicity would corrupt the trial; and
3. Jurors harbor preconceived notions of guilt or innocence that existed prior to their call to jury service and that such notions cannot be set aside, and that the Jurors cannot fairly and impartially render a verdict based upon the trial evidence.[109]
4. If the court is satisfied that the evidence presented demonstrates that a change of jury pool or location is justified, the court shall enter an order transferring the case, or

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[105] NRS § 174.455 (1): A criminal action prosecuted by indictment, information or complaint may be removed from the court in which it is pending, on application of the defendant or state, on the ground that a fair and impartial trial cannot be had in the county where the indictment, information or complaint is pending.

[106] NRS § 174.455 (2): An application for removal of a criminal action shall not be granted by the court until after the voir dire examination has been conducted and it is apparent to the court that the selection of a fair and impartial jury cannot be had in the county where the indictment, information or complaint is pending.

[107] NRS 174.464.

[108] Ford v. State, 102 Nev. 126, 129, 717 P.2d 27, 29 (1986).

[109] Sonner v. State, 112 Nev. 1328, 1336, 903 P.2d 707, 712 (1996) (*citing* Rogers v. State, 101 Nev. 457, 462, 705 P.2d 664, 668 (1985).

selecting a jury from a county free from prejudice. If the court is not satisfied that the evidence demonstrates that a change of jury pool or location is justified, the court shall either enter an order denying the motion. or order a hearing to receive further evidence with respect to the alleged prejudice and resolve the matter.[110]

5. In the justice courts, if a party believes that a fair and impartial trial cannot be had in the court location or in the county where the action is pending, that party may move to have the trial of the case take place with a jury from another county or in a court location where a fair trial may be held. Such motion shall be supported by an affidavit setting forth facts. If the trial involves a jury, the rules applicable to the District Court should be followed.

(d) **Time for Filing.** A motion filed pursuant to this Rule 30 shall be filed not later than 14 days after the party learns or with the exercise of reasonable diligence should have learned of the grounds upon which the motion is based. If the party fails to allege facts and circumstances that would justify the Court in concluding that the motion was timely under this subsection, the Court may consider said failure in making a ruling on the Motion.

(e) **Entry of order of removal; transmittal of papers.**[111] The order of removal must be entered on the minutes, and the clerk must immediately make out and transmit to the court to which the action is removed a certified copy of the order of removal, record, pleadings, and proceedings in the action, including the undertakings for the appearance of the defendant and of the witnesses.

(f) **Proceedings on removal when defendant is in custody.**[112] If the defendant is in custody, the order must direct the defendant's removal and the defendant must be forthwith removed by the sheriff of the county where the defendant is imprisoned, to the custody of the sheriff of the county to which the action is removed.

(g) **Authority of court to which action is removed; transmission of original papers.**[113] The court to which the action is removed must proceed to trial and judgment therein as if the action had been commenced in such court. If it is necessary to have any of the original pleadings or other papers before such court, the court from which the action is removed must, at any time, on the application of the district attorney or the defendant, order such papers or pleadings to be transmitted by the clerk, a certified copy thereof being retained.

[110] NRS 174.475.
[111] NRS 174.485.
[112] NRS 174.495.
[113] NRS 174.505.

Rule 32 [Reserved]

Rule 33 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE VI. TRIAL

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 34 Time of Trial

(a) **Right of State to trial within 60 days after arraignment; exceptions.**[114] The State, upon demand, has the right to a trial of the defendant within 60 days after arraignment. The court may postpone the trial if:

1. It finds that more time is needed by the defendant to prepare a defense; or
2. The number of other cases pending in the court prohibits the acceptance of the case for trial within that time.

(b) **Postponement: When and how ordered; court may require depositions of and undertakings by witnesses; court may consider adverse effect upon child who is victim or witness.**[115]

1. When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party by affidavit, direct the trial to be postponed to another day. In all cases where a continuance is granted upon the application of either party the court may require, as a condition of granting such continuance, that the party applying therefor consent to taking, forthwith, or at any time to be fixed by the court, of the deposition of any witness summoned by the opposite party whose deposition has not previously been taken.
2. The court also may require all witnesses to enter into undertakings in such sum as the court may order, with or without sureties, to appear and testify on the day to which the case may be continued, but any witness who is unable to procure sureties for the witness's attendance may be discharged on the witness's own recognizance, upon giving a deposition in the manner prescribed in NRS 174.175 and 174.205.
3. If the trial involves acts committed against a child less than 16 years of age or involving acts witnessed by a child less than 16 years of age, the court may consider any adverse effect a continuance or other postponement might have upon the mental or emotional health or well-being of the child. The court may deny a continuance or other postponement if the delay will adversely affect the mental or emotional health or well-being of the child.

(c) **Request for preference in setting date for trial where child is victim or witness; court may consider effect on child of delay in commencement of trial.**[116] If the trial involves acts committed against a child less than 16 years of age or involving acts witnessed by a child less than 16 years of age, the prosecuting attorney shall request the court, in its discretion, to give preference in setting a date for the trial of the defendant. In making a ruling, the court may consider the effect a delay in the commencement of the trial might have on the mental or emotional health or well-being of the child.

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[114] NRS 174.511.
[115] NRS 174.515.
[116] NRS 174.519.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 35 Selection Of The Jury

(a) **Trial by Jury.**[117]

1. In a district court, cases required to be tried by jury must be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State. A defendant who pleads not guilty to the charge of a capital offense must be tried by jury.
2. In a Justice Court, a case must be tried by jury only if the defendant so demands in writing not less than 30 days before trial. Except as otherwise provided in NRS 4.390 and 4.400, if a case is tried by jury, a reporter must be present who is a certified court reporter and shall report the trial.

(b) **Formation of jury; number of jurors.**[118]

1. Trial juries for criminal actions are formed in the same manner as trial juries in civil actions.[119]
2. Except as provided in subsection 3, juries must consist of 12 jurors, but at any time before verdict, the parties may stipulate in writing with the approval of the court that the jury consist of any number less than 12 but not less than six.
3. Juries must consist of six jurors for the trial of a criminal action in a Justice Court.

(c) **Examination of trial jurors.**[120] The court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and then the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted. Examination may be limited by the Court to issues regarding grounds for disqualification.

(d) **Challenges for cause for individual jurors: Grounds; trial of challenge.**[121]

1. Either side may challenge an individual juror for disqualification or for any cause or favor which would prevent the juror from adjudicating the facts fairly, including:[122]
    i. Want of any of the qualifications prescribed by law.
    ii. Any mental or physical infirmity which renders one incapable of performing the duties of a juror.
    iii. Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged, or on whose complaint the prosecution was instituted.
    iv. The existence of any social, legal, business, fiduciary or other relationship between the prospective juror and any party, witness or person alleged to have been victimized or injured by the defendant, which relationship when viewed objectively, would suggest to reasonable minds that the prospective juror would be unable or unwilling to return a verdict which would be free of favoritism. A

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117 NRS 175.011.
118 NRS 175.021.
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120 NRS 175.031.
121 NRS 175.036.
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prospective juror shall not be disqualified solely because the juror is indebted to or employed by the state or a political subdivision thereof.

v. Having been or being the party adverse to the defendant in a civil action, or having complained against or having been accused by the defendant in a criminal prosecution.
vi. Having served on the grand jury which found the indictment.
vii. Having served on a trial jury which has tried another person for the particular offense charged.
viii. Having been one of a jury formally sworn to try the same charge, and whose verdict was set aside, or which was discharged without a verdict after the case was submitted to it.
ix. Having served as a juror in a civil action brought against the defendant for the act charged as an offense.
x. If the offense charged is punishable with death, the juror's views on capital punishment would prevent or substantially impair the performance of the juror's duties as a juror in accordance with the instructions of the court and the juror's oath in subsection (*).
xi. Because the juror is or, within one year preceding, has been engaged or interested in carrying on any business, calling or employment, the carrying on of which is a violation of law, where defendant is charged with a like offense.
xii. Because the juror has been a witness, either for or against the defendant on the preliminary examination or before the grand jury.
xiii. Having formed or expressed an unqualified opinion or belief as to whether the defendant is guilty or not guilty of the offense charged.
xiv. Conduct, responses, state of mind or other circumstances that reasonably lead the court to conclude the juror is not likely to act impartially. No person may serve as a juror, if challenged, unless the judge is convinced the juror can and will act impartially and fairly.

2. Challenges for cause shall be tried by the court. The juror challenged and any other person may be examined as a witness on the trial of the challenge. Challenges for cause shall be completed before peremptory challenges are taken.

(e) **Limitation of defendants' right to sever in challenges.**[123] When several defendants are tried together, they cannot sever their peremptory challenges, but must join therein.

(f) **Number of peremptory challenges.**[124] A peremptory challenge is an objection to a juror for which no reason need be given. If there is more than one defendant the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

1. If the offense charged is punishable by death or by imprisonment for life, each side is entitled to eight peremptory challenges.
2. If the offense charged is punishable by imprisonment for any other term or by fine or by both fine and imprisonment, each side is entitled to four peremptory challenges.
3. The State and the defendant shall exercise their challenges alternately, in that order. Any challenge not exercised in its proper order is waived.

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123 NRS 175.041.
124 NRS 175.051.

(g) **Alternate jurors.**[125]

1. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors.
2. Alternate jurors, in the order in which they were called, shall replace jurors who become unable or disqualified to perform their duties.
3. Alternate jurors shall:
    i. Be drawn in the same manner;
    ii. Have the same qualifications;
    iii. Be subject to the same examination and challenges;
    iv. Take the same oath; and
    v. Have the same functions, powers, facilities and privileges, as the regular jurors.
4. If an alternate juror is required to replace a regular juror after the jury has retired to consider its verdict, the judge shall recall the jury, seat the alternate and resubmit the case to the jury.
5. Each side is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by statute may not be used against an alternate juror.

(h) **Oath of jurors.**[126] When the jury has been impaneled, the court shall administer the following oath:

Do you and each of you solemnly swear that you will well and truly try this case, now pending before this court, and a true verdict render according to the evidence given, so help you God.

(i) **Personal knowledge of jurors.**[127]

1. The judge shall then admonish the jury that:
    i. No juror may declare to any fellow jurors any fact relating to the case as of the juror's own knowledge; and
    ii. If any juror discovers during the trial or after the jury has retired that he or she or any other juror has personal knowledge of any fact in controversy in the case, the juror shall disclose such situation to the judge out of the presence of the other jurors.
2. When any such disclosure is made, the judge shall examine the juror who admits or is alleged to have personal knowledge, under oath, in the presence of counsel for the parties, and may allow such counsel to examine the juror.
3. If the juror has disclosed the juror's own knowledge to the judge and it appears that the juror has not declared any fact relating to the case to any fellow jurors as of the juror's own knowledge, the judge shall after the examination decide whether the juror shall remain or shall be replaced by an alternate juror.

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[125] NRS 175.061.
[126] NRS 175.111.
[127] NRS 175.121.

4. If it appears that the juror has declared any fact relating to the case to any fellow jurors as of the juror's own knowledge, or that the juror's vote was influenced by such knowledge undisclosed, the judge shall declare a mistrial.

(j) **Judge to inform jury of right to take notes.**[128] Before any evidence has been introduced the judge may inform the jury they may individually take notes during the trial, but the judge shall further caution them not to rely upon their respective notes in case of conflict among them, because the reporter's notes contain the complete and authentic record of the trial.

(k) **Discharge of juror where juror dies or unable to perform duty.**[129] If, before the conclusion of the trial, and there being no alternate juror called or available, a juror dies, or becomes disqualified or unable to perform the juror's duty, the court may duly order the juror to be discharged and a new juror may be sworn and the trial begun anew, or the jury may be discharged and a new jury then or afterward impaneled.

(l) **Discharge of jury after retirement upon accident or cause.**[130] If, after the retirement of the jury, any accident or cause occurs to prevent their being kept for deliberation, the jury may be discharged.

[128] NRS 175.131.
[129] NRS 175.071.
[130] NRS 175.081.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 36 The Trial

(a) **Defendant's Presence.**[131] In all cases the defendant shall have the right to appear and defend in person and by counsel. The defendant shall be personally present at the trial with the following exceptions:

1. In prosecutions of misdemeanors and infractions, the defendant may consent in writing to trial in his absence;
2. In prosecutions for offenses not punishable by death, the defendant's voluntary absence from the trial after notice to defendant of the time for trial shall not prevent the case from being tried and a verdict or judgment entered therein shall have the same effect as if defendant had been present; and
3. The court may exclude or excuse a defendant from trial for good cause shown which may include tumultuous, riotous, or obstreperous conduct.

Upon application of the prosecution, the court may require the personal attendance of the defendant at the trial.

(b) **Calendar Priorities.**[132] Cases shall be set on the trial calendar to be tried in the following order:

1. misdemeanor cases when defendant is in custody;
2. felony cases when defendant is in custody;
3. felony cases when defendant is on bail or recognizance; and
4. misdemeanor cases when defendant is on bail or recognizance.

(c) **Order of trial.**[133] The jury having been impaneled and sworn, the trial shall proceed in the following order:

1. If the indictment or information be for a felony or gross misdemeanor, the clerk must read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with.
2. The district attorney, or other counsel for the State, must open the cause. The defendant or the defendant's counsel may then either make the defendant's opening statement or reserve it to be made immediately prior to the presentation of evidence in the defendant's behalf.
3. The State must then offer its evidence in support of the charge, and the defendant may then offer evidence in his or her defense.
4. The parties may then respectively offer rebutting testimony only, unless the court, for good reasons, in furtherance of justice, permit them to offer evidence upon their original cause.
5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney, or other counsel for the State, must open and must conclude the argument.

(d) **Number of counsel who may argue case.**[134] If the indictment or information be for an offense punishable with death, two counsel on each side may argue the case to the jury, but in such case, as

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133 NRS 175.141.

134 NRS 175.151.

well as in all others, the counsel for the State must open and conclude the argument. If it be for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side.

(e) **Presumption of innocence: Acquittal in case of reasonable doubt.**[135] A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant is entitled to be acquitted.

(f) **Presumption of innocence: Conviction of lowest degree of offense.**[136] Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against the person, and there exists a reasonable doubt as to which of two or more degrees the person is guilty, the person shall be convicted only of the lowest.

(g) **Definition of reasonable doubt; no other definition to be given to juries.**[137] **The jury must be instructed on the definition of reasonable doubt.**

1. ***Definition of Reasonable Doubt***: A reasonable doubt is one based on reason. It is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.
2. No other definition of reasonable doubt may be given by the court to juries in criminal actions in this State.

(h) **Evidence.**[138]

1. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute.
2. The admissibility of evidence and the competency and privileges of witnesses shall be governed by:
    i. The general provisions of title 4 of NRS;
    ii. The Rules of Evidence;
    iii. The specific provisions of any other applicable statute; and
    iv. Where no statute applies, the principles of the common law as they may be interpreted by the courts of the State of Nevada in the light of reason and experience.

(i) **Proof of corporate existence generally.**[139] If, upon a trial or proceeding in a criminal case, the existence, constitution or powers of any corporation shall become material, or be in any way drawn in question, it is not necessary to produce a certified copy of the articles or acts of incorporation, but the same may be proved by general reputation, or by the printed statutes of the state, or government, or country by which such corporation was created.

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135 NRS 175.191.
136 NRS 175.201.
137 NRS 175.211.
138 NRS 175.221.
139 NRS 175.241.

(j) **Conspiracy: Allegation and proof of overt act; evidence of overt acts not alleged.**[140] Upon a trial for conspiracy, in a case where an overt act shall be necessary to constitute the offense, the defendant shall not be convicted unless one or more overt acts shall be expressly alleged in the indictment or information, nor unless one of the acts alleged shall have been proved; but other overt acts not alleged may be given in evidence.

(k) **False pretenses: What evidence necessary.**[141] Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, obtained the signature of any person, to a written instrument, or having obtained from any person any money, personal property, or valuable thing, the defendant shall not be convicted if the false pretense shall have been expressed in language, unaccompanied by a false token or writing, unless the pretense or some note or memorandum thereof be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense be proved by the testimony of two witnesses, or that of one witness and corroborating circumstances; but this section shall not apply to a prosecution for falsely representing or personating another, and, in such assumed character, marrying, or receiving any money or property.

(l) **Plea bargain: Inspection by jury; instruction of jury; cross-examination of defendant.**[142] If a prosecuting attorney enters into an agreement with a defendant in which the defendant agrees to testify against another defendant in exchange for a plea of guilty, guilty but mentally ill or nolo contendere to a lesser charge or for a recommendation of a reduced sentence, the court shall:

1. After excising any portion it deems irrelevant or prejudicial, permit the jury to inspect the agreement;
2. If the defendant who is testifying has not entered a plea or been sentenced pursuant to the agreement, instruct the jury regarding the possible related pressures on the defendant by providing the jury with an appropriate cautionary instruction; and
3. Allow the defense counsel to cross-examine fully the defendant who is testifying concerning the agreement.

(m) **Testimony of accomplice must be corroborated; sufficiency of corroboration; accomplice defined.**[143]

1. A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.
2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

(n) **Testimony of person upon or with whom abortion was allegedly committed.**[144] Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, the defendant must

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[140] NRS 175.251.
[141] NRS 175.261.
[142] NRS 175.282.
[143] NRS 175.291.
[144] NRS 175.301.

not be convicted upon the testimony of the person upon or with whom the offense has allegedly been committed, unless:

1. The testimony of that person is corroborated by other evidence; or
2. The person giving the testimony is, and was at the time the crime is alleged to have taken place, a police officer or deputy sheriff who was performing his or her duties as such.

(o) **Procedure when higher offense is shown by evidence.**[145] If it appears by the testimony that the facts proved constitute an offense of a higher nature than that charged in the indictment or information, the court may direct the jury to be discharged, and all proceedings on the indictment or information to be suspended, and may order the defendant to be committed, or continued on, or admitted to bail, to answer any new indictment or information which may be found or filed against the defendant for the higher offense.

(p) **Procedure if higher offense ignored.**[146] If an indictment for the higher offense be dismissed by the grand jury, or be not found at its next session, or if an information be not filed before the next session of the grand jury, the court shall again proceed to try the defendant on the original indictment or information.

(q) **When defendant on bail appears for trial defendant may be committed and held.**[147] When a defendant who has given bail appears for trial, the court may, in its discretion, at any time after the defendant's appearance for trial, order the defendant to be committed to the custody of the proper officer, to abide the judgment or further order of the court, and the defendant must be committed and held in custody accordingly.

(r) **Mistake in charging proper offense: Defendant not discharged; commitment or bail.**[148] When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant must not be discharged, if there appears good cause to detain the defendant in custody; but the court must commit the defendant, or require the defendant to give bail for his or her appearance to answer to the offense; and may also require the witnesses to give bail for their appearance.

(s) **Discharge of defendant when jury discharged for want of jurisdiction.**[149] If the jury is discharged because the court has not jurisdiction of the offense charged, and it appears that it was committed out of the jurisdiction of this state, the defendant must be discharged, unless the court orders that the defendant be detained for a reasonable time, to be specified in the order, to enable the district attorney to communicate with the chief executive officer of the country, state, territory or district where the offense was committed.

(t) **Offense committed in other county: Commitment to await warrant; admission to bail; transmittal of papers to district attorney of proper county; expense of transmission.**[150] If the offense was committed within the jurisdiction of another county of this state, the court may direct the defendant to be committed for such time as it deems reasonable, to await a warrant from the

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145 NRS 175.311.
146 NRS 175.321.
147 NRS 175.331.
148 NRS 175.341.
149 NRS 175.351.
150 NRS 175.361.

proper county for the defendant's arrest, or it may admit the defendant to bail in an undertaking, with sufficient sureties that the defendant will, within such time as the court may appoint, render himself or herself amenable to a warrant for arrest from the proper county; and, if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a certain time particularly specified in the undertaking, to surrender himself or herself upon the warrant, if issued, or that the defendant's bail will forfeit such sum as the court may fix, to be mentioned in the undertaking; and the clerk must forthwith transmit a certified copy of the indictment or information, and of all the papers filed in the action, to the district attorney of the proper county, the expenses of which transmission are chargeable to that county.

(u) **Discharge where defendant not arrested on warrant from other county; proceedings in case of arrest.**[151]

1. If the defendant is not arrested on a warrant from the proper county, as provided in NRS 175.361, the defendant must be discharged from custody, or the defendant's bail in the action is exonerated, or money deposited instead of bail must be refunded, as the case may be, and the sureties in the undertaking, as mentioned in that section, must be discharged.
2. If the defendant is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county on a warrant issued by a magistrate.

(v) **Court may advise jury to acquit defendant when evidence on either side closed; motion for judgment of acquittal after verdict of guilty or guilty but mentally ill; subsequent motion for new trial.**[152]

1. If, at any time after the evidence on either side is closed, the court deems the evidence insufficient to warrant a conviction, it may advise the jury to acquit the defendant, but the jury is not bound by such advice.
2. The court may, on a motion of a defendant or on its own motion, which is made after the jury returns a verdict of guilty or guilty but mentally ill, set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. The motion for a judgment of acquittal must be made within 7 days after the jury is discharged or within such further time as the court may fix during that period.
3. If a motion for a judgment of acquittal after a verdict of guilty or guilty but mentally ill pursuant to this section is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed. The court shall specify the grounds for that determination. If the motion for a new trial is granted conditionally, the order thereon does not affect the finality of the judgment. If the motion for a new trial is granted conditionally and the judgment is reversed on appeal, the new trial must proceed unless the appellate court has otherwise ordered. If the motion is denied conditionally, the defendant on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings must be in accordance with the order of the appellate court.

(w) **Withdrawal, discharge or change of defense counsel; limitations.**[153] If a counsel seeks to withdraw from the case or is discharged by the defendant for the purpose of delaying the trial, the

[151] NRS 175.371.
[152] NRS 175.381.
[153] NRS 175.383.

court shall not allow the counsel to be changed. The counsel for a defendant may not be changed after a trial has commenced except upon good cause shown to the court.

(x) **Misconduct of defendant; sanctions.**[154]

1. Whenever a defendant interferes with the orderly course of a trial by disruptive, disorderly or disrespectful conduct, the court may:
    i. Order the defendant bound and gagged.
    ii. Cite the defendant for contempt.
    iii. Order the defendant removed from the courtroom and proceed with the trial.
2. No such order or citation shall issue except after the defendant has been fully and fairly informed that the defendant's conduct is wrong and intolerable and has been warned of the consequences of continued misconduct.
3. A defendant who has been removed from the courtroom may be returned upon the defendant's promise to discontinue such misconduct. If the defendant's misconduct continues after the defendant's return the court may proceed as provided in subsection 1.

[154] NRS 175.387.

Rule 37 Conduct of the Jury

1. **Separation or custody of jury before submission.**[155] The jurors sworn to try a criminal action may, at any time before the submission of the case to the jury, in the discretion of the court, be permitted to separate, depart for home overnight or be kept in charge of a proper officer. Upon commencing deliberation, the jurors shall be kept in charge of a proper officer, unless at the discretion of the court they are permitted to depart for home overnight. When the jurors are kept together, the officer in charge shall keep the jurors in some private and convenient place and separate from other persons. The officer shall not permit any communication to be made to them, or make any personally, unless by order of the court, except to ask them if they have agreed upon their verdict. The officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon. The officer shall return them into court when they have reached their verdict or when ordered by the court.

2. **Jury to be admonished at each adjournment.**[156] At each adjournment of the court, whether the jurors are permitted to separate or depart for home overnight, or are kept in charge of officers, they must be admonished by the judge or another officer of the court that it is their duty not to:

1. Converse among themselves or with anyone else on any subject connected with the trial;
2. Read, watch or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information, including without limitation newspapers, television and radio; or
3. If they have not been charged, form or express any opinion on any subject connected with the trial until the cause is finally submitted to them.

3. **Accommodations for jury upon retirement; power of court to furnish.**[157] A room shall be provided by the sheriff of each county for the use of the jury upon their retirement for deliberation, with suitable furniture, fuel, lights and stationery, unless such necessaries have been already furnished by the county. The court may order the sheriff to do so, and the expenses incurred by the sheriff in carrying the order into effect, when certified by the court, shall be a county charge.

4. **Jury provided food and lodging when kept together.**[158] While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, they shall be provided, at the expense of the county, with suitable and sufficient food and lodging.

5. **Questions by jurors.**[159] A judge may invite jurors to submit written questions to a witness as provided in this section.

1. If the judge permits jurors to submit questions, the judge shall control the process to ensure the jury maintains its role as the impartial finder of fact and does not become an investigative body. The judge may disallow any question from a juror and may discontinue questions from jurors at any time.

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155 NRS 175.391.
156 NRS 175.401.
157 NRS 175.431.
158 NRS 175.421.
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2. If the judge permits jurors to submit questions, the judge should advise the jurors that they may write the question as it occurs to them and submit the question to the bailiff for transmittal to the judge. The judge should advise the jurors that some questions might not be allowed.
3. The judge shall review the question with counsel and unrepresented parties and rule upon any objection to the question. The judge may disallow a question even though no objection is made. The judge shall preserve the written question in the court file. If the question is allowed, the judge shall ask the question or permit counsel or an unrepresented party to ask it. The question may be rephrased into proper form. The judge shall allow counsel and unrepresented parties to examine the witness after the juror's question.

6. **Jury may take written instructions, materials received in evidence, certain papers and own notes of trial on retiring for deliberation.**[160] Upon retiring for deliberation, the jury may take with them:

1. All papers and all other items and materials which have been received as evidence in the case, except depositions or copies of such public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession.
2. The written instructions given, and notes of the testimony or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person.

(f) **Juries visiting off-site places.**[161] When in the opinion of the court it is proper for the jury to view the place in which the offense is alleged to have been committed, or in which any other material fact occurred, it may order them to be conducted in a body under the charge of an officer to the place, which shall be shown to them by some person appointed by the court for that purpose. The officer shall be sworn that while the jury are thus conducted, the officer will suffer no person other than the person so appointed to speak to them nor shall the officer speak to the jury on any subject connected with the trial and to return them into court without unnecessary delay or at a specified time. The judge and all parties shall attend any on-site visits with the jury.

(g) **Admonition prior to recess.**[163] At each recess of the court, whether the jurors are permitted to separate or are sequestered, they shall be admonished by the court that it is their duty not to converse among themselves or to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial, and that it is their duty not to form or express an opinion thereon until the case is finally submitted to them.

(h) **Return of jury for information.**[163] After the jury have retired for deliberation, if there is any disagreement between them as to any part of the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the district attorney and the defendant or the defendant's counsel.

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160 NRS 175.441.

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163 NRS 175.451.

(i) **Deliberations.**[164] Upon retiring for deliberation, the jury may take with them the instructions of the court and all exhibits which have been received as evidence, except exhibits that should not, in the opinion of the court, be in the possession of the jury, such as exhibits of unusual size, weapons or contraband. The court shall permit the jury to view exhibits upon request. Jurors are entitled to take notes during the trial and to have those notes with them during deliberations. As necessary, the court shall provide jurors with writing materials and instruct the jury on taking and using notes.

(j) **Jury under officer's charge.**[165] When the case is finally submitted to the jury, they shall be kept together in some convenient place under charge of an officer until they agree upon a verdict or are discharged, unless otherwise ordered by the court. Except by order of the court, the officer having them under the officer's charge shall not allow any communication to be made to them, nor shall the officer speak to the jury except to ask them if they have agreed upon their verdict, and the officer shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

(k) **Juror questions during deliberations.**[166] After the jury has retired for deliberation, if they desire to be informed on any point of law arising in the cause, they shall inform the officer in charge of them, who shall communicate such request to the court. The court may then direct that the jury be brought before the court where, in the presence of the defendant and both counsel, the court shall respond to the inquiry or advise the jury that no further instructions shall be given. Such response shall be recorded. The court may in its discretion respond to the inquiry in writing without having the jury brought before the court, in which case the inquiry and the response thereto shall be entered in the record.

(l) **Jury not to be discharged after cause submitted; exceptions.**[167] Except as provided in NRS 175.081, the jury shall not be discharged after the cause is submitted to them, until they have agreed upon their verdict and rendered it in open court, unless by the consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.

(m) **Incorrect verdict.**[168] If the verdict rendered by a jury is incorrect on its face, it may be corrected by the jury under the advice of the court, or the jury may be sent out again.

(n) **Directed verdict.**[169] At the conclusion of the evidence by the prosecution, or at the conclusion of all the evidence, the court may issue an order dismissing any information or indictment, or any count thereof, upon the ground that the evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

(o) **Adjournment of court during absence of jury.**[170] While the jury are absent, the court may adjourn from time to time, as to other business, but it shall nevertheless be deemed to be open for every purpose connected with the cause submitted to the jury, until a verdict be rendered or the jury discharged.

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167 NRS 175.461.

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170 NRS 175.471.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 38 Expert Witnesses And Interpreters

(a) **Expert witnesses.**[171] The court may appoint any expert witness agreed upon by the parties or of its own selection. An expert so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed. An expert so appointed shall advise the court and the parties of his findings and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court shall determine the reasonable compensation of the expert and direct payment thereof. The parties may call expert witnesses of their own at their own expense. Upon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, the witness fee shall be paid as if he were called on behalf of the prosecution.

(b) **Interpreters.**[172] The court may appoint an interpreter of its own selection and shall determine reasonable compensation and direct payment thereof. The court may allow counsel to question the interpreter before he is sworn to discharge the duties of an interpreter.

[171] Replaces NRS 175.271.

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Rule 39 Out Of Court Statement And Testimony Of Child Victims Or Child Witnesses Of Sexual Or Physical Abuse - Conditions Of Admissibility

(a) **Previously recorded statements.**[173] In any case concerning a charge of child abuse or of a sexual offense against a child, the oral statement of a victim or other witness younger than 14 years of age which was recorded prior to the filing of an information or indictment is, upon motion and for good cause shown, admissible as evidence in any court proceeding regarding the offense if all of the following conditions are met:

1. the child is available to testify and to be cross-examined at trial, either in person or as provided by law, or the child is unavailable to testify at trial, but the defendant had a previous opportunity to cross-examine the child concerning the recorded statement, such that the defendant's rights of confrontation are not violated;
2. no attorney for either party is in the child's presence when the statement is recorded;
3. the recording is visual and aural and is recorded on film, videotape or other electronic means;
4. the recording is accurate and has not been altered;
5. each voice in the recording is identified;
6. the person conducting the interview of the child in the recording is present at the proceeding and is available to testify and be cross-examined by either party;
7. the defendant and his attorney are provided an opportunity to view the recording before it is shown to the court or jury; and
8. the court views the recording before it is shown to the jury and determines that it is sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence.

(b) **Remote transmission of testimony.**[174] In a criminal case concerning a charge of child abuse or of a sexual offense against a child, the court, upon motion of a party and for good cause shown, may order that the testimony of any victim or other witness younger than 14 years of age be taken in a room other than the court room, and be televised by closed circuit equipment to be viewed by the jury in the court room. All of the following conditions shall be observed:

1. Only the judge, attorneys for each party and the testifying child (if any), persons necessary to operate equipment, and a counselor or therapist whose presence contributes to the welfare and emotional well-being of the child may be in the room during the child's testimony. A defendant who consents to be hidden from the child's view may also be present unless the court determines that the child will suffer serious emotional or mental strain if required to testify in the defendant's presence, or that the child's testimony will be inherently unreliable if required to testify in the defendant's presence. If the court makes that determination, or if the defendant consents:
    i. the defendant may not be present during the child's testimony;
    ii. the court shall ensure that the child cannot hear or see the defendant;
    iii. the court shall advise the child prior to his testimony that the defendant is present at the trial and may listen to the child's testimony;

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iv. the defendant shall be permitted to observe and hear the child's testimony, and the court shall ensure that the defendant has a means of two-way telephonic communication with his attorney during the child's testimony; and

v. the conditions of a normal court proceeding shall be approximated as nearly as possible.

2. Only the judge and an attorney for each party may question the child.
3. As much as possible, persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror so the child cannot see or hear them.
4. If the defendant is present with the child during the child's testimony, the court may order that persons operating the closed circuit equipment film both the child and the defendant during the child's testimony, so that the jury may view both the child and the defendant, if that may be arranged without violating other requirements of Subsection (b)(1).

(c) **Remote recording of testimony.**[175] In any criminal case concerning a charge of child abuse or of a sexual offense against a child, the court may order, upon motion of a party and for good cause shown, that the testimony of any victim or other witness younger than 14 years of age be taken outside the courtroom and be recorded. That testimony is admissible as evidence, for viewing in any court proceeding regarding the charges if the provisions of Subsection (b) are observed, in addition to the following provisions:

1. the recording is visual and aural and recorded on film, videotape or by other electronic means;
2. the recording is accurate and is not altered;
3. each voice on the recording is identified; and
4. each party is given an opportunity to view the recording before it is shown in the courtroom.

(d) **Presence of child when recording is used.**[176] If the court orders that the testimony of a child be taken under Subsection (b) or (c), the child may not be required to testify in court at any proceeding where the recorded testimony is used.

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Rule 40 Instructions

(a) **Instructions before opening statements.**[177] After the jury is sworn and before opening statements, the court may instruct the jury concerning the jurors' duties and conduct, the order of proceedings, the elements and burden of proof for the alleged crime, and the definition of terms. The court may instruct the jury concerning any matter stipulated to by the parties and agreed to by the court and any matter the court in its discretion believes will assist the jurors in comprehending the case. Preliminary instructions shall be in writing and a copy provided to each juror. At the final pretrial conference or at such other time as the court directs, a party may file a written request that the court instruct the jury on the law as set forth in the request. The court shall inform the parties of its action upon a requested instruction prior to instructing the jury, and it shall furnish the parties with a copy of its proposed instructions, unless the parties waive this requirement.

(b) **Instructions during trial.**[178] During the course of the trial, the court may instruct the jury on the law if the instruction will assist the jurors in comprehending the case. Prior to giving the written instruction, the court shall advise the parties of its intent to do so and of the content of the instruction. A party may request an interim written instruction.

(c) **Instructions at the close of trial.**[179]

1. Upon the close of the argument, the judge shall charge the jury. The judge may state the testimony and declare the law, but may not charge the jury in respect to matters of fact. The charge must be reduced to writing before it is given, and no charge or instructions may be given to the jury otherwise than in writing, unless by the mutual consent of the parties. If either party requests it, the court must settle and give the instructions to the jury before the argument begins, but this does not prevent the giving of further instructions which may become necessary by reason of the argument.
2. In charging the jury, the judge shall state to them all such matters of law the judge thinks necessary for their information in giving their verdict.
3. Either party may present to the court any written charge, and request that it be given. If the court believes that the charge is pertinent and an accurate statement of the law, whether or not the charge has been adopted as a model jury instruction, it must be given. If the court believes that the charge is not pertinent or not an accurate statement of law, then it must be refused.
4. An original and one copy of each instruction requested by any party must be tendered to the court. The copies must be numbered and indicate who tendered them. Copies of instructions given on the court's own motion or modified by the court must be so identified. When requested instructions are refused, the judge shall write on the margin of the original the word "refused" and initial or sign the notation. The instructions given to the jury must be firmly bound together and the judge shall write the word "given" at the conclusion thereof and sign the last of the instructions to signify that all have been given. After the instructions are given, the judge may not clarify, modify or in any

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179 NRS 175.161.

manner explain them to the jury except in writing unless the parties agree to oral instructions.

5. After the jury has reached a verdict and been discharged, the originals of all instructions, whether given, modified or refused, must be preserved by the clerk as part of the proceedings.
6. Conferences with counsel to settle instructions must be held out of the presence of the jury and may be held in chambers at the option of the court.
7. When the offense charged carries a possible penalty of life without possibility of parole a charge to the jury that such penalty does not exclude executive clemency is a correct and pertinent charge, and must be given upon the request of either party.

(d) **No special instructions to be given relating exclusively to defendant's testimony.**[180] In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offenses, the person so charged shall, at the person's own request, but not otherwise, be deemed a competent witness, the credit to be given the person's testimony being left solely to the jury, under the instructions of the court, but no special instruction shall be given relating exclusively to the testimony of the defendant.

(e) **Restriction on comments of evidence.**[181] The court shall not comment on the evidence in the case, and if the court refers to any of the evidence, it shall instruct the jury that they are the exclusive judges of all questions of fact.

(f) **Instruction not to be given relative to failure of defendant to testify.**[182]

1. No instruction shall be given relative to the failure of the person charged with the commission of crime or offense to testify, except, upon the request of the person so charged, the court shall instruct the jury that, in accordance with a right guaranteed by the Constitution, no person can be compelled, in a criminal action, to be a witness against himself or herself.
2. Nothing herein contained shall be construed as compelling any such person to testify.

(g) **Instructions in prosecution for sexual assault or statutory sexual seduction: Use of certain terms and instructions prohibited.**[188]

1. In any prosecution for sexual assault or statutory sexual seduction or for an attempt to commit or conspiracy to commit either crime, the term "unchaste character" may not be used with reference to the alleged victim of the crime in any instruction to the jury.
2. In a prosecution for sexual assault or statutory sexual seduction, the court may not give any instructions to the jury to the effect that it is difficult to prove or establish the crime beyond a reasonable doubt.

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180 NRS 175.171.

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182 NRS 175.181.

183 NRS 175.186.

Rule 41 Verdict

(a) **Return.**[184] The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) **Verdict where there are several defendants.**[185] If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) **Jury may convict of lesser included offense or attempt.**[186] The defendant may be found guilty or guilty but mentally ill of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) **When offenses to be stated separately.**[187] When the defendant may be convicted of more than one offense charged, each offense of which the defendant is convicted must be stated in the verdict or the finding of the court.

(e) **Polling jury; further deliberation or discharge.**[188] When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

(g) **Acquittal.**[189] If judgment of acquittal is given on a verdict or the case is dismissed and the defendant is not detained for any other legal cause, he shall be discharged as soon as the judgment is given. If a verdict of guilty is returned, the court may order the defendant to be taken into custody to await judgment on the verdict or may permit the defendant to remain on bail.

(f) **Notice to defendant of provisions concerning sealing of records of proceedings leading to acquittal.**[190] Upon the entry of a judgment of acquittal, the court shall provide the defendant with a written notice of the provisions of NRS 179.255 which concern the sealing of records of the proceedings leading to the acquittal.

(g) **Finding of guilty but mentally ill upon plea of not guilty by reason of insanity; required findings; effect of finding.**[191]

1. During a trial, upon a plea of not guilty by reason of insanity, the trier of fact may find the defendant guilty but mentally ill if the trier of fact finds all of the following:
    i. The defendant is guilty beyond a reasonable doubt of an offense;

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184 NRS 175.481.
185 NRS 175.491.
186 NRS 175.501.
187 NRS 175.511.
188 NRS 175.531.
189 Replaces NRS 175.541.
190 NRS 175.543.
191 NRS 175.533.

ii. The defendant has established by a preponderance of the evidence that due to a disease or defect of the mind, the defendant was mentally ill at the time of the commission of the offense; and
iii. The defendant has not established by a preponderance of the evidence that the defendant is not guilty by reason of insanity pursuant to subsection 6 of NRS 174.035.

2. Except as otherwise provided by specific statute, a defendant who is found guilty but mentally ill is subject to the same criminal, civil and administrative penalties and procedures as a defendant who is found guilty.
3. If the trier of fact finds a defendant guilty but mentally ill pursuant to subsection 1, the court shall cause, within 5 business days after the finding, on a form prescribed by the Department of Public Safety, a record of the finding to be transmitted to the Central Repository for Nevada Records of Criminal History, along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System.
4. As used in this section:
   i. "Disease or defect of the mind" does not include a disease or defect which is caused solely by voluntary intoxication.
   ii. "National Instant Criminal Background Check System" has the meaning ascribed to it in NRS 179A.062.

(h) Acquittal by reason of insanity: Defendant to be examined; hearing to be held to determine whether defendant is mentally ill; procedure for committing defendant to custody of Division of Public and Behavioral Health.[192]

1. Where on a trial a defense of insanity is interposed by the defendant and the defendant is acquitted by reason of that defense, the finding of the jury pending the judicial determination pursuant to subsection 2 has the same effect as if the defendant were regularly adjudged insane, and the judge must:
   i. Order a peace officer to take the person into protective custody and transport the person to a forensic facility for detention pending a hearing to determine the person's mental health;
   ii. Order the examination of the person by two psychiatrists, two psychologists, or one psychiatrist and one psychologist who are employed by a division facility; and
   iii. At a hearing in open court, receive the report of the examining advisers and allow counsel for the State and for the person to examine the advisers, introduce other evidence and cross-examine witnesses.
2. If the court finds, after the hearing:
   i. That there is not clear and convincing evidence that the person is a person with mental illness, the court must order the person's discharge; or
   ii. That there is clear and convincing evidence that the person is a person with mental illness, the court must order that the person be committed to the custody of the Administrator of the Division of Public and Behavioral Health of the Department of Health and Human Services until the person is

[192] NRS 175.539.

discharged or conditionally released therefrom in accordance with NRS 178.467 to 178.471, inclusive.

The court shall issue its finding within 90 days after the defendant is acquitted.

3. The Administrator shall make the reports and the court shall proceed in the manner provided in NRS 178.467 to 178.471, inclusive.
4. If the court accepts a verdict acquitting a defendant by reason of insanity pursuant to this section, the court shall cause, within 5 business days after accepting the verdict, on a form prescribed by the Department of Public Safety, a record of that verdict to be transmitted to the Central Repository for Nevada Records of Criminal History, along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System.
5. As used in this section, unless the context otherwise requires:
    i. "Division facility" has the meaning ascribed to it in NRS 433.094.
    ii. "Forensic facility" means a secure facility of the Division of Public and Behavioral Health of the Department of Health and Human Services for offenders and defendants with mental disorders. The term includes, without limitation, Lakes Crossing Center.
    iii. "National Instant Criminal Background Check System" has the meaning ascribed to it in NRS 179A.062.
    iv. "Person with mental illness" has the meaning ascribed to it in NRS 178.3986.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 42 Written Orders, Judgments And Decrees.[198]

(a) In all pretrial and postconviction rulings by a court, counsel for the party or parties obtaining the ruling shall within 14 days, or within a shorter time as the court may direct, file with the court a proposed order, judgment, or decree in conformity with the ruling.

(b) Copies of the proposed findings, judgments, and orders shall be served upon opposing counsel before being presented to the court for signature unless the court otherwise orders. Notice of objections shall be submitted to the court and counsel within five days after service.

(c) All orders, judgments, and decrees shall be prepared in such a manner as to show whether they are entered based on a ruling after a hearing or argument, the stipulation of counsel, the motion of counsel or upon the court's own initiative, and shall identify the attorneys of record in the cause or proceeding in which the judgment, order or decree is made. If the order, judgment, or decree is the result of a hearing, the order shall include the date of the hearing, the nature of the hearing, and the names of the attorneys and parties present at the hearing.

(d) The trial court shall prepare the final judgment and sentence, and any commitment order. The trial court shall serve the final judgment and sentence on the parties and immediately transmit the commitment order to the county sheriff.

(e) All orders, judgments and decrees shall be prepared as separate documents and shall not include any matters by reference unless otherwise directed by the court.

(f) No orders, judgments, or decrees based upon stipulation shall be signed or entered unless the stipulation is in writing, signed by the attorneys of record for the respective parties and filed with the clerk or the stipulation was made on the record.

[193] .

Rule 43 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 44 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE VII. POST-CONVICTION PROCEDURES

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 45 Presentence Investigation Reports; Restitution.

(a) **Presentence investigation and report: When required; time for completing.**[194]

1. Except as otherwise provided in this section and NRS 176.151, the Division shall make a presentence investigation and report to the court on each defendant who pleads guilty, guilty but mentally ill or nolo contendere to, or is found guilty or guilty but mentally ill of, a felony.
2. If a defendant is convicted of a felony that is a sexual offense, the presentence investigation and report:
    i. Must be made before the imposition of sentence or the granting of probation; and
    ii. If the sexual offense is an offense for which the suspension of sentence or the granting of probation is permitted, must include a psychosexual evaluation of the defendant.
3. If a defendant is convicted of a felony other than a sexual offense, the presentence investigation and report must be made before the imposition of sentence or the granting of probation unless:
    i. A sentence is fixed by a jury; or
    ii. Such an investigation and report on the defendant has been made by the Division within the 5 years immediately preceding the date initially set for sentencing on the most recent offense.
4. Upon request of the court, the Division shall make presentence investigations and reports on defendants who plead guilty, guilty but mentally ill or nolo contendere to, or are found guilty or guilty but mentally ill of, gross misdemeanors.

(b) **Presentence investigation and report: Psychosexual evaluation of certain sex offenders required; standards and methods for conducting evaluation; access to records; rights of confidentiality and privileges deemed waived; costs.**[195]

1. If a defendant is convicted of a sexual offense for which the suspension of sentence or the granting of probation is permitted, the Division shall arrange for a psychosexual evaluation of the defendant as part of the Division's presentence investigation and report to the court.
2. The psychosexual evaluation of the defendant must be conducted by a person professionally qualified to conduct psychosexual evaluations.
3. The person who conducts the psychosexual evaluation of the defendant must use diagnostic tools that are generally accepted as being within the standard of care for the evaluation of sex offenders, and the psychosexual evaluation of the defendant must include:
    i. A comprehensive clinical interview with the defendant; and

[194] NRS 176.135.
[195] NRS 176.139.

ii. A review of all investigative reports relating to the defendant's sexual offense and all statements made by victims of that offense.

4. The psychosexual evaluation of the defendant may include:
   i. A review of records relating to previous criminal offenses committed by the defendant;
   ii. A review of records relating to previous evaluations and treatment of the defendant;
   iii. A review of the defendant's records from school;
   iv. Interviews with the defendant's parents, the defendant's spouse or other persons who may be significantly involved with the defendant or who may have relevant information relating to the defendant's background; and
   v. The use of psychological testing, polygraphic examinations and arousal assessment.
5. The person who conducts the psychosexual evaluation of the defendant must be given access to all records of the defendant that are necessary to conduct the evaluation, and the defendant shall be deemed to have waived all rights of confidentiality and all privileges relating to those records for the limited purpose of the evaluation.
6. The person who conducts the psychosexual evaluation of the defendant shall:
   i. Prepare a comprehensive written report of the results of the evaluation;
   ii. Include in the report all information that is necessary to carry out the provisions of NRS 176A.110; and
   iii. Provide a copy of the report to the Division.
7. If a psychosexual evaluation is conducted pursuant to this section, the court shall:
   i. Order the defendant, to the extent of the defendant's financial ability, to pay for the cost of the psychosexual evaluation; or
   ii. If the defendant was less than 18 years of age when the sexual offense was committed and the defendant was certified and convicted as an adult, order the parents or guardians of the defendant, to the extent of their financial ability, to pay for the cost of the psychosexual evaluation. For the purposes of this paragraph, the court has jurisdiction over the parents or guardians of the defendant to the extent that is necessary to carry out the provisions of this paragraph.

(c) **Presentence investigation and report: Contents of report.**[196]

1. The report of any presentence investigation must contain:
   i. Any:
      A. Prior criminal convictions of the defendant;
      B. Unresolved criminal cases involving the defendant;
      C. Incidents in which the defendant has failed to appear in court when his or her presence was required;
      D. Arrests during the 10 years immediately preceding the date of the offense for which the report is being prepared; and

[196] NRS 176.145.

E. Participation in any program in a specialty court or any diversionary program, including whether the defendant successfully completed the program;

F. Information concerning the characteristics of the defendant, the defendant's financial condition, including whether the information pertaining to the defendant's financial condition has been verified, the circumstances affecting the defendant's behavior and the circumstances of the defendant's offense that may be helpful in imposing sentence, in granting probation or in the correctional treatment of the defendant;

ii. Information concerning the effect that the offense committed by the defendant has had upon the victim, including, without limitation, any physical or psychological harm or financial loss suffered by the victim, to the extent that such information is available from the victim or other sources, but the provisions of this paragraph do not require any particular examination or testing of the victim, and the extent of any investigation or examination is solely at the discretion of the court or the Division and the extent of the information to be included in the report is solely at the discretion of the Division;

iii. Information concerning whether the defendant has an obligation for the support of a child, and if so, whether the defendant is in arrears in payment on that obligation;

iv. Data or information concerning reports and investigations thereof made pursuant to chapter 432B of NRS and NRS 392.275 to 392.365, inclusive, that relate to the defendant and are made available pursuant to NRS 432B.290or NRS 392.317 to 392.335, inclusive, as applicable;

v. The results of the evaluation of the defendant conducted pursuant to NRS 484C.300, if such an evaluation is required pursuant to that section;

vi. A recommendation of a minimum term and a maximum term of imprisonment or other term of imprisonment authorized by statute, or a fine, or both;

vii. A recommendation, if the Division deems it appropriate, that the defendant undergo a program of regimental discipline pursuant to NRS 176A.780;

viii. If a psychosexual evaluation of the defendant is required pursuant to NRS 176.139, a written report of the results of the psychosexual evaluation of the defendant and all information that is necessary to carry out the provisions of NRS 176A.110; and

ix. A specific statement of pecuniary damages. This statement shall include, but not be limited to, a specific dollar amount recommended by the Division to be paid by the defendant to the victim(s). In cases where a specific dollar value is not known, and is not an accumulating amount, e.g. continuing medical expenses, the court may continue the sentencing. If sentencing occurs, it shall be done with the concurrence of defense counsel/defendant and the prosecutor and an agreement shall be reached as to how restitution shall be determined. In no instance shall the restitution amount be determined by the Department of Corrections without approval of the court, defendant, defense counsel and the

prosecutor. If the parties disagree about the restitution amount, a restitution hearing shall be scheduled.[197]

x. Such other information as may be required by the court.

2. The Division shall include in the report all scoresheets and scales used in determining any recommendation made pursuant to paragraphs (g) and (h) of subsection 1.
3. The Division shall include in the report the source of any information, as stated in the report, related to the defendant's offense, including, without limitation, information from:
   i. A police report;
   ii. An investigative report filed with law enforcement; or
   iii. Any other source available to the Division.
4. The Division may include in the report any additional information that it believes may be helpful in imposing a sentence, in granting probation or in correctional treatment.

(d) **General investigation and report on defendant convicted of category E felony: When required; time for completing; contents of report.**[198]

1. If a defendant pleads guilty, guilty but mentally ill or nolo contendere to, or is found guilty or guilty but mentally ill of, one or more category E felonies, but no other felonies, the Division shall not make a presentence investigation and report on the defendant pursuant to NRS 176.135, unless the Division has not made a presentence investigation and report on the defendant pursuant to NRS 176.135 within the 5 years immediately preceding the date initially set for sentencing on the category E felony or felonies and:
   i. The court requests a presentence investigation and report; or
   ii. The prosecuting attorney possesses evidence that would support a decision by the court to deny probation to the defendant pursuant to paragraph (b) of subsection 1 of NRS 176A.100.
2. If the Division does not make a presentence investigation and report on a defendant pursuant to subsection 1, the Division shall, not later than 45 days after the date on which the defendant is sentenced, make a general investigation and report on the defendant that contains:
   i. Any prior criminal convictions of the defendant;
   ii. Information concerning the characteristics of the defendant, the circumstances affecting the defendant's behavior and the circumstances of the defendant's offense that may be helpful to persons responsible for the supervision or correctional treatment of the defendant;
   iii. Information concerning the effect that the offense committed by the defendant has had upon the victim, including, without limitation, any physical or psychological harm or financial loss suffered by the victim, to the extent that such information is available from the victim or other sources, but the provisions of this paragraph do not require any particular examination or testing of the victim, and the extent of any investigation or examination and the extent of the information included in the report is solely at the discretion of the Division;

[197] .

[198] NRS 176.151.

iv. Data or information concerning reports and investigations thereof made pursuant to chapter 432B of NRS and NRS 392.275 to 392.365, inclusive, that relate to the defendant and are made available pursuant to NRS 432B.290or NRS 392.317 to 392.335, inclusive, as applicable; and

v. Any other information that the Division believes may be helpful to persons responsible for the supervision or correctional treatment of the defendant.

(e) **Disclosure of report of presentence investigation: Report to include certain information relating to any gang affiliation of defendant.**[199]

1. Except as otherwise provided in subsection 3, the Division shall disclose to the prosecuting attorney, the counsel for the defendant, the defendant and the court, not later than 14 calendar days before the defendant will be sentenced, the factual content of the report of any presentence investigation made pursuant to NRS 176.135 and the recommendations of the Division.
2. In addition to the disclosure requirements set forth in subsection 1, if the Division includes in the report of any presentence investigation made pursuant to NRS 176.135 any information relating to the defendant being affiliated with or a member of a criminal gang and the Division reasonably believes such information is disputed by the defendant, the Division shall provide with the information disclosed pursuant to subsection 1 copies of all documentation relied upon by the Division as a basis for including such information in the report, including, without limitation, any field interview cards.
3. The defendant may waive the minimum period required by subsection 1.
4. As used in this section, "criminal gang" has the meaning ascribed to it in NRS 193.168.

(f) **Disclosure of report of presentence or general investigation; corrections to report; persons entitled to use report; confidentiality of report.**[200]

1. The Division shall disclose to the prosecuting attorney, the counsel for the defendant and the defendant the factual content of the report of:
   i. Any presentence investigation made pursuant to NRS 176.135 and the recommendations of the Division and, if applicable, provide the documentation required pursuant to subsection 2 of NRS 176.153, in the period provided in NRS 176.153.
   ii. Any general investigation made pursuant to NRS 176.151.

   The Division shall afford an opportunity to each party to object to factual errors in any such report and to comment on any recommendations. The court may order the Division to correct the contents of any such report following sentencing of the defendant if, within 180 days after the date on which the judgment of conviction was entered, the prosecuting attorney and the defendant stipulate to correcting the contents of any such report.
2. Unless otherwise ordered by a court, upon request, the Division shall disclose the content of a report of a presentence investigation or general investigation to a law enforcement agency of this State or a political subdivision thereof and to a law

[199] NRS 176.153.
[200] NRS 176.156.

enforcement agency of the Federal Government for the limited purpose of performing their duties, including, without limitation, conducting hearings that are public in nature.

3. Unless otherwise ordered by a court, upon request, the Division shall disclose the content of a report of a presentence investigation or general investigation to the Division of Public and Behavioral Health of the Department of Health and Human Services for the limited purpose of performing its duties, including, without limitation, evaluating and providing any report or information to the Division concerning the mental health of:
    i. A sex offender as defined in NRS 213.107; or
    ii. An offender who has been determined to be mentally ill.
4. Unless otherwise ordered by a court, upon request, the Division shall disclose the content of a report of a presentence investigation or general investigation to the Nevada Gaming Control Board for the limited purpose of performing its duties in the administration of the provisions of chapters 462 to 467, inclusive, of NRS.
5. Except for the disclosures required by subsections 1 to 4, inclusive, a report of a presentence investigation or general investigation and the sources of information for such a report are confidential and must not be made a part of any public record.

(g) **Delivery of report of presentence or general investigation to Director of Department of Corrections.**[201]

1. Except as otherwise provided in subsection 2, when a court imposes a sentence of imprisonment in the state prison or revokes a program of probation and orders a sentence of imprisonment to the state prison to be executed, the court shall cause a copy of the report of the presentence investigation to be delivered to the Director of the Department of Corrections, if such a report was made. The report must be delivered not later than when the judgment of imprisonment is delivered pursuant to NRS 176.335. Delivery of the report may, at the court's discretion, also be accomplished by electronic transmission or by affording the Department of Corrections the required electronic access necessary to retrieve the report.
2. If a presentence investigation and report were not required pursuant to paragraph (b) of subsection 3 of NRS 176.135 or pursuant to subsection 1 of NRS 176.151, the court shall cause a copy of the previous report of the presentence investigation or a copy of the report of the general investigation, as appropriate, to be delivered to the Director of the Department of Corrections in the manner provided pursuant to subsection 1.

(h) **Portion of certain presentence or general investigations and reports to be paid by county in which indictment found or information filed.**[202]

1. Seventy percent of the expense of any presentence or general investigation and report made by the Division pursuant to NRS 176.135 or 176.151, other than the expense of a psychosexual evaluation conducted pursuant to NRS 176.139, must be paid by the county in which the indictment was found or the information filed.
2. Each county shall pay to the Division all expenses required pursuant to subsection 1 according to a schedule established by the Division, which must require payment on at least a quarterly basis.

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[201] NRS 176.159.
[202] NRS 176.161.

(i) **Presentence reports confidential.**[203] Presentence reports shall either be physically removed from the case file and kept in a separate storage area or retained in the case file in a sealed envelope marked "Confidential".

[203] .

Rule 46 Sentence, Judgment And Commitment.

(a) **Prompt hearing; court may commit defendant or continue or alter bail before hearing; statement by defendant; presentation of mitigating evidence; rights of victim; notice of hearing.**[204]

1. Sentence must be imposed without unreasonable delay. Pending sentence, the court may commit the defendant or continue or alter the bail.
2. Before imposing sentence, the court shall:
    i. Afford counsel an opportunity to speak on behalf of the defendant; and
    ii. Address the defendant personally and ask the defendant if:
        A. The defendant wishes to make a statement in his or her own behalf and to present any information in mitigation of punishment; and
        B. The defendant is a veteran or a member of the military. If the defendant meets the qualifications of subsection 1 of NRS 176A.280, the court may, if appropriate, assign the defendant to:
            i. A program of treatment established pursuant to NRS 176A.280; or
            ii. If a program of treatment established pursuant to NRS 176A.280 is not available for the defendant, a program of treatment established pursuant to NRS 176A.250 or 453.580.
3. After hearing any statements presented pursuant to subsection 2 and before imposing sentence, the court shall afford the victim an opportunity to:
    i. Appear personally, by counsel or by personal representative; and
    ii. Reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim and the need for restitution.
4. The prosecutor shall give reasonable notice of the hearing to impose sentence to:
    i. The person against whom the crime was committed;
    ii. A person who was injured as a direct result of the commission of the crime;
    iii. The surviving spouse, parents or children of a person who was killed as a direct result of the commission of the crime; and
    iv. Any other relative or victim who requests in writing to be notified of the hearing.

    Any defect in notice or failure of such persons to appear are not grounds for an appeal or the granting of a writ of habeas corpus. All personal information, including, but not limited to, a current or former address, which pertains to a victim or relative and which is received by the prosecutor pursuant to this subsection is confidential.
5. For the purposes of this section:
    i. "Member of the military" has the meaning ascribed to it in NRS 176A.043.
    ii. "Relative" of a person includes:
        A. A spouse, parent, grandparent or stepparent;
        B. A natural born child, stepchild or adopted child;
        C. A grandchild, brother, sister, half brother or half sister; or
        D. A parent of a spouse.
    iii. "Veteran" has the meaning ascribed to it in NRS 176A.090.
    iv. "Victim" includes:

[204] NRS 176.015.

A. A person, including a governmental entity, against whom a crime has been committed;
B. A person who has been injured or killed as a direct result of the commission of a crime; and
C. A relative of a person described in subparagraph (1) or (2).

v. This section does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing.

(b) **Imposition of sentence on person convicted as adult for offense committed when person was under age of 18 years: Additional considerations; reduction of sentence.**[205]

1. If a person is convicted as an adult for an offense that the person committed when he or she was less than 18 years of age, in addition to any other factor that the court is required to consider before imposing a sentence upon such a person, the court shall consider the differences between juvenile and adult offenders, including, without limitation, the diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth.
2. Notwithstanding any other provision of law, after considering the factors set forth in subsection 1, the court may, in its discretion, reduce any mandatory minimum period of incarceration that the person is required to serve by not more than 35 percent if the court determines that such a reduction is warranted given the age of the person and his or her prospects for rehabilitation.

[205] NRS 176.017.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 47 Arrest of Judgment.

(a) **Arrest of judgment: When granted and time in which motion is to be made.**[206] The court shall arrest judgment if the indictment, information or complaint does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after determination of guilt or within such further time as the court may fix during the 7-day period.

(b) **Effect of arresting judgment.**[207] The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which the defendant was before the indictment was found or information or complaint filed.

(c) **Procedure after allowance of arrest of judgment.**[208]

1. If, from the evidence on the trial, there is reasonable ground to believe the defendant guilty, and a new indictment, information or complaint can be framed upon which the defendant may be convicted, the court may order the defendant to be recommitted to the officers of the proper county, or admitted to bail anew to answer the new indictment, information or complaint.
2. If the evidence shows the defendant guilty of another offense, the defendant shall be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution.
3. But if no evidence appear sufficient to charge the defendant with any offense, the defendant shall, if in custody, be discharged; or, if admitted to bail, the defendant's bail shall be exonerated; or, if money has been deposited instead of bail, it shall be refunded to the defendant, and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment, information or complaint was founded.

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[206] NRS 176.525.
[207] NRS 176.535.
[208] NRS 176.545.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 48 Motion For New Trial[209]

(a) The court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence.

(b) If trial was by the court without a jury, the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment.

(c) Except as otherwise provided in NRS 176.09187, a motion for a new trial based on the ground of newly discovered evidence may be made only within 2 years after the verdict or finding of guilt.

(d) A motion for a new trial based on any other grounds must be made within 7 days after the verdict or finding of guilt or within such further time as the court may fix during the 7-day period.

[209] NRS 176.151

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 49 Stays Of Sentence Pending Appeal From Courts Of Record.[210]

(a) Staying sentence terms other than incarceration.

1. A sentence of death is stayed if an appeal or a petition for other relief is pending. The defendant shall remain in the custody of the warden of the Utah State Prison until the appeal or petition for other relief is resolved.
2. When an appeal is taken by the prosecution, a stay of any order of judgment in favor of the defendant may be granted by the court upon good cause pending disposition of the appeal.
3. Upon the filing of a notice of appeal, and motion of the defendant, the court may stay any sentenced amount of fines, conditions of probation (other than incarceration) pending disposition of the appeal, upon notice to the prosecution and a hearing if requested by the prosecution.
4. A party dissatisfied with the trial court's ruling on such a motion may petition for relief in the court in which the appeal is pending.

(b) Staying sentence terms of incarceration. A defendant sentenced, or required as a term of probation, to serve a period of incarceration in jail or in prison, shall be detained, unless released by the court in conformity with this rule.

1. In general. Before a court may release a defendant after the filing of a notice of appeal, the court must:
    i. issue a certificate of probable cause; and
    ii. determine by clear and convincing evidence that the defendant:
        A. is not likely to flee; and
        B. does not pose a danger to the safety of any other person or the community if released under any conditions as set forth in subsection (c).
2. A defendant shall file a written motion in the trial court requesting a stay of the sentence term of incarceration.
    i. That motion shall be accompanied by a copy of the filed notice of appeal; a written application for a certificate of probable cause; and a memorandum of law. The memorandum shall identify the issues to be presented on appeal and support the defendant's position that those issues raise a substantial question of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison. The memorandum shall also address why clear and convincing evidence exists that the defendant is not a flight risk and that the defendant does not pose a danger to any other person or the community.
    ii. A copy of the motion, the application for a certificate of probable cause and supporting memorandum shall be served on the prosecuting attorney. An opposing memorandum may be filed within 14 days after receipt of the application, or within a shorter time as the court deems necessary. A hearing on the application shall be held within 14 days after the court receives the opposing memorandum, or if no opposing memorandum is filed, within 14 days after the application is filed with the court.

[210] .

3. The court shall issue a certificate of probable cause if it finds that the appeal:
    i. is not being taken for the purpose of delay; and
    ii. raises substantial issues of law or fact reasonably likely to result in reversal, an order for a new trial or a sentence that does not include a term of incarceration in jail or prison.
4. If the court issues a certificate of probable cause it shall order the defendant released if it finds that clear and convincing evidence exists to demonstrate that the defendant is not a flight risk and that the defendant does not pose a danger to any other person or the community if released under any of the conditions set forth in subsection (c).
5. The court ordering release pending appeal under subsection (b)(4) shall order release on the least restrictive condition or combination of conditions set forth in subsection (c) that the court determines will reasonably assure the appearance of the person as required and the safety of persons and property in the community.
6. Review of trial court's order. A party dissatisfied with the relief granted or denied under this subsection may petition the court in which the appeal is pending for relief.
    i. If the petition is filed by the defendant, a copy of the petition, the affidavit and papers filed in support of the original motion shall be served on the Utah Attorney General if the case involves any felony charge, and on the prosecuting attorney if the case involves only misdemeanor charges.
    ii. If the petition is filed by the prosecution, a copy of the petition and supporting papers shall be served on defense counsel, or the defendant if the defendant is not represented by counsel.

(c) If the court determines that the defendant may be released pending appeal, it may release the defendant on the least restrictive condition or combination of conditions that the court determines will reasonably assure the appearance of the person as required and the safety of persons and property in the community, which conditions may include, without limitation, that the defendant:

1. is admitted to appropriate bail;
2. not commit a federal, state or local crime during the period of release;
3. remain in the custody of a designated person who agrees to assume supervision of the defendant and who agrees to report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;
4. maintain employment, or if unemployed, actively seek employment;
5. maintain or commence an educational program;
6. abide by specified restrictions on personal associations, place of abode or travel;
7. avoid all contact with the victim or victims of the crime(s), any witness or witnesses who testified against the defendant and any potential witnesses who might testify concerning the offenses if the appeal results in a reversal or an order for a new trial;
8. report on a regular basis to a designated law enforcement agency, pretrial services agency or other agency;
9. comply with a specified curfew;
10. refrain from possessing a firearm, destructive device or other dangerous weapon;
11. refrain from possessing or using alcohol, or any narcotic drug or other controlled substance except as prescribed by a licensed medical practitioner;

12. undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol abuse or dependency;
13. execute an agreement to forfeit, upon failing to appear as required, such designated property, including money, as is reasonably necessary to assure the appearance of the defendant as required, and post with the court such indicia of ownership of the property or such percentage of the money as the court may specify;
14. return to custody for specified hours following release for employment, schooling or other limited purposes; and
15. satisfy any other condition that is reasonably necessary to assure the appearance of the defendant as required and to assure the safety of persons and property in the community.

(d) The court may at any time for good cause shown amend the order granting release to impose additional or different conditions of release.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 50 Stays Pending Appeal From A Court Not Of Record- Appeals For A Trial De Novo[211]

(a) Except as outlined in subsection (d) below, the procedures in this rule shall govern stays of terms of sentences when a defendant files an appeal in a court not of record for a trial de novo.

(b) Upon the timely filing of a notice of appeal for a trial de novo, the court shall:

1. order stayed any fine or fee payments until the appeal is resolved; and
2. order stayed any period of incarceration, unless:
    i. at the time of sentencing, the judge found by a preponderance of the evidence that the defendant posed a danger to another person or the community; or
    ii. the appeal does not appear to have a legal basis.

(c) If a stay is ordered, the judge may leave in effect any other terms of probation the judge deems necessary including:

1. continuation of any pre-trial restrictions or orders;
2. sentencing protective orders;
3. orders that limit or monitor a defendant's drug and alcohol use, including use of an ignition interlock device; and
4. requiring defendant's bail to continue until defendant's appearance in the district court. The judge shall only order bail to continue if the court finds by clear and convincing evidence that, without such security, the defendant will likely fail to appear at district court.

(d) A party dissatisfied with the findings made by the justice court judge in staying a sentence under this rule shall utilize the procedure outlined in rule ** to obtain relief in the district court.

(e) A court may at any time for good cause shown amend its order granting release to impose additional or different conditions of release. However, the justice court may only act under this subsection (f) if the district court has not docketed or held any hearings pursuant to this rule.

(f) For purposes of this rule, "term of sentence" or "sentence" shall include findings of contempt pursuant to NRS **.

[211]

Rule 51 RESERVED

Rule 52 Disposition After Appeal[212]

(a) If a judgment of conviction is reversed, a new trial shall be held unless otherwise specified by the appellate court. Pending a new trial or other proceeding, the defendant shall be detained, or released upon bail, or otherwise restricted as the trial court on remand determines proper. If no further trial or proceeding is to be had a defendant in custody shall be discharged, and a defendant restricted by bail or otherwise shall be released from restriction and bail exonerated and any deposit of funds or property refunded to the proper person.

(b) Upon affirmance by the appellate court, the judgment or order affirmed or modified shall be executed.

(c) Unless otherwise ordered by the trial court, within 28 days after receipt of the remittitur, the trial court shall notify the parties and place the matter on the calendar for review.

[212] .

Rule 53 [Reserved]

Rule 54 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE VIII. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 55 Exceptions Unnecessary.[213]

Exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party state his objections to the actions of the court and the reasons therefor. Failure to object generally precludes appellate review.

[213] .

Rule 56 Dismissal Without Trial[214]

(a) **Dismissing an information.** In its discretion, for substantial cause and in furtherance of justice, the court may, either on its own initiative or upon application of either party, order an information or indictment dismissed.

(b) **Mandatory dismissal.** The court shall dismiss the information or indictment when:

1. There is unreasonable or unconstitutional delay in bringing defendant to trial;
2. The allegations of the information or indictment, together with any bill of particulars furnished in support thereof, do not constitute the offense intended to be charged in the pleading so filed;
3. It appears that there was a substantial and prejudicial defect in the impaneling or in the proceedings relating to the grand jury;
4. The court is without jurisdiction; or
5. The prosecution is barred by the statute of limitations.

(c) **Record of dismissal.** The reasons for any such dismissal shall be set forth in an order and entered in the minutes.

(d) **Effects of dismissal.** If the dismissal is based upon the grounds that there was unreasonable delay, or the court is without jurisdiction, or the offense was not properly alleged in the information or indictment, or there was a defect in the impaneling or of the proceedings relating to the grand jury, further prosecution for the offense shall not be barred and the court may make such orders with respect to the custody of the defendant pending the filing of new charges as the interest of justice may require. Otherwise the defendant shall be discharged and bail exonerated.

An order of dismissal based upon unconstitutional delay in bringing the defendant to trial or based upon the statute of limitations, shall be a bar to any other prosecution for the offense charged.

(e) **Dismissal by compromise.** In misdemeanor cases, upon motion of the prosecutor, the court may dismiss the case if it is compromised by the defendant and the injured party. The injured party shall first acknowledge the compromise before the court or in writing. The reasons for the order shall be set forth therein and entered in the minutes. The order shall be a bar to another prosecution for the same offense; provided however, that dismissal by compromise shall not be granted when the misdemeanor is committed by or upon a peace officer while in the performance of his duties, or riotously, or with an intent to commit a felony.

(f) **Voluntary dismissal by the State.** Pursuant NRS ***.***, the state may exercise its discretion to a one-time dismissal of a case in the justice or municipal court.

[214] .

Rule 57 Appeals From Justice Court To District Court by Defendant

(a) **Appeal must be taken within 10 days.**[215] Except as otherwise provided in NRS 177.015, a defendant in a criminal action tried before a justice of the peace may appeal from the final judgment therein to the district court of the county where the court of the justice of the peace is held, at any time within 10 days from the time of the rendition of the judgment.

(b) **Notice of intention to appeal: Filing and service; stay of judgment pending appeal.**[216]

1. The party intending to appeal must file with the justice and serve upon the district attorney a notice entitled in the action, setting forth the character of the judgment, and the intention of the party to appeal therefrom to the district court.
2. Stay of judgment pending appeal is governed by NRS 177.105 and 177.115.

(c) **Transmission of transcript, other papers, sound recording and copy of docket to district court.**[217]

1. The justice shall, within 10 days after the notice of appeal is filed, transmit to the clerk of the district court the transcript of the case, all other papers relating to the case and a certified copy of the docket.
2. The justice shall give notice to the appellant or the appellant's attorney that the transcript and all other papers relating to the case have been filed with the clerk of the district court.
3. If the district judge so requests, before or after receiving the record, the justice of the peace shall transmit to the district judge the sound recording of the case.

(d) **Procedure where transcript defective.**[218]

1. Except as provided in subsection 2, if the district court finds that the transcript of a case which was recorded by sound recording equipment is materially or extensively defective, the case must be returned for retrial in the justice court from which it came.
2. If all parties to the appeal stipulate to being bound by a particular transcript of the proceedings in the justice court, or stipulate to a particular change in the transcript, an appeal based on that transcript as accepted or changed may be heard by the district court without regard to any defects in the transcript.

(e) **Action to be judged on record.**[219] An appeal duly perfected transfers the action to the district court to be judged on the record.

(f) **Grounds for dismissal of appeal; enforcement of judgment.**[220]

1. The appeal may be dismissed on either of the following grounds:
    i. For failure to take the same in time.

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215 NRS 189.010.
216 NRS 189.020.
217 NRS 189.030.
218 NRS 189.035.
219 NRS 189.050.
220 NRS 189.060.

ii. For failure to appear in the district court when required.

2. If the appeal is dismissed, a copy of the order of dismissal must be remitted to the justice, who may proceed to enforce the judgment.

(g) **Dismissal for failure to set or reset appeal for hearing.**[221]

1. An appeal must be dismissed by the district court unless the appeal is perfected by application of the defendant, within 60 days after the appeal is filed in the justice court, by having it set for hearing before the District Court.
2. If an appeal has been set for hearing and the hearing is vacated at the request of the appellant, the appeal must be dismissed unless application is made by the appellant to reset the hearing within 60 days after the date on which the hearing was vacated.

(h) **Grounds for dismissal of complaint on appeal.**[222] Any complaint, upon motion of the defendant, may be dismissed upon any of the following grounds:

1. That the justice of the peace did not have jurisdiction of the offense.
2. That more than one offense is charged in any one count of the complaint.
3. That the facts stated do not constitute a public offense.

[221] NRS 189.065.
[222] NRS 189.070.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 58 Appeals From Justice Court To District Court by State[223]

Appeal by State from order granting defendant's motion to suppress evidence.

1. The State may appeal to the district court from an order of a justice court granting the motion of a defendant to suppress evidence.
2. Such an appeal shall be taken:
    i. Within 2 days after the rendition of such an order during a trial or preliminary examination.
    ii. Within 5 days after the rendition of such an order before a trial or preliminary examination.
3. Upon perfecting such an appeal:
    i. After the commencement of a trial or preliminary examination, further proceedings in the trial shall be stayed pending the final determination of the appeal.
    ii. Before trial or preliminary examination, the time limitation within which a defendant shall be brought to trial shall be extended for the period necessary for the final determination of the appeal.

[223] NRS 189.120.

Rule 59 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 60 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

TITLE IX. GENERAL PROVISIONS

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 61 Definitions

As used within this title, unless the context requires otherwise, the words and terms defined in this Rule have the meaning ascribed to them in the following sections:[224]

(a) **"Arrest"** defined. "Arrest" is defined under NRS 171.104.
(b) **"Attorney General"** defined. "Attorney General" includes any deputy attorney general or special prosecutor appointed by the Nevada Attorney General to prosecute individuals for the commission of a criminal offense.
(c) **"Case in chief of the defendant"** defined. "Case in chief of the defendant" means the first opportunity of the defendant to present evidence after the close of the case in chief of the State during trial.
(d) **"Case in chief of the state"** defined. "Case in chief of the state" means the first opportunity of the prosecutor to present evidence at the beginning of the trial.
(e) **"Complaint"** defined.[225] "Complaint" means a written statement of the essential facts constituting the public offense charged. The "Complaint" shall be made upon:

1. Oath before a magistrate or a notary public; or
2. Declaration which is made subject to the penalty for perjury.

(f) **"Criminal action"** defined. "Criminal action" means the proceedings by which a party charged with a public offense is accused and brought to trial and punishment. A criminal action is prosecuted in the name of the State of Nevada, as plaintiff.
(g) **"Defendant"** defined. "Defendant" means the party prosecuted in a criminal action. "The defendant" is the person named as such in a complaint, indictment, or information. "The defendant" as used in these rules includes an arrested person who at the time of arrest is not named in a charging document. "The defendant" in the context of certain rules includes the attorney who represents the defendant.
(h) **"Defense attorney"** defined. "Defense attorney" means the lawyer appointed or retained to represent a defendant in a criminal action. In a case in which multiple attorneys represent the same defendant, the term may be read to be plural.
(i) **"District attorney"** defined. "District attorney" includes the elected or appointed district attorney of the county and any deputy district attorney appointed .
(j) "Issues of Fact" defined. "Issues of Fact" those issues which must be tried by a jury if a jury trial is required under the Constitution of the United States or the State of Nevada or by any statute of the State of Nevada.[226]
(k) **"Law"** defined. "Law" means: Any rule, statute, ordinance or judicial opinion.
(l) **"May"** defined. "May" means: Generally, a discretionary choice to act or not, as distinguished from "shall" which generally makes the act imperative in nature. However, in certain

[224] Many of these definitions mirror the definitions under Chapter 169 of the Nevada Revised Statutes.
[225] NRS 171.102.
[226] NRS 174.135.

contexts "may" can have an imperative meaning, the word "may" must in those circumstances be read in context to determine if it means that the act is optional/discretionary or mandatory/required.

(m) **"Provision of Law"** defined. "Provision of law" means a clause or condition contained within a law that requires a party or some parties to perform a particular requirement by some specified time or prevents a party or some parties from performing a particular requirement by some specified time.

(n) **"Limited Jurisdiction Court"** defined. A "limited jurisdiction court" is a justice court under NRS §§ 4.370 *et seq.*, or a municipal court under NRS §§ 5.050 *et seq.*

(o) **"Magistrate"** defined. "Magistrate" means an officer having power to issue a warrant for the arrest of a person charged with a public offense and includes:

1. The justices of the Supreme Court;
2. The judges of the court of appeals;
3. The judges of the district courts;
4. The justices of the peace;
5. The judges of the municipal courts; and
6. Others upon whom are conferred by law the powers of a justice of the peace in a criminal case.

(p) **"Master"** defined. "Master" means a person appointed by the district court to inform defendants of their rights, assign counsel for indigent defendants and perform other similar administrative duties assigned by the court.

(q) **"Month"** defined. "Month" means a calendar month unless otherwise expressed.

(r) **"Oath"** defined. "Oath" includes an affirmation.

(s) **"Party"** defined. "Party" means the parties to the case, which generally include, but are not limited to, the State of Nevada and the defendants in a case. Use of the word "party" in these rules means all parties to the action unless specifically limited to a particular party (i.e. State or Defendant) or limited by the context of the word.

(t) **"Peace officer"** defined. "Peace officer" includes any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, *inclusive*.

(u) **"Person"** defined. "Person" includes an entity.

(v) **"Personal property"** defined. "Personal property" includes money, goods, chattels, things in action and evidences of debt.

(w) **"Presiding Judge"** defined. "Presiding Judge" means:

(1) **For the District Court**: In a district having more than one judge, the presiding judge is designated by the appropriate rule or law or procedure. In a district that has only one district court judge, the lone judge is the presiding judge.

(2) For a Limited Jurisdiction Court. In courts having more than one judge, the presiding judge is designated by the appropriate rule or law or procedure. If a limited jurisdiction court consists only of one judge, the lone judge is the presiding judge.

(x) **"Property"** defined. "Property" includes both real and personal property.

(y) **"Prosecuting attorney"** defined. "Prosecuting attorney" means an attorney who conducts proceedings in a court on behalf of the government.

Commented [TW3]: You had the phase but no definition. I could not find a definition in the NRS but located this one.

(z) **"Public officer"** defined. "Public officer" means a person elected or appointed to a position which:

1. Is established by the constitution or a statute of this State, or by a charter or ordinance of a political subdivision of this State; and

2. Involves the continuous exercise, as part of the regular and permanent administration of the government, of a public power, trust or duty.

(aa) **"Real property"** defined. "Real property" is coextensive with lands, tenements, and hereditaments.

(bb) **"Shall"** defined. "Shall" means generally, an imperative mandate to act or not, as distinguished from "may" which generally makes the act permissive in nature. However, in certain contexts "shall" can have a permissive meaning, the word "shall" must in those circumstances be read in context to determine if it means that the act is optional/discretionary or mandatory/required.

(cc) **"The State."** "The State" means the State of Nevada, or any other Nevada state or local governmental entity or political subdivision that files a criminal charge in a Nevada court. "The State" in the context of certain rules includes the prosecuting attorney representing the State. "The State," when under context in which it is used refers to the different parts of the United States, includes within its reference all the States of the United States, including the District of Columbia and the territories.

(dd) **"Trial"** defined. "Trial" means that portion of a criminal action which:

(a) If a jury is used, begins with the impaneling of the jury and ends with the return of the verdict, both inclusive.

(b) If no jury is used, begins with the opening statement, or if there is no opening statement, when the first witness is sworn, and ends with the closing argument or upon submission of the cause to the court without argument, both inclusive.

The term "Trial" does not include any proceeding had upon a plea of guilty or guilty but mentally ill to determine the degree of guilt or to fix the punishment.

(ee) **"Trier of Fact"** defined. "Trier of Fact" as used in these rules means a jury who is shall determine issues of fact that are required to be tried by a jury under either the Constitution of the United States or of the State of Nevada and any statute.

(ff) **"United States"** defined. "United States" means all the State of the United States and includes the District of Columbia, Puerto Rico, territories or insular possessions as the context may require.

(gg) **"Victim"** defined. "Victim" means a person as defined in NRS § 217.070.

(hh) **"Writing"** defined. "Writing" means any typewritten, printed, computer generated, handwritten, or other document which contains letters or marks placed upon paper, parchment, or other material substance.[227]

(ii) **"Oral Statement"** defined. Every mode of oral statement, under oath or affirmation, is embraced by the term "testify," and every written one in the term "depose." [228]

[227] NRS 169.215

[228] NRS 169.215

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 62 Time

(a) **Computing time.** The following rules apply in computing any time period specified in these rules, any local rule or court order, or in any statute that does not specify a method of computing time.[229] The following applies to counting time:

1. When the period is stated in days or a longer unit of time, the following applies:
    i. The day of the event that triggers the period of time shall be excluded from the calculation of the time period;
    ii. If the period of time is greater than seven (7) days, count every day, including intermediate Saturdays, Sundays, and legal holidays;
    iii. If the period of time is less than seven (7) days, count every day, excluding intermediate Saturdays, Sundays, and legal holidays; and
    iv. Include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.
2. When the period is stated in hours:
    i. Begin counting immediately on the occurrence of the event that triggers the period; and
    ii. Count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays.
3. Unless the court orders otherwise, if the clerk's office is inaccessible.
    i. On the last day for filing under Rule **, then the time for filing is extended to the first accessible day that is not a Saturday, Sunday or legal holiday; or
    ii. During the last hour for filing under Rule **, then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.
4. Unless a different time is set by a statute or court order, filing on the last day means:
    i. For electronic filing, at midnight; and
    ii. For filing by other means, the filing must be made before the clerk's office is scheduled to close.
5. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.
6. "Legal holiday" means the day for legal holidays set forth in NRS 236.015.

(b) **Extending time.**[230]

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229 NRS 178.472 provides that: "In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a nonjudicial day, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a nonjudicial day. When a period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and nonjudicial days shall be excluded in the computation.

230 NRS 178.476 provides that:

1. When an act may or must be done within a specified time, the court may, for good cause, extend the time unless a provision of law governing the act does not permit the Court to extend the time period:
    i. With or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or
    ii. On motion made after the time has expired if the party failed to act because of excusable neglect.
2. A court must not extend the time for taking any action under the rules applying to a judgment of acquittal, new trial, arrest of judgment and appeal, unless otherwise provided in these rules. Nor may the court extend times for filing and perfecting appeals.

(c) **Motions; affidavits.**[231]

1. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof must be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application.
2. When a motion is supported by affidavit, the affidavit must be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.
3. A certificate of service must accompany each motion filed.

(d) **Additional time after service by mail.** When a party may or must act within a specified time after service and service is made by mail, three days are added after the period would otherwise expire under paragraph (a).

When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

1. With or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or
2. Upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect,

but the court may not extend the time for taking any action under NRS 176.515 or 176.525 except to the extent and under the conditions stated in those sections.

The statutory exceptions under NRS 176.515 and 176.525 are covered by the language "unless a provision of law governing the act does not permit the Court to extend the time period."

[231] NRS 178.478

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 64 Service And Filing Of Papers

(a) **Service Required.** All written motions, notices and pleadings shall be filed with the court and served on all other parties.

(b) **Service Upon Counsel.** Whenever service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney, unless service upon the party himself is ordered by the court or required by a specific rule or statute. Service upon the attorney or upon a party shall be made in the manner provided in civil actions. If a Court has implemented an e-filing system, service effectuated by the e-filing system shall constitute service under these rules.

(c) **Certificate of Service.** The motion, notice, or pleading shall also have a Certificate of Service which indicates that the party, the legal counsel for the party, or an employee of either has served the document and shall indicate the method of service employed. The party preparing an order shall, upon execution by the court, serve upon each party a Notice of Entry of Order which has a copy of the Order attached thereto and certify to the court such service in a Certificate of Mailing.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 65 Rules Of Court

(a) District courts may make local rules for the conduct of criminal proceedings not inconsistent with these rules and statutes of the state. Copies of all rules made by a court shall, upon promulgation, be furnished to the Supreme Court and to the Judicial Council and shall be made available to members of the state bar and the public.

(b) If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or statutes.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 66 Victims And Witnesses

Commented [TW4]: Need to update with the new law

(a) The prosecuting agency shall inform all victims and subpoenaed witnesses of their responsibilities during the criminal proceedings.

(b) The prosecuting agency shall inform all victims and subpoenaed witnesses of their right to be free from threats, intimidation and harm by anyone seeking to induce the victim or witness to testify falsely, withhold testimony or information, avoid legal process, or secure the dismissal of or prevent the filing of a criminal complaint, indictment or information.

(c) If requested by the victim, the prosecuting agency shall provide notice to all victims of the date and time of scheduled hearings, trial and sentencing and of their right to be present during those proceedings and any other public hearing unless they are subpoenaed to testify as a witness and the exclusionary rule is invoked.

(d) The informational rights of victims and witnesses contained in paragraphs (a) through (c) of this rule are contingent upon their providing the prosecuting agency and court with their current telephone numbers and addresses.

(e) In cases where the victim or the victim's legal guardian so requests, the prosecutor shall explain to the victim that a plea agreement involves the dismissal or reduction of charges in exchange for a plea of guilty and identify the possible penalties which may be imposed by the court upon acceptance of the plea agreement. At the time of entry of the plea, the prosecutor shall represent to the court, either in writing or on the record, that the victim has been contacted and an explanation of the plea bargain has been provided to the victim or the victim's legal guardian prior to the court's acceptance of the plea. If the victim or the victim's legal guardian has informed the prosecutor that he or she wishes to address the court at the change of plea or sentencing hearing, the prosecutor shall so inform the court.

(f) The court shall not require victims and witnesses to state their addresses and telephone numbers in open court.

(g) Judges should give scheduling priority to those criminal cases where the victim is a minor in an effort to minimize the emotional trauma to the victim. Scheduling priorities for cases involving minor victims are subject to the scheduling priorities for criminal cases where the defendant is in custody.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 67 Regulation Of Conduct In The Courtroom

(a) All pleadings, written motions and other papers must be free from burdensome, irrelevant, immaterial, scandalous, or uncivil matters. All attorneys must likewise govern their conduct. Pleadings, written motions and other papers and attorney conduct which are not in compliance may be disregarded or stricken, in whole or in part, and the court may impose sanctions against the offending person.

(b) The court may make appropriate orders regulating the conduct of officers, parties, spectators and witnesses prior to and during the conduct of any proceeding.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 68 Withdrawal Of Counsel

(a) Withdrawal of counsel prior to entry of judgment.

1. Consistent with the Rules of Professional Conduct, an attorney may not withdraw as counsel of record in criminal cases without the approval of the court.
2. A motion to withdraw as an attorney in a criminal case shall be made in open court with the defendant present unless otherwise ordered by the court. Counsel must certify that the withdrawal meets the requirements of the Rules of Professional Conduct.

(b) Withdrawal of counsel after entry of judgment. Prior to permitting withdrawal of trial counsel, the trial court shall require counsel to file a written statement certifying:

1. That the defendant has been advised of the right to file a motion for new trial or to seek a certificate of probable cause, and if in counsel's opinion such action is appropriate, that the same has been filed.
2. That the defendant has been advised of the right to appeal and if in counsel's opinion such action is appropriate, that a Notice of Appeal, a Request for Transcript, and in appropriate cases, an Affidavit of Impecuniosity and an Order requiring the appropriate county to bear the costs of preparing the transcript have been filed.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 69 Minute Entry

The case file shall include copies of all minute entries of proceedings made in that case.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 70 Errors And Defects

(a) Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

(b) 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 may order.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 71 Citation To Decisions

Published decisions of the Supreme Court and the Court of Appeals may be cited as precedent in all criminal proceedings. Unpublished decisions may also be cited as precedent, so long as all parties and the court are supplied with accurate copies at the time the decision is first cited and said unpublished decisions are entitled to precedential effect as set forth by an appropriate rule.

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 72 Coordination Of Cases Pending In District Court And Juvenile Court

(a) All parties have a continuing duty to notify the court of a delinquency case pending in juvenile court in which the defendant is a party.

(b) The notice shall be filed with a party's initial pleading or as soon as practicable after the party becomes aware of the other pending case. The notice shall include the case caption, file number and name of the judge or commissioner in the other case.

Rule 73 [Reserved]

PROPOSED NEVADA RULES OF CRIMINAL PROCEDURE

Rule 74 [Reserved]

TAB 5

UNLV William S. Boyd SCHOOL OF LAW

Nevada Law Journal Forum

Volume 1 Article 1

Spring 2017

Statewide Rules of Criminal Procedure: A 50 State Review

Emily Dyer
Nevada Law Journal

Chelsea Stacey
Nevada Law Journal

Adrian Viesca
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STATEWIDE RULES OF CRIMINAL PROCEDURE: A 50 STATE REVIEW

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EXECUTIVE SUMMARY

The Federal Criminal Procedure Rules "provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[1] To emulate that same goal, forty-seven states have implemented some form of statewide governing procedural rules for criminal cases.[2] Particularly, thirty-four states have adopted statewide criminal procedure rules, seven states have promulgated statewide criminal procedural rules for the varying levels of courts, and six state legislatures have enacted all-encompassing criminal procedure statutory codes.

Nevada is one of three states without statewide criminal procedure rules, resulting in both an increased likelihood of unfair, inconsistent, and misapplication of procedures. Practitioners must review the state's procedural statutes, statewide rules of district courts, supreme court rules, case law, and local district court rules to determine how to proceed in each criminal case. Eight of Nevada's eleven judicial districts have their own local procedural rules that either directly, or "if applicable" apply to criminal matters. The Second judicial district is the only district with separate criminal procedure rules. The ambiguity within local district rules creates problems for practitioners as it is not clear what civil/general local rules apply to criminal proceedings. With the ease of travel and technology, attorneys are

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* This White Paper was written by Emily Dyer, Executive Managing Editor, Chelsea Stacey, Nevada Law Editor, and Adrian Viesca, Executive Editor, with contributions in drafting, editing, and researching by Paul George, Baylie Hellman, Robert Schmidt, Andrea Orwoll, Beatriz Aguirre, and Julia Barker. The Nevada Law Journal would also like to thank Professor Anne Traum for her guidance and support. Conclusions in this White Paper are based primarily on the text of the state's statute, rule, or code section governing criminal procedures. The authors acknowledge that some information may be incomplete despite the authors' best efforts given the complex nature of each state's court structures, judicial decisions, statutes, and rules regarding criminal procedure. This White Paper seeks to provide an insight on the breadth, variations, and structures of each state's criminal procedure rules.

[1] FED. R. CRIM. P. 2.

[2] The benefits of criminal procedure rules are only effective if they are actually followed and enforceable; however, that inquiry is beyond the scope of this White Paper.

no longer tied to one county, but the unfamiliarity of the next county's rules may, in effect, tie a practitioner's hands.

Additionally, without statewide criminal procedure rules, and due to the difficult legislative process with Nevada's biennial legislature, criminal procedural rules are regularly created through case law. Absent specific criminal procedures, Nevada courts are granted wide discretion to "proceed in any lawful manner not inconsistent with this title or with any other applicable statute." This may result in overly particular procedural rules because they are created based on the circumstances of that specific case. Rules and standards should primarily be centralized and generally applicable regardless of the facts to allow practitioners to advocate and judges to interpret how a rule applies to each case, instead of crafting new precedential standards in each case.

This White Paper intends to compare the varying states' criminal procedure rules, to provide Nevada's legal community with an awareness of how rules can be structured, what rules are included, and how rules interact with statutes and other court rules. If Nevada chooses to follow in the path of the forty-seven states and develop statewide criminal procedure rules, this White Paper also offers some considerations as to the potential applicability, depth, and specifics of statewide criminal procedure rules. For example, Nevada could either expand its criminal procedure statutes, filling in the day-to-day gaps, and develop a criminal procedure code. Or, alternatively, in a process similar to creating Nevada's Rules of Civil Procedure, the legislature could grant the Nevada Supreme Court power to adopt statewide rules. Regardless of the method, the goal remains the same: promote fairness, regularity, and transparency regardless of where in the state a criminal case is being adjudicated and who adjudicates the case.

TABLE OF CONTENTS

INTRODUCTION

According to the United States Supreme Court, the "interest of the United States in criminal prosecution is not that it shall win a case but that justice shall be done."[3] The two-fold aim of justice, "that guilt shall not escape nor innocence suffer,"[4] is aided when a uniform set of procedures and practices govern cases with consistency and sound administration.[5] To this end, the United States Supreme Court originally adopted the Federal Rules of Criminal Procedure ("FRCP") in 1944, which were subsequently approved in 1946.[6]

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[3] Campbell v. United States, 365 U.S. 85, 96 (1961).

[4] Berger v. United States, 295 U.S. 78, 88 (1935).

[5] United States v. Weinstein, 452 F.2d 704, 715 (2d Cir. 1971).

[6] *Current Rules of Practice & Procedure*, U.S. CTS., http://www.uscourts.gov/rules-policies/current-rules-practice-procedure [https://perma.cc/5M7S-Q6R2] (last visited Mar. 18, 2017).

As one of the three states without statewide criminal procedure rules or codes, Nevada practitioners must review the state's procedural statutes,[7] statewide rules of district courts,[8] supreme court rules,[9] case law, and local district court rules to determine how to proceed in each criminal case. Eight of the Nevada's eleven judicial districts have their own local procedural rules that either directly, or "if applicable" apply to criminal matters.[10] The Second judicial district is the only district with separate criminal procedure rules. The ambiguity within local district rules creates even more problems for practitioners as it is not clear what civil/general local rules apply to criminal proceedings. Additionally, absent specific criminal procedures, Nevada courts are granted wide discretion to "proceed in any lawful manner not inconsistent with this title or with any other applicable statute."[11]

In early 2015, the Nevada Supreme Court sought to resolve growing concerns regarding the lack of statewide criminal procedure rules by convening an administrative docket and commission[12] to consider statewide rules.[13] Concerns

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[7] *See* NEV. REV. STAT. tit. 14.

[8] The Rules of the District Courts of the State of Nevada are cited as: D.C.R. *See* RULES DISTRICT CTS. ST. NEV., http://www.leg.state.nv.us/COURTRULES/DCR.html [https://perma.cc/BV7K-MV6K] (last visited Mar. 20, 2017). The scope provision of the District Court Rules states:

> These rules shall be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice by the court. These rules cover the practice and procedure in all actions in the district courts of all districts where no local rule covering the same subject has been approved by the supreme court. Local rules which are approved for a particular judicial district shall be applied in each instance whether they are the same as or inconsistent with these rules.

D.C.R. 5.

[9] Nevada's Supreme Court Rules are cited as: S.C.R. *See*, *e.g.*, S.C.R. 250 (capital proceeding procedures); *Checklist of Issues*, SUP. CT. RULES (2016), http://www.leg.state.nv.us/courtrules/scr.html [https://perma.cc/VQJ5-W4D4].

[10] The Fifth, Sixth, and Eleventh Districts do not have any documented rules of practice or rules of criminal procedure. The Second District is the only district with separate rules for criminal practice but their rules of practice have additional criminal rules. The First and Ninth District Rules of practice are often very similar and both apply to criminal cases when applicable. The Eighth District's rules of practice are extensive, but Part III is specifically for criminal cases, while the rest of the rules are said to apply to "all" cases in the district. The Third, Fourth, Seventh, and Tenth Districts do not state whether the rules of practice apply to criminal cases, or only if applicable, but some rules explicitly mention their application to criminal cases. See *District Courts*, SUP. CT. NEV., http://nvcourts.gov/Find_a_Court/District_Courts/ [https://perma.cc/T7PF-GXCY] (last visited Mar. 6, 2017), for more information on the judicial districts in Nevada.

[11] NEV. REV. STAT. § 178.610.

[12] The Commission on Statewide Rules of Criminal Procedure members include Chief Justice Michael Cherry, Nevada Supreme Court; Justice Michael Douglas, Nevada Supreme Court; Justice Lidia Stiglich, Nevada Supreme Court; Judge Scott Freeman, Second Judicial District Court, Dept. 9; Judge Douglas Herndon, Eighth Judicial District Court, Dept. 3; Judge Jim Shirley, Eleventh Judicial District Court; Mr. Jeremy Bosler, Public Defender, Washoe County; Mr. Christopher Hicks, District Attorney, Washoe County; Mr. Mark Jackson, District Attorney, Douglas County; Mr. Phil Kohn, Public Defender, Clark County; Mr. Steve Wolfson, District Attorney, Clark County.

about the lack of statewide rules stem from the desire to ensure fairness in the judicial system[14] and, as a practical matter, to reduce confusion and misapplication of rules, as practitioners are currently required to review a number of sources to determine what criminal procedure rules apply in each case and in each local jurisdiction.[15] The Nevada Supreme Court's Commission was created to address the lack of uniformity of criminal procedure rules throughout the state.[16] "The Commission is ultimately tasked with ascertaining whether the problems facing the criminal justice system are structural in nature, where the statutes of NRS need to be altered or amended, or if it is something the Court can accomplish within the Supreme Court's Rules."[17]

To assist in this matter, the Nevada Law Journal at the William S. Boyd School of Law at the University of Nevada, Las Vegas has prepared this White Paper. It is primarily a fifty-state review of criminal procedure and practices, comparing and contrasting several criminal procedural topics. Though not a fully comprehensive review, this White Paper focuses on the core procedural topics, with a specific focus on the Commission's committee topics: jury instructions,[18] motion practice,[19] discovery,[20] and life and death practices.[21]

First, this White Paper details the different ways that states create, implement, and construct criminal procedural rules. The next section is an overview

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[13] *Minutes of the 2015–2016 Interim Advisory Comm. on the Admin. of Justice* 6 (Apr. 19, 2016), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/4353 [https://perma.cc/8VAT-NXMS] (comments by J. Michael L. Douglas, Nevada Supreme Court).

[14] *Panel Trying to Reform Criminal Evidence Rules*, NEV. APPEAL (Apr. 21, 2016), http://www.nevadaappeal.com/news/government/panel-trying-to-reform-criminal-evidence-rules/ [https://perma.cc/PUS4-JFSE].

[15] *Id.*

[16] *Overview of the Commission on Statewide Rules of Criminal Procedure*, ADMIN. OFFICE CTS., http://nvcourts.gov/AOC/Committees_and_Commissions/Criminal_Procedure/Overview/ [https://perma.cc/KX4K-NKKF] (last visited Mar. 20, 2017).

[17] MEETING NOTES, RECOMMENDATION 10: INCLUDE A POLICY STATEMENT IN THE FINAL REPORT RECOGNIZING AND SUPPORTING THE WORK OF THE NEVADA SUPREME COURT'S COMMISSION ON STATEWIDE RULES OF CRIMINAL PROCEDURE (2016), http://nvleg.granicus.com/MediaPlayer.php?clip_id=6141 [https://perma.cc/GN2Q-6TSW].

[18] "The Jury Instructions Work Group is chaired by Judge Scott Freeman. There are ten members participating in this work group in an effort to develop/compile pattern jury instructions." OVERVIEW OF THE COMMISSION ON STATEWIDE RULES OF CRIMINAL PROCEDURE, https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/3248 [https://perma.cc/J7N4-7CQJ] (last visited Mar. 20, 2017) [hereinafter OVERVIEW OF THE COMMISSION].

[19] "The Motions Practice Work Group is chaired by Mr. Jeremy Bosler. This five-member group is working on a wide range of issues; the work group has enlisted the help of Boyd School of Law students to conduct extensive research and has sought input from legal professionals across Nevada." OVERVIEW OF THE COMMISSION, *supra* note 18.

[20] "The Discovery Work Group is chaired by Mr. Phil Kohn and is comprised of seven members representing various viewpoints across the state. The work group is addressing a variety of discovery-based issues." OVERVIEW OF THE COMMISSION, *supra* note 18.

[21] "The Life/Death Pretrial Practice Work Group is chaired by Mr. Steven Wolfson. Nine legal professionals from various jurisdictions participate in this work group and address a variety of important questions regarding this area of criminal practice." OVERVIEW OF THE COMMISSION, *supra* note 18.

of the following subjects: Bail and Pre-Trial Release, Pre-Trial Motion Practices, Discovery, Jury Instructions, Competency, Capital Punishment, and Appellate Procedures. Each section contains a brief discussion of Nevada's applicable rules, statutes, and case law.[22] This White Paper concludes with a discussion on Nevada's potential next steps. The Nevada Law Journal has also created a chart, attached as Appendix, for an easy reference to many of the topics discussed throughout this White Paper and additional background on statewide criminal procedure rules generally.

A. A Brief History of Procedural Rules

Constructing procedural rules is not a new practice for states. It flows from our common-law ancestry in England.[23] The judiciary in England determined the "procedure to be followed in the courts."[24] However, beginning in the nineteenth century, the American justice system began moving away from case law and moving towards set rules.[25] State legislatures began regulating court procedures and civil practice.[26] The zenith, reached by the New York State Legislature, occurred after it adopted the "Field Code" for civil procedure in 1848[27] with twenty-four states following by 1870.[28]

States began to consider criminal procedure rules in 1925 when the American Law Institute ("ALI") began to draft a model code of criminal procedure.[29] After the ALI's promulgation of the Model Code of Criminal Procedure of 1930, twenty-nine states adopted the ALI model rule sections in full, in part, or in substance.[30]

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[22] For reference, the following Nevada District Court Local Rules are cited as follows: First District Court Rules of Practice cited as FJDCR. Second District Court Rules of Criminal Procedure cited as LCR. Third District Court Rules of Practice cited as TJDCR. Fourth District Court Rules of Practice cited as 4JDCR. Seventh District Court Rules of Practice cited as 7JDCR. Eighth District Court Rules of Practice cited as EDCR. Ninth District Court Rules of Practice cited as NJDCR. Tenth District Court Rules of Practice cited as 10JDCR. The Fifth, Sixth, and Eleventh districts do not have documented rules of practice or rules of criminal procedure.

[23] Jerold Israel, *Federal Crimes Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 135 (1996).

[24] Homer Cummings, *The New Criminal Rules—Another Triumph of the Democratic Process*, 31 A.B.A. J. 236, 236 (1945).

[25] Kellen Funk, *The Influence of the Field Code: An Introduction to the Critical Issues*, KELLEN FUNK BLOG (Sept. 1, 2014), http://kellenfunk.org/field-code/the-influence-of-the-field-code-an-introduction/ [https://perma.cc/WG2U-FQHC].

[26] *See* Cummings, *supra* note 24.

[27] Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 9 (1989).

[28] *Id*. at 10 n.14 (1989); *see also* Funk, *supra* note 25.

[29] *Proceedings of the Annual Meeting of the American Institute of Criminal Law and Criminology*, 15 J. CRIM. L. & CRIMINOLOGY 509, 510 (1925).

[30] Herbert F. Goodrich, *Annual Report of Adviser on Professional Relations*, 22 A.L.I. PROC. 1, 41–42 (1946). A few of the states included: Arizona (1940), Arkansas (1937), California (1935), Connecticut (1931), Florida (1937), Georgia (1935), Indiana (1937), Kansas (1937), Michigan (1935), Minnesota (1935), Montana (1935), Nebraska (1935), New Jersey (1935),

On the federal level, scholars, lawyers, judges, and government officials came together to create the FRCP in 1938.[31] Eight years later, the FRCP went into effect.[32] Rather than pursuing Congressional involvement, (although Congress passed enabling legislation),[33] the Court used the same process that created the Federal Rules of Civil Procedure to draft the federal criminal rules.[34] Former Attorney General Homer Cummings called it a "democratic process in that they represent[ed] the thought and labor of the legal profession of the whole."[35]

Although the ALI and other institutions have created model rules,[36] nearly half the states used the FRCP to model their own rules.[37]

States continue to engage in reform efforts to ensure that their rules are uniform, clear, and helpful to courts and practitioners. Most recently, after starting the process in 2004, Mississippi adopted new rules of criminal procedure to take effect on July 1, 2017[38] with the goal of having them "be uniform from district to district and from court to court."[39] Idaho just recently adopted newly formatted statewide criminal procedure rules in an effort to "simplify, clarify and modernize the language, and to create a consistent structure and format along with a more useful table of contents."[40] Reform and revision is vital to maintaining standards that are effectively applied and applicable statewide.

This is true for Nevada as well. In 1965, the Legislature passed Assembly Concurrent Resolution 9 calling on the legislative commission "to study the en-

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New Mexico (1935, 1937), New York (1935, 1936), North Dakota (1935), Ohio, (1935), Oklahoma (1935), Oregon (1937), South Carolina (1937), Virginia (1937) Wisconsin (1937). Herbert F. Goodrich, *Annual Report of Adviser on Professional Relations*, 15 A.L.I. PROC. 57, 67–68 (1938); Herbert F. Goodrich, *Annual Report of Adviser on Professional Relations*, 17 A.L.I. PROC. 50, 62 (1940).

[31] George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694 (1946).

[32] *See id*.

[33] *Id*. at 695.

[34] *Id*.

[35] Cummings, *supra* note 24.

[36] The Uniform Law Commission promulgated the Uniform Rules of Criminal Procedure in 1952. *Rules of Criminal Procedure, Model Summary*, UNIF. LAW COMM'N, http://www.uniformlaws.org/ActSummary.aspx?title=Rules%20of%20Criminal%20Procedure,%20Model [https://perma.cc/73CQ-35V7] (last visited Mar. 17, 2017).

[37] Israel, *supra* note 23, at 138. The states using the FRCP to model their procedural rules include: "Alaska, Arizona, Colorado, Delaware, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. States with statutory codes modeled upon the Federal Rules are Kansas, Montana, and Utah." *Id*. at 138 n.18.

[38] *In Re* Adoption of Miss. Rules of Criminal Procedure, No. 89-R-99038-SCT (Miss. Dec. 13, 2016), https://courts.ms.gov/Images/Opinions/209786.pdf [https://perma.cc/7UGP-3W7T].

[39] PROPOSED MISSISSIPPI RULES OF CRIMINAL PROCEDURE, https://courts.ms.gov/rules/rulesforcomment/2011/announcement9-8.pdf [https://perma.cc/N2XA-WBNW] (last visited Mar. 17, 2017).

[40] 2017 IDAHO COURT ORDER 0003 (C.O. 0003).

tire area of substantive criminal law" and to "prepare a new criminal code."[41] Before this, the criminal law statutes had not been reviewed since 1911.[42] The legislative commission created a subcommittee comprised of legislators, judges, and lawyers.[43] The commission narrowed their study to penalties and procedures.[44] Their policy goal for criminal procedure was to adopt in statutory form the Federal Rules of Criminal Procedure.[45] Since then, these criminal law statutes have set the foundation for proceedings in Nevada and have been amended periodically.

B. Criminal Procedure Rules—Generally

State criminal procedure rules fall into four categories. The first, and largest category, includes states that have adopted statewide rules of criminal procedure that govern all criminal proceedings.[46] Almost every one of these states also have statutes governing criminal proceedings. However, states supplemented those generally bare statutes with statewide rules to ensure criminal proceedings across the state were governed by a uniform set of procedural rules. These statewide rules are either promulgated by the state's supreme court, or adopted by the state's legislature. This category will be referred to as "statewide rules" herein.

Second, six states have chosen to incorporate the intricate details of statewide procedural rules into their existing criminal procedure statutes, creating one location—a criminal procedure code—to govern all criminal proceedings within the state. These codes were created by the states' legislatures and, in substance and application, are similar to the first category. This category will be referred to as "code" states throughout.

Third, seven states do not have statewide procedural rules that apply to all criminal matters throughout the state; instead, these states have a separate set of procedural rules for each level of court within the state. These states may have a distinct set of criminal procedure rules for their state circuit courts, superior court, supreme court, and/or trial court that apply to all criminal cases throughout the state within that specific court. For example, Delaware has a distinct set of criminal procedure rules for their Superior, Supreme, Common Pleas, and Justice of the Peace courts.[47] This category will be referred to as "by court" rules herein.

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[41] Assemb. Con. Res. 9, 1965 Leg., 53d Sess. (Nev. 1965).

[42] *Id*.

[43] REPORT OF THE SUBCOMM. FOR REVISION OF THE CRIMINAL LAW TO THE LEGIS. COMM'N 4 (1966).

[44] *Id*. at 1.

[45] *Id*. at 3.

[46] Please note that almost all states have exceptions to this application, especially for appellate procedures and juvenile criminal proceedings. Often, separate statewide rules govern these specific criminal cases.

[47] *See* 50 State Rule Chart, Appendix. Delaware Superior Court Criminal Procedure Rules: DEL. SUPER. CT. CRIM. R.; Delaware Supreme Court Rules: DEL. SUP. CT. CRIM. R.; Dela-

Fourth, the last and smallest category, includes states that do not have criminal procedure rules either statewide, by court, or code. These states, like Nevada, have statutes and sporadic court rules, but do not have any statewide governing rules. While these states have criminal procedure statutes, those statutes are unlike the code states because the statutes do not provide the guidance and direction necessary to generate consistent applications of procedures across the state.

Statewide Criminal Procedure Rules (34)	Criminal Procedure Code (6)	By Court Criminal Procedure Rules (7)	No Statewide Rules or Code (3)
Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wyoming	Kansas, Montana, Oklahoma, South Dakota, Texas, Wisconsin	Delaware, Georgia, Illinois, New Hampshire, New Mexico, Rhode Island, Washington	Nebraska, Nevada, North Carolina

Further, more than half of the states with statewide rules[48] and five of the six states with criminal procedure codes[49] also allow counties, circuits, and/or district courts to implement local criminal procedure rules, so long as the rules do no conflict with the statewide procedures. Two of the seven states with by court statewide rules allow individual counties, circuits, and/or district courts to utilize local criminal procedure rules.[50] Lastly, all three states without any statewide rules or codes allow local counties, circuits, and/or district courts to establish criminal procedure rules.[51] These local rules are usually very short, focus on day-to-day procedural details, and/or are only created by the state's largest counties, circuits, and/or district courts.

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ware Court of Common Pleas Criminal Procedure Rules: DEL. CRIM. R. GOV'G C.P.; Justice of the Peace Criminal Procedure Rules: DEL. J. P. CT. CRIM. R.

[48] These states include: Arizona, California, Colorado, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, Washington, and West Virginia.

[49] These states include: Kansas, Montana, Oklahoma, Texas, and Wisconsin.

[50] These states include: Illinois and Rhode Island.

[51] These states include: Nebraska, Nevada, and North Carolina.

C. The Scope and Purpose of Statewide Criminal Procedure Rules

Most states include a scope, analogous to FRCP 1, which states, "these rules govern the procedure in all criminal proceedings . . . ." The scope provision, or applicability provision, informs practitioners what cases in which the rules apply.[52] All states with criminal procedure codes and by court rules contain statements of scope. Of the states with statewide rules, only Indiana and Oregon[53] do not have statements of scope.

Usually, a purpose or construction rule appears alongside a scope or applicability statement. As demonstrated by the federal purpose rule, FRCP 2, "[t]hese [rules of criminal procedure] are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[54] This rule serves as a "polestar" for interpreting the purpose, construction, and effect of the criminal procedure rules.[55] As interpreted by the United States Supreme Court, the FRCP was never intended to be "a rigid code [with] inflexible meaning irrespective of the circumstances."[56]

Generally, criminal procedure rules are intended to be interpreted according to their plain meaning, while remaining open to constructions that would avoid unjust outcomes. The clear majority of states have an analogous rule that is identical or nearly identical to the federal rule.[57] One reason most states model the federal rule may be that the federal rule comes with "a body of judicial precedent far more complete and rapidly developed than would be available for a standard unique to the state."[58]

Some states include additional language to avoid unjust outcomes, such as including the protection of the rights of individuals while preserving the public welfare.[59] Minnesota's procedural rules are to be construed to ensure the rules are applied without discrimination to everyone, despite "race, color, creed, religion, national origin, sex, marital status, public-assistance status, disability, in-

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[52] For example, Alaska's criminal procedure rules "govern the practice and procedure in the superior court in all criminal proceedings…" ALASKA R. CRIM. P. 1.

[53] Oregon is slightly unusual in that it adopted a set of rules called the Uniform Trial Court Rules, containing chapter 4 devoted to criminal procedure rules. Chapter 4 itself does not have a scope or applicability provision, but the Uniform Trial Court Rules Chapter 1, General Provisions, does detail that the Uniform Trial Court Rules apply to all circuit court proceedings.

[54] FED. R. CRIM. P. 2.

[55] United States v. Hall, 505 F.2d 961, 963 (3d Cir. 1974).

[56] Fallen v. United States, 378 U.S. 139, 142 (1964).

[57] *See, e.g.*, ALASKA R. CRIM. P. 2; FLA. R. CRIM. P. 3.020.

[58] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.3(e) (4th ed. 2016).

[59] Alabama, Arizona, Arkansas, and Mississippi are identical, and differ from the federal rule in this one addition. In an explanatory note, Alabama explained this addition as a way to ensure "the [state] constitutional guarantee . . . that no person shall be deprived of life, liberty, or property, except by due process of law." ALA. R. CRIM. P. 1.2, Note (internal quotations omitted).

cluding disability in communication, sexual orientation, or age."[60] Tennessee's rules note that the rules should be interpreted in a manner to avoid the unnecessary claim on the time of jurors.[61]

Whereas the additions just mentioned may be interpreted as further protection for criminal defendants, Illinois' criminal procedure statutes has a prosecutorial focus stating that the rules should be construed to "ensure the effective apprehension and trial of persons accused of crime."[62] Texas takes the prosecutorial focus even further by noting that their criminal procedure code should be interpreted to promote a just determination and little delay with the primary objective of "the prevention and prosecution of offenses."[63]

D. The Scope and Purpose of Nevada's Criminal Procedure Local Rules and Statutes

Nevada's constitutional due process clause requires procedures in criminal proceedings to be fair.[64] Without statewide rules governing all criminal proceedings, some of Nevada's districts have developed local rules to supplement the state's criminal procedure statutes. Nevada's criminal procedure statutes "govern[] the procedure in the courts of the State of Nevada and before magistrates in all criminal proceedings."[65] Although Nevada has no statewide rules, district court rules often apply to criminal proceedings. The Second District Court's criminal procedure rules were created to "provide uniformity" while allowing "each individual judge [to] retain discretion over how cases ultimately proceed in their courtroom."[66] Additionally, Part III of the Eighth Judicial District's rules govern criminal proceedings within the district except in juvenile cases, expressly provided for in Title 5 of NRS.[67] In the absence of specific rules on point, the district court has wide discretion "in many facets of" criminal trial procedures and case law has helped to develop procedural rules.[68]

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[60] MINN. R. CRIM. P. 1.02.

[61] TENN. R. CRIM. P. 2(c)(2). The Advisory Committee even adds a comment on this addition, stressing that the construction of the rules ensure the efficient use of a juror's time.

[62] 725 ILL. COMP. STAT. 5/101-1.

[63] TEX. CODE CRIM. PROC. § 1.03.

[64] NEV. CONST. art. 1, § 8.

[65] NEV. REV. STAT. § 169.025.

[66] LCR 1, Comment.

[67] EDCR 3.01.

[68] *See, e.g.*, Harte v. State, 373 P.3d 98, 101 (Nev. 2016); Manley v. State, 979 P.2d 703, 709 (Nev. 1999) (finding that the district court had the discretion to impose a two-hour time limit on closing arguments); Williams v. State, 539 P.2d 461, 462 (Nev. 1975) (holding district court had the discretion to allow the discovery to be reopened during the trial after each side rested); State v. Harrington, 9 Nev. 91, 93 (1873) (stating that the district court may deviate from the normal trial sequence in the interest of justice).

I. BAIL AND PRE-TRIAL RELEASE

Bail and pre-trial release rules focus on what offenses are bailable, if and how assessments are utilized, what conditions of release may be employed, and the amount for bail. Of the thirty-four states with statewide rules, all but two address bail: Colorado and South Carolina.[69] Most states, such as California, have ratified bail and pretrial rules both in statute and provide additional guidance in their statewide criminal procedure rules.[70]

Statewide rules vary in their specificity of bail and pretrial release. Some state procedural rules simply note that a defendant has a right to bail and that the bail amount will be determined at the arraignment hearing when the defendant's plea is entered.[71] Other states' statutes include more, such as a detailed outline of the process for securing cash bail,[72] and directing the court to consider the defendant's financial condition when imposing bail amount.[73] Other common variations include using pretrial risk assessments to guide the judge in determining bail amounts, releasing the defendant on their own recognizance,[74] outlining crimes where a defendant is ineligible for bail,[75] and providing other non-monetary pretrial release options in lieu of bail such as house arrest.[76]

A. Bail and Pre-Trial Release in Nevada

Nevada's constitution affords a defendant the right to bail, except for capital cases or murders punishable by life imprisonment.[77] Nevada's statutes supplement the constitution's language, providing that bail is not afforded to a person arrested for first-degree murder,[78] and adds that a person arrested for a felony whose sentence has been statutorily suspended or subject to residential confinement may not be granted bail unless certain statutory conditions are met.[79] Additionally, Nevada's statutes dictate that a defendant may not have a

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[69] Colorado's statewide rules specifically exclude bail proceedings, pointing the court and practitioners to "the statutes and the Constitution of the State of Colorado and the United States Constitution." COLO. CRIM. P. 46; *see also* S.C. CODE ANN. §§ 17-15-10 to -260.

[70] *See, e.g.*, CAL. PENAL CODE §§ 1270–1318; CAL. R. CT. 4.101.

[71] *See, e.g.*, 2016 ARIZ. COURT ORDER 0039 (C.O. 0039) (Rule 7); MINN. R. CRIM. P. 6.02; MASS. R. CRIM. P. 7(b).

[72] *See* COLO. REV. STAT. §§ 16-4-102 to -106; TEX. CODE CRIM. PROC. § 17.04.

[73] COLO. REV. STAT. § 16-4-103.

[74] *See* COLO. REV. STAT. §§ 16-4-103; TEX. CODE CRIM. PROC. § 17.032(b)(3).

[75] COLO. REV. STAT. § 16-4-101.

[76] *See* COLO. REV. STAT. § 16-4-105; TEX. CODE CRIM. PROC. § 17.44.

[77] NEV. CONST. art. 1, § 7 ("All persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great.").

[78] NEV. REV. STAT. § 178.484(1).

[79] *Id.* § 178.484(2).

right to bail for a period of time, usually twelve hours, for certain domestic violence and driving under the influence offenses.[80]

Further, Nevada's constitution forbids excessive bail.[81] When a defendant appears before a judge, "bail must be set at an amount which . . . will reasonably ensure the appearance of the defendant" and the safety of the community.[82] Statutory factors a judge can use in setting a bail amount include the nature of the offense, the financial ability of the defendant, the character of the defendant, length of residence, employment status, relationships between friends and family, and members of the community who would vouch for the defendant.[83]

Although Nevada's statutes provide factors for a judge to consider when setting a bail amount, some local jurisdictions have chosen to implement bail schedules, creating wildly different bail regimes throughout the state. For example, the Las Vegas Justice Court bail schedule specifies that: Category A felonies must be set in court;[84] Category B felonies range from $5,000 to $10,000 or to $20,000 depending on the prison term;[85] Category C felonies are set at $5,000[86] and Category D and E felonies are set at $3,000.[87] The bail schedule in Churchill County is set up significantly differently. It details a bail amount for each different crime. For instance, voluntary manslaughter has a set bail of $25,000, false imprisonment is set at $5,000, and burglary is $10,000.[88] Most other districts in Nevada do not have bail schedules, or provide any guidance beyond the statutory factors for setting bail. The Second District previously had a uniform bail schedule for anyone arrested within Washoe County, but the schedule has been suspended during a Pretrial Risk Assessment Tool pilot program.[89] A lack of uniform bail rules have resulted in significantly different bail amounts depending on where the defendant's case is located, and if no bail schedule is set, then which judge the defendant is before may alter the bail amount significantly under the more discretionary statutory considerations.

In addition to bail amount determinations, judges in Nevada have the statutory authority to impose reasonable conditions of release on the defendant as necessary to "protect the health, safety and welfare of the community."[90] How-

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[80] *Id*. § 178.484.
[81] NEV. CONST. art. I, § 6.
[82] NEV. REV. STAT. § 178.498.
[83] *Id*. §§ 178.498, 178.4853.
[84] STANDARD BAIL SCHEDULE, JUSTICE COURT, L.V. TWP. (2015), https://www.clarkcountybar.org/wp-content/uploads/lvjcsbs15.pdf [https://perma.cc/7TBX-JKQP].
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] BAIL SCHEDULE, CHURCHILL CTY., http://www.churchillcounty.org/index.aspx?NID=361 [https://perma.cc/P5Y6-6K7N] (last visited Mar. 21, 2017).
[89] Admin. Order 2016-15, *In re* Admin. Matter of Rescinding Washoe Cty. Unif. Bail Schedule (Jan. 20, 2016), http://www.washoecourts.com/AdminOrders/PDF/2016/2016-15%20ADMINISTRATIVE%20MATTER%20OF%20RESCINDING%20WASHOE%20COUNTY%20UNIFORM%20BAIL%20SCHEDULE.pdf [https://perma.cc/72CA-8JQ4].
[90] NEV. REV. STAT. § 178.484(11).

ever there is no comprehensive list for what conditions a judge may consider when determining a defendant's release conditions. Statutes provide a short list of possible conditions, including requiring the defendant to stay in the state or a certain county, stopping the defendant from contacting someone, precluding the defendant from going to a certain geographic area, and preventing the defendant from hurting himself or another person.[91] But the Second District's rules supplement the statutory list of conditions by providing fourteen possible conditions a judge may impose, with the last condition acting as a catch-all.[92] The Eighth District is silent on providing guidance on possible conditions.

Except for supplementing the state's constitution regarding what offenses may limit a defendant's right to bail, Nevada's statutes provide little guidance on determining whether to release defendants who have not been charged with crimes described in the statute. The Second District's rules have attempted to supplement this statutory deficiency by stating that a judge shall release a defendant on his personal recognizance, with the implementation of conditions, unless the court is concerned that the defendant will not appear or endanger the safety of the community.[93] The Eighth District's rules allow a judge to take unilateral action and release a defendant accused of a misdemeanor, gross misdemeanor, non-violent felony, or some combination thereof on his own recognizance or reduce the standard bail amount.[94] However, in violent felony offenses or an arrest on a bench warrant for a violent felony offense, the judge must allow the district attorney the opportunity to assert the state's position prior to release or a bail reduction.[95] Without a single list of possible conditions for release, while all not mandatory, may still result in a defendant receiving wildly different release conditions. Similarly, the lack of a standard procedure for a judge to follow in determining release may cause significant differences in case outcomes.

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[91] *Id.*

> Before releasing a person arrested for any crime, the court may impose such reasonable conditions on the person as it deems necessary to protect the health, safety and welfare of the community and to ensure that the person will appear at all times and places ordered by the court, including, without limitation:
>
> (a) Requiring the person to remain in this State or a certain county within this State; (b) Prohibiting the person from contacting or attempting to contact a specific person or from causing or attempting to cause another person to contact that person on the person's behalf; (c) Prohibiting the person from entering a certain geographic area; or (d) Prohibiting the person from engaging in specific conduct that may be harmful to the person's own health, safety or welfare, or the health, safety or welfare of another person.

[92] LCR 5.

[93] *Id.* 5(c).

[94] EDCR 3.80(a).

[95] *Id.* 3.80(b).

B. Bailable and Non-Bailable Offenses

Forty-one state constitutions afford defendants the right to bail.[96] Most states typically have additional statutes and/or procedural rules affording a defendant bail as a matter of right with exceptions for capital offenses and instances where the defendant would pose a danger to themselves or others.[97] It is common for states to discuss bail in sections devoted to warrants[98] or arraignment hearings,[99] while other states provide independent rules or statutes on both bail and pretrial release.

Some state statutes discuss at length instances when a defendant is ineligible to be released on bail. For example, Colorado's statutes detail that bail is denied to: (1) defendants accused of committing a crime of violence while on parole or bail, (2) defendants with a history of two felony convictions or one felony conviction for a violent crime, (3) defendants with prior felony convictions that are now charged with possession of weapon, and (4) defendants with sexual assault charges.[100] Arizona's statewide rules categorizes offenses as bailable or non-bailable offenses.[101] Arizona judges *must* release a person charged with a bailable offense on their own recognizance during the defendant's initial appearance.[102] In its criminal procedure code, Texas also classifies which violent offenses[103] are ineligible for bail, and imposes additional criteria for defendants with mental illness,[104] cases of domestic violence,[105] cases involving a child victim,[106] and provides additional instructions for defendants with an AIDS or HIV diagnosis.[107] Similarly, some statewide rules direct law

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[96] Ariana Lindermayer, Note, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 284 n.111 (2009) (citing the following states as containing a right to bail constitutional provision: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming).

[97] *See* UTAH CODE § 77-20-1(2); CAL. PENAL CODE § 1270.1.

[98] FLA. R. CRIM. P. 3.121; ALA. R. CRIM. P. 7.2.

[99] *See, e.g.*, N.H. R. CRIM. RULE 10.

[100] COLO. REV. STAT. § 16-4-102; ARIZ. R. CRIM. P. 7(a); WASH. REV. CODE § 10.21.015.

[101] ARIZ. R. CRIM. P. 7.2.

[102] *Id.* 7.3(a).

[103] *See* TEX. CODE CRIM. PROC. §§ 17.033(A)–(J). Listing capital murder; aggravated kidnapping; aggravated sexual assault; deadly assault on law enforcement or corrections officer, member or employee of board of pardons and paroles, or court participant; injury to a child, elderly individual, or disabled individual; aggravated robbery; burglary; engaging in organized criminal activity; continuous sexual abuse of young child or children; or continuous trafficking of persons. *Id.*

[104] *Id.* § 17.032.

[105] *Id.* § 17.152.

[106] *Id.* § 17.153.

[107] *Id.* § 17.45.

enforcement to "release [defendants] on citation"—a practice reserved for misdemeanor cases and offenses not punishable by incarceration.[108]

In this regard, states generally provide the right to bail while either assigning a court broad discretion to determine whether to release a defendant on bail or their own recognizance, or providing strict guidelines for the court to utilize to determine which crimes automatically disqualify a defendant from bail. States also employ statutes to establish guidelines and then use the procedural rules to provide further direction and process to the courts.

C. Bail Amounts

State procedural rules vary on how courts determine bail amounts. Some states establish a bail amount floor and begin by presuming that the defendant is eligible for release on bail with the least restrictive conditions and "lowest amount necessary to ensure the defendant will reappear."[109] Alternatively, other states set a bail amount ceiling. For example, the Texas procedural code section for fixing bail amount states, "[t]he bail [amount] shall be sufficiently high" with the caveat that bail is "not to be so used as to make it an instrument of oppression."[110] Some states, like Alabama, provide a detailed bail schedule in their statewide procedural rules.[111] Despite differences amongst the states, and given the national discourse on a defendant's right to counsel at bail hearings, it is important for states to set reasonable guidelines for determining bail amounts consistent with Eighth Amendment due process protections.[112]

D. Pre-trial Risk Assessments

Most statewide rules require a judge to rely on "clear and convincing evidence" when deciding to deny bail or release a defendant as directed by the procedural rules.[113] Across all states, courts consider at least whether a defendant is a flight risk, likely to reappear for trial, and poses a threat of harm to the

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[108] MINN. R. CRIM. P. 6.01.

[109] COLO. REV. STAT. § 16-4-103; UTAH R. CRIM. P. 6(e)(3)(A).

[110] TEX. CODE CRIM. PROC. § 17.15.

[111] *See, e.g.*, ALA. R. CRIM. P. 7(b); KAN. R. CRIM. P. 4.20.

[112] *See, e.g.*, CONSTITUTION PROJECT, DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING-A REPORT OF THE CONSTITUTION PROJECT NATIONAL RIGHT TO COUNSEL COMMITTEE 17–30 (Mar. 2015), http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf [https://perma.cc/Y3S8-KMLF]; NAT'L ASSOC. CRIMINAL DEF. LAWYERS, GIDEON AT 50, PART 3—REPRESENTATION IN ALL CRIMINAL PROSECUTIONS: THE RIGHT TO COUNSEL IN STATE COURTS (Oct. 2016), https://www.nacdl.org/gideonat50/ [https://perma.cc/U4WL-JGLF].

[113] *See, e.g.*, UTAH CODE ANN. § 77-20-1(5); ARIZ. R. CRIM. P. 7.3(c); CAL. PENAL CODE § 1270.1. Some states delegate this analysis to a bail authority. *See, e.g.*, PA. R. CRIM. P. 523. "This rule clarifies present practice, and does not substantively alter the criteria utilized by the bail authority to determine the type of release on bail or the conditions of release reasonably necessary, in the bail authority's discretion, to ensure the defendant's appearance at subsequent proceedings and compliance with the conditions of the bail bond." *Id.*, Comment.

community or themselves.[114] In California, and most states, the prosecutor presents this evidence, not subject to the rules of evidence,[115] regarding these considerations based on the defendant's previous criminal history.[116] Some states allow the defendant to provide a statement on his or her behalf during a bail determination hearing, while others allow the defense attorney (assuming the defendant has counsel) to inform the court of the defendant's desire to be released.[117]

While some states establish pre-trial risk assessments in their procedural rules, others, like Colorado, have pre-trial risk assessment procedures in statute.[118] To better assist the judge in making pre-trial release determinations, many states have created pretrial release services or agencies who present their findings after a risk assessment of the defendant.[119] "[P]retrial services programs [support] the work of the court and evidence-based decision-making in determining the type of bond and conditions of release."[120] The assessments assign the defendant a "risk score" based on certain considerations to assist the judge in assessing the defendant's flight risk and potential danger to the community, and whether to impose additional release conditions to ensure the defendant returns to court.[121] Colorado's statutes encourage individual counties and cities to develop their own evidence-based pretrial risk assessment tools by working with a community advisory board, members of the judiciary, and rep-

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[114] *See, e.g.*, CAL. PENAL CODE § 1270.1.

[115] ARIZ. R. CRIM. P. 7.3(c).

[116] CAL. PENAL CODE § 1270.1. Some state statutes even allow evidence of a person's juvenile criminal record. *See, e.g.*, N.M. STAT. § 31-3-1.1.

[117] *See, e.g.*, CAL. PENAL CODE § 1270.1; COLO. REV. STAT. § 16-4-101; UTAH CODE ANN. § 77-20-1(5).

[118] *See, e.g.*, COLO. REV. STAT. § 16-4-106.

> An emerging area of pretrial policy involves use of risk assessment to evaluate the risk posed by an individual defendant and the likelihood that he or she will commit a new offense or fail to appear. While empirical risk assessment tools are used around the country by local jurisdictions, it is only recently that lawmakers have provided statewide, statutory guidance on their use. Fifteen states—Colorado, Connecticut, Delaware, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maine, New Jersey, Oklahoma, South Carolina, Vermont, Virginia and West Virginia—authorize courts to consider the results of a risk assessment when making the pretrial release decision. Six States—Delaware, Colorado, Kentucky, New Jersey, South Carolina and West Virginia—require risk assessments for all defendants. Kansas and Oklahoma assessments apply to defendants who will potentially be supervised by pretrial services program. Maine and Louisiana require assessments for domestic violence offenses. In Hawaii and Virginia, assessments are utilized at the court's discretion.

Guidance for Setting Release Conditions, NAT'L CONF. ST. LEGISLATURES (May 13, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx [https://perma.cc/N6GB-RRGP].

[119] *See, e.g.*, IND. R. CRIM. P. 26. Some states conduct pretrial risk assessments only for felonies. *See, e.g.*, ARK. R. CRIM. P. 8.4.

[120] COLO. REV. STAT. § 16-4-106.

[121] *Id.* § 16-4-106. Other states are silent with regard to how the assessment is conducted but employ their states procedural rules to direct the court to use the pretrial risk assessment during the bail hearing. *See, e.g.*, MINN. R. CRIM. P. 6.02(3).

resentatives from the bond industry.[122] Pretrial risk assessments have been successful in reducing the pretrial detention population, minimizing the negative psychological, social, and financial consequences a defendant faces because of pretrial detention, and assisting courts to correctly deny bail to violent offenders.[123]

E. Conditions of Release

Judges often rely on statutory guidance, the procedural rules, and pre-trial risk assessments to impose conditions on a defendant's release. Conditions of release ensure that the defendant will reappear for trial, protect the community and defendant, and "avoid unnecessary pretrial incarceration."[124] Some statewide rules consider the "individual characteristics of each person in custody, including the person's financial condition," employment status, social support systems, housing arrangements, character and reputation, the sentence the defendant is likely to receive, criminal record, and the defendant's likelihood to flee when determining whether a defendant should be released, with or without conditions.[125] Common conditions for release include supervised release, temporary restraining orders, if the defendant is charged with drinking under the influence of alcohol, to abstain from drinking alcohol, supervision under a pretrial services organization, drug and alcohol testing, mental health and substance abuse counseling, electronic-monitored house arrest, bail, or pretrial work release.[126] Texas' procedural code lists different conditions a judge can order based on the specific crime. For example, a judge can order a defendant in a family violence case to wear a global-positioning-device and stay away from the child's school.[127]

F. Conclusion on Bail and Pre-Trial Release

Uniformity in bail and pre-trial release procedures is necessary to ensure fairness across the state. Simply providing a court with a non-exhaustive list of considerations in determining the bail amount can result in inconsistent determinations if there is no standard, presumption, or process for direction. While procedural uniformity with bail and pre-trail release determinations is difficult, providing courts with standard considerations, risk assessments, or bail schedules may result in more uniform determinations. Additionally, having a uniform

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[122] COLO. REV. STAT. § 16-4-106(4)(c).

[123] *See, e.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837 (2016).

[124] COLO. REV. STAT. § 16-4-103.

[125] *Id.* § 16-4-103. This information can be presented in a pretrial risk assessment report. *See* ARK. R. CRIM. P. 8.5.

[126] These conditions appear in statute in some states and the procedural rules in others. COLO. REV. STAT. § 16-4-105; ARIZ. R. CRIM. P. 7.2.; MINN. R. CRIM. P. 6.02; FLA. R. CRIM. P. 3.131(b); WASH. REV. CODE § 10.21.030.

[127] TEX. CODE CRIM. PROC. § 17.49.

bail schedule will likely make courts more efficient by eliminating the time required to determine the bail amount.

Pre-trial risk assessments provide valuable information to help guide the court to more consistent decisions by utilizing data to distinguish between high-risk and low-level offenders. This likely results in more fair proceedings across the state, and may reduce overcrowded jails and maximize limited criminal justice resources. Pre-trial risk assessments also have the added value of insulating low-level offenders from additional negative consequence of pretrial detention by allowing the defendant to maintain his or her job, custody of children, home, and medical care and commitment to the court while waiting for their case to proceed.

II. PRE-TRIAL MOTIONS

Procedural rules for pre-trial motions primarily address what types of motions can and *must* be filed prior to trial, the time for filing these motions, which party can file certain motions, and the process for handling these motions. States with more developed pre-trial motion rules detail the possible pleas a defendant can make and explain that failure to raise any issues pre-trial constitutes a waiver of those issues. Defined pre-trial motion rules are important because the parties are moving the court for significant, case-altering requests, such as whether evidence may be suppressed, defenses are properly raised to be preserved for appeal, and defendants' cases are joined or severed.

Thirty-two of the thirty-four states with statewide rules have a defined section for pre-trial motions.[128] Neither Michigan and New York have specific motion rules in their statewide rules. Notably, Arkansas and Oregon have very limited motion practice rules, focusing almost solely on motions to suppress evidence.[129] All six states with criminal procedure codes have pretrial motion rules.[130] Of those thirty-eight states with pre-trial motion rules, twenty-three[131] states' rules effectively mirror FRCP 12.[132] The remaining states either provide

[128] The states that have pre-trial motion procedure rules include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming.

[129] ARK. R. CRIM. P. 16.2; OR. UTCR 4.060.

[130] KAN. STAT. ANN. § 22-2716; MONT. CODE. ANN. tit. 46, ch. 9; OKLA. STAT. tit. 22, ch. 19; S.D. CODIFIED LAWS tit. 23A, ch. 43; TEX. CODE CRIM. PROC. tit. 1, art. 17; WIS. STAT. ch. 969.

[131] The states that mirror FRCP 12 include: Alaska, Colorado, Hawaii, Idaho, Maine, North Dakota, Ohio, Rhode Island, Tennessee, Utah, Virginia, West Virginia, Wyoming. Other states also closely follow the Federal Rules, but with different numbering. These states include: Florida, Illinois, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, South Dakota, Texas.

[132] The FRCP outlines what motions can be brought, when they may be brought, when a court must rule of the motions and the procedure for motion hearings. FED. R. CRIM. P. 12.

very detailed rules,[133] or only have a general statement and list different motions that may be brought in various sections.[134] California's rules are an outlier because its pre-trial motion practice includes only two brief sections regarding filing and service.[135]

Generally, states mirror the FRCP and then add additional state specific distinctions or preferences. Most of the pre-trial motion procedural rules commonly focus on the defense's filings, rather than prosecution's filings. This can likely be explained by considering that in a criminal case, the defendant is most often the movant, filing for any possible relief with the court prior to trial.

Like the FRCP, Alabama and Colorado's pre-trial motion rules define criminal pleadings and motions, as well as defenses and objections, which can or must be raised by motion. Any defense or objection capable of determination without the trial of general issue *may* be raised by motion.[136] The rules list defenses and objections that *must* be raised prior to trial. This includes defenses and objections based on defects in the institution of the prosecution or the indictment or information or complaint, or summons and complaint.[137] Alabama's pre-trial motions rule includes a comment from the committee stating that "[t]his rule is designed to simplify the procedure and avoid the technical distinctions that serve as traps for the unwary. . . . the form or styling of the motion is not important, and substance shall govern over form."[138]

A. Nevada's Pre-Trial Motion Practice

In the absence of statewide criminal procedure rules, Nevada courts and practitioners rely on the minimal applicable statutes, districts' local rules, case law, and the statewide district court rules, which provide little to no guidance on criminal pre-trial motions. Nevada's criminal procedure statutes have substantive pre-trial motion procedures similar to FRCP 12,[139] and are more specific than any local applicable rule. Specifically, the statutes detail which motions

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[133] Unlike most states, Connecticut has rather extensive pretrial motion rules, which includes rules for general pretrial motion practice, CONN. SUPER. CT. CRIM. MATTERS ch. 41, rules regarding motions to dismiss, *id.* § 41-8 to 41-11, rules regarding motions to suppress, *id.* § 41-12 to 41-17, rules regarding severance and joinder of offenses, *id.* § 41-18 to 41-19, rules regarding a bill of particulars, *id.* § 41-20 to 41-22, and transfer of prosecution, *id.* § 41.23 to 41.25.

[134] *See, e.g.*, Kentucky, Louisiana, Michigan, and South Carolina.

[135] CAL. R. CT. 4.111(a)–(b) ("Unless otherwise ordered or specifically provided by law, all pretrial motions, accompanied by memorandum, must be served and filed at least 10 court days, all papers opposing the motion at least 5 court days, and all reply papers at least 2 court days before the time appointed for hearing. Proof of service of the moving papers must be filed no later than 5 court days before the time appointed for hearing. . . . The court may consider the failure without good cause of the moving party to serve and file a memorandum within the time permitted as an admission that the motion is without merit.").

[136] ALA. R. CRIM. P. 15.2; COLO. R. CRIM. P. 12(b)(1).

[137] ALA. R. CRIM. P. 15.2; COLO. R. CRIM. P. 12(b)(2).

[138] ALA. R. CRIM. P. 15, Comment.

[139] NEV. REV. STAT. §§ 174.075, 174.095–.145.

must be made before trial,[140] including motions to suppress evidence, requests for transcripts of previous proceedings, for a preliminary hearing, for severance of joint defendants, for withdrawal of counsel, or any motion, if granted, that would delay the start of trial.[141] The deadlines for filing motions are also detailed in statute, which is determinative of the number of judges in the judicial district.[142]

Without clear statutory guidance on criminal pre-trial motions, local districts have developed rules to help guide judges and practitioners.[143] Only the Second District's criminal procedure rules has distinct rules for pre-trial motions.[144] The Eighth District also has criminal motion rules, including a separate discovery rule and motion in limine rule.[145] The general motion rule provides for the timing of motions,[146] including that motions must be served and filed not less than fifteen days before the start of trial unless the movant can demonstrate good cause.[147] Oppositions are due seven days after service of the motion.[148]

In contrast of FRCP 12, Nevada's districts' rules on motion practices that may apply to criminal proceedings, if applicable,[149] do not list the defenses, objections, and/or requests that *must* be raised before trial. Instead, the rules focus on deadlines to file the motion, opposition, and reply,[150] list that a memorandum with the motion setting forth the points and authorities relied on to support

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[140] *Id*. § 174.125.

[141] *Id*. § 174.125(1).

[142] For example, in judicial districts with only one judge, the motion "must be made in writing, with not less than ten days' notice to the opposite party" unless good cause is shown to the court. *Id*. § 174.125(2)(a). Judicial districts with more than one judge, the motion "must be made in writing not less than fifteen days before the date set for trial, except that if less than fifteen days intervene between entry of a plea and the date set for trial," then the motion may be made within five days after the entry of the plea. *Id*. § 174.125(3)(a).

[143] Three rules for procedures on how to make motions generally, continuance motions; and when motions can be heard in chambers, or must be heard in open court, or can be submitted on the briefs. D.C.R. 13–15. These rules do not have a specific rule for pretrial motions; however, the rules do explain the timing for filing a response and a reply, and requires that a memorandum setting forth the movants points of authorities accompany each motion. *Id*. 13(1).

[144] LCR 7.

[145] EDCR 3(20).

[146] *Id*.

[147] *Id*. 3(20)(a).

[148] *Id*. 3(20)(c).

[149] *See, e.g*., 4JDCR 11(1); 7JDCR 7; 10JDCR 15(1). The Fourth, Seventh, and Tenth judicial districts' share the same deadlines: the opposition must be filed within ten days after service and the reply may be filed five days after service. 4JDCR 11; 7JDCR 7; 10JDCR 15. The Seventh judicial district motion rules also detail memorandums of points of authorities for each motion, requests for hearings, and procedures in alerting the court to review the motion. 7JDCR 7. The First and Third judicial districts, both have motion rules for civil cases only; there are no criminal motion rules. FJDCR 15 ("Motions and similar moving papers in civil cases."); TJDCR 7 (same). The Ninth judicial district's motion rules are limited and only apply to criminal proceedings "if applicable." NJDCR 2(c).

[150] *E.g*., FJDCR 15.

the motion is required,[151] procedures on how to request a hearing on the motion,[152] and in certain cases, procedures on how to request that the court review the motion.[153] Specifically, pre-trial motions must be served and filed no later than twenty days before trial. The opposition is due ten days later (and no later than ten days before trial), and the reply is due three days later (and no later than seven days before trial.)[154] The movant then notifies the court it is time to rule on the motion.[155]

Practitioners are left uncertain as to what rules apply to criminal cases, especially in terms of filing deadlines. As an example of inconsistent rules, compare Nevada's statutes on motions in limine with Nevada's Eighth and Second Judicial Districts' local rules.

NRS 174.125 states in pertinent part:

> 1. All motions in a criminal prosecution to suppress evidence, . . . and all other motions which by their nature, if granted, delay or postpone the time of trial must be made before trial,
>
> . . .
>
> 3. In any judicial district in which two or more judges are provided:
>
> (a) All motions subject to the provisions of subsection 1 must be made in writing not less than 15 days before the date set for trial, except that if less than 15 days intervene between entry of a plea and the date set for trial, such a motion may be made within 5 days after entry of the plea.

EDCR 3.28, entitled Motions in Limine states:

> All motions in limine to exclude or admit evidence must be in writing and noticed for hearing not later than calendar call, or if no calendar call was set by the court, no later than 7 days before trial. The court may refuse to consider any oral motion in limine and any motion in limine which was not timely filed.

LCR 7, titled pretrial motions states, in part:

> (a) Except as otherwise ordered by the court, all pretrial motions, including motions in limine, shall be served and filed no later than 20 days prior to trial. Computation of time as set forth in this rule shall be in calendar days. If a pretrial motion is filed within 30 days prior to trial, it shall either be personally served upon the opposition on the date of filing or be e-filed.
>
> . . . .
>
> (c) All motions shall be decided without oral argument unless requested by the court or party.

As demonstrated by the above excerpts, there is no clear rule as to when a motion to suppress, which is comparable to a motion in limine, is to be filed. By statute such motion must be made fifteen days prior to trial, in the Eighth Judicial District it must be made before calendar call, or seven days, and in the Second Judicial District it must be made at least twenty days prior to trial.

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[151] *E.g.*, 4JDCR 5(a).
[152] *E.g.*, NJDCR 6(e).
[153] *E.g.*, LCR 7(f).
[154] LCR 7.
[155] *Id.* 7(f).

There does not appear to be a specific reason why each rule requires a different deadline, but a practitioner is left with little direction on when to file a motion in limine.

III. DISCOVERY

Detailed and defined discovery procedures are vital for efficient proceedings and to protect a defendant's due process rights. Ambiguity or inconsistency in governing discovery rules may result in non-disclosure of critical mitigating and/or aggravating evidence. Currently, there is no consistent approach across the states for discovery rules, as "[d]iscovery systems range from mandatory to discretionary and from mutual to reciprocal."[156]

Almost every state has a section of their criminal procedure rules, codes, or statutes dedicated to discovery.[157] Generally, states' discovery rules follow the FRCP format,[158] but some states chose to expand the scope of the FRCP by including more detailed rules[159] and specify remedies for a party's failure to follow the discovery requirements. Most states separate their discovery rules by the defense's obligations and the prosecution's obligations.[160] A few states expand beyond these obligations, implementing offense specific discovery procedural rules. For instance, implementing special discovery rules for crimes against children.[161] Overall, most states' rules tend to be more thorough than the FRCP.[162]

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[156] HON. ROSSIE D. ALSTON, ACLU OF VIR., BRADY V. MARYLAND AND PROSECUTORIAL DISCLOSURES: A FIFTY STATE SURVEY 2 (2014), https://acluva.org/wp-content/uploads/2015/05/150526-Criminal-Discover-Judge-Alston-article.pdf [https://perma.cc/53BH-B9GN].

[157] Delaware, Indiana, and Nevada do not have statewide procedural discovery rules. Some states use the term "disclosure" in place of, or in addition to the term "discovery." For example, Arizona exclusively uses "disclosure," Mississippi uses "disclosure and discovery," and Montana uses "production of evidence."

[158] Several of those states model their discovery rules after FRCP 16 in both structure and substance. These states include Alaska, Arizona, Hawaii, Iowa, North Dakota, Pennsylvania, South Carolina, Tennessee, Utah, West Virginia, and Wyoming.

[159] *See, e.g.*, ARIZ. R. CRIM. P. 15.1–15.9. Arizona's criminal procedure rules are more detailed than the FRCP, discussing the prosecutor's obligations, then the defendant's, and then includes several rules on procedural specifics. The rules also specify sanctions that can be brought against a party who fails to disclose as well as procedures for appointment of investigators and expert witnesses for indigent defendants. *Id*. 15.7, 15.9. The procedural rule for the appointment of experts and investigators includes (1) the application for appointment; (2) ex parte proceeding restrictions; (3) mitigation specialists; and (4) deadlines for capital cases. *Id*.

[160] Although, a few states, including Maine and Texas do not distinguish the states' and the defense's obligations.

[161] For example, Texas includes specific discovery rules on evidence in child abuse and child sexual exploitation cases. California, too, has a specific rule on disclosure in child pornography cases. Texas does not allow the defense to copy or duplicate images of child pornography. TEX. CODE CRIM. PROC. §§ 39.15, 39.151. The state is only required to make the evidence "reasonably available" to the defense. The evidence is considered reasonably available if the state allows "ample opportunity for the inspection...and examination of the property" by the defense or any expert qualified for trial. *Id*. § 39.15(c)–(d). California prohibits *any* attorney from releasing copies of child pornography evidence to the defendant or the

There are three uniform disclosures required in every state: (1) the defendant's prior written statements, (2) the defendant's prior recorded statements, and (3) physical evidence to be used at trial.[163] Common additional disclosures include the defendant's oral statements, co-defendant statements, defendant's criminal record, witness statements, expert witness information, and grand jury testimony.[164] Another commonality in states' discovery rules is procedures to protect privacy of those involved in discovery.[165]

Further, the states generally fall into two broad categories depending on whether the parties must request discovery[166] or whether discovery, at least some disclosures, are automatic.[167] Depending on how rigid the rules requiring request or automatic disclosures are, there appears to be a difference in philosophy of discovery. One end promotes cooperation[168] and the other end utilizes detailed schemes and specifies the process for court intervention.

Unique among the states, California's criminal discovery procedures are governed by its Constitution. In 1990, California voters passed Proposition 115 to establish constitutional discovery.[169] The California Constitution states: "[i]n

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defendant's family. CAL. PENAL CODE § 1054.10. The images may only be disclosed after a hearing by the court and a showing of good cause. *Id*.

[162] For example, Connecticut's "Discovery and Depositions" rule includes a lengthy, detailed list of procedures in addition to the basic requirements of the prosecution and defense. CONN. SUPER. CT. CRIM. MATTERS §§ 40-1 to 40-58.

[163] ALSTON, *supra* note 156, at 9.

[164] *Id*. at 9–10.

[165] *See, e.g*., COLO. R. CRIM. P. 16 (detailing that the court may deny disclosures that may cause a person substantial harm, which outweighs the usefulness of the disclosure); ALA. R. CRIM. P. 16(d)(3)(B) (specifying that an attorney shall not disclose to the defendant any personal information of any witnesses involved); UTAH R. CRIM. P. 16 (stating reasonable limitations may be imposed to protect the privacy of individuals involved in discovery).

[166] On the extreme end of the categories is Alabama, which requires defendants to request discovery in writing. ALA. R. CRIM. P. 16.2.

> Upon written request of the state/municipality, the defendant shall, within fourteen (14) days after the request has been filed in court as required by Rule 16.4(c), or within such shorter or longer period as may be ordered by the court, on motion, for good cause shown, permit the state/municipality to analyze, inspect, and copy or photograph books, papers, documents, photographs, tangible objects, buildings, places, or portions of any of these things, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.

Id.

[167] For example, Maine's discovery rule details automatic discovery, deadlines, discovery upon request discovery based on court order and sanctions for noncompliance for both parties. *See* M.R.U. CRIM. P. 16.

[168] *See, e.g*., PA. R. CRIM. P. 573(A) ("Before any disclosure or discovery can be sought under these rules by either party, counsel for the parties shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules as to which there is no dispute."); ALA. R. CRIM. P. 16 ("In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system.").

[169] Crime Victims Justice Reform Act, Cal. Proposition 115 (June 5, 1990).

order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process."[170] This requirement has been written into the California Penal Code, which is similar to many other states' discovery procedures, separating the obligations of the prosecution and defense and then offering procedural specifications.[171]

A. Nevada's Discovery Rules

A defendant's right to discovery is generally linked to the protection of a defendant's constitutional right, like the right to confrontation.[172] With no statewide criminal discovery rules, practitioners must look to the discovery statutes and determine whether a local districts' rules are applicable.[173] While the prosecutor is still bound by their disclosure requirements mandated by Nevada's Constitution and the United States Constitution, Nevada's statutes require both the state and defendant to request discovery; there is no requirement for automatic discovery.[174] The statutes, much like FRCP 16, provide specific rules for disclosures by the prosecuting attorney[175] and defendant.[176] All parties have a continuing duty to disclose previously requested material that is subject to discovery.[177] Nevada's discovery statutes also establish various rules for dis-

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[170] CAL. CONST. art. 1, § 30.

[171] CAL. PENAL CODE, tit. 6, ch. 2. California has criminal procedural rules in both court rule and codified in the penal code. *See* 50 State Rule Chart, Appendix. California's detailed discovery statute lays out not only the prosecution's and defense's obligations, but also procedures from everything to time for disclosure to disclosure of special categories, such as privileged information, work product, and post-conviction writ of habeas proceedings. CAL. PENAL CODE §§ 1054.8–.9. California's criminal procedural rules by court rule do not address procedure for discovery, that procedure appears to be entirely left to the California Constitution and the California Penal Code.

[172] *See, e.g.*, Higgs v. State, 222 P.3d 648, 664 (Nev. 2010) ("This court has observed that a defendant's right to discovery is tangentially related to the right of confrontation.").

[173] Nevada's Judicial Districts with discovery rules for criminal cases—First, Second, and Eighth Districts—slightly build upon the discovery procedures found in statute. The First Judicial District discovery rules, which apply to criminal proceedings if applicable, details the procedure on answering interrogatories and admissions under the Nevada Rules of Civil Procedure. FJDCR 16.

[174] NEV. REV. STAT. §§ 174.235–.245.

[175] *Id.* § 174.235. Upon a defendant's request, the prosecutor must permit the defendant to inspect, copy, and photograph written or recorded statements, or confessions, or any written or recorded statement made by witnesses the prosecutor plans to call during the case in chief, results or reports of physical or mental exams, scientific tests or experiments, and books, papers, documents, or objects the prosecutor intends to introduce. *Id.*

[176] *Id.* § 174.245. At the request of the prosecutor, the defendant must permit the prosecutor to inspect, copy or photograph any written or recorded statements made by witnesses the defendant plans to call during the case in chief, results or reports of physical or mental exams, and scientific tests or scientific experiments that will be introduced by the defendant during the case in chief. *Id.*

[177] *Id.* § 174.295.

covery matters, such as when a defendant intends to establish an alibi,[178] or if a party intends to use an expert witness.[179] Additionally, both the prosecutor and defendant must disclose all witnesses each side plans to call during the case-in-chief.[180]

The Second and Eighth criminal discovery rules' process and philosophy differ significantly. The Second District's discovery rule does not address the requirement that the parties must request discovery, and the rule appears to promote some form of automatic discovery in stating, "The parties, through their counsel, without order of the court, shall timely provide discovery of all information and materials permitted by any applicable provision of the Nevada Revised Statutes."[181] This rule is intended to promote timely disclosure and "eliminates the need for a discovery order unless the court orders discovery beyond that required by the statutes of Nevada."[182] Alternatively, the Eighth District's rules only discusses discovery on how a defendant may make an oral motion for a court order requiring the state to produce their statutory required disclosures.[183] These two districts' rules impose different duties upon both the state and defendant. The Second District appears to promote cooperation and discourages the need for a court order requesting statutorily required discovery, while the Eighth District appears to promote the use of court orders to make the state disclose the requirements listed in statute.

IV. COMPETENCE OF A DEFENDANT TO STAND TRIAL

The United States Supreme Court has established that trying an incompetent criminal defendant violates his or her fundamental right to due process.[184] A defendant is incompetent when he is "unable to understand the proceedings against him or properly to assist in his own defense."[185] Issues regarding whether a defendant is competent to stand trial may be raised at any time.[186] While every state has a statute, code provision, or rule regarding this right, not

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[178] If a defendant who intends to offer evidence of an alibi must give written notice of the details and witnesses who can establish the alibi. *Id*. § 174.233. The prosecutor must reciprocally disclose witnesses to discredit the defendant's alibi within ten days of the defendant's notice. *Id*.

[179] *Id*. § 174.234(2). If the defendant will be tried for a gross misdemeanor or felony, a party who intends to use an expert witness must provide written notice to what the expert witness will testify, a copy of the expert's curriculum vitae, and a copy of all reports made by or at the direction of the expert. *Id*.

[180] *Id*. § 174.234.

[181] LCR 6.

[182] *Id*. 6(a), Comment.

[183] EDCR 3.24.

[184] Cooper v. Oklahoma, 517 U.S. 348, 354 (1996).

[185] Greenwood v. United States, 350 U.S. 366, 369 (1956); *see also, e.g*., ARIZ. R. CRIM. P. 11.1.

[186] *E.g*., TEX. CODE CRIM. PROC. § 46B.005(c)(3)(D).

all states have codified procedures in their statewide rules of criminal procedure. Thirty-two states have some procedural rules addressing competency.[187]

In general, most states' statutes detail the procedures for determining competency.[188] While most states' statutes control competency procedures,[189] it is common for procedural rules to dictate how to compute time to protect a defendant's speedy trial rights if competency is at issue[190] and raising the insanity defense.[191] Although, several states employ their statewide criminal procedure rules to detail competency determinations. For example, California has thorough competency procedures in its criminal procedure rules.[192] Even more detailed is Arizona's statewide rules on competency, which has specific rules discussing experts, hearing procedures, records, and disclosure of mental health evidence.[193]

A. Competency Determinations in Nevada

In Nevada, a defendant is deemed competent to stand trial if he has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."[194] Consistent statewide determination procedures are

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[187] The states that have procedure rules addressing a defendant's competency to stand trial include: Alabama, Arizona, California, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. While the preceding states have rules of criminal procedure that specifically address competency, the remaining states may have codified competency issues in their state statutes. For this paper, only the Rules of Criminal Procedure for each state were evaluated.

[188] For instance, New Mexico's criminal procedure competency statutes are broken down into the following subsections: raising the issue, evaluation and determination, commitment, reports, ninety-day review, continuing treatment, evidentiary hearing, hearing to determine mental retardation, mental examination, criminal trials, plea and verdict of guilty but mentally ill, and sentence upon plea or verdict of guilty but mentally ill. The Texas Code of Criminal Procedure have broken competency down into the following subsections: General Provisions, Examination, Incompetency Trial, Procedures After Determination of Incompetency, Civil Commitment: Charges Pending, Civil Commitment: Charges Dismissed. The Arizona Rule of Criminal Procedure Rule 11 has broken competency down into the following subsections: definition and effect of incompetency, motion to have Defendant's mental condition examines, appointment of experts, disclosure of mental health evidence, hearing and orders, subsequent hearings, privilege, records. N.M. STAT. 31 § 9.

[189] *See, e.g.*, N.M. STAT. § 31-9; UTAH CODE § 77-16a.

[190] *See, e.g.*, ALASKA R. CRIM. P. 45 (allowing delays due to a defendant's incompetence to not count when computing time for trial); CONN. SUPER. CT. CRIM. MATTERS § 43-40(1)(A); HRPP 48(c)(1); MASS. R. CRIM. P. 36.

[191] *See, e.g.*, N.D. R. CRIM. P. 22 ("Notice of Defense Based on Mental Condition; Mental Examination"); TENN. R. CRIM. P. 12.2 ("Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition").

[192] CAL. R. CT. 4.130.

[193] ARIZ. R. CRIM. P. 11.

[194] Calvin v. State, 147 P.3d 1097, 1100 (Nev. 2006) (citations omitted).

essential due to the risk that a defendant's fundamental due process right may be violated if a competency determination is not accurate or appropriate.

This issue is completely governed by statute and none of Nevada's local districts' rules discuss competency proceedings.[195] A judge can suspend proceedings at any time after a defendant is arrested if there is doubt about the defendant's competence[196] and the court must appoint a certified mental health professional to help determine whether a defendant is competent to stand trial.[197] If the defendant is found competent, the trial or judgment proceeds.[198] Otherwise, the defendant receives treatment to become competent.[199] If there is a substantial probability that the defendant will not attain competence in the foreseeable future, the proceedings must be dismissed.[200]

B. Raising the Issue of Competency

At common law, the issue of competency may be raised at any time during a criminal proceeding, either by observation of the court or by suggestion from a party.[201] Most procedural rules reiterate this right and detail the procedures to be followed once an issue of competency has been raised. Generally, either a party or judge may raise the issue of competency,[202] usually by way of a motion in which "the facts upon which the mental examination is sought."[203] For example, in Arizona, once a motion is filed, the court must be provided with all of the defendant's medical and criminal history within three days.[204] A preliminary hearing is then scheduled to help the judge decide whether reasonable grounds exist to evaluate the defendant's competency.[205] Similarly under Texas's criminal procedure code, a judge may hold an informal inquiry to decide if the defendant's competence is at issue.[206] If issues regarding a defendant's competence are raised, judges may petition the state to dismiss the charge before any formal competency decision is made.[207] Though either the judge or the parties may raise the issue, the ultimate determination is left to the judge.[208]

Generally, all states' rules on continuances allow for a delay in proceedings for competency determination proceedings. Once the court decides that a de-

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[195] NEV. REV. STAT. §§ 178.3981–.4715.
[196] *Id.* § 178.405(1).
[197] *Id.* §§ 178.415–.417. The appointed mental health professional must be certified by the Division of Public and Behavioral Health of the Department of Health and Human Services. *Id.*
[198] *Id.* § 178.420.
[199] *Id.* § 178.498.
[200] *Id.* § 178.425(5).
[201] Godinez v. Moran, 509 U.S. 389, 406 (1993).
[202] *See, e.g.*, ARIZ. R. CRIM. P. 11.2(a); CAL. R. CT. 4.130.
[203] ARIZ. R. CRIM. P. 11.2(a).
[204] *Id.* 11.2(B).
[205] *Id.* 11.2(C).
[206] TEX. CODE CRIM. PROC. § 46B.004(c).
[207] *Id.* § 46B.004(e).
[208] CAL. R. CT. § 4.130(b)(1).

fendant's competence is at issue, proceedings are suspended until competence is determined.[209] In some states, such as California, this may impact speedy trial requirements. To preemptively combat issues with a defendant's speedy trial rights, the state's rules set forth guidelines and timelines for how to deal with this issue.[210]

C. Determining Competence

Once the issue of competency is raised, the court must determine whether the defendant is or is not competent to stand trial. States' procedural rules often require the appointment of at least one expert to compile a report and make a recommendation.[211] Arizona, has even set a ten-day deadline from the time the expert's exam of the defendant to the time when the completed report must be available to the court and the parties.[212]

Rules appear to vary on how many experts a court may appoint, and whether the parties may recommend or appoint their own experts. For example, in California, once competency proceedings have begun, the judge must ask the defendant whether he is seeking a finding of mental incompetence.[213] If the defendant is seeking a determination then the court must appoint at least one expert;[214] but the court must appoint at least two experts if defense counsel does not seek a determination of competence.[215] Regardless of the number of experts

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[209] *Id*. § 4.130(C)(1).

[210] *Id*. § 4.130(C)(1)(B)(3).

> (1) If mental competency proceedings are initiated, criminal proceedings are suspended and may not be reinstated until a trial on the competency of the defendant has been concluded and the defendant either:
>
> (A) Is found mentally competent; or
>
> (B) Has his or her competency restored under Penal Code section 1372.
>
> (2) In misdemeanor cases, speedy trial requirements are tolled during the suspension of criminal proceedings for mental competency evaluation and trial. If criminal proceedings are later reinstated and time is not waived, the trial must be commenced within 30 days after the reinstatement of the criminal proceedings, as provided by Penal Code section 1382(a)(3).
>
> (3) In felony cases, speedy trial requirements are tolled during the suspension of criminal proceedings for mental competency evaluation and trial. If criminal proceedings are reinstated, unless time is waived, time periods to commence the preliminary examination or trial are as follows:
>
> (A) If criminal proceedings were suspended before the preliminary hearing had been conducted, the preliminary hearing must be commenced within 10 days of the reinstatement of the criminal proceedings, as provided in Penal Code section 859b.
>
> (B) If criminal proceedings were suspended after the preliminary hearing had been conducted, the trial must be commenced within 60 days of the reinstatement of the criminal proceedings, as provided in Penal Code section 1382(a)(2).

Id.§ 4.130(C).

[211] *See, e.g*., ARIZ. R. CRIM. P 11.3; CAL. R. CT. 4.130(d)(1); TEX. CODE CRIM. PROC. § 46B.021.

[212] ARIZ. R. CRIM. P. 11.4(A).

[213] CAL. R. CT. 4.130(D)(1).

[214] *Id*. § 4.130(D)(1)(A).

[215] *Id*. § 4.130(D)(1)(B).

the court ultimately appoints, the experts must come from a court approved list.[216] In contrast, in Arizona, the defense and the prosecution may provide a list of three experts to the court, which the court may then choose from.[217] Texas' competency statute states that the court must appoint "disinterested" experts.[218] This language does not specify whether the parties may suggest experts. Some states' procedural rules also include details on what qualifications are required of the experts.[219] Ultimately, the court has the discretion as to choose the appointed expert(s). Additionally, some states' rules, like Texas', provide factors that experts should consider when examining the defendants.[220]

D. Holding a Competence Proceeding

Once an expert completes and provides the report of the defendant's exam to the judge and the parties, generally, states then hold either a competency hearing or trial. Some states, like Arizona and Texas, require a hearing within thirty days of the expert's submission of the report.[221] At the hearing, parties may introduce additional evidence regarding the defendant's mental condition. California's procedural rules state that the defendant is presumed competent at the time of the trial, placing the burden on the moving party to prove that the defendant is not competent by a preponderance of the evidence.[222] At the trial or hearing, the experts may be called to testify and examined by both the defense and prosecution.[223] New Mexico is unlike its surrounding states in this issue because its statutory procedural rules only require a hearing when the case has not been dismissed *and* when the defendant is charged with certain specified felonies.[224] If these factors[225] are not present then the case shall be dis-

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[216] *Id*.

[217] ARIZ. R. CRIM. P. 11.3(C).

[218] TEX. CODE CRIM. PROC. § 46b.021(A).

[219] *See, e.g.*, ARIZ. R. CRIM. P. 11.3(A)–(B). For instance, Arizona requires at least one of the minimum of two experts appointed be a psychiatrist and the other must be a mental health professional, which the statute then defines. *Id*.

[220] TEX. CODE CRIM. PROC. § 46B.024. Experts may consider factors such as the ability of the defendant to: (1) understand the charges against him and their accompanying penalties, (2) work with and provide counsel necessary and important facts, (3) assist in their defense in making strategic decisions, (4) understand the nature of the criminal proceedings, (4) testify, and (5) behave in a courtroom. *Id*. § 46B.024(2). Experts may additionally consider any diagnosable mental illness or mental retardation and whether those conditions would affect their ability to work with defense counsel, whether the defendant is taking any medication for the mental illness and that medications effect on their competence. *Id*. § 46B.024(1).

[221] ARIZ. R. CRIM. P. 11.5(A); TEX. CODE CRIM. PROC. § 46b.026(B).

[222] CAL. R. CT. 4.130(E)(2).

[223] *Id*. § 4.130(E)(3).

[224] N.M. STAT. § 31-9-1.5(A). These felonies include: (1) the infliction of great bodily harm on another person, (2) the use of a firearm, (3) aggravated arson, (4) criminal sexual penetration, (5) or criminal sexual contact of a minor. *Id*.

[225] Also, hearsay evidence is admissible on secondary matters. *Id*. The secondary matters provided are "testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, district court and business records and public documents." *Id*.

missed with prejudice and then the prosecutor may initiate proceedings non-criminal proceedings.[226]

Instead of a hearing, both California and Texas also allow a jury to determine whether the defendant is competent to stand trial, though neither state *requires* a jury to make the determination.[227] However, if a jury is used, the jury verdict relating to the defendant's competence must be unanimous.[228]

V. JURY INSTRUCTIONS

Nevada is one of only three states that do not have pattern criminal jury instructions.[229] Jury instructions are often referred to as pattern, standard, or model instructions[230] and are designed to provide attorneys with a comprehensive list of criminal law and procedure jury instructions. Most states encourage, but do not require parties to utilize these jury instructions.[231] States differ in how pattern jury instructions are created, who creates them, where and how the instructions are located, and whether the highest court in the state adopts them. Of the remaining forty-seven states, the authors of the state's jury instructions are divided into three categories. First, twenty-eight states have jury instructions drafted by a court created committee.[232] Though a large majority of state jury instructions are drafted by court-made committees, very few state courts have "approved" or directly supported the pattern instructions. Second, fifteen states' jury instructions were drafted by the state bar.[233] Third, four states' jury instructions were drafted by miscellaneous organizations.[234]

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[226] Specifically, the state may initiate proceedings under the Mental Health and Developmental Disabilities Code as well as confine the defendant for no more than seven days while proceedings are initiated. *Id*. § 31-9-1.5(B).

[227] CAL. R. CT. 4.130(E)(4); TEX. CODE CRIM. PROC. § 46b.051.

[228] CAL. R. CT. 4.130(E)(4)(B); TEX. CODE CRIM. PROC. § 46b.051.

[229] There are only three states that do not have pattern criminal jury instructions: Nevada, Rhode Island, and West Virginia. *See* 50 State Rule Chart, Appendix.

[230] For continuity, the term "pattern" will be used throughout. See Chart 50 State Rule Chart, Appendix, for details.

[231] Additionally, the instructions usually include warnings of accuracy and explanations that the burden still lies on the user of the instructions to verify and modify, if necessary, the instructions before use.

[232] The twenty-eight states include: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Tennessee, Utah, Virginia, and Washington.

[233] The fifteen states include: Arizona, Iowa, Maryland, Michigan, Missouri, New Hampshire, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Wisconsin, and Wyoming.

[234] These four states include Alabama, Louisiana, Massachusetts, and Montana. Alabama's criminal jury instructions were drafted by the Alabama Law Institute. *Alabama Pattern Jury Instructions – Criminal Proceedings*, SUP. CT. & ST. LAW LIBR., http://judicial.alabama.gov/library/jury_instructions_cr.cfm [https://perma.cc/K4RU-U258] (last visited Mar. 16, 2017). Louisiana's criminal jury instructions were drafted by two Louisiana State University professors, with the Louisiana Practice Series. THOMSON REUTERS, CRIMINAL JURY INSTRUCTIONS AND PROCEDURES, 3D (VOL. 17, LA. CIVIL LAW TREATISE SERIES), http://legal

Most states offer these pattern instructions on the court's website or through LexisNexis or Westlaw. Some states even offer PDF and word-fillable versions.[235] Other states' pattern instructions are published in a book, requiring attorneys to regularly purchase the latest edition. Further, the drafter or drafting organization of state pattern instructions differ from state to state. There are essentially three categories of authors: state bars, supreme court committees, and miscellaneous drafters, which includes individual authors, non-descriptive "state court" authors, and even law schools.[236]

The forty-seven states with criminal jury instructions also differ in how accessible the instructions are to both attorneys and the public. Twenty states do not offer free public access to the pattern jury instructions,[237] requiring users to either purchase a physical book, purchase Westlaw or LexisNexis, or be a member of state bar associations to obtain access to the information. Ten of the fifteen state bar drafted pattern criminal jury instructions,[238] nine court committee drafted instructions,[239] and one miscellaneous drafter's instructions require payment.[240]

A. Nevada and Jury Instructions

Nevada does not have statewide criminal jury instructions, either created by the court, state bar, or other organization. However, the State Bar of Nevada publishes *Nevada Jury Instructions – Civil*.[241] The publication is authored col-

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solutions.thomsonreuters.com/law-products/Treatises/Criminal-Jury-Instructions-and-Procedures-3d-Vol-17-Louisiana-Civil-Law-Treatise-Series/p/100085121 [https://perma.cc/B6MM-UDCT] (last visited Mar. 16, 2017). Massachusetts's criminal jury instructions were drafted by the Massachusetts Continuing Legal Education, Inc. MD. STATE BAR ASS'N, INC., CRIMINAL PATTERN JURY INSTRUCTIONS, MD., 2D ED., https://msba.inreachce.com/Details/Information/33a2f588-7b22-4aea-a641-d588172962c9 [https://perma.cc/FZ3K-4QXP] (last visited Mar. 16, 2017). Lastly, Montana's criminal jury instructions were drafted by the Montana Criminal Jury Instruction Committee, with the state attorney general's office and legal services division. *Criminal Jury Instructions*, ATT'Y GEN.'S OFFICE & LEGAL SERVICES DIVISION, https://dojmt.gov/agooffice/criminal-jury-instructions/ [https://perma.cc/B6AL-YWR2] (last visited Mar. 16, 2017).

[235] *See Criminal Pattern Jury Instructions*, ALASKA CT. SYS., http://www.courts.alaska.gov/rules/crimins.htm [https://perma.cc/ZWT4-GSMK] (last visited April 14, 2017).

[236] *See* 50 State Rule Chart, Appendix.

[237] The twenty state jury instructions that cost money or state bar access include: Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Wisconsin, and Wyoming.

[238] The ten states include: Iowa, Maryland, Missouri, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Wisconsin, and Wyoming.

[239] The nine states include: Georgia, Indiana, Kansas, Kentucky, Maine, Minnesota, Nebraska, Ohio, and Virginia.

[240] Louisiana's criminal jury instructions, drafted by Louisiana State University professors, is available for purchase.

[241] STATE BAR OF NEV., NEVADA JURY INSTRUCTIONS—CIVIL, http://sbn.peachnewmedia.com/store/seminar/seminar.php?seminar=47730 [https://perma.cc/78HB-VLYH] (last visited Mar. 21, 2017).

laboratively by lawyers, judges, law students, and lay people.[242] While not officially approved by the Supreme Court of Nevada, lawyers in Nevada rely on it as a starting point.[243]

Jury instructions should be clear and unambiguous.[244] Nevada's district courts have broad discretion to settle jury instructions, and the Nevada Supreme Court reviews a district court's decision regarding a jury instruction for an abuse of that discretion or judicial error.[245] Instructions that correctly state the law and summarize the statutory definition of the specific crime will most likely be a sufficient instruction.[246] Additionally, the district court must not instruct a jury on theories that misstate the applicable law, and may refuse an instruction of the defendant's trial theory if it is substantially covered in other instructions.[247] When reviewing criminal jury instructions, the Nevada Supreme Court often turns to other states' instructions for guidance.[248] Because of the common use of inconsistent or misstated instructions, entities have previously petitioned the Nevada Supreme Court for "an order [] prohibiting the respondent district judge from giving certain jury instructions in future criminal trials."[249] However, the Nevada Supreme Court has determined that a petition is not the appropriate avenue for such a request and directed that the Nevada Rules on the Administrative Docket provided appropriate procedures.[250] Pattern jury instructions, compiled by and with input from the community, would likely solve the problems of inconsistent and inaccurate instructions because every judge would have a single location of accurate and appropriate instructions, that can then be modified if necessary.

VI. CRIMINAL APPEALS

Though the United States Supreme Court has long held that the Constitution does not guarantee a right to an appeal in criminal cases,[251] once a state decides to allow criminal appeals, this right must be made available to all con-

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[242] *Id*.

[243] *See* Mark Denton, *Effectively Using Jury Instructions in a Civil Trial*, NEV. LAW., June 2014, at 25–28, http://www.nvbar.org/wp-content/uploads/NevLawyer_June_2014_Effectively_Using_JI.pdf [https://perma.cc/64M2-PP7D].

[244] Vallery v. State, 46 P.3d 66, 77 (Nev. 2002).

[245] Crawford v. State, 121 P.3d 582, 585 (Nev. 2005).

[246] *Id*.

[247] *Vallery*, 46 P.3d at 77.

[248] *See, e.g.*, Green v. State, 80 P.3d 93, 96 (Nev. 2003) (embracing Arizona, Hawaii, and Oregon approach on the use of an "unable to agree" instruction and citing to California's jury instruction for guidance on lesser included offenses instructions).

[249] State v. Second Judicial Dist. Court, 862 P.2d 422, 422 (Nev. 1993).

[250] *Id*. at 423.

[251] *See, e.g.*, McKane v. Durston, 153 U.S. 684, 687 (1894) (holding that the Fourteenth Amendment did not require states to provide a right of appeal in criminal cases); Jones v. Barnes, 463 U.S. 745 (1983); Abney v. United States, 431 U.S. 651, 656 (1977).

victed criminals,[252] and is subject to the constitutional guarantees of due process and equal protection.[253] States are not required to provide any system of appellate review at all.[254] Each state determines whether an appeal should be allowed and what conditions trigger an appeal.[255]

However, the United States Supreme Court, through common law, has established some procedural rights for defendants appealing criminal convictions that apply to all states. For example, an indigent appellant has the right to a transcript—furnished by the state—at no cost.[256] A criminal appellant also has the right to legal representation for their first appeal,[257] but there is no right to legal representation for supplementary appeals[258] or collateral attacks.[259] Additionally, a criminal appellant does not have the right to represent himself on appeal from conviction.[260] While the United States Supreme Court has not ruled on appellate rights waivers, every Circuit Court recognizes and enforces valid appellate rights waivers.[261]

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[252] *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 607 (1974); Coppedge v. United States, 369 U.S. 438, 441 (1962).

[253] *See, e.g.*, Evitts v. Lucey, 469 U.S. 387, 393 (1985).

[254] Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[255] McKane v. Durston, 153 U.S. 684, 688 (1894).

[256] *See, e.g.*, *Griffin*, 351 U.S. at 18–19.

[257] *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Douglas v. California, 372 U.S. 353, 356–57 (1963).

[258] *See, e.g.*, *Ross*, 417 U.S. at 610.

[259] *See, e.g.*, *Finley*, 481 U.S. at 556.

[260] *See, e.g.*, Martinez v. Court of Appeal, 528 U.S. 152, 159 (2000).

[261] *See, e.g.*, United States v. Chambers, 646 F. App'x 213 (3d Cir. 2016) (finding defendant knowingly waived right to appeal in plea agreement); United States v. Wheaten, 465 F. App'x 321 (5th Cir. 2012) (determining defendant would be held to plea agreement's waiver of right to appeal sentence, despite any defects in plea colloquy.); United States v. Guillen, 561 F.3d 527 (D.C. Cir. 2009) (holding defendant's waiver of her right to appeal her sentence was knowing, intelligent, and voluntary); United States v. Sura, 511 F.3d 654 (7th Cir. 2007) (finding the court's failure to advise the defendant that he was waiving appellate rights in a plea agreement was plain error); United States v. Vallas, 218 F. App'x 877 (11th Cir. 2007) (determining sentence-appeal waiver was valid and enforceable as to preclude sentence challenge on appeal); United States v. Blick, 408 F.3d 162 (4th Cir. 2005) (holding appeal waiver precluded defendant from appealing prison term on ground that sentence was miscalculated); United States v. Sharp, 442 F.3d 946 (6th Cir. 2006) (holding waiver of right to appeal was valid, even though judge failed to ask if defendant understood appellate-waiver provision); United States v. Aronja-Inda, 422 F.3d 734 (8th Cir. 2005) (finding defendant validly waived his appellate rights when he pleaded guilty to charges against him); United States v. Domingo, 156 F. App'x 999 (9th Cir. 2005) (holding defendant made a valid and enforceable waiver of his appellate rights); United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004) (finding waiver of appellate rights contained in plea agreement was enforceable); United States v. Teeter, 257 F.3d 14 (1st Cir. 2001) (determining Presentence waivers of appellate rights are not forbidden); United States v. Fisher, 232 F.3d 301 (2d Cir. 2000) (finding judge's post-sentencing reference to appeal did not vitiate legitimate appellate waiver).

Every state has granted the right to appeal criminal convictions by statute, court rule, or state constitution.[262] Arkansas, Virginia, and West Virginia are the only states without a specific constitutional or statutory right to a criminal appeal, but their court rules allow a process to appeal.[263] Arkansas' appellate court criminal rules give defendants the right to appeal.[264] In Virginia, non-felony offenders in district court have a right to appeal their criminal conviction.[265] While there is no automatic right to appeal felonies in Virginia, every defendant has the right to file a petition for appeal.[266] The procedure to determine whether the court will hear an appeal in Virginia is essentially equivalent to the full-scale review available in other states.[267] The courts in West Virginia derive a right to appeal from its state constitution's due process clause.[268] However, the due process provision has been interpreted to just provide defendant's

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[262] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence."). *See generally* 4 AM. JUR. 2D, *Appellate Review* § 222. State supreme courts have postulated several different theories to explain their appellate powers. Some courts concede that if the legislature does not authorize an appeal, it is powerless to create that rule on its own. *See, e.g.*, State v. Arnold, 183 P.2d 845, 845 (N.M. 1947). State case law explains that appellate claims are constitutional in nature, but derived from a statutory right. *See, e.g.*, Gaines v. Manson, 481 A.2d 1084, 1089 (Conn. 1984). While other courts find that the right to appeal is rooted in both statutory and constitutional law. *See, e.g.*, Howell v. United States, 455 A.2d 1371, 1372 (D.C. 1983); Blackmon v. State, 450 N.E.2d 104, 107 (Ind. Ct. App. 1983) ("Any person convicted of a criminal offense in Indiana may, as a matter of statutory and constitutional right, appeal the judgment against him."). Other courts find that the right to appeal is authorized by statute and appellate court rules of procedure. *See, e.g.*, State v. Wilson, 693 S.E.2d 923, 924 (S.C. 2010). In reviewing each state's criminal appellate proves, most state courts derive their appellate power from statute, but additional details, such as the deadline to submit a notice of appeal, are often promulgated by statute or court rules. *See* 50 State Rule Chart, Appendix.

[263] *See* Thomas B. Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43, 72–74 (1982) (describing Virginia and West Virginia appellate procedures, which include review by a three-judge panel, where oral argument is heard from the appellant, but not the appellee, including briefs and a full record).

[264] ARK. RAP CRIM. 1. "Any person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas." *Id*.

[265] VA. CODE ANN. § 16.1-132.

[266] *See* VA. STATE BAR, THE REVISED HANDBOOK ON APPELLATE ADVOCACY IN THE SUPREME COURT OF VIRGINIA AND THE COURT OF APPEALS OF VIRGINIA (2011), http://www.vsb.org/docs/sections/litigation/AAhandbook.pdf [https://perma.cc/5XMU-JN4F]. "With a few exceptions, there is no automatic right to appeal in Virginia from the trial court of record to an appellate court. One must petition for a writ of appeal, and, if the court grants the writ, the court will hear the appeal on the merits. . . . In Virginia, every criminal defendant has the right to le a petition for appeal to the Court of Appeals of Virginia." *Id*. at 3, 30–31.

[267] *See* Marvell, *supra* note 263.

[268] *See* W. VA. CONST. art. III, § 10; *see, e.g.*, Rhodes v. Leverette, 239 S.E.2d 136, 139 (W. Va. 1977) ("An indigent criminal defendant in this State has a right to appeal his conviction.").

with the right to apply for appeal.[269] States also vary in how their rules or procedures for appeals are organized. Some states have entire separate websites dedicated to criminal appeals, while other states incorporate their appellate procedures in their designated criminal procedure rules or statutes.

A. Appellate Court Structures

Effective appellate courts detect errors and correct or uphold trial court decisions, while providing timely,[270] consistent, and fair resolutions to criminal appeals.[271] "The ability to administer both quality and efficiency is affected by resources, rules, procedures, legal culture, and court structure."[272] States have created various appellate court structures to implement this state-given right to defendants.[273] Appellate courts operate within either 1-tier or 2-tier structures and hear appeals either by right or by permission. States with one-tier systems have one appellate court—the court of last resort ("COLR")—whereas states with 2-tier systems have at least one intermediate appellate court ("IAC") and a COLR.[274]

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[269] State v. Legg, 151 S.E.2d 215, 218 (W. Va. 1967) ("One convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error.").

[270] Time standards for criminal appeals are "used as an administrative goal to assist in achieving case flow management that is efficient, productive, and produces quality results." NAT'L CTR. FOR STATE COURTS, MODEL TIME STANDARDS FOR STATE APPELLATE COURTS 3 (2014), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Web%20documents/Model-Time-Standards-August-2014.ashx [https://perma.cc/C9PN-9XSM] (citation omitted). In 2010, 40 percent of the states had state-specific criminal appellate time standards in place. Nicole L. Waters & Kathryn Genthon, *Achieving Timely Resolution for Criminal Appeals in State Courts*, 21 NAT'L CTR. FOR ST. CTS., May 2016, at 2, http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/275 [https://perma.cc/MYV4-FRPY]. "Time standards apply differentially depending on whether the COLR is part of a 1-tier or 2-tier review system and whether the court's review of a case is by permission (discretionary) or by right (mandatory)." *Id*. In appellate structures that rely on appeals by permission, COLRs rendered a decision to grant or deny further review within 98 days in 1-tier systems and 140 days in 2-tier systems. *Id*. at 3. In appellate systems that rely on appeals by right, COLRs rendered a decision to grant or deny further review within 482 days in 1-tier systems and 558 days in 2-tier systems. *Id*. Clearly, COLRs in discretionary systems grant or deny review much faster than COLRs in mandatory systems.

[271] Waters & Genthon, *supra* note 270, at 1.

[272] *Id*.

[273] Ten states and the District of Columbia do not have intermediate appellate courts: Delaware, District of Columbia, Maine, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

[274] There are essentially seven different categories of appellate court structures utilized today. NICOLE L. WATERS ET AL., BUREAU OF JUSTICE STATISTICS, CRIMINAL APPEALS IN STATE COURTS, NCJ 248874, at 3 (2015), https://www.bjs.gov/content/pub/pdf/casc.pdf [https://perma.cc/R4HB-TJ2L]. (1) The mandatory COLR structure consists of only one appellate court, a COLR, that hears appeals by right. Eight states have this mandatory COLR structure: Delaware, Montana, Wyoming, North Dakota, South Dakota, Rhode Island, Vermont, Maine. *Id*. Prior to the creation of Nevada's appellate court, Nevada had a mandatory COLR structure. (2) The discretionary COLR structure consists of only one appellate court, a COLR, that hears appeals by permission. Two states have this discretionary COLR structure: New

Appellate courts are highly influenced by whether an appeal is one "as of right" or "by permission." An appeal "as of right" is guaranteed by statute or some underlying constitutional or legal principle. An appellate court cannot refuse to listen to this type of appeal. Whereas, an appeal "by permission" allows the appellate court to choose to grant or deny the appeal for further review. Depending on the type of appeals heard, states differ widely on other appellate court features, including: mandatory or discretionary jurisdiction, court size, panel usage, geographical divisions, and division between criminal and civil jurisdiction by court.

B. Notice Deadlines for Criminal Appeals

It behooves a defendant to be aware of the notice requirement, but varying rules prove determining them difficult.[275] Some states have different notice requirements depending on where the appeal is to be heard and whether the conviction is a misdemeanor, felony, or capital. States permit defendants anywhere from five to ninety days to file their notice of appeal.[276] More than half of the states have chosen to give appellants thirty days to appeal.[277] Pennsylvania requires defendants to file a post-sentence motion within ten days, then allows thirty days for defendants to file their notice of appeal.[278] Rhode Island only allows a defendant five days to file a notice of appeal.[279] Missouri, Oklahoma,

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Hampshire and West Virginia. (3) In the deflective structure, appeals are filed, usually fully briefed, and submitted with the COLR, which then decides whether to retain the appeal or transfer to an IAC. Four states have this deflective structure: Idaho, Iowa, Mississippi, and Nevada. (4) In the discretionary COLR and mandatory IAC, the COLR hears appeals mostly by permission, and the IAC hears appeals mostly by right. Twenty-seven states have this discretionary COLR and mandatory IAC structure: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oregon, South Carolina, Utah, Washington, and Wisconsin. This is the most common appellate court structure. (5) In the COLR and discretionary IAC structure, both the COLR and IAC hear appeals mostly by permission. Two states have this COLR and discretionary IAC structure: Louisiana, Virginia. (6) The IAC by subject matter includes states with more than one IAC that is distinguished by subject matter. Five states have this IAC by subject matter structure: Alabama, Indiana, New York, Pennsylvania, and Tennessee. (7) The COLR by subject matter structure allows states to have more than one COLR that is distinguished by subject matter. Two states have this COLR by subject matter structure: Oklahoma and Texas.

[275] With this wide range in deadlines, there could be more expansive discussion regarding what the permissible time frame says about a jurisdiction's attitudes towards meaningful appellate review, however, this will not be explored here. See 50 State Rule Chart, Appendix, for a detailed list of the deadlines by state.

[276] *See* 50 State Rule Chart, Appendix.

[277] Thirty states allow defendants thirty days to file a notice of appeal: Arkansas, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.*

[278] PA. R. CRIM. P. 720.

[279] 12 R.I. GEN. LAWS § 12-22-1.

and South Carolina only allow defendants ten days to file their notice of appeal[280] and Kansas and North Carolina allow defendants fourteen days to file a notice of appeal.[281] Minnesota allows a defendant ninety days to file a notice of appeal.[282]

C. Criminal Appeals in Nevada

Under Nevada's Constitution, the Nevada Supreme Court and Court of Appeals have jurisdiction "on questions of law alone in all criminal cases in which the offense charged is within the original jurisdiction of the district courts."[283] On November 4, 2014, voters approved an amendment to the Nevada Constitution creating the Court of Appeals.[284] The Nevada Rules of Appellate Procedure detail the types of cases heard between the Nevada Supreme Court and Court of Appeals.[285] None of the local districts' rules have any criminal appellate procedures.[286] The Nevada Supreme Court has jurisdiction over all direct and post-conviction appeals involving death penalty appeals and most serious felony convictions.[287] The Court of Appeals can be assigned almost all other criminal appeals.[288] If a party believes that the matter should be retained by the Nevada Supreme Court, it can provide reasons in the routing statement of its appeals brief.[289]

Nevada statutes provide a right to appeal criminal convictions.[290] Generally, the defendant or the State must file a notice of appeal with the district court within thirty days after entry of the judgment or order being appealed.[291] The

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[280] *See* 50 State Rule Chart, Appendix.

[281] *See id*.

[282] MINN. R. CRIM. P. 28.02, subd. 4(3)(a).

[283] NEV. CONST. art. VI, § 4; *see also* NEV. REV. STAT. § 177.025 ("Appeal to court of appeals or Supreme Court taken on questions of law alone.").

[284] Sandra Cherub, *State Wasting No Time in Starting New Appellate Court*, L.V. REV.-J. (Nov. 16, 2014, 10:18 AM), http://www.reviewjournal.com/news/nevada/state-wasting-no-time-starting-new-appellate-court [https://perma.cc/EMN7-3M2X].

[285] Nevada Rules of Appellate Procedure are cited as NRAP. *See* NRAP 17.

[286] Nevada's First, Second, and Ninth Judicial Districts' local rules explain, generally, the procedures for appeals coming from the justice and municipal courts. FJDCR 33; WDFCR 19; NJDCR 22 ("Petitions for judicial review and appeals from courts of limited jurisdiction."). The remaining judicial districts local rules do not discuss rules related to the appeal process.

[287] NRAP 17(a)(2).

[288] *Id*. 17(b)(1). The criminal appeals the appellate court can hear include all post-conviction appeals except death penalty cases and cases that involve a conviction of a Category A felony, any direct appeal from a judgment of conviction based on a guilty plea, guilty but mentally ill or nolo contendere (*Alford*) plea, direct appeals from a judgment of conviction that challenges only the sentence imposed or the sufficiency of the evidence, and any direct appeal from a judgment of conviction based on a jury verdict that does not involve a conviction for Category A or B felonies. *Id*.

[289] NRAP 17(d).

[290] NEV. REV. STAT. § 177.015; *see also id*. § 34.575 ("Appeal from order of district court granting or denying writ.").

[291] NRAP 4(b)(1)(A)–(B).

Appellate Rules also allow the Nevada Supreme Court, by a majority of its members, to expedite criminal appeals by eliminating steps normally required in preparing the record and briefs, expediting the stenographic transcripts, prioritizing dates for oral arguments, utilizing court opinion or per curiam orders, and other measures reasonably calculated to expedite the appeal and promote justice.[292] Additionally, the Appellate Rules provide a fast-track procedure for all criminal appeals, except where the appeal challenges an order or a judgment involving a Category A felony, where the defendant was not represented by counsel, or where the defendant was sentenced to death or life imprisonment.[293] The fast-track rules were initially implemented to address the growing backlog in cases and have them briefed and resolved quickly.[294]

Either the state or defendant can appeal orders from the district court granting a motion for acquittal or a motion in arrest of judgment, or granting or refusing a trial,[295] and orders regarding whether a defendant is intellectually disabled.[296] However, only the defendant can appeal from a final judgment or verdict.[297] A defendant may not appeal a final judgment or verdict resulting from a voluntary plea of guilty, guilty but mentally ill, or nolo contendere unless "the appeal is based upon constitutional, jurisdictional or other grounds that challenge the legality of the proceedings."[298]

VII. CAPITAL PUNISHMENT

Nevada, one of thirty-two states[299] with the death penalty, has detailed rules governing the procedural aspects of death penalty cases.[300] Most states with the

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[292] *Id*. 4(f).

[293] *Id*. 3C(a).

[294] Paul Taggart, *Fast Track Criminal Appeals: The First Year in Review*, 5 NEV. LAW. 30, 31 (1997).

[295] NEV. REV. STAT. § 177.015(1)(b).

[296] *Id*. § 177.015(1)(c).

[297] *Id*. § 177.015(3).

[298] *Id*. § 177.015(4).

[299] Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming all allow the death penalty. *States and Capital Punishment*, NAT'L CONF. ST. LEGISLATURES (Feb. 2, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx [https://perma.cc/RH78-UERL]. For federal death penalty cases, the prosecutor must file a notice of intent to seek the death penalty. 18 U.S.C. § 3593(a) ("[T]he attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice—(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.").

[300] Many states exempt mentally incompetent defendants from execution. *See, e.g*., MISS. R. CRIM. P. 12.2(c). Further, the Supreme Court has held that states cannot constitutionally execute mentally incompetent persons. Ford v. Wainwright, 477 U.S. 399 (1986).

death penalty require the prosecutor to first file a notice of intent to seek the death penalty with a list of reasons or aggravating factors.[301] Once the court and defense counsel know the prosecution is seeking the death penalty, all states except Alabama require a jury to unanimously decide to give a defendant the death penalty.[302] The FRCP does not have procedural rules pertaining to the death penalty; the federal death penalty is governed entirely by statute and case law.[303]

While states' statutes detail which crimes are eligible for the death penalty as well as any aggravating or mitigating factors, this White Paper focuses exclusively on which states provide statewide criminal procedure rules applicable to the death penalty or capital cases. Of the thirty-two states with the death penalty, twenty have statewide rules of criminal procedure, four have criminal procedure rules by court, five have a code of criminal procedure, and three have no statewide rules or code. Within those states' procedural rules, the comments and notes section often include information on the applicability of the specific rule to death penalty cases.

In general, there are no uniform procedures or consistency in rules applicable to the death penalty. Some states have death penalty specific rules while others mention the death penalty throughout their rules and how seeking the death penalty may affect the procedure. However, most states, at the very least,[304] have included rules on aggravating or mitigating circumstances attorneys may argue and jurors may consider, the effect of a potential juror's moral beliefs about the death penalty, unanimity of jury verdicts, and whether death sentences are automatically reviewed by a higher court in that state.[305] Most states also address requirements for attorneys defending death penalty eligible

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[301] *See, e.g.*, COLO. R. CRIM. P. 32.1; ARIZ. R. CRIM. P. 15.1(g)(i).

[302] The Supreme Court held that a defendant has a Sixth Amendment right to let a jury, as opposed to a judge, decide whether to impose the death penalty. Ring v. Arizona, 536 U.S. 583, 589 (2002). As such, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming all require a unanimous jury verdict.

[303] *See* 18 U.S.C. §§ 3591–3599.

[304] Despite some general similarities, there does not appear to be clear uniformity with how states outline their procedures for death penalty cases. Further, within the state sections with separate rules for dealing with death penalty cases, the states have chosen to focus on different areas. Some states, like California, deal with defense attorney qualifications, while Arizona, in contrast, deals with the procedures of sentencing hearings, while other states choose to focus on jury verdicts. These variations show what each state values as important or unique for death penalty cases.

[305] Most procedural rules mandate review of the sentence by the state's highest court. Though, the states' rules varied on which section this requirement was included in. *See, e.g.*, ARIZ. R. CRIM. P. 26.15. Idaho's statutes, for example, state that before the death penalty sentence is final, the Superior Court of Idaho must first review and approve the sentence. IDAHO CODE § 19-2827. The Mississippi procedural rules also include more detail about what the court looks for and reviews as well as what to include in the court's final decision. MISS. CODE § 99-19-105.

defendants.[306] Further, if a state does have death penalty specific rules, it will likely be in the sentencing section of their statewide procedural rules.[307]

A. Different Forms of Rules for Death Penalty Proceedings

In several states, the criminal procedural rules either had separate death penalty sections, like Indiana,[308] or mention the death penalty throughout the rules, like Arizona.[309] Louisiana has more extensive rules of criminal procedure for the death penalty than most states. Louisiana's statewide criminal procedure rules, for example, requires the accuser to move for the death penalty[310] and a jury to find proof of at least one aggravating circumstance beyond a reasonable doubt.[311] Additionally, the rules provide lists of both aggravating and mitigating circumstances attorneys may argue and jurors may consider, sets out the procedure for sentencing hearings in capital cases,[312] states that the jury who returned the guilty verdict will also decide the sentence,[313] requires a unanimous verdict,[314] and requires automatic review of a death sentence by the Louisiana Supreme Court.[315] Similarly, Mississippi's criminal procedure statutes follow this model.[316]

Montana's statewide criminal procedure code also follows this organization method and is similar to most other states whose death penalty rules of procedure are within the sentencing guidelines of the state's procedural rules.[317] Further, Montana's procedural code is detailed and organized, with death penalty procedural rules divided into clear categories.[318] Of all the states, Mon-

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[306] California, Arkansas, and Pennsylvania's procedural rules all include a list of qualifications for an attorney representing a defendant in a death penalty case. *See, e.g.*, CAL. R. CT. 4.117(d); ARK. R. CRIM. P. 37.5; PA. R. CRIM. P. 801. For instance, in California, lead counsel must have prior experience trying a serious felony and have taken at least two murder cases to a jury. CAL. R. CT. 4.117(d). Another unique rule comes out of Louisiana where the procedural rules only allow a defendant to plead guilty to a capital case if the courts stipulate to a sentence of life in prison without the possibility of parole or probation. LA. CODE. CRIM. P. ART. 557.

[307] *See, e.g.*, COLO. R. CRIM. P. 32.1; I.C.R. 33.1; KAN. REV. STAT. § 22-4001.

[308] *See, e.g.*, IND. CODE § 35-50-2-9.

[309] *See, e.g.*, ARIZ. R. CRIM. P. 19.1(c).

[310] LA. CODE CRIM. P. ART. 905.

[311] *Id.* 905.3.

[312] *Id.* 905.2.

[313] *Id.* 905.1.

[314] *Id.* 905.6.

[315] *Id.* 905.9.

[316] MISS. CODE ANN. § 99-19-105.

[317] MONT. §§ 46-18-301 to -18-310.

[318] *Id.* Montana's statutory code is broken up into the following sections: (1) hearing in imposition of death penalty, (2) evidence that may be received, (3) aggravating circumstances, (4) mitigating circumstances, (5) effect of aggravating and mitigating circumstances, (6) specific written findings of fact, (7) automatic review of sentence, (8) time for review—consolidation with appeal, (9) transmission of transcript and trial record, and (10) supreme court's determination as to sentence. *Id.* These subsections apply after a defendant has been

tana's code and Louisiana's criminal procedure rules seem most practical for attorneys seeking the death penalty because there are specific rules of criminal procedure to guide death penalty cases through the process. In contrast, other states include death penalty exceptions to the general rules instead of making death penalty procedure rules an independent section, such as found in Arizona, Kansas, Kentucky, and Ohio.[319]

B. Death Penalty Sentencing

Due to complexity, states' criminal procedure rules or codes have constructed separate sections for post-conviction procedures in death penalty cases. Texas follows this structure with separate trial and sentencing procedures, and penalty phase procedures[320] for death penalty cases.[321] Arizona, for example, details the procedures for both a hearing on whether the defendant is eligible for the death penalty and whether to impose the death penalty.[322]

Other common themes in death penalty rules is the procedure for how the state notifies the highest state court[323] and how defendant's counsel is appointed.[324] Most procedural rules require prosecutors to file a written statement of intent to seek the death penalty, procedures for setting the date of the sentencing hearing, as well as discovery procedures for gathering evidence to be presented at the sentencing hearing.[325] Generally, most states require specific procedures for sentencing hearings in death penalty cases.[326] Though, states vary in the depth of their rules;[327] some detail what constitutes an aggravating or mitigating factor,[328] what evidence is admissible,[329] and whether victim impact testimony is allowed.[330]

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convicted. *Id.* § 46-18-301 ("When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed . . . .).

[319] *See, e.g.*, ARIZ. R. CRIM. P. 19.1(c); KAN. STAT. ANN. § 22-4001.

[320] TEX. CODE CRIM. PROC. § 11.071.

[321] *Id.* § 37.071.

[322] ARIZ. R. CRIM. P. 19.1(c)–(d).

[323] Colorado's criminal procedure rules detail post-trial procedures such as notifying the Colorado Supreme Court, setting dates for hearings to deal with appeal and appointment of post-conviction counsel for the defendant. COLO. R. CRIM. P. 2.2.

[324] *See, e.g.*, COLO. R. CRIM. P. 2.2.

[325] COLO. R. CRIM. P. 32.1(b). Oklahoma and Oregon similarly follow this procedure. OKL. STAT. tit. 22, § 17 (titled "Death Sentence"); OR. REV. STAT. tit. 14, ch. 137.

[326] *See, e.g.*, COLO. R. CRIM. P. 32.1; FLA. R. CRIM. P. 3.780. Further, in Arizona, opening statements are made and evidence is offered by both sides, with the jury ultimately deciding whether sufficient aggravating factors exist to proceed with the death penalty. ARIZ. R. CRIM. P. 19.1(c)–(d).

[327] *See, e.g.*, PA. R. CRIM. P. 806. Florida's criminal procedure rules are scattered with additional rules devoted to capital cases, including post-conviction public records production, minimum attorney standards, and insanity hearings at time of execution. *See, e.g.*, FLA. R. CRIM. P. 3.112, 3.812, 3.852.

[328] Arizona's rules do not list what constitutes an aggravating factor, though other states such as, Louisiana do. LA. CODE CRIM. P. ART. § 905.4. In Florida, the state and defendant to present mitigating and aggravating evidence, cross-examine witnesses, and provide a closing statement. FLA. R. CRIM. P. 3.780.

C. The Jury in Death Penalty Cases

States' rules differ significantly in the procedures for determining how to handle a jurors' opinions about the death penalty. Most states address the issue of juror qualifications for death penalty cases in statute. For example, Florida, Idaho, Kansas, and Montana's statutes preclude those whose beliefs about the death penalty would keep them from finding a defendant guilty in a death penalty eligible case.[331] A minority of states address juror qualifications in their statewide procedural rules. Common law has also significantly helped develop the standards and qualifications needed to sit on a death penalty jury.[332] Arkansas allows the same trial jury to conduct the capital sentencing phase.[333] Arkansas requires the two alternative jurors from the trial to be placed in the jury box for the capital sentencing.[334] If there are more than two alternative jurors the remaining are to be dismissed.[335]

Some states also provide both the state and defense counsel additional peremptory challenges in capital cases. For instance, Mississippi allows each party twelve peremptory challenges instead of six in non-capital cases.[336] Montana, on the other hand, allows eight peremptory challenges,[337] and Ohio allows six instead of four peremptory challenges.[338]

D. Nevada's Death Penalty Procedural Rules

Both statute and court rules detail procedures for death penalty cases in Nevada. Specifically, only the Fourth Judicial District local rules[339] and the Nevada Supreme Court Rules provide any guidance for death penalty cases, with both providing the qualifications required of defense counsel.[340] Unsurprisingly, the Nevada Supreme Court "places the highest priority on diligence in the discharge of professional responsibility in capital cases" by providing at-

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[329] *See, e.g.*, MISS. CODE ANN. § 99-19-10 ("[E]vidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Mississippi.").

[330] *Id.*§ 99-43-33.

[331] *See, e.g.*, FLA. STAT. § 913.13; IDAHO CODE § 19-2827; KAN. REV. STAT. § 22-3410; MONT. CODE. ANN. § 46-16-115; State v. Gollehon, 864 P.2d 249 (Mont. 1993).

[332] *See, e.g.*, Uttecht v. Brown, 551 U.S. 1, 18 (2007); Lockhart v. McCree, 476 U.S. 162, 176 (1986).

[333] ARK. R. CRIM. P. 23.3.

[334] *Id.*

[335] *Id.*

[336] MISS. CODE ANN. § 99-17-3.

[337] *Id.* § 46-16-116.

[338] OHIO CRIM. R. 24(d).

[339] 4JDCR 10.

[340] S.C.R. 250(2); *see also* NEV. REV. STAT. § 178.3971 ("Appointment of defense team for defendant accused of murder of first degree.").

torneys with detailed procedures, checklists for necessary legal research, and legal citations to relevant cases.[341]

The Nevada Supreme Court's checklist provides relevant statutes and case law for each phase of a death penalty proceeding.[342] According to the rules and similar to other states' procedures, the prosecution must give notice no later than thirty days after filing an information or indictment that it is seeking the death penalty and must allege all the aggravating circumstances that the state plans to prove, including the specific facts that the state will rely on to prove it.[343] A defendant who pleads not guilty to a capital offense must be tried by a jury[344] and the verdict must be unanimous.[345] A jury determines whether aggravating or mitigating circumstances exist[346] and can only impose a death sentence if they find there are no mitigating circumstances that outweigh the aggravating circumstances.[347] There are specific statutory aggravating circumstances for first degree murder[348] along with mitigating circumstances.[349] Appeals are automatically reviewed by the Nevada Supreme Court.[350]

VIII. NEVADA'S NEXT STEPS

"No person, neither the alleged victim nor the accused, should be placed at a substantial disadvantage in a criminal trial by the rules of procedure and evidence."[351] Inconsistencies and deficiencies in procedural rules may result in a violation of a defendant's constitutional rights, and cause significant confusion and misapplication of procedures by judges, practitioners, and defendants that the very rules are designed to guide. Discrepancies between local rules and state statutes can result in unfair procedures, violations of a defendant's due process rights, and confusion amongst practitioners, courts, and their clerks.[352]

For example, in *Craine v. Eighth Judicial District Court*, the petitioner sent a notice of appeal to the district court after being found guilty of sexual assault.[353] Once received, the clerk of the court attempted to follow an Eighth Judicial District rule regarding papers not to be filed, but failed to follow the pro-

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[341] S.C.R. 250 (appended checklist).

[342] *Id*. Nevada law also provides proceedings for the penalty hearing phase of a trial for first degree murder. NEV. REV. STAT. §§ 175.552–.556.

[343] SCR 250(4)(c).

[344] NEV. REV. STAT. § 175.011(1).

[345] *Id*. § 175.481.

[346] *Id*. § 175.554(2). Nevada law also allows evidence to be presented during the penalty hearing concerning aggravating and mitigating circumstances related to the offense, defendant, or victim. *Id*. § 175.552(3).

[347] *Id*. § 200.030(4)(a); *see also id*. § 175.554(4).

[348] *Id*. § 200.033.

[349] *Id*. § 200.035.

[350] *Id*. § 177.055.

[351] Felix v. State, 849 P.2d 220, 255 (Nev. 1993), *superseded on other grounds by statute as stated in* Evans v. State, 28 P.3d 498, 509–10 (Nev. 2001).

[352] *See, e.g*., Craine v. Eighth Judicial Dist. Court, 816 P.2d 451, 452 (Nev. 1991).

[353] *Id*.

cedural rule by not sending a copy of the notice to the petitioner's counsel.[354] The Court determined that because fairness is important to a defendant's right to appeal, the local Eighth Judicial District's rule did not apply to notices of appeal.[355] The clerk should have followed the Court's directive in a case decided just months before regarding what actions a clerk should take in order to accurately document the date of the notice of appeal, which triggered the thirty-day appeal period.[356] In holding this, the Nevada Supreme Court stated "We cannot allow the operation of a local rule of procedure or the actions of a court clerk to impair the right of any person to prosecute an appeal to this court."[357]

Similarly, in a case involving the filing deadlines of a notice to appeal, the Nevada Supreme Court determined that the deadline requirement in the Nevada Rules of Appellate Procedure superseded the deadline requirement in a criminal procedure statute.[358] Because the judiciary has the inherent power to govern its procedures and the statutory right to promulgate appellate rules, a rule of procedure supersedes and controls over a conflicting pre-existing procedural statute.[359]

The Nevada Supreme Court has noted in various criminal cases the absence of procedural rules, requiring courts to look to other contexts and jurisdictions for guidance.[360] Also, Nevada's courts are often confronted with interpreting vague rules, arguably allowing courts to broadly interpret and apply procedures affecting a defendant's constitutional rights differently, with no clear procedural guidance for future cases.[361] While "the district court certainly

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[354] *Id*.

[355] *Id*.

[356] *Id*. (citing Huebner v. State, 810 P.2d 1209, 1210 (Nev. 1991)).

[357] *Id*.

[358] State v. Connery, 661 P.2d 1298, 1300 (Nev. 1983).

[359] *Id*.

> Although such rules may not conflict with the state constitution or 'abridge, enlarge or modify any substantive right,' NRS 2.120, the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature. [] We have held that the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect. [] Furthermore, where, as here, a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls.

Id. (internal citations omitted).

[360] Howard v. State, 291 P.3d 137, 142 (Nev. 2012) ("Because we have no rule outlining the procedures for sealing court documents and records in criminal proceedings, we look to other sources for guidance."); State v. Wilson, 760 P.2d 129, 130 (Nev. 1988) ("No Nevada statute or rule of procedure is specifically directed to the district court's power in criminal cases, following the jury's verdict of guilty, to dismiss the charges, acquit the defendant, or enter a judgment notwithstanding the verdict when the court deems the evidence insufficient to sustain the verdict.").

[361] Mack v. State, 367 P.3d 795 (Nev. 2010). The Court determined that Nevada law does not require the intricate and detailed requirements of FRCP 11, but that it generally follows the same scheme and purpose of the rule in determining whether a guilty plea was entered knowingly, voluntarily, and intelligently, arguably leaving future parties unsure how the rule and its case law may be persuasive or applicable. *Id*.

does not have an obligation to give the defendant specific warnings or advisements about every rule or procedure which may be applicable," a defendant should not be disadvantaged by scattered, unclear, and potentially conflicting rules.[362]

In the absence of statewide criminal procedure rules, and due to the significantly difficult legislative process with Nevada's biennial legislature, court procedural rules are regularly created through case law. While this process may be sufficient in some circumstances, both the State and defendant are burdened to be well versed in ever-changing and developing case law. For example, the Nevada Supreme Court has held that a prosecutor acted willful and consciously indifferent when he was very unprepared for a hearing and also failed to follow procedures for continuances that have been established through case law.[363] "We believe these prior decisions establish simple, fair, nontechnical guidelines for seeking continuances, with which any lawyer acting in good faith can comply."[364]

Similarly, for decades, Nevada courts have considered various factors when determining a defendant's competency, including evidence of a defendant's irrational behavior, his demeanor at trial, any prior medical opinion, and even the defendant's counsel's opinion is considered given the close contact and relationship.[365] Centralizing these factors—and others the court and/or legislature may deem appropriate—in statewide procedural rules may ensure accurate and uniform competency determinations across the state.

Nevada's recent move towards a statewide pre-trial risk assessment tool may reflect a general push towards statewide criminal procedure rules. Nevada's implementation of this tool can be seen as a response to the disjointed and disorderly bail system Nevada has "defaulted" into.[366] Bail amounts differ across the state for similar offenses.[367] This new pilot program hopes to bring uniformity and consistency across jurisdictions so that defendants are rated individually, and consistently by risk factors that are statistically proven to predict whether they are at risk for failing to appear at their next hearing or a risk to public safety.[368] In 2015, the Nevada Judicial Council approved a resolution creating a committee to study the best practices of evidence-based pretrial release.[369] The committee developed the tool[370] and it is currently being tested in

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[362] Wiesner v. State, No. 64373, 2014 WL 4670115, at *1 (Nev. Sept. 18, 2014).

[363] McNair v. Sheriff, 514 P.2d 1175, 1178 (Nev. 1973).

[364] *Id*.

[365] *See, e.g*., Calvin v. State, 147 P.3d 1097, 1100 (2006).

[366] *See Overview of the Committee to Study Evidence-Based Pretrial Release: Hearing Before the Assemb. Comm. on Judiciary*, 2017 Leg., 79th Sess. (Nev. 2017).

[367] *See id*.

[368] *See id*.

[369] *Overview of the Committee to Study Evidence-Based Pretrial Release*, ADMIN. OFF. CTS., http://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Overview/ [https://perma.cc/AXN5-XMNG] (last visited Mar. 16, 2017); *see also* Memorandum from Chief Justice James W. Hardesty to the Judicial Council of the State of Nevada (June 12, 2015),

a twelve-month pilot program in Clark, Washoe, and White Pine counties.[371] The tool uses a questionnaire that looks at, among other things, the defendant's previous criminal history, the age at first arrest, prior failures to appear in court, and indications of substance abuse.[372] A defendant with a "risk score" between 0-4 is low risk, 5-10 points is moderate risk, and 11+ points is considered a high risk.[373] While the results of the pilot program are yet to be determined, it is a sign towards unifying bail and pre-trial release standards.

A. Two Approaches to Creating Statewide Criminal Procedure Rules

Nevada is in the minority of states that do not have statewide rules of criminal procedure. If Nevada were to adopt statewide, comprehensive rules of criminal procedure, it would likely require legislative approval. The Nevada Constitution vests the "judicial power . . . in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace."[374] Some states, such as Mississippi, have relied on similar vesting clauses[375] as authority to promulgate criminal rules, even to the point that the rules override conflicting statutes.[376] Arguably, the Nevada Supreme Court could make a similar claim in promulgating criminal rules; however, when Nevada adopted statewide Nevada Rules of Civil Procedure, it did so under legislative authority.[377] The legislature passed an enabling act in 1951 authorizing the Supreme Court to "regulate original and appellate civil practice and procedure."[378]

If Nevada decides to create statewide criminal procedure rules, it may be beneficial to review and consider a few states that have recently adopted statewide criminal procedure rules. For example, Mississippi is the most recent state to implement statewide criminal procedure rules, which will be effective July 2017. Mississippi began considering statewide criminal procedure rules in 2004 when the chief judge appointed an independent committee to study and

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http://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Documents/Miscellaneous/JCSN_Memorandum/ [https://perma.cc/39SL-Z37K].

[370] JAMES AUSTIN & ROBIN ALLEN, DEVELOPMENT OF THE NEVADA PRETRIAL RISK ASSESSMENT SYSTEM FINAL REPORT 8 (2016), http://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Documents/Committee_Materials/NPRA_Validation_Report_and_Final_NPRA_Tool/ [https://perma.cc/TKU4-XGV 2].

[371] *Id*.; Admin. Order 16-03, Las Vegas Justice Court, NPRAT Pilot Program (Dec. 7, 2016), https://www.clarkcountybar.org/wp-content/uploads/16-03-NPRAT-Pilot-Program-Signed.pdf; *Pretrial Services*, SECOND JUD. DIST. CT., https://www.washoecourts.com/index.cfm?page=pretrial_services&td=main [https://perma.cc/9T3Y-UUB3] (last visited Mar. 16, 2017).

[372] AUSTIN & ALLEN, *supra* note 370.

[373] *Id*.

[374] NEV. CONST. art. VI, § 1.

[375] MISS. CONST. art. VI, § 144.

[376] *See* MISS. R. CRIM. P. 1.1, Comment (citing State v. Delaney, 52 So. 3d 348, 351 (Miss. 2011) ("[W]hen a statute conflicts with this Court's rules regarding matters of judicial procedure, our rules control.").

[377] NEV. R. CIV. P., Preface.

[378] NEV. REV. STAT. § 2.120.

consider criminal procedure rules.[379] Mississippi's Supreme Court promulgated the rules "[i]n order to promote justice, uniformity, and efficiency in our courts, we find it necessary and reasonable now to combine all of the requirements governing criminal procedure in the courts of this State into a singular set of rules."[380] In an effort to inform the general public about the state's new rules, the rules committee released a memorandum generally explaining the new rules.[381]

This Section will illustrate two ways Nevada could implement comprehensive statewide rules of criminal procedure. First, the legislature could delegate authority to the Nevada Supreme Court to promulgate statewide rules of criminal procedure. Or, the Nevada Legislature could adopt a comprehensive "code" of criminal procedure combining the state's current statutes with rules stemming from case law and local rules.

1. Nevada Rules of Criminal Procedure by Nevada Supreme Court

"Court rules, when not inconsistent with the Constitution or certain laws of the state, have the effect of statutes."[382] The Nevada Supreme Court adopted the Nevada Rules of Civil Procedure with the express authority from the Nevada Legislature.[383] The legislature delegated the authority through statute allowing the Court to adopt rules to regulate original and appellate civil practice. The statute specifically allows the Court to regulate, "pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State."[384] The Nevada Supreme Court then established an advisory committee to draft the rules.[385] The draft of the rules was published and distributed for comment; the comments and modifications were discussed and made before the final recommendation was submitted to the Court. The Court then adopted the rules by Court order.[386]

Nevada could follow the same format in creating statewide criminal procedure rules. However, one issue that Nevada would encounter through this ap-

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[379] PURSUANT TO RULE 27(F) OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE, THE RULES COMMITTEE ON CRIMINAL PRACTICE AND PROCEDURE SEEKS COMMENTS FROM THE BENCH, THE BAR AND THE PUBLIC ON THE PROPOSED MISSISSIPPI RULES OF CRIMINAL PROCEDURE, https://courts.ms.gov/rules/rulesforcomment/2011/announcement9-8.pdf [https://perma.cc/EC5Z-4XYN] (last visited Mar. 17, 2017).

[380] En Banc Order, *In re* Adoption of Mississippi Rules of Criminal Procedure, No. 89-R-99038-SCT (Miss. Dec. 13, 2016), https://courts.ms.gov/Images/Opinions/209786.pdf [https://perma.cc/YCP8-V254].

[381] Memorandum re: Executive Summary of the Mississippi Rules of Criminal Procedure (Dec. 16, 2016), https://courts.ms.gov/rules/msrulesofcourt/2017-EXECUTIVE%20SUMMARY%20OF%20RULES%20&%20COMMENTS%20-%20FINAL%20VERSION%20121116.pdf [https://perma.cc/7G66-NHGZ].

[382] Margold v. Eighth Judicial Dist. Court, 858 P.2d 33, 35 (Nev. 1993).

[383] NEV. R. CIV. P., Preface.

[384] NEV. REV. STAT. § 2.120.

[385] NEV. R. CIV. P., Preface.

[386] *Id*.

proach are the already existing criminal procedure statutes in Title 14 of the NRS.[387] The Nevada Rules of Civil Procedure dealt with existing statutes by stating that "[e]xisting statutes were deemed rules of court, to remain in effect until superseded."[388] Thus, the Court could place the same statement in the rules of criminal procedure. The Nevada Supreme Court has also held that any procedural rules supersede conflicting statutes, because "the courts of this state have the power to make their own procedural rules."[389] While the courts do have the authority to create procedural rules, Nevada would likely choose to follow precedent and seek the grant of authority through the legislature.

If the legislature were to grant the Nevada Supreme Court the authority to promulgate the rules of criminal procedure it would likely model the authority for the rules of civil procedure. The legislation could simply add a subsection to the already existing statute that grants authority for civil procedure rules:

NRS 2.120 Adoption of rules for government of courts and State Bar of Nevada; Adoption of rules for civil practice and procedure~~[.]~~*; Adoption of rules for criminal practice and procedure.*

> 1. The Supreme Court may make rules not inconsistent with the Constitution and laws of the State for its own government, the government of the district courts, and the government of the State Bar of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court which in no event shall be less than 30 days after entry of an order adopting such rules.
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> 2. The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the Constitution of the State of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court which in no event shall be less than 60 days after entry of an order adopting such rules.
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> *3. The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate criminal practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of justice. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the Constitution of the State of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Su-*

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[387] NEV. REV. STAT. tit 14 (Procedure in Criminal Cases).

[388] NEV. R. CIV. P., Preface.

[389] *See, e.g.*, State v. Second Judicial Dist. Ct., 11 P.3d 1209, 1213 (Nev. 2000) (*citing* Whitlock v. Salmon, 752 P.2d 210, 211 (Nev. 1988); *see also* Goldberg v. District Court, 572 P.2d 521, 523 (Nev. 1977); Galloway v. Truesdell, 422 P.2d 237, 244 (Nev. 1967) ("There are regulating . . . powers of the Judicial Department that are within the province of the judicial function, i.e., . . . promulgating and prescribing any and all rules necessary or desirable to handle the business of the courts or their judicial functions.").

> *preme Court which in no event shall be less than 60 days after entry of an order adopting such rules.*[390]

Once the Nevada Supreme Court has the delegated authority from the Nevada Legislature, the Court could follow the same process that was used to adopt rules of civil procedure. This process would allow the Court to appoint an advisory committee and to receive comment from members of the public. The Court would then have the final review of the rules before adopting them by court order.

Several states with statewide rules still retain criminal procedure statutes. The statutes enacted by the legislature govern the procedures for certain topics, such as the death penalty, bail, and competency. If there are topics that the legislature determines to be of great concern to Nevada or better left to the representative body, then the legislature can maintain those procedures in statute.[391]

An advantage of adopting the rules through the Nevada Supreme Court is the ability for the Court to reform and revise the rules in a timely manner. The rule making and revision process of court rules is quicker than waiting for the biennial legislative session and going through the law-making process. Most states with statewide rules have rules committees that meet regularly to update and amend the court rules. Further, as illustrated above, the Nevada Supreme Court has adopted several procedural rules through case law. These concepts and procedural rules would be more accessible, controlling, and directive if located in one place, with the Court retaining control over revising and explaining the procedural rules.

2. Nevada Code of Criminal Procedure, by the Nevada Legislature

Nevada could choose to adopt a comprehensive code of criminal procedure, by statute, like Texas. In 1965, after six years of work, the Texas legislature enacted the Code of Criminal Procedure.[392] Texas' code was the first overhaul of their criminal procedure in over 100 years.[393]

The Texas State Bar established a Committee for Revision of the Code of Criminal Procedure and Penal Code. The stated goals for the committee were:

> [T]o eliminate unnecessary, unjust and outmoded technicalities in favor of the State, as well as of the defendants, to achieve an up-to-date code of trial and appellate procedure that would be comparable to the advance made by adoption of

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[390] Explanation of changes: matter in *blue italics* is new; matter between brackets ~~[omitted material]~~ is material to be omitted. This is consistent with bill drafts in the Nevada Legislature.

[391] This is beyond the scope of this White Paper. However, as an example, bail in California is left to the legislature.

[392] *Texas Code of Criminal Procedure Revision Research Guide*, LEGIS. REFERENCE LIBR. TEX., http://www.lrl.state.tx.us/collections/CriminalProcedureIntro.cfm [https://perma.cc/V2DA-NEDT] (last visited April 6, 2017). The Texas Legislative Reference Library provides countless documents on the revision process that led to adopting the Code of Criminal Procedure.

[393] *Id.*

> the Code of Civil Procedure; and to achieve justice by striking a balance between protection of society from criminals and the prevention of convictions of innocent persons.[394]

The enacted bill was 841 pages long.[395] Only five other states have adopted their code of criminal procedure through their legislature.[396] Unfortunately, these states lack an overview of the law-making process that they went through to enact the codes. Texas did attempt to establish rules of criminal procedure through the courts instead of through the legislature, but once unsuccessful, relied upon the legislature.[397] Texas' code of criminal procedure took four years and two legislative sessions to pass.[398] The resulting legislative history and information would be extremely helpful to Nevada if Nevada were to enact a code instead of rules.

Developing a criminal procedure code in Nevada may be ideal because the state's current statutes are relatively in-depth. Creating a code may likely fill in the gaps, taking rules from case law and local rules to supplement any missing provisions. However, as discussed above, in time, a code may result in a similar situation as Nevada currently faces where it is difficult to change current statutes to case law and local rules were needed for the rules to adapt to changing procedures. It may be possible for the legislature to enact a rules committee to combat this problem, but that likely will not yield an amending process as possible with court rules.

B. Various Considerations When Drafting Criminal Procedure Rules for Nevada

Ultimately, if Nevada decides to move forward with statewide criminal procedure rules this White Paper, and the accompanying chart, intends to provide insight to the various "types" of criminal procedural rules. There are three main distinctions to consider: applicability, depth, and specifics.

Drafters of Nevada's statewide rules or code would be able to determine the potential applicability of such rules. Nevada could follow states like Montana, South Dakota, and Texas by incorporating detailed statewide criminal procedure rules into its statutes and create a code of criminal procedure. Conversely, Nevada could develop separate and distinct statewide criminal procedure rules that could supersede all local district court rules and/or conflicting

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[394] *Timeline of the Revision Process*, LEGIS. REFERENCE LIBR. TEX., http://www.lrl.state.tx.us/collections/CriminalProcedureTimeline.cfm [https://perma.cc/9LT7-P8WS] (last visited Apr. 15, 2017). The draft that was presented to the legislature can be found here: http://www.lrl.state.tx.us/legis/billSearch/BillDetails.cfm?legSession=59-0&billTypeDetail=SB&billnumberDetail=107&submitbutton=Search+by+bill [https://perma.cc/6N3U-BAF5].

[395] S.B. 170, 59th Sess. (Tex. 1966), http://www.lrl.state.tx.us/LASDOCS/59R/SB107/SB107_59R.pdf#page=690 [https://perma.cc/Q9L8-3YWS].

[396] Kansas, Montana, Oklahoma, South Dakota, and Wisconsin. See 50 State Rule Chart, Appendix for code citations.

[397] *Timeline of the Revision Process*, *supra* note 394.

[398] *Texas Code of Criminal Procedure Revision Research Guide*, *supra* note 392.

statutes, similar to Alabama, Florida, and Mississippi. Since Nevada does not have as complex a court system as states like Delaware and Georgia,[399] it is likely unnecessary to develop statewide procedural rules for each level of court. Meaning, separate statewide criminal procedure rules for district courts and justice courts is likely ineffective to solve Nevada's current criminal procedure quandary.

If Nevada creates statewide criminal procedure rules, its drafters should consider whether additional rules related to criminal cases should be incorporated. For example, it must be determined how and if juvenile proceedings will follow the statewide criminal rules by way of including its application in the scope section or mentioning, in each specific rule, how it applies to juvenile proceedings. Alternatively, statewide juvenile criminal proceedings may be necessary.

Nevada would also need to define the potential depth of statewide rules or codes. Each state with statewide criminal procedure rules varies in the depth of its rules. For example, on one end of the spectrum, Nevada could follow Colorado, Hawaii, and Maine by promulgating or codifying extensive, detailed rules, that may go as far as detailing the preparation for clerk's minutes[400] or the exact margins of pleadings.[401] On the other hand, Nevada could follow in Oregon's path and develop uniform trial rules that are, comparatively, extremely limited for criminal procedure rules, allowing state statutes to control most procedural rules.[402] Further, Nevada may need to consider whether it should incorporate modern rules like electronic filing procedures in its criminal procedure rules.[403] For example, while Texas has a statewide criminal procedure code, it recently created statewide procedures for electronic filing in criminal cases.[404]

Lastly, developing statewide rules would allow Nevada the opportunity to determine what specific rules should be included and what should be left to the legislature or local districts. Statewide rules can be standardized, by modeling the FRCP, or can be tailored to address the specific concerns or repeat problems in Nevada. Based on the procedural needs of the state, statewide criminal procedure rules can detail those concerns. For example, several states with

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[399] Delaware has various levels of courts including: Justice of the Peace, Court of Common Pleas, Family Court (juvenile proceedings), Superior Court, and Supreme Court. *An Overview of Delaware Court System*, DEL. CTS., http://courts.delaware.gov/overview.aspx [https://perma.cc/9XNV-HTA4] (last visited Mar. 20, 2017).

[400] HRRP 50.1.

[401] HRRP 2.2.

[402] Chapter 4 of Oregon's Uniform Trial Court Rules, devoted to Proceedings in Criminal Cases, contains limited, yet detailed sections, including: Oral Argument on Motions in Criminal Cases and Motions to Suppress Evidence. OR. UTCA 4.050; 4.060.

[403] *See* Daniel B. Garrie & Daniel K. Gelb, *E-Discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U. L. REV. 393 (2010).

[404] *See Final Approval of Rules Governing Electronic Filing in Criminal Cases,* TEX. JUD. BRANCH, http://www.txcourts.gov/media/589351/Local-Rules-3rdAJR.pdf [https://perma.cc/J6QH-5Q3M] (last visited Mar. 28, 2017).

statewide rules have a specific and detailed rule section devoted to ensuring a speedy trial.[405] Alaska's speedy trial procedural rule states that a defendant shall be tried within 120 days, then details the time when trial begins.[406] Alaska's procedural rules even allow for an absolute discharge if a defendant is not brought to trial before the running of the time for trial.[407] Other states have similar detailed statewide speedy trail, or dismissal rule, rules, including: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Louisiana, Massachusetts, and Michigan. As another example, several states have detailed statewide rules on search and seizure procedures. While all states with statewide rules have some discussion of warrants, states like Hawaii, Maine, North Dakota, and Tennessee have thorough search and seizure procedural rules.[408]

CONCLUSION

The Arkansas Supreme Court said it best when they abolished all local rules and announced that "[a] member of the bar of this state, or a litigant representing himself or herself, should be able to go into any of our courts and know what to expect without having to read, in some instances, 50 pages of local rules trying to discern their effect."[409] While this White Paper does not call for such an abolishment, confusion is sowed by forcing litigants to check various sources (which sometimes conflict with each other).[410] Uniform, simple, and statewide criminal procedure rules can alleviate this confusion. Forty-seven states have adopted rules of criminal procedure, either by rule, by code, or by court. This leaves Nevada as one of three states lacking comprehensive rules. Rules of criminal procedure are enacted to "provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[411]

Nevada has several sources for rules of criminal procedure: Title 14 of the Nevada Revised Statutes, Nevada Supreme Court Rules, rules for each judicial district court, case law, and rules of practice for each court. Under this system,

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[405] *See generally* Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 660 (2015).

[406] *See, e.g.*, ALASKA R. CRIM. P. 45.; *see also* ARIZ. R. CRIM. P. 8.2 (detailing the specific running times based on whether a defendant is in custody or released, the case is complex, or a capital proceeding).

[407] ALASKA R. CRIM. P. 45(g). "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the court upon motion of the defendant shall dismiss the charge with prejudice. Such discharge bars prosecution for the offense charged and for any other lesser included offense within the offense charged." *Id*.

[408] HRPP 41; M.R.U. CRIM. P. 41; N.D. R. CRIM. P. 41; TENN. R. CRIM. P. 41.

[409] *In re* Changes to Arkansas Rules of Civil Procedure, 742 S.W.2d 551, 552 (Ark. 1987) (abolishing local rules since the Arkansas Supreme Court found them unnecessary in view of the since-adopted Arkansas Rules of Criminal Procedure).

[410] *Supra* Part II.A.

[411] FED. R. CRIM. P. 2.

obtaining justice in our criminal justice system is truly a daunting task.[412] Because there are so many sources, a defendant in Reno may have different procedural rules that apply to him than a defendant in Las Vegas. As illustrated above, there are also inconsistent rules throughout the many sources of criminal procedure. If Nevada were to adopt statewide comprehensive rules or a code of criminal procedure, Nevada could ensure the consistent, streamlined application of justice in our criminal system. One where "[n]o person . . . should be placed at a substantial disadvantage in a criminal trial by the rules of procedure."[413]

[412] *Minutes of the 2015–2016 Interim Advisory Comm. on the Admin. of Justice*, *supra* note 13.

[413] Felix v. State, 849 P.2d 220, 255 (Nev. 1993), *superseded on other grounds by statute as stated in* Evans v. State, 28 P.3d 498, 509–10 (Nev. 2001).

TAB 6

Supreme Court of Nevada

ADMINISTRATIVE OFFICE OF THE COURTS

ROBIN SWEET
Director and
State Court Administrator

JOHN MCCORMICK
Assistant Court Administrator
Judicial Programs and Services

RICHARD A. STEFANI
Deputy Director
Information Technology

Commission on Statewide Rules of Criminal Procedure

Potential Areas for Review

1. Discovery (revisit)
2. Rules governing appearances before a magistrate following arrest or initial appearance.
3. Post-conviction procedures/rules

Supreme Court Building ♦ 201 South Carson Street, Suite 250 ♦ Carson City, Nevada 89701 ♦ (775) 684-1700 · Fax (775) 684-1723

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A GUIDE TO POST-CONVICTION PROCEEDINGS FOR NEVADA DISTRICT COURT JUDGES

These materials supplement the course entitled "Post-Conviction Remedies" presented at the 2010 District Judges Spring Judicial Institute held on April 21, 2010. They were prepared by Phaedra Kalicki, Legal Counsel for the Criminal Division of the Nevada Supreme Court's Central Legal Staff, and Paula Horn, Supervisory Attorney for the Post-Conviction Team in the Nevada Supreme Court's Central Legal Staff, with editing assistance from Harriet Cummings, Chief Assistant Clerk-Attorney, Nevada Supreme Court. The materials were updated in December 2013.

These materials are not intended to express the opinion of the Nevada Supreme Court. Instead, they are offered as an educational or research tool. Users are strongly encouraged to read the cases and statutes and conduct independent research. Legislation may have changed and/or the cases cited may well have been amended, withdrawn, or overruled since the materials were last updated.

TABLE OF CONTENTS

I. POST-CONVICTION PETITION FOR A WRIT OF HABEAS CORPUS

A. GENERAL PROVISIONS

1. INTRODUCTION

The right to seek the remedy of habeas corpus is protected by Article 1, Section 5 of the Nevada Constitution. Since 1993, Nevada law has provided that with a few exceptions discussed in these materials, a post-conviction petition for a writ of habeas corpus is the exclusive means of challenging the validity of a conviction or sentence and the computation of time served. NRS 34.724(2)(b), (c).

A post-conviction petition for a writ of habeas corpus may be used to:

1. Seek relief from a judgment of conviction or sentence in a criminal case, or
2. Challenge the computation of time served pursuant to a judgment of conviction.

NRS 34.720, 34.722. A habeas petition cannot be used to challenge the conditions of confinement or the manner in which a sentence is carried out. McConnell v. State, 125 Nev. ___, ___, 212 P.3d 307, 310-11 (2009) (Adv. Op. No. 24, at 3-5); Bowen v. Warden, 100 Nev. 489, 686 P.2d 250 (1984).

"[H]abeas corpus is a proceeding which should be characterized as neither civil nor criminal for all purposes. It is a special statutory remedy which is essentially unique." Hill v. Warden, 96 Nev. 38, 40, 604 P.2d 807, 808 (1980).

2. JURISDICTION: WHERE IS THE PETITION FILED?

A petition that **challenges the validity of a conviction or sentence** must be filed in the district court for the **county in which the conviction occurred**. NRS 34.738(1).

A petition that **challenges the computation** of time served must be filed in the district court for the **county in which the petitioner is incarcerated**. NRS 34.738(1).

If a petition is filed in the wrong court, the clerk of that court must transfer the petition to the correct district court. In this situation, the petition is treated as having been filed on the date it was received in the court in which it originally was filed. NRS 34.738(2).

3. MIXED PETITION: CHALLENGES JUDGMENT AND COMPUTATION OF TIME SERVED.

A single petition may not challenge both the judgment of conviction and the computation of time served. NRS 34.738(3). This is because the claims must be filed in different courts—the challenge to the judgment of conviction is filed in the county in which the conviction occurred whereas the challenge to the computation of time served is filed in the county in which the petitioner is incarcerated. NRS 34.738(1).

When a petition does challenge both the judgment of conviction and the computation of time served, the district court should resolve the petition to the extent of the court's jurisdiction and dismiss the remainder of the petition without prejudice. Id. If the court has jurisdiction over both challenges, the best practice may be to dismiss the computation claims without prejudice and resolve the challenges to the judgment. Otherwise, the court will be faced with having to order answers from different parties (DA for challenge to judgment and AG for challenge to computation), see NRS 34.745, which may also create complications on appeal. If the court takes this approach, it should dismiss the computation claims promptly rather than waiting until final resolution of the claims that challenge the judgment.

4. TECHNICAL REQUIREMENTS

The petitioner is not required to pay a filing fee. NRS 34.724(1).

The petition must be signed by the petitioner and verified by the petitioner or his counsel. NRS 34.735; NRS 34.730(1). If the petition is verified by counsel, then counsel also must verify that the petitioner personally authorized counsel to file the petition. NRS 34.730(1). An inadequate verification is **not** a jurisdictional defect and therefore may be cured through an amendment. See the Nevada Supreme Court's decision in Miles v. State, 120 Nev. 383, 91 P.3d 588 (2004), for a discussion of the verification requirement and the circumstances in which an inadequate verification may be cured.

The petition must be served by mail on the Nevada Attorney General and, if the petition seeks relief from a judgment of conviction or sentence, the district attorney in the county in which the conviction was obtained. NRS 34.730(2). Inadequate service is **not** a jurisdictional defect and therefore may be cured. See Miles, 120 Nev. 383, 91 P.3d 588.

5. FORM OF PETITION

The petition must be in substantially the form set forth in NRS 34.735 and be titled "Petition for Writ of Habeas Corpus (Postconviction)." NRS 34.730(2). A blank form petition is attached as Appendix A.

The petition must name as the respondent "the officer or other person by whom the petitioner is confined or restrained,"—e.g., the warden or head of the institution. NRS 34.730(2); see also NRS 34.735 (instructions in form petition). Nonetheless, petitions often name the State of Nevada as the respondent.

In reviewing the technical compliance of a petition, the district court should keep in mind the Nevada Supreme Court's observation that the statutory provisions governing post-conviction petitions do not preclude a petitioner "from curing technical defects by amendment." Miles, 120 Nev. at 385, 91 P.3d at 589.

6. EXCLUSIVE REMEDY

As a general rule, a post-conviction petition for a writ of habeas corpus is the exclusive means of challenging the validity of a conviction or sentence and the computation of time served. NRS 34.724(2)(b), (c).

There are two exceptions to that rule for challenges to a conviction or sentence.

- The post-conviction petition is not a substitute for and does not affect the remedy of a direct appeal. NRS 34.724(2)(a).
- The post-conviction petition "[i]s not a substitute for and does not affect "any remedies which are incident to the proceedings in the trial court." Id.

Only four remedies have been recognized by the Nevada Supreme Court as incident to the trial court proceedings that are available remedies other than habeas corpus for seeking relief from a conviction or sentence. They are:

- Motions for modification of sentence. Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996).
- Motions to correct an illegal sentence. Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996).
- Motions to withdraw a guilty plea. Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).
- Motions for new trial based on newly discovered evidence. Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000).

Another remedy that is likely incident to the trial court proceedings is a motion to set aside a death sentence based on mental retardation as provided in NRS 175.554.

7. NRCP APPLY IF CONSISTENT WITH NRS CH. 34

The Nevada Rules of Civil Procedure (NRCP) apply to post-conviction habeas proceedings to the extent that the rules are not inconsistent with the statutes governing those proceedings. NRS 34.780(1). The Nevada Supreme Court has held that three rules of civil procedure, in particular, do not apply to proceedings on a post-conviction petition for a writ of habeas corpus:

- NRCP 56, allowing for summary judgment, does not apply to a post-conviction petition for a writ of habeas corpus. Beets v. State, 110 Nev. 339, 341, 871 P.2d 357, 358 (1994).
- The default provisions set forth in NRCP 55 are inapplicable to a post-conviction petition for a writ of habeas corpus. Means v. State, 120 Nev. 1001, 1019, 103 P.3d 25, 37 (2004). Although the district court therefore cannot enter a default judgment as a sanction for the State's failure to timely respond to a petition, the district court may consider other sanctions for dilatory conduct, "including but not limited to the imposition of an attorney fee or other monetary sanctions, or in the most egregious cases, an order of confinement of the person at fault." Id. at 1020, 103 P.3d at 37-38.
- The rules regarding relation-back set forth in NRCP 15(c) do not apply to supplemental pleadings in a post-conviction habeas proceeding. State v. Powell, 122 Nev. 751, 757-58, 138 P.3d 453, 457-58 (2006).

The district court may not dismiss a petition because the petitioner has not taken any action after filing the petition. The next action required after the filing of the petition is by the district court, as explained below.

8. EXPEDITIOUS JUDICIAL EXAMINATION

Whenever possible, a petition that challenges the validity of a conviction or sentence should be assigned to the judge or court that presided over the original criminal proceedings. NRS 34.730(3)(b). The clerk is required to "promptly" present the petition to a district judge. NRS 34.740.

The judge to whom the petition is assigned must "expeditiously" examine the petition. NRS 34.740. This must be done before a hearing on the petition may be set. NRS 34.730(4).

An expeditious judicial examination should include a review of the petition for the following:

- ✓ The nature of the petition—challenge to conviction or sentence, challenge to computation of time served, mixed. NRS 34.720; NRS 34.724; NRS 34.738.
- ✓ Whether the petition is properly filed by a person who has standing to file the petition. NRS 34.724(1).
- ✓ Whether the petition was filed in the correct court. NRS 34.738.
- ✓ Whether the petition has technical defects that can be corrected by an amendment. NRS. 34.730; NRS 34.735; Miles v. State, 120 Nev. 383, 91 P.3d 588 (2004).
- ✓ Whether the petition was timely filed under NRS 34.726.
- ✓ Whether the petition is a second or successive petition under NRS 34.810(2) that may be summarily dismissed. NRS 34.745(4).
- ✓ Whether to order an answer or direct the prosecuting authority to take some other action. NRS 34.745.
- ✓ Whether to appoint counsel. NRS 34.750.

The initial examination under NRS 34.740 is not for purposes of determining the truth of any factual allegations, as the court cannot grant relief that discharges or changes the petitioner's custody unless an evidentiary hearing is held. NRS 34.770(1).

9. FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The written order is the district court's opportunity to "present [its] position to the appellate court in the most effective way" and to alert the appellate court to unsettled issues that the district court observes from its position in the trial court. Chad M. Oldfather, Writing, Cognition, and the Nature of the Judicial Function, 96 Geo. L.J. 1283, 1291 (2008). The written order explains the thoughts behind the decision-making process and provides legitimacy to decisions with an "assurance that a given decision is not arbitrary." Id. at 1317.

a) Findings and Conclusions Required

The district court is required by NRS 34.830 to make specific findings of fact and conclusions of law when resolving a post-conviction petition for a writ of habeas corpus. NRS 34.830(1) provides: "Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court." This requirement is echoed in NRAP 4(b)(5)(B).

b) Findings of Fact

An order resolving a petition should contain specific findings regarding the facts that are relevant to each claim raised in the petition. "A finding of fact is a fact that has been deduced from the evidence and found by the judge to be essential to an understanding of the case or to determine the rights of the parties." J.J. George, Judicial Opinion Writing Handbook 209 (2007).

The district court should take the opportunity to inform the appellate court of the bases for the findings of fact, which otherwise might not be apparent from a cold record. If there are special facts or inferences that the district court relied upon in resolving a claim, making specific findings helps eliminate appellate guesswork. The Judge's Book 233 (1994). In particular, the order should include findings as to any disputed facts and any credibility determinations made by the court.

For the district court, the benefit to making specific findings of fact is that a reviewing court will give deference to purely factual findings so long as they are supported by the record. See, e.g., Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994). Making specific findings of fact therefore increases the chances that a decision will withstand review.

c) Conclusions of Law

An order resolving a petition should contain specific conclusions of law for each claim raised in the petition. "The conclusion of law should not be a mere recitation of general legal precepts." J.J. George, Judicial Opinion Writing Handbook 239 (2007). Thus, while it is appropriate to include statements of the applicable law in the order, a conclusion of law should apply the relevant law to the facts, as found by the court, to reach a conclusion as to the legal issue presented by each claim. Id. ("The conclusion of law should state how the applicable legal precept is specifically applied to the facts of the case and the issue raised."). The order should state the specific grounds for denying each claim.

For example, in an ineffective assistance claim, the conclusions of law would evaluate the relevant facts in light of the Strickland test to determine the legal questions of whether the petitioner demonstrated that counsel's performance was deficient and that the petitioner was prejudiced as a result. Resolving the claim may therefore require several conclusions of law.

Although a reviewing court generally will conduct an independent review of the legal conclusions, see, e.g., Riley v. State, 110 Nev. 638, 647, 878 P.2d 272, 278 (1994), it is important for the district court to explain its conclusions of law. This is the district court's opportunity to explain its reasoning to the parties and the public and to inform the appellate court of the reasoning underlying the decision.

d) Resolve All Claims

The district court's final order, unless prior intermediate orders have been entered, must resolve all claims that were raised in the petition and any supplemental documents that the petitioner has been permitted to file. An order is not final until all claims raised in the proceedings have been resolved. Thus, if the district court denies some claims summarily, but determines that an evidentiary hearing is warranted on other claims, an order entered to that effect is not the final order.

e) Order Prepared by Prevailing Party

The district court "may request a party to submit proposed findings of facts and conclusions of law." NCJC Canon 3B(7) cmt. There are special requirements that must be met if the district court chooses to have a party draft a proposed order:

1. The court first "must make a ruling and state its findings of fact and conclusions of law before [the prevailing party] can draft a proposed order for the district court's review." Byford v. State, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007).

2. The court also must ensure that "the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions." NCJC Canon 3B(7) cmt.; see also NCJC Canon 3B(7) (requiring the district court to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard"); Byford, 123 Nev. at 69-70, 156 P.3d at 692.

3. Finally, the court must ensure that the proposed order drafted by the prevailing party accurately reflects the district court's findings and conclusions. See Byford, 123 Nev. at 69, 156 P.3d at 692.

There are two special problems that the district court should be aware of in having a prevailing party prepare a written order.

- First, it may be difficult to enter a written order within 20 days from the date of oral pronouncement, as required by NRAP 4(b)(5)(B), if the order is prepared by the prevailing party because of the time it may take to allow the other party an opportunity to review and respond to the proposed order. The court should set regular status checks to ensure that the order is prepared as expeditiously as possible.
- Second, if the losing party is not represented by counsel and is incarcerated, the requirement that he or she be given an opportunity to review and respond to the proposed order may present additional challenges. Although Byford did not involve a proper person petitioner and the Nevada Supreme Court has not expressly stated that the requirements in Byford apply when the petitioner is not represented by counsel, the district court may want to exercise caution

nonetheless as the language used in Byford and in the commentary to NCJC Canon 3B(7)—"other parties"—is broad.

f) Time Limit for Entering Written Order

The district court must enter a written order resolving a post-conviction petition for a writ of habeas corpus within 20 days after the oral pronouncement of the final decision. NRAP 4(b)(5)(B). When a district court plans to draft its own order, the court should carefully consider whether to make an oral pronouncement of its decision. An oral pronouncement triggers the deadlines in NRAP 4(b). Also, the losing party may file a notice of appeal following an oral pronouncement. In that situation, the Nevada Supreme Court will order the district court to enter a written order within a specified period of time if one has not already been entered. But regardless of whether the court orally pronounces its decision, it should ensure that a petition is resolved expeditiously.

g) Notice of Entry

The district court clerk is required to serve a copy of a district court order discharging the petitioner from custody, committing the petitioner to the custody of another person, dismissing the petition, or denying the requested relief. The notice of entry must be served on the following people:

- The petitioner.
- The petitioner's counsel, if any.
- The respondent.
- The Attorney General.
- The district attorney of the county in which the petitioner was convicted.

NRS 34.830(2).

The time limit for filing a notice of appeal from the district court's order does not begin to run until the written notice of entry is properly served. See NRS 34.575(1). Any deficiency in the notice of entry will give the aggrieved party additional time to file an appeal. For example, because NRS 34.830(2) requires that the notice of entry be served by the district court clerk, service by the Attorney General or district attorney is ineffective and does not start the time limit for filing an appeal. Similarly, the petitioner and the petitioner's counsel, if any, must both be served individually with notice of entry of the order; a notice of entry that is not properly served on both does not start the time limit for filing an appeal. See Klein v. Warden, 118 Nev. 305, 309, 43 P.3d 1029, 1032 (2002); Lemmond v. State, 114 Nev. 219, 954 P.2d 1179 (1998).

B. CHALLENGE TO CONVICTION OR SENTENCE

1. INTRODUCTION

The post-conviction petition for a writ of habeas corpus is the standard means, other than a direct appeal, of challenging a conviction or sentence in a criminal case. This section addresses the processing of these petitions.

2. JURISDICTION: WHERE IS THE PETITION FILED?

A petition that challenges the legality of a judgment of conviction or sentence must be filed in the district court for the **county in which the conviction occurred**. NRS 34.738(1). If the petition is filed in the wrong county, the district court should order the clerk to transfer the petition to the appropriate county. NRS 34.738(2)(b).

3. STANDING

The petitioner's standing to file the petition may impact the district court's handling of the petition.

The Nevada Constitution gives the district courts the power to issue writs of habeas corpus "on petition by . . . any person . . . who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction." Nev. Const. art. 6, § 6(1) (emphases added). Similarly, NRS 34.724(1) limits a post-conviction habeas petition challenging a judgment of conviction or sentence to those individuals who

- ✓ have been convicted of a crime, and
- ✓ are under sentence of death or imprisonment.

Based on these provisions, the district court must dismiss a petition that challenges the validity of a judgment of conviction if the petitioner filed the petition after having completed the sentence for the challenged conviction. Jackson v. State, 115 Nev. 21, 23, 973 P.2d 241, 242 (1999).

4. RESPONSE OR ANSWER TO PETITION

The State is not required to respond to a petition until the district court orders it to do so. And in many instances, despite a certificate of service attached to a petition, the State may not have been served and may be unaware that the petition is pending until it receives an order for an answer.

If the petition challenges a judgment of conviction or sentence and is the petitioner's first such petition, the district court must order the **prosecuting authority** that obtained the conviction (usually the district attorney but sometimes the attorney general) to file a response or answer or may order the prosecuting authority to "[t]ake other action that the judge . . . deems appropriate." NRS 34.745(1)(a)(1), (b).

The statute allows for a response "within 45 days or a longer period fixed by the judge." NRS 34.745(1)(a).

The order directing a response or answer must be in "substantially" the form provided in NRS 34.745(3) and must be served on the petitioner or his counsel, the respondent, the Attorney General, and the district attorney of the county in which the petitioner was convicted. The form order is reproduced in Appendix B. Although the form order is directed to the respondent, if the petition properly names the confining authority as the respondent, see NRS 34.730(2), then the order for a response or answer should be directed to the prosecuting authority consistent with NRS 34.745(1)(a).

5. RETURN

The return provides basic information about the petitioner's custody status. See NRS 34.430.

NRS 34.745(1)(a)(2) provides that the district court must order the **prosecuting authority** (usually the district attorney but sometimes the attorney general) to file a return if the petition challenges a conviction or sentence and an evidentiary hearing is required under NRS 34.770.

The statute allows for a return to be filed "within 45 days or a longer period fixed by the judge." NRS 34.745(1)(a). The order directing a return must be in "substantially" the form provided in NRS 34.745(3) and must be served on the petitioner or his counsel, the respondent, the Attorney General, and the district attorney of the county in which the petitioner was convicted. The form order is reproduced in Appendix B.

6. SUMMARY DISMISSAL OF SECOND OR SUCCESSIVE PETITIONS

The district court may "enter an order for [the] summary dismissal" of a second or successive petition when it "plainly appears from the face of the petition or an amended petition and documents and exhibits that are annexed to it, or from records of the court" that the petition is procedurally barred under NRS 34.810(2). NRS 34.745(4). As the statutory language states, the court may "look beyond the face of a petition to the courts' own records in deciding whether to order summary dismissal of the petition." State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003).

When the district court summarily dismisses a second or successive petition under NRS 34.745(4), the court must enter a written order. See section I.A.9 for a discussion of written orders.

7. APPOINTMENT OF COUNSEL

There is no federal or state constitutional right to counsel in state post-conviction proceedings. Coleman v. Thompson, 501 U.S. 722 (1991); Murray v. Giarratano, 492 U.S. 1 (1989) (plurality opinion); accord Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996); see also Martinez v. Ryan, 132 S. Ct. 1309, 1315, 1317 (2012) (declining to recognize constitutional right to counsel in initial state post-conviction proceedings but holding that where post-conviction proceeding is first opportunity to challenge effectiveness of trial counsel, ineffective assistance of post-conviction counsel may provide good cause to excuse procedural default as to a federal habeas petition and absence of counsel in initial state post-conviction proceeding will preclude State from relying on procedural default to bar a federal habeas petition).

The district court is **required** by statute to appoint post-conviction counsel in only one situation: when the petitioner is under a death sentence and the petition is the first petition challenging the validity of the conviction or sentence. NRS 34.820(1).

In all other situations, the district court has **discretion** to appoint post-conviction counsel if "the court is satisfied" that the petitioner is indigent and the petition is not dismissed summarily. NRS 34.750(1). In exercising its discretion, the court may consider many factors, including the following non-exhaustive list set forth in NRS 34.750(1):

- the severity of the consequences facing the petitioner
- the difficulty of the issues presented
- whether the petitioner is unable to comprehend the proceedings
- whether counsel is necessary to proceed with discovery.

When a petitioner is **indigent**, all costs—including reasonable compensation for appointed post-conviction counsel—are paid from money appropriated to the State Public Defender's Office for that purpose. When that appropriation to the State Public Defender's Office is exhausted, additional money is allocated to that office from the Reserve for Statutory Contingency Account. NRS 34.750(2). Thus, the county is not required to bear the costs of compensating appointed post-conviction counsel.

8. SUPPLEMENTAL PLEADINGS

After the district court appoints post-conviction counsel, that counsel may file supplemental pleadings. NRS 34.750(3).

NRS 34.750(3) provides that counsel may file and serve supplemental pleadings within 30 days after the date the court orders the filing of an answer or return, or the date of counsel's appointment, whichever is later. While the district court may choose to grant counsel additional time to supplement the petition, the district court should set firm deadlines to ensure the timely prosecution of a petition. NCJC 2.5 Comment 4 ("In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.").

The district court also has broad discretion to order supplemental pleadings. For example, the court may order supplemental pleadings to cure a technical defect in the petition. See Miles v. State, 120 Nev. 383, 91 P.3d 588 (2004); NRS 34.750(5). A supplemental petition relates back to the filing date of the original petition. State v. Powell, 122 Nev. 751, 757-58, 138 P.3d 453, 457-58 (2006). The district court may decline to allow additional proper person pleadings, see NRS 34.750(5), but if the district court declines to consider a document filed by the clerk of the district court, the district court should take the appropriate action in striking the document or explicitly set forth the documents considered in the final order resolving the petition.

A petitioner is permitted to file a response to a motion to dismiss the petition. See NRS 34.750(4). The response is required to be filed within 15 days after service of the motion to dismiss. This necessarily requires the district court to wait to resolve a petition and the motion to dismiss until after this period has expired.

9. PROCEDURAL BARS

a) Introduction

A post-conviction habeas petition that challenges a judgment of conviction or sentence may be subject to several statutory procedural bars that preclude a determination on the merits of the petitioner's claims. The procedural bars limit the time in which a petition may be filed, the scope of petitions challenging a conviction based on a guilty plea, claims that could have been raised in a prior proceeding, and the number of petitions that may be filed.

The Nevada Supreme Court has held that the statutory procedural bars are mandatory, and a district court therefore lacks discretion to ignore them. State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005); see also Pellegrini v. State, 117 Nev. 860, 886 & n.116, 34 P.3d 519, 536 & n.116 (2001). If a district court ignores a clearly applicable procedural bar, the Nevada Supreme Court may entertain an original writ petition and direct the district court to consider and apply the procedural bars. Riker, 121 Nev. at 233, 112 P.3d at 1075-76.

When the district court dismisses a claim or petition based on a procedural bar, the written order should identify the specific procedural bar(s) applied. And if the court addresses the merits of the barred claims to determine whether the petitioner can demonstrate prejudice, the written order should make that clear. If the court fails to do so, a federal court may address the merits of the claim on federal habeas review. Harris v. Reed, 489 U.S. 255, 263 (1989).

b) Time Limits: One Year and Laches

The passage of time operates as a bar to the right to pursue a claim in a post-conviction habeas petition. Nevada has two statutory provisions that address time limits on the filing of a post-conviction habeas petition that challenges a judgment of conviction or sentence.

(1) One-Year Time Limit (NRS 34.726).

A petition that challenges a conviction or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal was taken from the judgment of conviction, within 1 year after the Nevada Supreme Court issues its remittitur. NRS 34.726(1). All petitions must be timely filed, including second or successive petitions. Pellegrini v. State, 117 Nev. 860, 874, 34 P.3d 519, 529 (2001).

A petition may be filed while a direct appeal is pending—the only thing that the statute requires is a judgment of conviction. See Sheriff v. Hatch, 100 Nev. 664, 666, 691 P.2d 449, 450 (1984) (explaining that petition for a writ of habeas corpus is "a form of collateral attack—an independent proceeding instituted for the purpose of testing the legality of detention"). The court may resolve the petition or stay the proceedings pending resolution of the direct appeal in order to avoid piecemeal litigation.

When first reviewing a petition under NRS 34.740, the district court should determine whether the petition was timely filed. If the petitioner used the form petition, the answers to the following questions should assist the court in determining whether the petition was timely filed:

- ✓ Question 3 (date of judgment of conviction)
- ✓ Question 12 (whether petitioner appealed from judgment of conviction)
- ✓ Question 13 (information about any appeal)
- ✓ Question 19 (whether petition was untimely and reasons for filing untimely petition)

See NRS 34.735. The district court should also look to its records in determining whether the petition was timely filed.

There are several considerations to keep in mind that affect the computation of the 1-year period.

- ✓ The prison mailbox rule (document is timely filed when received by prison official for mailing) does not apply. The petition must be filed with the district court clerk before the time period expires. Gonzales v. State, 118 Nev. 590, 595, 53 P.3d 901, 903-04 (2002). Although the prison mailbox rule does not apply to the filing of a post-conviction petition, official interference that prevented the inmate from timely mailing or filing the petition may provide cause to excuse the untimely filing. Id.
- ✓ The 1-year period begins to run from the entry of the judgment of conviction unless the petitioner filed a timely direct appeal. Dickerson v. State, 114 Nev. 1084, 1087, 967 P.2d 1132, 1133-34 (1998). If the petitioner did not timely file a notice of appeal from the judgment of conviction, the 1-year period begins to run from the date that the judgment of conviction was entered.
- ✓ If the petitioner timely filed a direct appeal, the 1-year period runs from the date that the Nevada Supreme Court issues its remittitur, not the date that the district court receives it. Gonzales, 118 Nev. at 593, 53 P.3d at 902.
- ✓ If the petitioner voluntarily dismissed a timely direct appeal, the 1-year period for filing a petition begins to run upon entry of the Nevada Supreme Court's order granting the voluntary dismissal because the court does not issue a remittitur following a voluntary dismissal. Id. at 596 n.18, 53 P.3d at 904 n.18.
- ✓ If the petitioner was allowed to file an untimely direct appeal pursuant to NRAP 4(c) (effective July 1, 2009), the 1-year period for filing a petition begins to run from the date that the Nevada Supreme Court issues its remittitur in the untimely direct appeal. NRAP 4(c)(4) (effective July 1, 2009).
- ✓ A supplemental petition relates back to the date of filing of the original petition for purposes of NRS 34.726. State v. Powell, 122 Nev. 751, 757-58, 138 P.3d 453, 457-58 (2006).
- ✓ In computing the time period, the date the judgment is entered or the remittitur is issued shall not be included and if the last day falls on a Saturday, Sunday, or a nonjudicial day, the 1-year period runs until the end of the next judicial day. See NRS 178.472; see also Gonzales, 118 Nev. at 593 n.7, 53 P.3d at 903 n.7.

The district court **must dismiss** an untimely petition under NRS 34.726 **unless the petitioner shows good cause for the delay**. See State v. Dist. Ct. (Riker), 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory."). Good cause exists if the petitioner demonstrates

- To the court's "satisfaction," that the delay was not the petitioner's fault and dismissal of the petition as untimely would unduly prejudice the petitioner, NRS 34.726(1), or

- That failure to consider the claims would result in a fundamental miscarriage of justice, Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001).

In evaluating the cause for a delay, the district court should keep in mind that all claims reasonably available must be made within the 1-year period. Hathaway v. State, 119 Nev. 248, 252-53, 71 P.3d 503, 506 (2003). The cause, prejudice, and fundamental miscarriage of justice standards are addressed in further detail in section I.B.9.f.

If the petitioner used the form petition, the answer to Question 19 (reasons for filing untimely petition) should assist the court in determining whether the petitioner has demonstrated good cause for the delay. See NRS 34.735. If the form was not used, the court should read the entire petition for any relevant argument about why the petition is late.

(2) Laches (NRS 34.800).

A petition must be dismissed if delay in filing the petition prejudices the State in responding to the petition or in its ability to retry the petitioner. NRS 34.800(1).

- ✓ The petition must be dismissed if delay in filing it prejudices the State in responding to the petition, unless
  - o "the petitioner shows that the petition is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800(1)(a).
- ✓ The petition must be dismissed if delay in filing it prejudices the State in its ability to retry the petitioner, unless
  - o "the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(1)(b).

The statute creates a **rebuttable presumption of prejudice** to the State when the delay in filing the petition exceeds 5 years from the entry of the judgment of conviction, an order imposing a sentence of imprisonment, or a decision on direct appeal from a judgment of conviction. NRS 34.800(2). If the petitioner was authorized to file an untimely direct appeal pursuant to NRAP 4(c), the 5-year period begins to run from the decision in that appeal. NRAP 4(c)(4) (effective July 1, 2009).

The district court cannot rely on NRS 34.800 to dismiss a petition unless the State specifically pleads laches in a motion to dismiss. NRS 34.800(2). When the State does plead laches, the district court must give the petitioner an opportunity to respond to the motion before ruling on it. Id. Generally, the petitioner must respond to a motion to dismiss within 15 days after service of the motion. NRS 34.750(4).

The equitable doctrine of laches recognized by the Nevada Supreme Court in Hart v. State, 116 Nev. 558, 563, 1 P.3d 969, 972 (2000) only applies to post-conviction motions to withdraw a guilty plea under NRS 176.165 and is inapplicable to post-conviction petitions filed under NRS chapter 34. Clem v. State, 119 Nev. 615, 620 n.22, 81 P.3d 521, 525 n.22 (2003).

c) Limits on Challenges to Guilty Plea (NRS 34.810(1)(a))

A petition that challenges a conviction based on a plea of guilty or guilty but mentally ill is limited to allegations that the plea

- was involuntarily or unknowingly entered or
- was entered without effective assistance of counsel.

NRS 34.810(1)(a).

d) Waiver (NRS 34.810(1)(b))

A petition that challenges a conviction based on a jury verdict is limited to claims that could not have been raised in a prior proceeding, such as at trial, on direct appeal, or in a prior post-conviction petition. NRS 34.810(1)(b). Claims that could have been considered in a prior proceeding are waived.

The district court must dismiss any claims that could have been raised in a prior proceeding unless the court finds

- cause for the procedural default and actual prejudice to the petitioner, NRS 34.810(1)(b), or
- that failure to consider the claims would result in a fundamental miscarriage of justice, Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

The petitioner has the burden of **pleading and proving** specific facts to demonstrate good cause and prejudice. NRS 34.810(3); see also State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). The cause, prejudice, and fundamental miscarriage of justice standards are addressed in further detail in section I.B.9.f.

e) Second or Successive Petitions (NRS 34.810(2))

If the petitioner previously has filed a post-conviction petition, the court must dismiss a second or successive petition when

- the petition fails to allege new or different grounds for relief and the prior determination on the claims was on the merits, or

- the petition raises new and different grounds for relief but the petitioner's failure to assert those grounds in a prior petition constitutes an "abuse of the writ."

NRS 34.810(2). If the petitioner was authorized to file an untimely direct appeal pursuant to NRAP 4(c), a post-conviction habeas petition filed after resolution of that appeal is not a second or successive petition for purposes of NRS 34.810(2). NRAP 4(c)(4) (effective July 1, 2009).

If the petitioner used the form petition, the answers to the following questions should assist the district court in determining whether the petition is a second or successive petition:

- ✓ Question 15 (whether petitioner has filed any petitions, applications, or motions challenging judgment in any court)
- ✓ Question 16 (information about any petitions, applications, or motions challenging judgment in any court)
- ✓ Question 17 (whether any claims being raised have been raised previously)
- ✓ Question 18 (whether and why any claims were not raised in prior proceedings)

See NRS 34.735. The district court should also look to its record in making this determination. See NRS 34.745(4).

The district court **may excuse the procedural bar** against second or successive petitions if it finds

- good cause for the petitioner's failure to present the claim or for presenting the claim again and actual prejudice to the petitioner, NRS 34.810(3), or
- that failure to consider the petition would result in a fundamental miscarriage of justice, Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

The statute specifically provides that the petitioner has the burden of **pleading and proving** "specific facts" demonstrating good cause and actual prejudice. NRS 34.810(3); see also State v. Haberstroh, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). Additionally, the State has no burden to prove that the petitioner knowingly and intelligently waived the grounds for relief. Ford v. Warden, 111 Nev. 872, 879-80, 901 P.2d 123, 127 (1995). The cause, prejudice, and fundamental miscarriage of justice standards are addressed in further detail in section I.B.9.f.

If the petitioner used the form petition, the answers to the following questions should assist the court in determining whether the petitioner has pleaded specific facts to demonstrate good cause or has asserted that failure to consider the petition will result in a fundamental miscarriage of justice:

- ✓ Question 17(c) (why any claims are being raised again)

- ✓ Question 18 (whether and why any claims were not raised in prior proceedings)

See NRS 34.735. If the petitioner did not use the form, the court should review the petition and any supporting documents submitted with it to determine whether the petitioner has met the requirements for pleading good cause or a fundamental miscarriage of justice. See NRS 34.745(4).

f) Excusing the Procedural Bars (Good Cause, Prejudice, and Fundamental Miscarriage of Justice)

As explained above the procedural bars for untimely petitions under NRS 34.726, waived claims under NRS 34.810(1)(b), and second or successive petitions under NRS 34.810(2) may be overcome by a showing of good cause and prejudice or a fundamental miscarriage of justice. The Nevada Supreme Court has applied the same standards for determining good cause and prejudice to overcome the procedural bars for untimely petitions under NRS 34.726, waived claims under NRS 34.810(1)(b), and second or successive petitions under NRS 34.810(2). See, e.g., Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537.

(1) Good Cause

To show good cause to overcome these procedural bars, a petitioner must demonstrate that an impediment external to the defense prevented him from complying with the procedural requirements—e.g., filing a timely petition, failing to raise a claim in a prior proceeding, or raising a claim again. State v. Dist. Ct. (Riker), 121 Nev. 225, 232, 112 P.3d 1070, 1074-75 (2005); Pellegrini, 117 Nev. at 886, 34 P.3d at 537.

Examples of good cause:

- The factual basis for a claim was not reasonably available. Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537. The claim must be raised within a reasonable time after it became available. See Hathaway v. State, 119 Nev. 248, 253-55, 71 P.3d 503, 506-08 (2003).
- The legal basis for a claim was not reasonably available. Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537. The claim must be raised within a reasonable time after it became available. See Hathaway, 119 Nev. at 253-55, 71 P.3d at 506-08.
- Official interference made compliance with the procedural requirement impracticable. Pellegrini, 117 Nev. at 886-87, 34 P.3d at 537.
- An appeal-deprivation claim may provide good cause to excuse the delay in filing a post-conviction petition if the petitioner (1) asked counsel to file an appeal, (2) reasonably believed that counsel had filed an appeal, and (3) filed the petition within a reasonable time after learning that a direct

appeal had not been filed. Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507-08 (2003).

- When the appointment of post-conviction counsel is statutorily mandated, the ineffective assistance of post-conviction counsel may provide good cause for filing a successive petition. Crump v. Warden, 113 Nev. 293, 934 P.2d 247 (1997); McKague v. Warden, 112 Nev. 159, 912 P.2d 255 (1996). The United States Supreme Court has declined to recognize a constitutional right to post-conviction counsel, but it has determined that when a state post-conviction proceeding is the first opportunity to challenge the effectiveness of trial counsel, ineffective assistance of state post-conviction counsel may equitably excuse a federal procedural defect (the adequate-state-ground bar) in litigating a petition in federal court and likewise the failure to appoint post-conviction counsel in the state proceeding will preclude the State from arguing a procedural bar (the adequate-state-ground bar) in federal court. Martinez v. Ryan, 132 S.Ct. 1309, 1315, 1317 (2012). To date, the Nevada Supreme Court has recognized ineffective-assistance of post-conviction counsel as good cause to excuse a state procedural default only where the appointment of that counsel was statutorily mandated.

Examples of common allegations that are **not** good cause:

- Trial counsel's failure to send a petitioner his or her file. Hood v. State, 111 Nev. 335, 890 P.2d 797 (1995).
- The petitioner's limited intelligence and reliance on an unschooled inmate law clerk for assistance. Phelps v. Director, Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).
- The petitioner's pursuit of habeas corpus relief in federal court. Colley v. State, 105 Nev. 235, 773 P.2d 1229 (1989).
- Claims, such as ineffective assistance of counsel, that are themselves procedurally barred. See Hathaway, 119 Nev. at 252-53, 71 P.3d at 506; Harris v. Warden, 114 Nev. 956, 964 P.2d 785 (1998), clarified by Hathaway, 119 Nev. 248, 71 P.3d 503.

(2) Prejudice

To show actual prejudice, a petitioner must demonstrate not just that the claimed errors "'created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Riker, 121 Nev. at 232, 112 P.3d at 1075 (quoting United States v. Frady, 456 U.S. 152, 170 (1982)); see also Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

(3) Fundamental Miscarriage

When a petitioner cannot demonstrate good cause, the district court may nonetheless excuse a procedural bar if the petitioner demonstrates that failure to consider the petition would result in a fundamental miscarriage of justice. Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

A fundamental miscarriage of justice requires "a colorable showing" that the petitioner is "actually innocent of the crime or is ineligible for the death penalty." Id. When claiming a fundamental miscarriage based on actual innocence, the petitioner thus must show that "'it is more likely than not that no reasonable juror would have convicted him in light of . . . new evidence.'" Calderon v. Thompson, 523 U.S. 538, 559 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)); see also Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001); Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996). Similarly, when claiming a fundamental miscarriage based on ineligibility for the death penalty, the petitioner "must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him death eligible." Pellegrini, 117 Nev. at 887, 34 P.3d at 537.

10. EVIDENTIARY HEARINGS

a) Introduction

After reviewing the petition, return and answer, and all supporting documents, the district court should determine whether an evidentiary hearing is required. NRS 34.770(1).

The district court may not grant a new trial or a new sentencing hearing, or otherwise discharge a petitioner, without conducting an evidentiary hearing. NRS 34.770(1) ("A petitioner must not be discharged or committed to the custody of a person other than the respondent [the warden] unless an evidentiary hearing is held.").

b) When to Grant an Evidentiary Hearing

An evidentiary hearing is required if:

- ✓ The claims are supported by specific factual allegations.
- ✓ The factual allegations are not belied by the record.
- ✓ The factual allegations, if true, would entitle the petitioner to relief.

Hargrove v. State, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984). An evidentiary hearing may be required on the substantive claims, good cause to overcome a procedural bar, a claim of fundamental miscarriage of justice asserted to overcome a procedural bar.

The first two requirements—specific factual allegations that are not belied by the record—go to the **factual underpinnings** of the claims.

- First, an evidentiary hearing not required if the claims are not supported by specific factual allegations. "Bare," "naked" or conclusory claims are not sufficient. Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).
- Second, an evidentiary hearing is not required if the claims are belied by the record. "A claim is 'belied' when it is contradicted or proven to be false by the record as it existed at the time the claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002). Thus, the district court cannot rely on affidavits submitted with a response or answer in determining whether the factual allegations are belied by the record. Id. at 354-56, 46 P.3d at 1230-31. And the district court cannot make credibility determinations without an evidentiary hearing. See id. at 356, 46 P.3d at 1231 (rejecting suggestion that district court can resolve factual dispute without an evidentiary hearing and noting that "by observing the witnesses' demeanors during an evidentiary hearing, the district court will be better able to judge credibility").

The last requirement—that the factual allegations, if true, would entitle the petitioner to relief—goes to the **legal underpinnings** of the claims. For purposes of this requirement, the district court must accept as true the factual allegations in the petition. Thus, the district court should ask the following question: Assuming that the facts are as the petitioner states, would the application of the law to those facts require relief? If the answer is no, an evidentiary hearing is not required. If the answer is yes, an evidentiary hearing is required.

If the court has any doubt about whether to grant an evidentiary hearing, it should err in favor of granting a hearing. Although it may save some time to deny a hearing, doing so may serve to delay resolution of the case for two reasons.

- Error in failing to grant an evidentiary hearing likely will not be considered harmless by a reviewing court, see Mann, 118 Nev. at 356, 46 P.3d at 1231, requiring the district court to conduct further proceedings on remand.
- Denying a hearing in questionable circumstances gives the petitioner an opportunity to obtain an evidentiary hearing on federal habeas on the ground that he was denied a full and fair hearing in state court. If the federal court agrees, then the state court's denial of a hearing only served to delay resolution of the case.

If the district court determines an evidentiary hearing is not required, the judge shall deny the petition without an evidentiary hearing. NRS 34.770(2). The district court may, however, place the petition on calendar for the purpose of stating its reasons for denying the petition and directing the preparation of a written order in compliance with its reasons.

c) Granting Writ and Scheduling the Hearing

When the district court determines that an evidentiary hearing is required, it shall grant the writ and schedule a date for the hearing. NRS 34.770(3). Granting the writ "does not entitle a petitioner to be discharged from the custody or restraint under which he is held," but instead "requires only the production of the petitioner to determine the legality of his custody or restraint." NRS 34.390(2); see also Gebers v. State, 118 Nev. 500, 503, 50 P.3d 1092, 1094 (2002). The writ therefore "must be directed to the person who has the petitioner in custody" and "command[ ] him to have the body of the petitioner produced before the district court . . . at a time which the judge . . . directs." NRS 34.400.

As a practical matter, some courts have the state prepare a transport order to obtain the petitioner's presence for the evidentiary hearing rather than granting the writ.

When the district court grants an evidentiary hearing, it may limit the scope of the hearing to the specific claims that warrant the hearing. The district court may do so in the order granting the writ and scheduling the evidentiary hearing. In that order, the district court also may resolve with specific findings of fact and conclusions of law the remaining claims raised in the petition that did not require an evidentiary hearing. Alternatively, the district court may wait to resolve the remaining claims in the final order disposing of the petition.

When the district court grants an evidentiary hearing, it should schedule the hearing for at least 30 days after entry of the order. The court should keep in mind that there needs to be sufficient time for the petitioner to receive notice of the hearing, have time to prepare for the hearing, and be transported. Allowing sufficient time should avoid later arguments that the petitioner was deprived of due process.

d) Discovery Allowed If Evidentiary Hearing Granted

After granting the writ and setting a date for an evidentiary hearing, the district court may grant leave for a party to "invoke any method of discovery available under the Nevada Rules of Civil Procedure" upon a showing of "good cause." NRS 34.780(2). The request for discovery must be accompanied by a statement of the interrogatories or requests for admission and a list of any documents sought. NRS 34.780(3).

e) Appointing Counsel When an Evidentiary Hearing Is Granted

As discussed in section I.B.7, with the exception of a timely first petition filed by an inmate under a death sentence, the district court has **discretion** to appoint counsel to assist a petitioner in the post-conviction proceedings. See NRS 34.750; NRS 34.820. The district court may, however, find that when an evidentiary hearing is required, the appointment of counsel may provide a more meaningful hearing:

- An attorney will have greater access to the case file and necessary documents. In contrast, a self-represented petitioner may not be permitted to bring his belongings—including his petitions and paperwork—when he is transported from the facility where he is incarcerated.
- An attorney may be able to focus the hearing and will be better able to stay within any limits that the district court has placed on the claims to be addressed at the hearing. In contrast, a self-represented petitioner may stray from the district court's determination of the scope of the petition, which may cause confusion or waste the court's limited time.
- An attorney will be in a better position to investigate the claims and request and conduct discovery. In contrast, a self-represented petitioner may not be able to fully support his claims through discovery, etc. as the result of his custody status.

f) Petitioner's Presence Required for Evidentiary Hearing

The provisions of NRS chapter 34 **require** the petitioner's presence at an evidentiary hearing conducted on the merits of the petition. Gebers, 118 Nev. at 504, 50 P.3d at 1094 (discussing NRS 34.390 (granting and effect of writ), NRS 34.400 (content of writ), and NRS 34.770 (determination of need for evidentiary hearing)). Any argument or factual presentation requires the petitioner's presence.

The petitioner's presence is not required if the district court is merely announcing its decision on the petition. However, as discussed in section I.A.9, the district court must enter a written order for its decision to be final.

Additionally, although the Nevada Supreme Court has not addressed the issue, the petitioner may be able to waive his or her presence so long as the waiver is knowingly and voluntarily entered. If the court allows a waiver, the waiver should be explicit and in writing or made on the record.

g) Record May Be Expanded If Evidentiary Hearing Granted

If an evidentiary hearing is required, the district court may direct that the record be expanded by the parties to include additional materials that are relevant to the determination of the merits of the petition. NRS 34.790(1). The expanded record may include letters, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits may also be considered as part of the expanded record. NRS 34.790(2). Any documents submitted to expand the record "must be submitted to the party against whom they are to be offered, and [that party] must be afforded an opportunity to admit or deny their correctness." NRS 34.790(3).

The district court must require the authentication of any documents submitted to expand the record. NRS 34.790(4). Authentication is particularly important in evaluating documents submitted by a proper person petitioner. And because authentication may be beyond the ken of many proper person petitioners, this presents another reason to appoint counsel if an evidentiary hearing is required.

h) Conducting an Evidentiary Hearing

A post-conviction evidentiary hearing is similar to any other evidentiary hearing in a criminal case. The petitioner is entitled to present evidence on the issues that are the subject of the hearing and the state is entitled to present evidence in response. The district court judge acts as the trier of fact, resolving conflicts in the evidence, making credibility determinations, and determining the weight to be given to the testimony and evidence.

Because an evidentiary hearing is required when there are specific factual allegations that are not contradicted by the record and that, if true, would entitle the petitioner to relief, the hearing may require a comprehensive presentation of testimony and evidence to prove the factual allegations in the petition. For example, if the petitioner raises an ineffective-assistance claim based on trial counsel's failure to present expert testimony and the court determines that an evidentiary hearing is warranted, the hearing likely will require testimony from trial counsel and the expert(s) that the petitioner claims should have been presented at trial so that the district court can determine whether the petitioner has met his burden of proving that

counsel's performance was deficient and that he was prejudiced as a result of the deficient performance. A claim of ineffective assistance of counsel operates to waive the attorney-client privilege for that proceeding. NRS 34.735; Molina v. State, 120 Nev. 185, 193-94, 87 P.3d 533, 539 (2004).

i) Discretion to Consider New Claims at Evidentiary Hearing

The district court has discretion to allow a petitioner to raise new claims at the evidentiary hearing. Barnhart v. State, 122 Nev. 301, 303, 130 P.3d 650, 652 (2006). Although the district court is under no obligation to consider issues raised for the first time at an evidentiary hearing, the court may wish to do so when issues have been brought to light by the evidence adduced at the hearing or implicated by some new law. Id. at 304, 130 P.3d at 652. Allowing the presentation of new claims under these circumstances may promote the finality of judgments and be a more efficient use of resources in that all available claims are resolved in a single post-conviction proceeding.

If the district court allows the petitioner to expand the issues, the district court should do so explicitly on the record and enumerate the additional issues that it will consider. Id. at 303, 130 P.3d at 652.

The district court should not resolve the new issues without first allowing the State an opportunity to respond. Id. at 303-04, 130 P.3d at 652.

j) Resolving a Petition After the Evidentiary Hearing

Because the district court may order the record expanded or order the parties to provide further briefings, the resolution of the petition may suffer some delay after the evidentiary hearing. The district court should track the supplemental filings and attempt to resolve the petition as expeditiously as possible.

11. COMMON CLAIMS: INEFFECTIVE ASSISTANCE OF COUNSEL

The most common claim that is raised in post-conviction petitions for writs of habeas corpus challenging a conviction or sentence is that the petitioner received ineffective assistance of counsel under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 685-86 (1984) (explaining that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results" and therefore the right to counsel is the right to effective assistance of counsel). This section provides a synopsis of the key

components to an ineffective-assistance claim and the considerations that are relevant in resolving such a claim.

a) Strickland Test (Deficient Performance/Prejudice)

The district court must review a claim of ineffective assistance of counsel under the two-part Strickland test, which requires the petitioner to show that:

1. Counsel's performance was deficient, and
2. Counsel's deficient performance prejudiced the defense.

466 U.S. at 687; accord Warden v. Lyons, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984).

The district court is not required to address both prongs if the petitioner makes an insufficient showing on either prong. Strickland, 466 U.S. at 697. And the court is not obligated to analyze the Strickland prongs in a particular order. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed." Id. If the court finds that either prong has not been established, the ineffective-assistance claim fails.

Appellate review of the district court's disposition of an ineffective-assistance-of-counsel claim requires deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous. Lader v. Warden, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). However, the district court's application of the law to those facts is reviewed de novo. Id.

b) Deficient Performance

To meet the deficiency prong of the Strickland test, a petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness. 466 U.S. at 687-88; Means v. State, 120 Nev. 1001, 1011, 103 P.3d 25, 32 (2004). The district court's scrutiny of counsel's performance is highly deferential, should consider that there are countless ways to provide effective assistance in any given case, and should attempt to avoid the distorting effects of hindsight. Strickland, 466 U.S. at 689.

In evaluating the reasonableness of counsel's performance, the district court should consider whether trial counsel's assistance was reasonable based on the facts of the particular case and viewed at the time of counsel's conduct. Id. at 690. The inquiry is objective—the objective reasonableness of counsel's performance—and does not look at counsel's subjective state of mind. Harrington v. Richter, 131 S. Ct. 770, 790

(2011). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom." Id. at 788 (quoting Strickland, 466 U.S. at 640. The United States Supreme Court has recognized that "counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Cullen v. Pinholster, 131 S. Ct. 1388, 1403 (2011) (citation omitted). Overcoming this presumption requires the petitioner to demonstrate that "counsel failed to act 'reasonabl[y] considering all the circumstances.'" Id. (citation omitted). In relying upon this presumption, a court reviewing a claim of ineffective assistance of counsel must "affirmatively entertain the range of possible reasons" that counsel may have had for proceeding as they did. Id. at 1407.

- A delicate balance is required here. Reviewing courts may not indulge in "'post hac rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions" nor may reviewing courts "insist counsel confirm every aspect of the strategic basis for his or her actions." Richter, 131 S. Ct. at 790 (citation omitted).

- The presumption is that the actions of counsel reflect trial tactics rather than sheer neglect. Id.

- In emphasizing the objective nature of the inquiry, the United States Supreme Court has noted that after an adverse verdict trial counsel may find it "difficult to resist asking whether a different strategy might have been better" and shifting the blame on themselves. Id. Thus, a reviewing court is reminded that the inquiry is objective and is based upon counsel's performance at the time of trial.

c) Prejudice; When May Prejudice Be Presumed

As a general rule, in addition to demonstrating that counsel's performance was deficient, a petitioner must demonstrate prejudice. For purposes of the prejudice prong of Strickland, petitioner must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Means, 120 Nev. at 1011, 103 P.3d at 32. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. The petitioner is required to show a "substantial" not just "conceivable" likelihood of a different result. Pinholster, 131 S. Ct. at 1403.

In **assessing prejudice**, the district court should consider the type of claim being made:

- In a claim challenging the effective assistance of counsel in regards to a **jury trial**, the question is whether there is a reasonable probability that but

for trial counsel's error the fact finder would have had a reasonable doubt respecting guilt. Strickland, 466 U.S. at 695.

- A claim challenging the effective assistance of counsel at a **sentencing** hearing presents a more general question, whether there is a reasonable probability of a different outcome but for counsel's errors. See Means, 120 Nev. at 1011, 103 P.3d at 32.
- In a claim challenging the effective assistance of counsel when a defendant has entered a **guilty plea**, the question is whether there is a reasonable probability that but for counsel's error the defendant would not have entered a guilty plea and would have insisted on going to trial. Kirksey v. State, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996).
- In a claim challenging the effective of assistance of **appellate counsel**, the question is whether the omitted issue or the deficient argument would have had a reasonable probability of success on appeal. Id. at 998, 923 at 1114.

Prejudice may be **presumed** in limited circumstances:

- The actual or constructive denial of the assistance of counsel altogether. Strickland, 466 U.S. at 692.
- State interference with counsel's assistance that results in counsel's total absence or prevents counsel from assisting the accused during a critical stage of the proceeding. United States v. Cronic, 466 U.S. 648, 659 & n.25 (1984).
- An actual conflict of interest—the petitioner must demonstrate that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected counsel's performance. Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980).
- In the context of an appeal-deprivation claim, prejudice may be presumed if the petitioner was deprived of the right to a direct appeal due to the ineffective assistance of counsel. Hathaway v. State, 119 Nev. 248, 254, 71 P.3d 503, 507 (2003); Lozada v. State, 110 Nev. 349, 357, 871 P.2d 944, 949 (1994). See section I.B.12 for a discussion of appeal-deprivation claims.

d) Burden of Proof

The petitioner carries the burden of proving **both** prongs of the Strickland test (deficient performance and prejudice). Strickland, 466 U.S. at 687; Means, 120 Nev. 1011, 103 P.3d at 32. The petitioner must prove the facts underlying an ineffective-assistance claim by a preponderance of the evidence. Means, 120 Nev. at 1012, 103 P.3d at 33.

e) Notable Recent United States Supreme Court Decisions

- Padilla v. Kentucky, 559 U.S. 356 (2010). In Padilla, the Court held that defense counsel must advise a client of the removal/deportation consequences of a guilty plea when removal/deporation is presumptively mandatory and the consequences are easily determined from reading of the removal statutes. Id. at 368-69. However, to win relief on this claim, a petitioner must demonstrate that "a decision to reject the plea bargain would have been rational under the circumstances." Id. at 372. In Chaidez v. United States, 133 S. Ct. 1103, 1113 (2013), the Court determined that the decision in Padilla did not apply retroactively.

- Missouri v. Frye, 132 S. Ct. 1399 (2012). The Frye Court held that trial counsel has a duty to communicate formal plea offers favorable to the accused. Id. at 1408. To show prejudice where a plea offer has lapsed, a petitioner must demonstrate a reasonable probability that she would have accepted the earlier plea offer absent counsel's deficient performance and a reasonable probability that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. Id. at 1409.

    - A prosecutor may withdraw a plea bargain offer before the court formally accepts the defendant's guilty plea so long as the defendant has not detrimentally relied on the offer. State v. Crockett, 110 Nev. 838, 845, 877 P.2d 1077, 1080-81 (1994).

    - A district court may refuse to accept a guilty plea. NRS 174.035(1).

- Lafler v. Cooper, 132 S. Ct. 1376 (2012). In Lafler, the Court held that an ineffective-assistance claim may be based on deficient advice that caused a defendant to turn down a more favorable plea offer and go to trial. To show prejudice in this circumstance, a petitioner must show that but for the deficient performance there is a reasonable probability that the plea offer would have been accepted by the petitioner, the State would not have withdrawn it, and the court would have accepted its terms, **and** that the plea offer was more favorable, either in terms of the sentence or the charges, or both. Id. at 1385.

    - In providing a remedy where the plea offer was for the same count or counts that appellant was convicted of at trial, the court may exercise discretion in determining whether petitioner should receive the term offered in the plea, the sentence he received at trial, or something in between. Id. at 1389.

    - In providing a remedy where the plea offer was for less counts or less serious counts and resentencing would not redress the injury, the court may require the State to reoffer the plea proposal. Id. The court can

then determine whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed. Id.

12. COMMON CLAIMS: APPEAL-DEPRIVATION CLAIMS (LOZADA)

A claim that a petitioner was deprived of a direct appeal due to ineffective assistance of counsel presents several special considerations.

a) Deficient Performance

In determining whether a petitioner can demonstrate the deficiency prong of the Strickland test for purposes of a claim that he was denied the right to a direct appeal due to ineffective assistance of counsel, the district court must determine the nature of trial counsel's duty. There are two duties that may be implicated in an appeal-deprivation claim—(1) the duty to accurately inform and consult about the right to appeal and (2) the duty to file a notice of appeal.

- The duty to accurately inform and consult about the right to appeal.
    - When the conviction was the **result of a jury trial**, trial counsel has an **affirmative duty to inform the defendant** of the right to appeal, the procedures for filing an appeal, and the advantages and disadvantages of filing an appeal. Lozada v. State, 110 Nev. 349, 356, 871 P.2d 944, 948 (1994). If trial counsel fails to so inform the defendant, trial counsel's performance is deficient.
    - When the conviction is the **result of a guilty plea**, there is **no constitutional requirement that counsel inform** a defendant of the right to appeal **unless** (1) the **defendant inquires** about an appeal or (2) the **defendant may benefit from the advice** because of the existence of a direct-appeal claim that has a reasonable likelihood of success. Thomas v. State, 115 Nev. 148, 150, 979 P.2d 222, 223 (1999); see also Roe v. Flores-Oretga, 528 U.S. 470 (2000). If either of these circumstances is present and counsel fails to properly advise the defendant, his or her performance is deficient for purposes of the Strickland test.
    - Affirmatively misadvising a client about the availability of an appeal is deficient performance. Toston v. State, 127 Nev.___, 267 P.3d 795, 800 (2011).
- The duty to file a notice of appeal
    - Trial counsel has a constitutional duty to file a direct appeal when requested to do so or when a defendant expresses dissatisfaction with

the conviction. Id. at ___, 267 P.3d at 800. If trial counsel fails to do so, his or her performance is deficient for purposes of the Strickland test. Davis v. State, 115 Nev. 17, 20, 974 P.2d 658, 660 (1999).

- In determining whether counsel has a duty under the second circumstance, expressing dissatisfaction with the conviction, the court must consider whether counsel knew or should have known that the defendant wanted to appeal the conviction based upon the totality of the circumstances. Toston, 127 Nev. at ___, 267 P.3d at 801. When the conviction is based upon a guilty plea, the court may consider whether the defendant received the bargained-for sentence, whether any issues were reserved for appeal, whether the defendant indicated a desire to appeal within the time period, whether the defendant sought relief from the plea before sentencing. Id.

Because the facts regarding this claim may fall outside the record, an evidentiary hearing is often essential to the district court's consideration of the merits of the claim.

b) Presumed Prejudice

If the district court determines that trial counsel's performance was deficient (i.e., it deprived the petitioner of the right to a direct appeal), then prejudice is presumed. Lozada v. State, 110 Nev. 349, 871 P.2d 944 (1994). This is true regardless of the availability of any meritorious direct appeal claims.

c) Procedural Bars

An appeal-deprivation claim must be raised in a timely filed post-conviction petition. Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132 (1998); Hathaway v. State, 119 Nev. 248, 253, 71 P.3d 503, 507 (2003) (explaining that claims that counsel failed to inform the petitioner of the right to appeal and that the petitioner received misinformation about the right to appeal "would be reasonably available to the petitioner within the statutory time period"). However, an appeal-deprivation claim may provide good cause to excuse the delay in filing a post-conviction petition if the petitioner (1) asked counsel to file an appeal, (2) reasonably believed that counsel had filed an appeal, and (3) filed the petition within a reasonable time after learning that a direct appeal had not been filed. Hathaway, 119 Nev. at 254, 71 P.3d at 507-08. If the petitioner makes such allegations and they are not belied by the record, the district court must grant an evidentiary hearing to determine whether the petitioner can demonstrate good cause. See id. at 255, 71 P.3d at 508.

d) Remedy under NRAP 4(c) (eff. 7/1/09)

The remedy for a meritorious appeal-deprivation claim is set forth in NRAP 4(c), which provide for an untimely notice of appeal if the district court has determined that the petitioner was deprived of the right to a direct appeal due to the ineffective assistance of counsel. A copy of NRAP 4(c) is attached as Appendix C.

The remedy in NRAP 4(c) includes provisions that impact the district court. If the district court determines that the petitioner was deprived of his right to a direct appeal, the court must enter a written order containing the following:

- ✓ Specific findings of fact and conclusions of law finding that the petitioner has established a valid and timely appeal-deprivation claim and is entitled to a direct appeal with the assistance of appointed or retained counsel.
- ✓ If the petitioner is indigent, directions for the appointment of appellate counsel to represent the petitioner in the direct appeal. Trial counsel cannot be appointed to represent the petitioner in the direct appeal.
- ✓ Directions to the district court clerk to prepare and file a notice of appeal on the petitioner's behalf within 5 days.

NRAP 4(c)(1)(B). The district court clerk is then required to serve certified copies of the district court's written order and the notice of appeal on:

- ✓ The petitioner and his post-conviction counsel, if any.
- ✓ The respondent.
- ✓ The attorney general.
- ✓ The district attorney for the county in which the petitioner was convicted.
- ✓ The attorney appointed to represent the petitioner in the untimely appeal.
- ✓ The clerk of the Nevada Supreme Court

NRAP 4(c)(2).

There also are special provisions that address **federal court orders** to grant a defendant relief based on an appeal-deprivation claim; those provisions are directed at the district court clerk. When a federal court of competent jurisdiction determines that a Nevada inmate was deprived of the right to a direct appeal due to ineffective assistance of counsel and issues a final order directing the state to provide a direct appeal to a federal habeas petitioner, the petitioner or his counsel must file the federal court's order with the district court clerk for the county in which the petitioner was convicted within 30 days after entry of the federal court's order. The district court clerk then has 30 days to prepare and file a notice of appeal from the judgment of conviction on the petitioner's behalf. NRAP 4(c)(1)(C).

For purposes of **procedural bars**, the rule provides that the timeliness provisions governing any subsequent habeas petition attacking the validity of the conviction begin to run upon the termination of the direct appeal authorized by NRAP 4(c). The rule further provides that a habeas petition filed after an appeal authorized by NRAP 4(c) shall not be deemed a "second or successive petition" under NRS 34.810(2).

NRAP 4(c)(4). As a result, the district court may not need to decide the rest of the petition. To avoid piecemeal litigation, the court could stay the proceedings on the remainder of the petition or dismiss the petition without prejudice.

13. COMMON CLAIMS: BRADY VIOLATIONS

Another common claim raised in post-conviction petitions is that the State withheld favorable evidence in violation of a defendant's due process rights. Brady v. Maryland, 373 U.S. 83 (1963). This section provides a synopsis of the three components of a Brady claim and the relevant analysis when a Brady claim is raised in a petition that is subject to a procedural bar.

a) Brady Analysis

"There is no general constitutional right to discovery in a criminal case." Weatherford v. Bursey, 429 U.S. 545, 559 (1977). But in Brady, the Supreme Court required as a matter of due process that the State disclose evidence to the defense in certain circumstances. To make a successful claim under Brady, the petitioner must demonstrate that:

1. The evidence at issue is favorable to the accused,
2. The evidence was withheld by the State, and
3. Prejudice.

State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003); Mazzan v. Warden (Mazzan II), 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). The duty to disclose material exculpatory evidence extends to a defendant pleading guilty. State v. Huebler, 128 Nev. ___, 275 P.3d 91, 96-97 (2012). Because a Brady claim involves questions of fact and law, the Nevada Supreme Court will review the district court's decision de novo. Bennett, 119 Nev. at 599, 81 P.3d at 7-8.

(1) Favorable Evidence

"Favorable" evidence for purposes of Brady is not limited to exculpatory evidence. Impeachment evidence may also be favorable for purposes of Brady, including evidence that "provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks." Mazzan II, 116 Nev. at 67, 993 P.2d at 37; see also United States v. Bagley, 473 U.S. 667, 676 (1985). The evidence need not be independently admissible. Mazzan II, 116 Nev. at 67, 993 P.2d at 37. The United States Supreme Court has indicated that "the character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record." Kyles v. Whitley, 514 U.S. 419, 439 (1995), quoted in Mazzan II, 116 Nev. at 71, 993 P.2d at 39.

(2)Withheld by the State

The State has an affirmative duty to disclose favorable evidence in its possession regardless of whether the defense has made a discovery request. United States v. Agurs, 427 U.S. 97, 107 (1976); Bennett, 119 Nev. at 601, 81 P.3d at 9. The State's duty is a continuing one—it does not end with the start of trial or the return of a guilty verdict. Bennett, 119 Nev. at 601, 81 P.3d at 9. The State does not, however, have a constitutional duty to disclose impeachment evidence before entry of a guilty plea. United States v. Ruiz, 536 U.S. 622, 628-30 (2002).

Brady does not require the prosecution to deliver its entire file to the defense. Bagley, 473 U.S. at 675. The United States Supreme Court has indicated, however, that in certain circumstances if the State "asserts that [it] complies with Brady through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under Brady." Strickler v. Greene, 527 U.S. 263, 283 n.23 (1999).

The State is charged with possession of evidence in the custody of other state agents. Bennett, 119 Nev. at 603, 81 P.3d at 10; Jimenez v. State, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996). As the United States Supreme Court has explained, "Brady suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006) (quoting Kyles, 514 U.S. at 438); Kyles, 514 U.S. at 437 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

It is irrelevant under Brady whether the State acted intentionally or inadvertently in withholding the evidence. Brady, 373 U.S. at 87; Mazzan II, 116 Nev. at 67, 993 P.2d at 37; see also Agurs, 427 U.S. at 110 ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

(3)Prejudice: Material Evidence

Prejudice for purposes of Brady turns on whether the withheld favorable evidence is **material** to guilt or to punishment. Mazzan II, 116 Nev. at 66, 993 P.2d at 36. The Nevada Supreme Court adheres to separate materiality tests depending on whether there was a specific request for the evidence. Roberts v. State, 110 Nev. 1121, 1128-32, 881 P.2d 1, 5-8 (1994) (reviewing federal and state authority and deciding to preserve, on state law grounds, separate materiality tests based on whether there was a specific request), overruled on other grounds by Foster v. State, 116 Nev. 1088, 13 P.3d 61 (2000). Nevada district courts therefore need to ensure that the proper materiality test is employed in order to withstand review in the Nevada Supreme Court.

If there was a **specific request** for the evidence, the evidence is material "if there is a **reasonable possibility** that the omitted evidence would have affected the outcome." Mazzan II, 116 Nev. 66, 993 P.2d at 36. The question is whether "'the suppressed evidence might have affected the outcome of the trial,'" not by a mere possibility but by a real possibility. Roberts, 110 Nev. at 1132, 881 P.2d at 8 (quoting Agurs, 427 U.S. 97, 104 (1975)).

If there was **no request or only a general request**, the evidence is material "if there is a **reasonable probability** that the result would have been different if the evidence had been disclosed." Mazzan II, 116 Nev. 74, 993 P.2d at 41. This is not a sufficiency-of-the-evidence test—the defendant need not show "that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not not have been enough left to convict." Kyles, 514 U.S. at 434-35. Rather, "[a] reasonable probability is shown when the nondisclosure undermines confidence in the outcome of the trial." Mazzan II, 116 Nev. 74, 993 P.2d at 41; see also Kyles, 514 U.S. at 434-35.

Materiality is determined by looking at the undisclosed evidence collectively rather than item by item. Kyles, 514 U.S. at 436; Mazzan II, 116 Nev. 66, 993 P.2d at 36.

Once the petitioner "has articulated a substantial basis for claiming materiality," the State "bears the burden of avoiding discovery by seeking in camera review" by the district court. Roberts, 110 Nev. at 1134-35, 881 P.2d at 9; see also Agurs, 427 U.S. at 106 (explaining that once a defendant states a substantial basis for claiming materiality, "it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge").

In the context of a petitioner challenging the validity of a guilty plea based on the State's failure to disclose exculpatory evidence, the prejudice or materiality test is slightly different in light of the presumption that a guilty plea is valid and the petitioner's burden to overcome the presumption of validity. Huebler, 128 Nev. at ___, 275 P.3d at 98. Where there was no specific request for the evidence, to demonstrate materiality, a petitioner must show a reasonable probability that but for the failure to disclose the evidence, the petitioner would have refused to enter a guilty plea and would have gone to trial. Id. Where there was a specific request for the evidence, a petitioner must demonstrate a reasonable possibility that but for the failure to disclose the evidence the petitioner would have refused to plead and would have insisted on going to trial. Id. at ___, 275 P.3d at 99.

- ✓ In considering materiality in the context of a guilty plea, the court should consider the relative strength and weakness of the State's case and the defendant's case, the persuasiveness of the withheld evidence, the reasons for the defendant's choice to enter a guilty plea if any are expressed, the benefits obtained by the plea bargain, and the thoroughness of the plea canvass. Id.

b) Brady Claims and Procedural Bars

By their very nature, Brady claims are often raised in petitions that are procedurally barred. When a Brady claim is raised for the first time in a post-conviction petition or in an untimely or successive post-conviction petition, the petitioner has the burden of pleading and proving specific facts that demonstrate good cause and actual prejudice to overcome the procedural bars. State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

(1) Good Cause

As a general matter, the good-cause showing to overcome the procedural bars parallels the second component of a Brady claim. In other words, "proving that the State withheld the evidence generally establishes cause" to overcome the procedural bars. Bennett, 119 Nev. at 599, 81 P.3d at 8.

The second component of a Brady claim may not, however, be sufficient to establish good cause to overcome a procedural bar if the petitioner knew about the factual basis for the claim in time to address it in a prior proceeding or in a timely petition. See Huebler, 128 Nev. at ___ n.3, 275 P.3d at 95 n.3 ("We note that a Brady claim still must be raised within a reasonable time after the withheld evidence was disclosed to or discovered by the defense."); see also Hathaway v. State, 119 Nev. 248, 253-55, 71 P.3d 503, 506-08 (2003); Strickler, 527 U.S. at 287, 288 n.33 (distinguishing prior decisions on cause because in those cases, "the petitioner was previously aware of the factual basis for his claim but failed to raise it earlier" and stating that Court did not reach "impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them" because the issue was not raised); Gray v. Netherland, 518 U.S. 152, 161-62 (1996) (recognizing that a Brady claim was not cognizable in federal habeas proceeding because petitioner knew about the factual basis for the claim at the time he litigated his state petition but did not raise the claim in the state petition and made no attempt to demonstrate cause or prejudice for his default in the state habeas proceedings). If the petitioner cannot demonstrate cause, then it may be necessary to determine whether the Brady evidence is sufficient to establish a fundamental miscarriage of justice to excuse the procedural default.

(2) Actual Prejudice

Generally, the prejudice required to overcome the procedural bars paralells the third component of a Brady claim. In other words, "proving that the withheld evidence was material establishes prejudice" for purposes of the procedural bars. Bennett, 119 Nev. at 599, 81 P.3d at 8.

(3) Laches

When a Brady claim is raised in a petition that is subject to laches under NRS 34.800 and the State has affirmatively pleaded laches, the petitioner must overcome the presumption of prejudice to the State as provided in NRS 34.800(1). The Nevada Supreme Court has not addressed laches in the context of a Brady claim in a published opinion. A district court facing this issue should consider whether the second and third components of a Brady claim—the State withheld evidence and prejudice—are sufficient to meet the petitioner's burden under NRS 34.800(1)(a)—petition based on grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred—or NRS 34.800(1)(b)—a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence.

14. SPECIAL ISSUES IN DEATH PENALTY CASES

Special procedures apply to a petition filed by a person who has been sentenced to death. Those procedures are set forth in NRS 34.820 and SCR 250. Otherwise, these petitions are subject to the same provisions as any other post-conviction petition challenging a judgment of conviction or sentence.

a) Petition Must Be Given Priority

The district court is required to give calendar priority to death penalty cases and to conduct proceedings in those cases "with minimal delay." SCR 250(5)(a); see also NRS 34.820(7) (providing that the judge "shall make all reasonable efforts to expedite the matter"). The court also is required to "render a decision within 60 days after submission of the matter for decision." NRS 34.820(7).

b) First Petition (Stay Execution and Appoint Counsel)

If the petition is filed by a person who has been sentenced to death and is the first petition challenging the judgment of conviction or sentence, the district court must (1) stay execution of the judgment until the petition and any appeal are resolved and (2) appoint counsel to represent the petitioner. NRS 34.820(1).

SCR 250 governs the qualifications of counsel appointed in post-conviction proceedings in the district court. To be appointed as post-conviction counsel representing a petitioner who has been sentenced to death, an attorney must have acted as counsel in at least two post-conviction proceedings arising from felony convictions and the district court must be satisfied that counsel is capable and competent to represent the petitioner. SCR 250(2)(c). If an attorney does not satisfy those requirements, the district court must "hold a hearing to assess the attorney's competence and ability to act as [post-conviction] counsel." SCR 250(2)(e). At the hearing, the district court is required to "thoroughly investigate the attorney's background, training, and experience and consult with the attorney on his or her current caseload." Id. If the district court is satisfied that the attorney can

provide competent representation, the district court shall make a finding on the record and appoint the attorney. SCR 250(2)(e).

Unlike at trial, the district court may appoint only one attorney in the post-conviction proceeding. SCR 250(2)(f).

c) When to Order an Evidentiary Hearing

In deciding whether to grant an evidentiary hearing on a petition filed by a person who has been sentenced to death, the district court should apply the same general principles that apply to other post-conviction petitions. See section I.B.10 for a discussion of those principles.

A petitioner who has been sentenced to death is not entitled to an evidentiary hearing unless the petition states that each issue to be considered at the hearing has not been determined in a prior evidentiary hearing in state or federal court or, if an issue has been determined at a prior evidentiary hearing, that the prior hearing was not a full and fair consideration of the issue. NRS 34.820(2).

d) Daily Transcripts Required

If an evidentiary hearing is conducted, the district court must ensure that a daily transcript is prepared for the purpose of appellate review. NRS 34.820(6); SCR 250(5)(a). The district court may employ audio recording equipment as a backup or in lieu of a court reporter. SCR 250(5)(c). The person responsible for the recording shall prepare a daily transcript of all proceedings and deliver it to the court and counsel. Id.

e) Caution Regarding Piecemeal Litigation

"The court shall inform the petitioner and his counsel that all claims which challenge the conviction or imposition of the sentence must be joined in a single petition and that any matter not included in the petition will not be considered in a subsequent proceeding." NRS 34.820(4). Despite this language, the district court should consider new claims that are raised in any subsequent proceedings under the appropriate procedural bar analysis.

C. COMPUTATION OF TIME SERVED

1. INTRODUCTION

An incarcerated person may file a post-conviction petition for a writ of habeas corpus to challenge the computation of time served pursuant to a judgment of conviction. NRS 34.724(1). A post-conviction petition for a writ of habeas corpus is the **only remedy** available for an incarcerated person to challenge the computation of time served pursuant to a judgment of conviction. NRS 34.724(2)(c).

2. JURISDICTION: WHERE IS THE PETITION FILED?

A petition that challenges the computation of time served must be filed with the clerk of the district court for the county in which the petitioner is incarcerated. NRS 34.738(1). If the petition is filed in the wrong county, the district court should order the clerk of the district court to transfer the petition to the appropriate county. NRS 34.738(2)(b).

3. STANDING

The petitioner's standing to file the petition may impact the district court's handling of the petition.

The Nevada Constitution gives the district courts the power to issue writs of habeas corpus "on petition by . . . any person who is held in actual custody in their respective districts." Nev. Const. art. 6, § 6(1) (emphasis added). Similarly, NRS 34.724(1) limits a post-conviction habeas petition challenging the computation of time served to those individuals who

- ✓ have been convicted of a crime, and
- ✓ are under sentence of death or imprisonment.

Based on these provisions, the district court should dismiss a petition that challenges the computation of time served if the petitioner has expired the challenged sentence. See Johnson v. Director, Dep't Prisons, 105 Nev. 314, 316, 774 P.2d 1047, 1049 (1989).

4. RESPONSE OR ANSWER AND RETURN

The State typically will respond to a petition only if the district court orders it to do so. In many instances, despite a certificate of service attached to a petition, the State may not have been served and may be unaware that the petition is pending until it receives an order for an answer.

If the petition challenges the computation of time served, the district court must order the **Attorney General** to file a response or answer and a return or may order the attorney general to "[t]ake other action that the judge . . . deems appropriate." NRS 34.745(2)(a), (b).

The statute allows for a response or answer and a return "within 45 days or a longer period fixed by the judge." NRS 34.745(2)(a).

The order directing a response or answer and a return must be in "substantially" the form provided in NRS 34.745(3) and must be served on the petitioner or his counsel, the respondent, the Attorney General, and the district attorney of the county in which the petitioner was convicted. The form order is reproduced in Appendix B.

5. CHALLENGE TO AMOUNT OF CREDITS EARNED AFTER SENTENCE IMPOSED

A challenge to the computation of time served involves credit earned **after imposition of a sentence and entry of the judgment of conviction**. Griffin v. State, 122 Nev. 737, 743, 137 P.3d 1165, 1169 (2006) ("It is more logical to read the language 'pursuant to a judgment of conviction' to refer to credit earned after a petitioner has begun to serve the sentence specified in the judgment of conviction.")

A claim that alleges that the sentencing judge failed to award the correct amount presentence credit **is not** a challenge to the computation of time served. Such a claim is a challenge to the validity of the judgment of conviction and sentence and must be raised in a habeas petition filed in the district court for the county in which the judgment of conviction was obtained and the petition must comply with all procedural rules applicable to a habeas petition that challenges the validity of the judgment of conviction and sentence. See Griffin, 122 Nev. at 744-45, 137 P.3d at 1169-70.

The following are the most typical challenges to the computation of time served.

a) Failure to Correctly Award Statutory Credits (Good Time, Work Time, or Other Meritorious Credits)

Petitions frequently challenge the failure to award good time, work time, or other meritorious credits after a petitioner has begun to serve the sentence. The amount of credits that an inmate may be entitled to depends in most instances on the date of the offense and/or the date of sentencing. Statutory credits are governed by NRS chapter 209 as follows:

- ✓ NRS 209.433 (credits for offenders sentenced on or before June 30, 1969)

- ✓ NRS 209.443 (credits for offenders sentenced after June 30, 1969, for crime committed before July 1, 1985)
- ✓ NRS 209.446 (credits for offenders sentenced for crime committed on or after July 1, 1985, but before July 17, 1997)
- ✓ NRS 209.4465 (credits for offenders sentenced for crime committed on or after July 17, 1997)
- ✓ NRS 209.4465 was amended in 2007 to increase the amount of credits with limited retroactive effect. 2007 Nev. Stat., ch. 525, §§ 5, 21, at 3176, 3196.
- ✓ NRS 209.447 (credits for offenders sentenced after June 30, 1991, for crime committed before July 1, 1985, and released on parole)
- ✓ NRS 209.4475 (credits for offenders on parole as of January 1, 2004, or released on parole on or after January 1, 2004)
- ✓ NRS 209.448 (credits for completion of program of treatment for abuse of alcohol or drugs)
- ✓ NRS 209.449 (credits for completion of vocational education and training or other program).

The petitioner bears the burden of demonstrating that he was not awarded the proper amount of credits.

The credit history report maintained by the Department of Corrections may be necessary to resolve claims challenging the failure to award the proper amount of statutory credits. When the credit history report is necessary and was not included with the response or answer to the petition, the court should order the attorney general to provide the report.

b) Failure to Correctly Calculate Amount of Credits

Petitions also frequently challenge the calculation of credits. These claims may be presented as a challenge to the Department of Corrections' methodology in calculating credits, with petitioners suggesting that the Department uses a mathematical formula to reduce the statutory credits.

The petitioner bears the burden of demonstrating that the calculations are incorrect. It is important to authenticate documentation received from the petitioner because unauthenticated documents may be submitted in support of these claims.

Again, the credit history report maintained by the Department of Corrections may be necessary to resolve this type of claim. When the credit history report is necessary and was not included with the response or answer to the petition, the court should order the attorney general to provide the report.

6. CHALLENGS TO PRISON DISCIPLINARY PROCEEDINGS

Incarcerated petitioners frequently file habeas petitions to challenge prison disciplinary proceedings. Whether the challenge may be raised in a habeas petition depends on the nature of the sanctions imposed as a result of the disciplinary proceeding.

a) Habeas Is Limited to Loss of Credits

When the disciplinary proceeding results in the **loss of credits**, an incarcerated person **may challenge** the loss of those credits in a habeas petition. See Wolff v. McDonnell, 418 U.S. 539, 554 (1974).

When the disciplinary proceeding results in **sanctions other than the loss of credits**, such as placement in disciplinary segregation, transfer to another facility, and loss of privileges, the proceeding **cannot be challenged** in a post-conviction habeas petition because the challenge involves the conditions of confinement rather than a challenge to the conviction or sentence or the computation of time served. Bowen v. Warden, 100 Nev. 489, 490, 686 P.2d 250, 250 (1984); see also Sandin v. Conner, 515 U.S. 472, 486 (1995) (holding that liberty interests protected by the Due Process Clause will generally be limited to freedom from restraint which imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life).

> **Note:** When the sanctions resulting from a prison disciplinary proceeding involve the conditions of confinement, the inmate may seek relief in the district court through an appropriate civil action such as a civil rights complaint filed under § 1983. These materials do not address those proceedings.

Thus, the threshold issue for the district court is whether the disciplinary proceeding resulted in the loss of credits. The district court should summarily deny a petition that challenges a disciplinary proceeding if the disciplinary proceeding did not result in the loss of credits. If the disciplinary sanctions are mixed, the court should resolve any claims related to the loss of credits and deny any other claims.

b) Applicability of NRS 34.720 to 34.830

The Nevada Supreme Court has never addressed whether a petition that challenges the loss of credits as the result of a prison disciplinary proceeding should be treated as a petition filed under NRS 34.360 ("true habeas" challenging the legality of the confinement) or a petition filed under NRS 34.724(1) (post-conviction petition challenging the computation of time served). However, such a petition seems to involve a challenge to the computation of time served under NRS 34.724(1) because the computation is affected by the loss of credits. As a result, the provisions of NRS 34.720 to 34.830 should be applied to petitions that challenge a prison disciplinary hearing that resulted in the loss of credits. See NRS 34.720. These materials take that approach, but it is an open question.

c) Jurisdiction

The petition should be filed in the district court for the county in which the petitioner is incarcerated. NRS 34.738(1).

d) Response or Answer

The district court should order the **attorney general** to file a response or answer. See NRS 34.745(2). To assist the court in evaluating the claims, the judge may require the attorney general to provide, as a part of the response, copies of the prison disciplinary hearing proceedings, including any transcripts previously prepared, and/or the audiotape of the prison disciplinary hearing if the hearing was recorded. The record of proceedings that involved testimony by a confidential informant may need to be filed under seal and reviewed in camera.

e) Appointment of Counsel

The district court has discretion to appoint counsel. See NRS 34.750.

f) Due Process Challenges

The United States Supreme Court has recognized that "[p]rison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply," and consequently, the Supreme Court only requires minimal due process at a prison disciplinary hearing. Wolff, 418

U.S. at 556, 563. The following minimal due process protections are required in a prison disciplinary hearing:

- ✓ Advance written notice of the charges. Id. at 563-64.
- ✓ A written statement of the evidence relied upon and the reasons for disciplinary action. Id. at 563-65.
- ✓ A qualified right to call witnesses and present evidence. Id. at 566. The right to confront and cross-examine witnesses does not apply in prison disciplinary proceedings. Id. at 567-68. But due process requires that if a request to present witnesses is refused, prison officials must explain that decision, in a limited manner, either on the record at the prison disciplinary hearing or in later testimony in court if the prisoner challenges the refusal to permit witnesses. Ponte v. Real, 471 U.S. 491, 497 (1985).
- ✓ When the inmate is illiterate or the hearing involves complex issues, the inmate "should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff." Wolff, 418 U.S. at 570. Counsel is not required. Id.
- ✓ An impartial decision maker. Id. at 571.
- ✓ Some evidence in support of the hearing officer's decision. Superintendent v. Hill, 472 U.S. 445, 455, 457 (1985). In determining whether there is "some evidence," the court is not required to examine the entire record, independently assess the credibility of the witnesses, or weigh the evidence; but rather, the court must determine whether there is any evidence in the record to support the hearing officer's finding of guilt. Id. at 455.

The sufficiency of the evidence supporting the hearing officer's decision is only relevant when the basis for the attack on the decision is insufficiency of the evidence. Thus, the court cannot rely on the sufficiency of the evidence to reject an attack on the decision based on the failure to meet one of the other minimal due process protections. See Edwards v. Balisok, 520 U.S. 641, 647-48 (1997).

To the extent that the Department of Corrections' regulations provide additional procedural protections, a violation of those regulations does not violate due process. Sandin, 515 U.S. at 477-84 (examining prior precedent and rejecting the approach that due process springs from mandatory language and recognizing that a protected liberty interest must be implicated for due process to apply).

g) Evidentiary Hearing

The district court should conduct an evidentiary hearing if the petitioner has raised claims that are not belied by the record and that, if true, would entitle the petitioner to relief. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). The resolution of a due process claim may require the district court to examine the prison

disciplinary hearing proceedings and conduct an evidentiary hearing if the prison disciplinary hearing record is deficient on the points raised in the petition. See section I.B.10 for a discussion of evidentiary hearings.

h) What Is the Remedy If the Challenge Has Merit

If the petition has merit, the remedy depends upon the type of due process violation. If the district court determines that "some evidence" was not presented during the disciplinary proceedings, the district court should order the Department of Corrections to restore the forfeited credits. If the district court determines that one of the other due process requirements was violated, the district court should order the Department to restore credits and conduct a new prison disciplinary hearing.

7. PROCEDURAL BARS

The procedural bars set forth in NRS chapter 34 apply only in part to petitions that challenge the computation of time served.

The time limit set forth in **NRS 34.726 does not** apply to a petition that challenges the computation of time served. See NRS 34.726(1) (providing that time limit applies to "a petition that challenges the validity of a judgment or sentence").

The procedural bar against a **second or successive petition under NRS 34.810(2) applies** if a prior petition litigated the same computation claim and the claim was decided on the merits. In such cases, the petition must be denied unless the petitioner has demonstrated good cause and actual prejudice. See section I.B.9 regarding second or successive petitions challenging a judgment of conviction and sentence for the showings required to demonstrate good cause and actual prejudice.

II. POST-CONVICTION MOTION TO WITHDRAW GUILTY PLEA

A. INTRODUCTION

A defendant may file a post-conviction motion to withdraw a guilty plea under NRS 176.165. The motion is considered to be incident to the trial court proceedings and therefore is not affected or abolished by the statutory provisions governing post-conviction petitions for writs of habeas corpus. Hart v. State, 116 Nev. 558, 562-63, 1 P.3d 969, 971-72 (2000).

B. LIMITED TO VALIDITY OF PLEA

A post-conviction motion to withdraw a guilty plea is limited to claims that challenge the validity of the plea. Hart, 116 Nev. at 564, 1 P.3d at 973. Thus, challenges to the validity of the sentence, the computation of time served, or a conviction entered upon a jury verdict cannot be raised in a post-conviction motion to withdraw a guilty plea. Id.

C. GRANT TO CORRECT "MANIFEST INJUSTICE"

The district court may grant a post-conviction motion to withdraw a guilty plea "[t]o correct manifest injustice." NRS 176.165. No Nevada cases specifically define "manifest injustice." But this standard should not be confused with the showing required to demonstrate a fundamental miscarriage of justice to overcome a procedural bar to a post-conviction petition for a writ of habeas corpus.

Although the Nevada Supreme Court has not defined "manifest injustice," when reviewing decisions resolving motions filed under NRS 176.165, the court has focused on the validity of the guilty plea. See Baal v. State, 106 Nev. 69, 787 P.2d 391 (1990). The validity of the guilty plea, whether the plea was knowingly and voluntarily entered, is determined upon an examination of the totality of the circumstances. State v. Freese, 116 Nev. 1097, 1105, 13 P.3d 442, 448 (2000). A guilty plea is presumptively valid, and a petitioner carries the burden of establishing that the plea was not entered knowingly and intelligently. Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986); see also Hubbard v. State, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

One instance of manifest injustice that has been recognized: a defendant must be aware before entry of the plea that an offense does not allow for probation. See Little v. Warden, 117 Nev. 845, 34 P.3d 540 (2001).

D. EQUITABLE LACHES LIMITS TIME FOR FILING

NRS 176.165 does not set forth any time limits on the filing of a post-conviction motion to withdraw a guilty plea. However, the Nevada Supreme Court has held that "consideration of the equitable doctrine of laches is **necessary** in determining whether a defendant has shown 'manifest injustice'" for purposes of NRS 176.165. Hart, 116 Nev. at 563, 1 P.3d at 972 (emphasis added).

The district court must weigh the following factors in determining whether a post-conviction motion to withdraw a guilty plea is barred by laches:

- ✓ Whether there was an inexcusable delay in seeking relief.
- ✓ Whether an implied waiver has arisen from the defendant's knowing acquiescence in existing conditions.
- ✓ Whether the defendant previously sought relief from the judgment but failed to identify all grounds for relief in the prior proceeding.
- ✓ Whether circumstances exist that prejudice the State.

Id. at 563-64, 1 P.3d at 972.

The decision in Hart placed the burden upon the defendant to overcome application of laches, and the court suggested that laches in this context was to fill a void and operate like the procedural time bar in NRS chapter 34. Id. at 564, 1 P.3d at 972. If the district court denies a petition based on the equitable doctrine of laches, the written order should make that clear and address the factors supporting the decision.

III. MOTION TO CORRECT AN ILLEGAL SENTENCE

A. INTRODUCTION

NRS 176.555 provides that the district court "may correct an illegal sentence at any time." The motion is considered to be incident to the trial court proceedings and therefore is not affected or abolished by the statutory provisions governing post-conviction petitions for writs of habeas corpus. Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321, 323-24 (1996).

B. NO TIME LIMIT FOR FILING

There is no time limit for filing a motion to correct an illegal sentence. See NRS 176.555.

C. LIMITED TO FACIAL LEGALITY

A motion to correct an illegal sentence may only challenge the facial legality of the sentence. The facial legality of a sentence depends on two factors:

- ✓ Whether the district court was without jurisdiction to impose a sentence.
  - o The jurisdiction of the court should not be confused with trial-court error. "The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts." Nev. Const., art. 6, § 6(1).
- ✓ Whether the sentence imposed exceeds the statutory maximum.

Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996). Because a motion to correct an illegal sentence presupposes a valid judgment of conviction, a motion to correct an illegal sentence cannot be used to challenge errors occurring before or at trial or other errors occurring at sentencing. Id.

The district court should summarily deny a motion to correct an illegal sentence that raises claims that fall outside the proper scope of such a motion. Edwards, 112 Nev. at 708-09 n.2, 918 P.2d at 325 n.2.

IV. MOTION TO MODIFY SENTENCE

A. INTRODUCTION

Although the district court generally lacks jurisdiction to suspend or modify a defendant's sentence after the defendant begins to serve it, NRS 176A.400(3); Passanisi v. State, 108 Nev. 318, 322, 831 P.2d 1371, 1373 (1992), the court may grant a post-conviction motion to modify a sentence in limited circumstances, id. at 322-23, 831 P.2d at 1373-74; see also Edwards v. State, 112 Nev. 704, 707, 918 P.2d 321, 324 (1996). The motion is considered to be incident to the trial court proceedings and therefore is not affected or abolished by the statutory provisions governing post-conviction petitions for writs of habeas corpus. Edwards, 112 Nev. 704, 918 P.2d 321.

B. NO TIME LIMIT

No statute or case law sets forth a time limit for filing a motion to modify a sentence.

C. LIMITED TO MATERIAL MISTAKES OF FACT REGARDING CRIMINAL RECORD THAT WORKED TO DEFENDANT'S EXTREME DETRIMENT

The district court may modify a sentence when:

- ✓ The court made a material mistake of fact about the defendant's criminal record, and
- ✓ The mistake worked to the defendant's extreme detriment.

Edwards, 112 Nev. at 708, 918 P.2d at 324; Passanisi, 108 Nev. at 322-23, 831 P.2d at 1373-74. The district court's misapprehension regarding the legal consequences of a sentence does not permit the district court to modify the sentence after the defendant has begun to serve the sentence. State v. Kimsey, 109 Nev. 519, 522, 853 P.2d 109, 111 (1993) (holding that district court could not modify sentence based on misapprehension of parole consequences of stacking multiple sentences).

The district court should summarily deny a motion to modify a sentence that raises claims that fall outside the proper scope of such a motion. Edwards, 112 Nev. at 708-09 n.2, 918 P.2d at 325 n.2.

V. POST-JUDGMENT MOTION FOR A NEW TRIAL

A. INTRODUCTION

A defendant may file a motion for new trial based on newly discovered evidence or any other ground. A motion that is based on any ground other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilt or such time as fixed by the district court within the 7-day period. NRS 176.515(4). In contrast, a motion that is based on newly discovered evidence may be filed after the judgment of conviction. NRS 176.515(1). A post-judgment motion for new trial based on newly discovered evidence is considered to be incident to the trial court proceedings and therefore is not affected or abolished by the statutory provisions governing post-conviction petitions for writs of habeas corpus. Hart v. State, 116 Nev. 558, 563 n.4, 1 P.3d 969, 972 n.4 (2000).

B. 2-YEAR TIME LIMIT AND EXCEPTIONS

A motion for a new trial based on the ground of newly discovered evidence must be filed within 2 years after the verdict or finding of guilt. NRS 176.515(3). The district court must dismiss an untimely motion.

The 2-year time limit does not apply when a defendant obtains genetic marker testing under NRS 176.0918 and the results of the tests are favorable to the defendant. In such cases, the defendant may file a motion for a new trial relying on the tests as newly discovered evidence and the motion is not subject to the 2-year time limit. NRS 176.0918(10); NRS 176.515(3).

C. EFFECT OF PENDING DIRECT APPEAL

The district court retains jurisdiction to grant a post-judgment motion for a new trial based on newly discovered evidence even if an appeal from the judgment of conviction is pending in the Nevada Supreme Court. See Vest v. State, 120 Nev. 669, 98 P.3d 996 (2004).

D. TESTS FOR WHETHER TO GRANT MOTION

A motion for a new trial filed after entry of the judgment of conviction must be based upon newly discovered evidence.

1. GENERAL TEST FOR NEWLY DISCOVERED EVIDENCE

The district court should grant a motion for a new trial based on newly discovered evidence only if the following components are met:

- ✓ The evidence is newly discovered.
- ✓ The evidence is material to the defense.
- ✓ The evidence is such that it could not have been discovered and produced for trial even with the exercise of reasonable diligence.
- ✓ The evidence is not cumulative.
- ✓ The evidence is such as to make a different result probable on retrial.
- ✓ The evidence is not simply an attempt to contradict or discredit a former witness.
- ✓ The evidence is the best evidence the case admits.

Callier v. Warden, 111 Nev. 976, 988, 901 P.2d 619, 626 (1995) (citing Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991)).

2. TEST FOR NEWLY DISCOVERED EVIDENCE BASED ON WITNESS RECANTATION OF TRIAL TESTIMONY

If the motion is based on newly discovered evidence that a witness has recanted his or her trial testimony, the district court should grant the motion only if the following components are met:

- ✓ The court is satisfied that a material witness's trial testimony was false.
- ✓ The evidence showing that false testimony was introduced at trial is newly discovered.
- ✓ The evidence could not have been discovered and produced for trial even with the exercise of reasonable diligence.
- ✓ It is probable that had the false testimony not been admitted, a different result would have occurred at trial.

Id. at 990, 901 P.2d at 627-28.

3. JUROR MISCONDUCT

The Nevada Supreme Court has not determined whether juror misconduct is "newly discovered evidence" for purposes of NRS 176.515.

VI. PETITION FOR A WRIT OF MANDAMUS

A. INTRODUCTION

The Nevada Constitution provides the district courts with jurisdiction to issue writs of mandamus. Nev. Const., art. 6, § 6. Inmates frequently file petitions for writs of mandamus. The threshold question in dealing with these petitions is whether there is another remedy available.

> **Note**: These materials do not address the technical requirements for a petition, the issuance of a writ, or the procedures that govern writ proceedings. See NRS 34.150–.310.

B. WHEN THE WRIT MAY ISSUE

The district court may issue a writ of mandamus "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or

station." NRS 34.160. The Nevada Supreme Court has further recognized that while the writ may not generally be used to control a discretionary action, the writ of mandamus may be used to control an arbitrary or capricious exercise of discretion. Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981).

The district court shall not issue a writ of mandamus when there is a "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170. In the following examples mandamus will not lie because there is a plain, speedy and adequate remedy at law:

- A challenge to the validity of the judgment of conviction and sentence must be raised on direct appeal, in a post-conviction petition for a writ of habeas corpus, or in a motion that is incident to the trial court proceedings (discussed in sections II-V). NRS 34.724(2)(a), (b).
- A challenge to the computation of time served must be raised in a post-conviction petition for a writ of habeas corpus. NRS 34.724(2)(c).
- A challenge to a prison disciplinary proceeding that did not result in the loss of statutory good time credits should be raised in a civil rights action.
- The district court has authority to issue a writ of mandamus directing an **inferior tribunal** to take action and therefore cannot consider a petition that seeks a writ directed at itself or another district court. Jennett v. Stevens, 33 Nev. 527, 530, 111 P. 1025, 1026 (1910) ("To permit the writ to [be issued by the district court] in this case is to compel one district judge, in the exercise of a judicial duty, to be governed by the views of another district judge as to the construction of a statute, contrary to his own opinion of what that construction should be, a situation contrary to the principle of the law of *mandamus*, which presupposes a superior authority to command the doing of a particular act enjoined by law."); see also NRS 34.160; EICON v. State Bd. of Exam'rs, 117 Nev. 249, 252, 21 P.3d 628, 630 (2001) (stating that writ of mandamus is available to compel performance by an inferior tribunal).

C. FILING

A petition for a writ of mandamus should be filed in a separate, civil case because the petition is not permitted to raise claims challenging the validity of the judgment of conviction. If the petition was filed in the criminal case and the district court determines that the petition should be filed as a separate action, the district court should direct the clerk of the district court to docket the petition as a separate, civil matter. The filing of the petition in a criminal case should not be used as a basis to summarily deny the petition.

VII. PETITION FOR A WRIT OF CORAM NOBIS

The Nevada Supreme Court has recognized the availability of the common-law writ of coram nobis. Trujillo v. State, 129 Nev. ___, 310 P.3d 594, 601 (2013).

A. WHEN AVAILABLE

The writ is available to a person who is not in custody on the conviction being challenged. Id.

B. SCOPE OF THE WRIT

The writ may be used to address errors of fact outside the record that affect the validity and regularity of the decision itself and would have precluded the judgment from being entered. Id.

- ✓ Errors must be factual and not legal.
- ✓ Facts must not be known to the court at the time of the plea or trial.
- ✓ Facts must not have been withheld by the defendant.
- ✓ Facts must be of such a character that they would preclude entry of the judgment.
    - o Personal-jurisdiction-type errors or errors regarding the status of the party which would have prevented a judgment from being entered against the party. For example, the competency of the defendant at the time of the plea or trial.
    - o Not newly discovered evidence as this is not a type of error that would preclude a valid judgment from being entered in the first place.
    - o Not available to litigate the guilt or innocence of the petitioner.

Id.

VIII. MISCELLANEOUS PROPER PERSON PETITIONS AND MOTIONS

An incarcerated person, proceeding in proper person, may submit a document to the district court that does not contain the label of the petitions or motions discussed previously or does not appear to be authorized by statute or case law. The key to resolving these motions is to discern the allegation for relief and to determine which recognized petition or motion the document is most like. A document that challenges the validity of the judgment of conviction that does not fit easily within any of the petitions or motions discussed previously should generally be construed as a post-conviction petition for a writ of habeas corpus pursuant to the language in NRS 34.724(2)(b).

If the motion would be substantially deficient as a post-conviction petition for a writ of habeas corpus, the district court may require the incarcerated person to cure the defects. Miles v. State, 120 Nev. 383, 387, 91 P.3d 588, 590 (2004).

APPENDIX A

FORM POST-CONVICTION HABEAS PETITION (NRS 34.735)

Case No. _____
Dept. No. _____

IN THE _____ JUDICIAL DISTRICT COURT OF THE

STATE OF NEVADA IN AND FOR THE COUNTY OF _____

_____, Petitioner, v. _____, Respondent.	PETITION FOR WRIT OF HABEAS CORPUS (Post-conviction) (NRS 34.720 et seq.)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of prisons, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of prisons.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty:

_____.

2. Name and location of court which entered the judgment of conviction under attack:

_____.

3. Date of judgment or conviction: _____.

4. Case Number: _____.

5. (a) Length of sentence:

_____
_____
_____
_____
_____
_____
_____.

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion: _____.

7. Nature of offense involved in conviction being challenged:

_____
_____
_____
_____
_____
_____.

8. What was your plea? (check one):
   (a) Not guilty _____
   (b) Guilty _____
   (c) Nolo contendere _____

9. If you entered a guilty plea to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a guilty plea was negotiated, give details:

_____
_____
_____
_____.

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury _____
(b) Judge without a jury _____

11. Did you testify at the trial? _____.

12. Did you appeal from the judgment of conviction? _____.

13. If you did appeal, answer the following:

(a) Name of court: _____.
(b) Case number or citation: _____.
(c) Result:

_____
_____
_____.

14. If you did not appeal, explain briefly why you did not:

_____
_____
_____.

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? _____.

16. If your answer to No. 15 was "yes," give the following information:

(a) (1) Name of court: _____.
(2) Nature of proceeding: _____.
(3) Grounds raised:

_____
_____
_____
_____.

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____.

(5) Result: _____.

(6) Date of result: _____.

(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

_____.

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____.

(2) Nature of proceeding: _____.

(3) Grounds raised:

_____

_____

_____

_____.

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____.

(5) Result: _____.

(6) Date of Result: _____.

(7) If known, citations or written opinion or date of orders entered pursuant to such result:

_____.

(c) As to any third or subsequent additional applications or motions, give the same information:

(1) Name of court: _____.

(2) Nature of proceeding: _____.

(3) Grounds raised:

_____

_____

_____

_____.

(4) Did you receive an evidentiary hearing on your petition, application or motion? _____.

(5) Result: _____.

(6) Date of Result: _____.

(7) If known, citations or written opinion or date of orders entered pursuant to such result:

_____.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? _____.
Citation or date of decision: _____.

(2) Second petition, application or motion? _____.
Citation or date of decision: _____.

(3) Third or subsequent petitions, applications or motions: _____.
Citation or date of decision: _____.

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

_____
_____
_____
_____.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same:

_____
_____
_____
_____.

(b) The proceedings in which these grounds were raised:

_____
_____
_____
_____.

(c) Briefly explain why you are again raising these grounds:

_____
_____
_____
_____
_____
_____
_____
_____.

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for presenting them.

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? _____.
If yes, state what court and the case number:

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal:

22. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

(a) Ground one:

Supporting Facts:

(b) Ground two:

Supporting Facts:

(c) Ground three:

Supporting Facts:

(d) **Ground four:**

Supporting Facts:

(e) **Ground five:**

Supporting Facts:

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at _____, Nevada on the _____ day of _____, 20__.

_____

_____, Petitioner

BAC No. _____

Address: _____

_____

_____

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

CERTIFICATE OF SERVICE BY MAIL

I, _____, hereby certify pursuant to N.R.C.P. 5(b), that on this ____ day of _____, 20__, I mailed/handed to a correction officer for mailing a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

_____
Respondent prison or jail official

_____
address

_____

District Attorney of County of _____

_____
address

_____

Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

_____
Signature of Petitioner

APPENDIX B

FORM ORDER TO FILE ANSWER AND RETURN (NRS 34.745)

Case No.
Dept. No.

IN THE _____ JUDICIAL DISTRICT COURT OF THE
STATE OF NEVADA IN AND FOR THE COUNTY OF _____

_____
Petitioner,

v. ORDER

_____
Respondent.

Petitioner filed a petition for a writ of habeas corpus on ..... (month) ..... (day), ... (year). The court has reviewed the petition and has determined that a response would assist the court in determining whether petitioner is illegally imprisoned and restrained of his liberty. Respondent shall, within 45 days after the date of this order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

Dated ..... (month) ..... (day), ... (year)

_____
District Judge

APPENDIX C

NRAP 4(c)

NRAP 4(c) (effective July 1, 2009)

(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 post-conviction 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 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 5 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 .

(2) Service by the District Court Clerk. The district court clerk shall serve certified copies of the district court's written order and the notice of appeal required by Rule 4(c) on the petitioner and petitioner's counsel in the post-conviction proceeding, if any, the respondent, the Attorney General, the district attorney of the county in which the petitioner was convicted, the

appellate counsel appointed to represent the petitioner in the direct appeal, if any, and the clerk of the Supreme Court.

(3) Motion to Dismiss Appeal. The state may challenge a district court's written order granting an appeal-deprivation claim by filing a motion to dismiss the appeal with the clerk of the Supreme Court within 30 days after docketing. The state's motion to dismiss shall be properly supported with all documents relating to the district court proceeding that are necessary to the Supreme Court's complete understanding of the matter.

(4) Effect on Procedural Bars. When a direct appeal of a criminal conviction and sentence is conducted under this Rule, the timeliness provisions governing any subsequent habeas corpus attack on the judgment shall begin to run upon the termination of the direct appeal, as provided in NRS 34.726(1) and NRS 34.800(2). A habeas corpus petition filed after a direct appeal conducted under this Rule shall not be deemed a "second or successive petition" under NRS 34.810(2).