Research Division, Nevada Legislative Counsel Bureau

POLICY AND PROGRAM REPORT

Criminal Procedure

April 2016

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This section of the *Policy and Program Report* covers the procedural aspects of the criminal justice system in Nevada. Although many persons may be generally familiar with such terms as "arraignment," "bail," "detention," "grand jury," "indictment," and "sealing of criminal records," the following review of what these terms mean and how they relate to each other may be helpful.

Over the years, many important constitutional cases at the federal and State level have revolved around procedural matters arising from arrest, detention, and trial.

DETENTION AND ARREST

The justice system follows different procedures relating to detention and arrest, depending on whether a complaint has been filed and a judge has issued an arrest warrant.

Detention and Arrest Under a Warrant

When a person with personal knowledge of a crime files a complaint with the court and it appears from the complaint that there is probable cause to believe that the defendant has committed the offense, the magistrate must issue a warrant to any peace officer for the

arrest of the defendant. ("Magistrate" means a Supreme Court justice, district court judge, justice of the peace, or municipal judge.) The warrant must describe the offense and command that the defendant be arrested and brought before the nearest available magistrate. If the complaint is against a corporation, the magistrate must issue a summons requiring the corporation to appear before the judge at a specified time and place within ten days.

If the offense is a felony or gross misdemeanor, a peace officer may make the arrest on any day, at any time of day or night. If the offense is a misdemeanor, the arrest cannot be made between the hours of 7 p.m. and 7 a.m. unless the warrant directs otherwise.

Detention and Arrest Without a Warrant

A peace officer may detain any person whom the officer encounters under circumstances indicating the person has committed or is about to commit a crime or has violated the conditions of parole or probation. The person who is detained must provide identification but may not be compelled to answer any questions. The detention must not be longer than necessary and in no event longer than one hour, and it must remain in the immediate vicinity where the detention occurred unless the person is arrested.

At any time after the detention begins, the peace officer must arrest the person if probable cause appears. If there is no probable cause for arrest, the peace officer must release the person. If the officer believes the person may be armed with a dangerous weapon, the officer may search the person and seize any such weapon or any evidence of a crime.

Detention and Arrest, Generally

A peace officer may break open a door or window of a house or other place where the officer believes the person to be arrested is located, after demanding admittance and explaining the reason for the demand. If necessary to prevent escape, a peace officer may, after giving a warning, use deadly force to carry out the arrest if there is probable cause to believe the person has committed a felony involving serious bodily harm or the use of deadly force or poses a threat of serious bodily harm to the officer or others. Any person arrested has the right to make a reasonable number of completed telephone calls—including one to a friend or bail agent and one to an attorney—from the police station or other place where booking occurs, not later than three hours after the arrest.

Under certain circumstances, a person other than a peace officer may make an arrest.

Arrest and DNA Analysis

A law enforcement agency is required to obtain a biological specimen for DNA analysis when a person is arrested for a felony. The DNA profile is then entered into a national database where it is used to generate investigative leads if it matches a profile taken from a crime scene. If a judge determines there was no probable cause for the person's arrest, the specimen must be destroyed, and if a person arrested for a felony is not convicted, he or she may make a written request to the Central

Repository for Nevada Records of Criminal History to destroy the specimen and purge the DNA record from the national and State databases.

MISDEMEANOR CITATIONS

When a peace officer detains a person for an offense punishable as a misdemeanor, the person must be taken before a magistrate without unnecessary delay in the following instances: (1) when the person demands it; (2) when the person is detained pursuant to an arrest warrant; (3) when the person has been arrested; (4) if the person is issued a misdemeanor citation and refuses to give a written promise to appear in court; or (5) if the person does not furnish satisfactory evidence of identity.

If the person is not required to be taken before a magistrate, the peace officer may issue a misdemeanor citation, electronically or manually. The citation must include a notice to appear in court at a specific time and place, the offense charged, and other information, and it must be signed by the peace officer. Other public officials, including officials responsible for animal control, building inspections, fire, health, parking, solid waste, zoning, and other functions may, if authorized, also issue misdemeanor citations within their field of enforcement. The peace officer or other officer issuing the citation must file a copy with the court having jurisdiction over the offense. If the form of the citation is proper, it is deemed a complaint for the purpose of prosecuting the misdemeanor.

Justice courts and municipal courts have jurisdiction over misdemeanor offenses. When a person alleged to have committed such an offense appears in court as required by a misdemeanor citation, the person enters a plea, and the case proceeds to trial and sentencing.

PROCEDURE AFTER ARREST

After an arrest, the defendant must be brought before a magistrate without unnecessary delay, normally within 72 hours excluding nonjudicial days. The magistrate must inform the defendant of the complaint and of the right to retain counsel or request assignment of counsel. The magistrate must 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.

If the case will not be tried in justice court, the defendant does not enter a plea and has a right to a preliminary examination. If the defendant waives the preliminary examination, the magistrate must immediately transfer the matter to the district court. If the defendant requests a preliminary examination, the magistrate must hear the evidence within 15 days, unless the period is extended for cause. Unless the defendant waives the right to have an attorney, the judge must allow reasonable time for the attorney to appear. The county district attorney must be present and conduct the prosecution.

If, from the evidence presented in the preliminary examination, the magistrate finds there is probable cause to believe the defendant has committed an offense, the magistrate must require the defendant to answer in district court and transfer all papers from the proceeding to the district court. In these circumstances, or if the defendant has waived a preliminary hearing, the prosecuting attorney then

files a formal criminal charge, known as an "information," with the district court. The information must be filed within 15 days of the preliminary examination or waiver.

Through the passage of Assembly Bill 193 (Chapter 148, *Statutes of Nevada 2015*) certain hearsay evidence is allowed in a preliminary examination under certain circumstances. The court must also allow a witness to testify at a preliminary examination through the use of audiovisual technology under certain circumstances.

GRAND JURIES

In Clark and Washoe Counties, the district attorney may also seek a criminal charge by bringing the case before the grand jury. The grand jury may return an indictment, which is a written accusation charging a person with a public offense, or a presentment, which is an informal written statement representing to the court that a triable public offense has been committed and there is reasonable ground to believe that a particular person has committed it.

A grand jury must elect from its members a foreman, deputy foreman, and secretary. The grand jury may administer oaths, enter the jail, examine all public records, issue subpoenas for witnesses, engage additional counsel or experts, and receive evidence. The grand jury is not required to hear evidence from the defendant, but it must weigh all evidence submitted and, if it believes other evidence would explain away the charge, order such evidence to be produced. If the district attorney is aware of evidence that would explain away the charge, the district attorney must submit it.

As in preliminary examinations, A.B. 193 provided that certain hearsay evidence is allowed before a grand jury in certain circumstances, and the court must also allow a witness to testify using audiovisual technology under certain circumstances before a grand jury.

Only the district attorney, a witness and the witness' attorney, the court reporter, interpreters when necessary, and persons the grand jury requests to be present may attend a session of a grand jury. Only the grand jurors may be present when the grand jury is deliberating or voting.

Persons who are the subject of the grand jury proceedings may request to appear if they have not been subpoenaed to appear but only if they execute a written waiver of their constitutional privilege against self-incrimination. The district attorney or a peace officer must serve notice on a person who is the subject of grand jury proceedings unless the court determines adequate cause exists to withhold notice.

A grand jury consists of 17 jurors and may return an indictment or presentment only upon the concurrence of 12 or more jurors. The grand jury should return an indictment when all the evidence presented establishes probable cause to believe an offense has been committed and the defendant committed it.

BAIL

In general, a person who is arrested in Nevada for an offense other than first-degree murder must be allowed to post bail, known as being "admitted to bail," by posting a bond for the person's appearance. A person may be admitted to bail at various stages of criminal procedure, including after arrest, after trial and before sentencing, and after conviction and pending appeal.

The Legislature has placed limits and conditions on admission to bail for a person arrested for:

- A felony and who has been released on parole or probation for a different offense;
- A felony and whose sentence was suspended or who was sentenced to a term of residential confinement for a different offense;
- Driving under the influence (DUI) or a related offense;
- Battery that constitutes domestic violence; or
- Violating a protective order against domestic violence.

Someone who was arrested for first-degree murder may be admitted to bail in the discretion of any competent court or magistrate authorized to do so.

Before releasing a person on bail, a court may require the surrender of the person's passports or impose other conditions to protect the public health, safety, and welfare and ensure the person will appear in court as ordered. Upon a showing of good cause, a court may also release without bail a person who is entitled to bail, and a sheriff or chief of police may release without bail a person charged with a misdemeanor, pursuant to court standards.

ARRAIGNMENT AND PREPARATION FOR TRIAL

Nevada's courts may exercise jurisdiction and try criminal cases either after the district attorney has filed information or a grand jury has returned an indictment.

Arraignment takes place in open court and consists of reading the indictment or information to the defendant or stating the substance of the charge and calling on the defendant to enter a plea. A defendant may plead guilty, guilty but mentally ill, not guilty, not guilty by reason of insanity, or with the consent of the court, nolo contendere (i.e., no contest). The court must determine that a plea of guilty, guilty but mentally ill, or nolo contendere is made voluntarily with an understanding of its consequences. The defendant has the burden to prove insanity or mental illness by a preponderance of the evidence.

If a defendant does not plead or the court refuses to accept a plea of guilty or guilty but mentally ill, the court must enter a plea of not guilty. With certain conditions and restrictions, a defendant may enter a plea of guilty or guilty but mentally ill pursuant to a plea bargain with the prosecuting attorney.

Defense counsel may raise any defense or objection that can be determined without trial of the general case. Defenses and objections based on defects in the prosecution, other than insufficiency of the evidence, must be raised before trial and, except with the permission of the court, before a plea is entered. Motions that, by their nature, may delay or postpone a trial if granted must be made before trial unless there was no opportunity to do so. A motion raising defenses or objections must be determined before trial unless the court orders it be determined during the trial. An issue of fact must be tried by a jury if a jury trial is required by law.

If the defendant will be tried for a felony or gross misdemeanor, the defendant and the prosecuting attorney must file and serve on each other a list of witnesses they intend to call during the case. If the defendant or prosecutor expects to offer testimony of an expert witness, they must file and serve a specific notice on the opposing party at least 21 days before the trial. After complying with these requirements, each party has a continuing duty to the other party to provide the names and addresses of additional witnesses as soon as practicable. If a party acts in bad faith, the court must prohibit the additional witness from testifying.

At the request of the defendant, the prosecuting attorney must allow the defendant to copy or inspect any written or recorded statements made by the defendant or a witness, results of mental or physical examinations, and documents or objects the prosecutor intends to introduce in evidence that are not privileged or protected from disclosure by law. Likewise, at the request of the prosecuting attorney, the defendant must allow the prosecuting attorney to copy or inspect the same items.

TRIAL

Trial by Jury

In Nevada's district courts, jury trials are required unless the defendant waives a jury trial in writing, the court approves, and the State consents. If a defendant pleads not guilty to a capital offense, there must be a jury trial. In Nevada's justice courts, cases are tried by jury only if a defendant demands a jury trial at least 30 days in advance.

In district court, a jury normally consists of 12 jurors; in justice court, a jury on a criminal case consists of 6 jurors. The court may impanel up to 6 alternate jurors to replace, when called, jurors who are disqualified or unable to perform.

The presiding judge or justice of the peace conducts the initial examination of the jurors, and the defense and prosecution are entitled to make further reasonable inquiries. Either side may challenge an individual juror, and each side is entitled to four peremptory challenges or, if the charge is punishable by death or imprisonment for life, eight peremptory challenges.

A criminal action may be removed from the court in which it is pending, upon an application by either the defense or the prosecution, on the grounds that a fair and impartial trial cannot be accomplished in that county. The court must not grant the application until after the examination of jurors has been conducted and the court finds that the selection of a fair and impartial jury cannot be accomplished.

Conduct of the Trial

After the jury is impaneled, the court administers a specific oath to the jury and admonishes the jury regarding the disclosure of personal knowledge of a fact in controversy. In a felony case, the clerk must then read the indictment or information and state the defendant's plea. The district attorney opens the case and defense counsel may then make an opening statement or reserve it until before the presentation of the defense.

The prosecution then offers its evidence in support of the charge, the defendant may offer evidence in defense, and both sides may offer rebuttal testimony. The testimony of witnesses must be taken orally in open court, unless the law provides otherwise. After the presentation of evidence and rebuttal, unless either side submits the case to the jury without argument, the prosecution makes a concluding argument. The judge must then charge the jury and, unless the parties agree, the charge must be in writing. The judge must inform the jury of all matters of law the judge believes are necessary for reaching a verdict.

A defendant in a criminal action is presumed innocent until proven otherwise. If there is reasonable doubt whether the prosecution has satisfactorily proven guilt, the defendant is entitled to acquittal.

Conduct of the Jury

In a criminal case, the court may in its discretion allow the jurors to go home overnight before the case is submitted to the jury and after jury deliberation commences. If the jury is kept in the charge of a proper officer, the officer must not allow any communications with them, except by court order, except to ask whether they have reached a verdict. Each time the court adjourns, the court must admonish the jurors not to converse among themselves or with anyone else concerning the trial; listen to, read, or watch any news report on the trial; or form an opinion before the case is finally submitted to them.

The jury must not be discharged until it has reached a verdict and presented it in open court or, after a proper time, it appears there is no reasonable probability the jury can agree.

Verdict

The jury's verdict must be unanimous. At the request of any party or the court, the jury must be polled to determine whether there is unanimous concurrence.

If a defendant is found guilty or guilty but mentally ill of first-degree murder, the court must hold a separate penalty hearing. If a jury reached the verdict, the penalty hearing must take place before the same jury. If the defendant pled guilty or guilty but mentally ill, a jury must be impaneled for the penalty phase if the prosecution seeks the death penalty.

In cases where the prosecution seeks the death penalty, the jury must determine upon the evidence presented whether aggravating and mitigating circumstances exist. The jury may impose a death

sentence only if it finds at least one aggravating circumstance and no mitigating circumstance sufficient to outweigh it. If the jury cannot reach a unanimous verdict in the penalty phase and the prosecution seeks the death sentence, the judge must sentence the defendant to life without the possibility of parole or impanel a new jury for the penalty phase. If the prosecution does not seek the death sentence, the trial judge must impose the sentence.

SENTENCING

Imposition of the Sentence

After trial, the court must impose a sentence without unreasonable delay. However, before imposing a sentence, the court must give the defendant's attorney an opportunity to speak, give the defendant an opportunity to make a statement or present mitigating information, and give the victim or the victim's representative an opportunity to express any views.

The sentence must cover any term of imprisonment; the amount and terms of any fine, restitution, or administrative assessment; a reference to the statute under which the person is sentenced; and any statutory provision necessary to determine eligibility for parole.

With the passage of A.B. 267 (Chapter 152, *Statutes of Nevada*) in the 2015 Session, a court may no longer impose a sentence of life without the possibility of parole upon a person convicted of certain crimes who was less than 18 years of age at the time the crime was committed. Courts must consider the differences between juvenile and adult offenders in determining an appropriate sentence, and certain minimum periods of incarceration must be served by a prisoner who was sentenced as an adult for certain offenses that were committed when he or she was less than 18 years of age before the prisoner is eligible for parole.

Concurrent and Consecutive Sentences

Whenever a person is convicted of two or more offenses, the court may provide that the sentences to be served will run either concurrently or consecutively.

To give both offenders and crime victims more clarity about prison sentences when a court imposes consecutive sentences, the 2013 Legislature approved Senate Bill 71 (Chapter 64, *Statutes of Nevada*) to require the sentences be added together or "aggregated" for crimes committed on or after July 1, 2014. This bill streamlines the work of the State Board of Parole Commissioners and reduces concern on the part of victims and their families by eliminating the need for a parole hearing when the first of two consecutive sentences is being served.

Presentence Investigations

With some exceptions, for each person who pleads guilty or no contest to a felony, or who is found guilty of a felony, the Division of Parole and Probation, Department of Public Safety (DPS), must make a presentence investigation and report to the court. No report is required if a jury fixes the sentence, if a report has been made previously within the last five years, or for most convictions for a

category E felony. Except for disclosures to the parties, corrections and law enforcement agencies, and as necessary for mental health evaluations and administration of the State's gaming laws, presentence investigation reports are confidential.

The report must cover the defendant's prior criminal record; information about the defendant and the effect of the offense on the victim; a recommendation of a minimum and maximum term of imprisonment, fine, or both; and other information.
For persons convicted of felony sexual offenses, additional requirements apply to the presentence investigations. For more information, see the April 2016 *Policy and Program Report* titled, "Justice System: Focus on Sex Offenders."

APPEALS

A party who is aggrieved by a decision in a criminal case may appeal to a higher court in some circumstances. Either the defendant or the State may:

- Appeal to the district court from a final judgment in justice court;
- Appeal to the Nevada Supreme Court a district court order granting a motion to dismiss, granting a motion for acquittal, or granting or refusing a new trial; or
- Appeal to the Nevada Supreme Court a district court determination on whether a defendant is intellectually disabled.

For good cause, the State may also appeal to the Nevada Supreme Court a pretrial district court order granting or denying a motion to suppress evidence.

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 defendant reserved that right in writing or the appeal is based on constitutional or other grounds that challenge the legality of the proceedings.

Unless the defendant waives the appeal, an appeal to the Nevada Supreme Court is automatic in cases where the defendant pled not guilty or not guilty by reason of insanity and was convicted and sentenced to death. Even where such a defendant waives the appeal, the Supreme Court must still review the sentence.

An appeal to the Nevada Supreme Court must be made only on questions of law, not evidence. All appeals from a district court to the Supreme Court must be heard on the original record and the reporter's transcript of the proceedings. The Supreme Court may reverse, affirm, or modify the judgment that was appealed or order a new trial.

Nevada Court Of Appeals

Senate Joint Resolution No. 14 of the 76th Session (File No. 47, *Statutes of Nevada 2013*) was approved for the second consecutive time by the 2013 Legislature and was submitted to the voters at the 2014 General Election. With voter approval, an intermediate Court of Appeals was established in Nevada. Article 6 of the *Nevada Constitution* was amended, creating a Court of Appeals consisting of three judges. The Nevada Supreme Court assigns the types of district court decisions to be heard by the Court of Appeals and also determines when a Court of Appeals decision may be reviewed by the Nevada Supreme Court.

Senate Bill 463 (Chapter 343, *Statutes of Nevada 2013*), a companion measure, covered implementation of the court of appeals and took effect upon ratification of the constitutional amendment by the voters.

RECORDS OF CRIMINAL HISTORY

Sealing of Records

After a convicted person is released from custody or discharged from parole or probation, the person may petition the court where the conviction occurred to seal all records relating to the conviction. The person must wait a certain number of years before submitting a petition, ranging from 2 years for a misdemeanor conviction to 15 years for a category A or B felony conviction, and no person may petition the court to seal records relating to a conviction for a crime against a child, a sexual offense, or a felony DUI conviction. After notifying the prosecuting attorney and conducting a hearing, the court may grant such a petition if the convicted person does not have a conviction or pending charge, except for minor traffic violations, during the waiting period.

If a person was arrested for alleged criminal conduct and acquitted, or if the charge was dismissed or the conviction was set aside, that person may petition the court to seal all records related to the arrest and the proceedings. After notifying the prosecuting attorney and conducting a hearing, the court may grant such a petition. In addition, if the prosecuting attorney declines to prosecute the charges, a person may apply for the sealing of all records after the statute of limitations has run out, after ten years, or pursuant to an agreement among the parties.

The effect of a court order sealing a record is that the covered proceedings are deemed never to have occurred, the person to whom the order applies may answer any inquiry accordingly, and the person's rights to hold office, serve on a jury, and vote are immediately restored.

Sealed records may be reopened for inspection upon a petition from the person who is the subject of the records, or by court order. Also, the Nevada Gaming Commission and the Nevada Gaming Control Board may inspect sealed records, if the event or conviction was related to gaming, to determine a person's suitability for a State gaming license or registration.

Central Repository

In 1985, the Legislature created the Central Repository for Nevada Records of Criminal History in the General Services Division, DPS. Each agency of criminal justice and any agency dealing with delinquency of children must collect and submit required information to the Central Repository. The Department may disseminate information from the Central Repository to other criminal justice agencies, exchange information with federal repositories and those of other states, and request and receive background information from the Federal Bureau of Investigation on any person who applies to the State of Nevada or one of its local governments for a license, with whom the State or a local government intends to enter into an employment relationship, who has applied to attend an academy for training police officers, and other persons as authorized by law.

The Central Repository must investigate the criminal history of any person who has applied to the Superintendent of Public Instruction for a license, has applied to a public or private school for employment, or is employed by a public or private school, and must notify the Superintendent or school administrator, as appropriate, if the person has been convicted of a felony, an offense involving moral turpitude, or certain other crimes.

The Central Repository must also make annual reports of statistical crime data to the Governor and the Legislature.

The Legislature has placed conditions and limits on the dissemination of records of criminal history, depending on the need for the records, the purpose of the request, the source of the request, the types of records, and other factors. A record of criminal history must be used only for the purpose for which it was requested and may not be disseminated further without express authority or a court order. The Central Repository and each police agency in the State must allow a person to inspect a record of criminal history pertaining to that person during regular business hours, subject to reasonable charges or fees, and the DPS must adopt regulations covering the correction of any records found to be inaccurate.

ACTIVITIES DURING THE 2015-2016 INTERIM

The Advisory Commission on the Administration of Justice will meet to discuss activities related to criminal procedure.

SOURCES OF ADDITIONAL INFORMATION

Advisory Commission on the Administration of Justice: http://www.leg.state.nv.us/Interim/78th2015/Committee/StatCom/AdminJustice/?ID=18.

STATE CONTACT INFORMATION

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Department of Public Safety
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Division of Parole and Probation
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