Rule 250. Procedure in capital proceedings.

1. The scope and purposes of this rule. The provisions of this rule apply only in cases in which the death penalty is or may be sought or has been imposed, including proceedings for post-conviction relief from a judgment of conviction and sentence of death. This court places the highest priority on diligence in the discharge of professional responsibility in capital cases. The purposes of this rule are: to ensure that capital defendants receive fair and impartial trials, appellate review, and post-conviction review; to minimize the occurrence of error in capital cases and to recognize and correct promptly any error that may occur; and to facilitate the just and expeditious final disposition of all capital cases.

2. Appointment and qualifications of counsel.

(a) Applicability. This section applies to all defense counsel including public defenders who are appointed to represent indigent persons in capital cases.

(b) Trial counsel. Unless the district court determines pursuant to subsection (2)(e) that defense counsel otherwise has the competence to represent an indigent person in a capital case, an attorney appointed as lead counsel at trial at a minimum must have: (1) acted as lead defense counsel in five felony trials, including one murder trial, tried to completion (i.e., to a verdict or a hung jury); (2) acted as defense co-counsel in one death penalty trial tried to completion; and (3) been licensed to practice law at least three years.

(c) Counsel in post-conviction proceedings in district court. Counsel appointed to represent a petitioner for post-conviction relief in the district court must have acted as counsel in at least two post-conviction proceedings arising from felony convictions and must otherwise satisfy the court that counsel is capable and competent to represent the petitioner.

(d) Counsel on direct and post-conviction appeal. Counsel appointed to represent an appellant on direct or post-conviction appeal must have acted as counsel in at least two appeals of felony convictions and must otherwise satisfy the court that counsel is capable and competent to represent the appellant.

(e) Exceptions. If an attorney does not satisfy the minimum requirements set forth in subsections (2)(b), (c), or (d) of this rule, or if the district court otherwise considers it warranted, the court shall hold a hearing to assess the attorney's competence and ability to act as defense counsel. The court shall thoroughly investigate the attorney's background, training, and experience and consult with the attorney on his or her current caseload. If satisfied that the attorney is competent and able to provide the representation, the court shall make that finding on the record and appoint the attorney.

(f) Co-counsel. When the district court appoints defense counsel to provide representation at trial, it shall appoint two counsel, one of whom must be qualified under this rule to act as lead counsel in a capital case. When the court appoints defense counsel to provide representation in a direct appeal, a first post-conviction petition for a writ of habeas corpus, or an appeal from such post-conviction proceeding, the court may only appoint one counsel who is qualified under this rule.

(g) Appointment of public defender. When the district court appoints an office of a public defender to provide representation in a capital case, any attorney assigned by the office to act as defense counsel shall prepare and file with the court the application form required by subsection (2)(h) of this rule.

(h) Application forms and list of qualified counsel. Each judicial district shall maintain a list of qualified defense counsel and shall establish procedures to ensure that defense counsel are considered and selected for appointment to capital cases from the list in a fair, equal and consecutive basis. The judicial districts shall further arrange for the preparation and distribution of application forms to defense attorneys who wish to be included on the list. The forms must require specific information respecting the attorney's qualifications to act as defense counsel in a capital case and a complete statement of any discipline or sanctions pending or imposed against the attorney by any court or disciplinary body. Before appointing any attorney to act as counsel in a capital case, the district court to which the case is assigned shall carefully consider the information in the attorney's application form.

[As amended; January 20, 2000.]

3. Duties and compensation of defense counsel.

(a) Records of litigation. Defense counsel shall maintain contemporaneous records of all work performed while serving as trial counsel, appellate counsel, or post-conviction counsel, including time records, communications with the client, expert witness reports, witness statements, investigations, and the rationale for strategic decisions. Defense counsel shall file with the district court an affidavit certifying that counsel has maintained and retains the record required by this subsection within 30 days after any of the following events: (1) the district court's imposition of the death sentence, (2) the district court's entry of an order resolving a post-conviction matter, or (3) the supreme court's entry of a written decision finally resolving an appeal. Defense counsel shall retain either the original record or a copy until the court authorizes its disposal.

(b) Providing files to successor counsel. If for any reason defense counsel is unable to continue to represent a capital case client prior to concluding the representation for which counsel was appointed, defense counsel's case files and copies of counsel's records of litigation must be provided to successor counsel. Defense counsel shall not be permitted to withdraw until successor counsel has been retained or appointed and the files have been delivered to the successor. Withdrawing counsel shall thereafter promptly file a notice of the disposition of the files with the clerk of the district court and serve a copy of the notice on the prosecutor. If defense counsel at trial is permitted to withdraw after trial from representing the defendant on appeal, counsel shall have 30 days from the date of withdrawal within which to prepare a memorandum for appellate counsel detailing each arguable issue on appeal with appropriate specific citations to the pertinent parts of the record.

(c) Compensation of counsel and defense costs. Appointed defense counsel must be compensated for all time reasonably spent on a case and must be reimbursed for all expenses reasonably incurred. The court shall conduct ex parte proceedings to authorize employment and payment of investigative, expert, or other services for the defense, and the transcript of such proceedings must be placed in the record under seal.

4. Proceedings before trial.

(a) Proceedings by criminal complaint. When the state seeks to initiate a charge of open or first-degree murder by the filing of a criminal complaint, unless the state declares at the defendant's first appearance before a magistrate pursuant to NRS 171.178 that it will not seek the death penalty, the magistrate shall appoint one attorney to serve as defense counsel during the preliminary hearing if the defendant is indigent. Appointed counsel must possess the qualifications specified in subsection 2(b) of this rule.

(b) Proceedings by indictment. When the state seeks to initiate a charge of open or first-degree murder by indictment, the state shall, together with the notice required by NRS 172.241(2), notify the person whose indictment will be considered that if the person is indigent, he or she may request the court to appoint defense counsel prior to the commencement of the grand jury proceedings. This notice is required unless: (i) the district court finds adequate cause to withhold notice under NRS 172.241; (ii) the state declares that it will not seek the death penalty; or (iii) the state is unable, after reasonable diligence, to locate or notify the person. Upon the person's request, the district court shall appoint one attorney to serve as defense counsel prior to and during the grand jury proceedings. Appointed counsel must possess the qualifications specified in subsection 2(b) of this rule.

(c) Notice of intent after filing of indictment or information. No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance. A defendant may extend the time in which the state must file a notice of intent to seek the death penalty by filing a written waiver no later than 30 days after the filing of an information or indictment. The purpose of allowing for this waiver is to provide additional time to gather potential mitigation evidence. Mitigation evidence may be provided to the state at the defendant's discretion to assist the state in its determination to file a notice of intent to seek the death penalty. If a written waiver has been filed, the state must file a written reservation of the right to seek the death penalty no later than 30 days after the filing of the waiver and a notice of intent to seek the death penalty no later than 180 days after the filing of the waiver.

(d) Late notice of intent. Upon a showing of good cause, the district court may grant a motion to file a late notice of intent to seek the death penalty or of an amended notice alleging additional aggravating circumstances. The state must file the motion within 15 days after learning of the

grounds for the notice or amended notice. If the court grants the motion, it shall also permit the defense to have a reasonable continuance to prepare to meet the allegations of the notice or amended notice. The court shall not permit the filing of an initial notice of intent to seek the death penalty later than 30 days before trial is set to commence.

(e) Withdrawal of notice. The state may at any time declare that it will not seek the death penalty or withdraw its notice of intent to seek the death penalty, and the provisions of this rule will no longer apply. The state also may at any time withdraw an allegation of an aggravating circumstance.

(f) Filing of notice of evidence in aggravation. The state must file with the district court a notice of evidence in aggravation no later than 15 days before trial is to commence. The notice must summarize the evidence which the state intends to introduce at the penalty phase of trial, if a first-degree murder conviction is returned, and identify the witnesses, documents, or other means by which the evidence will be introduced. Absent a showing of good cause, the district court shall not admit evidence not summarized in the notice. If the court determines that good cause has been shown to admit evidence not previously summarized in the notice, it must permit the defense to have a reasonable continuance to prepare to meet the evidence.

[As amended; July 8, 2019.]

5. Procedure at trial and post-conviction proceedings.

(a) Calendar priority and transcripts. The district court shall give capital cases calendar priority and conduct such proceedings with minimal delay. The court shall ensure that all proceedings in a capital case are reported and transcribed, but with the consent of each party's counsel the court may conduct proceedings outside the presence of the jury or the court reporter. If any objection is made or any issue is resolved in an unreported proceeding, the court shall ensure that the objection and resolution are made part of the record at the next reported proceeding.

(b) Duties of court reporters. Court reporters shall give priority to transcripts of pretrial proceedings in capital cases. As prescribed by the district court, reporters shall furnish such transcripts to the court and counsel prior to trial. During trial or post-conviction proceedings, reporters shall prepare a daily transcript of all proceedings and deliver it to the court and counsel.

(c) Audio recording. If audio recording equipment is available, the district court may employ audio recordings as backup to or in lieu of a court reporter. If audio recording is used in lieu of a court reporter, the person responsible for the recording shall: give priority to transcripts of pretrial proceedings in capital cases; furnish, as prescribed by the district court, such transcripts to the court and counsel prior to trial; and prepare, during trial or post-conviction proceedings, a daily transcript of all proceedings and deliver it to the court and counsel.

(d) Transcription of audio or video recorded evidence. If an audio or video recording which includes spoken language is played as evidence, the court shall ensure that the spoken language is transcribed as part of the record. Alternatively, if all parties agree that a transcript of the spoken language prepared by a party is accurate, the court may order that the record include that transcript; if the parties cannot agree on the accuracy of a proposed transcript, each party may offer a transcript which the court shall include in the record.

6. Procedure on direct appeal from judgment of conviction and sentence of death.

(a) Docketing of appeal. When the district court enters a written judgment of conviction imposing a sentence of death, the clerk of the district court shall immediately transmit to the clerk of the supreme court two certified, file-stamped copies of the following documents: (1) the written judgment signed by the judge and filed by the district court clerk; (2) the notice of appeal, if any; (3) the district court docket entries; (4) the minutes of the district court proceedings; and (5) a list of exhibits offered into evidence, if any. Upon receipt of these documents, the clerk of the supreme court shall docket the appeal and immediately give notice to all parties of the date on which the appeal was docketed.

(b) Time for filing record on appeal. On direct appeal from a judgment of conviction and sentence of death, the clerk of the district court shall file a certified copy of the record on appeal with the clerk of the supreme court no later than 30 days after entry of the judgment of conviction and imposition of sentence. If the district court clerk cannot timely transmit the record, the clerk shall seek an extension of time from the supreme court.

(c) Form and contents of direct appeal record. On direct appeal from a judgment of conviction and sentence of death, the clerk of the district court shall transmit as the record on appeal a certified copy of the complete record made and considered in the court below. The complete record shall include, without limitation, certified copies of: any criminal complaint, indictment or information (including any amendments); all papers, motions, petitions, oppositions, responses, replies, orders, opinions, and documentary evidence or exhibits filed in the lower courts; transcripts of all lower court proceedings; all jury instructions offered, excluded or given; all verdicts or findings of fact, conclusions of law, and decisions; the lower court minutes; any notices of appeal. No physical evidence or exhibits shall be transmitted absent an order of the supreme court. The record shall be assembled, paginated, and indexed in the same manner as an appendix to the briefs under NRAP 30(c). No designation of record is required. The clerk of the district court shall retain the original record. All questions as to the filing, form, and content of the record on appeal shall be presented to the supreme court.

(d) Filing and service of briefs. On direct appeal from a judgment of conviction and sentence of death, appellant shall serve and file the opening brief within 70 days from the date that the record on appeal is filed in the supreme court. Respondent shall serve and file the answering brief within 60 days after service of the opening brief. Appellant shall serve and file the reply brief within 45 days after service of the answering brief.

(e) Extensions of time. The supreme court may grant an initial extension of time of up to 60 days to file a brief upon a showing of good cause, but shall not grant additional extensions of time except upon a showing of extraordinary circumstances and extreme need.

(f) Oral argument. The supreme court shall determine whether oral argument is warranted and shall enter an appropriate order respecting the time and place of argument. Unless otherwise ordered by the court, the oral argument will be limited to 60 minutes and will proceed in accordance with NRAP 34. The court may in its discretion hold oral argument during the summer recess when deemed necessary.

7. Procedure in post-conviction appeals.

(a) Docketing of appeal; general procedure. On appeal from a judgment or order resolving an application for post-conviction relief, except as otherwise specifically provided in this rule, the appeal shall be docketed and shall proceed in accordance with the ordinary procedures specified in the Nevada Rules of Appellate Procedure. The fast track provisions of NRAP 3C, however, shall not apply in capital cases.

(b) Record on appeal. Unless otherwise ordered by the supreme court, the clerk of the district court shall retain the original record of the proceedings and shall not transmit a record on appeal to the supreme court. When the supreme court deems it necessary to review the district court record, the clerk of the district court shall assemble and transmit to the clerk of the supreme court in accordance with NRAP 11 such portions of the record designated by the supreme court. In lieu of a record on appeal, the parties shall file an appendix or appendices as specified in the Nevada Rules of Appellate Procedure.

(c) Filing and service of briefs. Briefing shall proceed in accordance with NRAP 28 through 32, inclusive.

(d) Extensions of time. The supreme court may grant an initial extension of time of up to 60 days to file a brief upon a showing of good cause, but shall not grant additional extensions of time except upon a showing of extraordinary circumstances and extreme need.

(e) Oral argument. Post-conviction appeals shall stand submitted for decision on the briefs and appendices without oral argument unless the court otherwise orders.

8. Miscellaneous procedures on appeal.

(a) Prebriefing conferences. Upon the docketing of any appeal (direct or post-conviction) involving imposition of the death penalty, the supreme court may schedule a prebriefing conference at which a designee of the court shall preside. The parties' counsel and any other persons the court may designate shall attend. At the direction of the court, counsel for appellant shall file with the court and serve on respondent a prebriefing memorandum of no more than 10 pages, outlining the major issues, with relevant facts, which appellant intends to raise on appeal. At the direction of the court, counsel for respondent shall file and serve on appellant an answering memorandum of no more than 10 pages, stating respondent's position on the issues and facts outlined by appellant and any other issues which respondent considers important. Failure to include an issue in the memoranda will not preclude a party from raising the issue in the opening or answering briefs. The following matters may be considered at the conference: the

contents, preparation, and transmission of the record or appendices; the scheduling and conduct of oral argument; stipulations of fact; simplification of issues; and any other matters that may facilitate the just and expeditious resolution of the appeal.

(b) Limited remand to district court. If the supreme court determines that any matter requires further clarification or that additional proceedings in the district court would assist in the resolution of the appeal, it may remand the case to the district court for supplementary proceedings. The supreme court shall retain jurisdiction over an appeal remanded under this subsection and may take any action deemed warranted despite the issuance of a limited remand.

9. Filing of biannual status reports of cases where death penalty was imposed. Commencing in February 1999, the attorney general and the district attorney of each county shall file a biannual death penalty report with the clerk of the supreme court no later than the first judicial day in February and July of each year. The reports must identify all state and federal actions in which the State of Nevada is a party to an action involving a person who has been sentenced in state court to receive the death penalty. The reports must indicate: (1) the case caption and number and the court in which the action is pending; (2) the date upon which the action commenced and the length of time it has been pending; (3) a short description of the action, *e.g.*, state or federal post-conviction petition for a writ of habeas corpus; (4) the scheduled date of execution, if any; and (5) any stay of execution, the court that issued the stay, the date upon which the stay became effective, and the duration of the stay. Within 20 days after entry of a final judgment or order resolving an action subject to this subsection, counsel for the state shall file with the clerk of the supreme court written notice of entry of the judgment or order. The notice shall include a certified, file-stamped copy of the judgment or order.

[As amended; January 20, 2000.]

10. Notice to supreme court of entry of warrants of execution, execution dates, and stays of execution.

(a) Notice of warrant of execution. Immediately upon the issuance of any warrant of execution, counsel for the state shall file with the clerk of the supreme court written notice of issuance of the warrant. The notice must be transmitted to the clerk of the supreme court for filing by telephonic transmission to the telefax machine situated in the Office of the Clerk of the Supreme Court in Carson City. Counsel shall advise the clerk telephonically before transmitting the notice and shall submit an original of the document for filing within 3 judicial days of telephonic transmission. Counsel shall also provide notice of the issuance of a warrant of execution to the Director of the Department of Prisons.

(b) Notice of date of execution. Immediately upon the scheduling of a specific date of execution by execution order or otherwise, the Director of the Department of Prisons shall notify the clerk of the supreme court of the scheduled execution date. The notice must be transmitted to the clerk of the supreme court for filing by telephonic transmission to the telefax machine situated in the Office of the Clerk of the Supreme Court in Carson City. The director shall advise the clerk telephonically before transmitting the notice and shall submit an original of the document for filing within 3 judicial days of telephonic transmission.

(c) Notice of entry of stay of execution. Immediately upon the issuance of a stay of execution by any court other than the supreme court, counsel for the state shall file with the clerk of the supreme court written notice of entry of the stay. The notice must be transmitted to the clerk of the supreme court for filing by telephonic transmission to the telefax machine situated in the Office of the Clerk of the Supreme Court in Carson City. Counsel shall advise the clerk telephonically before transmitting the notice and shall submit an original of the document for filing within 3 judicial days of telephonic transmission. Counsel for the state shall also provide immediate notice of any stay issued by any court, including the supreme court, to the Director of the Department of Prisons.

(d) Notice of intent to seek stay of execution from supreme court: duty of defense counsel. Defense counsel shall file any motion seeking a stay of execution from the supreme court promptly upon learning the grounds to be asserted in support of the motion. Defense counsel shall telephonically provide advance notice to the clerk of the supreme court of counsel's intent to file a motion for a stay so that the court may make arrangements to assure that the motion is given prompt and thorough consideration. The supreme court may impose sanctions on defense counsel if it plainly appears that the grounds asserted in support of a motion for a stay of execution were known or should have been known to counsel well in advance of the filing of the motion.

11. Checklist of issues. A checklist of issues shall be published with this rule and periodically updated by the supreme court. The checklist shall contain citations intended to provide guidance regarding issues relevant to criminal proceedings, particularly capital cases. The list is not comprehensive, is not an authoritative statement of the law, and is not to be cited as authority. It is simply a reference guide providing a starting point for legal research.

12. Effective date of this rule. The provisions of this rule apply to all capital cases pending on or commenced after the effective date of the rule. For the purposes of this section, a case commences when the state formally charges a person with murder or serves a person with notice that an indictment for murder is being considered or when a person sentenced to death files an application for post-conviction relief. The provisions of this rule shall govern all further proceedings in actions pending in the supreme court on the effective date, unless in the opinion of the court their application in a particular pending action would not be feasible or would work an injustice, in which event the former procedure applies.

CHECKLIST OF ISSUES

This checklist is intended to provide some guidance regarding issues relevant to criminal proceedings, particularly capital cases. The list is not comprehensive, is not an authoritative statement of the law, and is not to be cited. It is simply a reference guide on some issues, providing a starting point for necessary research.

PRETRIAL MATTERS

1. PROCEEDINGS TO COMMITMENT: NRS 171.178-.208

Initial appearance before magistrate: NRS 171.178-.186

--County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991) (probable cause hearing required within 48 hours of warrantless arrest)

—Powell v. State, 113 Nev. 41, 43, 930 P.2d 1123, 1124 (NRS 171.178(3) unconstitutional to degree it conflicts with *McLaughlin*), *cert. denied,* ..... U.S.e....., 118 S. Ct. 377 (1997)

Appointment of counsel for indigent defendant: NRS 171.188

Preliminary examination: NRS 171.196-.208

Exclusion of witnesses ~~and others from~~ proceedings: NRS 171.204

Discovery: NRS 171.1965

2. INDICTMENT AND INFORMATION

Information: Nev. Const. art. 1, § 8, cl. 1; NRS 173.015-.105

Indictment: Nev. Const. art. 1, § 8, cl. 1; NRS 173.015, 173.075-.105

Grand Jury: NRS Chapter 172

Composition: NRS 172.055-.065

—Castaneda v. Partida, 430 U.S. 482 (1977) (purposeful discrimination in selection of grand jurors unconstitutional)
—Kirksey v. State, 112 Nev. 980, 989-90, 923 P.2d 1102, 1108-09 (1996) (grand jury must be drawn from cross-section of community, and there must be no purposeful exclusion of identifiable class of persons)

Notice of grand jury proceedings: NRS 172.241
—Solis-Ramirez v. District Court, 112 Nev. 344, 913 P.2d 1293 (1996)
—Sheriff v. Marcum, 105 Nev. 824, 783 P.2d 1389 (1989)

Notice that death penalty will be sought: SCR 250(4)(a)-(e)
—Lankford v. Idaho, 500 U.S. 110 (1991) (lack of adequate notice that sentencer was considering death sentence violated due process)

Death penalty not permitted for certain defendants (See also section 24 below.)

Defendant younger than sixteen at time of crime: NRS 176.025
—Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion)
—Stanford v. Kentucky, 492 U.S. 361 (1989) (death penalty for defendant sixteen years old at time of murder constitutional)

Defendant who did not kill, attempt to kill, or intend use of lethal force or was not major participant in felony and recklessly indifferent to human life. *Cf.* NRS 200.033(4).
—Enmund v. Florida, 458 U.S. 782, 797 (1982)
—Tison v. Arizona, 481 U.S. 137, 158 (1987)
—Doleman v. State, 107 Nev. 409, 417-18, 812 P.2d 1287, 1292-93 (1991)

3. ARRAIGNMENT: NRS 174.015-.065
Types of pleas: NRS 174.035
Insanity at time of offense is no defense: NRS 174.035(1),(4)
Insanity may be relevant to intent: NRS 193.220

Plea may specify degree of crime; first-degree murder plea may specify punishment less than death: NRS 174.065

Guilty plea must be knowing and voluntary
—Boykin v. Alabama, 395 U.S. 238, 242-44 (1969)
—Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986)
—Sturrock v. State, 95 Nev. 938, 940-41, 604 P.2d 341, 343-44 (1979) (court has discretion to reject plea)
—Meyer v. State, 95 Nev. 885, 603 P.2d 1066 (1979) (court must inform defendant of consequences of guilty plea, including nonprobational status of offense)

Defendant may plead guilty while maintaining innocence
—North Carolina v. Alford, 400 U.S. 25, 37-38 (1970)
—State v. Gomes, 112 Nev. 1473, 1479, 930 P.2d 701, 705-06 (1996) (nolo contendere and *Alford* pleas are equivalent), *cert. denied*, 520 U.S. 1160 (1997)
—Tiger v. State, 98 Nev. 555,r654 P.2d 1031 (1982)

Withdrawal of plea: NRS 176.165
—Mitchell v. State, 109 Nev. 137, 848 P.2d 1060 (1993)
—Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986)
—State v. District Court, 85 Nev. 381, 455 P.2d 923 (1969)

4. DISCOVERY
Duty of prosecution to provide exculpatory information to defendant
—Kyles v. Whitley, 514 U.S. 419 (1995)
—Brady v. Maryland, 373 U.S. 83, 87 (1963)
—Jimenez v. State, 112 Nev. 610, 618-20, 918 P.2d 687, 692-93 (1996) State must disclose plea agreement with witness: NRS 175.282
—Giglio v. United States, 405 U.S. 150 (1972)
—Sheriff v. Acuna, 107 Nev. 664, 669, 819 P.2d 197, 200 (1991) (state cannot bargain for particular testimony or specific result)

Disclosure of evidence by prosecutor and defendant: NRS 174.233-.295
—Williams v. Florida, 399 U.S. 78, 80-86 (1970) (constitutional to require defendant before trial to disclose alibi witnesses)
—Binegar v. District Court, 112 Nev. 544, 915 P.2d 889 (1996)

Subpoena and notice to produce: NRS 174.305-.385

Court-appointed expert witnesses: NRS 175.271

State's loss of or failure to gather evidence
—Daniels v. State, 114 Nev. 261, 956 P.2d 111 (1998) (state has duty to gather evidence in some circumstances)
—Sparks v. State, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988) (loss of evidence by state may lead to reversal)

5. REPRESENTATION BY COUNSEL (See also section 32 below.)
Right to counsel: U.S. Const. amend. VI; Nev. Const. art. 1, § 8, cl. 1; NRS 34.820(1)(a), 171,188, 175.151, 178.397; SCR 250(2), (3), (4)(a)-(b)
—Gideon v. Wainwright, 372 U.S. 335 (1963) (indigent criminal defendant has right to appointed counsel)
—Satterwhite v. Texas, 486 U.S. 249, 251 (1988) (capital defendant has right to consult counsel before submitting to psychiatric exam)

Effective assistance of counsel
—Strickland v. Washington, 466 U.S. 668 (1984)
—Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996)

Right of self-representation: SCR 253
—Faretta v. California, 422 U.S. 806 (1975) (constitutional right to represent self if election to do so is voluntary and intelligent)

—Harris v. State, 113 Nev. 799, 804, 942 P.2d 151, 155 (1997) (court has discretion to appoint advisory counsel)
—Blandino v. State, 112 Nev. 352, 914 P.2d 624 (1996) (no right to self-representation on direct appeal)
—Wheby v. Warden, 95 Nev. 567, 598 P.2d 1152 (1979) (no right to hybrid representation), *overruled on other grounds* by Keys v. State, 104 Nev. 736, 766 P.2d 270 (1988)

Discharge or withdrawal of counsel: NRS 175.383; SCR 250(3)(b)

Right to expert witness: NRS 175.271; SCR 250(3)(c)
—Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (if sanity likely to be significant factor at trial, defendant has constitutional right to appointed psychiatrist)

6. BAIL: Nev. Const. art. 1, § 7; NRS 178.484(4)
—In re Knast, 96 Nev. 597, 614 P.2d 2 (1980)

7. COMPETENCY AND SANITY OF DEFENDANT
Competency to stand trial: NRS 178.400-.460
—Dusky v. United States, 362 U.S. 402 (1960) (defendant must be able to consult rationally with lawyer and understand proceedings)
—Melchor-Gloria v. State, 99 Nev. 174, 179-81, 660 P.2d 109, 112-13 (1983) (hearing required if reasonable doubt as to competency)

Competency to choose self-representation or plead guilty is same as to stand trial
—Godinez v. Moran, 509 U.S. 389, 398-400 (1993)

"Next friend" has right to file habeas petition on behalf of incompetent person held in custody
—Calambro v. District Court, 114 Nev. 961, 964 P.2d 794 (1998)

Insanity at time of offense is no defense: NRS 174.035(1),(4)
Insanity may be relevant to intent: NRS 193.220

Constitution forbids execution of insane person: *see also* NRS 176.455(1)
—Ford v. Wainwright, 477 U.S. 399 (1986)
Constitution permits execution of mentally retarded person
—Penry v. Lynaugh, 492 U.S. 302, 330-35 (1989)

Right to civil commitment proceeding
—Jackson v. Indiana, 406 U.S. 715, 731-39 (1972) (indefinite commitment of incompetent criminal defendant violates due process)

Right to court-appointed psychiatrist: NRS 175.271
—Ake v. Oklahoma, 470 U.S. 68, 83 (1985)

Forced antipsychotic medication during trial unconstitutional
—Riggins v. Nevada, 504 U.S. 127, 133-38 (1992)

8. VENUE, PUBLICITY, SECURITY (See also section 18 below.)
Change of venue: NRS 174.455-.505
—Sonner v. State, 112 Nev. 1328, 1336-37, 930 P.2d 707, 712-13 (1996), *reh'g granted on other grounds*, 114 Nev. 321, 955 P.2d 673 (1998)

Denial of access of public and press to criminal trial must be narrowly tailored to serve compelling state interest
—Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-07 (1982)

Cameras and electronic media coverage in court: SCR 229-247
—Chandler v. Florida, 449 U.S. 560, 582-83 (1981) (absent showing of prejudice of constitutional dimension, electronic coverage of trial permissible)

Limits on lawyer's statements to press
—Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)

Courtroom security: NRS 175.387, 178.394
—Holbrook v. Flynn, 475 U.S. 560, 572 (1986) (uniformed troopers in courtroom not prejudicial to defendant's right to fair trial)
—McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998) (presence of security officers in courtroom during penalty phase was not inherently prejudicial, and defendant did not show actual prejudice)
—Duckett v. State, 104 Nev. 6, 11, 752 P.2d 752, 755 (1988) (safety concerns accorded greater significance at penalty phase)

9. PRETRIAL MOTIONS: NRS 174.125, 47.090, 174.075(2)
All motions which by their nature, if granted, delay trial must be made before trial: NRS 174.125(1)

9.1 MOTION TO SUPPRESS: NRS 174.125, 177.015(2), 179.085, 179.335, 179.505 (Compare section 12 below.)
—State v. Shade, 110 Nev. 57, 867 P.2d 393 (1994) (motion to suppress challenges evidence on constitutional grounds)
—Cranford v. Sheriff, 91 Nev. 551, 539 P.2d 1215 (1975) (motion to suppress, not habeas petition, is method to challenge evidence on constitutional grounds)

9.1.1 ARREST: NRS 171.102-.176
Without warrant
—Payton v. New York, 445 U.S. 573, 589-90 (1980) (absent exigent circumstances, warrantless arrest at defendant's home unconstitutional)
—United States v. Watson, 423 U.S. 411, 423-24 (1976) (warrantless arrest in public place based on probable cause constitutional)
—Howe v. State, 112 Nev. 458, 916 P.2d 153 (1996) (home)
—Edwards v. State, 107 Nev. 150, 808 P.2d 528 (1991) (hotel room)
—Franklin v. State, 96 Nev. 417, 419-20, 610 P.2d 732, 734 (1980) (public place)

9.1.2 SEARCH AND SEIZURE: U.S. Const. amend. IV; Nev. Const. art. 1, § 18

With warrant: NRS 179.015-.115, 179.330, 501.375(3)
—Illinois v. Gates, 462 U.S. 213, 238-39 (1983) (probable cause determined by analysis of totality of circumstances)
—United States v. Ramirez, ... U.S.n....., 118 S. Ct. 992 (1998) (no-knock entry justified if reasonable suspicion that announcing entry would inhibit investigation; no higher standard required to justify damaging property while entering)
—Wright v. State, 112 Nev. 391, 396-97, 916 P.2d 146, 149-50 (1996) (probable cause supported search warrant), *overruled on other grounds* by Levingston v. Washoe County, 114 Nev. 306,n956 P.2d 84 (1998)
—Keesee v. State, 110 Nev. 997, 879 P.2d 63 (1994) (search warrants supported by probable cause and not overbroad)
—State v. Parent, 110 Nev. 114, 867 P.2d 1143 (1994) (anticipatory warrant providing adequate protection against premature execution and adequate description of items to be searched valid)

Without warrant: NRS 171.1232, 179.065, 501.375
—Schneckloth v. Bustamonte, 412 U.S. 218,n219, 248-49 (1973) (voluntary consent exception to warrant requirement)
—Texas v. Brown, 460 U.S. 730 (1983) (if incriminating evidence in plain view, warrantless seizure proper)
—Steagald v. United States, 451 U.S. 204 (1981) (absent exigent circumstances, unconstitutional to search third person's home for subject of arrest warrant)
—United States v. Robinson, 414 U.S. 218, 235-36 (1973) (search of person incident to lawful arrest reasonable)
—Chimel v. California, 395 U.S. 752 (1969) (incident to arrest, unlawful to search areas of home beyond arrestee's reach)
—Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (warrantless entry of house in hot pursuit of armed robber constitutional)
—Howe v. State, 112 Nev. 458, 916 P.2d 153 (1996) (search of home without consent unconstitutional)
—Alward v. State, 112 Nev. 141, 149-52, 912 P.2d 243, 248-51 (1996) (search of tent and truck unconstitutional)
—Hayes v. State, 106 Nev. 543, 549-56, 797 P.2d 962, 965-70 (1990) (protective sweep of home, incident to lawful arrest outside home, unconstitutional)
—Carstairs v. State, 94 Nev. 125, 575 P.2d 927 (1978) (search of person incident to lawful arrest reasonable)

Standing to challenge search
—Rakas v. Illinois, 439 U.S. 128, 148-49 (1978) (standing requires person to have legitimate expectation of privacy in place searched)
—Scott v. State, 110 Nev. 622, 627-28, 877 P.2d 503, 507-08 (1994) (nonowner passenger lacks standing to challenge search of vehicle but has standing to challenge initial stop)
—Hicks v. State, 96 Nev. 82, 605 P.2d 219 (1980) (no standing to challenge search of apartment where defendant had no proprietary interest in apartment or items seized)

Stop and frisk: NRS 171.123
—Terry v. Ohio, 392 U.S. 1 (1968) (reasonable suspicion justifies limited stop and frisk)
—Florida v. Royer, 460 U.S. 491, 502-07, 509 (1983) (detention exceeded bounds of *Terry* stop)
—Scott v. State, 110 Nev. 622, 629-31, 877 P.2d 503, 508-09 (1994) (constitutional stop and frisk)

Inventory search
—Illinois v. Lafayette, 462 U.S. 640 (1983) (inventory search of arrestee's articles incident to incarceration reasonable)
—South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory search of seized automobile reasonable)
—Weintraub v. State, 110 Nev. 287, 871 P.2d 339 (1994) (search of vehicle failed to meet requirements for inventory search)
—State v. Greenwald, 109 Nev. 808, 858 P.2d 36 (1993) (search of motorcycle not justified either as incident to arrest or as inventory search)

Search of vehicle (see also inventory searches above)
—State v. Harnisch, 114 Nev. 225, 954 P.2d 1180 (1998) (exigent circumstances required for warrantless search of parked, unoccupied vehicle)
—Michigan v. Long, 463 U.S. 1032, 1049-52 (1983) (protective search during investigative stop reasonable under Terry v. Ohio, 392 U.S. 1 (1968))
—New York v. Belton, 453 U.S. 454 (1981) (search of passenger compartment incident to arrest proper)

Electronic surveillance: 18 U.S.C. §§ 2510-22; NRS 179.410-.515
—State v. Reyes, 107 Nev. 191, 808 P.2d 544 (1991)
—Summers v. State, 102 Nev. 195,n200, 718 P.2d 676, 680 (1986)
—Rupley v. State, 93 Nev. 60, 560 P.2d 146 (1977)

9.1.3 IDENTIFICATION
Unnecessarily suggestive identification procedure violates due process unless reliable under totality of circumstances
—Manson v. Brathwaite, 432 U.S. 98, 109-14 (1977)
—Wright v. State, 106 Nev. 647,n650, 799 P.2d 548, 550 (1990)
—Barone v. State, 109 Nev. 1168, 866 P.2d 291 (1993) (no right to counsel at pretrial photographic lineup)
—Echavarria v. State, 108 Nev. 734, 746-47, 839 P.2d 589, 597-98 (1992) (right to present expert testimony on reliability of eyewitness identification)

9.1.4 CONFESSIONS AND ADMISSIONS
Preliminary hearing on admissibility of defendant's statement: NRS 47.090
—Jackson v. Denno, 378 U.S. 368, 376, 394-95 (1964) (conviction based even in part on involuntary confession violates due process; out of presence of jury, court must find confession voluntary before jury allowed to consider it)
—Passama v. State, 103 Nev. 212, 735 P.2d 321 (1987) (effect of totality of circumstances on defendant's will determines voluntariness of confession)

Before custodial interrogation, arrestee must be informed, among other things, of right to remain silent and right to counsel
—Miranda v. Arizona, 384 U.S. 436, 467-73 (1966)
—Michigan v. Mosley, 423 U.S. 96 (1975) (after right to remain silent asserted and honored, later interrogation after renewed *Miranda* warnings proper)
—Arterburn v. State, 111 Nev. 1121, 901 P.2d 668 (1995) (despite *Miranda* warnings, confession inadmissible due to illegal arrest)
—Coleman v. State, 111 Nev. 657, 895 P.2d 653 (1995) (error to comment on defendant's postarrest silence whether or not defendant had received *Miranda* warnings)

Once right to counsel asserted, authorities cannot initiate further interrogation; waiver of right during such interrogation not valid
—Edwards v. Arizona, 451 U.S. 477, 484-87 (1981)
—Koza v. State, 102 Nev. 181, 718 P.2d 671 (1986)

—Sechrest v. State, 101 Nev. 360, 363-66, 705 P.2d 626, 629-31 (1985) (valid waiver after defendant initiated communications)

Nontestifying codefendant's admission implicating defendant cannot be used at joint trial
—Bruton v. United States, 391 U.S. 123 (1968)
—Richardson v. Marsh, 481 U.S. 200, 211 (1987) (codefendant's admission can be used when redacted to omit any reference to defendant's existence)
—Gray v. Maryland, ... U.S.n....., 118 S. Ct. 1151 (1998) (redaction replacing defendant's name with obvious indication of deletion prohibited by *Bruton* rule)
—Ducksworth v. State, 114 Nev. 951, 966 P.2d 165 (1998) (due to *Bruton* violation, reversible error not to grant severance of codefendants' trials)
—Lord v. State, 107 Nev. 28, 43-44, 806 P.2d 548, 557-58 (1991) (*Bruton* applies to penalty hearings)
—Davies v. State, 95 Nev. 553,r598 P.2d 636 (1979)

Evidence from court-ordered psychiatric examination
—Estelle v. Smith, 451 U.S. 454, 466-71 (1981) (not admissible unless defendant received *Miranda* warnings before exam and defense counsel received notice of exam)
—Powell v. Texas, 492 U.S. 680 (1989) (despite possible waiver of right to remain silent due to insanity defense, not admissible because counsel did not receive notice of exam)

9.2 DOUBLE JEOPARDY: U.S. Const. amend. V; Nev. Const. art. 1, § 8, cl. 1; NRS 174.085, 178.391
Conviction of two offenses based on one act not double jeopardy if each offense requires proof of fact which other does not
—Blockburger v. United States, 284 U.S. 299 (1932)
—Brown v. State, 113 Nev. 275, 285-87, 934 P.2d 235, 242-43 (1997)

Clearest proof is required to transform penalty intended by legislature to be civil into criminal punishment for double jeopardy purposes
—Hudson v. United States, ... U.S.n....., 118 S. Ct. 488 (1997)

Retrial violates double jeopardy unless manifest necessity existed for or defendant consented to earlier mistrial
—Benson v. State, 111 Nev. 692, 895 P.2d 1323 (1995)

9.3 SPEEDY TRIAL: U.S. Const. amends. VI, XIV; NRS 178.556
Deprivation of due process right to speedy trial determined by considering length of delay, reason for delay, assertion of right, and prejudice
—Barker v. Wingo, 407 U.S. 514,r530 (1972)
—Doggett v. United States, 505 U.S. 647, 651-52 (1992)
—Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998)
Appearance before magistrate: NRS 171.178
—County of Riverside v. McLaughlin, 500 U.S. 44, 56-57 (1991) (probable cause hearing required within 48 hours ofwarrantless arrest)
—Powell v. State, 113 Nev. 41, 43,r930 P.2d 1123, 1124 (NRS 171.178(3) unconstitutional to degree it conflicts with McLaughlin), *cert. denied*, ... U.S.n....., 118 S. Ct. 377 (1997)

9.4 SEVERANCE OF DEFENDANTS AND OFFENSES: NRS 173.115-.135, 174.155-.165
—Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998) (denial of motion to sever upheld where crimes were part of common scheme and joinder was not unfairly prejudicial)
—O'Brien v. State, 88 Nev. 488, 491-92, 500 P.2d 693, 695 (1972) (untimely motion)

9.5 DISQUALIFICATION OF JUDGE: NRS 1.225-.235; NCJC Canon 3E
—Kirksey v. State, 112 Nev. 980, 1005-07, 923 P.2d 1102, 1118-19 (1996)
—Vallardes v. District Court, 112 Nev. 79, 910 P.2d 256 (1996)

9.6 CONTINUANCES: NRS 174.515
Abuse of discretion standard
—Lord v. State, 107 Nev. 28, 40-43, 806 P.2d 548, 556-57 (1991) (penalty hearing)
—Banks v. State, 101 Nev. 771, 710 P.2d 723 (1985) (trial)

TRIAL: GUILT PHASE

10. PROSPECTIVE JURORS: U.S. Const. amends. VI, XIV
Jury venires must be drawn from representative cross-section of community
—Holland v. Illinois, 493 U.S. 474 (1990)
—Evans v. State, 112 Nev. 1172, 1186-87, 926 P.2d 265, 274-75 (1996), *cert. denied,* 520 U.S. 1245 (1997)

Examination of prospective jurors: NRS 175.031
—Mu'Min v. Virginia, 500 U.S. 415,r431 (1991) (Constitution does not require prospective jurors to be questioned on specific contents of pretrial publicity they were exposed to)
—Turner v. Murray, 476 U.S. 28, 36-37 (1986) (capital defendant accused of interracial crime has right to ask prospective jurors about racial bias)
—Adams v. Texas, 448 U.S. 38, 45 (1980) (voir dire is to ensure that juror will decide facts impartially and apply law conscientiously)
—Salazar v. State, 107 Nev. 982, 823 P.2d 273 (1991) (abuse of discretion to limit entire voir dire by defense to 30 minutes)
—Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (court's refusal to ask some proposed questions not error)
—Summers v. State, 102 Nev. 195, 199, 718 P.2d 676, 679 (1986) (individual voir dire without other prospective jurors not mandatory)

Challenges for cause: NRS 175.036
Jurors must be capable of considering death sentence
—Wainwright v. Witt, 469 U.S. 412 (1985)
—Witherspoon v. Illinois, 391 U.S. 510 (1968)
—Aesoph v. State, 102 Nev. 316,r318, 721 P.2d 379, 380-81 (1986)

Jurors must be capable of considering sentence other than death
—Morgan v. Illinois, 504 U.S. 719 (1992)

Peremptory challenges: NRS 175.041-.051
Equal Protection Clause prohibits purposeful exclusion of identifiable group from jury
—Purkett v. Elem, 514 U.S. 765 (1995)
—J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994)
—Georgia v. McCollum, 505 U.S. 42 (1992)
—Batson v. Kentucky, 476 U.S. 79 (1986)
—Doyle v. State, 112 Nev. 879, 887-91, 921 P.2d 901, 907-10 (1996)

11. EXCLUSION OF WITNESSES DURING TESTIMONY BY OTHERS: NRS 50.155
—Evans v. State, 112 Nev. 1172, 1188-89, 926 P.2d 265, 275-76 (1996) (if exclusion rule violated, prejudice presumed unless record shows otherwise), *cert. denied,* 520 U.S. 1245 (1997)

12. ADMISSIBILITY OF EVIDENCE (See also section 9.1 above.)
Relevant evidence: NRS 48.015-.035

Hearings on admissibility outside presence of jury: NRS 47.080-.090

Failure to object to evidence generally precludes appellate review
—Downey v. State, 103 Nev. 4, 7, 731 P.2d 350, 352-53 (1987)

Evidence of defendant's abstract beliefs violates First Amendment unless relevant to issue being tried
—Dawson v. Delaware, 503 U.S. 159 (1992)
—Flanagan v. State, 112 Nev. 1409, 1417-20, 930 P.2d 691, 696-98 (1996), *cert. denied,* ..... U.S.n....., 118 S. Ct. 1534 (1998)

Documentary and other physical evidence: NRS Chapter 52
Authentication: NRS 52.015-.175
—Frias v. Valle, 101 Nev. 219, 221-22, 698 P.2d 875, 876-77 (1985)

Proving contents of writing, recording, photograph: NRS 52.185-.295
Best evidence rule and exceptions: NRS 52.235-.255
—Tomlinson v. State, 110 Nev. 757, 878 P.2d 311 (1994)

Use of autopsy photographs of victim
—Robins v. State, 106 Nev. 611, 621-23, 798 P.2d 558, 565-66 (1990)

Chain of custody
—Sparks v. State, 104 Nev. 316, 318-20, 759 P.2d 180, 181-82 (1988)
—Burns v. Sheriff, 92 Nev. 533, 554 P.2d 257 (1976)

Character evidence generally inadmissible: NRS 48.045(1)

Proving character when relevant: NRS 48.055

Evidence of other wrongs or acts may be admissible to prove, e.g., motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident: NRS 48.045(2)
—Qualls v. State, 114 Nev. 900, 961 P.2d 765 (1998) (hearing to determine admissibility required before such evidence is introduced; admissible only if it is relevant, clear and convincing evidence supports it, and its probative value is not substantially outweighed by danger of unfair prejudice)
—Meek v. State, 112 Nev. 1288, 1292-95, 930 P.2d 1104, 1107-09 (1996) (such evidence improperly admitted)
—Taylor v. State, 109 Nev. 849, 854, 858 P.2d 843, 846-47 (1993) (such evidence not admissible to rebut claim not raised by defense)

Evidence of other act closely related to crime charged: NRS 48.035

Competency of witnesses: NRS 50.015-.025, 50.055-.068, 175.221(2)
—Felix v. State, 109 Nev. 151, 173-75, 849 P.2d 220, 235-37 (1993) (children)

Interpreter: NRS 50.045-.054

Scientific evidence
—Santillanes v. State, 104 Nev. 699, 703-05, 765 P.2d 1147, 1150-51 (1988)
Polygraph evidence
—United States v. Scheffer, ... U.S.n....., 118 S. Ct. 1261 (1998) (blanket rule against admission of polygraph evidence constitutional)
—Santillanes v. State, 102 Nev. 48, 714 P.2d 184 (1986)

Opinion evidence
Lay witnesses: NRS 50.265

Expert witnesses: NRS 50.275-.345, 175.271

Hearsay and exceptions: NRS Chapter 51
—Idaho v. Wright, 497 U.S. 805, 814-15 (1990) (Confrontation Clause prohibits admission of hearsay statement unless declarant unavailable and statement bears adequate indicia of reliability)
Prior testimony: NRS 171.198(6), 51.055, 50.115(4)
—Funches v. State, 113 Nev. 916, 919-23, 944 P.2d 775, 777-79 (1997)

Privileged communications: NRS Chapter 49

Screening witness from defendant; videotaped testimony: NRS 174.227-.229

—Felix v. State, 109 Nev. 151, 175-79, 849 P.2d 220, 237-39 (1993) (discussing Confrontation Clause and use of videotaped testimony and of out-of-court allegations of sexual abuse made by children)
—Coy v. Iowa, 487 U.S. 1012 (1988) (screen between witnesses and defendant violated Confrontation Clause)

13. EXAMINATION OF WITNESSES: NRS 50.115
Defendant must be allowed to cross-examine state's witnesses regarding bias
—Davis v. Alaska, 415 U.S. 308 (1974)
—Jones v. State, 108 Nev. 651, 659, 837 P.2d 1349, 1354 (1992)

14. MOTION FOR MISTRIAL
Ruling on motion for mistrial within court's sound discretion
—Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980)

Absent manifest necessity for or defendant's consent to mistrial, retrial violates double jeopardy
—Benson v. State, 111 Nev. 692, 895 P.2d 1323 (1995)

15. REOPENING CASE FOR INTRODUCTION OF EVIDENCE
After close of evidence, court "for good reasons, in furtherance of justice" may allow further evidence upon original cause: NRS 175.141(4)
—Williams v. State, 91 Nev. 533, 539 P.2d 461 (1975)

16. CONDUCT OF PROSECUTOR (See also section 27 below.)
—Darden v. Wainwright, 477 U.S. 168 (1986) (reversible error if prosecutor's misconduct violates due process right to fair trial)
—Murray v. State, 113 Nev. 11, 930 P.2d 121 (1997) (improper comment on defendants' postarrest silence)
—McKee v. State, 112 Nev. 642, 647-48, 917 P.2d 940, 943-44 (1996) (use of concealed evidence to impeach defendant violated prosecutor's duty to ensure that trial is fair)
—Williams v. State, 103 Nev. 106, 110, 734 P.2d 700, 703 (1987) (prosecutor's primary duty is to see that justice is done)

17. JURY INSTRUCTIONS: NRS 175.161
All instructions, whether given, modified, or refused, must be preserved as part of record: NRS 175.161(5)

Defendant has right to instruction on theory of case so long as some evidence, no matter how weak or incredible, supports it
—Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990)
—Walker v. State, 110 Nev. 571, 876 P.2d 646 (1994) (instruction on lesser included offense)

Capital jury must be instructed on lesser included offenses unless state law generally considers them not to be lesser included offenses
—Hopkins v. Reeves, ... U.S.n....., 118 S. Ct. 1895 (1998)

State has burden to prove every element of crime; mandatory presumptions not permissible: NRS 47.230
—Sandstrom v. Montana, 442 U.S. 510 (1979)
—Barone v. State, 109 Nev. 778, 858 P.2d 27 (1993) (must instruct that state has burden to prove lack of self-defense)
—Thompson v. State, 108 Nev. 749, 753-56, 838 P.2d 452, 455-57 (1992) (must instruct that state must prove presumed fact beyond reasonable doubt)

18. CONDUCT OF JUDGE (See also section 8 above.)
Physical control of defendant and witnesses: NRS 175.387, 178.394
—Holbrook v. Flynn, 475 U.S. 560 (1986) (uniformed troopers in courtroom not prejudicial to defendant's right to fair trial)
—Illinois v. Allen, 397 U.S. 337 (1970) (disruptive defendant can lose right to be present to confront witnesses)
—Dickson v. State, 108 Nev. 1, 822 P.2d 1122 (1992) (reversible error to allow jurors to see defendant in chains)
—Duckett v. State, 104 Nev. 6, 11, 752 P.2d 752, 755 (1988) (safety concerns accorded greater significance at penalty phase)
—White v. State, 105 Nev. 121, 771 P.2d 152 (1989) (defendant has no right to have inmate witness testify unrestrained and in civilian clothes)
—Thomas v. State, 94 Nev. 605, 608-09, 584 P.2d 674, 676-77 (1978) (jury properly admonished not to consider physical restraints imposed on defendant)

Court's examination of witness must be neutral and to seek truth
—Azbill v. State, 88 Nev. 240,r249,r495 P.2d 1064, 1070 (1972)

Instruction to deadlocked jury must not be coercive
—Staude v. State, 112 Nev. 1, 5-7, 908 P.2d 1373, 1376-77 (1996)

Sequestration of jury within discretion of district court: NRS 175.391
—Rogers v. State, 101 Nev. 457, 462-63, 705 P.2d 664, 668 (1985)
—Crew v. State, 100 Nev. 38, 42-43, 675 P.2d 986, 988-89 (1984)

Court cannot unreasonably restrict closing argument
—Collier v. State, 101 Nev. 473, 481-82, 705 P.2d 1126, 1131-32 (1985)

19. CONDUCT OF JURORS: NRS 175.011-.131, 175.391-.471
Communication with nonjurors
—Falcon v. State, 110 Nev. 530, 533, 874 P.2d 772, 774 (1994) (presence of alternate juror during first two hours of deliberations created rebuttable presumption of prejudice)
—Isbell v. State, 97 Nev. 222,r226,r626 P.2d 1274, 1276-77 (1981) (respondent has burden to prove communications not prejudicial)

20. CONDUCT OF DEFENDANT
Disruptive defendant: NRS 175.387

Right of confrontation, presumption of innocence, safety concerns
—Illinois v. Allen, 397 U.S. 337 (1970) (disruptive defendant can lose right to be present to confront witnesses)
—Dickson v. State, 108 Nev. 1, 822 P.2d 1122 (1992) (reversible error to allow jurors to see defendant in chains)
—Duckett v. State, 104 Nev. 6, 11, 752 P.2d 752, 755 (1988) (safety concerns accorded greater significance at penalty phase)

—Thomas v. State, 94 Nev. 605, 608-09, 584 P.2d 674, 676-77 (1978) (jury properly admonished not to consider physical restraints imposed on defendant)

Right to self-representation—see section 5 above

21. VERDICT: NRS 175.481-.541

Verdict must be unanimous: NRS 175.481

Constitution does not require jury unanimity on alternative theories of premeditated murder and felony murder

—Evans v. State, 113 Nev. 885, 893-96, 944 P.2d 253, 258-60 (1997)

Conviction of lesser included offense or attempt: NRS 175.501

—Cunningham v. State, 113 Nev. 897, 908-09, 944 P.2d 261, 268 (1997) (after conviction for lesser offense, defendant cannot complain that evidence proves greater offense)

—Ewish v. State, 111 Nev. 1365, 904 P.2d 1038 (1995) (defendant entitled to instruction on lesser related offense)

22. MOTION TO SET ASIDE VERDICT FOR INSUFFICIENT EVIDENCE: NRS 175.381

—Evans v. State, 112 Nev. 1172, 1193-94, 926 P.2d 265, 278-79 (1996), *cert. denied,* 520 U.S. 1245 (1997)

TRIAL: PENALTY PHASE

23. SEPARATE PENALTY HEARING FOR FIRST-DEGREE MURDER: NRS 175.552-.562

24. DEATH PENALTY NOT PERMITTED FOR SOME DEFENDANTS

Defendant younger than sixteen at time of crime: NRS 176.025

—Thompson v. Oklahoma, 487 U.S. 815 (1988) (plurality opinion)

—Stanford v. Kentucky, 492 U.S. 361 (1989) (death penalty for defendant sixteen years old at time of murder constitutional)

Defendant who did not kill, attempt to kill, or intend use of lethal force or was not major participant in felony and recklessly indifferent to human life. *Cf.* NRS 200.033(4).

—Enmund v. Florida, 458 U.S. 782, 797 (1982)

—Tison v. Arizona, 481 U.S. 137, 158 (1987)

—Doleman v. State, 107 Nev. 409, 417-18, 812 P.2d 1287, 1292 (1991)

Defendant who is insane at time of execution: NRS 176.455(1)

—Ford v. Wainwright, 477 U.S. 399 (1986)

Constitution permits execution of mentally retarded person

—Penry v. Lynaugh, 492 U.S. 302, 330-35 (1989)

Defendant who is pregnant: NRS 176.475(2)

25. PENALTY PHASE EVIDENCE

—Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998) (describing process jury must follow in considering evidence and determining sentence)

25.1 EVIDENCE IN MITIGATION

Defendant may present and each juror must consider any mitigating evidence: NRS 200.035

—McKoy v. North Carolina, 494 U.S. 433 (1990) (each juror must be permitted to consider and give effect to mitigating evidence)

—Penry v. Lynaugh, 492 U.S. 302, 319-28 (1989) (instructions unconstitutional where they did not permit jury to give effect to mitigating evidence)

—Skipper v. South Carolina, 476 U.S. 1 (1986) (unconstitutional to preclude evidence of defendant's good behavior while incarcerated)

—Eddings v. Oklahoma, 455 U.S. 104 (1982) (sentencer cannot refuse to consider any relevant mitigating evidence)

—Green v. Georgia, 442 U.S. 95 (1979) (unconstitutional to exclude relevant and reliable hearsay evidence at sentencing)

—Lockett v. Ohio, 438 U.S. 586, 602-08 (1978) (statute cannot preclude sentencer from considering mitigating evidence)

—Gardner v. Florida, 430 U.S. 349 (1977) (confidential sentence report violates due process; defendant must have opportunity to deny or explain information used at sentencing)

—Geary v. State, 114 Nev. 100, 952 P.2d 431 (1998) (specifying jury instruction on finding and weighing of aggravators and mitigators)

—Harris v. State, 106 Nev. 667, 671, 799 P.2d 1104, 1106 (1990)

As long as state must prove aggravating circumstances, it is constitutional to require defendant to prove mitigating circumstances

—Delo v. Lashley, 507 U.S. 272, 276 (1993)

—Witter v. State, 112 Nev. 908, 923, 921 P.2d 886, 896 (1996) (defendant has no right to argue last), *cert. denied,* 520 U.S. 1217 (1997)

—Gallego v. State, 101 Nev. 782, 790, 711 P.2d 856, 862 (1985)

Defendant's right to allocution

—Homick v. State, 108 Nev. 127, 132-34, 825 P.2d 600, 603-05 (1992)

25.2 EVIDENCE IN AGGRAVATION

Notice: NRS 175.552(3); SCR 250(4)(c)-(f)

—Kirksey v. State, 107 Nev. 499, 503, 814 P.2d 1008, 1010 (1991) (three-judge panel improperly found unnoticed aggravators)

—Emmons v. State, 107 Nev. 53, 62, 807 P.2d 718, 724 (1991) (one day's notice insufficient to comply with due process)

Only enumerated circumstances can aggravate first-degree murder, but other evidence relevant to sentencing is admissible: NRS 175.552(3), 175.554(3), 200.030(4)(a), 200.033

—Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998) (describing process jury must follow in considering evidence and determining sentence)

Use of codefendant admissions at penalty hearings governed by Bruton v. United States, 391 U.S. 123 (1968) (See section 9.1.4 above.)

—Lord v. State, 107 Nev. 28, 44, 806 P.2d 548, 558 (1991)

Aggravator can duplicate element of first-degree murder
—Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988)
—Atkins v. State, 112 Nev. 1122, 1134, 923 P.2d 1119, 1127 (1996), *cert. denied*, 520 U.S. 1126 (1997)

Psychiatric evidence on defendant's future dangerousness inadmissible
—Redmen v. State, 108 Nev. 227, 234, 828 P.2d 395, 400 (1992), *overruled on other grounds by* Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995)

Victim impact evidence: NRS 175.552 (3), 176.015
—Payne v. Tennessee, 501 U.S. 808 (1991) (Eighth Amendment does not bar victim impact evidence)
—Sherman v. State, 114 Nev. 998, 1012, 965 P.2d 903, 914 (1998) (evidence of victim impact from previous crimes not admissible)
—Rippo v. State, 113 Nev. 1239, 1261, 946 P.2d 1017, 1031 (1997) (victim cannot express opinion regarding sentence in capital case)

Evidence of defendant's abstract beliefs violates First Amendment unless evidence bears on issue being tried
—Dawson v. Delaware, 503 U.S. 159 (1992)
—Flanagan v. State, 109 Nev. 50, 846 P.2d 1053 (1993)

26. SPECIFIC STATUTORY AGGRAVATING CIRCUMSTANCES: NRS 200.033(1)-(13)

Murder committed by person under sentence of imprisonment: NRS 200.033(1)
—Geary v. State, 112 Nev. 1434, 1447-48, 930 P.2d 719, 728 (1996) (not duplicative to NRS 200.033(2)), *reh'g granted on other grounds*, 114 Nev. 100, 952 P.2d 431 (1998)
—McNelton v. State, 111 Nev. 900, 907-08, 900 P.2d 934, 938 (1995) (aggravator applies to defendant released from incarceration but still serving sentence)

Murder committed by person previously convicted of murder or felony involving use or threat of violence: NRS 200.033(2)
—Greene v. State, 113 Nev. 157, 171-72, 931 P.2d 54, 63 (1997) (applies to conviction in prior proceeding, unlike NRS 200.033(12), which applies to multiple murders in instant proceeding)
—Geary v. State, 112 Nev. 1434, 1447-48, 930 P.2d 719, 728 (1996) (not duplicative to NRS 200.033(1)), *reh'g granted on other grounds*, 114 Nev. 100, 952 P.2d 431 (1998)
—Hogan v. Warden, 109 Nev. 952, 956-57, 860 P.2d 710, 713-14 (1993) (evidence of use or threat of violence in prior conviction)
—Riley v. State, 107 Nev. 205, 216-17, 808 P.2d 551, 558 (1991) (separate prior convictions are basis for separate aggravators)
—Emil v. State, 105 Nev. 858, 864-65, 784 P.2d 956, 960 (1989) (previous conviction need only precede sentencing)
—Johnson v. Mississippi, 486 U.S. 578 (1988) (death sentence must be reexamined if based in part on prior conviction later reversed)

Murder committed by person who knowingly created great risk of death to more than one person: NRS 200.033(3)
—Flanagan v. State, 112 Nev. 1409, 1420-21, 930 P.2d 691, 699 (1996) (discussing application in relation to NRS 200.033(12)), *cert. denied*, ... U.S.n....., 118 S. Ct. 1534 (1998)
—Hogan v. Warden, 109 Nev. 952, 957-59, 860 P.2d 710, 714-15 (1993) (sufficient evidence of course of conduct creating great risk)
—Moran v. State, 103 Nev. 138, 142, 734 P.2d 712, 714 (1987) (insufficient evidence of aggravator)

Murder involved robbery, first-degree arson, burglary, invasion of home, or first-degree kidnapping and defendant killed, attempted to kill, or knew or had reason to know that life would be taken or lethal force used: NRS 200.033(4)
—Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998) (improper to find robbery aggravator and receiving money aggravator based on same facts)
—Bennett v. State, 106 Nev. 135, 141-43, 787 P.2d 797, 801-02 (1990) (need not charge crime to use it as aggravator; if each crime could be prosecuted separately, each can be used as separate aggravator; underlying felony in felony-murder can be used as aggravator)

Murder committed to avoid arrest or to escape from custody: NRS 200.033(5)
—Evans v. State, 112 Nev. 1172, 1196, 926 P.2d 265, 280-81 (1996) (arrest need not be imminent and victim need not be effecting arrest to find aggravator), *cert. denied*, 520 U.S. 1245 (1997)
—Witter v. State, 112 Nev. 908, 929, 921 P.2d 886, 900 (1996) (insufficient evidence of aggravator), *cert. denied*, 520 U.S. 1217 (1997)

Murder committed for purpose of receiving money or thing of monetary value: NRS 200.033(6)
—Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998) (improper to find robbery aggravator and receiving money aggravator based on same facts)

Murder committed upon peace officer or fireman: NRS 200.033(7)

Murder involved torture or mutilation of victim: NRS 200.033(8)
—Rippo v. State, 113 Nev. 1239, 1263-64, 946 P.2d 1017, 1032-33 (1997) (torture need not be cause of death)
—Browne v. State, 113 Nev. 305, 315-17, 933 P.2d 187, 193-94 (mutilation constitutionally defined and supported by sufficient evidence), *cert. denied*, ... U.S.n....., 118 S. Ct. 198 (1997)
—Domingues v. State, 112 Nev. 683, 702, 917 P.2d 1364, 1377 (1996) (insufficient evidence of torture, mutilation, or depravity of mind)
—Smith v. State, 110 Nev. 1094, 1104, 881 P.2d 649, 655 (1994) (former aggravating factor of depravity of mind required limiting instruction)
—Pertgen v. State, 110 Nev. 554, 561-63, 875 P.2d 361, 365-66 (1994) (torture unconstitutionally vague without defining instruction)
—Jimenez v. State, 106 Nev. 769, 774, 801 P.2d 1366, 1369 (1990) (despite disjunctive language, NRS 200.033(8) embraces only one aggravating circumstance)

Murder committed at random and without apparent motive: NRS 200.033(9)
—Geary v. State, 112 Nev. 1434, 1445-47, 930 P.2d 719, 726-27 (1996) (aggravator not unconstitutionally vague but applied too broadly to facts of case), *reh'g granted on other grounds*, 114 Nev. 100, 952 P.2d 431 (1998)
—Paine v. State, 107 Nev. 998, 823 P.2d 281 (1991) (aggravator can be found if robbery could have been completed without killing victim)

Murder committed upon person less than fourteen years of age: NRS 200.033(10)

Murder committed because of victim's race, color, religion, national origin, disability, or sexual orientation: NRS 200.033(11)

Defendant was convicted, in immediate proceeding, of more than one murder: NRS 200.033(12)
—Greene v. State, 113 Nev. 157, 171-72, 931 P.2d 54, 63 (1997) (applies to convictions in instant proceeding, unlike NRS 200.033(2), which applies to convictions in previous proceedings)

Defendant subjected or attempted to subject victim to nonconsensual sexual penetration: NRS 200.033(13)

27. CLOSING ARGUMENT AND CONDUCT OF PROSECUTOR (See also section 16 above.)

—Caldwell v. Mississippi, 472 U.S. 320 (1985) (improper to minimize jurors' sense of responsibility in determining death sentence)

—McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998) (improper to suggest jury is responsible for future victims or must choose between defendant and future victims)

—Riley v. State, 107 Nev. 205,r219, 808 P.2d 551, 559-60 (1991) (arguing future dangerousness proper if supported by evidence)

—Howard v. State, 106 Nev. 713, 718-19, 800 P.2d 175, 178 (1990) (prosecutor improperly injected personal beliefs and warned of escape without supporting evidence)

—Flanagan v. State, 104 Nev. 105, 754 P.2d 836 (1988) (among other things, state improperly referred to defendant's failure to testify)

—Collier v. State, 101 Nev. 473, 477-81, 705 P.2d 1126, 1128-31 (1985) (among other things, prosecutor improperly discussed matters not in evidence, told defendant he deserved to die, and implied that death sentence was justified to save money)

28. JURY INSTRUCTIONS

Defining aggravators: sentencing scheme must channel sentencer's discretion by clear and objective standards and genuinely narrow class of persons eligible for death penalty

—Arave v. Creech, 507 U.S. 463 (1993) (state court's limiting construction of statutory aggravating circumstance constitutional)

—Shell v. Mississippi, 498 U.S. 1 (1990) (state court's limiting construction of statutory aggravator unconstitutionally vague)

—Pertgen v. State, 110 Nev. 554, 560-63, 875 P.2d 361, 364-66 (1994) (failure to define "torture" constitutional error)

Considering mitigating and aggravating circumstances: NRS 200.030(4)(a)

—Geary v. State, 114 Nev. 100, 952 P.2d 431 (1998) (specifying jury instruction on finding and weighing of aggravating and mitigating circumstances and determining whether death sentence is appropriate)

—Bennett v. State, 111 Nev. 1099, 1110, 901 P.2d 676, 683 (1995) (death sentence not mandatory even ifmitigators do not outweigh aggravators)

Mitigating circumstances: NRS 175.554(1), 200.030(4)(a), 200.035

Court shall instruct jury on mitigating circumstances alleged by defense upon which evidence has been presented: NRS 175.554(1)

—Delo v. Lashley, 507 U.S. 272 (1993) (court not required to instruct on mitigating circumstance when defendant offered no evidence to support it)

Jury not to be instructed on possible sentence modification

—Sonnerv. State, 114 Nev. 321,r955 P.2d 673 (1998)

Instruction to deadlocked jury must not be coercive

—Lowenfield v. Phelps, 484 U.S. 231,r241 (1988)

—Staude v. State, 112 Nev. 1, 5-7, 908 P.2d 1373, 1376-77 (1996)

Advisory instruction to acquit: NRS 175.381(1)

29. VERDICT

Verdict form for death sentence must be signed by foreman, designate aggravators found beyond reasonable doubt, and state that mitigators do not outweigh aggravators: NRS 175.554(4)

—Rogers v. State, 101 Nev. 457,r469, 705 P.2d 664, 672 (1985) (form need not specify mitigating circumstances found)

NEW TRIAL; SECOND PENALTY HEARING; APPEAL AND HABEAS REVIEW; STAYS

30. MOTION FOR NEW TRIAL: NRS 176.515, 175.381(3)

—Walker v. State, 113 Nev. 853, 873, 944 P.2d 762, 775 (1997) (newly discovered evidence as basis for new trial)

—State v. Crockett, 84 Nev. 516, 444 P.2d 896 (1968) (trial court properly exercised discretion in granting new trial)

31. SECOND PENALTY HEARING

If jury fails to reach unanimous verdict, three-judge panel decides sentence: NRS 175.556(1)

—Paine v. State, 110 Nev. 609, 617-18, 877 P.2d 1025, 1030 (1994) (three-judge panels constitutional; no right to voir dire judges)

—Hill v. State, 102 Nev. 377, 724 P.2d 734 (1986) (three-judge panels constitutional)

When defendant is not sentenced to death in original trial, death penalty cannot be imposed on retrial

—Arizona v. Rumsey, 467 U.S. 203 (1984)

—Bullington, Missouri, 451 U.S. 430 (1981)

State may seek death penalty at second penalty hearing after death sentence reversed on appeal

—Hitchcock v. Dugger, 481 U.S. 393, 399 (1987)

—Poland v. Arizona, 476 U.S. 147 (1986)

—Collier v. State, 103 Nev. 563, 747 P.2d 225(1987)

32. APPEAL AND HABEAS REVIEW

Automatic appeal of judgment of death; mandatory review: NRS 177.055

Petition for writ of habeas corpus: NRS 34.820, 34.360-.830

"Next friend" has right to file habeas petition on behalf of incompetent person held in custody

—Calambro v. District Court, 114 Nev. 961, 964 P.2d 794 (1998)

Failure to object or request instruction generally precludes appellate review of issue, but court may review plain error affecting substantial rights or constitutional error *sua sponte*: NRS 178.602

—Walch v. State, 112 Nev. 25, 34, 909 P.2d 1184, 1189 (1996)

—Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (to warrant review, appellant must show that alleged error was patently prejudicial)

Court must dismiss habeas petition if grounds could have been raised in earlier proceeding, unless petitioner demonstrates cause for failure to raise grounds earlier and actual prejudice: NRS 34.810
—Mazzan v. Warden, 112 Nev. 838, 842, 921 P.2d 920, 922 (1996) (despite failure to demonstrate cause, court must review claim if failure to consider it would result in fundamental miscarriage of justice)

Right to counsel on direct appeal: NRS 178.397; SCR 250(2)(c),(e)
—Evitts v. Lucey, 469 U.S. 387 (1985) (defendant has right to effective assistance of counsel on first appeal as of right)
—Didomenico v. State, 110 Nev. 861, 877 P.2d 1069 (1994) (court has no discretion to deny appointed counsel to indigent defendant)

Right to counsel in postconviction proceedings: NRS 34.820(1)
—Crump v. Warden, 113 Nev. 293, 303-04, 934 P.2d 247, 253 (1997) (petitioner has right to effective assistance if counsel was appointed per statutory mandate, and ineffective assistance constitutes cause to overcome procedural default)

Effective assistance of counsel
—Strickland v. Washington, 466 U.S. 668 (1984)
—Kirksey v. State, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996)

Appellate court may reweigh aggravating and mitigating evidence and uphold death sentence based in part on invalid aggravator; automatic affirmance based on remaining valid aggravator not constitutional
—Clemons v. Mississippi, 494 U.S. 738 (1990)
—Tuggle v. Netherland, 516 U.S. 10 (1995) (remaining valid aggravator may not excuse constitutional error in admitting or excluding evidence)
—Parker v. Dugger, 498 U.S. 308 (1991) (reweighing erroneous where appellate court overlooked finding of mitigating evidence)
—Johnson v. Mississippi, 486 U.S. 578 (1988) (death sentence must be reexamined if based in part on prior conviction later reversed)
—Pertgen v. State, 110 Nev. 554, 563-64, 875 P.2d 361, 366-67 (1994)
—Canape v. State, 109 Nev. 864, 879-82, 859 P.2d 1023, 1032-35 (1993)

Retroactive application of judicial rulings
—Bousley v. United States, ... U.S.n....., ..., 118 S. Ct. 1604, 1609-10 (1998)
—O'Dell v. Netherland, ... U.S.n....., 117 S. Ct. 1969 (1997)
—Lambrix v. Singletary, 520 U.S. 518, 526-40 (1997)

33. STAY OF EXECUTION OF DEATH PENALTY: NRS 176.415, 176.486-.492

Death penalty not permitted for defendant insane at time of execution: NRS 176.455(1)
—Ford v. Wainwright, 477 U.S. 399 (1986)

Death penalty not permitted for pregnant defendant: NRS 176.475(2)
[Added effective January 29, 1999.]