January 2010

FREE LEGAL SEMINAR

ON

What Can You Do About Your Conviction?

A Quick Journey through the Land of Appeals, Sealing of Records, Writs & the Pardons Board

A Washoe County Law Library Community Service Program

Speaker: Richard Cornell, Esq.
Date: Thurs., Jan. 28, 2010
Location: Washoe County Law Library
75 Court St., Old Courthouse
Time: 5:00 – 7:00 PM

Due to limited space please sign up ahead of time by contacting the Washoe County Law Library at

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(See Carson City)

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FREQUENTLY ASKED QUESTIONS AND ANSWERS

APPEALS

1. If I am convicted of a misdemeanor in Justice Court or Municipal Court, where does my appeal go?

A: You file the Notice of Appeal in the court where the conviction occurred. The appeal is heard by one judge of the District Court in the District where the Muni. or Just. Court in question is located. See: Nev. Const., Art. 6, sec. 6. Also NRS 5.080; NRS 189.010.

2. How long do I have to file my Notice of Appeal?

A: In Justice Court, 10 days from rendition of judgment. NRS 189.010. In Municipal Court, statutes are silent. Probably no more than 30 days per NRAP 4(b).

3. Can I get a trial de novo for my appeal in district court?

A: No. Municipal Courts are generally courts of record (NRS 5.010), and Reno Muni/Sparks Muni are. Justice Courts are courts of record, and the transcript of the trial must be sent by the Justice Court Clerk with a certified copy of the docket to the District Court Clerk. NRS 189.030 (and see 189.035).

4. If I lose my appeal in district court, can I take my case to the Nevada Supreme Court?

A: Only on a Petition for Writ of Review. See: NRS 34.010. Petition is discretionary (i.e., the Nevada Supreme Court does not have to hear it); and Court will only hear issues re. the justice/municipal court exceeding its jurisdiction. See: Zamarippa v. First Judicial District, 103 Nev. 638, 747 P.2d 1386 (1987).

5. If I plead guilty, can I appeal?

A: Yes, but your chances of winning are extremely slim. See: Bryant v.

State, 102 Nev. 268, 272, 721 P.2d 721 (1986) [a defendant may not challenge the validity of a guilty plea on direct appeal from the judgment of conviction, but must raise a challenge to the validity of the guilty plea in the first instance, either by bringing a motion to withdraw the guilty plea or by initiating a post-conviction proceeding); and see: Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159 (1976) [appellate court will not interfere with sentence imposed, as long as record does not demonstrate prejudice resulting from consideration in sentencing proceeding of information or accusations founded on facts supported only by "impalpable" or "highly suspect" evidence].

6. Can I appeal on the grounds that my lawyer was ineffective?

A: Very rarely. Generally, claims of ineffective assistance of counsel are reviewed only in post-conviction proceedings. Pellegrini v. State, 117 Nev. 860, 881-84, 34 P.3d 519 (2001); Corbin v. State, 111 Nev. 378, 381, 892 P.2d 580, 582 (1995); Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981).

7. Under what circumstances can I appeal to the Nevada Supreme Court?

A: From a final judgment of the District Court (a felony or a gross misdemeanor). NRS 177.015 (and State can appeal, too, in certain circumstances - but not from a not guilty verdict).

8. How long do I have to appeal to the Nevada Supreme Court?

A: 30 days after entry of judgment. NRAP 4(b).

9. After I file the Notice of Appeal to the Nevada Supreme Court, what happens?

A: See NRAP 3C. If a Category "A" felony with life sentence, then full briefing. If not, then Fast Track Statement. Court can (and usually will) decide the appeal based on the Fast Track Statement and response, but can order further briefing.

10. After I file the Notice of Appeal in Muni. or Justice Court to the district court, what happens?

A: Beware: NRS 189.065 (must set for hearing within 60 days after Notice of Appeal filed) a carryover from old "trial de novo" days, doesn't really apply. Not an issue in 2d J.D., as Court will issue a briefing schedule. Potential big problem in 1st, 3rd, 4th, 7th and 9th, as those Courts do not.

HABEAS CORPUS WRITS

11. When do I file a Petition for Writ of Habeas Corpus?

A: NRS 34.726: Within one year of entry of judgment or, if timely appeal taken, within one year of issuance of remittitur. (If out of time, procedural default; must show "cause" external to the defense justifying delay to avoid petition being dismissed).

12. Can I file a Petition for Writ of Habeas Corpus after a misdemeanor conviction?

A: Open question. Under old NRS ch. 177 proceedings, no. Ferreira v. City of Las Vegas, 106 Nev. 386, 793 P.2d 1328 (1990). But ch. 177 no longer applies. NRS 34.724 et. seq. is exclusive procedure for post-conviction habeas. Based on literal language of NRS 34.726, yes if jail sentence imposed (including suspended jail sentence). Nevada Supreme Court has not decided issue.

13. What issues can I raise in a habeas petition?

A: NRS 34.810(1)(b) - cannot raise anything that could have been raised on direct appeal. Therefore, generally: 1) Ineffective assistance of counsel at trial; 2) Ineffective assistance of counsel on appeal; 3) Guilty plea or nolo contendere plea involuntary; 4) (rare - rarely discovered) - State withheld exculpatory evidence from defendant.

(Note: NRS ch. 34 writs can also address miscalculation of time by timekeeper's office of D.O.C. Those petitions are filed in the District where the prisoner is located. See: NRS 34.724(2)(c); Pangallo v. State, 112 Nev. 1533, 930 P.2d 100 (1996)).

14. Can I have a lawyer appointed to represent me?

A: NRS 34.750 - if issues complex or difficult, and/or if discovery needed to proceed. (Judge's call)

15. Can I get bail pending a petition of habeas corpus?

A: Rarely - and only then for the duration of the habeas proceeding before the District Court. See: NRS 178.4871-4873.

16. Are there any procedures I can try instead of or in addition to a ch. 34 NRS habeas proceeding?

A(1): NRS 176.165. Motion to set aside guilty plea. See: Hart v. State, 116 Nev. 558, 1 P.3d 969 (2000) [one year period of limitations of NRS 34.726 does not apply; but motions are subject to "the doctrine of laches"].

A(2): NRS 176.555 - illegal sentence. Can challenge at any time. But illegality of sentence must appear from face of judgment. See: Edwards v. State, 112 Nev. 704, 918 P.2d 321 (1996).

A(3): Motion to Modify Sentence. Only if judge made material mistake of fact re. criminal history working to the extreme detriment of the defendant. Passanisi v. State, 108 Nev. 318, 831 P.2d 1371 (1992). Otherwise, court has no jurisdiction to modify sentence once defendant begins to serve it. (But: Can modify terms and conditions of probation while probation ongoing. See: NRS 176A. 450)

17. Can I file a motion to make the judge terminate my probation early?

A: You can't, but your probation officer can. NRS 176A. 850(1)(b).

18. Can I file a habeas petition if I'm off probation or parole?

A: No. You must be "under sentence" when you file petition. State v. Baliotis, 98 Nev. 176, 643 P.2d 1223 (1982).

SEALING OF RECORDS

19. If I successfully complete probation or parole, is my record automatically sealed?

A: No. Per NRS 176A. 850, if you have been honorably discharged from probation, you may get your civil rights restored (right to vote, right to serve on jury, right to hold office) unless your conviction was a Category "A" felony or "B" involving force or violence. Right to bear arms is not restored, and while you wouldn't have to register as an ex-felon, you would have to register as a sex offender. But your felony remains of record, and can be used against you in a court of law.

20. If I do drug court (successfully), are my records sealed?

A: Depends. If you do drug court (or probation) for possession of controlled substance, then 453.3363 - not a conviction. 453.3365 - can seal 3 years after entry of "judgment." But drug court for anything else (even internal possession, or being under the influence) (or probation) - or diversion does not have a similar statute under NRS 458.290 et. seq. Under 458.320, sentence is deferred. Per NRS 458.330(2) conviction set aside. See Q. 21.

21. If I'm arrested and the charges against me are dismissed, can I seal the arrest? (I.e., do I have to be convicted in order to seal?)

A: Yes (i.e., no). NRS 179.255 - Must follow procedures of petition for sealing under NRS 179.245.

22. Are my juvenile records automatically sealed? Do I have to do anything to seal them? Even if they are sealed, can anybody look at them?

A: 62H.130 - if child is less than 21, and it has been 3 years (or more) since the last adjudication, child or probation officer can petition to seal. 62H.140 - at age 21, all records must be sealed. 62H.150 - Exceptions: Sex offenses cannot be sealed until juvenile reaches 30. Likewise, acts involving threats or use of force or violence which would have been felony if committed by an adult. And, you can't seal if you have any offenses between ages 21 and 30 (except parking or

traffic infractions). 62H.170 - court can look at if former juvenile is to be sentenced in a criminal proceeding and is less than 21. D.A. or defense attorney can unseal on petition and order. Agency charged with psychiatric care of former juvenile can petition to unseal.

23. I was convicted of a misdemeanor. How long do I have to wait before I can have my conviction sealed?

A: D.U.I. or domestic battery/domestic violence - 7 years. Any other misdemeanor - 2 years. NRS 179.245(1)(e), (f).

24. I was convicted of a gross misdemeanor. How long do I have to wait before I can have my conviction sealed?

A: 7 years. NRS 179.245(1)(d).

25. I was convicted of a felony. How long do I have to wait before I can seal my record?

A: If category A or B felony, 15 years. If category C or D felony, 12 years. If category E felony (and NRS 453.3363-65 or 458 do not apply), 7 years. NRS 179.245(1)(a), (b), (c).

26. When you say "2 years," "7 years," "12 years," or "15 years," what is the starting date for that period of time?

A: From discharge of custody, or discharge of parole or probation, whichever occurs later. (I.e., not date of sentencing - unless sentence was fine only and you paid the fine on the date of sentencing.)

27. What if I had another conviction between the "2 years," "7 years," "12 years," or "15 years"?

A: Then you blew it. Per NRS 179.245(4), court must find that in the period in question you weren't charged with any offense (or convicted) except for minor moving or standing traffic violation. I.e., you have to get that "later offense" sealed first. Big issue: NRS 484.3792(2) [felony D.U.I. for all D.U.I.'s

after a felony D.U.I., regardless of when).

28. What must accompany a petition to seal?

A: Current, verified record of criminal history received from Central Repository for Nevada Records of Criminal History (from Nevada Department of Public Safety in Carson City) and the local law enforcement agency of the city or county where the conviction happened. (Note: Statute does not require F.B.I. rap sheet! However, must list all agencies reasonably known that have possession of records.)

29. Where do I file my petition?

A. In the court that entered the conviction. (Note: 2d J.D. has been charging a filing fee!)

30. Can I seal a prior sex offense or crime against child?

A: No. NRS 179.245(5), (7). (Note: if prior sex offense/offense against a child occurred so long ago that it would have been sealable at one time, before the change in that part of the law, would it be "grandfathered" in? Unknown: but see Miller v. Warden, 112 Nev. 930, 921 P.2d 882 (1996)).

31. Will the F.B.I. honor a state court order sealing a record?

A: They don't have to. Orders are to be given full faith and credit under Art. IV, sec. I of U.S. Constitution; but if F.B.I. saw strong policy reason for ignoring (e.g., a domestic violence conviction being sealed), they might ignore. State court cannot tell them not to!

32. What if I "just can't wait" that long to get my record sealed? Do I have any recourse?

A: The Pardons Board.

PARDONS BOARD

33. Who are the Pardons Board, and what can they do?

A: The Pardons Board consists of the Governor, the Attorney General and the Justices of the Nevada Supreme Court (7 in number currently). Nev. Const., Art. 5, sec. 14. They can (and routinely do) grant pardons for people in the community. They also can (and routinely do) grant commutations for prisoners. They theoretically can (but to my knowledge never have) grant pardons for prisoners.

34. How do I apply for a pardon?

A: You fill out an application with the Executive Secretary of the Pardons Board (part of the Dept. of Parole Commissioners - David Smith/Brian Campoleiti). The Executive Secretary or 1 of the 9 members can put you on the agenda.

35. Do I automatically get a pardon (or commutation) once I fill out and turn in my paperwork?

A: No! The Board will meet and the Executive Secretary will put together an agenda. In fact, if you are a prisoner, your chances of getting on the agenda are about 1%!

36. How often does the Pardons Board meet?

A: Basically, whenever they can. In recent history, one day in October or November for prisoners, and the next day for community pardons. In 2010, they are having an extra meeting to consider overflow cases from 2009 in April.

37. If I get on the Pardons Board agenda, does that mean I win?

A: No. You have to take the majority vote, and the Governor has to be in the majority. Nev. Const., Art 5, sec. 14. (Note: Currently pending, McKinney v. Smith, Nev. Sup. Ct., No. 53952 - "Majority" of those elected, or "majority" of those present at the meeting?)

38. Will the Pardons Board hear my case, if I haven't yet sealed my arrest record or attempted to?

A(1): As a practical matter, you would have to show cause why a sealing would do you no good, or you would be harmed by having to wait that long. (E.g., undocumented workers, where ICE knows of conviction; or professional license situation). Even then the Board likely won't hear you if you're only "year one" into your waiting period.

A(2): Community Board can also hear petitions to get off parole. Parolee must follow NRS 176.033(2) procedure, if has spent half of time or at least 10 consecutive years on parole. (I.e., have P & P do investigation, then Chief decides whether to petition to district court to modify sentence. If he decides no, then can seek Pardons Board order.)

39. If my application is accepted for the Agenda, can anybody come to the hearing to speak for me or speak against me?

A: Yes. The District Attorney, the Court that sentenced you, and the victim (if any) will have the opportunity to speak against or for you. You can also present character letters/witnesses. NRS 213.020, 213.095.

40. Can the Pardons Board "condition" the Pardon?

A: Yes. See: NRS 213.090. Typically, the condition that might be imposed is a Pardon without right to bear arms. (Note: This may cause a problem for undocumented workers!)

Effective date of the 1976 amendment.
The 1976 amendment to this section, which increased the elective term of office for district court judges from four to six years, became effective on the date the votes for the amendment were canvassed, and the amendment had only prospective application. Torvinen v. Rollins, 93 Nev. 92, 560 P.2d 915, 1977 Nev. LEXIS 482 (1977).

Jurisdiction of justice court to hear motion to dismiss.
District court abused its discretion in granting state's writ of prohibition after a justice court determined it had jurisdiction to hear defendant's motion to dismiss as under the Interstate Agreement on Detainers (IAD), NRS 178.620, the justice court was the "appropriate court" for IAD-related challenges to felony complaints. Koller v. State, 130 P.3d 653, 2006 Nev. LEXIS 25 (2006).

Nevada's constitutional and statutory scheme contemplates reasonable judicial control of grand juries. In re Report of Washoe County Grand Jury, 95 Nev. 121, 590 P.2d 622, 1979 Nev. LEXIS 542 (1979).

Cited in:
State v. Buralli, 27 Nev. 41, 71 P. 532, 1903 Nev. LEXIS 2 (1903); State ex rel. Wichman v. Gerbig, 55 Nev. 46, 24 P.2d 313, 1933 Nev. LEXIS 29 (1933); Galloway v. Truesdell, 83 Nev. 13, 422 P.2d 237, 1967 Nev. LEXIS 217 (1967).

OPINIONS OF ATTORNEY GENERAL

The Legislature may provide an additional judge for a judicial district.
A statute which provides an additional judge for a judicial district, to take effect at the termination of existing terms of incumbent judges, or when a vacancy occurs before the end of such terms, does not violate this section, limiting the power of the Legislature to increase or decrease the number of judges. AGO 463 (6-3-1947).

6. District courts: Jurisdiction; referees; family court.

1. The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts. They also have final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law. The District Courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction. The District Courts and the Judges thereof shall also have power to issue writs of Habeas Corpus on petition by, or on behalf of any person who is held in actual custody in their respective districts, or who has suffered a criminal conviction in their respective districts and has not completed the sentence imposed pursuant to the judgment of conviction.

2. The legislature may provide by law for:

(a) Referees in district courts.

(b) The establishment of a family court as a division of any district court and may prescribe its jurisdiction.

Amendments.
The 1978 amendment to this section was proposed and passed in Statutes of Nevada 1975, p. 1951; agreed to and passed in Statutes of Nevada 1977, p. 1690; and ratified at the 1978 general election.

The 1986 amendment to this section was proposed and passed in Statutes of Nevada 1983, p. 2188; agreed to and passed in Statutes of Nevada 1985, p. 2332; and ratified at the 1986 general election.

The 1990 amendment to this section was proposed and passed in Statutes of Nevada 1987, p. 2444; agreed to and passed in Statutes of Nevada 1989, p. 2222; and ratified at the 1990 general election.

The 1992 amendment to this section was proposed and passed in Statutes of Nevada

History.
1907, p. 266; 1923, p. 279; CL 1929, § 1170; 1983, p. 903; 2001, ch. 115, § 31, p. 631.

Effect of amendment.
The 2001 amendment, effective October 1, 2001, added "city" before "council" and made stylistic changes.

266.590. Fines and penalties: Commitment; recovery by execution; chain gang.

1. Any person upon whom any fine or penalty shall be imposed may, upon the order of the court before whom the conviction is had, be committed to the county jail or the city jail, or to such other place as may be provided by the city for the incarceration of offenders, until such fine or penalty shall be fully paid.

2. The city council shall have power to provide by ordinance that every person committed shall be required to work for the city at such labor as his strength will permit, not exceeding 8 hours each working day; and for such work the person so employed shall be allowed $4 for each day's work on account of such fine. The council may provide for the formation of a chain gang for persons convicted of offenses in violation of the ordinances of the city, and for their proper employment for the benefit of the city, and to safeguard and prevent their escape while being so employed.

3. Fines imposed by the municipal court may be recovered by execution against the property of the defendant, or the payment thereof enforced by imprisonment in the city jail of the city at the rate of 1 day for every $4 of such fine, or the court may, in its discretion, adjudge and enter upon the docket a supplemental order that such offender shall work on the streets or public works of the city, at the rate of $4 for each day of the sentence, which shall apply on such fine until the same shall be exhausted or otherwise satisfied.

History.
1907, pp. 259, 265; RL 1912, §§ 798, 799, 832; CL 1929, §§ 1133, 1134, 1167; 1967, p. 1471.

266.595. Appeals.

Appeals to the district court may be taken from any final judgment of the municipal court in accordance with the provisions of NRS 5.073.

History.
1907, p. 267; RL 1912, § 837; CL 1929, § 1172; 1991, ch. 228, § 18.5, p. 467.

Cross references.
As to appeals to district court, see NRS 5.080 and 5.090.

NOTES TO DECISIONS

The phrase "in the same manner" does not require strict compliance. State ex rel. Digby v. Eighth Judicial Dist. Court, 69 Nev. 186, 244 P.2d 866, 1952 Nev. LEXIS 72 (1952).

Cited in:
Hudson v. Eighth Judicial Dist. Court ex rel. County of Clark, 83 Nev. 62, 422 P.2d 688, 1967 Nev. LEXIS 224 (1967); Root v. City of Las Vegas, 84 Nev. 258, 439 P.2d 219, 1968 Nev. LEXIS 344 (1968); Root v. City of Las Vegas, 85 Nev. 326, 454 P.2d 894, 1969 Nev. LEXIS 365 (1969).

5.079. Transferred.

Editor's note.
This section is now compiled as NRS 5.052.

APPEALS TO DISTRICT COURT FROM MUNICIPAL COURTS IN CITIES INCORPORATED UNDER GENERAL OR SPECIAL LAWS

5.080. Notice of intention to appeal; bail.

1. After filing a notice of intention to appeal, which shall include a statement of the character of the judgment, with the municipal court and serving such notice upon the city attorney, a defendant who has been convicted of a criminal violation in a municipal court may, if he desires to be released from custody during the pendency of the appeal or desires a stay of proceedings under the judgment until disposition of the appeal, enter bail for the prosecution of the appeal, the payment of any judgment, fine and costs that may be awarded against him on the appeal for failure to prosecute the appeal and for the rendering of himself in execution of the judgment from which he is appealing or of any judgment rendered against him in the action appealed from in the district court to which the action is appealed.

2. Any bail which has been entered in the municipal court for the prosecution of the action in such court may be released or retained by the court in partial satisfaction of the bail required pursuant to subsection 1.

History.
1967, p. 1088.

Constitution.
As to the appellate jurisdiction of district courts, see Const., Art. 6, § 6.

Cross references.
As to appeals to the district court from municipal court, see NRS 266.595.

5.090. Judgment on appeal; notice to municipal court; payment of fines.

1. When an appeal of a civil or criminal case from a municipal court to a district court has been perfected and the district court has rendered a judgment on appeal, the district court shall, within 10 days from the date of such judgment, give written notice to the municipal court of the district court's disposition of the appealed action.

2. When a conviction for a violation of a municipal ordinance is sustained and the fine imposed is sustained in whole or part, or a greater fine is imposed, the district court shall direct that the defendant pay the amount of the fine sustained or imposed by the district court to the city treasurer of the city in which the municipal court from which the appeal was taken is located.

History.
1967, p. 1089; 1989, ch. 420, § 2, p. 903.

Constitution.
As to the appellate jurisdiction of district courts, see Const., Art. 6, § 6.

GENERAL PROVISIONS

5.010. General requirements for court; designation as court of record.

There must be in each city a municipal court presided over by a municipal judge. The municipal court:

1. Must be held at such place in the city within which it is established as the governing body of that city may by ordinance direct.
2. May by ordinance be designated as a court of record.

History.
1865, p. 115; CL 1873, § 940; GS 1885, § 2454; CL 1900, § 2535; RL 1912, § 4855; CL 1929, § 8397; 1983, p. 899; 1985, p. 671; 1991, ch. 93, § 4, p. 161.

Constitution.
As to the vesting of judicial power in municipal courts, see Const., Art. 6, § 1. As to the establishment of municipal courts generally, see Const., Art. 6, § 9.

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Civil Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 51.

5.020. Municipal judges: Election; term; oath; qualifications; justice of the peace as ex officio municipal judge.

1. Except as provided in subsection 3 and NRS 266.405, each municipal judge must be chosen by the electors of the city within which the municipal court is established on a day to be fixed by the governing body of that city. The term of office of a municipal judge is the period fixed by:

(a) An ordinance adopted by the city if the city is organized under general law; or

(b) The charter of the city if the city is organized under a special charter. Before entering upon his duties, a municipal judge shall take the constitutional oath of office.

2. A municipal judge must:

(a) Be a citizen of the state;

(b) Except as otherwise provided in the charter of a city organized under a special charter, have been a bona fide resident of the city for not less than 1 year next preceding his election;

(c) Be a qualified elector in the city; and

(d) Not have ever been removed or retired from any judicial office by the commission on judicial discipline.

3. The governing body of a city, with the consent of the board of county commissioners and the justice of the peace, may provide that a justice of the peace of the township in which the city is located is ex officio the municipal judge of the city.

4. For the purposes of this section, a person shall not be ineligible to be a candidate for the office of municipal judge if a decision to remove or retire him from a judicial office is pending appeal before the supreme court or has been overturned by the supreme court.

NOTES TO DECISIONS

Cited in:
Hittlet v. Police Chief, 86 Nev. 672, 474 P.2d 722, 1970 Nev. LEXIS 592 (1970); City of Reno v. Forrest, 87 Nev. 6, 479 P.2d 465, 1971 Nev. LEXIS 334 (1971).

189.007. Grounds for dismissal of complaint.

Any complaint, upon motion of the defendant, may be dismissed by the justice of the peace upon any of the following grounds:

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

History.
1975, p. 36.

Editor's note.
This section was formerly compiled as NRS 185.025.

APPEALS TO DISTRICT COURT

Appeal by Defendant

189.010. Appeal must be taken within 10 days.

Except as otherwise provided in NRS 177.015, a defendant in a criminal action tried before a justice of the peace may appeal from the final judgment therein to the district court of the county where the court of the justice of the peace is held, at any time within 10 days from the time of the rendition of the judgment.

History.
CrPA 1911, § 662; RL 1912, § 7512; CL 1929, § 11309; 1995, ch. 480, § 4, p. 1536.

Editor's note.
Acts 1995, ch. 480, § 6, provides: "The amendatory provisions of sections 3 and 4 [NRS 177.015 and 189.010] of this act do not apply to final judgments or verdicts which are entered by a court before July 1, 1995."

Cross references.
As to civil appeals from justices' courts, see Justices' Courts' Rules of Civil Procedure, Rules 72 to 76B.

NOTES TO DECISIONS

This section relates only to the 10-day limit after judgment within which appeal may be taken. Root v. City of Las Vegas, 85 Nev. 326, 454 P.2d 894, 1969 Nev. LEXIS 365 (1969).

Cited in:
Root v. City of Las Vegas, 84 Nev. 258, 439 P.2d 219, 1968 Nev. LEXIS 344 (1968); Hittlet v. Police Chief, 86 Nev. 672, 474 P.2d 722, 1970 Nev. LEXIS 592 (1970); City of Reno v. Forrest, 87 Nev. 6, 479 P.2d 465, 1971 Nev. LEXIS 334 (1971).

Effect of amendment.
The 2007 amendment, effective October 1, 2008, rewrote the section.

213.090. Pardon: Restoration of civil rights; relieved of disabilities limitations.

1. A person who is granted a full, unconditional pardon by the Board is restored to all civil rights and is relieved of all disabilities incurred upon conviction.

2. A pardon granted by the Board shall be deemed to be a full, unconditional pardon unless the official document issued pursuant to subsection 3 explicitly limits the restoration of the civil rights of the person or does not relieve the person of all disabilities incurred upon conviction.

3. Upon being granted a pardon by the Board, a person so pardoned must be given an official document which provides that he has been granted a pardon. If the person has not been granted a full, unconditional pardon, the official document must explicitly state all limitations on the restoration of the civil rights of the person and all disabilities incurred upon conviction from which the person is not relieved.

4. A person who has been granted a pardon in this State or elsewhere and whose official documentation of his pardon is lost, damaged or destroyed may file a written request with a court of competent jurisdiction to restore his civil rights pursuant to this section. Upon verification that the person has been granted a pardon and is eligible to be restored to his civil rights, the court shall issue an order restoring the person to his civil rights. A person must not be required to pay a fee to receive such an order.

5. A person who has been granted a pardon in this State or elsewhere may present:

(a) Official documentation of his pardon; or

(b) A court order restoring his civil rights,

as proof that he has been restored to his civil rights.

History.
1933, p. 188; CL 1929 (1941 Supp.), § 11573; 1973, p. 1845; 1977, p. 665; 2001, ch. 358, § 11, p. 1696; 2003, ch. 447, § 13, p. 2692; 2005, ch. 509, § 3, p. 2907.

Effect of amendment.
The 2005 amendment, effective June 17, 2005, rewrote subsections 1 through 3; added the subsection 4 designation; and deleted "set forth in subsection 1" following "civil rights" in two places in the second sentence of subsection 4; and made stylistic changes.

10. Governor's message.

He shall communicate by Message to the Legislature at every regular Session the condition of the State and recommend such measures as he may deem expedient[.]

NOTES TO DECISIONS

Cited in:
Nevada Comm'n on Equal Rights of Citizens v. Smith, 80 Nev. 469, 396 P.2d 677, 1964 Nev. LEXIS 197 (1964).

11. Adjournment of legislature by governor.

In case of a disagreement between the two Houses with respect to the time of adjournment, the Governor shall have power to adjourn the Legislature to such time as he may think proper; Provided, it be not beyond the time fixed for the meeting of the next Legislature.

12. Person holding federal office ineligible for office of governor.

No person shall, while holding any office under the United States Government hold the office of Governor, except as herein expressly provided.

NOTES TO DECISIONS

Cited in:
State ex rel. Nourse v. Clarke, 3 Nev. 566, 1868 Nev. LEXIS 7 (1867).

13. Pardons, reprieves and commutations of sentence; remission of fines and forfeitures.

The Governor shall have the power to suspend the collection of fines and forfeitures and grant reprieves for a period not exceeding sixty days dating from the time of conviction, for all offenses, except in cases of impeachment. Upon conviction for treason he shall have power to suspend the execution of the sentence until the case shall be reported to the Legislature at its next meeting, when the Legislature shall either pardon, direct the execution of the sentence, or grant a further reprieve. And if the Legislature should fail or refuse to make final disposition of such case, the sentence shall be enforced at such time and place as the Governor by his order may direct. The Governor shall communicate to the Legislature, at the beginning of every session, every case of fine or forfeiture remitted, or reprieve, pardon, or commutation granted, stating the name of the convict, the crime of which he was convicted, the Sentence, its date, and the date of the remission, commutation, pardon or reprieve.

NOTES TO DECISIONS

"Commutation of a sentence" means the change of one punishment known to law for a different punishment also known to law. Ex parte Janes, 1 Nev. 319, 1865 Nev. LEXIS 41 (1865).

The power to remit fines absolutely or grant pardons rests in the State Board of Pardons Commissioners.

The Governor has no authority whatever to suspend a fine for a greater period than 60 days; the power to remit a fine absolutely and to grant pardons is vested, by the Constitution of this state, in the State Board of Pardons Commissioners, consisting of the Governor, Justices of the Supreme Court, and the Attorney General, and a majority of these designated officers, of whom the Governor shall be one, is the only power by which a fine or forfeiture can absolutely be suspended, punishment commuted, or absolute pardon granted. Ex parte Shelor, 33 Nev. 361, 33 Nev. 362, 111 P. 291, 1910 Nev. LEXIS 23 (1910).

Cited in:

State ex rel. Summerfield v. Moran, 43 Nev. 150, 182 P. 927, 1919 Nev. LEXIS 12 (1919).

OPINIONS OF ATTORNEY GENERAL

Reprieves may only be for a period of 60 days.

The Governor's power to grant reprieves under this section is strictly limited to a period of 60 days dating from the time of conviction. AGO 162 (9-21-1944).

Construction of the term "conviction".

The term "conviction" in this section should be given its ordinary, legal meaning. AGO 162 (9-21-1944).

14. Remission of fines and forfeitures; commutations and pardons; suspension of sentence; probation.

1. The governor, justices of the supreme court, and attorney general, or a major part of them, of whom the governor shall be one, may, upon such conditions and with such limitations and restrictions as they may think proper, remit fines and forfeitures, commute punishments, except as provided in subsection 2, and grant pardons, after convictions, in all cases, except treason and impeachments, subject to such regulations as may be provided by law relative to the manner of applying for pardons.

2. Except as may be provided by law, a sentence of death or a sentence of life imprisonment without possibility of parole may not be commuted to a sentence which would allow parole.

3. The legislature is authorized to pass laws conferring upon the district courts authority to suspend the execution of sentences, fix the conditions for, and to grant probation, and within the minimum and maximum periods authorized by law, fix the sentence to be served by the person convicted of crime in said courts.

Amendments.

The 1950 amendment to this section was proposed and passed in Statutes of Nevada 1947, p. 875; agreed to and passed in Statutes of Nevada 1949, p. 684; and ratified at the 1950 general election.

The 1982 amendment to this section was proposed and passed in Statutes of Nevada 1979, p. 2005; agreed to and passed in Statutes of Nevada 1981, p. 2097; and ratified at the 1982 general election.

213.020. Notice of application for remission, commutation, pardon or restoration of civil rights: Contents; service.

1. Any person intending to apply to have a fine or forfeiture remitted, a punishment commuted, a pardon granted or his civil rights restored, or any person acting on his behalf, must submit an application to the Board, in accordance with the procedures established by the Secretary pursuant to NRS 213.017, specifying therein:

(a) The court in which the judgment was rendered;

(b) The amount of the fine or forfeiture, or the kind or character of punishment;

(c) The name of the person in whose favor the application is to be made;

(d) The particular grounds upon which the application will be based; and

(e) Any other information deemed relevant by the Secretary.

2. A person must not be required to pay a fee to have a fine or forfeiture remitted, a punishment commuted, a pardon granted or his civil rights restored pursuant to this section.

3. The Secretary shall submit notice of the date, time and location of the meeting to consider the application and one copy of the application to the district attorney and to the district judge of the county wherein the person was convicted. In cases of fines and forfeitures, notice of the date, time and location of the meeting to consider the application must also be served on the chairman of the board of county commissioners of the county wherein the person was convicted.

4. Notice of the date, time and location of a meeting to consider an application pursuant to this section must be served upon the appropriate persons as required in this section at least 30 days before the presentation of the application, unless a member of the Board, for good cause, prescribes a shorter time.

History.

1933, p. 188; CL 1929 (1941 Supp.), §§ 11572, 11573; 1977, p. 869; 1983, p. 1331; 2001 Sp. Sess., ch. 14, § 25, p. 199; 2005, ch. 509, § 2, p. 2907.

Effect of amendment.

The 2005 amendment, effective June 17, 2005, rewrote this section.

213.055. Person with communications disability entitled to services of interpreter at hearing. [Effective October 1, 2008.]

An applicant or a witness at a hearing upon an application for clemency who is a person with a communications disability as defined in NRS 50.050 is entitled to the services of an interpreter at public expense in accordance with the provisions of NRS 50.050 to 50.053, inclusive. The interpreter must be appointed by the Governor or a member of the Board designated by him.

History.

2001, ch. 372, § 19, p. 1776; 2007, ch. 65, § 34, p. 170.

Editor's note.

For this section as effective until October 1, 2008, see the bound volume.

(c) The amount, kind and character of punishment substituted instead of the death penalty.

(d) The place where the substituted punishment is to be served out or suffered.

2. The statement shall be directed to the proper officer or authority charged by law with the safekeeping and execution of the punishment. The statement, attested with the great seal of this state, shall be sufficient authority for such officer or authority to receive and retain the person named in the statement as therein directed, and the officer or authority named in the statement must receive the person whose punishment has been commuted, and retain him as directed.

History.
1933, p. 187; CL 1929 (1941 Supp.), § 11571.

Cross references.
As to stay of execution of death penalty, see NRS 176.415.

NOTES TO DECISIONS

Consent to commutation unnecessary.
Commutation of a prisoner's sentence from death to life without possibility of parole is not subject to challenge under either the 8th or the 14th Amendments to the U.S. Constitution; nor is it a violation of a prisoner's rights to commute his sentence to a lesser penalty without his consent. Mears v. Nevada, 367 F. Supp. 84, 1973 U.S. Dist. LEXIS 10910 (D. Nev. 1973).

RESEARCH REFERENCES

Revocation of order commuting state criminal sentence. 88 A.L.R.5th 463.

213.085. Board prohibited from commuting sentence of death or imprisonment for life without possibility of parole to sentence that would allow parole.

1. If a person is convicted of murder of the first degree before, on or after July 1, 1995, the board shall not commute:

(a) A sentence of death; or

(b) A sentence of imprisonment in the state prison for life without the possibility of parole,

to a sentence that would allow parole.

2. If a person is convicted of any crime other than murder of the first degree on or after July 1, 1995, the board shall not commute:

(a) A sentence of death; or

(b) A sentence of imprisonment in the state prison for life without the possibility of parole,

to a sentence that would allow parole.

History.
1995, ch. 443, § 231, p. 1258.

RESEARCH REFERENCES

Pardon as restoring public office or license or eligibility therefor. 58 A.L.R.3d 1191.

Pardon as defense to disbarment of attorney. 59 A.L.R.3d 466.

213.095. Notice by board to victim if clemency granted.

If the board remits a fine or forfeiture, commutes a sentence or grants a pardon, it shall give written notice of its action to the victim of the person granted clemency, if the victim so requests in writing and provides his current address. If a current address is not provided, the board may not be held responsible if the notice is not received by the victim. All personal information, including, but not limited to, a current or former address, which pertains to a victim and which is received by the board pursuant to this section is confidential.

History.
1983, p. 1330; 1997, ch. 654, § 12, p. 3245.

NOTES TO DECISIONS

Cited in:
Colwell v. State, 112 Nev. 807, 919 P.2d 403, 1996 Nev. LEXIS 99 (1996).

213.100. Order of discharge when clemency granted.

Whenever clemency is granted by the board, there shall be served upon the director of the department of corrections or other officer having the person in custody, an order to discharge him therefrom upon a day to be named in the order, upon the conditions, limitations or restrictions named therein.

History.
1933, p. 188; CL 1929 (1941 Supp.), § 11573; 1977, p. 870; 2001 Sp. Sess., ch. 14, § 26, p. 199.

Effect of amendment.
The 2001 amendment, effective July 1, 2001, substituted "department of corrections" for "department of prisons."

PAROLE

General Provisions

213.107. Definitions.

As used in NRS 213.107 to 213.157, inclusive, unless the context otherwise requires:

1. "Board" means the State Board of Parole Commissioners.
2. "Chief" means the Chief Parole and Probation Officer.
3. "Division" means the Division of Parole and Probation of the Department of Public Safety.

person who is a party to the civil action may petition the juvenile court for release of the child's name.

2. If the person who petitions the juvenile court makes a satisfactory showing that the person intends, in good faith, to use the child's name in the civil action, the juvenile court shall order the release of the child's name and authorize its use in the civil action.

History.
2003, ch. 206, § 217, p. 1090.

Effective date.
This section is effective January 1, 2004.

Editor's note.
This section is derived from part of former NRS 62.360.

SEALING AND UNSEALING OF RECORDS

62H.100. "Records" defined.

1. As used in NRS 62H.100 to 62H.170, inclusive, unless the context otherwise requires, "records" means any records relating to a child who is within the purview of this title and who:

(a) Is taken into custody by a peace officer or a probation officer or is otherwise taken before a probation officer; or

(b) Appears before the juvenile court or any other court pursuant to the provisions of this title.

2. The term includes records of arrest.

History.
2003, ch. 206, § 218, p. 1091.

Effective date.
This section is effective January 1, 2004.

Editor's note.
This section is derived from part of former NRS 62.370.

RESEARCH REFERENCES

Expungement of juvenile court records. 71 A.L.R.3d 753.

62H.110. Applicability of provisions.

The provisions of NRS 62H.100 to 62H.170, inclusive, do not apply to:

1. Information maintained in the standardized system established pursuant to NRS 62H.200;

2. Information that must be collected by the Division of Child and Family Services pursuant to NRS 62H.220;

3. Records that are subject to the provisions of NRS 62F.260; or

4. Records relating to a traffic offense that would have been a misdemeanor if committed by an adult.

History.
2003, ch. 206, § 219, p. 1091.

Effective date.
This section is effective January 1, 2004.

Editor's note.
This section is derived from part of former NRS 62.370.

62H.120. Explanation of certain information concerning sealing of records to be included in court order.

Any decree or order entered concerning a child within the purview of this title must contain, for the benefit of the child, an explanation of the contents of NRS 62H.100 to 62H.170, inclusive, and, if applicable, NRS 62F.260.

History.
2003, ch. 206, § 220, p. 1091.

Effective date.
This section is effective January 1, 2004.

Editor's note.
This section is derived from former NRS 62.2115.

62H.130. Procedure for sealing records of child who is less than 21 years of age.

1. If a child is less than 21 years of age, the child or a probation officer on behalf of the child may petition the juvenile court for an order sealing all records relating to the child. The petition may be filed not earlier than 3 years after the child:

(a) Was last adjudicated in need of supervision or adjudicated delinquent; or

(b) Was last referred to the juvenile court,

whichever is later.

2. If a petition is filed pursuant to this section, the juvenile court shall notify the district attorney and, if a probation officer is not the petitioner, the chief probation officer.

3. The district attorney and the chief probation officer, or any of their deputies, or any other person who has evidence that is relevant to consideration of the petition may testify at the hearing on the petition.

4. After the hearing on the petition, the juvenile court shall enter an order sealing all records relating to the child if the juvenile court finds that:

(a) During the applicable 3-year period, the child has not been convicted of a felony or of any misdemeanor involving moral turpitude; and

(b) The child has been rehabilitated to the satisfaction of the juvenile court.

History.
2003, ch. 206, § 221, p. 1091.

Effective date.
This section is effective January 1, 2004.

Editor's note.
This section is derived from part of former NRS 62.370.

62H.140. Automatic scaling of records when child reaches 21 years of age; exception.

Except as otherwise provided in NRS 62H.150, when a child reaches 21 years of age, all records relating to the child must be sealed automatically.

History.
2003, ch. 206, § 222, p. 1091.

Effective date.
This section is effective January 1, 2004.

Editor's note.
This section is derived from part of former NRS 62.370.

62H.150. Limitations on sealing records related to certain delinquent acts.

1. If a child is adjudicated delinquent for an unlawful act listed in subsection 6 and the records relating to that unlawful act have not been sealed by the juvenile court pursuant to NRS 62H.130 before the child reaches 21 years of age, those records must not be sealed before the child reaches 30 years of age.

2. After the child reaches 30 years of age, the child may petition the juvenile court for an order sealing those records.

3. If a petition is filed pursuant to this section, the juvenile court shall notify the district attorney and the chief probation officer.

4. The district attorney and the chief probation officer, or any of their deputies, or any other person who has evidence that is relevant to consideration of the petition may testify at the hearing on the petition.

5. After the hearing on the petition, the juvenile court may enter an order sealing the records relating to the child if the juvenile court finds that, during the period since the child reached 21 years of age, the child has not been convicted of any offense, except for minor moving or standing traffic offenses.

6. The provisions of this section apply to any of the following unlawful acts:

(a) An unlawful act which, if committed by an adult, would have constituted:

(1) Sexual assault pursuant to NRS 200.366;

(2) Battery with intent to commit sexual assault pursuant to NRS 200.400; or

(3) Lewdness with a child pursuant to NRS 201.230.

(b) An unlawful act which would have been a felony if committed by an adult and which involved the use or threatened use of force or violence.

History.
2003, ch. 206, § 223, p. 1092.

Effective date.
This section is effective January 1, 2004.

Editor's note.
This section is derived from part of former NRS 62.370.

62H.160. Procedure for sealing records of child: Duties of juvenile court and other public officers and agencies.

1. If the juvenile court enters an order sealing the records relating to a child or the records are sealed automatically, all records relating to the child must be sealed that are in the custody of:

(a) The juvenile court or any other court;

(b) A probation officer, probation department or law enforcement agency; or

(c) Any other public officer or agency.

2. If the juvenile court enters an order sealing the records relating to a child, the juvenile court shall send a copy of the order to each public officer or agency named in the order. Not later than 5 days after receipt of the order, each public officer or agency shall:

(a) Seal the records in the custody of the public officer or agency, as directed by the order;

(b) Advise the juvenile court of compliance with the order; and

(c) Seal the copy of the order received by the public officer or agency.

History.
2003, ch. 206, § 224, p. 1092.

Effective date.
This section is effective January 1, 2004.

Editor's note.
This section is derived from part of former NRS 62.370.

62H.170. Effect of sealing records; inspection of sealed records in certain circumstances.

1. Except as otherwise provided in this section, if the records of a person are sealed:

(a) All proceedings recounted in the records are deemed never to have occurred; and

(b) The person may reply accordingly to any inquiry concerning the proceedings and the acts which brought about the proceedings.

2. The juvenile court may order the inspection of records that are sealed if:

(a) The person who is the subject of the records petitions the juvenile court to permit the inspection of the records by the persons named in the petition;

(b) An agency charged with the medical or psychiatric care of the person who is the subject of the records petitions the juvenile court to permit the inspection of the records by the agency; or

(c) A district attorney or an attorney representing a defendant in a criminal action petitions the juvenile court to permit the inspection of the records to obtain information relating to the persons who were involved in the acts detailed in the records.

3. Upon its own order, any court of this state may inspect records that are sealed if the records relate to a person who is less than 21 years of age and who is to be sentenced by the court in a criminal proceeding.

(a) The defendant be placed under supervision of the chief parole and probation officer; and

(b) The director of the department of corrections cause a copy of the records concerning the defendant's participation in the program to be provided to the chief parole and probation officer.

5. If a defendant is ordered to complete the program of regimental discipline in lieu of causing the sentence imposed to be executed upon the violation of a condition of probation, a failure by the defendant satisfactorily to complete the program constitutes a violation of that condition of probation and the director of the department of corrections shall return the defendant to the court.

6. Time spent in the program must be deducted from any sentence which may thereafter be imposed.

History.
1989, ch. 780, § 4, p. 1852; 1993, ch. 471, § 1, p. 1942; 2001 Sp. Sess., ch. 14, § 69, p. 222.

Editor's note.
This section was formerly compiled as NRS 176.2248.

DISCHARGE

176A.850. Honorable discharge from probation: When granted; restoration of civil rights; effect; documentation.

1. A person who:

(a) Has fulfilled the conditions of his probation for the entire period thereof;

(b) Is recommended for earlier discharge by the Division; or

(c) Has demonstrated his fitness for honorable discharge but because of economic hardship, verified by the Division, has been unable to make restitution as ordered by the court,

may be granted an honorable discharge from probation by order of the court.

2. Any amount of restitution remaining unpaid constitutes a civil liability arising upon the date of discharge.

3. Except as otherwise provided in subsection 4, a person who has been honorably discharged from probation:

(a) Is free from the terms and conditions of his probation.

(b) Is immediately restored to the following civil rights:

(1) The right to vote; and

(2) The right to serve as a juror in a civil action.

(c) Four years after the date of his honorable discharge from probation, is restored to the right to hold office.

(d) Six years after the date of his honorable discharge from probation, is restored to the right to serve as a juror in a criminal action.

(e) If he meets the requirements of NRS 179.245, may apply to the court for the sealing of records relating to his conviction.

(f) Must be informed of the provisions of this section and NRS 179.245 in his probation papers.

(g) Is exempt from the requirements of chapter 179C of NRS, but is not exempt from the requirements of chapter 179D of NRS.

(h) Shall disclose the conviction to a gaming establishment and to the State and its agencies, departments, boards, commissions and political subdivisions, if required in an application for employment, license or other permit. As used in this paragraph, "establishment" has the meaning ascribed to it in NRS 463.0148.

(i) Except as otherwise provided in paragraph (h), need not disclose the conviction to an employer or prospective employer.

4. Except as otherwise provided in this subsection, the civil rights set forth in subsection 3 are not restored to a person honorably discharged from probation if the person has previously been convicted in this state:

(a) Of a category A felony.

(b) Of an offense that would constitute a category A felony if committed as of the date of his honorable discharge from probation.

(c) Of a category B felony involving the use of force or violence that resulted in substantial bodily harm to the victim.

(d) Of an offense involving the use of force or violence that resulted in substantial bodily harm to the victim and that would constitute a category B felony if committed as of the date of his honorable discharge from probation.

(e) Two or more times of a felony, unless a felony for which the person has been convicted arose out of the same act, transaction or occurrence as another felony, in which case the convictions for those felonies shall be deemed to constitute a single conviction for the purposes of this paragraph.

A person described in this subsection may petition a court of competent jurisdiction for an order granting the restoration of his civil rights as set forth in subsection 3.

5. The prior conviction of a person who has been honorably discharged from probation may be used for purposes of impeachment. In any subsequent prosecution of the person, the prior conviction may be pleaded and proved if otherwise admissible.

6. Except for a person subject to the limitations set forth in subsection 4, upon his honorable discharge from probation, the person so discharged must be given an official document which provides:

(a) That he has received an honorable discharge from probation;

(b) That he has been restored to his civil rights to vote and to serve as a juror in a civil action as of the date of his honorable discharge from probation;

(c) The date on which his civil right to hold office will be restored to him pursuant to paragraph (c) of subsection 3; and

(d) The date on which his civil right to serve as a juror in a criminal action will be restored to him pursuant to paragraph (d) of subsection 3.

7. Subject to the limitations set forth in subsection 4, a person who has been honorably discharged from probation in this state or elsewhere and whose official documentation of his honorable discharge from probation is lost, damaged or destroyed may file a written request with a court of competent jurisdiction to restore his civil rights pursuant to this section. Upon verification that the person has been honorably discharged from probation and is

eligible to be restored to the civil rights set forth in subsection 3, the court shall issue an order restoring the person to the civil rights set forth in subsection 3. A person must not be required to pay a fee to receive such an order.

8. A person who has been honorably discharged from probation in this state or elsewhere may present:

(a) Official documentation of his honorable discharge from probation, if it contains the provisions set forth in subsection 6; or

(b) A court order restoring his civil rights,

as proof that he has been restored to the civil rights set forth in subsection 3.

History.

1967, p. 1436; 1989, ch. 819, § 4, p. 1983; 1993, ch. 466, § 127, p. 1517; 1997, ch. 451, § 88, p. 1672; 2001, ch. 345, § 4, p. 1639; 2001, ch. 358, § 2, p. 1690; 2003, ch. 2, § 45, p. 67; 2003, ch. 447, § 2, p. 2685; 2005, ch. 42, § 3, p. 81; 2005, ch. 476, § 10, p. 2354.

Editor's note.

This section was formerly compiled as NRS 176.225.

The Legislative Counsel substituted "176A.860" for "176.227" in subsection 3 and substituted "Chapter 179C of NRS" for "NRS 207.090" in subdivision 4(a).

Acts 2001, ch. 345, § 7(2) directs that the amendatory provisions to this section apply to any person who applies to the division of parole and probation of the department of motor vehicles and public safety to request a restoration of his civil rights pursuant to NRS 176A.860 on or after October 1, 2001, whether or not the person was convicted before, on or after October 1, 2001.

Acts 2003, ch. 447, § 71, provides that:

"1. Any person residing in this state who, before July 1, 2003, was:

"(a) Honorably discharged from probation pursuant to NRS 176A.850;

"(b) Pardoned pursuant to NRS 213.090;

"(c) Honorably discharged from parole pursuant to NRS 213.154 and 213.155; or

"(d) Released from prison pursuant to NRS 213.157, in this state or elsewhere, who is not on probation or parole or serving a sentence of imprisonment on July 1, 2003, and who has not had his civil rights restored is hereby restored to the civil rights set forth in subsection 2.

"2. A person listed in subsection 1:

"(a) Is immediately restored to the following civil rights:

"(1) The right to vote; and

"(2) The right to serve as a juror in a civil action.

"(b) Four years after the date on which he is released from his sentence of imprisonment, is restored to the right to hold office.

"(c) Six years after the date on which he is released from his sentence of imprisonment, is restored to the right to serve as a juror in a criminal action.

"3. A person who is restored to his civil rights pursuant to this section and whose official documentation which demonstrates that the person qualifies to have his civil rights restored pursuant to subsection 1 is lost, damaged or destroyed may file a written request with a court of competent jurisdiction to restore his civil rights pursuant to this section. Upon verification that the person qualifies to have his civil rights restored pursuant to subsection 1, the court shall issue an order restoring the person to the civil rights set forth in subsection 2. A person must not be required to pay a fee to receive such an order.

"4. A person who is restored to his civil rights pursuant to this section may present official documentation that he qualifies to have his civil rights restored pursuant to subsection 1 or a court order restoring his civil rights as proof that he has been restored to the civil rights set forth in subsection 2."

The 2003 amendment by ch. 2, § 45, effective March 5, 2003, affirmed technical changes made by the Legislative Counsel.

This section was amended by two 2005 acts which do not appear to be in conflict and have been compiled together.

Acts 2005, ch. 476, § 16, provides that:

"1. Notwithstanding any other provision of law, except as otherwise provided in subsection 2, a person who was dishonorably discharged from probation or parole before the effective date of this section [June 17, 2005], until July 1, 2008, may apply to the Division of Parole and Probation of the Department of Public Safety, in accordance with the regulations adopted by the Division pursuant to the provisions of this section, to request that his dishonorable discharge from probation or parole be changed to an honorable discharge from probation or parole.

"2. A person who was dishonorably discharged from probation or parole may not apply

OPINIONS OF ATTORNEY GENERAL

This section and NRS 189.020 are properly read together to provide that if a criminal defendant in a magistrate's court wishes to appeal his conviction, he must file his notice of appeal with the magistrate within 10 days after rendition of judgment. Since mailing is not specifically permitted by statute, notice must be received by the magistrate on or before the tenth day, not merely mailed on that day. Even if the notice received by the magistrate is untimely, he must transmit the papers to the district court as required by NRS 189.030, because only the district court may dismiss. AGO 79-4 (2-16-1979).

189.020. Notice of intention to appeal: Filing and service; stay of judgment pending appeal.

1. The party intending to appeal must file with the justice and serve upon the district attorney a notice entitled in the action, setting forth the character of the judgment, and the intention of the party to appeal therefrom to the district court.

2. Stay of judgment pending appeal is governed by NRS 177.105 and 177.115.

History.
CrPA 1911, § 663; RL 1912, § 7513; CL 1929, § 11310; 1967, p. 1467.

NOTES TO DECISIONS

Notice of appeal held sufficient.
A notice of appeal which was entitled in the action, which set forth the character of the judgment and the intention to appeal therefrom to the district court, and which was filed with the justice and served on the district attorney, was a sufficient notice of appeal and the fact that the offense was not described in the notice with the fullness requisite in a criminal complaint was immaterial. Jensen v. District Court of Seventh Judicial Dist. ex rel. Esmeralda County, 40 Nev. 135, 161 P. 162, 1916 Nev. LEXIS 44 (1916).

Provisions of the charter of the city of Las Vegas providing that appeals from municipal courts "may be taken in the same manner as in cases of appeal from justice courts" did not require a strict compliance with the statutory requirement for service of notice of appeal on the district attorney. Moreover, filing with the municipal judge, despite the statutory requirement that the filing be with the justice, was sufficient. State ex rel. Digby v. Eighth Judicial Dist. Court, 69 Nev. 186, 244 P.2d 866, 1952 Nev. LEXIS 72 (1952).

OPINIONS OF ATTORNEY GENERAL

This section and NRS 189.010 are properly read together to provide that if a criminal defendant in a magistrate's court wishes to appeal his conviction, he must file his notice of appeal with the magistrate within 10 days after rendition of judgment. Since mailing is not specifically permitted by statute, the notice must be received by the magistrate on or before the tenth day, not merely mailed on that day. Even if the notice received by the magistrate is untimely, he must transmit the papers to the district court as required by NRS 189.030, because only the district court may dismiss. AGO 79-4 (2-16-1979).

189.030. Transmission of transcript, other papers, sound recording and copy of docket to district court.

1. The justice shall, within 10 days after the notice of appeal is filed, transmit to the clerk of the district court the transcript of the case, all other papers relating to the case and a certified copy of his docket.

2. The justice shall give notice to the appellant or his attorney that the transcript and all other papers relating to the case have been filed with the clerk of the district court.

3. If the district judge so requests, before or after receiving the record, the justice of the peace shall transmit to him the sound recording of the case.

History.
CrPA 1911, § 664; RL 1912, § 7514; CL 1929, § 11311; 1973, p. 631; 1979, p. 1512.

Cross references.
As to transcripts and sound recordings in justices' courts, see NRS 4.390 to 4.420.

NOTES TO DECISIONS

The late filing of a transcript by the justice's court does not warrant dismissal of the underlying criminal charges against a defendant. State v. O'Donnell, 98 Nev. 305, 646 P.2d 1217, 1982 Nev. LEXIS 458 (1982).

Costs of transmission assessed to nonindigent appellant.
When a justice's court decision is appealed, the justice of the peace sends the case to the district court within 10 days, and costs of transmission can properly be assessed to the nonindigent appellant. Braham v. Fourth Judicial Dist. Court, 103 Nev. 644, 747 P.2d 1390, 1987 Nev. LEXIS 1886 (1987).

OPINIONS OF ATTORNEY GENERAL

NRS 189.010 and 189.020 are properly read together to provide that if a criminal defendant in a magistrate's court wishes to appeal his conviction, he must file his notice of appeal with the magistrate within 10 days after rendition of judgment. Since mailing is not specifically permitted by statute, the notice must be received by the magistrate on or before the 10th day, not merely mailed on that day. Even if the notice received by the magistrate is untimely, he must transmit the papers to the district court as required by this section, because only the district court may dismiss. AGO 79-4 (2-16-1979).

189.035. Procedure where transcript defective.

1. Except as provided in subsection 2, if the district court finds that the transcript of a case which was recorded by sound recording equipment is materially or extensively defective, the case must be returned for retrial in the Justice Court from which it came.

2. If all parties to the appeal stipulate to being bound by a particular transcript of the proceedings in the justice Court, or stipulate to a particular change in the transcript, an appeal based on that transcript as accepted or changed may be heard by the district court without regard to any defects in the transcript.

History.
1979, p. 1512.

189.050. Action to be judged on record.

An appeal duly perfected transfers the action to the district court to be judged on the record.

History.
CrPA 1911, § 666; RL 1912, § 7516; CL 1929, § 11313; 1979, p. 1512.

189.060. Grounds for dismissal of appeal; enforcement of judgment.

1. The appeal may be dismissed on either of the following grounds:
   (a) For failure to take the same in time.
   (b) For failure to appear in the district court when required.
2. If the appeal is dismissed, a copy of the order of dismissal must be remitted to the justice, who may proceed to enforce the judgment.

History.
CrPA 1911, § 666; RL 1912, § 7516; CL 1929, § 11313.

189.065. Dismissal for failure to set or reset appeal for hearing.

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

History.
1965, p. 376; 1985, pp. 57, 972.

NOTES TO DECISIONS

The provisions of this section are mandatory. Plankinton v. Fifth Judicial Dist. Court ex rel. County of Nye, 93 Nev. 643, 572 P.2d 525, 1977 Nev. LEXIS 653 (1977).

Doubt resolved in favor of appeal.
Any doubt regarding the interpretation of this section would be resolved in favor of the right to appeal. Thompson v. First Judicial Dist. Court, 100 Nev. 352, 683 P.2d 17, 1984 Nev. LEXIS 388 (1984).

Sixty days to apply for trial date.
Under this section, an appellant has 60 days after filing his appeal in the justice's court within which to apply for a trial date in the district court. He need not actually obtain a trial setting within the 60-day limit. Thompson v. First Judicial Dist. Court, 100 Nev. 352, 683 P.2d 17, 1984 Nev. LEXIS 388 (1984).

Late filing of a transcript by the justice's court does not warrant dismissal of the underlying criminal charges against a defendant. State v. O'Donnell, 98 Nev. 305, 646 P.2d 1217, 1982 Nev. LEXIS 458 (1982).

189.070. Grounds for dismissal of complaint on appeal.

Any complaint, upon motion of the defendant, may be dismissed upon any of the following grounds:

1. That the justice of the peace did not have jurisdiction of the offense.
2. That more than one offense is charged in any one count of the complaint.

3. That the facts stated do not constitute a public offense.

History.
CrPA 1911, § 667; RL 1912, § 7517; CL 1929, § 131414; 1979, p. 36.

NOTES TO DECISIONS

Complaint made on information and belief.
The fact that the complaint upon which petitioner was tried in justice's court was made upon information and belief rather than upon the knowledge of the complainant did not constitute a jurisdictional defect, and where petitioner pleaded to the complaint in the justice's court and first objected thereto after appealing to the district court, such defect was waived. Ex parte Murray, 39 Nev. 351, 157 P. 647, 1916 Nev. LEXIS 19 (1916).

Cited in:
Sardis v. Second Judicial Dist. Court ex rel. County of Washoe, 85 Nev. 585, 460 P.2d 163, 1969 Nev. LEXIS 431 (1969).

Appeal by State

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

1. The state may appeal to the district court from an order of a Justice Court granting the motion of a defendant to suppress evidence.

2. Such an appeal shall be taken:

(a) Within 2 days after the rendition of such an order during a trial or preliminary examination.

(b) Within 5 days after the rendition of such an order before a trial or preliminary examination.

3. Upon perfecting such an appeal:

(a) After the commencement of a trial or preliminary examination, further proceedings in the trial shall be stayed pending the final determination of the appeal.

(b) Before trial or preliminary examination, the time limitation within which a defendant shall be brought to trial shall be extended for the period necessary for the final determination of the appeal.

History.
1969, p. 1079.

NOTES TO DECISIONS

Certiorari held not available.
As the district court clearly had the power, under this section, to review an order of the justice's court granting a motion to suppress, the Supreme Court would not inquire into the correctness of its action upon a petition for a writ of certiorari. Goicoechea v. Fourth Judicial Dist. Court ex rel. County of Elko, 96 Nev. 287, 607 P.2d 1140, 1980 Nev. LEXIS 571 (1980).

Bail bond forfeiture action.
Since a bail bond forfeiture action is a civil proceeding, the filing of an appeal therefrom is governed by the civil rules; therefore, the state has a right of appeal to the district court. State

(5) *Appeal From Certain Amended Judgments and Post-Judgment Orders.* An appeal from a judgment substantively altered or amended upon the granting of a motion listed in Rule 4(a)(4), or from an order granting or denying a new trial, is taken by filing a notice of appeal, or amended notice of appeal, in compliance with Rule 3. The notice of appeal or amended notice of appeal must be filed after entry of a written order disposing of the last such remaining timely motion and no later than 30 days from the date of service of written notice of entry of that order.

(6) *Premature Notice of Appeal.* A premature notice of appeal does not divest the district court of jurisdiction. The Supreme Court may dismiss as premature a notice of appeal filed after the oral pronouncement of a decision or order but before entry of the written judgment or order, or before entry of the written disposition of the last-remaining timely motion listed in Rule 4(a)(4). If; however, a written order or judgment, or a written disposition of the last. remaining timely motion listed in Rule 4(a)(4), is entered before dismissal of the premature appeal, the notice of appeal shall be considered filed on the date of and after entry of the order, judgment or written disposition of the last-remaining timely motion.

(7) *Amended Notice of Appeal.* No additional fees shall be required if any party files an amended notice of appeal in order to comply with the provisions of this Rule.

(b) *Appeals in criminal cases.*

(1) *Time for filing a notice of appeal.*

(A) *Appeal by a defendant or petitioner.* Except as otherwise provided in NRS 34.560(2), 34.575(1), and 177.055 and Rule 4(c), the notice of appeal by a defendant or petitioner in a criminal case shall be filed with the district court clerk within 30 days after the entry of the judgment or order being appealed.

(B) *Appeal by the state.* Except as otherwise provided in NRS 34.575(2) and 177.015(2), when an appeal by the state is authorized by statute, the notice of appeal shall be filed with the district court clerk within 30 days after the entry of the judgment or order being appealed.

(2) *Filing before entry of judgment.* A notice of appeal filed after the announcement of a decision, sentence or order-but before entry of the judgment or order-shall be treated as filed after such entry and on the day thereof.

(3) *Effect of a motion on a notice of appeal.*

(A) If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 30 days after the entry of an order denying the motion.

(B) A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 30 days after entry of the judgment.

(4) *Entry defined.* A judgment or order is entered for purposes of this Rule when it is signed by the judge and filed with the clerk.

(5) *Time for entry of judgment; content of judgment or order in post-conviction matters.*

(A) *Judgment of conviction.* The district court judge shall enter a written judgment of conviction within 10 days after sentencing.

(B) *Order resolving post-conviction matter.* The district court judge shall enter a written judgment or order finally resolving any post-conviction matter within 20 days after the district court judge's oral pronouncement of a final decision in such a matter. The judgment or order in any post-conviction matter must contain specific findings of fact and conclusions of law supporting the district court's decision.

(C) *Sanctions; counsel's failure to timely prepare judgment or order.* The Supreme Court may impose sanctions on any counsel instructed by the district court judge to draft the judgment or order and who does not submit the proposed judgment or order to the district court judge within the applicable time periods specified in Rule 4(b)(5).

(6) *Withdrawal of appeal.* If an appellant no longer desires to pursue an appeal after the notice of appeal is filed, counsel for appellant shall file with the Supreme Court a notice of withdrawal of appeal. The notice of withdrawal of appeal shall substantially comply with Form 8 in the Appendix of Forms.

(c) *Untimely direct appeal from a judgment of conviction and sentence.*

(1) *When an untimely direct appeal from a judgment of conviction and sentence may be held.* An untimely notice of appeal from a judgment of conviction and sentence may be filed only under the following circumstances:

(A) A post-conviction petition for a writ of habeas corpus has been timely and properly filed in accordance with the provisions of NRS 34.720 to 34.830, asserting a viable claim that the petitioner was unlawfully deprived of the right to a timely direct appeal from a judgment of conviction and sentence; and

(B) The district court in which the petition is considered enters a written order containing:

(i) specific findings of fact and conclusions of law finding that the petitioner has established a valid appeal-deprivation claim and is entitled to a direct appeal with the assistance of appointed or retained appellate counsel;

(ii) if the petitioner is indigent, directions for the appointment of appellate counsel, other than counsel for the defense in the proceedings leading to the conviction, to represent the petitioner in the direct appeal from the conviction and sentence; and

(iii) directions to the district court clerk to prepare and file within 5 days of the entry of the district court's order-a notice of appeal from the judgment of conviction and sentence on the petitioner's behalf in substantially the form provided in Form 1 in the Appendix of Forms.

(C) If a federal court of competent jurisdiction issues a final order directing the state to provide a direct appeal to a federal habeas corpus petitioner the petitioner or his or her counsel shall file the federal court order within 30 days of entry of the order in the district court in which petitioner's criminal case was pending. The clerk of the district court shall prepare and file-within 30 days of filing of the federal court order in the district court-a notice of appeal from the

(b) Information concerning the person's activities while inside his residence,

must not be used.

4. The court shall not order a person to a term of residential confinement unless he agrees to the order.

5. A term of residential confinement may not be longer than the maximum term of a sentence imposed by the court.

6. As used in this section, "facility" has the meaning ascribed to it in NRS 209.065.

History.

1987, ch. 804, § 2, p. 2228; 1991, ch. 28, § 3, p. 57; 1993, ch. 466, § 121, p. 1515; 1995, ch. 443, § 215, p. 1252; 2001 Sp. Sess., ch. 8, § 15, p. 135; 2007, ch. 525, § 8.8, p. 3185.

Effect of amendment.

The 2007 amendment, effective July 1, 2007, redesignated former subdivisions 2(b) and 2(c) as present subdivisions 2(a)(1) and 2(a)(2), and inserted present subdivision 2(b); added subsection 6; and made related changes.

CHAPTER 177.

APPEALS AND REMEDIES AFTER CONVICTION.

APPEALS: WHEN ALLOWED, HOW TAKEN AND EFFECT THEREOF

APPEALS: WHEN ALLOWED, HOW TAKEN AND EFFECT THEREOF

177.015. Appeals to district court and Supreme Court.

The party aggrieved in a criminal action may appeal only as follows:

1. Whether that party is the State or the defendant:

(a) To the district court of the county from a final judgment of the Justice Court.

(b) To the Supreme Court from an order of the district court granting a motion to dismiss, a motion for acquittal or a motion in arrest of judgment, or granting or refusing a new trial.

(c) To the Supreme Court from a determination of the district court about whether a defendant is mentally retarded that is made as a result of a hearing held pursuant to NRS 174.098. If the Supreme Court entertains the appeal, it shall enter an order staying the criminal proceedings against the defendant for such time as may be required.

2. The State may, upon good cause shown, appeal to the Supreme Court from a pretrial order of the district court granting or denying a motion to suppress evidence made pursuant to NRS 174.125. Notice of the appeal must be filed with the clerk of the district court within 2 judicial days and with the Clerk of the Supreme Court within 5 judicial days after the ruling by the

district court. The Clerk of the district court shall notify counsel for the defendant or, in the case of a defendant without counsel, the defendant within 2 judicial days after the filing of the notice of appeal. The Supreme Court may establish such procedures as it determines proper in requiring the appellant to make a preliminary showing of the propriety of the appeal and whether there may be a miscarriage of justice if the appeal is not entertained. If the Supreme Court entertains the appeal, or if it otherwise appears necessary, it may enter an order staying the trial for such time as may be required.

3. The defendant only may appeal from a final judgment or verdict in a criminal case.

4. Except as otherwise provided in subsection 3 of NRS 174.035, the defendant in a criminal case shall not appeal a final judgment or verdict resulting from a plea of guilty, guilty but mentally ill or nolo contendere that the defendant entered into voluntarily and with a full understanding of the nature of the charge and the consequences of the plea, unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings. The Supreme Court may establish procedures to require the defendant to make a preliminary showing of the propriety of the appeal.

History.

1967, p. 1443; 1971, p. 1450; 1973, p. 1489; 1981, p. 1705; 1991, ch. 265, § 3, p. 652; 1995, ch. 480, § 3, p. 1535; 1997, ch. 203, § 57(2), p. 645; 2003, ch. 137, § 5, p. 769; 2003, ch. 284, § 21, p. 1468; 2007, ch. 327, § 27, p. 1422.

Effect of amendment.

The 2007 amendment, effective October 1, 2007, inserted "guilty but mentally ill" in subsection 4, and made a related change.

NOTES TO DECISIONS

Filing of notice of appeal before final judgment.

Defendant filed his notice of appeal following his convictions for sexual assault and lewdness with a minor but before final judgment was entered; this premature notice was treated as filed after the entry of judgment. George v. State, 127 P.3d 1055, 2006 Nev. LEXIS 2 (2006).

177.055. Automatic appeal in certain cases; mandatory review of death sentence by supreme court.

NOTES TO DECISIONS

IV. Illustrative Cases
A. Death Penalty Upheld

IV. ILLUSTRATIVE CASES.

A. Death Penalty Upheld.

Defendant's death sentence was not excessive.

Defendant's death sentence was appropriate where he was convicted of four first-degree murders during the guilt phase of his trial and overwhelming evidence supported the single aggravator found by the jury for each of the murders; additionally, the death sentence was not excessive because the evidence showed that he bound and shot four young men execution-style in the head; he took property from them, including money, and a VCR; and he bragged

standing on citizens to challenge findings as well as property owners. Hantges v. City of Henderson, 121 Nev. 319, 113 P.3d 848 (2005).

Various challenges appealable. — The challenging of the validity of an injunction, a contempt order, and the naming of a receiver are appealable and therefore not appropriately considered in a writ of mandamus petition. Guerin v. Guerin, 114 Nev. 127, 953 P.2d 716 (1998).

Exercise of jurisdiction over trust. — Review of whether the district court erroneously exercised jurisdiction over a trust is properly conducted by way of a writ of mandamus proceeding. Guerin v. Guerin, 114 Nev. 127, 953 P.2d 716 (1998).

As an appeal is not authorized from any district court judgment or order on attorney fee dispute arbitration committee decisions, the proper way to challenge such dispositions is through an original writ petition, which is available when no plain, speedy, and adequate legal remedy exists. Marquis & Aurbach v. Eighth Judicial Dist. Court, 122 Nev. 1147, 146 P.3d 1130 (2006).

Parties to an attorney fee dispute properly sought mandamus relief from the trial court's holding which affirmed the state bar fee dispute arbitration committee's decision upholding the contingency fee because rules do not provide for an appeal to the Supreme Court of Nevada from a district court judgment or order reviewing a state bar fee dispute arbitration committee decision. Marquis & Aurbach v. Eighth Judicial Dist. Court, 122 Nev. 1147, 146 P.3d 1130 (2006).

Cited in: Int'l Fid. Ins. Co. v. State, 122 Nev. 39, 126 P.3d 1133 (2006); Thomas v. City of N. Las Vegas, 122 Nev. 82, 127 P.3d 1057 (2006).

Rule 3B. Criminal actions: rules governing.

Appeals from district court determinations in criminal actions shall be governed by these Rules and by NRS 177.015 to 177.305 and NRS 34.575. All appeals in capital cases are also subject to the provisions of SCR 250. Rule 3C applies to all other direct and post-conviction criminal appeals, except those matters specifically excluded from the fast track by Rule 3C(a). (Amended eff. 11-27-83; Amended 7-22-96, eff. 9-1-96; Amended eff. 7-1-09.)

Rule 3C. Fast track criminal appeals.

(a) *Applicability.*

(1) This Rule applies to an appeal from a district court judgment or order entered in a criminal or post-conviction proceeding commenced after September 1, 1996, whether the appellant is the State or the defendant. A proceeding is commenced for the purposes of this Rule upon the filing of an indictment, information, or post-conviction application in the district court.

(2) The Supreme Court may exercise its discretion and apply this Rule to appeals arising from criminal and post-conviction proceedings that are not subject to this Rule.

(3) Unless the court otherwise orders, an appeal is not subject to this Rule if:

(A) the appeal challenges an order or judgment in a case involving a category A felony, as described in NRS 193.130(2)(a), in which a sentence of death or imprisonment in the state prison for life with or without the possibility of parole is actually imposed;

(B) the appeal is brought by a defendant or petitioner who was not represented by counsel in the district court; or

(C) the appeal is filed in accordance with Rule 4(c).

(b) *Responsibilities of trial counsel.*

(1) *Definition.* For purposes of this Rule, ""trial counsel" means the attorney who represented the defendant or post-conviction petitioner in district court in the underlying proceedings that are the subject of the appeal.

(2) *Responsibilities.* Trial counsel shall file the notice of appeal, rough draft transcript request form, and fast track statement and consult with appellate counsel for the case regarding the appellate issues that are raised. Trial counsel shall arrange their calendars and adjust their public or private contracts for compensation to accommodate the additional duties imposed by this Rule.

(3) *Withdrawal.* To withdraw from representation during the appeal, trial counsel shall file with the Supreme Court a motion to withdraw from representation. The motion shall be considered only after trial counsel has filed the notice of appeal, rough draft transcript request and fast track statement. The granting of such motions shall be conditioned upon trial counsel's full cooperation with appellate counsel during the appeal.

(c) *Notice of appeal.* When an appellant elects to appeal from a district court order or judgment governed by this Rule, appellant's trial counsel shall serve and file a notice of appeal pursuant to applicable rules and statutes.

(d) *Rough draft transcript.* A rough draft transcript is a computer-generated transcript that can be expeditiously prepared in a condensed fashion, but is not proofread, corrected for certified to be an accurate transcript.

(1) *Format.* For the purposes of this Rule, a rough draft transcript shall:

(A) Be printed on paper 81/2 by 11 inches in size, double-sided, with the words "Rough Draft Transcript" printed on the bottom of each page;

(B) Be produced with a yellow cover sheet in a condensed format that produces at least four conventional transcript pages on one condensed page;

(C) Include a concordance indexing key words in the transcript; and

(D) Include an acknowledgement by the court reporter or recorder that the document submitted under this Rule is a true original or copy of the rough draft transcript.

(2) *Notification of court reporter or recorder.* When a case may be subject to this Rule, the presiding district court judge shall notify the court reporter or recorder for the case before trial that a rough draft transcript may be required.

(3) *Request for rough draft transcript.*

(A) *Filing and service.*

(i) When a rough draft transcript is necessary for an appeal, trial counsel shall file a rough draft transcript request form with the district court and shall serve a copy of the request form upon the court reporter or recorder and opposing counsel.

(ii) Trial counsel shall serve and file the rough draft transcript request form on the same date the notice of appeal is served and filed.

(iii) Trial counsel shall file with the Supreme Court 2 file-stamped copies of the rough draft transcript request form and proof of service of the form upon the court reporter or recorder and opposing counsel.

(B) *Form.* The rough draft transcript request shall substantially comply with Form 5 of the Appendix of Forms.

(C) *Necessary transcripts.* Counsel shall order transcripts of only those portions of the proceedings that counsel reasonably and in good faith believes are necessary to determine whether appellate issues are present. In particular, transcripts of jury voir dire, opening statements, closing arguments, and the reading of jury instructions shall not be requested unless pertinent to the appeal.

(D) *No transcripts.* If no transcript is to be requested, trialcounsel shall serve and file with the Supreme Court a certificate tothat effect within the same period that a rough draft transcriptrequest form must be served and filed under subparagraph (A).Such a certificate shall substantially comply with Form 14 in theAppendix of Forms.

(E) *Court reporter or recorder's duty.*

(i) The court reporter or recorder shall submit an original rough draft transcript, as requested by appellant's or respondent's counsel, to the district court no more than 20 days after the date that the request is served.

(ii) The court reporter or recorder shall also deliver certified copies of the rough draft transcript to the requesting attorney and counsel for each party appearing separately no more than 20 days after the date of service of the request. The court reporter or recorder shall deliver an additional certified copy of the rough draft transcript to the requesting attorney for inclusion in the appendix. Within 5 days after delivering the certified copies of the rough draft transcript, the court reporter or recorder shall file with the clerk of the Supreme Court a certificate acknowledging delivery of the completed transcript and specifying the transcripts that have been delivered and the date that they were delivered to the requesting party. Form 15 in the Appendix of Forms is a suggested form of certificate delivery.

(iii) Relevant portions of the trial or hearing that were audio recorded or video recorded shall be submitted in typewritten form. The Supreme Court will not accept audio- or videotapes in lieu of a rough draft transcript.

(4) *Supplemental request for rough draft transcript.*

(A) Opposing counsel may make a supplemental request for portions of the rough draft transcript that were not previously requested. The request shall be made no more than 3 days after opposing counsel is served with the transcript request made under Rule 3C(d)(3)(A)

(B) In all other respects, opposing counsel shall comply with the provisions of this Rule governing a rough draft transcript request when making a supplemental rough draft transcript request.

(5) *Sufficiency of the rough draft transcript.* Trial counsel shall review the sufficiency of the rough draft transcript. If a substantial question arises regarding an inaccuracy in a rough draft transcript, the Supreme Court may order that a certified transcript be produced.

(6) *Exceptions.* The provisions of Rule 3C(d)(1) shall not apply to preparation of transcripts produced by means other than computer-generated technology. But time limits and other procedures governing requests for and preparation of transcripts produced by means other than computer-generated technology shall conform with the provisions of this Rule respecting rough draft transcripts.

(e) *Filing of fast track statement and appendix.*

(1) Fast track statement

(A) *Time for serving and filing.* Within 40 days from the date that the appeal is docketed in the Supreme Court under Rule 12, appellant's trial counsel shall serve and file a fast track statement that substantially complies with Form 6 in the Appendix of Forms.

(B) *Length and contents.* Except by court order granting a motion filed in accordance with Rule 32(a)(7)(C), the fast track statement shall not exceed 10 pages in length and shall include the following:

(i) A statement of jurisdiction for the appeal;

(ii) A statement of the case and procedural history of the case;

(iii) A concise statement summarizing all facts material to a consideration of the issues on appeal;

(iv) An outline of the alleged error(s) of the district court;

(v) A statement describing how the alleged issues on appeal were preserved during trial;

(vi) Legal argument, including authorities, pertaining to the alleged error(s) of the district court;

(vii) Where applicable, a statement regarding the sufficiency of the rough draft transcript; and

(viii) Where applicable, a reference to all related or prior appeals, including the appropriate citations for those appeals.

(C) *References to the appendix.* Every assertion in the fast track statement regarding matters in a rough draft transcript or other document shall cite to the page and volume number, if any, of the appendix that supports the assertion.

(D) *Number of copies to be filed and served.* An original and 1 copy of the fast track statement shall be filed with the clerk of the Supreme Court, and 1 copy shall be served on counsel for each party separately represented.

(2) *Appendix.*

(A) *Joint appendix.* Counsel have a duty to confer and attempt to reach an agreement concerning a possible joint appendix to be filed with the fast track statement.

(B) *Apellant's appendix.* In the absence of an agreement respecting a joint appendix, appellant shall prepare and file an original and 1 copy of a separate appendix with the fast track statement. Appellant shall serve a copy of the appendix on counsel for each party separately represented.

(C) *Form and content.* The preparation and contents of appendices shall comply with Rules 30 and 32 and shall be paginated sequentially.

(f) *Filing of fast track response and appendix.*

(1) *Fast track response.*

(A) *Time for service and filing.* Within 20 days from the date a fast track statement is served, the respondent shall serve and file a fast track response that substantially complies with Form 7 in the Appendix of Forms.

(B) *Length and contents.* Except by court order granting a motion filed in accordance with Rule 32(a)(7)(C), the fast track response shall not exceed 10

pages in length and shall include additional authority and factual information necessary to rebut the contentions in the fast track statement.

(C) *References to the appendix.* Every assertion in the fast track response regarding matters in a rough draft transcript or other document shall cite to the page and volume number, if any, of the appendix that supports the assertion.

(D) *Number of copies to be filed and served.* An original and 1 copy of the fast track response shall be filed with the clerk of the Supreme Court, and 1 copy shall be served on counsel for each party separately represented.

(2) *Appendix.*

(A) *Joint appendix.* Counsel have a duty to confer and attempt to reach an agreement concerning a possible joint appendix.

(B) *Respondent's appendix.* In the absence of an agreement respecting a joint appendix, respondent shall prepare and file an original and 1 copy of a separate appendix with the fast track response. Respondent shall serve a copy of the appendix on a counsel for each party separately represented.

(C) *Form and contents.* The preparation and contents of appendices shall comply with Rules 30 and 32 and shall be paginated sequentially.

(g) *Filing of supplemental fast track statement and response.*

(1) *Supplemental fast track statement.*

(A) *When permitted; length.* A supplemental fast track statement of not more than 5 pages may be filed when appellate counsel differs from trial counsel and can assert material issues that should be considered but were not raised in the fast track statement.

(B) *Time for service and filing; number of copies.* When permitted under subparagraph (A), an original and 1 copy of a supplemental fast track statement shall be filed with the Supreme Court and 1 copy shall be served upon opposing counsel no more than 20 days after the fast track statement is filed or appellate counsel is appointed, whichever is later.

(2) *Supplemental fast track response.* No later than 10 days after a supplemental fast track statement is served, the respondent may file and serve a response of not more than 5 pages.

(h) *Extensions of time.*

(1) *Preparation of rough draft transcript.*

(A) *Five-day telephonic extension.* A court reporter or recorder may request by telephone a 5 day extension of time to prepare a rough draft transcript if the preparation requires more time than is allowed under this Rule. If good cause is shown, the clerk of the Supreme Court or a designated deputy may grant the request by telephone or by written order of the clerk.

(B) *Additional extensions by motion.* Subsequent extensions of time for filing rough draft transcripts shall be granted only upon motion to the Supreme Court. The motion shall justify the requested extension in light of the time limits provided in this Rule, and shall specify the exact length of the extension requested. Extensions of time for the filing of rough draft transcripts shall be granted only upon demonstration of good cause. Sanctions may be imposed if a motion is brought without reasonable grounds.

(2) *Fast track statement and response; supplemental statement and response.*

(A) *Five-day telephonic extension.* Counsel may request by telephone a 5 day extension of time for filing fast track statements and responses, and supplemental fast track statements and responses. If good cause is shown, the clerk of the Supreme Court may grant the request by telephone or by written order of the clerk.

(B) *Additional extensions by motion.* Subsequent extensions of time for filing fast track statements and responses, and supplemental fast track statements and responses shall be granted only upon motion to the Supreme Court. The motion shall justify the requested extension in light of the time limits provided in this Rule, and shall specify the exact length of the extension requested. Extensions of time for the filing of fast track statements and responses, and supplemental fast track statements and responses shall be granted only upon demonstration of extreme need or merit. Sanctions may be imposed if a motion is brought without reasonable grounds.

(i) *Amendments to statements and responses.* Leave to amend fast track statements and responses, or supplemental fast track statements and responses shall be granted only upon motion to the Supreme Court. A motion to amend shall justify the absence of the offered arguments in the initial or supplemental fast track statement or response. The motion shall be granted only upon demonstration of extreme need or merit.

(j) *Full briefing, calendaring or summary disposition.*

(1) Based solely upon review of the rough draft transcript, fast track statement, fast track response, and any supplemental documents, the Supreme Court may summarily dismiss the appeal, may affirm or reverse the decision appealed from without further briefing or argument, may order the appeal to be fully briefed and argued or submitted for decision without argument, may order that briefing and any argument be limited to specific issues, or may direct the appeal to proceed in any manner reasonably calculated to expedite its resolution and promote justice.

(2) If the Supreme Court orders an appeal to be fully briefed, and neither party objects to the sufficiency of the rough draft transcripts to adequately inform this court of the issues raised in the appeal, counsel are not required to file certified transcript request forms under Rule 9(a). If a party's brief will cite to a transcript not previously included in an appendix submitted to this court, that party shall file and serve a transcript request form in accordance with Rule 9 within the time specified for filing the brief in the Supreme Court's briefing order. If a party's brief will cite to documents not previously filed in the Supreme Court, that party shall file and serve an appropriately documented supplemental appendix with the brief.

(k) Reserved.

(*l*) *Withdrawal of appeal.* If an appellant no longer desires to pursue an appeal after the notice of appeal is filed, counsel responsible for the appeal at that time shall file with the Supreme Court a notice of withdrawal of appeal. The notice of withdrawal of appeal shall substantially comply with Form 8 in the Appendix of Forms.

(m) *Court reporter or recorder protection and compensation.*

(1) *Liability.* Court reporters or recorders shall not be subject to civil, criminal or administrative causes of action for inaccuracies in a rough draft transcript unless the court reporter or recorder willfully:

(A) Fails to take full and accurate stenographic notes of the criminal proceeding for which the rough draft transcript is submitted, or willfully and improperly alters stenographic notes from the criminal proceeding, or willfully transcribes audio- or videotapes inaccurately; and

(B) Such willful conduct proximately causes injury or damage to the party asserting the action, and that party demonstrates that appellate or post-conviction relief was granted or denied based upon the court reporter's or recorder's inaccuracies.

(2) *Compensation.* Court reporters shall be compensated as follows:

(A) For preparing a rough draft transcript, the court reporter shall receive 100 percent of the rate established by NRS 3.370 for each transcript page as defined by NRS 3.370 and $25 for costs. Costs include the cost of delivery of the original and copies of the rough draft transcript. In the event that overnight delivery is required to or from outlying areas, that cost shall be additional.

(B) In the event a certified transcript is ordered after the rough draft transcript is prepared, the court reporter shall receive an additional fee equal to 25 percent of the amount established by NRS 3.370 for the already prepared rough draft portion of the transcript. Any portions not included with the rough draft transcript will be compensated by the amount established by NRS 3.370.

(n) *Sanctions.* Any attorney, court reporter, or court recorder who lacks due diligence in compliance with this Rule may be subject to sanctions by the Supreme Court. Sanctionable actions include, but are not limited to, failure of trial counsel to file a timely fast track statement or fast track response; failure of trial counsel to fully cooperate with appellate counsel during the course of the appeal; and failure of counsel to raise material issues or arguments in a fast track statement, response, supplemental statement or supplemental response.

(o) *Conflict.* The provisions of this Rule shall prevail over conflicting provisions of any other rule. (Added 7-22-96, eff. 9-1-96; amended 1-27-00, eff. 2-26-00; amended 4-5-07, eff. 7-1-07; amended 12-31-08, eff. 7-1-09.)

CASE NOTES

Constitutionality. — Nevada's Fast Track criminal appeal procedure complies with the United States Constitution, the Nevada Constitution, and § 2.120 of the Nevada Revised Statutes. Wood v. State, 115 Nev. 344, 990 P.2d 786 (1999).

Cited in: Barkley v. State, 114 Nev. 635, 958 P.2d 1218 (1998).

Rule 3D. Judicial Discipline: Right to Appeal; How Taken; Rules Governing.

(a) *Definitions.* As used in this Rule:

(1) "Respondent" means any Supreme Court justice, district judge, justice of the peace, or municipal court judge or referee, master, or commissioner who is

APPENDIX OF FORMS

Form 1. Notice of Appeal to the Supreme Court from a Judgment or Order of a District Court.

No. _____

Dept. No. _____

IN THE _____ JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF _____

A. B., Plaintiff
v.
C. D., Defendant

NOTICE OF APPEAL

Notice is hereby given that C. D., defendant above named, hereby appeals to the Supreme Court of Nevada (from the final judgment) (from the order (describing it)) entered in this action on the _____ day of _____, 20____.

Attorney for C.D.

/s/

Address

Form 2. Case Appeal Statement.

No. ..... Dept. No. .....

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

A. B., Plaintiff
v.
C. D., Defendant

CASE APPEAL STATEMENT

1. Name of appellant filing this case appeal statement:
2. Identify the judge issuing the decision, judgment, or order appealed from:
3. Identify all parties to the proceedings in the district court (the use of et al. to denote parties is prohibited):
4. Identify all parties involved in this appeal (the use of et al. to denote parties is prohibited):
5. Set forth the name, law firm, address, and telephone umber of all counsel on appeal and identify the party or parties whom they represent:

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):

Dated this ..... day of ....., 20.....

.....
(Signature of Attorney)
.....
(Nevada Bar Identification No.)
.....
(Law Firm)
.....
(Address)
.....
(Telephone Number)

Form 3. Transcript Request Form.

IN THE SUPREME COURT OF THE STATE OF NEVADA

A. B., Appellant
v.
C. D., Respondent

No. .....

REQUEST FOR TRANSCRIPT OF PROCEEDINGS

TO: [Court Reporter Name]

Appellant requests preparation of a transcript of the proceedings before the district court, as follows:

Judge or officer hearing the proceeding:

Date or dates of proceeding:

Portions of the transcript requested:

Number of copies required:

I hereby certify that on this date I ordered this transcript from the court reporter named above, and paid the required deposit.

Dated this ..... day of ....., 20.....

(Signature of Attorney)
.....
(Nevada Bar Identification No.)
.....
(Law Firm)
.....
(Address)
.....
(Telephone Number)

WITHDRAWAL OF PLEA

176.165. When plea of guilty or nolo contendere may be withdrawn.

Except as otherwise provided in this section, a motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended. To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

History.
1967, p. 1434; 1989, ch. 819, § 2, p. 1983; 1995, ch. 637, § 19, p. 2456; 2003, ch. 284, § 18, p. 1467.

Effect of amendment.
The 2003 amendment, effective July 1, 2003, deleted ", guilty but mentally ill" following "a plea of guilty".

Cross references.
As to pleas generally, see NRS 174.035 to 174.065.

NOTES TO DECISIONS

A motion to withdraw a plea of guilty is addressed to the discretion of the court, and the court's decision thereon will not be set aside on appeal unless an abuse of discretion is apparent. State v. Adams, 94 Nev. 503, 581 P.2d 868, 1978 Nev. LEXIS 599 (1978).

The granting of the motion to withdraw one's plea before sentencing is proper where for any substantial reason the granting of the privilege seems fair and just, and the action of the lower court is discretionary and will not be reversed unless there has been a clear abuse of that discretion. State v. Second Judicial Dist. Court, 85 Nev. 381, 455 P.2d 923, 1969 Nev. LEXIS 379 (1969).

Motion to withdraw a plea must be limited to issues related to the validity of the plea.
Challenges to the validity of a defendant's sentence, to the computation of time served toward the sentence, or to a conviction entered pursuant to a verdict are not appropriate to the motion to withdraw a plea. Hart v. State, 116 Nev. 558, 1 P.3d 969, 2000 Nev. LEXIS 76 (2000).

Procedural label of relief sought is determinative.
The motion to withdraw a plea in cases where a judgment of conviction has been entered is "incident to the proceeding in the trial court under Chapter 34" and as such exists independently from the post-conviction petition for a writ of habeas corpus; so to ensure compliance with the relevant procedural requirements, defendants should clearly identify the nature of the relief sought as the procedural label will be determinative. Hart v. State, 116 Nev. 558, 1 P.3d 969, 2000 Nev. LEXIS 76 (2000).

Duty of trial court to review entire record.
When a defendant brings a motion to withdraw a guilty plea, the trial court has a duty to review the entire record to determine whether the plea was valid; a district court may not simply review the plea canvass in a vacuum, conclude that it indicates that the defendant understood what she was doing, and use that conclusion as the sole basis for denying a motion to withdraw a guilty plea. Mitchell v. State, 109 Nev. 137, 848 P.2d 1060, 1993 Nev. LEXIS 23 (1993).

Abuse of discretion for district court to deny motion to withdraw guilty plea.
It was a clear abuse of discretion for district court to deny appellant's motion to withdraw her guilty plea to a charge of attempted burglary, where appellant provided the court with a credible story explaining her actions and denying any criminal intent, and only a very minor amount of money was involved, and moreover, appellant filed her motion to withdraw her plea before sentencing, thereby avoiding any prejudice to the state. Mitchell v. State, 109 Nev. 137, 848 P.2d 1060, 1993 Nev. LEXIS 23 (1993).

The failure to adequately inform the defendant of the consequences of his plea created a manifest injustice that may be corrected by setting aside the conviction and allowing the defendant to withdraw his guilty plea. Meyer v. State, 95 Nev. 885, 603 P.2d 1066, 1979 Nev. LEXIS 683 (1979).

176.156. Disclosure of report of presentence or general investigation; persons entitled to use report; confidentiality of report.

NOTES TO DECISIONS

Reading presentence report to jury violated statute.

In a first-degree murder case, defendant's sentence was reversed and remanded for resentencing as it was plain error for the trial court to permit the presentence report, including a description of 17 previous unrelated arrests, to be read to the jury; while it was not submitted as a formal copy, it was essentially read into the record and transcribed, making it part of the public record. Herman v. State, 128 P.3d 469, 2006 Nev. LEXIS 20 (2006).

WITHDRAWAL OF PLEA

176.165. When plea of guilty, guilty but mentally ill or nolo contendere may be withdrawn.

Except as otherwise provided in this section, a motion to withdraw a plea of guilty, guilty but mentally ill or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended. To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

History.

1967, p. 1434; 1989, ch. 819, § 2, p. 1983; 1995, ch. 637, § 19, p. 2456; 2003, ch. 284, § 18, p. 1467; 2007, ch. 327, § 24, p. 1421.

Effect of amendment.

The 2007 amendment, effective October 1, 2007, inserted "guilty but mentally ill" and made a related change.

NOTES TO DECISIONS

Cited in:

Tanner v. McDaniel, 493 F.3d 1135, 2007 U.S. App. LEXIS 16757 (2007).

EXECUTION

176.337. Court to notify defendant convicted of domestic violence concerning possession, shipment, transportation or receipt of firearm or ammunition.

If a defendant is convicted of a misdemeanor or felony that constitutes domestic violence pursuant to NRS 33.018, the court shall notify the defendant that possession, shipment, transportation or receipt of a firearm or ammunition by the defendant may constitute a felony pursuant to NRS 202.360 or federal law.

History.

2007, ch. 46, § 2, p. 95.

Effective date.

This section is effective October 1, 2007.

framed upon which he may be convicted, the court may order him to be recommitted to the officers of the proper county, or admitted to bail anew to answer the new indictment, information or complaint.

2. If the evidence shows him guilty of another offense, he shall be committed or held thereon, and in neither case shall the verdict be a bar to another prosecution.

3. But if no evidence appear sufficient to charge him with any offense, he shall, if in custody, be discharged; or, if admitted to bail, his bail shall be exonerated; or, if money has been deposited instead of bail, it shall be refunded to the defendant, and the arrest of judgment shall operate as an acquittal of the charge upon which the indictment, information or complaint was founded.

History.
1967, p. 1443.

MISCELLANEOUS PROVISIONS

176.555. Correction of illegal sentence.

The court may correct an illegal sentence at any time.

History.
1967, p. 1443.

NOTES TO DECISIONS

Challenge to presentence credits.
Defendant who was denied sentencing credit one on count of a multiple count conviction was entitled to raise the issue on direct appeal. Defendant was not required to file a post-conviction petition for a writ of habeas corpus or a motion to correct an illegal sentence. Johnson v. State, 89 P.3d 669, 2004 Nev. LEXIS 37 (2004).

Invalidated death sentence.
Where the defendant was initially sentenced to death for first-degree murder but subsequently the U.S. Supreme Court declared the death penalty as applied to be unconstitutional, life imprisonment without the possibility of parole became the maximum sentence that could be imposed against a person convicted of first-degree murder, and the district judge was authorized to resentence the defendant and invoke the penalty of life without possibility of parole, it being the only lawful penalty which could have been entered upon the conviction and finding of the jury that the defendant should receive the maximum sentence permitted by law. Anderson v. State, 90 Nev. 385, 528 P.2d 1023, 1974 Nev. LEXIS 406 (1974).

Motions.
The inherent power to correct an illegal sentence, like the inherent power to modify sentences based on mistakes about a defendant's record, must necessarily include the power to entertain a motion to correct an illegal sentence. Edwards v. State, 112 Nev. 704, 918 P.2d 321, 1996 Nev. LEXIS 84 (1996).

A motion to correct an illegal sentence is an appropriate vehicle for raising the claim that a sentence is facially illegal at any time; such a motion cannot be used as a vehicle for challenging the validity of a judgment of conviction or sentence based on alleged errors occurring at trial or sentencing. Issues concerning the validity of a conviction or sentence, except in certain cases, must be raised in habeas proceedings. Edwards v. State, 112 Nev. 704, 918 P.2d 321, 1996 Nev. LEXIS 84 (1996).

OPINIONS OF ATTORNEY GENERAL

Validity of sentence.
A district court cannot validly sentence a felon pursuant to a statute not in effect at the time of the offense. Judgments of conviction

that do not conform to the statute in effect at the time of the offense are illegal and must be corrected. AGO 97-23 (8-28-1997).

176.565. Clerical mistakes.

Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

History.
1967, p. 1443.

NOTES TO DECISIONS

This section is to be used to correct oversights.

If the magistrate's failure to include a count three in his order to have the defendant tried was "mere inadvertence" the prosecutor's remedy was to request the magistrate to correct the mistake as a clerical error. Koza v. Sheriff, Clark County, 93 Nev. 6, 559 P.2d 394, 1977 Nev. LEXIS 447 (1977).

Cited in:

Ward v. State, 93 Nev. 501, 569 P.2d 399, 1977 Nev. LEXIS 606 (1977).

CHAPTER 176A.

PROBATION AND SUSPENSION OF SENTENCE.

GENERAL PROVISIONS

AUTHORITY OF THE COURT; LIMITATIONS

PROCEDURE

ASSIGNMENT TO PROGRAM FOR TREATMENT OF MENTAL ILLNESS

History.
1987, ch. 539, § 48, p. 1232; 1991, ch. 44, § 29, p. 91.

Editor's note.
Acts 1991, ch. 44, § 32, provides that the amendatory provisions of the 1991 act do not apply to any post-conviction proceeding commenced before January 1, 1993.

178.4875. Proceeding for forfeiture of bail pending review or appeal; proceeding for recommitment of defendant.

1. If the court admits a petitioner to bail pending review of his petition or pending appeal, any subsequent proceeding for forfeiture of the bail must take place in the proceeding on the petition.

2. Any subsequent proceeding for the recommitment of the defendant pursuant to NRS 178.532 may be initiated on behalf of the state in the proceeding on the petition or in the district court where the original conviction was had, if it was in a different court. If the proceeding occurs in the district court where the original conviction was had, that court must notify the court conducting the proceeding on the petition of any order for recommitment entered and subsequently enforced.

History.
1987, ch. 539, § 49, p. 1232.

178.488. Right to bail upon review; notice of application to be given district attorney.

1. Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay.

2. Pending appeal to a district court, bail may be allowed by the trial justice, by the district court, or by any judge thereof, to run until final termination of the proceedings in all courts.

3. Pending appeal or certiorari to the supreme court, bail may be allowed by the district court or by any judge thereof or by the supreme court or by a justice thereof.

4. Any court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail.

5. The court or judge by whom bail may be ordered shall require such notice of the application therefor as he may deem reasonable to be given to the district attorney of the county in which the verdict or judgment was originally rendered.

History.
1967, p. 1452; 1969, p. 10.

Cross references.
As to admission to bail upon appeal, see NRS 177.135.

NOTES TO DECISIONS

Bail pending appeal may be denied if an appellant's release poses a risk of flight or danger to the community, or if the appeal appears frivolous or taken for delay. Lane v. State, 98 Nev. 458, 652 P.2d 1174, 1982 Nev. LEXIS 502 (1982).

Bail is to be denied only in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community may be threatened by the applicant's release. In re Austin, 86 Nev. 798, 477 P.2d 873, 1970 Nev. LEXIS 622 (1970).

Bail pending appeal of first-degree murder conviction.

Defendant convicted of first-degree murder is not statutorily precluded from receiving bail pending his appeal pursuant to this section despite the fact that NRS 178.484(4) permits a person charged with first-degree murder to be released on bail unless the proof is evident and the presumption is great. Bergna v. State, 102 P.3d 549, 2004 Nev. LEXIS 125 (2004).

Although defendant, who was convicted of first-degree murder, was not statutorily precluded from receiving bail pending his appeal pursuant to this section, he failed to establish that his release on bail was warranted because he did not sufficiently undermine the quality and strength of the evidence presented at trial that he planned and committed a particularly violent, premeditated murder under circumstances designed to escape detection and he did not allege or establish any errors at trial that so eroded or undermined the validity of the conviction and sentence that the court could confidently conclude that defendant's release on bail posed no danger of further violence or risk of flight. Bergna v. State, 102 P.3d 549, 2004 Nev. LEXIS 125 (2004).

The factors to be considered in the exercise of discretion in favor of bail on appeal are: misconduct during trial, harmful errors at trial, newly discovered evidence, health of the defendant, probable merit of appeal, length of time the defendant has resided in the community, and the probability that the defendant would turn himself in. State v. McFarlin, 41 Nev. 105, 167 P. 1011, 1917 Nev. LEXIS 26 (1917) (decision under former similar statute).

Denial of basis where appeal is frivolous.

Although a district court may make a determination that an appeal is frivolous in ruling on a motion for bail pending appeal, it should exercise due caution when denying bail solely on this ground; the determination of frivolousness approaches the province of appellate review, and is ultimately a question for decision by the Supreme Court. Lane v. State, 98 Nev. 458, 652 P.2d 1174, 1982 Nev. LEXIS 502 (1982).

178.494. Bail for witnesses; judicial review of detention or amount of bail.

1. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the magistrate may require him to give bail for his appearance as a witness, in an amount fixed by the magistrate. If the person fails to give bail the magistrate may:

(a) Commit him to the custody of a peace officer pending final disposition of the proceeding in which the testimony is needed;

(b) Order his release if he has been detained for an unreasonable length of time; and

(c) Modify at any time the requirement as to bail.

2. Every person detained as a material witness must be brought before a judge or magistrate within 72 hours after the beginning of his detention. The judge or magistrate shall make a determination whether:

(a) The amount of bail required to be given by the material witness should be modified; and

(b) The detention of the material witness should continue.

The judge or magistrate shall set a schedule for the periodic review of whether the amount of bail required should be modified and whether detention should continue.

History.

1967, p. 1452; 1989, ch. 157, § 1, p. 327.

habeas corpus. Castillo v. State, 106 Nev. 349, 792 P.2d 1133 (1990), appeal dismissed, 106 Nev. 1017, 835 P.2d 31 (1990).

IV. WRIT PROPER.

Lack of probable cause to hold for trial.

The motion to suppress is the remedy normally used to preclude the introduction of evidence at trial which is claimed to be inadmissible for constitutional reasons, and is the remedy contemplated by the criminal code. The use of habeas corpus is not precluded in a case where the claim is that evidence does not exist in the record to establish reasonable or probable cause to hold an accused for trial; in such a case there is nothing to suppress to which a motion for that purpose could be directed, since it is the absence of evidence that supplies the cause for challenge via habeas. Cook v. State, 85 Nev. 692, 462 P.2d 523, 1969 Nev. LEXIS 458 (1969), modified on other grounds, State v. Loyle, 101 Nev. 65, 692 P.2d 516, 1985 Nev. LEXIS 367 (1985).

Once a judicial officer has determined that probable cause does not exist, it would be the most naked deprivation of due process and an intolerable interference with the privilege of the writ of habeas corpus to retain him in custody pending appeal by the state. Gary v. Sheriff, Clark County, 96 Nev. 78, 605 P.2d 212, 1980 Nev. LEXIS 526 (1980).

A defendant charged with having committed a public offense may challenge probable cause to hold him to answer through a petition for a writ of habeas corpus. If unsuccessful, he thereafter may challenge the state's case at trial, and on appeal from conviction if conviction occurs. An order denying pretrial habeas relief is not a final adjudication of his guilt. On the other hand, an order granting such a petition for relief before trial possesses the quality of a final judgment. Gary v. Sheriff, Clark County, 96 Nev. 78, 605 P.2d 212, 1980 Nev. LEXIS 526 (1980).

The validity of a guilty plea is a matter which may be determined upon a petition for a writ of habeas corpus filed in the district court of the district having custody of the petitioner. Krewson v. Warden, Nev. State Prison, 96 Nev. 886, 620 P.2d 859, 1980 Nev. LEXIS 752 (1980).

Habeas corpus would lie to test the legality of the parole board's order transferring the petitioner to an out-of-state parole, even though it would not permit discharge from actual custody. Roberts v. Hocker, 85 Nev. 390, 456 P.2d 425, 1969 Nev. LEXIS 382 (1969).

V. WRIT IMPROPER.

Pretrial challenge to discovery orders.

Since there is no provision in the habeas corpus statutes which permits a pretrial challenge to an order denying a motion for discovery nor for interlocutory appellate review of such orders, the habeas petition challenging court's order denying motion for production of certain records was not cognizable in the district court. Kinsey v. Sheriff, Clark County, 94 Nev. 596, 584 P.2d 158, 1978 Nev. LEXIS 626 (1978).

A claim that certain evidence is inadmissible must be raised in a motion to suppress, not in a habeas petition. Craig v. Sheriff, Washoe County, 92 Nev. 741, 557 P.2d 710, 1976 Nev. LEXIS 741 (1976).

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

Petitions for Post-Conviction Relief

34.720. Scope of provisions.

The provisions of NRS 34.720 to 34.830, inclusive, apply only to petitions for writs of habeas corpus in which the petitioner:

1. Requests relief from a judgment of conviction or sentence in a criminal case; or

2. Challenges the computation of time that he has served pursuant to a judgment of conviction.

History.
1985, p. 1233; 1987, ch. 539, § 12, p. 1217; 1991, ch. 44, § 11, p. 79.

NOTES TO DECISIONS

Cited in:
Hosier v. State, 117 P.3d 212, 2005 Nev. LEXIS 56 (Aug. 11, 2005).

34.722. "Petition" defined.

As used in NRS 34.720 to 34.830, inclusive, unless the context otherwise requires, "petition" means a post-conviction petition for habeas corpus filed pursuant to NRS 34.724.

History.
1991, ch. 44, § 3, p. 75.

34.724. Persons who may file petition; effect of filing.

1. Any person convicted of a crime and under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the constitution or laws of this state, or who claims that the time he has served pursuant to the judgment of conviction has been improperly computed, may, without paying a filing fee, file a post-conviction petition for a writ of habeas corpus to obtain relief from the conviction or sentence or to challenge the computation of time that he has served.

2. Such a petition:

(a) Is not a substitute for and does not affect any remedies which are incident to the proceedings in the trial court or the remedy of direct review of the sentence or conviction.

(b) Comprehends and takes the place of all other common law, statutory or other remedies which have been available for challenging the validity of the conviction or sentence, and must be used exclusively in place of them.

(c) Is the only remedy available to an incarcerated person to challenge the computation of time that he has served pursuant to a judgment of conviction.

History.
1991, ch. 44, § 4, p. 75.

NOTES TO DECISIONS

Editor's note.
The annotations below were decided under a former similar provision of the Code, NRS 177.315.

Challenge to presentence credit.
Defendant, who was denied sentencing credit on one count of a multiple count conviction, was entitled to raise the issue on direct appeal, and was not required to file a post-conviction petition for a writ of habeas corpus or a motion to correct an illegal sentence. Johnson v. State, 89 P.3d 669, 2004 Nev. LEXIS 37 (2004).

Const. Art. 6, § 6, authorizes post-conviction remedy.
There is ample provision in the state constitution for the post-conviction remedy, since

cause for defendant's failure to file his petition for post-conviction relief within the one-year statutory deadline. Colley v. State, 105 Nev. 235, 773 P.2d 1229, 1989 Nev. LEXIS 51 (1989).

State claims not exhausted for purposes of federal habeas.

Where Nevada Supreme Court's dismissal of petitioner's state habeas petition was based on his failure to show "good cause" for not raising issues therein before one year statutory period expired, and it was possible that the state courts would consider the merits of the unexhausted claims if a showing of good cause was made, the petitioner could not be said to have exhausted his state remedies as to these claims and federal habeas petition would be dismissed. Johnstone v. Wolff, 582 F. Supp. 455, 1984 U.S. Dist. LEXIS 19945 (D. Nev. 1984).

Petitioner incarcerated out of state.

There is nothing in the post-conviction statutes which would prohibit a district court from considering a petition for post-conviction relief from a petitioner incarcerated out of state. Birges v. State, 107 Nev. 809, 820 P.2d 764, 1991 Nev. LEXIS 172 (1991).

Challenge to validity of guilty plea.

The Supreme Court will no longer permit a defendant to challenge the validity of a guilty plea on direct appeal from the judgment of conviction; instead, a defendant must raise a challenge to the validity of his guilty plea in the district court in the first instance, either by bringing a motion to withdraw the guilty plea, or by initiating a post-conviction proceeding under NRS 34.360 or this section. Bryant v. State, 102 Nev. 268, 721 P.2d 364, 1986 Nev. LEXIS 1302 (1986).

Despite defendant's failure to challenge the validity of his guilty plea before the district court, he was permitted to appeal from his judgment of conviction because the court was no less able to consider the validity of the underpinnings of the plea than the district court and because no basis for further prosecution under the original charges existed. Lyons v. State, 105 Nev. 317, 775 P.2d 219, 1989 Nev. LEXIS 61 (1989).

Petition appropriate where appeal delayed by defense counsel.

A petition for post-conviction relief was appropriate to challenge convictions for perjury and for being a habitual criminal since direct appeal was precluded by delay incident to the attempt by the defendant's counsel to determine the validity of a conviction underlying the habitual criminal finding. White v. State, 102 Nev. 153, 717 P.2d 45, 1986 Nev. LEXIS 1123 (1986).

Filing after sentence served.

District court lacks jurisdiction to hear a post-conviction habeas corpus petition after the petitioner has completed the sentence imposed for the challenged conviction. Jackson v. State, 115 Nev. 21, 973 P.2d 241, 1999 Nev. LEXIS 7 (1999).

District court properly dismissed post-conviction habeas corpus petition filed fourteen years after the petitioner had completed service of the sentence; the fact that the petitioner was confined for another conviction which had been enhanced based on the first conviction didn't alter the jurisdictional requirement that the petitioner must not have completed service of the sentence for the conviction he seeks to challenge. Jackson v. State, 115 Nev. 21, 973 P.2d 241, 1999 Nev. LEXIS 7 (1999).

34.725. Requirements for filing petition for writ of habeas corpus.

Repealed by Acts 1991, ch. 44, § 33, p. 92, effective January 1, 1993.

34.726. Limitations on time to file; stay of sentence.

1. Unless there is good cause shown for delay, a petition that challenges the validity of a judgment or sentence must be filed within 1 year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the supreme court issues its remittitur. For the purposes of this subsection, good cause for delay exists if the petitioner demonstrates to the satisfaction of the court:

(a) That the delay is not the fault of the petitioner; and

(b) That dismissal of the petition as untimely will unduly prejudice the petitioner.

2. The execution of a sentence must not be stayed for the period provided in subsection 1 solely because a petition may be filed within that period. A stay of sentence must not be granted unless:

(a) A petition is actually filed; and

(b) The petitioner establishes a compelling basis for the stay.

History.
1991, ch. 44, § 5, p. 75.

NOTES TO DECISIONS

Failure to show good cause for delay.
Denial of the inmate's petition for post-conviction relief was proper pursuant to subsection 1 where it was untimely and he failed to show good cause for the delay; entry of an amended judgment of conviction did not provide good cause to excuse the untimely filing of the inmate's petition. Sullivan v. State, 96 P.3d 761, 2004 Nev. LEXIS 76 (2004).

Defect in petition not jurisdictional.
Lack of verification for defendant's postconviction relief petition was not a jurisdictional defect; rather, the petition was amendable, and should not have been dismissed. Miles v. State, 91 P.3d 588, 2004 Nev. LEXIS 47 (2004).

Constitutionality.
Legislature's enactment of the statutory one-year time limit in this section as applicable to successive habeas corpus petitions is a reasonable regulation of the right to pursue habeas corpus relief, especially in light of the provisions for excusing the bar in instances of cause and actual prejudice; therefore, the statute is not constitutionally infirm. Pellegrini v. State, 117 Nev. —, 34 P.3d 519, 2001 Nev. LEXIS 80 (2001).

Counsel's failure to send appellant his files did not prevent appellant from filing a timely petition, and thus did not constitute good cause for appellant's procedural default. Hood v. State, 111 Nev. 335, 890 P.2d 797, 1995 Nev. LEXIS 12 (1995).

Review of the merits of an untimely claim is prohibited unless the petitioner demonstrates cause. Even before the Legislature adopted the procedural rules which bar the defendant's claims in state court, the Supreme Court dismissed petitions without reviewing the merits if the delay was unreasonable and prejudicial. Moran v. McDaniel, 80 F.3d 1261, 1996 U.S. App. LEXIS 6101 (9th Cir. 1996).

Failure to show good cause and prejudice.
Defendant failed to show good cause, actual prejudice, or a fundamental miscarriage of justice under the provisions of NRS 34.726(1) that were sufficient to overcome the procedural bars applicable to a post-conviction habeas petition filed nearly seven years after his conviction was affirmed. Klein v. Warden, 118 Nev. —, 43 P.3d 1029, 2002 Nev. LEXIS 41 (2002).

Trial counsel's failure to inform defendant of his right to appeal not good cause excusing untimely filing of petition.
An allegation that trial counsel was ineffective in failing to inform a claimant of the right to appeal from the judgment of conviction, or any other allegation that a claimant was deprived of a direct appeal without his or her consent, does not constitute good cause to excuse the untimely filing of a petition under subsection (1) of this section. Harris v. Warden, S. Desert Correctional Ctr., 114 Nev. 107, 964 P.2d 785 (1998).

The one-year period for filing a post-conviction habeas corpus petition begins to run from the issuance of the remittitur from a timely direct appeal to the Supreme Court from the judgment of conviction, or from the entry of the judgment of conviction if no direct appeal is taken. Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132, 1998 Nev. LEXIS 129 (1998).

Counsel's failure to inform client his right to appeal.
Counsel's failure to inform client of his right to appeal does not alone constitute good cause to overcome the time bar of subsection (1) of this section. Dickerson v. State, 114 Nev. 1084, 967 P.2d 1132, 1998 Nev. LEXIS 129 (1998).

Timeliness of petition.
Petitions for habeas corpus relief pursuant to NRS § 34.726(1) must be filed with the appropriate district court within the time set forth in the statute; the court declines to extend the prison mailbox rule to the filing of such petitions. Gonzales v. State, 118 Nev. —, 53 P.3d 901; 2002 Nev. LEXIS 75 (2002).

As with petitions that challenge the validity of the judgment or sentence, the appellate court refused to extend the prison mailbox rule to an inmate's personal injury complaint when the inmate claimed he handed the complaint to the prison official for mailing; the complaint did not reach the court's clerk before the expiration of the statute of limitations, and the district court properly dismissed the matter. Milton v. Nev. Dep't of Prisons, 119 Nev. —, 68 P.3d 895, 2003 Nev. LEXIS 22 (2003).

Defendant's petition for habeas corpus should not have been dismissed merely because his good cause allegation involved an appeal deprivation claim, although an appeal deprivation claim was not good cause if that claim was reasonably available to the petitioner within the one-year statutory period for filing a post-conviction habeas petition under subsection 1 of this section; however, a petitioner's mistaken but reasonable belief that his attorney was pursuing a direct appeal was good cause if the petitioner raised the claim within a reasonable time after learning that his attorney was not in fact pursuing a direct appeal on his behalf. Hathaway v. State, 119 Nev. —, 71 P.3d 503, 2003 Nev. LEXIS 36 (2003).

Successive petitions.

This section applies to successive petitions. Pellegrini v. State, 117 Nev. —, 34 P.3d 519, 2001 Nev. LEXIS 80 (2001).

Trial court properly denied petitioner's untimely and successive petition for a writ of habeas corpus; one-year time bar under this section applied to all postconviction petitions. Pellegrini v. State, 117 Nev. —, 34 P.3d 519, 2001 Nev. LEXIS 80 (2001).

Statutory amendment and new case law altering the definition of "deadly weapons" did not apply retroactively to appellants' convictions, as the new law carried no constitutional significance under state or federal case law, and claims brought in successive petitions were procedurally barred. Clem v. State, 119 Nev. —, 81 P.3d 521, 2003 Nev. LEXIS 81 (2003).

Cited in:

Loveland v. Hatcher, 2000 U.S. App. LEXIS 27443, 231 F.3d 640 (9th Cir. 2000); State v. Haberstroh, 119 Nev. —, 69 P.3d 676, 2003 Nev. LEXIS 27 (2003).

34.730. Petition: Verification; title; service; filing by clerk; prerequisites for hearing.

1. A petition must be verified by the petitioner or his counsel. If the petition is verified by counsel, he shall also verify that the petitioner personally authorized him to commence the action.

2. The petition must be titled "Petition for Writ of Habeas Corpus (Post-Conviction)" and be in substantially the form set forth in NRS 34.735. The petition must name as respondent and be served by mail upon the officer or other person by whom the petitioner is confined or restrained. A copy of the petition must be served by mail upon:

(a) The attorney general; and

(b) In the case of a petition challenging the validity of a judgment of conviction or sentence, the district attorney in the county in which the petitioner was convicted.

3. Except as otherwise provided in this subsection, the clerk of the district court shall file a petition as a new action separate and distinct from any original proceeding in which a conviction has been had. If a petition challenges the validity of a conviction or sentence, it must be:

(a) Filed with the record of the original proceeding to which it relates; and

(b) Whenever possible, assigned to the original judge or court.

4. No hearing upon the petition may be set until the requirements of NRS 34.740 to 34.770, inclusive, are satisfied.

History.

1985, p. 1229; 1987, ch. 539, § 13, p. 1218; 1991, ch. 44, § 12, p. 79.

NOTES TO DECISIONS

Defect in petition not jurisdictional.
Lack of verification for defendant's postconviction relief petition was not a jurisdictional defect; rather, the petition was amendable, and should not have been dismissed. Miles v. State, 91 P.3d 588, 2004 Nev. LEXIS 47 (2004).

Constitutionality.
Requiring petitioners to first seek relief in the court of conviction within a year of conviction is a reasonable regulation, especially when that requirement can be waived by showing of prejudice and good cause for failure to meet it. Therefore, this section and the statutory scheme regarding petitions for post-conviction relief are constitutional as reasonable regulation of the writ of habeas corpus. Passanisi v. Director, Nev. Dep't of Prisons, 105 Nev. 63, 769 P.2d 72, 1989 Nev. LEXIS 15 (1989) (decided under former NRS 34.725).

Prerequisites for filing petition.
Previous decisions in which the court referred to habeas and post-conviction procedures as alternative remedies have been superseded by the legislature's enactment in 1987 of this section which requires that a request for a writ of habeas corpus be preceded by a timely petition for post-conviction relief or, alternatively, be accompanied by a showing of prejudice and good cause why the movant has not filed a timely petition for post-conviction relief. Passanisi v. Director, Nev. Dep't of Prisons, 105 Nev. 63, 769 P.2d 72, 1989 Nev. LEXIS 15 (1989) (decided under former NRS 34.725).

Dismissal held proper.
Appellant's failure to meet the statutory prerequisites of this section for filing a petition for habeas corpus is a proper ground for dismissal of his petition. Passanisi v. Director, Nev. Dep't of Prisons, 105 Nev. 63, 769 P.2d 72, 1989 Nev. LEXIS 15 (1989) (decided under former NRS 34.725).

Cited in:
Crump v. First Judicial Dist. Court, 114 Nev. 590, 958 P.2d 1200, 1998 Nev. LEXIS 69 (1998).

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

Review of Selected Nevada Legislation, Criminal Procedure, 1987 Pac. L.J. Rev. Nev. Legis. 69.

34.735. Form of petition.

A petition must be in substantially the following form, with appropriate modifications if the petition is filed in the supreme court:

Case No. _____
Dept. No. _____

IN THE _____ JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF _____

_____	)	
Petitioner,	)	PETITION FOR WRIT
v.	)	OF HABEAS CORPUS
_____	)	(POST-CONVICTION)
Respondent	)	

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the department of corrections, name the warden or head of the institution. If you are not in a specific institution of the department but within its custody, name the director of the department of corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the attorney general's office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty:

_____

2. Name and location of court which entered the judgment of conviction under attack: _____

_____

3. Date of judgment of conviction: _____

4. Case number: _____

5. (a) Length of sentence: _____

_____

(b) If sentence is death, state any date upon which execution is scheduled:

_____

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes ____ No ____

If "yes," list crime, case number and sentence being served at this time:

_____

_____

7. Nature of offense involved in conviction being challenged: _____

_____

8. What was your plea? (check one)

(a) Not guilty ____

(b) Guilty ____

(c) Nolo contendere ____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details: _____

_____

_____

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury ____

(b) Judge without a jury ____

11. Did you testify at the trial? Yes ____ No ____

12. Did you appeal from the judgment of conviction? Yes ____ No ____

13. If you did appeal, answer the following:

(a) Name of court: _____

(b) Case number or citation: _____

(c) Result: _____

(d) Date of result: _____

(Attach a copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: _____

_____

_____

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes ____ No ____

16. If your answer to No. 15 was "yes," give the following information:

(a)(1) Name of court: _____

(2) Nature of proceeding: _____

_____

_____

(3) Grounds raised: _____

_____

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

_____

(b) As to any second petition, application or motion, give the same information:

(1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____

(5) Result: _____

(6) Date of result: _____

(7) If known, citations of any written opinion or date of orders entered pursuant to such result: _____

_____

(c) As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes ____ No ____

Citation or date of decision: _____

(2) Second petition, application or motion? Yes ____ No ____

Citation or date of decision: _____

(3) Third or subsequent petitions, applications or motions? Yes ____ No ____

Citation or date of decision: _____

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

_____

_____

_____

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify:

(a) Which of the grounds is the same: _____

_____

(b) The proceedings in which these grounds were raised: _____

_____

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.)

_____

_____

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any

other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) _____

_____

_____

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.). _____

_____

_____

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ____ No ____

If yes, state what court and the case number: _____

_____

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: _____

_____

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ____ No ____

If yes, specify where and when it is to be served, if you know: _____

_____

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) Ground one: _____

_____

Supporting FACTS (Tell your story briefly without citing cases or law.):

_____

_____

_____

(b) Ground two: _____

_____

Supporting FACTS (Tell your story briefly without citing cases or law.):

_____

_____

_____

(c) Ground three: _____

_____

Supporting FACTS (Tell your story briefly without citing cases or law.):

_____

_____

_____

(d) Ground four: _____

_____

Supporting FACTS (Tell your story briefly without citing cases or law.):

_____

_____

_____

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at _____ on the ____ day of the month of _____ of the year ____.

_____
Signature of petitioner

_____
Address

_____
Signature of attorney (if any)

_____
Attorney for petitioner

_____
Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

_____
Petitioner

_____
Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, _____, hereby certify pursuant to N.R.C.P. 5(b), that on this ____ day of the month of _____ of the year ____, I mailed a true and correct copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS addressed to:

_____
Respondent prison or jail official

_____
Address

_____

Attorney General
Heroes' Memorial Building
Capitol Complex
Carson City, Nevada 89710

District Attorney of County of Conviction

Address

Signature of Petitioner

History.

1987, ch. 539, § 7, p. 1210; 1989, ch. 204, § 3, p. 451; 1991, ch. 44, § 13, p. 79; 1993, ch. 137, § 1, p. 243; 1995, ch. 637, § 26, p. 2460; 2001, ch. 10, § 4, p. 21; 2001 Sp. Sess., ch. 14, § 45, p. 207; 2003, ch. 284, § 28, p. 1473.

Editor's note.

Acts 1991, ch. 44, § 32, provided that the amendatory provisions of this act do not apply to any post-conviction proceeding commenced before January 1, 1993.

Acts 1995, ch. 637, § 61, provides: "The amendatory provisions of this act are applicable only to criminal proceedings concerning offenses committed on or after October 1, 1995."

Effect of amendment.

The 2003 amendment, effective July 1, 2003, in the petition, deleted former subdivision 8(c), which read: "Guilty but mentally ill", and twice deleted "or guilty but mentally ill" following "a plea of guilty" in subsection 9.

NOTES TO DECISIONS

Defect in petition not jurisdictional.

Lack of verification for defendant's postconviction relief petition was not a jurisdictional defect; rather, the petition was amendable, and should not have been dismissed. Miles v. State, 91 P.3d 588, 2004 Nev. LEXIS 47 (2004).

Insufficient evidence.

Under the circumstances of this case, the defendant's claim lacked sufficient specific factual allegations that, if true, would have shown he was entitled to relief. Pangallo v. State, 112 Nev. 1533, 930 P.2d 100, 1996 Nev. LEXIS 179 (1996), but see 116 Nev. 558, 1 P.3d 969, 2000 Nev. LEXIS 76 (2000).

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Criminal Procedure, 1987 Pac. L.J. Rev. Nev. Legis. 69.

34.738. Petition: Filing in appropriate county; limitation on scope.

1. A petition that challenges the validity of a conviction or sentence must be filed with the clerk of the district court for the county in which the conviction occurred. Any other petition must be filed with the clerk of the district court for the county in which the petitioner is incarcerated.

2. A petition that is not filed in the district court for the appropriate county:

(a) Shall be deemed to be filed on the date it is received by the clerk of the district court in which the petition is initially lodged; and

(b) Must be transferred by the clerk of that court to the clerk of the district court for the appropriate county.

3. A petition must not challenge both the validity of a judgment of conviction or sentence and the computation of time that the petitioner has served pursuant to that judgment. If a petition improperly challenges both the validity of a judgment of conviction or sentence and the computation of time

that the petitioner has served pursuant to that judgment, the district court for the appropriate county shall resolve that portion of the petition that challenges the validity of the judgment of conviction or sentence and dismiss the remainder of the petition without prejudice.

History.
1991, ch. 44, § 6, p. 76; 1999, ch. 59, § 3, p. 145.

NOTES TO DECISIONS

Editor's note.
Many of the annotations below were decided under a former similar provision of the Code, NRS 177.325.

Constitutionality.
Vesting of jurisdiction to hear the post-conviction application in the district court where the conviction took place is compatible with Const., Art. 6, § 6. Marshall v. Warden, Nev. State Prison, 83 Nev. 442, 434 P.2d 437 (1967).

There is ample provision in our state constitution for the post-conviction remedy, since Const., Art. 6, § 6 expressly grants district courts, among other powers, the power to issue all other writs proper and necessary to the complete exercise of their jurisdiction. Marshall v. Warden, Nev. State Prison, 83 Nev. 442, 434 P.2d 437 (1967).

Furnishing of records.
This section, NRS 177.335 (now repealed) and 177.345 (now repealed) do not contemplate that records will be furnished at state expense upon the mere unsupported request of a post-conviction petitioner who is unable to pay for them. The petitioner must satisfy the court that the points he raises have merit and that such merit will tend to be supported by a review of the record before he may have trial records supplied at state expense; he must specifically set forth the grounds upon which the petition is based. Peterson v. Warden, Nev. State Prison, 87 Nev. 134, 483 P.2d 204, 1971 Nev. LEXIS 368, cert. denied, 404 U.S. 993, 92 S. Ct. 540, 30 L. Ed. 2d 544 (1971) (decision prior to the 1973 amendments to these sections).

Jurisdiction.
Having once properly exercised jurisdiction over a habeas corpus proceeding, a district court may retain jurisdiction despite a transfer of the petitioner to a prison outside the court's judicial district. Crump v. First Judicial Dist. Court, 114 Nev. 590, 958 P.2d 1200, 1998 Nev. LEXIS 69 (1998).

34.740. Petition: Expeditious judicial examination.

The original petition must be presented promptly to a district judge or a justice of the supreme court by the clerk of the court. The petition must be examined expeditiously by the judge or justice to whom it is assigned.

History.
1985, p. 1229; 1989, ch. 204, § 4, p. 456; 1991, ch. 44, § 14, p. 85.

NOTES TO DECISIONS

Dismissal held proper.
Appellant's failure to meet the statutory prerequisites of former NRS 34.725 for filing a petition for habeas corpus is a proper ground for dismissal of his petition. Passanisi v. Director, Nev. Dep't of Prisons, 105 Nev. 63, 769 P.2d 72, 1989 Nev. LEXIS 15 (1989).

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

34.745. Judicial order to file answer and return; when order is required; form of order; summary dismissal of successive petitions; record of proceeding.

1. If a petition challenges the validity of a judgment of conviction or sentence and is the first petition filed by the petitioner, the judge or justice shall order the district attorney or the attorney general, whichever is appropriate, to:

(a) File:

(1) A response or an answer to the petition; and

(2) If an evidentiary hearing is required pursuant to NRS 34.770, a return,

within 45 days or a longer period fixed by the judge or justice; or

(b) Take other action that the judge or justice deems appropriate.

(2) If a petition challenges the computation of time that the petitioner has served pursuant to a judgment of conviction, the judge or justice shall order the attorney general to:

(a) File:

(1) A response or an answer to the petition; and

(2) A return,

within 45 days or a longer period fixed by the judge or justice; or

(b) Take other action that the judge or justice deems appropriate.

(3) An order entered pursuant to subsection 1 or 2 must be in substantially the following form, with appropriate modifications if the order is entered by a justice of the supreme court:

Case No. _____
Dept. No. _____

IN THE _____ JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF _____

_____	)	
Petitioner,	)	
v.	)	ORDER
_____	)	
Respondent.	)	

Petitioner filed a petition for a writ of habeas corpus on _____ (month) _____ (day), _____ (year). The court has reviewed the petition and has determined that a response would assist the court in determining whether petitioner is illegally imprisoned and restrained of his liberty. Respondent shall, within 45 days after the date of this order, answer or otherwise respond to the petition and file a return in accordance with the provisions of NRS 34.360 to 34.830, inclusive.

Dated _____ (month) _____ (day), _____ (year)

_____
District Judge

A copy of the order must be served on the petitioner or his counsel, the respondent, the attorney general and the district attorney of the county in which the petitioner was convicted.

4. If the petition is a second or successive petition challenging the validity of a judgment of conviction or sentence and if it plainly appears from the face of the petition or an amended petition and documents and exhibits that are annexed to it, or from records of the court that the petitioner is not entitled to relief based on any of the grounds set forth in subsection 2 of NRS 34.810, the judge or justice shall enter an order for its summary dismissal and cause the petitioner to be notified of the entry of the order.

5. If the judge or justice relies on the records of the court in entering an order pursuant to this section, those records must be made a part of the record of the proceeding before entry of the order.

History.
1991, ch. 44, § 7, p. 76; 1999, ch. 59, § 4, p. 145; 2001, ch. 10, § 48, p. 57.

NOTES TO DECISIONS

Cited in:
State v. Haberstroh, 119 Nev. —, 69 P.3d 676, 2003 Nev. LEXIS 27 (2003); Barnhart v. State, 130 P.3d 650, 2006 Nev. LEXIS 27 (2006).

34.750. Appointment of counsel for indigents; pleadings supplemental to petition; response to motion to dismiss.

1. A petition may allege that the petitioner is unable to pay the costs of the proceedings or to employ counsel. If the court is satisfied that the allegation of indigency is true and the petition is not dismissed summarily, the court may appoint counsel to represent the petitioner. In making its determination, the court may consider, among other things, the severity of the consequences facing the petitioner and whether:

(a) The issues presented are difficult;

(b) The petitioner is unable to comprehend the proceedings; or

(c) Counsel is necessary to proceed with discovery.

2. If the court determines that the petitioner is unable to pay all necessary costs and expenses incident to the proceedings of the trial court and the reviewing court, including court costs, stenographic services, printing and reasonable compensation for legal services, all costs must be paid from money appropriated to the office of the state public defender for that purpose. After appropriations for that purpose are exhausted, money must be allocated to the office of the state public defender from the reserve for statutory contingency account for the payment of the costs, expenses and compensation.

3. After appointment by the court, counsel for the petitioner may file and serve supplemental pleadings, exhibits, transcripts and documents within 30 days after:

(a) The date the court orders the filing of an answer and a return; or

(b) The date of his appointment,

whichever is later. If it has not previously been filed, the answer by the respondent must be filed within 15 days after receipt of the supplemental pleadings and include any response to the supplemental pleadings.

4. The petitioner shall respond within 15 days after service to a motion by the state to dismiss the action.

5. No further pleadings may be filed except as ordered by the court.

History.
1985, p. 1230; 1987, ch. 539, § 14, p. 1218; 1991, ch. 44, § 15, p. 85; 1991, ch. 556, §§ 9, 212, pp. 1751, 1824.

NOTES TO DECISIONS

Effective counsel.
An indigent defendant may choose to accept discretionarily appointed counsel; however, that counsel need not be "effective" as is required of counsel during trial and on direct appeal. Bejarano v. Warden, Nev. State Prison, 112 Nev. 1466, 929 P.2d 922, 1996 Nev. LEXIS 160 (1996).

Cited in:
Barnes v. Eighth Judicial Dist. Court ex rel. County of Clark, 103 Nev. 679, 748 P.2d 483, 1987 Nev. LEXIS 1899 (1987); Standley v. Warden, Southern Nev. Cor. Ctr., 115 Nev. 333, 990 P.2d 783, 1999 Nev. LEXIS 64 (1999); Barnhart v. State, 130 P.3d 650, 2006 Nev. LEXIS 27 (2006).

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

Review of Selected Nevada Legislation, Criminal Procedure, 1987 Pac. L.J. Rev. Nev. Legis. 69.

34.760. Contents of respondent's answer; supplemental material.

1. The answer must state whether the petitioner has previously applied for relief from his conviction or sentence in any proceeding in a state or federal court, including a direct appeal or a petition for a writ of habeas corpus or other post-conviction relief.

2. The answer must indicate what transcripts of pretrial, trial, sentencing and post-conviction proceedings are available, when these transcripts can be furnished and what proceedings have been recorded and not transcribed. The respondent shall attach to the answer any portions of the transcripts, except those in the court's file, which he deems relevant. The court on its own motion or upon request of the petitioner may order additional portions of existing transcripts to be furnished or certain portions of the proceedings which were not transcribed to be transcribed and furnished. If a transcript is not available or procurable, the court may require a narrative summary of the evidence to be submitted.

3. If the petitioner appealed from the judgment of conviction or any adverse judgment or order in a prior petition for a writ of habeas corpus or post-conviction relief, a copy of the petitioner's brief on appeal and any opinion of the appellate court must be filed by the respondent with the answer.

History.
1985, p. 1230; 1991, ch. 44, § 16, p. 86.

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

34.770. Judicial determination of need for evidentiary hearing: Dismissal of petition or granting of writ.

1. The judge or justice, upon review of the return, answer and all supporting documents which are filed, shall determine whether an evidentiary hearing is required. A petitioner must not be discharged or committed to the custody of a person other than the respondent unless an evidentiary hearing is held.

2. If the judge or justice determines that the petitioner is not entitled to relief and an evidentiary hearing is not required, he shall dismiss the petition without a hearing.

3. If the judge or justice determines that an evidentiary hearing is required, he shall grant the writ and shall set a date for the hearing.

History.
1985, p. 1230; 1991, ch. 44, § 17, p. 86.

NOTES TO DECISIONS

In general.
This section, NRS 34.800 and NRS 34.810 provide for the manner in which the district court decides a post-conviction petition for a writ of habeas corpus. These statutes do not provide for summary judgment as a method of determining the merits of a post-conviction petition for a writ of habeas corpus. Beets v. State, 110 Nev. 339, 871 P.2d 357, 1994 Nev. LEXIS 38 (1994).

Hearing.
District court erred in conducting evidentiary hearings concerning appellants' habeas corpus petitions, where appellants were not present at these hearings, nor was post-conviction counsel appointed to represent appellants at the hearings. Gebers v. State, 118 Nev. —, 50 P.3d 1092, 2002 Nev. LEXIS 70 (2002).

Cited in:
Standley v. Warden, Southern Nev. Cor. Ctr., 115 Nev. 333, 990 P.2d 783, 1999 Nev. LEXIS 64 (1999).

34.780. Applicability of Nevada Rules of Civil Procedure; discovery.

1. The Nevada Rules of Civil Procedure, to the extent that they are not inconsistent with NRS 34.360 to 34.830, inclusive, apply to proceedings pursuant to NRS 34.720 to 34.830, inclusive.

2. After the writ has been granted and a date set for the hearing, a party may invoke any method of discovery available under the Nevada Rules of Civil Procedure if, and to the extent that, the judge or justice for good cause shown grants leave to do so.

3. A request for discovery which is available under the Nevada Rules of Civil Procedure must be accompanied by a statement of the interrogatories or requests for admission and a list of any documents sought to be produced.

History.
1985, p. 1231; 1987, ch. 539, § 15, p. 1219; 1991, ch. 44, § 18, p. 87.

NOTES TO DECISIONS

Limitation on applicability of civil rules.
The provisions of this section expressly limit the extent to which civil rules govern post-conviction habeas proceedings; therefore, the court may not turn to the rules of civil procedure for guidance when this chapter has already addressed the matter at issue. Mazzan v. State, 109 Nev. 1067, 863 P.2d 1035, 1993 Nev. LEXIS 162 (1993).

34.790. Record of evidentiary hearing after writ is granted; submission of additional material.

1. If an evidentiary hearing is required, the judge or justice may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the petition.

2. The expanded record may include, without limitation, letters which predate the filing of the petition in the district court, documents, exhibits and answers under oath to written interrogatories propounded by the judge. Affidavits may be submitted and considered as a part of the record.

3. In any case in which the record is expanded, copies of proposed letters, documents, exhibits and affidavits must be submitted to the party against whom they are to be offered, and he must be afforded an opportunity to admit or deny their correctness.

4. The court must require the authentication of any material submitted pursuant to subsection 2 or 3.

History.
1985, p. 1231.

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

34.800. Dismissal of petition for delay in filing.

1. A petition may be dismissed if delay in the filing of the petition:

(a) Prejudices the respondent or the State of Nevada in responding to the petition, unless the petitioner shows that the petition is based upon grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred; or

(b) Prejudices the State of Nevada in its ability to conduct a retrial of the petitioner, unless the petitioner demonstrates that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence.

2. A period exceeding 5 years between the filing of a judgment of conviction, an order imposing a sentence of imprisonment or a decision on direct appeal of

a judgment of conviction and the filing of a petition challenging the validity of a judgment of conviction creates a rebuttable presumption of prejudice to the state. In a motion to dismiss the petition based on that prejudice, the respondent or the State of Nevada must specifically plead laches. The petitioner must be given an opportunity to respond to the allegations in the pleading before a ruling on the motion is made.

History.
1985, p. 1231; 1987, ch. 539, § 16, p. 1219; 1991, ch. 44, § 19, p. 87.

NOTES TO DECISIONS

In general.
NRS 34.770, 34.810 and this section provide for the manner in which the district court decides a post-conviction petition for a writ of habeas corpus. These statutes do not provide for summary judgment as a method of determining the merits of a post-conviction petition for a writ of habeas corpus. Beets v. State, 110 Nev. 339, 871 P.2d 357, 1994 Nev. LEXIS 38 (1994).

Review of the merits of an untimely claim is prohibited unless the petitioner demonstrates cause. Even before the Legislature adopted the procedural rules which bar the defendant's claims in state court, the Supreme Court dismissed petitions without reviewing the merits if the delay was unreasonable and prejudicial. Moran v. McDaniel, 80 F.3d 1261, 1996 U.S. App. LEXIS 6101 (9th Cir. 1996).

Cited in:
Boatwright v. Director, Dep't of Prisons, 109 Nev. 318, 849 P.2d 274, 1993 Nev. LEXIS 44 (1993); Sechrest v. Ignacio, 943 F. Supp. 1245, 1996 U.S. Dist. LEXIS 14784 (D. Nev. 1996).

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

Review of Selected Nevada Legislation, Criminal Procedure, 1987 Pac. L.J. Rev. Nev. Legis. 69.

34.810. Additional reasons for dismissal of petition.

1. The court shall dismiss a petition if the court determines that:

(a) The petitioner's conviction was upon a plea of guilty and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

(b) The petitioner's conviction was the result of a trial and the grounds for the petition could have been:

(1) Presented to the trial court;

(2) Raised in a direct appeal or a prior petition for a writ of habeas corpus or postconviction relief; or

(3) Raised in any other proceeding that the petitioner has taken to secure relief from his conviction and sentence,

unless the court finds both cause for the failure to present the grounds and actual prejudice to the petitioner.

2. A second or successive petition must be dismissed if the judge or justice determines that it fails to allege new or different grounds for relief and that the prior determination was on the merits or, if new and different grounds are

alleged, the judge or justice finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

3. Pursuant to subsections 1 and 2, the petitioner has the burden of pleading and proving specific facts that demonstrate:

(a) Good cause for the petitioner's failure to present the claim or for presenting the claim again; and

(b) Actual prejudice to the petitioner.

The petitioner shall include in the petition all prior proceedings in which he challenged the same conviction or sentence.

4. The court may dismiss a petition that fails to include any prior proceedings of which the court has knowledge through the record of the court or through the pleadings submitted by the respondent.

History.

1985, p. 1232; 1989, ch. 204, § 5, p. 457; 1995, ch. 637, § 27, p. 2465; 2003, ch. 284, § 29, p. 1478.

Effect of amendment.

The 2003 amendment, effective July 1, 2003, deleted "or guilty but mentally ill" following "a plea of guilty" in subdivision 1(a).

NOTES TO DECISIONS

Burden of proof.

The legislature intended that the affirmative defenses of waiver or abuse of the writ must be raised by the state in response to a post-conviction petition under NRS Chapter 34. Once such an allegation is made by the state, the burden then falls upon the petitioner to show: (1) That good cause exists for his failure to raise any grounds in an earlier petition and that he will suffer actual prejudice if the grounds are not considered; or (2) if no new grounds for relief are asserted, that the previous petition was not decided on its merits. Phelps v. Director, Nev. Dep't of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

The state does not have the burden of proving that a petitioner knowingly and understandingly waived grounds for relief as a prerequisite to the petitioner's burden of showing good cause. Ford v. Warden, Nev. Women's Correctional Ctr., 111 Nev. 872, 901 P.2d 123, 1995 Nev. LEXIS 105 (1995).

By requiring the state, in response to a post-conviction petition under this chapter, to allege waiver or abuse of the writ as an affirmative defense, petitioner is afforded an opportunity to meet the burden placed on him by this section. Without such a procedure, a petitioner may never be allowed an opportunity to meet this burden. Phelps v. Director, Nev. Dep't of Prisons, 104 Nev. 656, 764 P.2d 1303 (1988).

Good cause not shown.

The failure of the defendant's court-appointed counsel in the post-conviction proceeding to provide the record relevant to his petition did not constitute the "good cause" required by this section. Therefore, contrary to the defendant's contention, this failure did not preclude the court from dismissing his petition. Bejarano v. Warden, Nev. State Prison, 112 Nev. 1466, 929 P.2d 922, 1996 Nev. LEXIS 160 (1996).

District court did not err in dismissing the inmate's claim without an evidentiary hearing where the only specific factual allegation that the inmate made was that his guilty plea came barely an hour after he told the district court that he was not guilty and was not satisfied with his counsel, and that he was somehow improperly forced to change his mind, but the inmate made no specific factual allegations to support this speculation, and the plea memoranda and transcript of the plea canvass belied this claim. Hodges v. State, 119 Nev. —, 78 P.3d 67, 2003 Nev. LEXIS 68 (2003).

District court did not err in relying upon copies of the petitioner's 1994 and 1996 felony driving under the influence convictions at his sentencing hearing adjudicating him an habitual criminal; the claim should have been raised on direct appeal and was barred from review absent a showing of good cause or prejudice. Lader v. Warden, 120 P.3d 1164, 2005 Nev. LEXIS 87 (Oct. 6, 2005).

The defendant could not demonstrate "good cause" for filing a successive petition based on an ineffectiveness of post-conviction counsel claim, because the defendant had no federal constitutional, state constitutional or statutory right to counsel, or effective assistance of counsel, in a post-conviction proceeding. McKague v. Whitley, 112 Nev. 159, 912 P.2d 255 (1996).

7. The judge or justice who considers a petition filed by a petitioner who has been sentenced to death shall make all reasonable efforts to expedite the matter and shall render a decision within 60 days after submission of the matter for decision.

History.
1985, p. 1232; 1987, ch. 539, § 17, p. 1219; 1991, ch. 44, § 20, p. 87.

Cross references.
As to procedure in cases in which the death penalty may be sought, see Supreme Court Rule 250.

NOTES TO DECISIONS

Good cause not shown.
Defendant failed to show good cause, actual prejudice, or a fundamental miscarriage of justice under the provisions of NRS 34.810(2) and (3) that were sufficient to overcome the procedural bars applicable to a post-conviction habeas petition filed nearly seven years after his conviction was affirmed. Klein v. Warden, 118 Nev. —, 43 P.3d 1029, 2002 Nev. LEXIS 41 (2002).

RESEARCH REFERENCES

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

34.830. Contents and notice of order finally disposing of petition.

1. Any order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court.

2. A copy of any decision or order discharging the petitioner from the custody or restraint under which he is held, committing him to the custody of another person, dismissing the petition or denying the requested relief must be served by the clerk of the court upon the petitioner and his counsel, if any, the respondent, the attorney general and the district attorney of the county in which the petitioner was convicted.

3. Whenever a decision or order described in this section is entered by the district court, the clerk of the court shall prepare a notice in substantially the following form and mail a copy of the notice to each person listed in subsection 2:

Case No. _____
Dept. No. _____

IN THE _____ JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF _____

_____
Petitioner,
v.
_____
Respondent.

NOTICE OF ENTRY OF DECISION OR ORDER

PLEASE TAKE NOTICE that on _____ (month) ____ (day) ____ (year), the court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the supreme court from the decision or order of this court. If you wish to appeal, you must file a notice of appeal with the clerk of this court within 33 days after the date this notice is mailed to you. This notice was mailed on _____ (month) ____ (day) ____ (year)

Dated _____ (month) ____ (day) ____ (year)

_____
Clerk of court

By _____
Deputy

(SEAL)

History.
1985, p. 1233; 1987, ch. 539, § 18, p. 1220; 1991, ch. 44, § 21, p. 88; 2001, ch. 10, § 5, p. 26.

Editor's note.
The 2001 amendment by ch. 10, § 5, effective April 2, 2001, affirmed a technical correction made by the Legislative Counsel.

NOTES TO DECISIONS

Persons who must be served.
Subsection (2) of this section, setting forth who must be served with the order resolving the petition, describes the service contemplated in NRS 34.575(1). Lemmond v. State, 114 Nev. 219, 954 P.2d 1179, 1998 Nev. LEXIS 15 (1998).

Time in which to appeal from denial of a post-conviction habeas petition.
Notice of appeal was timely filed under NRS 34.575(1) and 34.830 because the time to file a notice of appeal from an order denying a post-conviction habeas petition did not commence to run until notice of entry of an order denying the petition was separately served by the district court on both the petitioner and the petitioner's counsel, if any. Klein v. Warden, 118 Nev. —, 43 P.3d 1029, 2002 Nev. LEXIS 41 (2002).

Running begins with direct service upon petitioner.
The thirty-day period for appealing from an order denying a petition for a writ of habeas corpus under NRS 34.575(1) begins to run after the clerk of the district court has complied with this section and properly served the petitioner, as well as petitioner's counsel, if any; therefore, despite the general rule that service upon counsel constitutes service upon a party, the time for filing an appeal from an order denying a petition for a writ of habeas corpus does not begin

4. During any period of stay as provided in this section, the local officer having custody of such party shall retain custody thereof.

History.
1862, p. 98; CL 1873, § 374; GS 1885, § 3696; CL 1900, § 3768; RL 1912, § 6251; CL 1929, § 11400; 1959, p. 18.

NOTES TO DECISIONS

Cited in:
Robinson v. Leypoldt, 74 Nev. 58, 322 P.2d 304, 1958 Nev. LEXIS 89 (1958); White v. Warden, Nev. State Prison, 96 Nev. 634, 614 P.2d 536, 1980 Nev. LEXIS 656 (1980).

34.570. Pending judgment on proceedings, judge may commit or place in custody.

Until judgment is given on a petition, the judge before whom any party may be brought on the petition may:

1. Commit him to the custody of the sheriff of the county; or
2. Place him in such care or under such custody as his age or circumstances may require.

History.
1862, p. 98; CL 1873, § 375; GS 1885, § 3697; CL 1900, § 3769; RL 1912, § 6252; CL 1929, § 11401; 1999, ch. 59, § 2, p. 145.

NOTES TO DECISIONS

Powers of examining judge.
When an accused person is held by a judge for examination before him under the provisions of habeas corpus law, the judge is invested with only such powers as are conferred on other magistrates in matters of preliminary examinations. Ex parte Ah Kee, 22 Nev. 374, 40 P. 879, 1895 Nev. LEXIS 15 (1895).

Includes power to reconsider discharge prior to written order.
Under the statutory provisions for writs of habeas corpus, the discharge of the petitioner is a judgment which must be memorialized in an order, and until a written order discharging the habeas corpus petitioner is signed by the judge and filed by the clerk, the judge retains the power to reconsider his decision. Tener v. Babcock, 97 Nev. 369, 632 P.2d 1140, 1981 Nev. LEXIS 541 (1981).

34.575. Appeal from order of district court granting or denying writ.

1. An applicant who, after conviction or while no criminal action is pending against him, has petitioned the district court for a writ of habeas corpus and whose application for the writ is denied, may appeal to the supreme court from the order and judgment of the district court, but the appeal must be made within 30 days after service by the court of written notice of entry of the order or judgment.

2. The State of Nevada is an interested party in proceedings for a writ of habeas corpus. If the district court grants the writ and orders the discharge or a change in custody of the petitioner, the district attorney of the county in which the application for the writ was made, or the city attorney of a city which is situated in the county in which the application for the writ was made, or the attorney general on behalf of the state, may appeal to the supreme court from

the order of the district judge within 30 days after the service by the court of written notice of entry of the order.

3. Whenever an appeal is taken from an order of the district court discharging a petitioner or committing him to the custody of another person after granting a pretrial petition for habeas corpus based on alleged want of probable cause, or otherwise challenging the court's right or jurisdiction to proceed to trial of a criminal charge, the clerk of the district court shall forthwith certify and transmit to the supreme court, as the record on appeal, the original papers on which the petition was heard in the district court and, if the appellant or respondent demands it, a transcript of any evidentiary proceedings had in the district court. The district court shall require its court reporter to expedite the preparation of the transcript in preference to any request for a transcript in a civil matter. When the appeal is docketed in the supreme court, it stands submitted without further briefs or oral argument unless the supreme court otherwise orders.

History.
1991, ch. 44, § 2, p. 74.

Editor's note.
Acts 1991, ch. 44, § 32, provided that the amendatory provisions of this act do not apply to any post-conviction proceeding commenced before January 1, 1993.

NOTES TO DECISIONS

Editor's Note.
Some of the annotations below were decided under former similar provisions.

Denial of venue change motion not an appealable determination.
The omission of orders denying motions for change of venue from the list of appealable determinations in this chapter evinces the legislature's intent to exclude interlocutory appeals during post-conviction habeas proceedings. The legislature enacted a statute which expressly governs, and thereby limits, the scope of appeals in post-conviction habeas proceedings, thus, an appeal from an order of the district court denying a motion to change venue in a post-conviction habeas proceeding is not available. Mazzan v. State, 109 Nev. 1067, 863 P.2d 1035, 1993 Nev. LEXIS 162 (1993) decision under former NRS 34.815.

Appeal.
Because no statute or court rule provides for an appeal from an order denying a motion for reconsideration, the supreme court lacks jurisdiction to entertain appeals from such orders. Phelps v. State, 111 Nev. 1021, 900 P.2d 344, 1995 Nev. LEXIS 114 (1995).

Appeal is a criminal proceeding.
An appeal taken from a final judgment on an application for post-conviction relief brought pursuant to this section should not be treated as a civil, rather than criminal, proceeding; therefore, the appellant's notice of appeal was untimely, in that it was not filed within 30 days from the date the district court entered its opinion denying appellant's petition. Washington v. State, 104 Nev. 309, 756 P.2d 1191, 1988 Nev. LEXIS 32 (1988).

State may challenge court's granting of pretrial writ.
Permitting sheriff's appeals from orders granting pretrial habeas corpus relief as to some but not all charges effectuates the clear purpose of this statute: to permit the state to challenge district court orders granting pretrial habeas corpus relief. Sheriff, Clark County v. Gillock, 112 Nev. 213, 912 P.2d 274, 1996 Nev. LEXIS 31 (1996).

Failure of clerk to date documents or promptly file them.
Because it could not be determined whether appellant's notice of appeal was received into the custody of the clerk of the district court in a timely fashion, due to failure of the clerk to date documents when received or to promptly file them, the ambiguity in the record regarding the date of receipt of the appellant's notice of appeal was resolved in appellant's favor. Huebner v. State, 107 Nev. 328, 810 P.2d 1209, 1991

as he may deem reasonable to be given to the district attorney of the county where the examination is had.

History.
1967, p. 1452.

178.487. Bail after arrest for felony offense committed while on bail.

Every release on bail with or without security is conditioned upon the defendant's good behavior while so released, and upon a showing that the proof is evident or the presumption great that the defendant has committed a felony during the period of release, the defendant's bail may be revoked, after a hearing, by the magistrate who allowed it or by any judge of the court in which the original charge is pending. Pending such revocation, the defendant may be held without bail by order of the magistrate before whom he is brought after an arrest upon the second charge.

History.
1971, p. 574; 1973, p. 348.

178.4871. Post-conviction petitioner for habeas corpus: Limitations on release.

A person who has filed a post-conviction petition for habeas corpus:

1. Must not in any case be released on his own recognizance.
2. Must not be admitted to bail pending a review of his petition unless:
   (a) The petition is filed in the proper jurisdiction;
   (b) The petition presents substantial questions of law or fact and does not appear to be barred procedurally;
   (c) The petitioner has made out a clear case on the merits; and
   (d) There are exceptional circumstances deserving of special treatment in the interests of justice.

History.
1987, ch. 539, § 47, p. 1232; 1991, ch. 44, § 28, p. 91.

Editor's note.
Acts 1991, ch. 44, § 32, provides that the amendatory provisions of the 1991 act do not apply to any post-conviction proceeding commenced before January 1, 1993.

178.4873. Post-conviction petitioner for habeas corpus: Release pending appeal.

If a district court denies a post-conviction petition for habeas corpus, the petitioner must not be released on his own recognizance or admitted to bail pending any appeal. If the petition is granted and a stay of the order granting relief is not entered, the district court shall admit the petitioner to bail pending appeal if the respondent files a notice of appeal.

case, the case number, and a brief descriptive title indicating the purpose of the paper. If a cover is used, it must be white.

(d) *Signature.* Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) *Effect of noncompliance with rule.* If a brief, petition, motion or other paper is not prepared in accordance with this Rule, the clerk will not file the document, but shall return it to be properly prepared. (Amended eff. 6-19-83; Amended 12-23-94, eff. 2-21-95; Amended 12-31-08, eff. 7-1-09.)

Rule 33. Appeal conferences.

The court may direct the attorneys for the parties to appear before the court or a justice thereof for a conference to address any matter that may aid in disposing of the proceedings, including simplifying the issues. The court or justice may, as a result of the conference, enter an order controlling the course of the proceedings. (Amended 12-31-08, eff. 7-1-09.)

Rule 34. Oral argument.

(a) *Notice of argument; postponement.* The clerk shall advise all parties of the date, time and place for oral argument, the time allowed for oral argument, and whether argument will be before the full court or a panel, and, to the extent possible, issues to be addressed at oral argument. A motion to postpone the argument must be filed reasonably in advance of the date fixed for hearing.

(b) *Time allowed for argument.* Unless the case is submitted for decision on the briefs under Rule 34(f), each side, at the court's discretion, will be allowed 15 or 30 minutes for argument. If counsel believes that additional time is necessary for the adequate presentation of his or her argument, counsel may request such additional time as he or she deems necessary. A motion to allow longer argument must be filed reasonably in advance of the date fixed for the argument and shall be liberally granted if cause therefor is shown. A party is not obliged to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(c) *Order and content of argument.* The appellant opens and concludes the argument. If the appellant has not filed a reply brief, however, a concluding or rebuttal argument will not be allowed except by permission of the court or at the request of a justice. The opening argument shall include a fair statement of the case. Counsel will not be permitted to read at length from briefs, records or authorities.

(d) *Cross-appeals and separate appeals.* Unless the court directs otherwise, a cross-appeal or separate appeal shall be argued with the initial appeal at a single argument. If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the respondent for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellant support the same argument, care shall be taken to avoid duplication of argument.

(e) *Non-appearance of a party.* If the respondent fails to appear for argument, the court will hear the appellant's argument. If the appellant fails to appear, the court may hear the respondent's argument. If neither party appears, the case will be decided on the briefs unless the court orders otherwise.

(f) *Submission on briefs.*

(1) The court may order a case submitted for decision on the briefs, without oral argument.

(2) The parties may agree to submit a case for decision on the briefs, but the court may direct that the case be argued.

(3) Appeals brought in proper person and appeals in post-conviction proceedings instituted under NRS 34.360 et seq. will be submitted for decision without oral argument, but the court may direct that a case be argued. (Amended eff. 5-11-75; Amended eff. 6-19-83; Amended eff. 9-1-89; Amended 12-14-98, eff. 1-4-99; Amended 12-31-08, eff. 7-1-09.)

CASE NOTES

Cited in: Pinheiro v. Young Elec. Sign Co., 91 Nev. 384, 535 P.2d 800 (1975); Regas v. State, 91 Nev. 502, 538 P.2d 582 (1975); Thomas v. State, 93 Nev. 565, 571 P.2d 113 (1977); Sheriff, Clark County v. Provenza, 97 Nev. 346, 630 P.2d 265 (1981); Sierra Creek Ranch, Inc. v. J.I. Case, 97 Nev. 457, 634 P.2d 458 (1981); Leroy G. v. State, 98 Nev. 401, 650 P.2d 809 (1982); Office of Clark County Dist. Att'y v. Eighth Judicial Dist. Court ex rel. Clark County, 101 Nev. 843, 710 P.2d 1384 (1985); Bowman v. Eighth Judicial Dist. Court ex rel. Clark County, 102 Nev. 106, 728 P.2d 433 (1986); Ewell v. State, 105 Nev. 897, 785 P.2d 1028 (1989); Bowman v. Clark, 106 Nev. 356, 792 P.2d 1136 (1990); State v. Cavaricci, 108 Nev. 411, 834 P.2d 406 (1992); Lovie v. State, 108 Nev. 488, 835 P.2d 20 (1992); State of Washington v. Bagley, 114 Nev. 788, 963 P.2d 498 (1998).

Rule 35. Disqualification of justices.

(a) *Motion for disqualification.* A request that a justice of the Supreme Court be disqualified from sitting in a particular case shall be made by motion. Unless the court permits otherwise, the motion shall be \ in writing and shall be in the form required by Rule 27.

(1) *Time to file.* A motion to disqualify a justice shall be filed with the clerk of the Supreme Court within 60 days after docketing of the appeal under Rule 12, together with proof of service on all other parties. Except for good cause shown, the failure to file a timely motion to disqualify shall be deemed a waiver of the moving party's right to object to a justice's participation in a case.

(2) *Contents of a motion.*

(A) *Grounds, supporting facts, and legal authorities.* A motion shall state clearly and concisely in separately numbered paragraphs each ground relied upon as a basis for disqualification with the specific facts alleged in support thereof and the legal argument, including citations to relevant cases, statutes or rules, necessary to support it.

(B) *Verification.* All assertions of fact in a motion must be supported by proper sworn averments in an affidavit or by citations to the specific page and line where support appears in the record of the case.

(i) A verification by affidavit shall be served and filed with the motion.

History.
1991, ch. 617, § 2, p. 2043; 1993, ch. 466, § 118, p. 1514; 1995, ch. 443, § 211, p. 1251.

Editor's note.
This section was formerly compiled as NRS 176.198.

The Legislative Counsel substituted "176A.100" for "176.185" in subsection 1.

176A.450. Modification; procedure for modifying conditions relating to program of probation secured by surety bond; limitations.

1. Except as otherwise provided in this section, by order duly entered, the court may impose, and may at any time modify, any conditions of probation or suspension of sentence. The court shall cause a copy of any such order to be delivered to the parole and probation officer and the probationer. A copy of the order must also be sent to the director of the department of corrections if the probationer is under the supervision of the director pursuant to NRS 176A.780.

2. If the probationer is participating in a program of probation secured by a surety bond, the court shall not impose or modify the conditions of probation unless the court notifies the surety and:

(a) Causes the original bond to be revoked and requires a new bond to which the original and the new conditions are appended and made part; or

(b) Requires an additional bond to which the new conditions are appended and made part.

3. The court shall not modify a condition of probation or suspension of sentence that was imposed pursuant to NRS 176A.410, unless the court finds that extraordinary circumstances are present and the court enters those extraordinary circumstances in the record.

History.
1967, p. 1435; 1989, ch. 780, § 8, p. 1855; 1995, ch. 443, § 212, p. 1251; 1997, ch. 451, § 87, p. 1672; 2001 Sp. Sess., ch. 14, § 68, p. 222.

Editor's note.
This section was formerly compiled as NRS 176.205.

The Legislative Counsel changed the catchline for this section; and substituted "176A.780" for "176.2248" in subsection 1.

Acts 1995, ch. 443, § 393, provides: "The amendatory provisions of sections 1 to 230, inclusive, and 232 to 374, inclusive, of this act do not apply to offenses which are committed before July 1, 1995."

NOTES TO DECISIONS

Incarceration as a condition of probation.
There is no compelling reason to conclude that the Legislature intended to exclude incarceration from the range of permissible conditions of probation. A short term of incarceration imposed as a condition of probation may in certain cases play a beneficial role in the rehabilitation of a convicted person, and that such a condition has a useful and proper place in the range of sentencing alternatives available to the district court under NRS 176.185 (now NRS 176A.100) and this section. Creps v. State, 94 Nev. 351, 581 P.2d 842, 1978 Nev. LEXIS 561, cert. denied, 439 U.S. 981, 99 S. Ct. 570, 58 L. Ed. 2d 653 (1978).

Cited in:
Ward v. State, 93 Nev. 501, 569 P.2d 399,

History.
1975, p. 1144; 1989, ch. 852, § 21, p. 2057; 1991, ch. 708, § 4, p. 2351; 1999, ch. 630, § 19, p. 3515; 2007, ch. 423, § 12, p. 1979.

Effect of amendment.
The 2007 amendment, effective October 1, 2007, inserted "and NRS 439.538" in subsection 1; added the subdivision 2(a) designation and subdivision 2(b); and made related changes.

CIVIL COMMITMENT OF ALCOHOLICS AND DRUG ADDICTS CONVICTED OF CRIME

458.290. "Drug addict" defined.

As used in NRS 458.290 to 458.350, inclusive, unless the context otherwise requires, "drug addict" means any person who habitually takes or otherwise uses any controlled substance, other than any maintenance dosage of a narcotic or habit-forming drug administered pursuant to chapter 453 of NRS, to the extent that he endangers the health, safety or welfare of himself or any other person.

History.
1975, p. 971; 1987, ch. 658, § 18, p. 1553.

Cross references.
As to additional provisions concerning admission to mental health facilities, see NRS 433A.120 to 433A.330.
As to treatment and rehabilitation of narcotic addicts, see NRS 453.600 to 453.730.

NOTES TO DECISIONS

Oath not required on election of treatment statement.
Because nothing in the statutory scheme governing civil commitment of alcoholics convicted of crime (NRS 458.290 to 458.350) mandates giving a statement under oath as a prerequisite for rehabilitative treatment, the defendant's affidavit, even when attached to the notice of election for rehabilitative treatment and filed in the criminal action against him, was not made in a proceeding where an oath or affirmation was required by law, an essential predicate to a conviction for perjury; therefore, his conviction for perjury was reversed. White v. State, 102 Nev. 153, 717 P.2d 45, 1986 Nev. LEXIS 1123 (1986).

Prescription drug addicts not excluded.
This section does not categorically, automatically or expressly exclude prescription drug addicts from chapter 458 treatment. Bunce v. State, 109 Nev. 240, 849 P.2d 327, 1993 Nev. LEXIS 36 (1993).

Cited in:
Hanks v. State, 105 Nev. 839, 784 P.2d 5, 1989 Nev. LEXIS 312 (1989).

458.300. Eligibility for assignment to program of treatment.

Subject to the provisions of NRS 458.290 to 458.350, inclusive, an alcoholic or a drug addict who has been convicted of a crime is eligible to elect to be assigned by the court to a program of treatment for the abuse of alcohol or drugs pursuant to NRS 453.580 before he is sentenced unless:

1. The crime is:
   (a) A crime against the person punishable as a felony or gross misdemeanor as provided in chapter 200 of NRS;
   (b) A crime against a child as defined in NRS 179D.0357;
   (c) A sexual offense as defined in NRS 179D.097; or

(d) An act which constitutes domestic violence as set forth in NRS 33.018;

2. The crime is that of trafficking of a controlled substance;

3. The crime is a violation of NRS 484.379, 484.3795, 484.37955 or 484.379778;

4. The alcoholic or drug addict has a record of two or more convictions of a crime described in subsection 1 or 2, a similar crime in violation of the laws of another state, or of three or more convictions of any felony;

5. Other criminal proceedings alleging commission of a felony are pending against the alcoholic or drug addict;

6. The alcoholic or drug addict is on probation or parole and the appropriate parole or probation authority does not consent to the election; or

7. The alcoholic or drug addict elected and was admitted, pursuant to NRS 458.290 to 458.350, inclusive, to a program of treatment not more than twice within the preceding 5 years.

History.

1975, p. 971; 1981, p. 1331; 1983, p. 1089; 1985, p. 1751; 1987, ch. 421, § 1, p. 962; 1987, ch. 658, § 19, p. 1553; 1989, ch. 48, § 18, p. 93; 1993, ch. 395, § 3, p. 1235; 1995, ch. 157, § 1, p. 235; 1999, ch. 622, § 10, p. 3408; 2005, ch. 63, § 58, p. 171; 2005, ch. 507, § 36, p. 2880; 2007, ch. 485, § 52, p. 2778; 2007, ch. 486, § 45, p. 2811.

Editor's note.

This section was amended by two 2005 acts which do not appear to conflict and have been compiled together.

This section was amended by two 2007 acts which do not appear to conflict and have been compiled together.

Effect of amendment.

The 2005 amendment by ch. 63, § 58, effective October 1, 2005, inserted "NRS 484.37955" at the end of subsection 3.

The 2005 amendment by ch. 507, § 36, effective July 1, 2005, in subsection 1 added the paragraph (a) and (d) designations and added paragraphs (b) and (c).

The 2007 amendment by. ch. 486, § 45, effective June 13, 2007 for the purposes of adopting regulations and performing any other preparatory administrative tasks necessary to carry out the provisions of the act, and for all other purposes effective October 1, 2007, inserted "or 484.379778" in subsection 3, and made related changes.

The 2007 amendment by ch. 485, § 52, effective July 1, 2008, substituted "NRS 179D.0357" for "NRS 179D.210" in subdivision 1(b), and substituted "NRS 179D.097" for "NRS 179D.410" in subdivision 1(c).

NOTES TO DECISIONS

Jail term does not constitute enhanced penalty since it is less palatable than civil commitment for drug addiction or alcoholism; thus, the district court, in determining eligibility for civil commitment, could consider the defendant's prior misdemeanor conviction for battery even though the defendant attempted to challenge such conviction as unconstitutional. Personius v. Ninth Judicial Dist. Court ex rel. County of Douglas, 99 Nev. 334, 661 P.2d 1307, 1983 Nev. LEXIS 443 (1983).

Department could be required to supervise civilly committed defendant.

The district court acted as directed by statute when it entered a judgment of conviction against defendant, deferred sentencing to allow defendant to obtain treatment, and placed defendant on probation; defendant's contention that the Department of Parole and Probation could not be required to supervise a civilly committed defendant pursuant to a lawfully imposed probation was entirely without merit. Hanks v. State, 105 Nev. 839, 784 P.2d 5, 1989 Nev. LEXIS 312 (1989).

Where defendant denied having addiction problem throughout his trial, the lower court abused its discretion when the defendant was denied an evaluation pursuant to this section since it is not unusual for persons addicted to drugs or alcohol to deny their addiction. Brinkley v. State, 101 Nev. 676, 708 P.2d 1026, 1985 Nev. LEXIS 487 (1985).

Election of treatment prior to sentencing.

Defendant's guilty plea to possession of a controlled substance with intent to sell, second offense, did not constitute a prior conviction under subsection 4 of this section; defendant was eligible for treatment because when she filed her notice to elect treatment prior to sentencing, she did not have a record of three or more felony convictions. Attaguile v. State, 134 P.3d 715, 2006 Nev. LEXIS 61 (2006).

Relationship with U.S. Sentencing Guidelines Manual.

Where defendant pled guilty to a state drug charge and was remanded to state drug court pursuant to NRS 458.300, 458.320(3)(b), and 458.330(1) under which he would be required to return to state court for sentencing under NRS 458.310(2)(d), and a bench warrant was issued for his arrest when he did not complete the program, and defendant committed federal offenses while subject to the outstanding warrant, the deferred sentence on the original state court drug charge contained a "custodial or supervisory component"; thus, the state court disposition was "criminal justice sentence" under U.S. Sentencing Guidelines Manual § 4A1.1(d). Accordingly, a district court, when sentencing defendant upon the federal offenses, properly added two criminal history points for the state court offense under § 4A1.1(c) and U.S. Sentencing Guidelines Manual § 4A1.2(a)(4). United States v. Franco-Flores, 558 F.3d 978, 2009 U.S. App. LEXIS 5442 (2009).

RESEARCH REFERENCES

Prosecution of chronic alcoholic for drunkenness offenses. 40 A.L.R.3d 321.

458.310. Hearing to determine whether defendant should receive treatment.

1. If the court has reason to believe that a person who has been convicted of a crime is an alcoholic or drug addict, or the person states that he is an alcoholic or drug addict, and the court finds that he is eligible to make the election provided for in NRS 458.300, the court shall hold a hearing before it sentences the person to determine whether or not he should receive treatment under the supervision of a state-approved facility for the treatment of abuse of alcohol or drugs. The district attorney may present the court with any evidence concerning the advisability of permitting the person to make the election.

2. At the hearing the court shall advise him that sentencing will be postponed if he elects to submit to treatment and is accepted for treatment by a state-approved facility. In offering the election, the court shall advise him that:

(a) The court may impose any conditions upon the election of treatment that could be imposed as conditions of probation;

(b) If he elects to submit to treatment and is accepted, he may be placed under the supervision of the facility for a period of not less than 1 year nor more than 3 years;

(c) During treatment he may be confined in an institution or, at the discretion of the facility, released for treatment or supervised care in the community; and

(d) If he satisfactorily completes treatment and satisfies the conditions upon the election of treatment, as determined by the court, the conviction will be set aside, but if he does not satisfactorily complete the treatment and satisfy the conditions, he may be sentenced and the sentence executed.

History.
1975, p. 971; 1977, p. 472; 1981, p. 1332; 1985, p. 1752; 1987, ch. 421, § 2, p. 962.

NOTES TO DECISIONS

Jail term does not constitute enhanced penalty since it is less palatable than civil commitment for drug addiction or alcoholism; thus, the district court, in determining eligibility for civil commitment, could consider the defendant's prior misdemeanor conviction for battery even though the defendant attempted to challenge such conviction as unconstitutional. Personius v. Ninth Judicial Dist. Court ex rel. County of Douglas, 99 Nev. 334, 661 P.2d 1307, 1983 Nev. LEXIS 443 (1983).

Cited in:
Brinkley v. State, 101 Nev. 676, 708 P.2d 1026, 1985 Nev. LEXIS 487 (1985).

RESEARCH REFERENCES

Prosecution of chronic alcoholic for drunkenness offenses. 40 A.L.R.3d 321.

458.320. Examination of defendant; determination of acceptability for treatment; imposition of conditions; deferment of sentencing; payment of costs of treatment.

1. If the court, after a hearing, determines that a person is entitled to accept the treatment offered pursuant to NRS 458.310, the court shall order an approved facility for the treatment of abuse of alcohol or drugs to conduct an examination of the person to determine whether he is an alcoholic or drug addict and is likely to be rehabilitated through treatment. The facility shall report to the court the results of the examination and recommend whether the person should be placed under supervision for treatment.

2. If the court, acting on the report or other relevant information, determines that the person is not an alcoholic or drug addict, is not likely to be rehabilitated through treatment or is otherwise not a good candidate for treatment, he may be sentenced and the sentence executed.

3. If the court determines that the person is an alcoholic or drug addict, is likely to be rehabilitated through treatment and is a good candidate for treatment, the court may:

(a) Impose any conditions to the election of treatment that could be imposed as conditions of probation;

(b) Defer sentencing until such time, if any, as sentencing is authorized pursuant to NRS 458.330; and

(c) Place the person under the supervision of an approved facility for treatment for not less than 1 year nor more than 3 years.

The court may require such progress reports on the treatment of the person as it deems necessary.

4. A person who is placed under the supervision of an approved facility for treatment shall pay the cost of the program of treatment to which he is assigned and the cost of any additional supervision that may be required, to the extent of his financial resources. The court may issue a judgment in favor of the court or facility for treatment for the costs of the treatment and

supervision which remain unpaid at the conclusion of the treatment. Such a judgment constitutes a lien in like manner as a judgment for money rendered in a civil action, but in no event may the amount of the judgment include any amount of the debt which was extinguished by the successful completion of community service pursuant to subsection 5.

5. If the person who is placed under the supervision of an approved facility for treatment does not have the financial resources to pay all of the related costs:

(a) The court shall, to the extent practicable, arrange for the person to be assigned to a program at a facility that receives a sufficient amount of federal or state funding to offset the remainder of the costs; and

(b) The court may order the person to perform supervised community service in lieu of paying the remainder of the costs relating to his treatment and supervision. The community service must be performed for and under the supervising authority of a county, city, town or other political subdivision or agency of the State of Nevada or a charitable organization that renders service to the community or its residents. The court may require the person to deposit with the court a reasonable sum of money to pay for the cost of policies of insurance against liability for personal injury and damage to property or for industrial insurance, or both, during those periods in which the person performs the community service, unless, in the case of industrial insurance, it is provided by the authority for which he performs the community service.

6. No person may be placed under the supervision of a facility under this section unless the facility accepts him for treatment.

History.

1975, p. 972; 1977, p. 472; 1981, p. 1332; 1985, p. 1752; 1987, ch. 421, § 3, p. 963; 1995, ch. 157, § 2, p. 235; 2001 Sp. Sess., ch. 8, § 28, p. 142.

Editor's note.

Acts 1995, c. 157, § 4, provides: "1. The amendatory provisions of this act do not apply to a criminal offender who is found, by a court of competent jurisdiction, to be ineligible for assignment to a program of treatment pursuant to NRS 458.300 before October 1, 1995.

"2. The amendatory provisions of section 2 of this act [NRS 458.320] do not apply to a criminal offender whose criminal conduct occurred before October 1, 1995."

NOTES TO DECISIONS

Department could be required to supervise civilly committed defendant.

The district court acted as directed by statute when it entered a judgment of conviction against defendant, deferred sentencing to allow defendant to obtain treatment, and placed defendant on probation; defendant's contention that the Department of Parole and Probation could not be required to supervise a civilly committed defendant pursuant to a lawfully imposed probation was entirely without merit. Hanks v. State, 105 Nev. 839, 784 P.2d 5, 1989 Nev. LEXIS 312 (1989).

Relationship with U.S. Sentencing Guidelines Manual.

Where defendant pled guilty to a state drug charge and was remanded to state drug court pursuant to NRS 458.300, 458.320(3)(b), and 458.330(1) under which he would be required to return to state court for sentencing under NRS 458.310(2)(d), a bench warrant was issued for his arrest when he did not complete the program, and defendant committed federal offenses while subject to the outstanding warrant, the deferred sentence on the original state court drug charge contained a "custodial or

supervisory component"; thus, the state court disposition was "criminal justice sentence" under U.S. Sentencing Guidelines Manual § 4A1.1(d). Accordingly, a district court, when sentencing defendant upon the federal offenses, properly added two criminal history points for the state court offense under § 4A1.1(c) and U.S. Sentencing Guidelines Manual § 4A1.2(a)(4). United States v. Franco-Flores, 558 F.3d 978, 2009 U.S. App. LEXIS 5442 (2009).

458.330. Deferment of sentencing; satisfaction of conditions; setting aside conviction; sentencing.

1. Whenever a person is placed under the supervision of a treatment facility, his sentencing must be deferred, and, except as otherwise provided in subsection 4, his conviction must be set aside if the treatment facility certifies to the court that he has satisfactorily completed the treatment program, and the court approves the certification and determines that the conditions upon the election of treatment have been satisfied.

2. If, upon the expiration of the treatment period, the treatment facility has yet to certify that the person has completed his treatment program, the court shall sentence him. If he has satisfied the conditions to the election of treatment and the court believes that he will complete his treatment on a voluntary basis, it may, in its discretion, set the conviction aside.

3. If, before the treatment period expires, the treatment facility determines that the person is not likely to benefit from further treatment at the facility, it shall so advise the court. The court shall then:

(a) Arrange for the transfer of the person to a more suitable treatment facility, if any; or

(b) Terminate the supervision and conduct a hearing to determine whether the person should be sentenced.

Whenever a person is sentenced under this section, time spent in institutional care must be deducted from any sentence imposed.

4. Regardless of whether the person successfully completes treatment, the court shall not set aside the conviction of a person who has a record of two or more convictions of any felony for two or more separate incidences.

History.

1975, p. 972; 1981, p. 1333; 1987, ch. 421, § 4, p. 964; 1995, ch. 157, § 3, p. 236.

Editor's note.

Acts 1995, c. 157, § 4(1), provides: "1. The amendatory provisions of this act do not apply to a criminal offender who is found, by a court of competent jurisdiction, to be ineligible for assignment to a program of treatment pursuant to NRS 458.300 before October 1, 1995."

Acts 1995, ch. 157, § 4(3), provides: "3. The amendatory provisions of section 3 of this act do not apply to a criminal offender who was assigned to a program of treatment pursuant to NRS 453.580 before October 1, 1995."

NOTES TO DECISIONS

Setting aside of conviction not precluded.

In a case in which defendant pleaded guilty to possession of a controlled substance with intent to sell, second offense, subsection 4 of this section would not prevent the district court from setting aside defendant's conviction if defendant successfully completed a drug treatment program. Attaguile v. State, 134 P.3d 715, 2006 Nev. LEXIS 61 (2006).

Relationship with U.S. Sentencing Guidelines Manual.

Where defendant pled guilty to a state drug charge and was remanded to state drug court

pursuant to NRS 458.300, 458.320(3)(b), and 458.330(1) under which he would be required to return to state court for sentencing under NRS 458.310(2)(d), a bench warrant was issued for his arrest when he did not complete the program, and defendant committed federal offenses while subject to the outstanding warrant, the deferred sentence on the original state court drug charge contained a "custodial or supervisory component"; thus, the state court disposition was "criminal justice sentence" under U.S. Sentencing Guidelines Manual § 4A1.1(d). Accordingly, a district court, when sentencing defendant upon the federal offenses, properly added two criminal history points for the state court offense under § 4A1.1(c) and U.S. Sentencing Guidelines Manual § 4A1.2(a)(4). United States v. Franco-Flores, 558 F.3d 978, 2009 U.S. App. LEXIS 5442 (2009).

458.340. Civil commitment not criminal conviction.

The determination of alcoholism or drug addiction and civil commitment pursuant to NRS 458.290 to 458.350, inclusive, shall not be deemed a criminal conviction.

History.
1975, p. 973; 1981, p. 1333.

NOTES TO DECISIONS

Relationship with U.S. Sentencing Guidelines Manual.
Where defendant committed federal offenses while subject to a drug court arrest warrant for failing to comply with drug court requirements, there was no merit to defendant's claim that a district court erred by adding two criminal history points for his state court offense pursuant to U.S. Sentencing Guidelines §§ 4A1.1(c) and 4A1.2(a)(4) on the ground that the drug court's oversight was neither custodial nor supervisory, as NRS 458.340 deemed such supervision civil in nature. United States v. Franco-Flores, 558 F.3d 978, 2009 U.S. App. LEXIS 5442 (2009).

RESEARCH REFERENCES

Prosecution of chronic alcoholic for drunkenness offenses. 40 A.L.R.3d 321.

458.350. State or political subdivision not required to provide facility for treatment.

The provisions of NRS 458.290 to 458.350, inclusive, do not require the state or any of its political subdivisions to establish or finance any facility for the treatment of abuse of alcohol or drugs.

History.
1975, p. 973; 1985, p. 1753.

UNLAWFUL ACTS

458.360. Unlawful representation as certified counselor; injunction; penalty.

Repealed by Acts 1999, ch. 574, § 78, p. 3078.

453.336. Unlawful possession not for purpose of sale: Prohibition; penalties.

1. A person shall not knowingly or intentionally possess a controlled substance, unless the substance was obtained directly from, or pursuant to, a prescription or order of a physician, physician assistant licensed pursuant to chapter 630 or 633 of NRS, dentist, podiatric physician, optometrist, advanced practitioner of nursing or veterinarian while acting in the course of his professional practice, or except as otherwise authorized by the provisions of NRS 453.005 to 453.552, inclusive.

2. Except as otherwise provided in subsections 3 and 4 and in NRS 453.3363, and unless a greater penalty is provided in NRS 212.160, 453.3385, 453.339 or 453.3395, a person who violates this section shall be punished:

(a) For the first or second offense, if the controlled substance is listed in schedule I, II, III or IV, for a category E felony as provided in NRS 193.130.

(b) For a third or subsequent offense, if the controlled substance is listed in schedule I, II, III or IV, or if the offender has previously been convicted two or more times in the aggregate of any violation of the law of the United States or of any state, territory or district relating to a controlled substance, for a category D felony as provided in NRS 193.130, and may be further punished by a fine of not more than $20,000.

(c) For the first offense, if the controlled substance is listed in schedule V, for a category E felony as provided in NRS 193.130.

(d) For a second or subsequent offense, if the controlled substance is listed in schedule V, for a category D felony as provided in NRS 193.130.

3. Unless a greater penalty is provided in NRS 212.160, 453.337 or 453.3385, a person who is convicted of the possession of flunitrazepam or gamma-hydroxybutyrate, or any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor, is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years.

4. Unless a greater penalty is provided pursuant to NRS 212.160, a person who is convicted of the possession of 1 ounce or less of marijuana:

(a) For the first offense, is guilty of a misdemeanor and shall be:

(1) Punished by a fine of not more than $600; or

(2) Examined by an approved facility for the treatment of abuse of drugs to determine whether he is a drug addict and is likely to be rehabilitated through treatment and, if the examination reveals that he is a drug addict and is likely to be rehabilitated through treatment, assigned to a program of treatment and rehabilitation pursuant to NRS 453.580.

(b) For the second offense, is guilty of a misdemeanor and shall be:

(1) Punished by a fine of not more than $1,000; or

(2) Assigned to a program of treatment and rehabilitation pursuant to NRS 453.580.

(c) For the third offense, is guilty of a gross misdemeanor and shall be punished as provided in NRS 193.140.

(d) For a fourth or subsequent offense, is guilty of a category E felony and shall be punished as provided in NRS 193.130.

5. As used in this section, "controlled substance" includes flunitrazepam, gamma-hydroxybutyrate and each substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor.

History.

1971, p. 2019; 1973, p. 1214; 1977, p. 1413; 1979, p. 1473; 1981, pp. 740, 1210, 1962; 1983, p. 289; 1987, ch. 328, § 2, p. 759; 1991, ch. 523, § 40, p. 1660; 1993, ch. 533, § 38, p. 2234; 1995, ch. 443, § 293, p. 1285; 1995, ch. 516, § 16, p. 1719; 1997, ch. 203, §§ 14(1), 14(3), pp. 521, 525; 1997, ch. 256, § 3, p. 903; 1999, ch. 404, § 13, p. 1917; 2001, ch. 47, § 9, p. 410; 2001, ch. 152, §§ 68, 87, pp. 785, 797; 2001, ch. 592, § 37, p. 3067; 2007, ch. 413, § 113, p. 1864.

Editor's note.

Acts 2001, ch. 592, § 49, makes the amendatory provisions of the act inapplicable to offenses committed prior to October 1, 2001.

Effect of amendment.

The 2007 amendment, effective June 13, 2007 for the purpose of adopting regulations and performing any other preparatory administrative tasks that are necessary to carry out the provisions of the act; and on January 1, 2008, for all other purposes, in subsection 1, deleted "osteopathic physician's assistant" following "of a physician," inserted "licensed pursuant to chapter 630 or 633 of NRS," and made a related change.

Cross references.

As to punishment for felonies, see NRS 193.130.

As to punishment for gross misdemeanors, see NRS 193.140.

As to medical use of marijuana, see NRS Chapter 453A.

NOTES TO DECISIONS

Conviction for both sale and possession of controlled substance arising out of identical transaction was improper. Fairman v. State, 83 Nev. 137, 425 P.2d 342, 1967 Nev. LEXIS 243 (1967). (Decision under former similar statutes).

But defendant could be convicted of both possession and sale of controlled substance if he sold a portion of the substance, consumed a portion, and kept the remainder. Talancon v. State, 97 Nev. 12, 621 P.2d 1111, 1981 Nev. LEXIS 414 (1981).

Knowledge by accused of narcotic character of article is essential element of crime; thus, evidence of a prior sale of heroin by a defendant who was being prosecuted for unlawful possession of heroin was probative to establish his guilty knowledge. Overton v. State, 78 Nev. 198, 370 P.2d 677, 1962 Nev. LEXIS 115 (1962). (Decision under former similar statute).

Possession of controlled substance may be actual or constructive; the accused has constructive possession only if she maintains control or a right to control the contraband. Possession of a controlled substance may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to her dominion and control; even if the accused does not have exclusive control of the hiding place possession may be imputed if she has not abandoned the narcotic and no other person has obtained possession. The accused is also deemed to have the same possession as any person actually possessing the narcotic pursuant to her direction or permission where she retains the right to exercise dominion or control over the property. Glispey v. Sheriff, Carson City, 89 Nev. 221, 510 P.2d 623, 1973 Nev. LEXIS 475 (1973).

Discretionary probation not sentencing enhancement.

Discretionary probation is not the equivalent of a sentencing enhancement under this section and, accordingly, the state was not required to give defendant, who pled guilty to a first-offense of possession to a controlled substance, formal notice in the charging document that probation was discretionary rather than mandatory under NRS 176A.100(1)(b); the holding in Lewis v. State, to the contrary was inapposite. Roberts v. State, 89 P.3d 998, 2004 Nev. LEXIS 38 (May 19, 2004).

Constructive possession.

A person has constructive possession of a controlled substance only if the person maintains control or a right to control the contraband. Sheriff, Washoe County v. Shade, 109

453.3361. Unlawful possession not for purpose of sale: Local ordinances adopting penalties for certain similar offenses; allocation of fines collected for violation of local ordinance.

1. A local authority may enact an ordinance adopting the penalties set forth for misdemeanors in NRS 453.336 for similar offenses under a local ordinance. The ordinance must set forth the manner in which money collected from fines imposed by a court for a violation of the ordinance must be disbursed in accordance with subsection 2.

2. Money collected from fines imposed by a court for a violation of an ordinance enacted pursuant to subsection 1 must be evenly allocated among:

(a) Nonprofit programs for the treatment of abuse of alcohol or drugs that are certified by the health division of the department;

(b) A program of treatment and rehabilitation established by a court pursuant to NRS 453.580, if any; and

(c) Local law enforcement agencies,

in a manner determined by the court.

3. As used in this section, "local authority" means the governing board of a county, city or other political subdivision having authority to enact ordinances.

History.
2001, ch. 592, § 36, p. 3066

453.3363. Suspension of proceedings and probation of accused under certain conditions; effect of discharge and dismissal.

1. If a person who has not previously been convicted of any offense pursuant to NRS 453.011 to 453.552, inclusive, or pursuant to any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant or hallucinogenic substances tenders a plea of guilty, guilty but mentally ill, nolo contendere or similar plea to a charge pursuant to subsection 2 or 3 of NRS 453.336, NRS 453.411 or 454.351, subparagraph (1) of paragraph (a) of subsection 2 of NRS 453.3325, or is found guilty or guilty but mentally ill of one of those charges, the court, without entering a judgment of conviction and with the consent of the accused, may suspend further proceedings and place him on probation upon terms and conditions that must include attendance and successful completion of an educational program or, in the case of a person dependent upon drugs, of a program of treatment and rehabilitation pursuant to NRS 453.580.

2. Upon violation of a term or condition, the court may enter a judgment of conviction and proceed as provided in the section pursuant to which the accused was charged. Notwithstanding the provisions of paragraph (e) of subsection 2 of NRS 193.130, upon violation of a term or condition, the court may order the person to the custody of the Department of Corrections.

3. Upon fulfillment of the terms and conditions, the court shall discharge the accused and dismiss the proceedings against him. A nonpublic record of the dismissal must be transmitted to and retained by the Division of Parole and

Probation of the Department of Public Safety solely for the use of the courts in determining whether, in later proceedings, the person qualifies under this section.

4. Except as otherwise provided in subsection 5, discharge and dismissal under this section is without adjudication of guilt and is not a conviction for purposes of this section or for purposes of employment, civil rights or any statute or regulation or license or questionnaire or for any other public or private purpose, but is a conviction for the purpose of additional penalties imposed for second or subsequent convictions or the setting of bail. Discharge and dismissal restores the person discharged, in the contemplation of the law, to the status occupied before the arrest, indictment or information. He may not be held thereafter under any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge that arrest, indictment, information or trial in response to an inquiry made of him for any purpose. Discharge and dismissal under this section may occur only once with respect to any person.

5. A professional licensing board may consider a proceeding under this section in determining suitability for a license or liability to discipline for misconduct. Such a board is entitled for those purposes to a truthful answer from the applicant or licensee concerning any such proceeding with respect to him.

History.

1991, ch. 523, § 12, p. 1647; 1993, ch. 395, § 2, p. 1234; 1993, ch. 466, § 452, p. 1622; 1995, ch. 293, § 37, p. 557; 1995, ch. 637, § 38, p. 2468; 1997, ch. 314, § 16, p. 1189; 2001, ch. 236, § 27, p. 1061; 2001, ch. 520, § 190, p. 2624; 2001, ch. 592, § 38, p. 3068; 2001 Sp. Sess., ch. 14, § 100, p. 241; 2003, ch. 2, § 109, pp. 289, 306; 2003, ch. 98, § 16, p. 557; 2003, ch. 284, § 44, p. 1486; 2005, ch. 310, § 3, p. 1058; 2007, ch. 327, § 64, p. 1446.

Editor's note.

Acts 2001, ch. 592, § 49, makes the amendatory provisions of the act inapplicable to offenses committed prior to October 1, 2001.

Effect of amendment.

The 2005 amendment, effective October 1, 2005, inserted a subparagraph reference in subsection 1.

The 2007 amendment, effective October 1, 2007, inserted "or guilty but mentally ill" or similar language twice in subsection 1.

453.3365. Sealing of record of person convicted of possession of controlled substance not for purpose of sale; conditions.

1. Three years after a person is convicted and sentenced pursuant to subsection 3 of NRS 453.336, the court may order sealed all documents, papers and exhibits in that person's record, minute book entries and entries on dockets, and other documents relating to the case in the custody of such other agencies and officers as are named in the court's order, if the:

(a) Person fulfills the terms and conditions imposed by the court and the parole and probation officer; and

(b) Court, after a hearing, is satisfied that the person is rehabilitated.

2. Except as limited by subsection 4, 3 years after an accused is discharged from probation pursuant to NRS 453.3363, the court shall order sealed all documents, papers and exhibits in that person's record, minute book entries

and entries on dockets, and other documents relating to the case in the custody of such other agencies and officers as are named in the court's order if the person fulfills the terms and conditions imposed by the court and the division of parole and probation of the department of public safety. The court shall order those records sealed without a hearing unless the division of parole and probation petitions the court, for good cause shown, not to seal the records and requests a hearing thereon.

3. If the court orders sealed the record of a person discharged pursuant to NRS 453.3363, it shall send a copy of the order to each agency or officer named in the order. Each such agency or officer shall notify the court in writing of its compliance with the order.

4. A professional licensing board is entitled, for the purpose of determining suitability for a license or liability to discipline for misconduct, to inspect and to copy from a record sealed pursuant to this section.

History.
1987, ch. 328, § 1, p. 759; 1991, ch. 523, § 41, p. 1662; 1993, ch. 466, § 456, p. 1624; 2001, ch. 520, § 191, p. 2625.

NOTES TO DECISIONS

Impeachment of witness.
A sealed judgment of conviction cannot support impeachment of a witness, because the witness is entitled to deny that conviction, and the proceedings leading to it are deemed never to have occurred. Yllas v. State, 112 Nev. 863, 920 P.2d 1003, 1996 Nev. LEXIS 111 (1996).

Independent existence of record.
The existence of an independent record of a sealed conviction does not legitimate use of that conviction to impeach a witness in a court of law. Yllas v. State, 112 Nev. 863, 920 P.2d 1003, 1996 Nev. LEXIS 111 (1996).

Improper impeachment.
Improper impeachment, by use of a sealed record, of the only real defense witness at the defendant's trial could not be considered harmless beyond a reasonable doubt. Yllas v. State, 112 Nev. 863, 920 P.2d 1003, 1996 Nev. LEXIS 111 (1996).

453.337. Unlawful possession for sale of flunitrazepam, gamma-hydroxybutyrate and schedule I or II substances; penalties.

1. Except as otherwise authorized by the provisions of NRS 453.011 to 453.552, inclusive, it is unlawful for a person to possess for the purpose of sale flunitrazepam, gamma-hydroxybutyrate, any substance for which flunitrazepam or gamma-hydroxybutyrate is an immediate precursor or any controlled substance classified in schedule I or II.

2. Unless a greater penalty is provided in NRS 453.3385, 453.339 or 453.3395, a person who violates this section shall be punished:

(a) For the first offense, for a category D felony as provided in NRS 193.130.

(b) For a second offense, or if, in the case of a first conviction of violating this section, the offender has previously been convicted of a felony under the Uniform Controlled Substances Act or of an offense under the laws of the United States or any state, territory or district which, if committed in this state, would amount to a felony under the Uniform Controlled Substances Act, for a category C felony as provided in NRS 193.130.

tive October 1, 2007, inserted "guilty but mentally ill" in subsection 2 and made a related change.

SEALING RECORDS OF CRIMINAL PROCEEDINGS

179.245. Sealing records after conviction: Persons eligible; petition; notice; hearing; order. [Effective July 1, 2008.]

1. Except as otherwise provided in subsection 5 and NRS 176A.265, 179.259 and 453.3365, a person may petition the court in which he was convicted for the sealing of all records relating to a conviction of:

(a) A category A or B felony after 15 years from the date of his release from actual custody or discharge from parole or probation, whichever occurs later;

(b) A category C or D felony after 12 years from the date of his release from actual custody or discharge from parole or probation, whichever occurs later;

(c) A category E felony after 7 years from the date of his release from actual custody or discharge from parole or probation, whichever occurs later;

(d) Any gross misdemeanor after 7 years from the date of his release from actual custody or discharge from probation, whichever occurs later;

(e) A violation of NRS 484.379 or 484.379778 other than a felony, or a battery which constitutes domestic violence pursuant to NRS 33.018 other than a felony, after 7 years from the date of his release from actual custody or from the date when he is no longer under a suspended sentence, whichever occurs later; or

(f) Any other misdemeanor after 2 years from the date of his release from actual custody or from the date when he is no longer under a suspended sentence, whichever occurs later.

2. A petition filed pursuant to subsection 1 must:

(a) Be accompanied by current, verified records of the petitioner's criminal history received from:

(1) The Central Repository for Nevada Records of Criminal History; and

(2) The local law enforcement agency of the city or county in which the conviction was entered;

(b) Include a list of any other public or private agency, company, official or other custodian of records that is reasonably known to the petitioner to have possession of records of the conviction and to whom the order to seal records, if issued, will be directed; and

(c) Include information that, to the best knowledge and belief of the petitioner, accurately and completely identifies the records to be sealed.

3. Upon receiving a petition pursuant to this section, the court shall notify the law enforcement agency that arrested the petitioner for the crime and:

(a) If the person was convicted in a district court or Justice Court, the prosecuting attorney for the county; or

(b) If the person was convicted in a municipal court, the prosecuting attorney for the city.

The prosecuting attorney and any person having relevant evidence may testify and present evidence at the hearing on the petition.

4. If, after the hearing, the court finds that, in the period prescribed in subsection 1, the petitioner has not been charged with any offense for which the charges are pending or convicted of any offense, except for minor moving or standing traffic violations, the court may order sealed all records of the conviction which are in the custody of the court, of another court in the State of Nevada or of a public or private agency, company or official in the State of Nevada, and may also order all such criminal identification records of the petitioner returned to the file of the court where the proceeding was commenced from, including, but not limited to, the Federal Bureau of Investigation, the California Bureau of Identification and Information, sheriffs' offices and all other law enforcement agencies reasonably known by either the petitioner or the court to have possession of such records.

5. A person may not petition the court to seal records relating to a conviction of a crime against a child or a sexual offense.

6. If the court grants a petition for the sealing of records pursuant to this section, upon the request of the person whose records are sealed, the court may order sealed all records of the civil proceeding in which the records were sealed.

7. As used in this section:

(a) "Crime against a child" has the meaning ascribed to it in NRS 179D.0357.

(b) "Sexual offense" means:

(1) Murder of the first degree committed in the perpetration or attempted perpetration of sexual assault or of sexual abuse or sexual molestation of a child less than 14 years of age pursuant to paragraph (b) of subsection 1 of NRS 200.030.

(2) Sexual assault pursuant to NRS 200.366.

(3) Statutory sexual seduction pursuant to NRS 200.368, if punishable as a felony.

(4) Battery with intent to commit sexual assault pursuant to NRS 200.400.

(5) An offense involving the administration of a drug to another person with the intent to enable or assist the commission of a felony pursuant to NRS 200.405, if the felony is an offense listed in this paragraph.

(6) An offense involving the administration of a controlled substance to another person with the intent to enable or assist the commission of a crime of violence pursuant to NRS 200.408, if the crime of violence is an offense listed in this paragraph.

(7) Abuse of a child pursuant to NRS 200.508, if the abuse involved sexual abuse or sexual exploitation.

(8) An offense involving pornography and a minor pursuant to NRS 200.710 to 200.730, inclusive.

(9) Incest pursuant to NRS 201.180.

(10) Solicitation of a minor to engage in acts constituting the infamous crime against nature pursuant to NRS 201.195.

thorities to disregard information concerning an applicant that is known independently of the sealed records. Baliotis v. Clark County, 102 Nev. 568, 729 P.2d 1338, 1986 Nev. LEXIS 1632 (1986).

The net effect of this section, except as to gaming matters, is a legal dispensation that regards criminal events itemized in the sealed record as if they had never occurred. Baliotis v. Clark County, 102 Nev. 568, 729 P.2d 1338, 1986 Nev. LEXIS 1632 (1986).

Abuse of discretion in granting petition to seal records.

The district court did not have the discretion to grant respondent's petition to seal his criminal records where respondent's criminal record revealed at least seven incidents since 1984 resulting in numerous charges, including multiple DUI arrests, resisting arrest, resisting a police officer, battery with use of a deadly weapon and possession of a controlled substance. State v. Cavaricci, 108 Nev. 411, 834 P.2d 406, 1992 Nev. LEXIS 89 (1992).

OPINIONS OF ATTORNEY GENERAL

Effect of sealing record.

When a record of conviction is sealed, such conviction may not be utilized to prove an element in a new crime or as an enhancement for a new conviction. In addition, a sealed conviction may not be used as the basis for denial or revocation of a professional license. A person whose records have been sealed may also vote, hold office and serve as a juror. AGO 83-13 (9-14-1983).

179.255. Sealing records after dismissal or acquittal: Petition; notice; hearing; order.

1. If a person has been arrested for alleged criminal conduct and the charges are dismissed or such person is acquitted of the charges, the person may petition:

(a) The court in which the charges were dismissed, at any time after the date the charges were dismissed; or

(b) The court in which the acquittal was entered, at any time after the date of the acquittal,

for the sealing of all records relating to the arrest and the proceedings leading to the dismissal or acquittal.

2. A petition filed pursuant to this section must:

(a) Be accompanied by a current, verified record of the criminal history of the petitioner received from the local law enforcement agency of the city or county in which the petitioner appeared in court;

(b) Include a list of any other public or private agency, company, official or other custodian of records that is reasonably known to the petitioner to have possession of records of the arrest and of the proceedings leading to the dismissal or acquittal and to whom the order to seal records, if issued, will be directed; and

(c) Include information that, to the best knowledge and belief of the petitioner, accurately and completely identifies the records to be sealed.

3. Upon receiving a petition pursuant to this section, the court shall notify the law enforcement agency that arrested the petitioner for the crime and:

(a) If the charges were dismissed or the acquittal was entered in a district court or Justice Court, the prosecuting attorney for the county; or

(b) If the charges were dismissed or the acquittal was entered in a municipal court, the prosecuting attorney for the city.

The prosecuting attorney and any person having relevant evidence may testify and present evidence at the hearing on the petition.

4. If, after the hearing, the court finds that there has been an acquittal or that the charges were dismissed and there is no evidence that further action will be brought against the person, the court may order sealed all records of the arrest and of the proceedings leading to the acquittal or dismissal which are in the custody of the court, of another court in the State of Nevada or of a public or private company, agency or official in the State of Nevada.

History.

1971, p. 955; 1997, ch. 636, § 2, p. 3160; 2001, ch. 358, § 6, p. 1693.

Editor's note.

Acts 2001, ch. 358, § 14, directs that the amendatory provisions of the act apply: (1) to a petition for an order to seal records pursuant to NRS 179.245 or 179.255 filed on or after the effective date of the act (June 5, 2001), and (2) an application for restoration of civil rights pursuant to NRS 176A.860, 213.090, 213.155, or 213.157 filed on or after the effective date of the act.

Cross references.

As to the right of the defendant to receive notice of these provisions upon acquittal, see NRS 175.543.

As to the right of the defendant to receive notice of these provisions upon dismissal, see NRS 178.563.

NOTES TO DECISIONS

Applicability.

This section is not applicable where one has been convicted of a crime. State v. Hayes, 94 Nev. 366, 580 P.2d 122, 1978 Nev. LEXIS 564 (1978).

This section and NRS 179.245 distinguished.

By its express terms, this section pertains only to the sealing of records of persons who have been arrested for an alleged crime, but have not been convicted. Where a person has been convicted of a crime, NRS 179.245 governs the sealing of records. The mere fact that one convicted of a crime has been discharged from probation does not alter this conclusion. State v. Hayes, 94 Nev. 366, 580 P.2d 122, 1978 Nev. LEXIS 564 (1978).

Section requires evidentiary hearing prior to record sealing.

Unless the parties stipulate otherwise, it is error for the district court to grant a record sealing petition pursuant to this section without first conducting an evidentiary hearing. State v. Second Judicial Dist. Court ex rel. County of Washoe, 105 Nev. 822, 783 P.2d 463, 1989 Nev. LEXIS 302 (1989).

Subsection (3) provides that the district court may order a person's criminal records sealed only if, after a hearing, the court finds that there has been an acquittal or that the charges were dismissed and there is no evidence that further action will be brought against the person. Once the prerequisite findings have been made, the decision whether to grant the record sealing petition is a matter within the sound discretion of the district court. A hearing may illuminate facts and circumstances which would assist the district court in exercising its discretion. State v. Second Judicial Dist. Court ex rel. County of Washoe, 105 Nev. 822, 783 P.2d 463, 1989 Nev. LEXIS 302 (1989).

This section has no provision for referring petitions to seal records to the office of the district attorney. Instead, the district attorney is entitled to be notified of the petition and to testify and present evidence at the hearing on the petition. There is no authority for referring a petition to the district attorney or for the district attorney to return a petition to the petitioner. Likewise, there is no authority for the district court to avoid its mandatory obligation to act on the petition by deferring its judicial role to a deputy district attorney, and district court's use of such procedures was illegal. Knox v. Eighth Judicial Dist. Court ex rel. County of Clark, 108 Nev. 354, 830 P.2d 1342, 1992 Nev. LEXIS 75 (1992).

Driver's license revocation is not a record, proceeding or event relating to the arrest which as a result, need not be sealed, under this section. State, Dep't of Motor Vehicles & Pub. Safety v. Frangul, 110 Nev. 46, 867 P.2d 397, 1994 Nev. LEXIS 6 (1994).

(11) Open or gross lewdness pursuant to NRS 201.210, if punishable as a felony.

(12) Indecent or obscene exposure pursuant to NRS 201.220, if punishable as a felony.

(13) Lewdness with a child pursuant to NRS 201.230.

(14) Sexual penetration of a dead human body pursuant to NRS 201.450.

(15) Luring a child or a person with mental illness pursuant to NRS 201.560, if punishable as a felony.

(16) An attempt to commit an offense listed in subparagraphs (1) to (15), inclusive.

History.

1971, p. 955; 1983, p. 1088; 1991, ch. 160, § 7, p. 303; 1993, ch. 20, § 2, p. 38; 1997, ch. 451, § 89, p. 1673; 1997, ch. 476, § 4, p. 1803; 1997, ch. 636, § 1, p. 3159; 1999, ch. 105, § 107, pp. 647, 648; 2001, ch. 262, § 23, p. 1167; 2001, ch. 358, § 5, p. 1692; 2001 Sp. Sess., ch. 16, § 11, p. 261; 2003, ch. 2, § 110, pp. 312, 316, 319; 2003, ch. 261, § 12, p. 1385; 2005, ch. 476, § 11, p. 2355; 2007, ch. 485, § 8, p. 2751.

Editor's note.

For this section as effective until July 1, 2008, see the bound volume.

Effect of amendment.

The 2007 amendment, effective July 1, 2008, substituted "NRS 179D.0357" for "NRS 179D.210" in subdivision 7(a).

179.259. Sealing records after completion of program for re-entry: Persons eligible; procedure; order; inspection of sealed records by professional licensing board. [Effective July 1, 2008.]

1. Except as otherwise provided in subsections 3 and 4, 5 years after an eligible person completes a program for reentry, the court may order sealed all documents, papers and exhibits in the eligible person's record, minute book entries and entries on dockets, and other documents relating to the case in the custody of such other agencies and officers as are named in the court's order. The court may order those records sealed without a hearing unless the Division of Parole and Probation of the Department of Public Safety petitions the court, for good cause shown, not to seal the records and requests a hearing thereon.

2. If the court orders sealed the record of an eligible person, the court shall send a copy of the order to each agency or officer named in the order. Each such agency or officer shall notify the court in writing of its compliance with the order.

3. A professional licensing board is entitled, for the purpose of determining suitability for a license or liability to discipline for misconduct, to inspect and to copy from a record sealed pursuant to this section.

4. A person may not petition the court to seal records relating to a conviction of a crime against a child or a sexual offense.

5. As used in this section:

(a) "Crime against a child" has the meaning ascribed to it in NRS 179D.0357.

(b) "Eligible person" means a person who has:

(1) Successfully completed a program for reentry to which he participated in pursuant to NRS 209.4886, 209.4888, 213.625 or 213.632; and

(2) Been convicted of a single offense which was punishable as a felony and which did not involve the use or threatened use of force or violence against the victim. For the purposes of this subparagraph, multiple convictions for an offense punishable as a felony shall be deemed to constitute a single offense if those offenses arose out of the same transaction or occurrence.

(c) "Program for reentry" means:

(1) A correctional program for reentry of offenders and parolees into the community that is established by the Director of the Department of Corrections pursuant to NRS 209.48875; or

(2) A judicial program for reentry of offenders and parolees into the community that is established in a judicial district pursuant to NRS 209.4883.

(d) "Sexual offense" has the meaning ascribed to it in paragraph (b) of subsection 7 of NRS 179.245.

History.
2001, ch. 262, § 22, p. 1166; 2003, ch. 2, § 24, p. 26; 2003, ch. 426, § 38, p. 2586; 2007, ch. 485, § 9, p. 2753.

Effect of amendment.
The 2007 amendment, effective July 1, 2008, substituted "NRS 179D.0357" for "NRS 179D.210" in subdivision 5(a).

Editor's note.
For this section as effective until July 1, 2008, see the bound volume.

INTERCEPTION OF WIRE OR ORAL COMMUNICATION

179.495. Notice to parties to intercepted communications.

1. Within a reasonable time but not later than 90 days after the termination of the period of an order or any extension thereof, the judge who issued the order shall cause to be served on the chief of the investigation division of the department of public safety, persons named in the order and any other parties to intercepted communications, an inventory which must include notice of:

(a) The fact of the entry and a copy of the order.

(b) The fact that during the period wire or oral communications were or were not intercepted.

Except as otherwise provided in NRS 239.0115, the inventory filed pursuant to this section is confidential and must not be released for inspection unless subpoenaed by a court of competent jurisdiction.

2. The judge, upon receipt of a written request from any person who was a party to an intercepted communication or from the person's attorney, shall make available to the person or his counsel those portions of the intercepted communications which contain his conversation. On an ex parte showing of good cause to a district judge, the serving of the inventory required by this section may be postponed for such time as the judge may provide.