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Statewide Rules of Criminal Procedure: A 50 State Review

Emily Dyer
Nevada Law Journal

Chelsea Stacey
Nevada Law Journal

Adrian Viesca
Nevada Law Journal

STATEWIDE RULES OF CRIMINAL PROCEDURE: A 50 STATE REVIEW

*Nevada Law Journal Staff**

EXECUTIVE SUMMARY

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

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

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

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

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

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

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

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

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INTRODUCTION

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

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

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

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

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

As one of the three states without statewide criminal procedure rules or codes, Nevada practitioners must review the state's procedural statutes,[7] statewide rules of district courts,[8] supreme court rules,[9] case law, and local district court rules to determine how to proceed in each criminal case. Eight of the Nevada's eleven judicial districts have their own local procedural rules that either directly, or "if applicable" apply to criminal matters.[10] The Second judicial district is the only district with separate criminal procedure rules. The ambiguity within local district rules creates even more problems for practitioners as it is not clear what civil/general local rules apply to criminal proceedings. Additionally, absent specific criminal procedures, Nevada courts are granted wide discretion to "proceed in any lawful manner not inconsistent with this title or with any other applicable statute."[11]

In early 2015, the Nevada Supreme Court sought to resolve growing concerns regarding the lack of statewide criminal procedure rules by convening an administrative docket and commission[12] to consider statewide rules.[13] Concerns

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[7] *See* NEV. REV. STAT. tit. 14.

[8] The Rules of the District Courts of the State of Nevada are cited as: D.C.R. *See* RULES DISTRICT CTS. ST. NEV., http://www.leg.state.nv.us/COURTRULES/DCR.html [https://perma.cc/BV7K-MV6K] (last visited Mar. 20, 2017). The scope provision of the District Court Rules states:

> These rules shall be liberally construed to secure the proper and efficient administration of the business and affairs of the court and to promote and facilitate the administration of justice by the court. These rules cover the practice and procedure in all actions in the district courts of all districts where no local rule covering the same subject has been approved by the supreme court. Local rules which are approved for a particular judicial district shall be applied in each instance whether they are the same as or inconsistent with these rules.

D.C.R. 5.

[9] Nevada's Supreme Court Rules are cited as: S.C.R. *See*, *e.g.*, S.C.R. 250 (capital proceeding procedures); *Checklist of Issues*, SUP. CT. RULES (2016), http://www.leg.state.nv.us/courtrules/scr.html [https://perma.cc/VQJ5-W4D4].

[10] The Fifth, Sixth, and Eleventh Districts do not have any documented rules of practice or rules of criminal procedure. The Second District is the only district with separate rules for criminal practice but their rules of practice have additional criminal rules. The First and Ninth District Rules of practice are often very similar and both apply to criminal cases when applicable. The Eighth District's rules of practice are extensive, but Part III is specifically for criminal cases, while the rest of the rules are said to apply to "all" cases in the district. The Third, Fourth, Seventh, and Tenth Districts do not state whether the rules of practice apply to criminal cases, or only if applicable, but some rules explicitly mention their application to criminal cases. See *District Courts*, SUP. CT. NEV., http://nvcourts.gov/Find_a_Court/District_Courts/ [https://perma.cc/T7PF-GXCY] (last visited Mar. 6, 2017), for more information on the judicial districts in Nevada.

[11] NEV. REV. STAT. § 178.610.

[12] The Commission on Statewide Rules of Criminal Procedure members include Chief Justice Michael Cherry, Nevada Supreme Court; Justice Michael Douglas, Nevada Supreme Court; Justice Lidia Stiglich, Nevada Supreme Court; Judge Scott Freeman, Second Judicial District Court, Dept. 9; Judge Douglas Herndon, Eighth Judicial District Court, Dept. 3; Judge Jim Shirley, Eleventh Judicial District Court; Mr. Jeremy Bosler, Public Defender, Washoe County; Mr. Christopher Hicks, District Attorney, Washoe County; Mr. Mark Jackson, District Attorney, Douglas County; Mr. Phil Kohn, Public Defender, Clark County; Mr. Steve Wolfson, District Attorney, Clark County.

about the lack of statewide rules stem from the desire to ensure fairness in the judicial system[14] and, as a practical matter, to reduce confusion and misapplication of rules, as practitioners are currently required to review a number of sources to determine what criminal procedure rules apply in each case and in each local jurisdiction.[15] The Nevada Supreme Court's Commission was created to address the lack of uniformity of criminal procedure rules throughout the state.[16] "The Commission is ultimately tasked with ascertaining whether the problems facing the criminal justice system are structural in nature, where the statutes of NRS need to be altered or amended, or if it is something the Court can accomplish within the Supreme Court's Rules."[17]

To assist in this matter, the Nevada Law Journal at the William S. Boyd School of Law at the University of Nevada, Las Vegas has prepared this White Paper. It is primarily a fifty-state review of criminal procedure and practices, comparing and contrasting several criminal procedural topics. Though not a fully comprehensive review, this White Paper focuses on the core procedural topics, with a specific focus on the Commission's committee topics: jury instructions,[18] motion practice,[19] discovery,[20] and life and death practices.[21]

First, this White Paper details the different ways that states create, implement, and construct criminal procedural rules. The next section is an overview

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[13] *Minutes of the 2015–2016 Interim Advisory Comm. on the Admin. of Justice* 6 (Apr. 19, 2016), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/4353 [https://perma.cc/8VAT-NXMS] (comments by J. Michael L. Douglas, Nevada Supreme Court).

[14] *Panel Trying to Reform Criminal Evidence Rules*, NEV. APPEAL (Apr. 21, 2016), http://www.nevadaappeal.com/news/government/panel-trying-to-reform-criminal-evidence-rules/ [https://perma.cc/PUS4-JFSE].

[15] *Id.*

[16] *Overview of the Commission on Statewide Rules of Criminal Procedure*, ADMIN. OFFICE CTS., http://nvcourts.gov/AOC/Committees_and_Commissions/Criminal_Procedure/Overview/ [https://perma.cc/KX4K-NKKF] (last visited Mar. 20, 2017).

[17] MEETING NOTES, RECOMMENDATION 10: INCLUDE A POLICY STATEMENT IN THE FINAL REPORT RECOGNIZING AND SUPPORTING THE WORK OF THE NEVADA SUPREME COURT'S COMMISSION ON STATEWIDE RULES OF CRIMINAL PROCEDURE (2016), http://nvleg.granicus.com/MediaPlayer.php?clip_id=6141 [https://perma.cc/GN2Q-6TSW].

[18] "The Jury Instructions Work Group is chaired by Judge Scott Freeman. There are ten members participating in this work group in an effort to develop/compile pattern jury instructions." OVERVIEW OF THE COMMISSION ON STATEWIDE RULES OF CRIMINAL PROCEDURE, https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/3248 [https://perma.cc/J7N4-7CQJ] (last visited Mar. 20, 2017) [hereinafter OVERVIEW OF THE COMMISSION].

[19] "The Motions Practice Work Group is chaired by Mr. Jeremy Bosler. This five-member group is working on a wide range of issues; the work group has enlisted the help of Boyd School of Law students to conduct extensive research and has sought input from legal professionals across Nevada." OVERVIEW OF THE COMMISSION, *supra* note 18.

[20] "The Discovery Work Group is chaired by Mr. Phil Kohn and is comprised of seven members representing various viewpoints across the state. The work group is addressing a variety of discovery-based issues." OVERVIEW OF THE COMMISSION, *supra* note 18.

[21] "The Life/Death Pretrial Practice Work Group is chaired by Mr. Steven Wolfson. Nine legal professionals from various jurisdictions participate in this work group and address a variety of important questions regarding this area of criminal practice." OVERVIEW OF THE COMMISSION, *supra* note 18.

of the following subjects: Bail and Pre-Trial Release, Pre-Trial Motion Practices, Discovery, Jury Instructions, Competency, Capital Punishment, and Appellate Procedures. Each section contains a brief discussion of Nevada's applicable rules, statutes, and case law.[22] This White Paper concludes with a discussion on Nevada's potential next steps. The Nevada Law Journal has also created a chart, attached as Appendix, for an easy reference to many of the topics discussed throughout this White Paper and additional background on statewide criminal procedure rules generally.

A. A Brief History of Procedural Rules

Constructing procedural rules is not a new practice for states. It flows from our common-law ancestry in England.[23] The judiciary in England determined the "procedure to be followed in the courts."[24] However, beginning in the nineteenth century, the American justice system began moving away from case law and moving towards set rules.[25] State legislatures began regulating court procedures and civil practice.[26] The zenith, reached by the New York State Legislature, occurred after it adopted the "Field Code" for civil procedure in 1848[27] with twenty-four states following by 1870.[28]

States began to consider criminal procedure rules in 1925 when the American Law Institute ("ALI") began to draft a model code of criminal procedure.[29] After the ALI's promulgation of the Model Code of Criminal Procedure of 1930, twenty-nine states adopted the ALI model rule sections in full, in part, or in substance.[30]

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[22] For reference, the following Nevada District Court Local Rules are cited as follows: First District Court Rules of Practice cited as FJDCR. Second District Court Rules of Criminal Procedure cited as LCR. Third District Court Rules of Practice cited as TJDCR. Fourth District Court Rules of Practice cited as 4JDCR. Seventh District Court Rules of Practice cited as 7JDCR. Eighth District Court Rules of Practice cited as EDCR. Ninth District Court Rules of Practice cited as NJDCR. Tenth District Court Rules of Practice cited as 10JDCR. The Fifth, Sixth, and Eleventh districts do not have documented rules of practice or rules of criminal procedure.

[23] Jerold Israel, *Federal Crimes Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 135 (1996).

[24] Homer Cummings, *The New Criminal Rules—Another Triumph of the Democratic Process*, 31 A.B.A. J. 236, 236 (1945).

[25] Kellen Funk, *The Influence of the Field Code: An Introduction to the Critical Issues*, KELLEN FUNK BLOG (Sept. 1, 2014), http://kellenfunk.org/field-code/the-influence-of-the-field-code-an-introduction/ [https://perma.cc/WG2U-FQHC].

[26] *See* Cummings, *supra* note 24.

[27] Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 9 (1989).

[28] *Id*. at 10 n.14 (1989); *see also* Funk, *supra* note 25.

[29] *Proceedings of the Annual Meeting of the American Institute of Criminal Law and Criminology*, 15 J. CRIM. L. & CRIMINOLOGY 509, 510 (1925).

[30] Herbert F. Goodrich, *Annual Report of Adviser on Professional Relations*, 22 A.L.I. PROC. 1, 41–42 (1946). A few of the states included: Arizona (1940), Arkansas (1937), California (1935), Connecticut (1931), Florida (1937), Georgia (1935), Indiana (1937), Kansas (1937), Michigan (1935), Minnesota (1935), Montana (1935), Nebraska (1935), New Jersey (1935),

On the federal level, scholars, lawyers, judges, and government officials came together to create the FRCP in 1938.[31] Eight years later, the FRCP went into effect.[32] Rather than pursuing Congressional involvement, (although Congress passed enabling legislation),[33] the Court used the same process that created the Federal Rules of Civil Procedure to draft the federal criminal rules.[34] Former Attorney General Homer Cummings called it a "democratic process in that they represent[ed] the thought and labor of the legal profession of the whole."[35]

Although the ALI and other institutions have created model rules,[36] nearly half the states used the FRCP to model their own rules.[37]

States continue to engage in reform efforts to ensure that their rules are uniform, clear, and helpful to courts and practitioners. Most recently, after starting the process in 2004, Mississippi adopted new rules of criminal procedure to take effect on July 1, 2017[38] with the goal of having them "be uniform from district to district and from court to court."[39] Idaho just recently adopted newly formatted statewide criminal procedure rules in an effort to "simplify, clarify and modernize the language, and to create a consistent structure and format along with a more useful table of contents."[40] Reform and revision is vital to maintaining standards that are effectively applied and applicable statewide.

This is true for Nevada as well. In 1965, the Legislature passed Assembly Concurrent Resolution 9 calling on the legislative commission "to study the en-

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New Mexico (1935, 1937), New York (1935, 1936), North Dakota (1935), Ohio, (1935), Oklahoma (1935), Oregon (1937), South Carolina (1937), Virginia (1937) Wisconsin (1937). Herbert F. Goodrich, *Annual Report of Adviser on Professional Relations*, 15 A.L.I. PROC. 57, 67–68 (1938); Herbert F. Goodrich, *Annual Report of Adviser on Professional Relations*, 17 A.L.I. PROC. 50, 62 (1940).

[31] George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694 (1946).

[32] *See id*.

[33] *Id*. at 695.

[34] *Id*.

[35] Cummings, *supra* note 24.

[36] The Uniform Law Commission promulgated the Uniform Rules of Criminal Procedure in 1952. *Rules of Criminal Procedure, Model Summary*, UNIF. LAW COMM'N, http://www.uniformlaws.org/ActSummary.aspx?title=Rules%20of%20Criminal%20Procedure,%20Model [https://perma.cc/73CQ-35V7] (last visited Mar. 17, 2017).

[37] Israel, *supra* note 23, at 138. The states using the FRCP to model their procedural rules include: "Alaska, Arizona, Colorado, Delaware, Hawaii, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, West Virginia, and Wyoming. States with statutory codes modeled upon the Federal Rules are Kansas, Montana, and Utah." *Id*. at 138 n.18.

[38] *In Re* Adoption of Miss. Rules of Criminal Procedure, No. 89-R-99038-SCT (Miss. Dec. 13, 2016), https://courts.ms.gov/Images/Opinions/209786.pdf [https://perma.cc/7UGP-3W7T].

[39] PROPOSED MISSISSIPPI RULES OF CRIMINAL PROCEDURE, https://courts.ms.gov/rules/rulesforcomment/2011/announcement9-8.pdf [https://perma.cc/N2XA-WBNW] (last visited Mar. 17, 2017).

[40] 2017 IDAHO COURT ORDER 0003 (C.O. 0003).

tire area of substantive criminal law" and to "prepare a new criminal code."[41] Before this, the criminal law statutes had not been reviewed since 1911.[42] The legislative commission created a subcommittee comprised of legislators, judges, and lawyers.[43] The commission narrowed their study to penalties and procedures.[44] Their policy goal for criminal procedure was to adopt in statutory form the Federal Rules of Criminal Procedure.[45] Since then, these criminal law statutes have set the foundation for proceedings in Nevada and have been amended periodically.

B. Criminal Procedure Rules—Generally

State criminal procedure rules fall into four categories. The first, and largest category, includes states that have adopted statewide rules of criminal procedure that govern all criminal proceedings.[46] Almost every one of these states also have statutes governing criminal proceedings. However, states supplemented those generally bare statutes with statewide rules to ensure criminal proceedings across the state were governed by a uniform set of procedural rules. These statewide rules are either promulgated by the state's supreme court, or adopted by the state's legislature. This category will be referred to as "statewide rules" herein.

Second, six states have chosen to incorporate the intricate details of statewide procedural rules into their existing criminal procedure statutes, creating one location—a criminal procedure code—to govern all criminal proceedings within the state. These codes were created by the states' legislatures and, in substance and application, are similar to the first category. This category will be referred to as "code" states throughout.

Third, seven states do not have statewide procedural rules that apply to all criminal matters throughout the state; instead, these states have a separate set of procedural rules for each level of court within the state. These states may have a distinct set of criminal procedure rules for their state circuit courts, superior court, supreme court, and/or trial court that apply to all criminal cases throughout the state within that specific court. For example, Delaware has a distinct set of criminal procedure rules for their Superior, Supreme, Common Pleas, and Justice of the Peace courts.[47] This category will be referred to as "by court" rules herein.

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[41] Assemb. Con. Res. 9, 1965 Leg., 53d Sess. (Nev. 1965).

[42] *Id*.

[43] REPORT OF THE SUBCOMM. FOR REVISION OF THE CRIMINAL LAW TO THE LEGIS. COMM'N 4 (1966).

[44] *Id*. at 1.

[45] *Id*. at 3.

[46] Please note that almost all states have exceptions to this application, especially for appellate procedures and juvenile criminal proceedings. Often, separate statewide rules govern these specific criminal cases.

[47] *See* 50 State Rule Chart, Appendix. Delaware Superior Court Criminal Procedure Rules: DEL. SUPER. CT. CRIM. R.; Delaware Supreme Court Rules: DEL. SUP. CT. CRIM. R.; Dela-

Fourth, the last and smallest category, includes states that do not have criminal procedure rules either statewide, by court, or code. These states, like Nevada, have statutes and sporadic court rules, but do not have any statewide governing rules. While these states have criminal procedure statutes, those statutes are unlike the code states because the statutes do not provide the guidance and direction necessary to generate consistent applications of procedures across the state.

Statewide Criminal Procedure Rules (34)	Criminal Procedure Code (6)	By Court Criminal Procedure Rules (7)	No Statewide Rules or Code (3)
Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Wyoming	Kansas, Montana, Oklahoma, South Dakota, Texas, Wisconsin	Delaware, Georgia, Illinois, New Hampshire, New Mexico, Rhode Island, Washington	Nebraska, Nevada, North Carolina

Further, more than half of the states with statewide rules[48] and five of the six states with criminal procedure codes[49] also allow counties, circuits, and/or district courts to implement local criminal procedure rules, so long as the rules do no conflict with the statewide procedures. Two of the seven states with by court statewide rules allow individual counties, circuits, and/or district courts to utilize local criminal procedure rules.[50] Lastly, all three states without any statewide rules or codes allow local counties, circuits, and/or district courts to establish criminal procedure rules.[51] These local rules are usually very short, focus on day-to-day procedural details, and/or are only created by the state's largest counties, circuits, and/or district courts.

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ware Court of Common Pleas Criminal Procedure Rules: DEL. CRIM. R. GOV'G C.P.; Justice of the Peace Criminal Procedure Rules: DEL. J. P. CT. CRIM. R.

[48] These states include: Arizona, California, Colorado, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Ohio, Oregon, Pennsylvania, Tennessee, Virginia, Washington, and West Virginia.

[49] These states include: Kansas, Montana, Oklahoma, Texas, and Wisconsin.

[50] These states include: Illinois and Rhode Island.

[51] These states include: Nebraska, Nevada, and North Carolina.

C. The Scope and Purpose of Statewide Criminal Procedure Rules

Most states include a scope, analogous to FRCP 1, which states, "these rules govern the procedure in all criminal proceedings . . . ." The scope provision, or applicability provision, informs practitioners what cases in which the rules apply.[52] All states with criminal procedure codes and by court rules contain statements of scope. Of the states with statewide rules, only Indiana and Oregon[53] do not have statements of scope.

Usually, a purpose or construction rule appears alongside a scope or applicability statement. As demonstrated by the federal purpose rule, FRCP 2, "[t]hese [rules of criminal procedure] are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[54] This rule serves as a "polestar" for interpreting the purpose, construction, and effect of the criminal procedure rules.[55] As interpreted by the United States Supreme Court, the FRCP was never intended to be "a rigid code [with] inflexible meaning irrespective of the circumstances."[56]

Generally, criminal procedure rules are intended to be interpreted according to their plain meaning, while remaining open to constructions that would avoid unjust outcomes. The clear majority of states have an analogous rule that is identical or nearly identical to the federal rule.[57] One reason most states model the federal rule may be that the federal rule comes with "a body of judicial precedent far more complete and rapidly developed than would be available for a standard unique to the state."[58]

Some states include additional language to avoid unjust outcomes, such as including the protection of the rights of individuals while preserving the public welfare.[59] Minnesota's procedural rules are to be construed to ensure the rules are applied without discrimination to everyone, despite "race, color, creed, religion, national origin, sex, marital status, public-assistance status, disability, in-

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[52] For example, Alaska's criminal procedure rules "govern the practice and procedure in the superior court in all criminal proceedings…" ALASKA R. CRIM. P. 1.

[53] Oregon is slightly unusual in that it adopted a set of rules called the Uniform Trial Court Rules, containing chapter 4 devoted to criminal procedure rules. Chapter 4 itself does not have a scope or applicability provision, but the Uniform Trial Court Rules Chapter 1, General Provisions, does detail that the Uniform Trial Court Rules apply to all circuit court proceedings.

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

[55] United States v. Hall, 505 F.2d 961, 963 (3d Cir. 1974).

[56] Fallen v. United States, 378 U.S. 139, 142 (1964).

[57] *See, e.g.*, ALASKA R. CRIM. P. 2; FLA. R. CRIM. P. 3.020.

[58] WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.3(e) (4th ed. 2016).

[59] Alabama, Arizona, Arkansas, and Mississippi are identical, and differ from the federal rule in this one addition. In an explanatory note, Alabama explained this addition as a way to ensure "the [state] constitutional guarantee . . . that no person shall be deprived of life, liberty, or property, except by due process of law." ALA. R. CRIM. P. 1.2, Note (internal quotations omitted).

cluding disability in communication, sexual orientation, or age."[60] Tennessee's rules note that the rules should be interpreted in a manner to avoid the unnecessary claim on the time of jurors.[61]

Whereas the additions just mentioned may be interpreted as further protection for criminal defendants, Illinois' criminal procedure statutes has a prosecutorial focus stating that the rules should be construed to "ensure the effective apprehension and trial of persons accused of crime."[62] Texas takes the prosecutorial focus even further by noting that their criminal procedure code should be interpreted to promote a just determination and little delay with the primary objective of "the prevention and prosecution of offenses."[63]

D. The Scope and Purpose of Nevada's Criminal Procedure Local Rules and Statutes

Nevada's constitutional due process clause requires procedures in criminal proceedings to be fair.[64] Without statewide rules governing all criminal proceedings, some of Nevada's districts have developed local rules to supplement the state's criminal procedure statutes. Nevada's criminal procedure statutes "govern[] the procedure in the courts of the State of Nevada and before magistrates in all criminal proceedings."[65] Although Nevada has no statewide rules, district court rules often apply to criminal proceedings. The Second District Court's criminal procedure rules were created to "provide uniformity" while allowing "each individual judge [to] retain discretion over how cases ultimately proceed in their courtroom."[66] Additionally, Part III of the Eighth Judicial District's rules govern criminal proceedings within the district except in juvenile cases, expressly provided for in Title 5 of NRS.[67] In the absence of specific rules on point, the district court has wide discretion "in many facets of" criminal trial procedures and case law has helped to develop procedural rules.[68]

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[60] MINN. R. CRIM. P. 1.02.

[61] TENN. R. CRIM. P. 2(c)(2). The Advisory Committee even adds a comment on this addition, stressing that the construction of the rules ensure the efficient use of a juror's time.

[62] 725 ILL. COMP. STAT. 5/101-1.

[63] TEX. CODE CRIM. PROC. § 1.03.

[64] NEV. CONST. art. 1, § 8.

[65] NEV. REV. STAT. § 169.025.

[66] LCR 1, Comment.

[67] EDCR 3.01.

[68] *See, e.g.*, Harte v. State, 373 P.3d 98, 101 (Nev. 2016); Manley v. State, 979 P.2d 703, 709 (Nev. 1999) (finding that the district court had the discretion to impose a two-hour time limit on closing arguments); Williams v. State, 539 P.2d 461, 462 (Nev. 1975) (holding district court had the discretion to allow the discovery to be reopened during the trial after each side rested); State v. Harrington, 9 Nev. 91, 93 (1873) (stating that the district court may deviate from the normal trial sequence in the interest of justice).

I. BAIL AND PRE-TRIAL RELEASE

Bail and pre-trial release rules focus on what offenses are bailable, if and how assessments are utilized, what conditions of release may be employed, and the amount for bail. Of the thirty-four states with statewide rules, all but two address bail: Colorado and South Carolina.[69] Most states, such as California, have ratified bail and pretrial rules both in statute and provide additional guidance in their statewide criminal procedure rules.[70]

Statewide rules vary in their specificity of bail and pretrial release. Some state procedural rules simply note that a defendant has a right to bail and that the bail amount will be determined at the arraignment hearing when the defendant's plea is entered.[71] Other states' statutes include more, such as a detailed outline of the process for securing cash bail,[72] and directing the court to consider the defendant's financial condition when imposing bail amount.[73] Other common variations include using pretrial risk assessments to guide the judge in determining bail amounts, releasing the defendant on their own recognizance,[74] outlining crimes where a defendant is ineligible for bail,[75] and providing other non-monetary pretrial release options in lieu of bail such as house arrest.[76]

A. Bail and Pre-Trial Release in Nevada

Nevada's constitution affords a defendant the right to bail, except for capital cases or murders punishable by life imprisonment.[77] Nevada's statutes supplement the constitution's language, providing that bail is not afforded to a person arrested for first-degree murder,[78] and adds that a person arrested for a felony whose sentence has been statutorily suspended or subject to residential confinement may not be granted bail unless certain statutory conditions are met.[79] Additionally, Nevada's statutes dictate that a defendant may not have a

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[69] Colorado's statewide rules specifically exclude bail proceedings, pointing the court and practitioners to "the statutes and the Constitution of the State of Colorado and the United States Constitution." COLO. CRIM. P. 46; *see also* S.C. CODE ANN. §§ 17-15-10 to -260.

[70] *See, e.g.*, CAL. PENAL CODE §§ 1270–1318; CAL. R. CT. 4.101.

[71] *See, e.g.*, 2016 ARIZ. COURT ORDER 0039 (C.O. 0039) (Rule 7); MINN. R. CRIM. P. 6.02; MASS. R. CRIM. P. 7(b).

[72] *See* COLO. REV. STAT. §§ 16-4-102 to -106; TEX. CODE CRIM. PROC. § 17.04.

[73] COLO. REV. STAT. § 16-4-103.

[74] *See* COLO. REV. STAT. §§ 16-4-103; TEX. CODE CRIM. PROC. § 17.032(b)(3).

[75] COLO. REV. STAT. § 16-4-101.

[76] *See* COLO. REV. STAT. § 16-4-105; TEX. CODE CRIM. PROC. § 17.44.

[77] NEV. CONST. art. 1, § 7 ("All persons shall be bailable by sufficient sureties; unless for Capital Offenses or murders punishable by life imprisonment without possibility of parole when the proof is evident or the presumption great.").

[78] NEV. REV. STAT. § 178.484(1).

[79] *Id.* § 178.484(2).

right to bail for a period of time, usually twelve hours, for certain domestic violence and driving under the influence offenses.[80]

Further, Nevada's constitution forbids excessive bail.[81] When a defendant appears before a judge, "bail must be set at an amount which . . . will reasonably ensure the appearance of the defendant" and the safety of the community.[82] Statutory factors a judge can use in setting a bail amount include the nature of the offense, the financial ability of the defendant, the character of the defendant, length of residence, employment status, relationships between friends and family, and members of the community who would vouch for the defendant.[83]

Although Nevada's statutes provide factors for a judge to consider when setting a bail amount, some local jurisdictions have chosen to implement bail schedules, creating wildly different bail regimes throughout the state. For example, the Las Vegas Justice Court bail schedule specifies that: Category A felonies must be set in court;[84] Category B felonies range from $5,000 to $10,000 or to $20,000 depending on the prison term;[85] Category C felonies are set at $5,000[86] and Category D and E felonies are set at $3,000.[87] The bail schedule in Churchill County is set up significantly differently. It details a bail amount for each different crime. For instance, voluntary manslaughter has a set bail of $25,000, false imprisonment is set at $5,000, and burglary is $10,000.[88] Most other districts in Nevada do not have bail schedules, or provide any guidance beyond the statutory factors for setting bail. The Second District previously had a uniform bail schedule for anyone arrested within Washoe County, but the schedule has been suspended during a Pretrial Risk Assessment Tool pilot program.[89] A lack of uniform bail rules have resulted in significantly different bail amounts depending on where the defendant's case is located, and if no bail schedule is set, then which judge the defendant is before may alter the bail amount significantly under the more discretionary statutory considerations.

In addition to bail amount determinations, judges in Nevada have the statutory authority to impose reasonable conditions of release on the defendant as necessary to "protect the health, safety and welfare of the community."[90] How-

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[80] *Id*. § 178.484.
[81] NEV. CONST. art. I, § 6.
[82] NEV. REV. STAT. § 178.498.
[83] *Id*. §§ 178.498, 178.4853.
[84] STANDARD BAIL SCHEDULE, JUSTICE COURT, L.V. TWP. (2015), https://www.clarkcountybar.org/wp-content/uploads/lvjcsbs15.pdf [https://perma.cc/7TBX-JKQP].
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] BAIL SCHEDULE, CHURCHILL CTY., http://www.churchillcounty.org/index.aspx?NID=361 [https://perma.cc/P5Y6-6K7N] (last visited Mar. 21, 2017).
[89] Admin. Order 2016-15, *In re* Admin. Matter of Rescinding Washoe Cty. Unif. Bail Schedule (Jan. 20, 2016), http://www.washoecourts.com/AdminOrders/PDF/2016/2016-15%20ADMINISTRATIVE%20MATTER%20OF%20RESCINDING%20WASHOE%20COUNTY%20UNIFORM%20BAIL%20SCHEDULE.pdf [https://perma.cc/72CA-8JQ4].
[90] NEV. REV. STAT. § 178.484(11).

ever there is no comprehensive list for what conditions a judge may consider when determining a defendant's release conditions. Statutes provide a short list of possible conditions, including requiring the defendant to stay in the state or a certain county, stopping the defendant from contacting someone, precluding the defendant from going to a certain geographic area, and preventing the defendant from hurting himself or another person.[91] But the Second District's rules supplement the statutory list of conditions by providing fourteen possible conditions a judge may impose, with the last condition acting as a catch-all.[92] The Eighth District is silent on providing guidance on possible conditions.

Except for supplementing the state's constitution regarding what offenses may limit a defendant's right to bail, Nevada's statutes provide little guidance on determining whether to release defendants who have not been charged with crimes described in the statute. The Second District's rules have attempted to supplement this statutory deficiency by stating that a judge shall release a defendant on his personal recognizance, with the implementation of conditions, unless the court is concerned that the defendant will not appear or endanger the safety of the community.[93] The Eighth District's rules allow a judge to take unilateral action and release a defendant accused of a misdemeanor, gross misdemeanor, non-violent felony, or some combination thereof on his own recognizance or reduce the standard bail amount.[94] However, in violent felony offenses or an arrest on a bench warrant for a violent felony offense, the judge must allow the district attorney the opportunity to assert the state's position prior to release or a bail reduction.[95] Without a single list of possible conditions for release, while all not mandatory, may still result in a defendant receiving wildly different release conditions. Similarly, the lack of a standard procedure for a judge to follow in determining release may cause significant differences in case outcomes.

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[91] *Id.*

> Before releasing a person arrested for any crime, the court may impose such reasonable conditions on the person as it deems necessary to protect the health, safety and welfare of the community and to ensure that the person will appear at all times and places ordered by the court, including, without limitation:
>
> (a) Requiring the person to remain in this State or a certain county within this State; (b) Prohibiting the person from contacting or attempting to contact a specific person or from causing or attempting to cause another person to contact that person on the person's behalf; (c) Prohibiting the person from entering a certain geographic area; or (d) Prohibiting the person from engaging in specific conduct that may be harmful to the person's own health, safety or welfare, or the health, safety or welfare of another person.

[92] LCR 5.

[93] *Id.* 5(c).

[94] EDCR 3.80(a).

[95] *Id.* 3.80(b).

B. Bailable and Non-Bailable Offenses

Forty-one state constitutions afford defendants the right to bail.[96] Most states typically have additional statutes and/or procedural rules affording a defendant bail as a matter of right with exceptions for capital offenses and instances where the defendant would pose a danger to themselves or others.[97] It is common for states to discuss bail in sections devoted to warrants[98] or arraignment hearings,[99] while other states provide independent rules or statutes on both bail and pretrial release.

Some state statutes discuss at length instances when a defendant is ineligible to be released on bail. For example, Colorado's statutes detail that bail is denied to: (1) defendants accused of committing a crime of violence while on parole or bail, (2) defendants with a history of two felony convictions or one felony conviction for a violent crime, (3) defendants with prior felony convictions that are now charged with possession of weapon, and (4) defendants with sexual assault charges.[100] Arizona's statewide rules categorizes offenses as bailable or non-bailable offenses.[101] Arizona judges *must* release a person charged with a bailable offense on their own recognizance during the defendant's initial appearance.[102] In its criminal procedure code, Texas also classifies which violent offenses[103] are ineligible for bail, and imposes additional criteria for defendants with mental illness,[104] cases of domestic violence,[105] cases involving a child victim,[106] and provides additional instructions for defendants with an AIDS or HIV diagnosis.[107] Similarly, some statewide rules direct law

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[96] Ariana Lindermayer, Note, *What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail*, 78 FORDHAM L. REV. 267, 284 n.111 (2009) (citing the following states as containing a right to bail constitutional provision: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, Wyoming).

[97] *See* UTAH CODE § 77-20-1(2); CAL. PENAL CODE § 1270.1.

[98] FLA. R. CRIM. P. 3.121; ALA. R. CRIM. P. 7.2.

[99] *See, e.g.*, N.H. R. CRIM. RULE 10.

[100] COLO. REV. STAT. § 16-4-102; ARIZ. R. CRIM. P. 7(a); WASH. REV. CODE § 10.21.015.

[101] ARIZ. R. CRIM. P. 7.2.

[102] *Id.* 7.3(a).

[103] *See* TEX. CODE CRIM. PROC. §§ 17.033(A)–(J). Listing capital murder; aggravated kidnapping; aggravated sexual assault; deadly assault on law enforcement or corrections officer, member or employee of board of pardons and paroles, or court participant; injury to a child, elderly individual, or disabled individual; aggravated robbery; burglary; engaging in organized criminal activity; continuous sexual abuse of young child or children; or continuous trafficking of persons. *Id.*

[104] *Id.* § 17.032.

[105] *Id.* § 17.152.

[106] *Id.* § 17.153.

[107] *Id.* § 17.45.

enforcement to "release [defendants] on citation"—a practice reserved for misdemeanor cases and offenses not punishable by incarceration.[108]

In this regard, states generally provide the right to bail while either assigning a court broad discretion to determine whether to release a defendant on bail or their own recognizance, or providing strict guidelines for the court to utilize to determine which crimes automatically disqualify a defendant from bail. States also employ statutes to establish guidelines and then use the procedural rules to provide further direction and process to the courts.

C. Bail Amounts

State procedural rules vary on how courts determine bail amounts. Some states establish a bail amount floor and begin by presuming that the defendant is eligible for release on bail with the least restrictive conditions and "lowest amount necessary to ensure the defendant will reappear."[109] Alternatively, other states set a bail amount ceiling. For example, the Texas procedural code section for fixing bail amount states, "[t]he bail [amount] shall be sufficiently high" with the caveat that bail is "not to be so used as to make it an instrument of oppression."[110] Some states, like Alabama, provide a detailed bail schedule in their statewide procedural rules.[111] Despite differences amongst the states, and given the national discourse on a defendant's right to counsel at bail hearings, it is important for states to set reasonable guidelines for determining bail amounts consistent with Eighth Amendment due process protections.[112]

D. Pre-trial Risk Assessments

Most statewide rules require a judge to rely on "clear and convincing evidence" when deciding to deny bail or release a defendant as directed by the procedural rules.[113] Across all states, courts consider at least whether a defendant is a flight risk, likely to reappear for trial, and poses a threat of harm to the

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[108] MINN. R. CRIM. P. 6.01.

[109] COLO. REV. STAT. § 16-4-103; UTAH R. CRIM. P. 6(e)(3)(A).

[110] TEX. CODE CRIM. PROC. § 17.15.

[111] *See, e.g.*, ALA. R. CRIM. P. 7(b); KAN. R. CRIM. P. 4.20.

[112] *See, e.g.*, CONSTITUTION PROJECT, DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING-A REPORT OF THE CONSTITUTION PROJECT NATIONAL RIGHT TO COUNSEL COMMITTEE 17–30 (Mar. 2015), http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf [https://perma.cc/Y3S8-KMLF]; NAT'L ASSOC. CRIMINAL DEF. LAWYERS, GIDEON AT 50, PART 3—REPRESENTATION IN ALL CRIMINAL PROSECUTIONS: THE RIGHT TO COUNSEL IN STATE COURTS (Oct. 2016), https://www.nacdl.org/gideonat50/ [https://perma.cc/U4WL-JGLF].

[113] *See, e.g.*, UTAH CODE ANN. § 77-20-1(5); ARIZ. R. CRIM. P. 7.3(c); CAL. PENAL CODE § 1270.1. Some states delegate this analysis to a bail authority. *See, e.g.*, PA. R. CRIM. P. 523. "This rule clarifies present practice, and does not substantively alter the criteria utilized by the bail authority to determine the type of release on bail or the conditions of release reasonably necessary, in the bail authority's discretion, to ensure the defendant's appearance at subsequent proceedings and compliance with the conditions of the bail bond." *Id.*, Comment.

community or themselves.[114] In California, and most states, the prosecutor presents this evidence, not subject to the rules of evidence,[115] regarding these considerations based on the defendant's previous criminal history.[116] Some states allow the defendant to provide a statement on his or her behalf during a bail determination hearing, while others allow the defense attorney (assuming the defendant has counsel) to inform the court of the defendant's desire to be released.[117]

While some states establish pre-trial risk assessments in their procedural rules, others, like Colorado, have pre-trial risk assessment procedures in statute.[118] To better assist the judge in making pre-trial release determinations, many states have created pretrial release services or agencies who present their findings after a risk assessment of the defendant.[119] "[P]retrial services programs [support] the work of the court and evidence-based decision-making in determining the type of bond and conditions of release."[120] The assessments assign the defendant a "risk score" based on certain considerations to assist the judge in assessing the defendant's flight risk and potential danger to the community, and whether to impose additional release conditions to ensure the defendant returns to court.[121] Colorado's statutes encourage individual counties and cities to develop their own evidence-based pretrial risk assessment tools by working with a community advisory board, members of the judiciary, and rep-

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[114] *See, e.g.*, CAL. PENAL CODE § 1270.1.

[115] ARIZ. R. CRIM. P. 7.3(c).

[116] CAL. PENAL CODE § 1270.1. Some state statutes even allow evidence of a person's juvenile criminal record. *See, e.g.*, N.M. STAT. § 31-3-1.1.

[117] *See, e.g.*, CAL. PENAL CODE § 1270.1; COLO. REV. STAT. § 16-4-101; UTAH CODE ANN. § 77-20-1(5).

[118] *See, e.g.*, COLO. REV. STAT. § 16-4-106.

> An emerging area of pretrial policy involves use of risk assessment to evaluate the risk posed by an individual defendant and the likelihood that he or she will commit a new offense or fail to appear. While empirical risk assessment tools are used around the country by local jurisdictions, it is only recently that lawmakers have provided statewide, statutory guidance on their use. Fifteen states—Colorado, Connecticut, Delaware, Hawaii, Illinois, Kansas, Kentucky, Louisiana, Maine, New Jersey, Oklahoma, South Carolina, Vermont, Virginia and West Virginia—authorize courts to consider the results of a risk assessment when making the pretrial release decision. Six States—Delaware, Colorado, Kentucky, New Jersey, South Carolina and West Virginia—require risk assessments for all defendants. Kansas and Oklahoma assessments apply to defendants who will potentially be supervised by pretrial services program. Maine and Louisiana require assessments for domestic violence offenses. In Hawaii and Virginia, assessments are utilized at the court's discretion.

Guidance for Setting Release Conditions, NAT'L CONF. ST. LEGISLATURES (May 13, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/guidance-for-setting-release-conditions.aspx [https://perma.cc/N6GB-RRGP].

[119] *See, e.g.*, IND. R. CRIM. P. 26. Some states conduct pretrial risk assessments only for felonies. *See, e.g.*, ARK. R. CRIM. P. 8.4.

[120] COLO. REV. STAT. § 16-4-106.

[121] *Id.* § 16-4-106. Other states are silent with regard to how the assessment is conducted but employ their states procedural rules to direct the court to use the pretrial risk assessment during the bail hearing. *See, e.g.*, MINN. R. CRIM. P. 6.02(3).

resentatives from the bond industry.[122] Pretrial risk assessments have been successful in reducing the pretrial detention population, minimizing the negative psychological, social, and financial consequences a defendant faces because of pretrial detention, and assisting courts to correctly deny bail to violent offenders.[123]

E. Conditions of Release

Judges often rely on statutory guidance, the procedural rules, and pre-trial risk assessments to impose conditions on a defendant's release. Conditions of release ensure that the defendant will reappear for trial, protect the community and defendant, and "avoid unnecessary pretrial incarceration."[124] Some statewide rules consider the "individual characteristics of each person in custody, including the person's financial condition," employment status, social support systems, housing arrangements, character and reputation, the sentence the defendant is likely to receive, criminal record, and the defendant's likelihood to flee when determining whether a defendant should be released, with or without conditions.[125] Common conditions for release include supervised release, temporary restraining orders, if the defendant is charged with drinking under the influence of alcohol, to abstain from drinking alcohol, supervision under a pretrial services organization, drug and alcohol testing, mental health and substance abuse counseling, electronic-monitored house arrest, bail, or pretrial work release.[126] Texas' procedural code lists different conditions a judge can order based on the specific crime. For example, a judge can order a defendant in a family violence case to wear a global-positioning-device and stay away from the child's school.[127]

F. Conclusion on Bail and Pre-Trial Release

Uniformity in bail and pre-trial release procedures is necessary to ensure fairness across the state. Simply providing a court with a non-exhaustive list of considerations in determining the bail amount can result in inconsistent determinations if there is no standard, presumption, or process for direction. While procedural uniformity with bail and pre-trail release determinations is difficult, providing courts with standard considerations, risk assessments, or bail schedules may result in more uniform determinations. Additionally, having a uniform

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[122] COLO. REV. STAT. § 16-4-106(4)(c).

[123] *See, e.g.*, Lauryn P. Gouldin, *Disentangling Flight Risk from Dangerousness*, 2016 B.Y.U. L. REV. 837 (2016).

[124] COLO. REV. STAT. § 16-4-103.

[125] *Id.* § 16-4-103. This information can be presented in a pretrial risk assessment report. *See* ARK. R. CRIM. P. 8.5.

[126] These conditions appear in statute in some states and the procedural rules in others. COLO. REV. STAT. § 16-4-105; ARIZ. R. CRIM. P. 7.2.; MINN. R. CRIM. P. 6.02; FLA. R. CRIM. P. 3.131(b); WASH. REV. CODE § 10.21.030.

[127] TEX. CODE CRIM. PROC. § 17.49.

bail schedule will likely make courts more efficient by eliminating the time required to determine the bail amount.

Pre-trial risk assessments provide valuable information to help guide the court to more consistent decisions by utilizing data to distinguish between high-risk and low-level offenders. This likely results in more fair proceedings across the state, and may reduce overcrowded jails and maximize limited criminal justice resources. Pre-trial risk assessments also have the added value of insulating low-level offenders from additional negative consequence of pretrial detention by allowing the defendant to maintain his or her job, custody of children, home, and medical care and commitment to the court while waiting for their case to proceed.

II. PRE-TRIAL MOTIONS

Procedural rules for pre-trial motions primarily address what types of motions can and *must* be filed prior to trial, the time for filing these motions, which party can file certain motions, and the process for handling these motions. States with more developed pre-trial motion rules detail the possible pleas a defendant can make and explain that failure to raise any issues pre-trial constitutes a waiver of those issues. Defined pre-trial motion rules are important because the parties are moving the court for significant, case-altering requests, such as whether evidence may be suppressed, defenses are properly raised to be preserved for appeal, and defendants' cases are joined or severed.

Thirty-two of the thirty-four states with statewide rules have a defined section for pre-trial motions.[128] Neither Michigan and New York have specific motion rules in their statewide rules. Notably, Arkansas and Oregon have very limited motion practice rules, focusing almost solely on motions to suppress evidence.[129] All six states with criminal procedure codes have pretrial motion rules.[130] Of those thirty-eight states with pre-trial motion rules, twenty-three[131] states' rules effectively mirror FRCP 12.[132] The remaining states either provide

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[128] The states that have pre-trial motion procedure rules include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming.

[129] ARK. R. CRIM. P. 16.2; OR. UTCR 4.060.

[130] KAN. STAT. ANN. § 22-2716; MONT. CODE. ANN. tit. 46, ch. 9; OKLA. STAT. tit. 22, ch. 19; S.D. CODIFIED LAWS tit. 23A, ch. 43; TEX. CODE CRIM. PROC. tit. 1, art. 17; WIS. STAT. ch. 969.

[131] The states that mirror FRCP 12 include: Alaska, Colorado, Hawaii, Idaho, Maine, North Dakota, Ohio, Rhode Island, Tennessee, Utah, Virginia, West Virginia, Wyoming. Other states also closely follow the Federal Rules, but with different numbering. These states include: Florida, Illinois, Iowa, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, South Dakota, Texas.

[132] The FRCP outlines what motions can be brought, when they may be brought, when a court must rule of the motions and the procedure for motion hearings. FED. R. CRIM. P. 12.

very detailed rules,[133] or only have a general statement and list different motions that may be brought in various sections.[134] California's rules are an outlier because its pre-trial motion practice includes only two brief sections regarding filing and service.[135]

Generally, states mirror the FRCP and then add additional state specific distinctions or preferences. Most of the pre-trial motion procedural rules commonly focus on the defense's filings, rather than prosecution's filings. This can likely be explained by considering that in a criminal case, the defendant is most often the movant, filing for any possible relief with the court prior to trial.

Like the FRCP, Alabama and Colorado's pre-trial motion rules define criminal pleadings and motions, as well as defenses and objections, which can or must be raised by motion. Any defense or objection capable of determination without the trial of general issue *may* be raised by motion.[136] The rules list defenses and objections that *must* be raised prior to trial. This includes defenses and objections based on defects in the institution of the prosecution or the indictment or information or complaint, or summons and complaint.[137] Alabama's pre-trial motions rule includes a comment from the committee stating that "[t]his rule is designed to simplify the procedure and avoid the technical distinctions that serve as traps for the unwary. . . . the form or styling of the motion is not important, and substance shall govern over form."[138]

A. Nevada's Pre-Trial Motion Practice

In the absence of statewide criminal procedure rules, Nevada courts and practitioners rely on the minimal applicable statutes, districts' local rules, case law, and the statewide district court rules, which provide little to no guidance on criminal pre-trial motions. Nevada's criminal procedure statutes have substantive pre-trial motion procedures similar to FRCP 12,[139] and are more specific than any local applicable rule. Specifically, the statutes detail which motions

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[133] Unlike most states, Connecticut has rather extensive pretrial motion rules, which includes rules for general pretrial motion practice, CONN. SUPER. CT. CRIM. MATTERS ch. 41, rules regarding motions to dismiss, *id.* § 41-8 to 41-11, rules regarding motions to suppress, *id.* § 41-12 to 41-17, rules regarding severance and joinder of offenses, *id.* § 41-18 to 41-19, rules regarding a bill of particulars, *id.* § 41-20 to 41-22, and transfer of prosecution, *id.* § 41.23 to 41.25.

[134] *See, e.g.*, Kentucky, Louisiana, Michigan, and South Carolina.

[135] CAL. R. CT. 4.111(a)–(b) ("Unless otherwise ordered or specifically provided by law, all pretrial motions, accompanied by memorandum, must be served and filed at least 10 court days, all papers opposing the motion at least 5 court days, and all reply papers at least 2 court days before the time appointed for hearing. Proof of service of the moving papers must be filed no later than 5 court days before the time appointed for hearing. . . . The court may consider the failure without good cause of the moving party to serve and file a memorandum within the time permitted as an admission that the motion is without merit.").

[136] ALA. R. CRIM. P. 15.2; COLO. R. CRIM. P. 12(b)(1).

[137] ALA. R. CRIM. P. 15.2; COLO. R. CRIM. P. 12(b)(2).

[138] ALA. R. CRIM. P. 15, Comment.

[139] NEV. REV. STAT. §§ 174.075, 174.095–.145.

must be made before trial,[140] including motions to suppress evidence, requests for transcripts of previous proceedings, for a preliminary hearing, for severance of joint defendants, for withdrawal of counsel, or any motion, if granted, that would delay the start of trial.[141] The deadlines for filing motions are also detailed in statute, which is determinative of the number of judges in the judicial district.[142]

Without clear statutory guidance on criminal pre-trial motions, local districts have developed rules to help guide judges and practitioners.[143] Only the Second District's criminal procedure rules has distinct rules for pre-trial motions.[144] The Eighth District also has criminal motion rules, including a separate discovery rule and motion in limine rule.[145] The general motion rule provides for the timing of motions,[146] including that motions must be served and filed not less than fifteen days before the start of trial unless the movant can demonstrate good cause.[147] Oppositions are due seven days after service of the motion.[148]

In contrast of FRCP 12, Nevada's districts' rules on motion practices that may apply to criminal proceedings, if applicable,[149] do not list the defenses, objections, and/or requests that *must* be raised before trial. Instead, the rules focus on deadlines to file the motion, opposition, and reply,[150] list that a memorandum with the motion setting forth the points and authorities relied on to support

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[140] *Id*. § 174.125.

[141] *Id*. § 174.125(1).

[142] For example, in judicial districts with only one judge, the motion "must be made in writing, with not less than ten days' notice to the opposite party" unless good cause is shown to the court. *Id*. § 174.125(2)(a). Judicial districts with more than one judge, the motion "must be made in writing not less than fifteen days before the date set for trial, except that if less than fifteen days intervene between entry of a plea and the date set for trial," then the motion may be made within five days after the entry of the plea. *Id*. § 174.125(3)(a).

[143] Three rules for procedures on how to make motions generally, continuance motions; and when motions can be heard in chambers, or must be heard in open court, or can be submitted on the briefs. D.C.R. 13–15. These rules do not have a specific rule for pretrial motions; however, the rules do explain the timing for filing a response and a reply, and requires that a memorandum setting forth the movants points of authorities accompany each motion. *Id*. 13(1).

[144] LCR 7.

[145] EDCR 3(20).

[146] *Id*.

[147] *Id*. 3(20)(a).

[148] *Id*. 3(20)(c).

[149] *See, e.g*., 4JDCR 11(1); 7JDCR 7; 10JDCR 15(1). The Fourth, Seventh, and Tenth judicial districts' share the same deadlines: the opposition must be filed within ten days after service and the reply may be filed five days after service. 4JDCR 11; 7JDCR 7; 10JDCR 15. The Seventh judicial district motion rules also detail memorandums of points of authorities for each motion, requests for hearings, and procedures in alerting the court to review the motion. 7JDCR 7. The First and Third judicial districts, both have motion rules for civil cases only; there are no criminal motion rules. FJDCR 15 ("Motions and similar moving papers in civil cases."); TJDCR 7 (same). The Ninth judicial district's motion rules are limited and only apply to criminal proceedings "if applicable." NJDCR 2(c).

[150] *E.g*., FJDCR 15.

the motion is required,[151] procedures on how to request a hearing on the motion,[152] and in certain cases, procedures on how to request that the court review the motion.[153] Specifically, pre-trial motions must be served and filed no later than twenty days before trial. The opposition is due ten days later (and no later than ten days before trial), and the reply is due three days later (and no later than seven days before trial.)[154] The movant then notifies the court it is time to rule on the motion.[155]

Practitioners are left uncertain as to what rules apply to criminal cases, especially in terms of filing deadlines. As an example of inconsistent rules, compare Nevada's statutes on motions in limine with Nevada's Eighth and Second Judicial Districts' local rules.

NRS 174.125 states in pertinent part:

> 1. All motions in a criminal prosecution to suppress evidence, . . . and all other motions which by their nature, if granted, delay or postpone the time of trial must be made before trial,
>
> . . .
>
> 3. In any judicial district in which two or more judges are provided:
>
> (a) All motions subject to the provisions of subsection 1 must be made in writing not less than 15 days before the date set for trial, except that if less than 15 days intervene between entry of a plea and the date set for trial, such a motion may be made within 5 days after entry of the plea.

EDCR 3.28, entitled Motions in Limine states:

> All motions in limine to exclude or admit evidence must be in writing and noticed for hearing not later than calendar call, or if no calendar call was set by the court, no later than 7 days before trial. The court may refuse to consider any oral motion in limine and any motion in limine which was not timely filed.

LCR 7, titled pretrial motions states, in part:

> (a) Except as otherwise ordered by the court, all pretrial motions, including motions in limine, shall be served and filed no later than 20 days prior to trial. Computation of time as set forth in this rule shall be in calendar days. If a pretrial motion is filed within 30 days prior to trial, it shall either be personally served upon the opposition on the date of filing or be e-filed.
>
> . . . .
>
> (c) All motions shall be decided without oral argument unless requested by the court or party.

As demonstrated by the above excerpts, there is no clear rule as to when a motion to suppress, which is comparable to a motion in limine, is to be filed. By statute such motion must be made fifteen days prior to trial, in the Eighth Judicial District it must be made before calendar call, or seven days, and in the Second Judicial District it must be made at least twenty days prior to trial.

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[151] *E.g.*, 4JDCR 5(a).
[152] *E.g.*, NJDCR 6(e).
[153] *E.g.*, LCR 7(f).
[154] LCR 7.
[155] *Id.* 7(f).

There does not appear to be a specific reason why each rule requires a different deadline, but a practitioner is left with little direction on when to file a motion in limine.

III. DISCOVERY

Detailed and defined discovery procedures are vital for efficient proceedings and to protect a defendant's due process rights. Ambiguity or inconsistency in governing discovery rules may result in non-disclosure of critical mitigating and/or aggravating evidence. Currently, there is no consistent approach across the states for discovery rules, as "[d]iscovery systems range from mandatory to discretionary and from mutual to reciprocal."[156]

Almost every state has a section of their criminal procedure rules, codes, or statutes dedicated to discovery.[157] Generally, states' discovery rules follow the FRCP format,[158] but some states chose to expand the scope of the FRCP by including more detailed rules[159] and specify remedies for a party's failure to follow the discovery requirements. Most states separate their discovery rules by the defense's obligations and the prosecution's obligations.[160] A few states expand beyond these obligations, implementing offense specific discovery procedural rules. For instance, implementing special discovery rules for crimes against children.[161] Overall, most states' rules tend to be more thorough than the FRCP.[162]

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[156] HON. ROSSIE D. ALSTON, ACLU OF VIR., BRADY V. MARYLAND AND PROSECUTORIAL DISCLOSURES: A FIFTY STATE SURVEY 2 (2014), https://acluva.org/wp-content/uploads/2015/05/150526-Criminal-Discover-Judge-Alston-article.pdf [https://perma.cc/53BH-B9GN].

[157] Delaware, Indiana, and Nevada do not have statewide procedural discovery rules. Some states use the term "disclosure" in place of, or in addition to the term "discovery." For example, Arizona exclusively uses "disclosure," Mississippi uses "disclosure and discovery," and Montana uses "production of evidence."

[158] Several of those states model their discovery rules after FRCP 16 in both structure and substance. These states include Alaska, Arizona, Hawaii, Iowa, North Dakota, Pennsylvania, South Carolina, Tennessee, Utah, West Virginia, and Wyoming.

[159] *See, e.g.*, ARIZ. R. CRIM. P. 15.1–15.9. Arizona's criminal procedure rules are more detailed than the FRCP, discussing the prosecutor's obligations, then the defendant's, and then includes several rules on procedural specifics. The rules also specify sanctions that can be brought against a party who fails to disclose as well as procedures for appointment of investigators and expert witnesses for indigent defendants. *Id*. 15.7, 15.9. The procedural rule for the appointment of experts and investigators includes (1) the application for appointment; (2) ex parte proceeding restrictions; (3) mitigation specialists; and (4) deadlines for capital cases. *Id*.

[160] Although, a few states, including Maine and Texas do not distinguish the states' and the defense's obligations.

[161] For example, Texas includes specific discovery rules on evidence in child abuse and child sexual exploitation cases. California, too, has a specific rule on disclosure in child pornography cases. Texas does not allow the defense to copy or duplicate images of child pornography. TEX. CODE CRIM. PROC. §§ 39.15, 39.151. The state is only required to make the evidence "reasonably available" to the defense. The evidence is considered reasonably available if the state allows "ample opportunity for the inspection...and examination of the property" by the defense or any expert qualified for trial. *Id*. § 39.15(c)–(d). California prohibits *any* attorney from releasing copies of child pornography evidence to the defendant or the

There are three uniform disclosures required in every state: (1) the defendant's prior written statements, (2) the defendant's prior recorded statements, and (3) physical evidence to be used at trial.[163] Common additional disclosures include the defendant's oral statements, co-defendant statements, defendant's criminal record, witness statements, expert witness information, and grand jury testimony.[164] Another commonality in states' discovery rules is procedures to protect privacy of those involved in discovery.[165]

Further, the states generally fall into two broad categories depending on whether the parties must request discovery[166] or whether discovery, at least some disclosures, are automatic.[167] Depending on how rigid the rules requiring request or automatic disclosures are, there appears to be a difference in philosophy of discovery. One end promotes cooperation[168] and the other end utilizes detailed schemes and specifies the process for court intervention.

Unique among the states, California's criminal discovery procedures are governed by its Constitution. In 1990, California voters passed Proposition 115 to establish constitutional discovery.[169] The California Constitution states: "[i]n

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defendant's family. CAL. PENAL CODE § 1054.10. The images may only be disclosed after a hearing by the court and a showing of good cause. *Id*.

[162] For example, Connecticut's "Discovery and Depositions" rule includes a lengthy, detailed list of procedures in addition to the basic requirements of the prosecution and defense. CONN. SUPER. CT. CRIM. MATTERS §§ 40-1 to 40-58.

[163] ALSTON, *supra* note 156, at 9.

[164] *Id*. at 9–10.

[165] *See, e.g*., COLO. R. CRIM. P. 16 (detailing that the court may deny disclosures that may cause a person substantial harm, which outweighs the usefulness of the disclosure); ALA. R. CRIM. P. 16(d)(3)(B) (specifying that an attorney shall not disclose to the defendant any personal information of any witnesses involved); UTAH R. CRIM. P. 16 (stating reasonable limitations may be imposed to protect the privacy of individuals involved in discovery).

[166] On the extreme end of the categories is Alabama, which requires defendants to request discovery in writing. ALA. R. CRIM. P. 16.2.

> Upon written request of the state/municipality, the defendant shall, within fourteen (14) days after the request has been filed in court as required by Rule 16.4(c), or within such shorter or longer period as may be ordered by the court, on motion, for good cause shown, permit the state/municipality to analyze, inspect, and copy or photograph books, papers, documents, photographs, tangible objects, buildings, places, or portions of any of these things, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.

Id.

[167] For example, Maine's discovery rule details automatic discovery, deadlines, discovery upon request discovery based on court order and sanctions for noncompliance for both parties. *See* M.R.U. CRIM. P. 16.

[168] *See, e.g*., PA. R. CRIM. P. 573(A) ("Before any disclosure or discovery can be sought under these rules by either party, counsel for the parties shall make a good faith effort to resolve all questions of discovery, and to provide information required or requested under these rules as to which there is no dispute."); ALA. R. CRIM. P. 16 ("In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system.").

[169] Crime Victims Justice Reform Act, Cal. Proposition 115 (June 5, 1990).

order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process."[170] This requirement has been written into the California Penal Code, which is similar to many other states' discovery procedures, separating the obligations of the prosecution and defense and then offering procedural specifications.[171]

A. Nevada's Discovery Rules

A defendant's right to discovery is generally linked to the protection of a defendant's constitutional right, like the right to confrontation.[172] With no statewide criminal discovery rules, practitioners must look to the discovery statutes and determine whether a local districts' rules are applicable.[173] While the prosecutor is still bound by their disclosure requirements mandated by Nevada's Constitution and the United States Constitution, Nevada's statutes require both the state and defendant to request discovery; there is no requirement for automatic discovery.[174] The statutes, much like FRCP 16, provide specific rules for disclosures by the prosecuting attorney[175] and defendant.[176] All parties have a continuing duty to disclose previously requested material that is subject to discovery.[177] Nevada's discovery statutes also establish various rules for dis-

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[170] CAL. CONST. art. 1, § 30.

[171] CAL. PENAL CODE, tit. 6, ch. 2. California has criminal procedural rules in both court rule and codified in the penal code. *See* 50 State Rule Chart, Appendix. California's detailed discovery statute lays out not only the prosecution's and defense's obligations, but also procedures from everything to time for disclosure to disclosure of special categories, such as privileged information, work product, and post-conviction writ of habeas proceedings. CAL. PENAL CODE §§ 1054.8–.9. California's criminal procedural rules by court rule do not address procedure for discovery, that procedure appears to be entirely left to the California Constitution and the California Penal Code.

[172] *See, e.g.*, Higgs v. State, 222 P.3d 648, 664 (Nev. 2010) ("This court has observed that a defendant's right to discovery is tangentially related to the right of confrontation.").

[173] Nevada's Judicial Districts with discovery rules for criminal cases—First, Second, and Eighth Districts—slightly build upon the discovery procedures found in statute. The First Judicial District discovery rules, which apply to criminal proceedings if applicable, details the procedure on answering interrogatories and admissions under the Nevada Rules of Civil Procedure. FJDCR 16.

[174] NEV. REV. STAT. §§ 174.235–.245.

[175] *Id.* § 174.235. Upon a defendant's request, the prosecutor must permit the defendant to inspect, copy, and photograph written or recorded statements, or confessions, or any written or recorded statement made by witnesses the prosecutor plans to call during the case in chief, results or reports of physical or mental exams, scientific tests or experiments, and books, papers, documents, or objects the prosecutor intends to introduce. *Id.*

[176] *Id.* § 174.245. At the request of the prosecutor, the defendant must permit the prosecutor to inspect, copy or photograph any written or recorded statements made by witnesses the defendant plans to call during the case in chief, results or reports of physical or mental exams, and scientific tests or scientific experiments that will be introduced by the defendant during the case in chief. *Id.*

[177] *Id.* § 174.295.

covery matters, such as when a defendant intends to establish an alibi,[178] or if a party intends to use an expert witness.[179] Additionally, both the prosecutor and defendant must disclose all witnesses each side plans to call during the case-in-chief.[180]

The Second and Eighth criminal discovery rules' process and philosophy differ significantly. The Second District's discovery rule does not address the requirement that the parties must request discovery, and the rule appears to promote some form of automatic discovery in stating, "The parties, through their counsel, without order of the court, shall timely provide discovery of all information and materials permitted by any applicable provision of the Nevada Revised Statutes."[181] This rule is intended to promote timely disclosure and "eliminates the need for a discovery order unless the court orders discovery beyond that required by the statutes of Nevada."[182] Alternatively, the Eighth District's rules only discusses discovery on how a defendant may make an oral motion for a court order requiring the state to produce their statutory required disclosures.[183] These two districts' rules impose different duties upon both the state and defendant. The Second District appears to promote cooperation and discourages the need for a court order requesting statutorily required discovery, while the Eighth District appears to promote the use of court orders to make the state disclose the requirements listed in statute.

IV. COMPETENCE OF A DEFENDANT TO STAND TRIAL

The United States Supreme Court has established that trying an incompetent criminal defendant violates his or her fundamental right to due process.[184] A defendant is incompetent when he is "unable to understand the proceedings against him or properly to assist in his own defense."[185] Issues regarding whether a defendant is competent to stand trial may be raised at any time.[186] While every state has a statute, code provision, or rule regarding this right, not

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[178] If a defendant who intends to offer evidence of an alibi must give written notice of the details and witnesses who can establish the alibi. *Id*. § 174.233. The prosecutor must reciprocally disclose witnesses to discredit the defendant's alibi within ten days of the defendant's notice. *Id*.

[179] *Id*. § 174.234(2). If the defendant will be tried for a gross misdemeanor or felony, a party who intends to use an expert witness must provide written notice to what the expert witness will testify, a copy of the expert's curriculum vitae, and a copy of all reports made by or at the direction of the expert. *Id*.

[180] *Id*. § 174.234.

[181] LCR 6.

[182] *Id*. 6(a), Comment.

[183] EDCR 3.24.

[184] Cooper v. Oklahoma, 517 U.S. 348, 354 (1996).

[185] Greenwood v. United States, 350 U.S. 366, 369 (1956); *see also, e.g*., ARIZ. R. CRIM. P. 11.1.

[186] *E.g*., TEX. CODE CRIM. PROC. § 46B.005(c)(3)(D).

all states have codified procedures in their statewide rules of criminal procedure. Thirty-two states have some procedural rules addressing competency.[187]

In general, most states' statutes detail the procedures for determining competency.[188] While most states' statutes control competency procedures,[189] it is common for procedural rules to dictate how to compute time to protect a defendant's speedy trial rights if competency is at issue[190] and raising the insanity defense.[191] Although, several states employ their statewide criminal procedure rules to detail competency determinations. For example, California has thorough competency procedures in its criminal procedure rules.[192] Even more detailed is Arizona's statewide rules on competency, which has specific rules discussing experts, hearing procedures, records, and disclosure of mental health evidence.[193]

A. Competency Determinations in Nevada

In Nevada, a defendant is deemed competent to stand trial if he has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."[194] Consistent statewide determination procedures are

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[187] The states that have procedure rules addressing a defendant's competency to stand trial include: Alabama, Arizona, California, Florida, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, Wisconsin, and Wyoming. While the preceding states have rules of criminal procedure that specifically address competency, the remaining states may have codified competency issues in their state statutes. For this paper, only the Rules of Criminal Procedure for each state were evaluated.

[188] For instance, New Mexico's criminal procedure competency statutes are broken down into the following subsections: raising the issue, evaluation and determination, commitment, reports, ninety-day review, continuing treatment, evidentiary hearing, hearing to determine mental retardation, mental examination, criminal trials, plea and verdict of guilty but mentally ill, and sentence upon plea or verdict of guilty but mentally ill. The Texas Code of Criminal Procedure have broken competency down into the following subsections: General Provisions, Examination, Incompetency Trial, Procedures After Determination of Incompetency, Civil Commitment: Charges Pending, Civil Commitment: Charges Dismissed. The Arizona Rule of Criminal Procedure Rule 11 has broken competency down into the following subsections: definition and effect of incompetency, motion to have Defendant's mental condition examines, appointment of experts, disclosure of mental health evidence, hearing and orders, subsequent hearings, privilege, records. N.M. STAT. 31 § 9.

[189] *See, e.g.*, N.M. STAT. § 31-9; UTAH CODE § 77-16a.

[190] *See, e.g.*, ALASKA R. CRIM. P. 45 (allowing delays due to a defendant's incompetence to not count when computing time for trial); CONN. SUPER. CT. CRIM. MATTERS § 43-40(1)(A); HRPP 48(c)(1); MASS. R. CRIM. P. 36.

[191] *See, e.g.*, N.D. R. CRIM. P. 22 ("Notice of Defense Based on Mental Condition; Mental Examination"); TENN. R. CRIM. P. 12.2 ("Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition").

[192] CAL. R. CT. 4.130.

[193] ARIZ. R. CRIM. P. 11.

[194] Calvin v. State, 147 P.3d 1097, 1100 (Nev. 2006) (citations omitted).

essential due to the risk that a defendant's fundamental due process right may be violated if a competency determination is not accurate or appropriate.

This issue is completely governed by statute and none of Nevada's local districts' rules discuss competency proceedings.[195] A judge can suspend proceedings at any time after a defendant is arrested if there is doubt about the defendant's competence[196] and the court must appoint a certified mental health professional to help determine whether a defendant is competent to stand trial.[197] If the defendant is found competent, the trial or judgment proceeds.[198] Otherwise, the defendant receives treatment to become competent.[199] If there is a substantial probability that the defendant will not attain competence in the foreseeable future, the proceedings must be dismissed.[200]

B. Raising the Issue of Competency

At common law, the issue of competency may be raised at any time during a criminal proceeding, either by observation of the court or by suggestion from a party.[201] Most procedural rules reiterate this right and detail the procedures to be followed once an issue of competency has been raised. Generally, either a party or judge may raise the issue of competency,[202] usually by way of a motion in which "the facts upon which the mental examination is sought."[203] For example, in Arizona, once a motion is filed, the court must be provided with all of the defendant's medical and criminal history within three days.[204] A preliminary hearing is then scheduled to help the judge decide whether reasonable grounds exist to evaluate the defendant's competency.[205] Similarly under Texas's criminal procedure code, a judge may hold an informal inquiry to decide if the defendant's competence is at issue.[206] If issues regarding a defendant's competence are raised, judges may petition the state to dismiss the charge before any formal competency decision is made.[207] Though either the judge or the parties may raise the issue, the ultimate determination is left to the judge.[208]

Generally, all states' rules on continuances allow for a delay in proceedings for competency determination proceedings. Once the court decides that a de-

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[195] NEV. REV. STAT. §§ 178.3981–.4715.
[196] *Id.* § 178.405(1).
[197] *Id.* §§ 178.415–.417. The appointed mental health professional must be certified by the Division of Public and Behavioral Health of the Department of Health and Human Services. *Id.*
[198] *Id.* § 178.420.
[199] *Id.* § 178.498.
[200] *Id.* § 178.425(5).
[201] Godinez v. Moran, 509 U.S. 389, 406 (1993).
[202] *See, e.g.*, ARIZ. R. CRIM. P. 11.2(a); CAL. R. CT. 4.130.
[203] ARIZ. R. CRIM. P. 11.2(a).
[204] *Id.* 11.2(B).
[205] *Id.* 11.2(C).
[206] TEX. CODE CRIM. PROC. § 46B.004(c).
[207] *Id.* § 46B.004(e).
[208] CAL. R. CT. § 4.130(b)(1).

fendant's competence is at issue, proceedings are suspended until competence is determined.[209] In some states, such as California, this may impact speedy trial requirements. To preemptively combat issues with a defendant's speedy trial rights, the state's rules set forth guidelines and timelines for how to deal with this issue.[210]

C. Determining Competence

Once the issue of competency is raised, the court must determine whether the defendant is or is not competent to stand trial. States' procedural rules often require the appointment of at least one expert to compile a report and make a recommendation.[211] Arizona, has even set a ten-day deadline from the time the expert's exam of the defendant to the time when the completed report must be available to the court and the parties.[212]

Rules appear to vary on how many experts a court may appoint, and whether the parties may recommend or appoint their own experts. For example, in California, once competency proceedings have begun, the judge must ask the defendant whether he is seeking a finding of mental incompetence.[213] If the defendant is seeking a determination then the court must appoint at least one expert;[214] but the court must appoint at least two experts if defense counsel does not seek a determination of competence.[215] Regardless of the number of experts

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[209] *Id*. § 4.130(C)(1).

[210] *Id*. § 4.130(C)(1)(B)(3).

> (1) If mental competency proceedings are initiated, criminal proceedings are suspended and may not be reinstated until a trial on the competency of the defendant has been concluded and the defendant either:
>
> (A) Is found mentally competent; or
>
> (B) Has his or her competency restored under Penal Code section 1372.
>
> (2) In misdemeanor cases, speedy trial requirements are tolled during the suspension of criminal proceedings for mental competency evaluation and trial. If criminal proceedings are later reinstated and time is not waived, the trial must be commenced within 30 days after the reinstatement of the criminal proceedings, as provided by Penal Code section 1382(a)(3).
>
> (3) In felony cases, speedy trial requirements are tolled during the suspension of criminal proceedings for mental competency evaluation and trial. If criminal proceedings are reinstated, unless time is waived, time periods to commence the preliminary examination or trial are as follows:
>
> (A) If criminal proceedings were suspended before the preliminary hearing had been conducted, the preliminary hearing must be commenced within 10 days of the reinstatement of the criminal proceedings, as provided in Penal Code section 859b.
>
> (B) If criminal proceedings were suspended after the preliminary hearing had been conducted, the trial must be commenced within 60 days of the reinstatement of the criminal proceedings, as provided in Penal Code section 1382(a)(2).

Id.§ 4.130(C).

[211] *See, e.g*., ARIZ. R. CRIM. P 11.3; CAL. R. CT. 4.130(d)(1); TEX. CODE CRIM. PROC. § 46B.021.

[212] ARIZ. R. CRIM. P. 11.4(A).

[213] CAL. R. CT. 4.130(D)(1).

[214] *Id*. § 4.130(D)(1)(A).

[215] *Id*. § 4.130(D)(1)(B).

the court ultimately appoints, the experts must come from a court approved list.[216] In contrast, in Arizona, the defense and the prosecution may provide a list of three experts to the court, which the court may then choose from.[217] Texas' competency statute states that the court must appoint "disinterested" experts.[218] This language does not specify whether the parties may suggest experts. Some states' procedural rules also include details on what qualifications are required of the experts.[219] Ultimately, the court has the discretion as to choose the appointed expert(s). Additionally, some states' rules, like Texas', provide factors that experts should consider when examining the defendants.[220]

D. Holding a Competence Proceeding

Once an expert completes and provides the report of the defendant's exam to the judge and the parties, generally, states then hold either a competency hearing or trial. Some states, like Arizona and Texas, require a hearing within thirty days of the expert's submission of the report.[221] At the hearing, parties may introduce additional evidence regarding the defendant's mental condition. California's procedural rules state that the defendant is presumed competent at the time of the trial, placing the burden on the moving party to prove that the defendant is not competent by a preponderance of the evidence.[222] At the trial or hearing, the experts may be called to testify and examined by both the defense and prosecution.[223] New Mexico is unlike its surrounding states in this issue because its statutory procedural rules only require a hearing when the case has not been dismissed *and* when the defendant is charged with certain specified felonies.[224] If these factors[225] are not present then the case shall be dis-

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[216] *Id*.

[217] ARIZ. R. CRIM. P. 11.3(C).

[218] TEX. CODE CRIM. PROC. § 46b.021(A).

[219] *See, e.g.*, ARIZ. R. CRIM. P. 11.3(A)–(B). For instance, Arizona requires at least one of the minimum of two experts appointed be a psychiatrist and the other must be a mental health professional, which the statute then defines. *Id*.

[220] TEX. CODE CRIM. PROC. § 46B.024. Experts may consider factors such as the ability of the defendant to: (1) understand the charges against him and their accompanying penalties, (2) work with and provide counsel necessary and important facts, (3) assist in their defense in making strategic decisions, (4) understand the nature of the criminal proceedings, (4) testify, and (5) behave in a courtroom. *Id*. § 46B.024(2). Experts may additionally consider any diagnosable mental illness or mental retardation and whether those conditions would affect their ability to work with defense counsel, whether the defendant is taking any medication for the mental illness and that medications effect on their competence. *Id*. § 46B.024(1).

[221] ARIZ. R. CRIM. P. 11.5(A); TEX. CODE CRIM. PROC. § 46b.026(B).

[222] CAL. R. CT. 4.130(E)(2).

[223] *Id*. § 4.130(E)(3).

[224] N.M. STAT. § 31-9-1.5(A). These felonies include: (1) the infliction of great bodily harm on another person, (2) the use of a firearm, (3) aggravated arson, (4) criminal sexual penetration, (5) or criminal sexual contact of a minor. *Id*.

[225] Also, hearsay evidence is admissible on secondary matters. *Id*. The secondary matters provided are "testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, district court and business records and public documents." *Id*.

missed with prejudice and then the prosecutor may initiate proceedings non-criminal proceedings.[226]

Instead of a hearing, both California and Texas also allow a jury to determine whether the defendant is competent to stand trial, though neither state *requires* a jury to make the determination.[227] However, if a jury is used, the jury verdict relating to the defendant's competence must be unanimous.[228]

V. JURY INSTRUCTIONS

Nevada is one of only three states that do not have pattern criminal jury instructions.[229] Jury instructions are often referred to as pattern, standard, or model instructions[230] and are designed to provide attorneys with a comprehensive list of criminal law and procedure jury instructions. Most states encourage, but do not require parties to utilize these jury instructions.[231] States differ in how pattern jury instructions are created, who creates them, where and how the instructions are located, and whether the highest court in the state adopts them. Of the remaining forty-seven states, the authors of the state's jury instructions are divided into three categories. First, twenty-eight states have jury instructions drafted by a court created committee.[232] Though a large majority of state jury instructions are drafted by court-made committees, very few state courts have "approved" or directly supported the pattern instructions. Second, fifteen states' jury instructions were drafted by the state bar.[233] Third, four states' jury instructions were drafted by miscellaneous organizations.[234]

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[226] Specifically, the state may initiate proceedings under the Mental Health and Developmental Disabilities Code as well as confine the defendant for no more than seven days while proceedings are initiated. *Id*. § 31-9-1.5(B).

[227] CAL. R. CT. 4.130(E)(4); TEX. CODE CRIM. PROC. § 46b.051.

[228] CAL. R. CT. 4.130(E)(4)(B); TEX. CODE CRIM. PROC. § 46b.051.

[229] There are only three states that do not have pattern criminal jury instructions: Nevada, Rhode Island, and West Virginia. *See* 50 State Rule Chart, Appendix.

[230] For continuity, the term "pattern" will be used throughout. See Chart 50 State Rule Chart, Appendix, for details.

[231] Additionally, the instructions usually include warnings of accuracy and explanations that the burden still lies on the user of the instructions to verify and modify, if necessary, the instructions before use.

[232] The twenty-eight states include: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Tennessee, Utah, Virginia, and Washington.

[233] The fifteen states include: Arizona, Iowa, Maryland, Michigan, Missouri, New Hampshire, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Wisconsin, and Wyoming.

[234] These four states include Alabama, Louisiana, Massachusetts, and Montana. Alabama's criminal jury instructions were drafted by the Alabama Law Institute. *Alabama Pattern Jury Instructions – Criminal Proceedings*, SUP. CT. & ST. LAW LIBR., http://judicial.alabama.gov/library/jury_instructions_cr.cfm [https://perma.cc/K4RU-U258] (last visited Mar. 16, 2017). Louisiana's criminal jury instructions were drafted by two Louisiana State University professors, with the Louisiana Practice Series. THOMSON REUTERS, CRIMINAL JURY INSTRUCTIONS AND PROCEDURES, 3D (VOL. 17, LA. CIVIL LAW TREATISE SERIES), http://legal

Most states offer these pattern instructions on the court's website or through LexisNexis or Westlaw. Some states even offer PDF and word-fillable versions.[235] Other states' pattern instructions are published in a book, requiring attorneys to regularly purchase the latest edition. Further, the drafter or drafting organization of state pattern instructions differ from state to state. There are essentially three categories of authors: state bars, supreme court committees, and miscellaneous drafters, which includes individual authors, non-descriptive "state court" authors, and even law schools.[236]

The forty-seven states with criminal jury instructions also differ in how accessible the instructions are to both attorneys and the public. Twenty states do not offer free public access to the pattern jury instructions,[237] requiring users to either purchase a physical book, purchase Westlaw or LexisNexis, or be a member of state bar associations to obtain access to the information. Ten of the fifteen state bar drafted pattern criminal jury instructions,[238] nine court committee drafted instructions,[239] and one miscellaneous drafter's instructions require payment.[240]

A. Nevada and Jury Instructions

Nevada does not have statewide criminal jury instructions, either created by the court, state bar, or other organization. However, the State Bar of Nevada publishes *Nevada Jury Instructions – Civil*.[241] The publication is authored col-

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solutions.thomsonreuters.com/law-products/Treatises/Criminal-Jury-Instructions-and-Procedures-3d-Vol-17-Louisiana-Civil-Law-Treatise-Series/p/100085121 [https://perma.cc/B6MM-UDCT] (last visited Mar. 16, 2017). Massachusetts's criminal jury instructions were drafted by the Massachusetts Continuing Legal Education, Inc. MD. STATE BAR ASS'N, INC., CRIMINAL PATTERN JURY INSTRUCTIONS, MD., 2D ED., https://msba.inreachce.com/Details/Information/33a2f588-7b22-4aea-a641-d588172962c9 [https://perma.cc/FZ3K-4QXP] (last visited Mar. 16, 2017). Lastly, Montana's criminal jury instructions were drafted by the Montana Criminal Jury Instruction Committee, with the state attorney general's office and legal services division. *Criminal Jury Instructions*, ATT'Y GEN.'S OFFICE & LEGAL SERVICES DIVISION, https://dojmt.gov/agooffice/criminal-jury-instructions/ [https://perma.cc/B6AL-YWR2] (last visited Mar. 16, 2017).

[235] *See Criminal Pattern Jury Instructions*, ALASKA CT. SYS., http://www.courts.alaska.gov/rules/crimins.htm [https://perma.cc/ZWT4-GSMK] (last visited April 14, 2017).

[236] *See* 50 State Rule Chart, Appendix.

[237] The twenty state jury instructions that cost money or state bar access include: Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, Nebraska, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Wisconsin, and Wyoming.

[238] The ten states include: Iowa, Maryland, Missouri, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Wisconsin, and Wyoming.

[239] The nine states include: Georgia, Indiana, Kansas, Kentucky, Maine, Minnesota, Nebraska, Ohio, and Virginia.

[240] Louisiana's criminal jury instructions, drafted by Louisiana State University professors, is available for purchase.

[241] STATE BAR OF NEV., NEVADA JURY INSTRUCTIONS—CIVIL, http://sbn.peachnewmedia.com/store/seminar/seminar.php?seminar=47730 [https://perma.cc/78HB-VLYH] (last visited Mar. 21, 2017).

laboratively by lawyers, judges, law students, and lay people.[242] While not officially approved by the Supreme Court of Nevada, lawyers in Nevada rely on it as a starting point.[243]

Jury instructions should be clear and unambiguous.[244] Nevada's district courts have broad discretion to settle jury instructions, and the Nevada Supreme Court reviews a district court's decision regarding a jury instruction for an abuse of that discretion or judicial error.[245] Instructions that correctly state the law and summarize the statutory definition of the specific crime will most likely be a sufficient instruction.[246] Additionally, the district court must not instruct a jury on theories that misstate the applicable law, and may refuse an instruction of the defendant's trial theory if it is substantially covered in other instructions.[247] When reviewing criminal jury instructions, the Nevada Supreme Court often turns to other states' instructions for guidance.[248] Because of the common use of inconsistent or misstated instructions, entities have previously petitioned the Nevada Supreme Court for "an order [] prohibiting the respondent district judge from giving certain jury instructions in future criminal trials."[249] However, the Nevada Supreme Court has determined that a petition is not the appropriate avenue for such a request and directed that the Nevada Rules on the Administrative Docket provided appropriate procedures.[250] Pattern jury instructions, compiled by and with input from the community, would likely solve the problems of inconsistent and inaccurate instructions because every judge would have a single location of accurate and appropriate instructions, that can then be modified if necessary.

VI. CRIMINAL APPEALS

Though the United States Supreme Court has long held that the Constitution does not guarantee a right to an appeal in criminal cases,[251] once a state decides to allow criminal appeals, this right must be made available to all con-

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[242] *Id*.

[243] *See* Mark Denton, *Effectively Using Jury Instructions in a Civil Trial*, NEV. LAW., June 2014, at 25–28, http://www.nvbar.org/wp-content/uploads/NevLawyer_June_2014_Effectively_Using_JI.pdf [https://perma.cc/64M2-PP7D].

[244] Vallery v. State, 46 P.3d 66, 77 (Nev. 2002).

[245] Crawford v. State, 121 P.3d 582, 585 (Nev. 2005).

[246] *Id*.

[247] *Vallery*, 46 P.3d at 77.

[248] *See, e.g.*, Green v. State, 80 P.3d 93, 96 (Nev. 2003) (embracing Arizona, Hawaii, and Oregon approach on the use of an "unable to agree" instruction and citing to California's jury instruction for guidance on lesser included offenses instructions).

[249] State v. Second Judicial Dist. Court, 862 P.2d 422, 422 (Nev. 1993).

[250] *Id*. at 423.

[251] *See, e.g.*, McKane v. Durston, 153 U.S. 684, 687 (1894) (holding that the Fourteenth Amendment did not require states to provide a right of appeal in criminal cases); Jones v. Barnes, 463 U.S. 745 (1983); Abney v. United States, 431 U.S. 651, 656 (1977).

victed criminals,[252] and is subject to the constitutional guarantees of due process and equal protection.[253] States are not required to provide any system of appellate review at all.[254] Each state determines whether an appeal should be allowed and what conditions trigger an appeal.[255]

However, the United States Supreme Court, through common law, has established some procedural rights for defendants appealing criminal convictions that apply to all states. For example, an indigent appellant has the right to a transcript—furnished by the state—at no cost.[256] A criminal appellant also has the right to legal representation for their first appeal,[257] but there is no right to legal representation for supplementary appeals[258] or collateral attacks.[259] Additionally, a criminal appellant does not have the right to represent himself on appeal from conviction.[260] While the United States Supreme Court has not ruled on appellate rights waivers, every Circuit Court recognizes and enforces valid appellate rights waivers.[261]

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[252] *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 607 (1974); Coppedge v. United States, 369 U.S. 438, 441 (1962).

[253] *See, e.g.*, Evitts v. Lucey, 469 U.S. 387, 393 (1985).

[254] Griffin v. Illinois, 351 U.S. 12, 18 (1956).

[255] McKane v. Durston, 153 U.S. 684, 688 (1894).

[256] *See, e.g.*, *Griffin*, 351 U.S. at 18–19.

[257] *See, e.g.*, Pennsylvania v. Finley, 481 U.S. 551, 555 (1987); Douglas v. California, 372 U.S. 353, 356–57 (1963).

[258] *See, e.g.*, *Ross*, 417 U.S. at 610.

[259] *See, e.g.*, *Finley*, 481 U.S. at 556.

[260] *See, e.g.*, Martinez v. Court of Appeal, 528 U.S. 152, 159 (2000).

[261] *See, e.g.*, United States v. Chambers, 646 F. App'x 213 (3d Cir. 2016) (finding defendant knowingly waived right to appeal in plea agreement); United States v. Wheaten, 465 F. App'x 321 (5th Cir. 2012) (determining defendant would be held to plea agreement's waiver of right to appeal sentence, despite any defects in plea colloquy.); United States v. Guillen, 561 F.3d 527 (D.C. Cir. 2009) (holding defendant's waiver of her right to appeal her sentence was knowing, intelligent, and voluntary); United States v. Sura, 511 F.3d 654 (7th Cir. 2007) (finding the court's failure to advise the defendant that he was waiving appellate rights in a plea agreement was plain error); United States v. Vallas, 218 F. App'x 877 (11th Cir. 2007) (determining sentence-appeal waiver was valid and enforceable as to preclude sentence challenge on appeal); United States v. Blick, 408 F.3d 162 (4th Cir. 2005) (holding appeal waiver precluded defendant from appealing prison term on ground that sentence was miscalculated); United States v. Sharp, 442 F.3d 946 (6th Cir. 2006) (holding waiver of right to appeal was valid, even though judge failed to ask if defendant understood appellate-waiver provision); United States v. Aronja-Inda, 422 F.3d 734 (8th Cir. 2005) (finding defendant validly waived his appellate rights when he pleaded guilty to charges against him); United States v. Domingo, 156 F. App'x 999 (9th Cir. 2005) (holding defendant made a valid and enforceable waiver of his appellate rights); United States v. Hahn, 359 F.3d 1315 (10th Cir. 2004) (finding waiver of appellate rights contained in plea agreement was enforceable); United States v. Teeter, 257 F.3d 14 (1st Cir. 2001) (determining Presentence waivers of appellate rights are not forbidden); United States v. Fisher, 232 F.3d 301 (2d Cir. 2000) (finding judge's post-sentencing reference to appeal did not vitiate legitimate appellate waiver).

Every state has granted the right to appeal criminal convictions by statute, court rule, or state constitution.[262] Arkansas, Virginia, and West Virginia are the only states without a specific constitutional or statutory right to a criminal appeal, but their court rules allow a process to appeal.[263] Arkansas' appellate court criminal rules give defendants the right to appeal.[264] In Virginia, non-felony offenders in district court have a right to appeal their criminal conviction.[265] While there is no automatic right to appeal felonies in Virginia, every defendant has the right to file a petition for appeal.[266] The procedure to determine whether the court will hear an appeal in Virginia is essentially equivalent to the full-scale review available in other states.[267] The courts in West Virginia derive a right to appeal from its state constitution's due process clause.[268] However, the due process provision has been interpreted to just provide defendant's

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[262] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("All of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence."). *See generally* 4 AM. JUR. 2D, *Appellate Review* § 222. State supreme courts have postulated several different theories to explain their appellate powers. Some courts concede that if the legislature does not authorize an appeal, it is powerless to create that rule on its own. *See, e.g.*, State v. Arnold, 183 P.2d 845, 845 (N.M. 1947). State case law explains that appellate claims are constitutional in nature, but derived from a statutory right. *See, e.g.*, Gaines v. Manson, 481 A.2d 1084, 1089 (Conn. 1984). While other courts find that the right to appeal is rooted in both statutory and constitutional law. *See, e.g.*, Howell v. United States, 455 A.2d 1371, 1372 (D.C. 1983); Blackmon v. State, 450 N.E.2d 104, 107 (Ind. Ct. App. 1983) ("Any person convicted of a criminal offense in Indiana may, as a matter of statutory and constitutional right, appeal the judgment against him."). Other courts find that the right to appeal is authorized by statute and appellate court rules of procedure. *See, e.g.*, State v. Wilson, 693 S.E.2d 923, 924 (S.C. 2010). In reviewing each state's criminal appellate proves, most state courts derive their appellate power from statute, but additional details, such as the deadline to submit a notice of appeal, are often promulgated by statute or court rules. *See* 50 State Rule Chart, Appendix.

[263] *See* Thomas B. Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43, 72–74 (1982) (describing Virginia and West Virginia appellate procedures, which include review by a three-judge panel, where oral argument is heard from the appellant, but not the appellee, including briefs and a full record).

[264] ARK. RAP CRIM. 1. "Any person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas." *Id*.

[265] VA. CODE ANN. § 16.1-132.

[266] *See* VA. STATE BAR, THE REVISED HANDBOOK ON APPELLATE ADVOCACY IN THE SUPREME COURT OF VIRGINIA AND THE COURT OF APPEALS OF VIRGINIA (2011), http://www.vsb.org/docs/sections/litigation/AAhandbook.pdf [https://perma.cc/5XMU-JN4F]. "With a few exceptions, there is no automatic right to appeal in Virginia from the trial court of record to an appellate court. One must petition for a writ of appeal, and, if the court grants the writ, the court will hear the appeal on the merits. . . . In Virginia, every criminal defendant has the right to le a petition for appeal to the Court of Appeals of Virginia." *Id*. at 3, 30–31.

[267] *See* Marvell, *supra* note 263.

[268] *See* W. VA. CONST. art. III, § 10; *see, e.g.*, Rhodes v. Leverette, 239 S.E.2d 136, 139 (W. Va. 1977) ("An indigent criminal defendant in this State has a right to appeal his conviction.").

with the right to apply for appeal.[269] States also vary in how their rules or procedures for appeals are organized. Some states have entire separate websites dedicated to criminal appeals, while other states incorporate their appellate procedures in their designated criminal procedure rules or statutes.

A. Appellate Court Structures

Effective appellate courts detect errors and correct or uphold trial court decisions, while providing timely,[270] consistent, and fair resolutions to criminal appeals.[271] "The ability to administer both quality and efficiency is affected by resources, rules, procedures, legal culture, and court structure."[272] States have created various appellate court structures to implement this state-given right to defendants.[273] Appellate courts operate within either 1-tier or 2-tier structures and hear appeals either by right or by permission. States with one-tier systems have one appellate court—the court of last resort ("COLR")—whereas states with 2-tier systems have at least one intermediate appellate court ("IAC") and a COLR.[274]

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[269] State v. Legg, 151 S.E.2d 215, 218 (W. Va. 1967) ("One convicted of a criminal offense is not entitled to a writ of error as a matter of right. The Constitution and statutes create an absolute right merely to apply for a writ of error.").

[270] Time standards for criminal appeals are "used as an administrative goal to assist in achieving case flow management that is efficient, productive, and produces quality results." NAT'L CTR. FOR STATE COURTS, MODEL TIME STANDARDS FOR STATE APPELLATE COURTS 3 (2014), http://cosca.ncsc.org/~/media/Microsites/Files/COSCA/Web%20documents/Model-Time-Standards-August-2014.ashx [https://perma.cc/C9PN-9XSM] (citation omitted). In 2010, 40 percent of the states had state-specific criminal appellate time standards in place. Nicole L. Waters & Kathryn Genthon, *Achieving Timely Resolution for Criminal Appeals in State Courts*, 21 NAT'L CTR. FOR ST. CTS., May 2016, at 2, http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/275 [https://perma.cc/MYV4-FRPY]. "Time standards apply differentially depending on whether the COLR is part of a 1-tier or 2-tier review system and whether the court's review of a case is by permission (discretionary) or by right (mandatory)." *Id*. In appellate structures that rely on appeals by permission, COLRs rendered a decision to grant or deny further review within 98 days in 1-tier systems and 140 days in 2-tier systems. *Id*. at 3. In appellate systems that rely on appeals by right, COLRs rendered a decision to grant or deny further review within 482 days in 1-tier systems and 558 days in 2-tier systems. *Id*. Clearly, COLRs in discretionary systems grant or deny review much faster than COLRs in mandatory systems.

[271] Waters & Genthon, *supra* note 270, at 1.

[272] *Id*.

[273] Ten states and the District of Columbia do not have intermediate appellate courts: Delaware, District of Columbia, Maine, Montana, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming.

[274] There are essentially seven different categories of appellate court structures utilized today. NICOLE L. WATERS ET AL., BUREAU OF JUSTICE STATISTICS, CRIMINAL APPEALS IN STATE COURTS, NCJ 248874, at 3 (2015), https://www.bjs.gov/content/pub/pdf/casc.pdf [https://perma.cc/R4HB-TJ2L]. (1) The mandatory COLR structure consists of only one appellate court, a COLR, that hears appeals by right. Eight states have this mandatory COLR structure: Delaware, Montana, Wyoming, North Dakota, South Dakota, Rhode Island, Vermont, Maine. *Id*. Prior to the creation of Nevada's appellate court, Nevada had a mandatory COLR structure. (2) The discretionary COLR structure consists of only one appellate court, a COLR, that hears appeals by permission. Two states have this discretionary COLR structure: New

Appellate courts are highly influenced by whether an appeal is one "as of right" or "by permission." An appeal "as of right" is guaranteed by statute or some underlying constitutional or legal principle. An appellate court cannot refuse to listen to this type of appeal. Whereas, an appeal "by permission" allows the appellate court to choose to grant or deny the appeal for further review. Depending on the type of appeals heard, states differ widely on other appellate court features, including: mandatory or discretionary jurisdiction, court size, panel usage, geographical divisions, and division between criminal and civil jurisdiction by court.

B. Notice Deadlines for Criminal Appeals

It behooves a defendant to be aware of the notice requirement, but varying rules prove determining them difficult.[275] Some states have different notice requirements depending on where the appeal is to be heard and whether the conviction is a misdemeanor, felony, or capital. States permit defendants anywhere from five to ninety days to file their notice of appeal.[276] More than half of the states have chosen to give appellants thirty days to appeal.[277] Pennsylvania requires defendants to file a post-sentence motion within ten days, then allows thirty days for defendants to file their notice of appeal.[278] Rhode Island only allows a defendant five days to file a notice of appeal.[279] Missouri, Oklahoma,

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Hampshire and West Virginia. (3) In the deflective structure, appeals are filed, usually fully briefed, and submitted with the COLR, which then decides whether to retain the appeal or transfer to an IAC. Four states have this deflective structure: Idaho, Iowa, Mississippi, and Nevada. (4) In the discretionary COLR and mandatory IAC, the COLR hears appeals mostly by permission, and the IAC hears appeals mostly by right. Twenty-seven states have this discretionary COLR and mandatory IAC structure: Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Carolina, Ohio, Oregon, South Carolina, Utah, Washington, and Wisconsin. This is the most common appellate court structure. (5) In the COLR and discretionary IAC structure, both the COLR and IAC hear appeals mostly by permission. Two states have this COLR and discretionary IAC structure: Louisiana, Virginia. (6) The IAC by subject matter includes states with more than one IAC that is distinguished by subject matter. Five states have this IAC by subject matter structure: Alabama, Indiana, New York, Pennsylvania, and Tennessee. (7) The COLR by subject matter structure allows states to have more than one COLR that is distinguished by subject matter. Two states have this COLR by subject matter structure: Oklahoma and Texas.

[275] With this wide range in deadlines, there could be more expansive discussion regarding what the permissible time frame says about a jurisdiction's attitudes towards meaningful appellate review, however, this will not be explored here. See 50 State Rule Chart, Appendix, for a detailed list of the deadlines by state.

[276] *See* 50 State Rule Chart, Appendix.

[277] Thirty states allow defendants thirty days to file a notice of appeal: Arkansas, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. *Id.*

[278] PA. R. CRIM. P. 720.

[279] 12 R.I. GEN. LAWS § 12-22-1.

and South Carolina only allow defendants ten days to file their notice of appeal[280] and Kansas and North Carolina allow defendants fourteen days to file a notice of appeal.[281] Minnesota allows a defendant ninety days to file a notice of appeal.[282]

C. Criminal Appeals in Nevada

Under Nevada's Constitution, the Nevada Supreme Court and Court of Appeals have jurisdiction "on questions of law alone in all criminal cases in which the offense charged is within the original jurisdiction of the district courts."[283] On November 4, 2014, voters approved an amendment to the Nevada Constitution creating the Court of Appeals.[284] The Nevada Rules of Appellate Procedure detail the types of cases heard between the Nevada Supreme Court and Court of Appeals.[285] None of the local districts' rules have any criminal appellate procedures.[286] The Nevada Supreme Court has jurisdiction over all direct and post-conviction appeals involving death penalty appeals and most serious felony convictions.[287] The Court of Appeals can be assigned almost all other criminal appeals.[288] If a party believes that the matter should be retained by the Nevada Supreme Court, it can provide reasons in the routing statement of its appeals brief.[289]

Nevada statutes provide a right to appeal criminal convictions.[290] Generally, the defendant or the State must file a notice of appeal with the district court within thirty days after entry of the judgment or order being appealed.[291] The

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[280] *See* 50 State Rule Chart, Appendix.

[281] *See id*.

[282] MINN. R. CRIM. P. 28.02, subd. 4(3)(a).

[283] NEV. CONST. art. VI, § 4; *see also* NEV. REV. STAT. § 177.025 ("Appeal to court of appeals or Supreme Court taken on questions of law alone.").

[284] Sandra Cherub, *State Wasting No Time in Starting New Appellate Court*, L.V. REV.-J. (Nov. 16, 2014, 10:18 AM), http://www.reviewjournal.com/news/nevada/state-wasting-no-time-starting-new-appellate-court [https://perma.cc/EMN7-3M2X].

[285] Nevada Rules of Appellate Procedure are cited as NRAP. *See* NRAP 17.

[286] Nevada's First, Second, and Ninth Judicial Districts' local rules explain, generally, the procedures for appeals coming from the justice and municipal courts. FJDCR 33; WDFCR 19; NJDCR 22 ("Petitions for judicial review and appeals from courts of limited jurisdiction."). The remaining judicial districts local rules do not discuss rules related to the appeal process.

[287] NRAP 17(a)(2).

[288] *Id*. 17(b)(1). The criminal appeals the appellate court can hear include all post-conviction appeals except death penalty cases and cases that involve a conviction of a Category A felony, any direct appeal from a judgment of conviction based on a guilty plea, guilty but mentally ill or nolo contendere (*Alford*) plea, direct appeals from a judgment of conviction that challenges only the sentence imposed or the sufficiency of the evidence, and any direct appeal from a judgment of conviction based on a jury verdict that does not involve a conviction for Category A or B felonies. *Id*.

[289] NRAP 17(d).

[290] NEV. REV. STAT. § 177.015; *see also id*. § 34.575 ("Appeal from order of district court granting or denying writ.").

[291] NRAP 4(b)(1)(A)–(B).

Appellate Rules also allow the Nevada Supreme Court, by a majority of its members, to expedite criminal appeals by eliminating steps normally required in preparing the record and briefs, expediting the stenographic transcripts, prioritizing dates for oral arguments, utilizing court opinion or per curiam orders, and other measures reasonably calculated to expedite the appeal and promote justice.[292] Additionally, the Appellate Rules provide a fast-track procedure for all criminal appeals, except where the appeal challenges an order or a judgment involving a Category A felony, where the defendant was not represented by counsel, or where the defendant was sentenced to death or life imprisonment.[293] The fast-track rules were initially implemented to address the growing backlog in cases and have them briefed and resolved quickly.[294]

Either the state or defendant can appeal orders from the district court granting a motion for acquittal or a motion in arrest of judgment, or granting or refusing a trial,[295] and orders regarding whether a defendant is intellectually disabled.[296] However, only the defendant can appeal from a final judgment or verdict.[297] A defendant may not appeal a final judgment or verdict resulting from a voluntary plea of guilty, guilty but mentally ill, or nolo contendere unless "the appeal is based upon constitutional, jurisdictional or other grounds that challenge the legality of the proceedings."[298]

VII. CAPITAL PUNISHMENT

Nevada, one of thirty-two states[299] with the death penalty, has detailed rules governing the procedural aspects of death penalty cases.[300] Most states with the

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[292] *Id*. 4(f).

[293] *Id*. 3C(a).

[294] Paul Taggart, *Fast Track Criminal Appeals: The First Year in Review*, 5 NEV. LAW. 30, 31 (1997).

[295] NEV. REV. STAT. § 177.015(1)(b).

[296] *Id*. § 177.015(1)(c).

[297] *Id*. § 177.015(3).

[298] *Id*. § 177.015(4).

[299] Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming all allow the death penalty. *States and Capital Punishment*, NAT'L CONF. ST. LEGISLATURES (Feb. 2, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx [https://perma.cc/RH78-UERL]. For federal death penalty cases, the prosecutor must file a notice of intent to seek the death penalty. 18 U.S.C. § 3593(a) ("[T]he attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice—(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and (2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.").

[300] Many states exempt mentally incompetent defendants from execution. *See, e.g*., MISS. R. CRIM. P. 12.2(c). Further, the Supreme Court has held that states cannot constitutionally execute mentally incompetent persons. Ford v. Wainwright, 477 U.S. 399 (1986).

death penalty require the prosecutor to first file a notice of intent to seek the death penalty with a list of reasons or aggravating factors.[301] Once the court and defense counsel know the prosecution is seeking the death penalty, all states except Alabama require a jury to unanimously decide to give a defendant the death penalty.[302] The FRCP does not have procedural rules pertaining to the death penalty; the federal death penalty is governed entirely by statute and case law.[303]

While states' statutes detail which crimes are eligible for the death penalty as well as any aggravating or mitigating factors, this White Paper focuses exclusively on which states provide statewide criminal procedure rules applicable to the death penalty or capital cases. Of the thirty-two states with the death penalty, twenty have statewide rules of criminal procedure, four have criminal procedure rules by court, five have a code of criminal procedure, and three have no statewide rules or code. Within those states' procedural rules, the comments and notes section often include information on the applicability of the specific rule to death penalty cases.

In general, there are no uniform procedures or consistency in rules applicable to the death penalty. Some states have death penalty specific rules while others mention the death penalty throughout their rules and how seeking the death penalty may affect the procedure. However, most states, at the very least,[304] have included rules on aggravating or mitigating circumstances attorneys may argue and jurors may consider, the effect of a potential juror's moral beliefs about the death penalty, unanimity of jury verdicts, and whether death sentences are automatically reviewed by a higher court in that state.[305] Most states also address requirements for attorneys defending death penalty eligible

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[301] *See, e.g.*, COLO. R. CRIM. P. 32.1; ARIZ. R. CRIM. P. 15.1(g)(i).

[302] The Supreme Court held that a defendant has a Sixth Amendment right to let a jury, as opposed to a judge, decide whether to impose the death penalty. Ring v. Arizona, 536 U.S. 583, 589 (2002). As such, Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming all require a unanimous jury verdict.

[303] *See* 18 U.S.C. §§ 3591–3599.

[304] Despite some general similarities, there does not appear to be clear uniformity with how states outline their procedures for death penalty cases. Further, within the state sections with separate rules for dealing with death penalty cases, the states have chosen to focus on different areas. Some states, like California, deal with defense attorney qualifications, while Arizona, in contrast, deals with the procedures of sentencing hearings, while other states choose to focus on jury verdicts. These variations show what each state values as important or unique for death penalty cases.

[305] Most procedural rules mandate review of the sentence by the state's highest court. Though, the states' rules varied on which section this requirement was included in. *See, e.g.*, ARIZ. R. CRIM. P. 26.15. Idaho's statutes, for example, state that before the death penalty sentence is final, the Superior Court of Idaho must first review and approve the sentence. IDAHO CODE § 19-2827. The Mississippi procedural rules also include more detail about what the court looks for and reviews as well as what to include in the court's final decision. MISS. CODE § 99-19-105.

defendants.[306] Further, if a state does have death penalty specific rules, it will likely be in the sentencing section of their statewide procedural rules.[307]

A. Different Forms of Rules for Death Penalty Proceedings

In several states, the criminal procedural rules either had separate death penalty sections, like Indiana,[308] or mention the death penalty throughout the rules, like Arizona.[309] Louisiana has more extensive rules of criminal procedure for the death penalty than most states. Louisiana's statewide criminal procedure rules, for example, requires the accuser to move for the death penalty[310] and a jury to find proof of at least one aggravating circumstance beyond a reasonable doubt.[311] Additionally, the rules provide lists of both aggravating and mitigating circumstances attorneys may argue and jurors may consider, sets out the procedure for sentencing hearings in capital cases,[312] states that the jury who returned the guilty verdict will also decide the sentence,[313] requires a unanimous verdict,[314] and requires automatic review of a death sentence by the Louisiana Supreme Court.[315] Similarly, Mississippi's criminal procedure statutes follow this model.[316]

Montana's statewide criminal procedure code also follows this organization method and is similar to most other states whose death penalty rules of procedure are within the sentencing guidelines of the state's procedural rules.[317] Further, Montana's procedural code is detailed and organized, with death penalty procedural rules divided into clear categories.[318] Of all the states, Mon-

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[306] California, Arkansas, and Pennsylvania's procedural rules all include a list of qualifications for an attorney representing a defendant in a death penalty case. *See, e.g.*, CAL. R. CT. 4.117(d); ARK. R. CRIM. P. 37.5; PA. R. CRIM. P. 801. For instance, in California, lead counsel must have prior experience trying a serious felony and have taken at least two murder cases to a jury. CAL. R. CT. 4.117(d). Another unique rule comes out of Louisiana where the procedural rules only allow a defendant to plead guilty to a capital case if the courts stipulate to a sentence of life in prison without the possibility of parole or probation. LA. CODE. CRIM. P. ART. 557.

[307] *See, e.g.*, COLO. R. CRIM. P. 32.1; I.C.R. 33.1; KAN. REV. STAT. § 22-4001.

[308] *See, e.g.*, IND. CODE § 35-50-2-9.

[309] *See, e.g.*, ARIZ. R. CRIM. P. 19.1(c).

[310] LA. CODE CRIM. P. ART. 905.

[311] *Id.* 905.3.

[312] *Id.* 905.2.

[313] *Id.* 905.1.

[314] *Id.* 905.6.

[315] *Id.* 905.9.

[316] MISS. CODE ANN. § 99-19-105.

[317] MONT. §§ 46-18-301 to -18-310.

[318] *Id.* Montana's statutory code is broken up into the following sections: (1) hearing in imposition of death penalty, (2) evidence that may be received, (3) aggravating circumstances, (4) mitigating circumstances, (5) effect of aggravating and mitigating circumstances, (6) specific written findings of fact, (7) automatic review of sentence, (8) time for review—consolidation with appeal, (9) transmission of transcript and trial record, and (10) supreme court's determination as to sentence. *Id.* These subsections apply after a defendant has been

tana's code and Louisiana's criminal procedure rules seem most practical for attorneys seeking the death penalty because there are specific rules of criminal procedure to guide death penalty cases through the process. In contrast, other states include death penalty exceptions to the general rules instead of making death penalty procedure rules an independent section, such as found in Arizona, Kansas, Kentucky, and Ohio.[319]

B. Death Penalty Sentencing

Due to complexity, states' criminal procedure rules or codes have constructed separate sections for post-conviction procedures in death penalty cases. Texas follows this structure with separate trial and sentencing procedures, and penalty phase procedures[320] for death penalty cases.[321] Arizona, for example, details the procedures for both a hearing on whether the defendant is eligible for the death penalty and whether to impose the death penalty.[322]

Other common themes in death penalty rules is the procedure for how the state notifies the highest state court[323] and how defendant's counsel is appointed.[324] Most procedural rules require prosecutors to file a written statement of intent to seek the death penalty, procedures for setting the date of the sentencing hearing, as well as discovery procedures for gathering evidence to be presented at the sentencing hearing.[325] Generally, most states require specific procedures for sentencing hearings in death penalty cases.[326] Though, states vary in the depth of their rules;[327] some detail what constitutes an aggravating or mitigating factor,[328] what evidence is admissible,[329] and whether victim impact testimony is allowed.[330]

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convicted. *Id.* § 46-18-301 ("When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed . . . .).

[319] *See, e.g.*, ARIZ. R. CRIM. P. 19.1(c); KAN. STAT. ANN. § 22-4001.

[320] TEX. CODE CRIM. PROC. § 11.071.

[321] *Id.* § 37.071.

[322] ARIZ. R. CRIM. P. 19.1(c)–(d).

[323] Colorado's criminal procedure rules detail post-trial procedures such as notifying the Colorado Supreme Court, setting dates for hearings to deal with appeal and appointment of post-conviction counsel for the defendant. COLO. R. CRIM. P. 2.2.

[324] *See, e.g.*, COLO. R. CRIM. P. 2.2.

[325] COLO. R. CRIM. P. 32.1(b). Oklahoma and Oregon similarly follow this procedure. OKL. STAT. tit. 22, § 17 (titled "Death Sentence"); OR. REV. STAT. tit. 14, ch. 137.

[326] *See, e.g.*, COLO. R. CRIM. P. 32.1; FLA. R. CRIM. P. 3.780. Further, in Arizona, opening statements are made and evidence is offered by both sides, with the jury ultimately deciding whether sufficient aggravating factors exist to proceed with the death penalty. ARIZ. R. CRIM. P. 19.1(c)–(d).

[327] *See, e.g.*, PA. R. CRIM. P. 806. Florida's criminal procedure rules are scattered with additional rules devoted to capital cases, including post-conviction public records production, minimum attorney standards, and insanity hearings at time of execution. *See, e.g.*, FLA. R. CRIM. P. 3.112, 3.812, 3.852.

[328] Arizona's rules do not list what constitutes an aggravating factor, though other states such as, Louisiana do. LA. CODE CRIM. P. ART. § 905.4. In Florida, the state and defendant to present mitigating and aggravating evidence, cross-examine witnesses, and provide a closing statement. FLA. R. CRIM. P. 3.780.

C. The Jury in Death Penalty Cases

States' rules differ significantly in the procedures for determining how to handle a jurors' opinions about the death penalty. Most states address the issue of juror qualifications for death penalty cases in statute. For example, Florida, Idaho, Kansas, and Montana's statutes preclude those whose beliefs about the death penalty would keep them from finding a defendant guilty in a death penalty eligible case.[331] A minority of states address juror qualifications in their statewide procedural rules. Common law has also significantly helped develop the standards and qualifications needed to sit on a death penalty jury.[332] Arkansas allows the same trial jury to conduct the capital sentencing phase.[333] Arkansas requires the two alternative jurors from the trial to be placed in the jury box for the capital sentencing.[334] If there are more than two alternative jurors the remaining are to be dismissed.[335]

Some states also provide both the state and defense counsel additional peremptory challenges in capital cases. For instance, Mississippi allows each party twelve peremptory challenges instead of six in non-capital cases.[336] Montana, on the other hand, allows eight peremptory challenges,[337] and Ohio allows six instead of four peremptory challenges.[338]

D. Nevada's Death Penalty Procedural Rules

Both statute and court rules detail procedures for death penalty cases in Nevada. Specifically, only the Fourth Judicial District local rules[339] and the Nevada Supreme Court Rules provide any guidance for death penalty cases, with both providing the qualifications required of defense counsel.[340] Unsurprisingly, the Nevada Supreme Court "places the highest priority on diligence in the discharge of professional responsibility in capital cases" by providing at-

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[329] *See, e.g.*, MISS. CODE ANN. § 99-19-10 ("[E]vidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Mississippi.").

[330] *Id.*§ 99-43-33.

[331] *See, e.g.*, FLA. STAT. § 913.13; IDAHO CODE § 19-2827; KAN. REV. STAT. § 22-3410; MONT. CODE. ANN. § 46-16-115; State v. Gollehon, 864 P.2d 249 (Mont. 1993).

[332] *See, e.g.*, Uttecht v. Brown, 551 U.S. 1, 18 (2007); Lockhart v. McCree, 476 U.S. 162, 176 (1986).

[333] ARK. R. CRIM. P. 23.3.

[334] *Id.*

[335] *Id.*

[336] MISS. CODE ANN. § 99-17-3.

[337] *Id.* § 46-16-116.

[338] OHIO CRIM. R. 24(d).

[339] 4JDCR 10.

[340] S.C.R. 250(2); *see also* NEV. REV. STAT. § 178.3971 ("Appointment of defense team for defendant accused of murder of first degree.").

torneys with detailed procedures, checklists for necessary legal research, and legal citations to relevant cases.[341]

The Nevada Supreme Court's checklist provides relevant statutes and case law for each phase of a death penalty proceeding.[342] According to the rules and similar to other states' procedures, the prosecution must give notice no later than thirty days after filing an information or indictment that it is seeking the death penalty and must allege all the aggravating circumstances that the state plans to prove, including the specific facts that the state will rely on to prove it.[343] A defendant who pleads not guilty to a capital offense must be tried by a jury[344] and the verdict must be unanimous.[345] A jury determines whether aggravating or mitigating circumstances exist[346] and can only impose a death sentence if they find there are no mitigating circumstances that outweigh the aggravating circumstances.[347] There are specific statutory aggravating circumstances for first degree murder[348] along with mitigating circumstances.[349] Appeals are automatically reviewed by the Nevada Supreme Court.[350]

VIII. NEVADA'S NEXT STEPS

"No person, neither the alleged victim nor the accused, should be placed at a substantial disadvantage in a criminal trial by the rules of procedure and evidence."[351] Inconsistencies and deficiencies in procedural rules may result in a violation of a defendant's constitutional rights, and cause significant confusion and misapplication of procedures by judges, practitioners, and defendants that the very rules are designed to guide. Discrepancies between local rules and state statutes can result in unfair procedures, violations of a defendant's due process rights, and confusion amongst practitioners, courts, and their clerks.[352]

For example, in *Craine v. Eighth Judicial District Court*, the petitioner sent a notice of appeal to the district court after being found guilty of sexual assault.[353] Once received, the clerk of the court attempted to follow an Eighth Judicial District rule regarding papers not to be filed, but failed to follow the pro-

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[341] S.C.R. 250 (appended checklist).

[342] *Id*. Nevada law also provides proceedings for the penalty hearing phase of a trial for first degree murder. NEV. REV. STAT. §§ 175.552–.556.

[343] SCR 250(4)(c).

[344] NEV. REV. STAT. § 175.011(1).

[345] *Id*. § 175.481.

[346] *Id*. § 175.554(2). Nevada law also allows evidence to be presented during the penalty hearing concerning aggravating and mitigating circumstances related to the offense, defendant, or victim. *Id*. § 175.552(3).

[347] *Id*. § 200.030(4)(a); *see also id*. § 175.554(4).

[348] *Id*. § 200.033.

[349] *Id*. § 200.035.

[350] *Id*. § 177.055.

[351] Felix v. State, 849 P.2d 220, 255 (Nev. 1993), *superseded on other grounds by statute as stated in* Evans v. State, 28 P.3d 498, 509–10 (Nev. 2001).

[352] *See, e.g*., Craine v. Eighth Judicial Dist. Court, 816 P.2d 451, 452 (Nev. 1991).

[353] *Id*.

cedural rule by not sending a copy of the notice to the petitioner's counsel.[354] The Court determined that because fairness is important to a defendant's right to appeal, the local Eighth Judicial District's rule did not apply to notices of appeal.[355] The clerk should have followed the Court's directive in a case decided just months before regarding what actions a clerk should take in order to accurately document the date of the notice of appeal, which triggered the thirty-day appeal period.[356] In holding this, the Nevada Supreme Court stated "We cannot allow the operation of a local rule of procedure or the actions of a court clerk to impair the right of any person to prosecute an appeal to this court."[357]

Similarly, in a case involving the filing deadlines of a notice to appeal, the Nevada Supreme Court determined that the deadline requirement in the Nevada Rules of Appellate Procedure superseded the deadline requirement in a criminal procedure statute.[358] Because the judiciary has the inherent power to govern its procedures and the statutory right to promulgate appellate rules, a rule of procedure supersedes and controls over a conflicting pre-existing procedural statute.[359]

The Nevada Supreme Court has noted in various criminal cases the absence of procedural rules, requiring courts to look to other contexts and jurisdictions for guidance.[360] Also, Nevada's courts are often confronted with interpreting vague rules, arguably allowing courts to broadly interpret and apply procedures affecting a defendant's constitutional rights differently, with no clear procedural guidance for future cases.[361] While "the district court certainly

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[354] *Id*.

[355] *Id*.

[356] *Id*. (citing Huebner v. State, 810 P.2d 1209, 1210 (Nev. 1991)).

[357] *Id*.

[358] State v. Connery, 661 P.2d 1298, 1300 (Nev. 1983).

[359] *Id*.

> Although such rules may not conflict with the state constitution or 'abridge, enlarge or modify any substantive right,' NRS 2.120, the authority of the judiciary to promulgate procedural rules is independent of legislative power, and may not be diminished or compromised by the legislature. [] We have held that the legislature may not enact a procedural statute that conflicts with a pre-existing procedural rule, without violating the doctrine of separation of powers, and that such a statute is of no effect. [] Furthermore, where, as here, a rule of procedure is promulgated in conflict with a pre-existing procedural statute, the rule supersedes the statute and controls.

Id. (internal citations omitted).

[360] Howard v. State, 291 P.3d 137, 142 (Nev. 2012) ("Because we have no rule outlining the procedures for sealing court documents and records in criminal proceedings, we look to other sources for guidance."); State v. Wilson, 760 P.2d 129, 130 (Nev. 1988) ("No Nevada statute or rule of procedure is specifically directed to the district court's power in criminal cases, following the jury's verdict of guilty, to dismiss the charges, acquit the defendant, or enter a judgment notwithstanding the verdict when the court deems the evidence insufficient to sustain the verdict.").

[361] Mack v. State, 367 P.3d 795 (Nev. 2010). The Court determined that Nevada law does not require the intricate and detailed requirements of FRCP 11, but that it generally follows the same scheme and purpose of the rule in determining whether a guilty plea was entered knowingly, voluntarily, and intelligently, arguably leaving future parties unsure how the rule and its case law may be persuasive or applicable. *Id*.

does not have an obligation to give the defendant specific warnings or advisements about every rule or procedure which may be applicable," a defendant should not be disadvantaged by scattered, unclear, and potentially conflicting rules.[362]

In the absence of statewide criminal procedure rules, and due to the significantly difficult legislative process with Nevada's biennial legislature, court procedural rules are regularly created through case law. While this process may be sufficient in some circumstances, both the State and defendant are burdened to be well versed in ever-changing and developing case law. For example, the Nevada Supreme Court has held that a prosecutor acted willful and consciously indifferent when he was very unprepared for a hearing and also failed to follow procedures for continuances that have been established through case law.[363] "We believe these prior decisions establish simple, fair, nontechnical guidelines for seeking continuances, with which any lawyer acting in good faith can comply."[364]

Similarly, for decades, Nevada courts have considered various factors when determining a defendant's competency, including evidence of a defendant's irrational behavior, his demeanor at trial, any prior medical opinion, and even the defendant's counsel's opinion is considered given the close contact and relationship.[365] Centralizing these factors—and others the court and/or legislature may deem appropriate—in statewide procedural rules may ensure accurate and uniform competency determinations across the state.

Nevada's recent move towards a statewide pre-trial risk assessment tool may reflect a general push towards statewide criminal procedure rules. Nevada's implementation of this tool can be seen as a response to the disjointed and disorderly bail system Nevada has "defaulted" into.[366] Bail amounts differ across the state for similar offenses.[367] This new pilot program hopes to bring uniformity and consistency across jurisdictions so that defendants are rated individually, and consistently by risk factors that are statistically proven to predict whether they are at risk for failing to appear at their next hearing or a risk to public safety.[368] In 2015, the Nevada Judicial Council approved a resolution creating a committee to study the best practices of evidence-based pretrial release.[369] The committee developed the tool[370] and it is currently being tested in

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[362] Wiesner v. State, No. 64373, 2014 WL 4670115, at *1 (Nev. Sept. 18, 2014).

[363] McNair v. Sheriff, 514 P.2d 1175, 1178 (Nev. 1973).

[364] *Id*.

[365] *See, e.g*., Calvin v. State, 147 P.3d 1097, 1100 (2006).

[366] *See Overview of the Committee to Study Evidence-Based Pretrial Release: Hearing Before the Assemb. Comm. on Judiciary*, 2017 Leg., 79th Sess. (Nev. 2017).

[367] *See id*.

[368] *See id*.

[369] *Overview of the Committee to Study Evidence-Based Pretrial Release*, ADMIN. OFF. CTS., http://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Overview/ [https://perma.cc/AXN5-XMNG] (last visited Mar. 16, 2017); *see also* Memorandum from Chief Justice James W. Hardesty to the Judicial Council of the State of Nevada (June 12, 2015),

a twelve-month pilot program in Clark, Washoe, and White Pine counties.[371] The tool uses a questionnaire that looks at, among other things, the defendant's previous criminal history, the age at first arrest, prior failures to appear in court, and indications of substance abuse.[372] A defendant with a "risk score" between 0-4 is low risk, 5-10 points is moderate risk, and 11+ points is considered a high risk.[373] While the results of the pilot program are yet to be determined, it is a sign towards unifying bail and pre-trial release standards.

A. Two Approaches to Creating Statewide Criminal Procedure Rules

Nevada is in the minority of states that do not have statewide rules of criminal procedure. If Nevada were to adopt statewide, comprehensive rules of criminal procedure, it would likely require legislative approval. The Nevada Constitution vests the "judicial power . . . in a court system, comprising a Supreme Court, a court of appeals, district courts and justices of the peace."[374] Some states, such as Mississippi, have relied on similar vesting clauses[375] as authority to promulgate criminal rules, even to the point that the rules override conflicting statutes.[376] Arguably, the Nevada Supreme Court could make a similar claim in promulgating criminal rules; however, when Nevada adopted statewide Nevada Rules of Civil Procedure, it did so under legislative authority.[377] The legislature passed an enabling act in 1951 authorizing the Supreme Court to "regulate original and appellate civil practice and procedure."[378]

If Nevada decides to create statewide criminal procedure rules, it may be beneficial to review and consider a few states that have recently adopted statewide criminal procedure rules. For example, Mississippi is the most recent state to implement statewide criminal procedure rules, which will be effective July 2017. Mississippi began considering statewide criminal procedure rules in 2004 when the chief judge appointed an independent committee to study and

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http://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Documents/Miscellaneous/JCSN_Memorandum/ [https://perma.cc/39SL-Z37K].

[370] JAMES AUSTIN & ROBIN ALLEN, DEVELOPMENT OF THE NEVADA PRETRIAL RISK ASSESSMENT SYSTEM FINAL REPORT 8 (2016), http://nvcourts.gov/AOC/Committees_and_Commissions/Evidence/Documents/Committee_Materials/NPRA_Validation_Report_and_Final_NPRA_Tool/ [https://perma.cc/TKU4-XGV 2].

[371] *Id*.; Admin. Order 16-03, Las Vegas Justice Court, NPRAT Pilot Program (Dec. 7, 2016), https://www.clarkcountybar.org/wp-content/uploads/16-03-NPRAT-Pilot-Program-Signed.pdf; *Pretrial Services*, SECOND JUD. DIST. CT., https://www.washoecourts.com/index.cfm?page=pretrial_services&td=main [https://perma.cc/9T3Y-UUB3] (last visited Mar. 16, 2017).

[372] AUSTIN & ALLEN, *supra* note 370.

[373] *Id*.

[374] NEV. CONST. art. VI, § 1.

[375] MISS. CONST. art. VI, § 144.

[376] *See* MISS. R. CRIM. P. 1.1, Comment (citing State v. Delaney, 52 So. 3d 348, 351 (Miss. 2011) ("[W]hen a statute conflicts with this Court's rules regarding matters of judicial procedure, our rules control.").

[377] NEV. R. CIV. P., Preface.

[378] NEV. REV. STAT. § 2.120.

consider criminal procedure rules.[379] Mississippi's Supreme Court promulgated the rules "[i]n order to promote justice, uniformity, and efficiency in our courts, we find it necessary and reasonable now to combine all of the requirements governing criminal procedure in the courts of this State into a singular set of rules."[380] In an effort to inform the general public about the state's new rules, the rules committee released a memorandum generally explaining the new rules.[381]

This Section will illustrate two ways Nevada could implement comprehensive statewide rules of criminal procedure. First, the legislature could delegate authority to the Nevada Supreme Court to promulgate statewide rules of criminal procedure. Or, the Nevada Legislature could adopt a comprehensive "code" of criminal procedure combining the state's current statutes with rules stemming from case law and local rules.

1. Nevada Rules of Criminal Procedure by Nevada Supreme Court

"Court rules, when not inconsistent with the Constitution or certain laws of the state, have the effect of statutes."[382] The Nevada Supreme Court adopted the Nevada Rules of Civil Procedure with the express authority from the Nevada Legislature.[383] The legislature delegated the authority through statute allowing the Court to adopt rules to regulate original and appellate civil practice. The statute specifically allows the Court to regulate, "pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State."[384] The Nevada Supreme Court then established an advisory committee to draft the rules.[385] The draft of the rules was published and distributed for comment; the comments and modifications were discussed and made before the final recommendation was submitted to the Court. The Court then adopted the rules by Court order.[386]

Nevada could follow the same format in creating statewide criminal procedure rules. However, one issue that Nevada would encounter through this ap-

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[379] PURSUANT TO RULE 27(F) OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE, THE RULES COMMITTEE ON CRIMINAL PRACTICE AND PROCEDURE SEEKS COMMENTS FROM THE BENCH, THE BAR AND THE PUBLIC ON THE PROPOSED MISSISSIPPI RULES OF CRIMINAL PROCEDURE, https://courts.ms.gov/rules/rulesforcomment/2011/announcement9-8.pdf [https://perma.cc/EC5Z-4XYN] (last visited Mar. 17, 2017).

[380] En Banc Order, *In re* Adoption of Mississippi Rules of Criminal Procedure, No. 89-R-99038-SCT (Miss. Dec. 13, 2016), https://courts.ms.gov/Images/Opinions/209786.pdf [https://perma.cc/YCP8-V254].

[381] Memorandum re: Executive Summary of the Mississippi Rules of Criminal Procedure (Dec. 16, 2016), https://courts.ms.gov/rules/msrulesofcourt/2017-EXECUTIVE%20SUMMARY%20OF%20RULES%20&%20COMMENTS%20-%20FINAL%20VERSION%20121116.pdf [https://perma.cc/7G66-NHGZ].

[382] Margold v. Eighth Judicial Dist. Court, 858 P.2d 33, 35 (Nev. 1993).

[383] NEV. R. CIV. P., Preface.

[384] NEV. REV. STAT. § 2.120.

[385] NEV. R. CIV. P., Preface.

[386] *Id*.

proach are the already existing criminal procedure statutes in Title 14 of the NRS.[387] The Nevada Rules of Civil Procedure dealt with existing statutes by stating that "[e]xisting statutes were deemed rules of court, to remain in effect until superseded."[388] Thus, the Court could place the same statement in the rules of criminal procedure. The Nevada Supreme Court has also held that any procedural rules supersede conflicting statutes, because "the courts of this state have the power to make their own procedural rules."[389] While the courts do have the authority to create procedural rules, Nevada would likely choose to follow precedent and seek the grant of authority through the legislature.

If the legislature were to grant the Nevada Supreme Court the authority to promulgate the rules of criminal procedure it would likely model the authority for the rules of civil procedure. The legislation could simply add a subsection to the already existing statute that grants authority for civil procedure rules:

NRS 2.120 Adoption of rules for government of courts and State Bar of Nevada; Adoption of rules for civil practice and procedure~~[.]~~*; Adoption of rules for criminal practice and procedure.*

> 1. The Supreme Court may make rules not inconsistent with the Constitution and laws of the State for its own government, the government of the district courts, and the government of the State Bar of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court which in no event shall be less than 30 days after entry of an order adopting such rules.
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> 2. The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate civil practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the Constitution of the State of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Supreme Court which in no event shall be less than 60 days after entry of an order adopting such rules.
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> *3. The Supreme Court, by rules adopted and published from time to time, shall regulate original and appellate criminal practice and procedure, including, without limitation, pleadings, motions, writs, notices and forms of process, in judicial proceedings in all courts of the State, for the purpose of simplifying the same and of promoting the speedy determination of justice. Such rules shall not abridge, enlarge or modify any substantive right and shall not be inconsistent with the Constitution of the State of Nevada. Such rules shall be published promptly upon adoption and take effect on a date specified by the Su-*

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[387] NEV. REV. STAT. tit 14 (Procedure in Criminal Cases).

[388] NEV. R. CIV. P., Preface.

[389] *See, e.g.*, State v. Second Judicial Dist. Ct., 11 P.3d 1209, 1213 (Nev. 2000) (*citing* Whitlock v. Salmon, 752 P.2d 210, 211 (Nev. 1988); *see also* Goldberg v. District Court, 572 P.2d 521, 523 (Nev. 1977); Galloway v. Truesdell, 422 P.2d 237, 244 (Nev. 1967) ("There are regulating . . . powers of the Judicial Department that are within the province of the judicial function, i.e., . . . promulgating and prescribing any and all rules necessary or desirable to handle the business of the courts or their judicial functions.").

> *preme Court which in no event shall be less than 60 days after entry of an order adopting such rules*.[390]

Once the Nevada Supreme Court has the delegated authority from the Nevada Legislature, the Court could follow the same process that was used to adopt rules of civil procedure. This process would allow the Court to appoint an advisory committee and to receive comment from members of the public. The Court would then have the final review of the rules before adopting them by court order.

Several states with statewide rules still retain criminal procedure statutes. The statutes enacted by the legislature govern the procedures for certain topics, such as the death penalty, bail, and competency. If there are topics that the legislature determines to be of great concern to Nevada or better left to the representative body, then the legislature can maintain those procedures in statute.[391]

An advantage of adopting the rules through the Nevada Supreme Court is the ability for the Court to reform and revise the rules in a timely manner. The rule making and revision process of court rules is quicker than waiting for the biennial legislative session and going through the law-making process. Most states with statewide rules have rules committees that meet regularly to update and amend the court rules. Further, as illustrated above, the Nevada Supreme Court has adopted several procedural rules through case law. These concepts and procedural rules would be more accessible, controlling, and directive if located in one place, with the Court retaining control over revising and explaining the procedural rules.

2. Nevada Code of Criminal Procedure, by the Nevada Legislature

Nevada could choose to adopt a comprehensive code of criminal procedure, by statute, like Texas. In 1965, after six years of work, the Texas legislature enacted the Code of Criminal Procedure.[392] Texas' code was the first overhaul of their criminal procedure in over 100 years.[393]

The Texas State Bar established a Committee for Revision of the Code of Criminal Procedure and Penal Code. The stated goals for the committee were:

> [T]o eliminate unnecessary, unjust and outmoded technicalities in favor of the State, as well as of the defendants, to achieve an up-to-date code of trial and appellate procedure that would be comparable to the advance made by adoption of

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[390] Explanation of changes: matter in *blue italics* is new; matter between brackets ~~[omitted material]~~ is material to be omitted. This is consistent with bill drafts in the Nevada Legislature.

[391] This is beyond the scope of this White Paper. However, as an example, bail in California is left to the legislature.

[392] *Texas Code of Criminal Procedure Revision Research Guide*, LEGIS. REFERENCE LIBR. TEX., http://www.lrl.state.tx.us/collections/CriminalProcedureIntro.cfm [https://perma.cc/V2DA-NEDT] (last visited April 6, 2017). The Texas Legislative Reference Library provides countless documents on the revision process that led to adopting the Code of Criminal Procedure.

[393] *Id*.

> the Code of Civil Procedure; and to achieve justice by striking a balance between protection of society from criminals and the prevention of convictions of innocent persons.[394]

The enacted bill was 841 pages long.[395] Only five other states have adopted their code of criminal procedure through their legislature.[396] Unfortunately, these states lack an overview of the law-making process that they went through to enact the codes. Texas did attempt to establish rules of criminal procedure through the courts instead of through the legislature, but once unsuccessful, relied upon the legislature.[397] Texas' code of criminal procedure took four years and two legislative sessions to pass.[398] The resulting legislative history and information would be extremely helpful to Nevada if Nevada were to enact a code instead of rules.

Developing a criminal procedure code in Nevada may be ideal because the state's current statutes are relatively in-depth. Creating a code may likely fill in the gaps, taking rules from case law and local rules to supplement any missing provisions. However, as discussed above, in time, a code may result in a similar situation as Nevada currently faces where it is difficult to change current statutes to case law and local rules were needed for the rules to adapt to changing procedures. It may be possible for the legislature to enact a rules committee to combat this problem, but that likely will not yield an amending process as possible with court rules.

B. Various Considerations When Drafting Criminal Procedure Rules for Nevada

Ultimately, if Nevada decides to move forward with statewide criminal procedure rules this White Paper, and the accompanying chart, intends to provide insight to the various "types" of criminal procedural rules. There are three main distinctions to consider: applicability, depth, and specifics.

Drafters of Nevada's statewide rules or code would be able to determine the potential applicability of such rules. Nevada could follow states like Montana, South Dakota, and Texas by incorporating detailed statewide criminal procedure rules into its statutes and create a code of criminal procedure. Conversely, Nevada could develop separate and distinct statewide criminal procedure rules that could supersede all local district court rules and/or conflicting

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[394] *Timeline of the Revision Process*, LEGIS. REFERENCE LIBR. TEX., http://www.lrl.state.tx.us/collections/CriminalProcedureTimeline.cfm [https://perma.cc/9LT7-P8WS] (last visited Apr. 15, 2017). The draft that was presented to the legislature can be found here: http://www.lrl.state.tx.us/legis/billSearch/BillDetails.cfm?legSession=59-0&billTypeDetail=SB&billnumberDetail=107&submitbutton=Search+by+bill [https://perma.cc/6N3U-BAF5].

[395] S.B. 170, 59th Sess. (Tex. 1966), http://www.lrl.state.tx.us/LASDOCS/59R/SB107/SB107_59R.pdf#page=690 [https://perma.cc/Q9L8-3YWS].

[396] Kansas, Montana, Oklahoma, South Dakota, and Wisconsin. See 50 State Rule Chart, Appendix for code citations.

[397] *Timeline of the Revision Process*, *supra* note 394.

[398] *Texas Code of Criminal Procedure Revision Research Guide*, *supra* note 392.

statutes, similar to Alabama, Florida, and Mississippi. Since Nevada does not have as complex a court system as states like Delaware and Georgia,[399] it is likely unnecessary to develop statewide procedural rules for each level of court. Meaning, separate statewide criminal procedure rules for district courts and justice courts is likely ineffective to solve Nevada's current criminal procedure quandary.

If Nevada creates statewide criminal procedure rules, its drafters should consider whether additional rules related to criminal cases should be incorporated. For example, it must be determined how and if juvenile proceedings will follow the statewide criminal rules by way of including its application in the scope section or mentioning, in each specific rule, how it applies to juvenile proceedings. Alternatively, statewide juvenile criminal proceedings may be necessary.

Nevada would also need to define the potential depth of statewide rules or codes. Each state with statewide criminal procedure rules varies in the depth of its rules. For example, on one end of the spectrum, Nevada could follow Colorado, Hawaii, and Maine by promulgating or codifying extensive, detailed rules, that may go as far as detailing the preparation for clerk's minutes[400] or the exact margins of pleadings.[401] On the other hand, Nevada could follow in Oregon's path and develop uniform trial rules that are, comparatively, extremely limited for criminal procedure rules, allowing state statutes to control most procedural rules.[402] Further, Nevada may need to consider whether it should incorporate modern rules like electronic filing procedures in its criminal procedure rules.[403] For example, while Texas has a statewide criminal procedure code, it recently created statewide procedures for electronic filing in criminal cases.[404]

Lastly, developing statewide rules would allow Nevada the opportunity to determine what specific rules should be included and what should be left to the legislature or local districts. Statewide rules can be standardized, by modeling the FRCP, or can be tailored to address the specific concerns or repeat problems in Nevada. Based on the procedural needs of the state, statewide criminal procedure rules can detail those concerns. For example, several states with

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[399] Delaware has various levels of courts including: Justice of the Peace, Court of Common Pleas, Family Court (juvenile proceedings), Superior Court, and Supreme Court. *An Overview of Delaware Court System*, DEL. CTS., http://courts.delaware.gov/overview.aspx [https://perma.cc/9XNV-HTA4] (last visited Mar. 20, 2017).

[400] HRRP 50.1.

[401] HRRP 2.2.

[402] Chapter 4 of Oregon's Uniform Trial Court Rules, devoted to Proceedings in Criminal Cases, contains limited, yet detailed sections, including: Oral Argument on Motions in Criminal Cases and Motions to Suppress Evidence. OR. UTCA 4.050; 4.060.

[403] *See* Daniel B. Garrie & Daniel K. Gelb, *E-Discovery in Criminal Cases: A Need for Specific Rules*, 43 SUFFOLK U. L. REV. 393 (2010).

[404] *See Final Approval of Rules Governing Electronic Filing in Criminal Cases,* TEX. JUD. BRANCH, http://www.txcourts.gov/media/589351/Local-Rules-3rdAJR.pdf [https://perma.cc/J6QH-5Q3M] (last visited Mar. 28, 2017).

statewide rules have a specific and detailed rule section devoted to ensuring a speedy trial.[405] Alaska's speedy trial procedural rule states that a defendant shall be tried within 120 days, then details the time when trial begins.[406] Alaska's procedural rules even allow for an absolute discharge if a defendant is not brought to trial before the running of the time for trial.[407] Other states have similar detailed statewide speedy trail, or dismissal rule, rules, including: Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Indiana, Louisiana, Massachusetts, and Michigan. As another example, several states have detailed statewide rules on search and seizure procedures. While all states with statewide rules have some discussion of warrants, states like Hawaii, Maine, North Dakota, and Tennessee have thorough search and seizure procedural rules.[408]

CONCLUSION

The Arkansas Supreme Court said it best when they abolished all local rules and announced that "[a] member of the bar of this state, or a litigant representing himself or herself, should be able to go into any of our courts and know what to expect without having to read, in some instances, 50 pages of local rules trying to discern their effect."[409] While this White Paper does not call for such an abolishment, confusion is sowed by forcing litigants to check various sources (which sometimes conflict with each other).[410] Uniform, simple, and statewide criminal procedure rules can alleviate this confusion. Forty-seven states have adopted rules of criminal procedure, either by rule, by code, or by court. This leaves Nevada as one of three states lacking comprehensive rules. Rules of criminal procedure are enacted to "provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay."[411]

Nevada has several sources for rules of criminal procedure: Title 14 of the Nevada Revised Statutes, Nevada Supreme Court Rules, rules for each judicial district court, case law, and rules of practice for each court. Under this system,

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[405] *See generally* Valena E. Beety, *Judicial Dismissal in the Interest of Justice*, 80 MO. L. REV. 629, 660 (2015).

[406] *See, e.g.*, ALASKA R. CRIM. P. 45.; *see also* ARIZ. R. CRIM. P. 8.2 (detailing the specific running times based on whether a defendant is in custody or released, the case is complex, or a capital proceeding).

[407] ALASKA R. CRIM. P. 45(g). "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the court upon motion of the defendant shall dismiss the charge with prejudice. Such discharge bars prosecution for the offense charged and for any other lesser included offense within the offense charged." *Id*.

[408] HRPP 41; M.R.U. CRIM. P. 41; N.D. R. CRIM. P. 41; TENN. R. CRIM. P. 41.

[409] *In re* Changes to Arkansas Rules of Civil Procedure, 742 S.W.2d 551, 552 (Ark. 1987) (abolishing local rules since the Arkansas Supreme Court found them unnecessary in view of the since-adopted Arkansas Rules of Criminal Procedure).

[410] *Supra* Part II.A.

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

obtaining justice in our criminal justice system is truly a daunting task.[412] Because there are so many sources, a defendant in Reno may have different procedural rules that apply to him than a defendant in Las Vegas. As illustrated above, there are also inconsistent rules throughout the many sources of criminal procedure. If Nevada were to adopt statewide comprehensive rules or a code of criminal procedure, Nevada could ensure the consistent, streamlined application of justice in our criminal system. One where "[n]o person . . . should be placed at a substantial disadvantage in a criminal trial by the rules of procedure."[413]

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[412] *Minutes of the 2015–2016 Interim Advisory Comm. on the Admin. of Justice*, *supra* note 13.

[413] Felix v. State, 849 P.2d 220, 255 (Nev. 1993), *superseded on other grounds by statute as stated in* Evans v. State, 28 P.3d 498, 509–10 (Nev. 2001).