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Criminal Procedure; Presentence Investigation and Report Probation-- Confiscated Property

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between counsel and the court held to settle instructions must be conducted outside the presence of the jury.⁹ If a requested instruction is refused, the court must write on the margin of the original the word "refused" and initial or sign the notation.¹⁰ If the instruction is given to the jury the court must write the word "given" at its conclusion and sign the last instruction to indicate that all preceding instructions have been given.¹¹ After the instructions are given, the judge may not clarify, modify, or explain them to the jury except in writing unless the parties agree to oral instructions.¹² Finally, Chapter 218 requires the clerk to preserve all original requests, whether given or refused, as part of the proceedings.¹³

9. *Id.* §175.161 6.

10. *Id.* §175.161 4.

11. *Id.*

12. *Id.*

13. *Id.* §175.161 5.

Criminal Procedure; presentence investigation and report— probation—confiscated property

N.R.S. §§213.— - 213.— (new); §§62.270, 176.135, 176.145, 176.156, 176.185, 176.215, 213.107 (amended).

SB 12 (Close); STATS 1981, Ch 19

SB 247 (Committee on Judiciary); STATS 1981, Ch 193

(*Effective May 6, 1981*)

SB 256 (Committee on Judiciary); STATS 1981, Ch 566

SB 307 (Committee on Judiciary); STATS 1981, Ch 237

Chapters 237, 193, 19, and 566 make a number of significant changes in the law concerning the presentence investigation and report. Included are changes which limit the required submission of the report,¹ expand the types of information required in the report,² secure the confidentiality of the report,³ and facilitate the preparation of the report.⁴ In addition, Chapter 193 (1) reduces the probationer's ability to be excused for a violation of probation,⁵ (2) broadens the types of terms and

1. *See* N.R.S. §§176.135 1(a), (b), 176.185 2.

2. *See id.* §§176.145 3, 176.145 2, 5.

3. *See id.* §176.156 2.

4. *See id.* §62.270 2(b).

5. *See id.* §176.189 2. *Compare id.* §176.185 3 with STATUTES OF NEVADA 1979, c. 655, §132, at 1460.

conditions that the court can impose on probation,⁶ (3) reduces the maximum period of probation in non-felony cases,⁷ and (4) establishes guidelines for the handling of confiscated property.⁸

Presentence Investigation and Report

The purpose of the presentence investigation and report is to assist judges in determining the sentence that should be imposed and whether or not probation should be granted.⁹ Prior law required that a presentence investigation and report be prepared by the probation service of the district court for each defendant who pled guilty or nolo contendere, or was found guilty before the imposition of sentence or the granting of probation.¹⁰ Chapter 193 now requires a presentence investigation and report only for those defendants who plead guilty or nolo contendere to, or who are found guilty of, a felony.¹¹ If the court requests, a report must be made for those defendants who plead guilty or nolo contendere to, or are found guilty of a gross misdemeanor.¹² In addition, Chapter 193 provides that a judge must receive a written report from the chief parole and probation officer before granting probation to individuals convicted of a felony.¹³ Chapter 237 eliminates, however, the necessity of a presentence report prior to sentencing or the granting of probation in cases when the sentence is fixed by a jury or where a defendant, with the consent of the court, waives his or her right to the report.¹⁴

Existing law requires that the presentence investigation include specified material.¹⁵ Chapter 19 now requires that the presentence investigation report also contain information concerning the effect of the crime on the victim.¹⁶ Since the effects that may be reported are not limited to physical or psychological harm, results from special exami-

6. See N.R.S. §176.185 3.

7. See *id.* §176.215 1(a).

8. See *id.* §§213.—, 213.—.

9. See generally [1968] OP. ATT'Y GEN. NO. 497 (March 15, 1968).

10. See STATUTES OF NEVADA 1969, c. 241, §1, at 406 (amending N.R.S. §176.135).

11. See N.R.S. §176.135 1.

12. See *id.* §176.135 2; BLACK'S LAW DICTIONARY 633 (5th ed. 1979) (definition of gross misdemeanor).

13. Compare N.R.S. §176.185 2 with STATUTES OF NEVADA 1979, c. 655, §132, at 1460. *But see* N.R.S. §176.185 2 (if no written report is submitted within thirty days, the judge may grant probation without the report).

14. Compare N.R.S. §176.135 1(a), (b) with STATUTES OF NEVADA 1969, c. 241, §1, at 406.

15. See N.R.S. §176.145 1, 2, 4, 5 (the presentence report must include the following: the defendant's prior criminal record, information concerning the defendant's characteristics and circumstances affecting his or her behavior, a recommendation of punishment, and any other information that the court may require). See generally *Thomas v. State*, 88 Nev. 382, 498 P.2d 1314 (1972); *Selective Presentence Investigation Report*, 38 FED. PROBATION 47 (1974).

16. See *id.* §176.145 3.

nations, made at the discretion of the court, may be included.¹⁷ This additional information may be helpful in calculating the extent of the victim's damages in situations where probation will be granted conditioned upon restitution to the victim.¹⁸ Chapter 566 also *requires* that information concerning the circumstances of the offense be included in the presentence investigation report if the information is helpful in imposing a sentence.¹⁹ Chapter 566 further provides that *any* information that the probation service believes to be helpful in imposing a sentence may also be included in the report.²⁰ In addition, Chapter 566 attempts to safeguard the defendant's privacy by providing that all contents of the presentence investigation report are confidential and cannot be made a part of any public record.²¹ Information in the report, however, must be disclosed to the district attorney, the defendant's counsel, and the defendant, in order to afford each party the opportunity to object to any factual errors in the report and to comment on the contents of the report.²² Furthermore, Chapter 566 facilitates preparation of a presentence report for juvenile offenders by permitting inspection of unsealed records²³ that are necessary for the preparation of the report without the need of a court order.²⁴

Probation

Prior to the enactment of Chapter 193, the economic hardship of the defendant could be taken into account in determining whether the defendant's failure to make court-ordered restitution violated a condition of probation.²⁵ Chapter 193 eliminates economic hardship as justification for the violation of conditional probation.²⁶ In addition, Chapter 193 now requires the court to include as a condition to probation, an order that the probationer dispose of all weapons in his or her possession.²⁷

Prior to the enactment of Chapter 193, the period of probation for the conviction of any crime, including any extensions, could not exceed

17. *See id.*

18. *See id.* §176.185 3. *See generally* 79 A.L.R.3d 976; 92 A.L.R.2d 458.

19. *Compare* N.R.S. §176.145 2 with STATUTES OF NEVADA 1973, c. 113, §1, at 178.

20. *See* N.R.S. §176.145 5.

21. *See id.* §176.156 2.

22. *Compare id.* §176.156 1, 2 with STATUTES OF NEVADA 1975, c. 400, §1, at 576.

23. *See* N.R.S. §62.275 4 (definition of seal).

24. *Compare id.* §62.270 2(b) with STATUTES OF NEVADA 1973, c. 745, §2, at 1533.

25. *See* N.R.S. §176.189 2. *See also* 73 A.L.R.3d 1240 (1976).

26. *See* N.R.S. §176.189 2. *Compare* N.R.S. §176.185 3 with STATUTES OF NEVADA 1979, c. 655, §132, at 1460.

27. *Compare* N.R.S. §176.185 3 with STATUTES OF NEVADA 1979, c. 655, §132, at 1460.

five years.²⁸ Chapter 193 retains the five year maximum period for felonies and reduces the maximum period of probation for gross misdemeanors or for deferred judgments of first-time offenders for the possession of a controlled substance²⁹ to three years.³⁰

Confiscated Property

Chapter 193 establishes guidelines regarding the retention and disposal of confiscated property by parole or probation officers.³¹ Chapter 193 provides that a parole or probation officer must immediately deliver to the Parole and Probation Department (hereinafter referred to as the Department) any seized, abandoned, or unclaimed property including instruments or weapons,³² that are obtained in the course of an officer's duty.³³ If an officer is ordered to retain any property as evidence by court order or by directive of the attorney general or district attorney,³⁴ the evidence must be immediately delivered to the Department when released from evidence.³⁵ Chapter 193 also requires the Department to keep complete and accurate records of all confiscated items.³⁶

Chapter 193 provides that confiscated instruments or weapons are to be disposed of in the following manner: (1) the Department will destroy or have destroyed any instrument or weapon determined dangerous to public safety;³⁷ (2) the Department will return any undestroyed instrument or weapon to either the person from whom it was confiscated if that person is acquitted,³⁸ or to the person who claims and establishes ownership of the item within one year,³⁹ provided that neither person is a parolee or probationer.⁴⁰ Chapter 193 also provides that those instruments or weapons that have not been destroyed or returned within one year following confiscation become the property of the Department,⁴¹ and establishes procedures for the sale of these

28. See STATUTES OF NEVADA 1979, c. 222, §2, at 324 (amending N.R.S. §176.215). See also 21 AM. JUR. *Criminal Law* §563 (2d ed. 1965).

29. See N.R.S. §453.041 (definition of controlled substance).

30. Compare *id.* §176.215 1(a), (b) with STATUTES OF NEVADA 1979, c. 222, §2, at 324.

31. See generally N.R.S. §213.—.

32. See *id.* §202.350 (definition of weapon).

33. See *id.* §§213.— 1, 213.— 1.

34. See *id.*

35. See *id.*

36. See *id.* §§213.— 5, 213.— 6.

37. See *id.* §213.— 2(a).

38. See *id.* §213.— 2(b)(1).

39. See *id.* §213.— 2(b)(2).

40. See *id.* §213.— 2(b).

41. See *id.* §213.— 2(b)(2).

items.⁴² All proceeds from the sale of the instruments and weapons must be deposited with the State Treasurer.⁴³ In addition, Chapter 193 provides that any property that is not contraband⁴⁴ will be returned to the owner if the owner can establish ownership and submit his or her claim within the one year period.⁴⁵ Any contraband consisting of controlled substances or dangerous drugs will be disposed of or destroyed.⁴⁶

42. *See id.* §213.— 3(c), (d).

43. *See id.* §213.— 4.

44. *See id.* §213.— 2 (definition of contraband).

45. *See id.* *See also* 68 AM. JUR. *Searches and Seizures* §118 (2d ed. 1973).

46. *See id.* §213.— 3.

Criminal Procedure; sentencing

N.R.S. §§4.370, 197.090, 200.481 (amended).
SB 109 (Committee on Judiciary); STATS 1981, Ch 9

Existing law provides that any person attempting to deter or prevent an executive or administrative officer from performing a law-imposed duty by the use of threat,¹ force, or violence,² or who knowingly resists, by the use of force or violence, an executive or administrative officer in the performance of his or her duty, is guilty of a gross misdemeanor.³ Additionally, existing law provides that a person convicted of a battery⁴ committed on an executive or administrative officer must be punished for a misdemeanor if a deadly weapon was not used in the commission of the offense, and if no substantial bodily harm to the victim results.⁵

Chapter 9 clarifies existing law by providing that *all* batteries committed upon an executive or administrative officer will be punishable, at minimum, as gross misdemeanors.⁶ Additionally, Chapter 9 provides for greater penalties if a battery has been committed upon an executive or administrative officer involving the use of a deadly weapon.⁷ Under these circumstances, an offender may be imprisoned for not less than two years nor more than ten years, and may be further

1. *See* N.R.S. §199.300 (intimidating a public officer).

2. *See id.* §200.481 1(a) (definition of battery).

3. *Id.* §197.090.

4. *See id.* §200.481 1(a) (definition of battery).

5. *Id.* §200.481 2.

6. *See id.* §§197.090, 200.481 2. This apparently also applies to batteries committed on peace officers. *See Senate Committee on Judiciary, Minutes*, at 4 (Feb. 16, 1981).

7. *See* N.R.S. §200.481 2(d).