Amendment No. 407

Assembly Amendment to Assembly Bill No. 356 (BDR 14-1155)
Proposed by: Assembly Committee on Judiciary
Amends: Summary: No Title: Yes Preamble: No Joint Sponsorship: No Digest: Yes

ASSEMBLY ACTION		Initial and Date	SENATE ACTION		Initial and Date
Adopted ☐	Lost ☐	_____	Adopted ☐	Lost ☐	_____
Concurred In ☐	Not ☐	_____	Concurred In ☐	Not ☐	_____
Receded ☐	Not ☐	_____	Receded ☐	Not ☐	_____

EXPLANATION: Matter in (1) ***blue bold italics*** is new language in the original bill; (2) variations of **green bold underlining** is language proposed to be added in this amendment; (3) ~~red strikethrough~~ is deleted language in the original bill; (4) ~~purple double strikethrough~~ is language proposed to be deleted in this amendment; (5) orange double underlining is deleted language in the original bill proposed to be retained in this amendment.

ASSEMBLY BILL NO. 356–ASSEMBLYWOMAN NEAL

MARCH 20, 2017

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to criminal procedure. (BDR 14-1155)

FISCAL NOTE: Effect on Local Government: May have Fiscal Impact.
Effect on the State: No.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to criminal procedure; [~~requiring a prosecuting attorney, defense attorney and lead investigating law enforcement officer to meet and exchange discoverable materials before trial in a criminal case; revising provisions governing a request for the disclosure of certain information in a criminal proceeding; revising provisions governing the disclosure of evidence by a prosecuting attorney; revising provisions governing sanctions for the destruction, loss or failure to collect evidence or violating certain provisions governing the discovery of evidence in a criminal proceeding;~~] **authorizing a prosecuting attorney or an attorney for a defendant to issue subpoenas for witnesses in this State to appear at an evidentiary hearing; revising the procedure for giving instructions to the jury;** and providing other matters properly relating thereto.

Legislative Counsel's Digest:

[~~In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that the due process clause of the Fourteenth Amendment of the United States Constitution requires a prosecuting attorney to disclose evidence material either to guilt or to punishment. Existing law requires a prosecuting attorney disclose certain information on request, including evidence that he or she intends to introduce during the case in chief of the State. (NRS 174.235) Section 3 of this bill: (1) requires the prosecuting attorney to disclose such information only if the information is in the actual or constructive possession of the State; (2) provides that the prosecuting attorney is deemed to be in actual or constructive possession of any materials generated, collected or created by any law enforcement agency; and (3) adds to the list of information required to be disclosed by requiring the disclosure of any material that tends to exculpate the defendant, adversely impact a government witness's credibility or evidence's credibility, mitigate the defendant's culpability or mitigate the defendant's potential punishment. In addition, section 3 specifies that the prosecuting attorney has an affirmative obligation to seek out and disclose exculpatory materials to the defendant, regardless of whether the defendant has requested such material. Finally, section 3 requires the court to hold a hearing on a request for such information if the defendant files a motion with the court concerning the request.~~]

[~~Section 1 of this bill requires the prosecuting attorney, defendant's attorney and lead investigating law enforcement officer to meet and exchange all discoverable materials not less~~]

~~than 30 days before trial. Section 1 also requires the prosecuting attorney and defendant to certify compliance with such requirement.~~

~~Existing law authorizes a court, upon sufficient showing, to order that discovery or inspection of material be denied, restricted or deferred, or make other appropriate orders. (NRS 174.275) Section 4 of this bill specifies that the court is authorized to make such an order upon a sufficient showing that the material subject to discovery or inspection is privileged. Section 4 further requires the court to include in an order declaring material privileged a statement of the reasons for the determination that the material is privileged.~~

~~Under existing law, a party may request the disclosure of information only within 30 days after arraignment or at such reasonable later time as the court permits. A party is authorized to make a subsequent request only upon a showing of cause why the request would be in the interest of justice. (NRS 174.285) Section 5 of this bill authorizes a party to make a subsequent request if the party learns additional material may exist, which was not known when the party made his or her initial request. Additionally, section 5 requires a request for permission to comply with a request later than 30 days before trial to be made by motion to the court.~~

~~If a party fails to comply with the provisions of existing law governing discovery in criminal cases, existing law authorizes the court to order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance or prohibit the party from introducing in evidence the material not disclosed. (NRS 174.295) Section 6 of this bill requires the court to prohibit the party from introducing in evidence the material not disclosed unless the party proves that the material was unknown to the party even though the party diligently complied with the provisions of existing law governing discovery in criminal cases. Section 6 also: (1) requires the court to dismiss the case if it finds that the State has, in bad faith, destroyed, lost or failed to collect evidence subject to the provisions of existing law governing discovery in criminal cases; and (2) requires the court to instruct the jury to infer that destroyed, lost or uncollected evidence would have been favorable to the defendant if the court finds that the destruction, loss or failure to collect evidence was not in bad faith. Finally, section 6 defines "bad faith" for the purposes of determining whether the State has, in bad faith, destroyed, lost or failed to collect evidence.]~~

Existing law authorizes the prosecuting attorney or the attorney for the defendant in a criminal proceeding to issue subpoenas for witnesses within this State to appear before the court at which a preliminary hearing is to be held or an indictment, information or criminal complaint is to be tried. (NRS 174.315) Section 7 of this bill additionally authorizes a prosecuting attorney or an attorney for the defendant to issue subpoenas for such witnesses to appear before the court at which an evidentiary hearing is to be held.

Existing law provides for the issuance of a subpoena to produce books, papers, documents or other objects. (NRS 174.335) Section 8 of this bill allows such a subpoena to request such production in addition or as an alternative to appearing before the court.

Existing law requires the court to be given a written charge presented by either party if the court thinks it is correct and pertinent. (NRS 175.161) Section 9 of this bill additionally requires the court to believe that the charge is an accurate statement of the law.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. ~~[Chapter 174 of NRS is hereby amended by adding thereto a new section to read as follows:~~

~~***1. Not less than 30 days before trial, the prosecuting attorney, defendant's attorney and lead investigating law enforcement officer shall meet and exchange all discoverable materials pursuant to this section and NRS 174.234 to 174.295, inclusive.***~~

~~*2. Upon the conclusion of the discovery conference, both the prosecuting attorney and defendant's attorney shall sign and file with the court an affidavit attesting to their compliance with this section.*~~ **(Deleted by amendment.)**

Sec. 2. ~~[~~NRS 174.234 is hereby amended to read as follows:~~]~~

~~174.234 1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:~~

~~(a) If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:~~

~~(1) The defendant shall file and serve upon the prosecuting attorney a written notice containing the names and last known addresses of all witnesses the defendant intends to call during the case in chief of the defendant; and~~

~~(2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.~~

~~(b) If the defendant will not be tried for any offenses that are punishable as a gross misdemeanor or felony:~~

~~(1) The defendant shall file and serve upon the prosecuting attorney a written notice containing the name and last known address of any witness the defendant intends to call during the case in chief of the defendant whose name and last known address have not otherwise been provided to the prosecuting attorney pursuant to NRS 174.245; and~~

~~(2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the name and last known address or place of employment of any witness the prosecuting attorney intends to call during the case in chief of the State whose name and last known address or place of employment have not otherwise been provided to the defendant pursuant to NRS 171.1965 or 174.235.~~

~~2. If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony and a witness that a party intends to call during the case in chief of the State or during the case in chief of the defendant is expected to offer testimony as an expert witness, the party who intends to call that witness shall file and serve upon the opposing party, not less than 21 days before trial or at such other time as the court directs, a written notice containing:~~

~~(a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony;~~

~~(b) A copy of the curriculum vitae of the expert witness; and~~

~~(c) A copy of all reports made by or at the direction of the expert witness.~~

~~3. After complying with the provisions of subsections 1 and 2, each party has a continuing duty to file and serve upon the opposing party:~~

~~(a) Written notice of the names and last known addresses of any additional witnesses that the party intends to call during the case in chief of the State or during the case in chief of the defendant. A party shall file and serve written notice pursuant to this paragraph as soon as practicable after the party determines that the party intends to call an additional witness during the case in chief of the State or during the case in chief of the defendant. The court shall prohibit an additional witness from testifying if the court determines that the party acted in bad faith by not including the witness on the written notice required pursuant to subsection 1.~~

~~(b) Any information relating to an expert witness that is required to be disclosed pursuant to subsection 2. A party shall provide information pursuant to this paragraph as soon as practicable after the party obtains that information. The court shall prohibit the party from introducing that information in evidence or shall prohibit the expert witness from testifying if the court determines that the party acted in bad faith by not timely disclosing that information pursuant to subsection 2.~~

~~4. Each party has a continuing duty to file and serve upon the opposing party any change in the last known address, or, if applicable, last known place of employment, of any witness that the party intends to call during the case in chief of the State or during the case in chief of the defendant as soon as practicable after the party obtains that information.~~

~~5. Upon a motion by either party or the witness, the court shall prohibit disclosure to the other party of the address of the witness if the court determines that disclosure of the address would create a substantial threat to the witness of bodily harm, intimidation, coercion or harassment. If the court prohibits disclosure of an address pursuant to this subsection, the court shall, upon the request of a party, provide the party or the party's attorney or agent with an opportunity to interview the witness in an environment that provides for protection of the witness.~~

~~6. In addition to the sanctions and protective orders otherwise provided in subsections 3 and 5, the court may upon the request of a party:~~

~~(a) Order that disclosure pursuant to this section be denied, restricted or deferred pursuant to the provisions of NRS 174.275; or~~

~~(b) Impose sanctions pursuant to subsection 2 *or 3* of NRS 174.295 for the failure to comply with the provisions of this section.~~

~~7. A party is not entitled, pursuant to the provisions of this section, to the disclosure of the name or address of a witness or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.]~~

(Deleted by amendment.)

Sec. 3. ~~[NRS 174.235 is hereby amended to read as follows:~~

~~174.235 1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, *and section 1 of this act,* at the *oral or written* request of a defendant [,] *pursuant to NRS 174.285,* the prosecuting attorney shall [permit] *provide to the defendant, subject to reimbursement of costs by the defendant, or permit* the defendant to inspect and to copy or photograph any:~~

~~(a) Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness [the prosecuting attorney intends to call during the case in chief] *within the actual or constructive possession, custody or control* of the State, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;~~

~~(b) Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the *actual or constructive* possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; [and]~~

~~(c) Books, papers, documents, tangible objects, or copies thereof, which [the prosecuting attorney intends to introduce during the case in chief of the State] *involve the defendant's prosecution* and which are within the *actual or constructive* possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney [.] *; and*~~

~~*(d) Any and all material that tends to exculpate the defendant, adversely impact a government witness's credibility or evidence's credibility, or mitigates the defendant's culpability or mitigates the defendant's potential punishment within the actual or constructive possession, custody or control of the State.*~~

~~2. The defendant is not entitled, pursuant to the provisions of this section, to the discovery or inspection of:~~

~~(a) An internal report, document or memorandum that is prepared by or on behalf of the prosecuting attorney in connection with the investigation or prosecution of the case [.] *unless the aforementioned satisfies the criteria set forth in paragraph (d) of subsection 1.*~~

~~(b) A statement, report, book, paper, document, tangible object or any other type of item or information that is privileged or protected from disclosure or inspection pursuant to the Constitution or laws of this state or the Constitution of the United States.~~

~~3. The provisions of this section are not intended to affect any obligation placed upon the prosecuting attorney by the Constitution of this state or the Constitution of the United States to disclose exculpatory evidence to the defendant.~~ ***The prosecuting attorney has an affirmative obligation to seek out and disclose exculpatory materials described in paragraph (d) of subsection 1 to the defendant, regardless of whether the defendant has made a request pursuant to that subsection.***

~~***4. For the purposes of NRS 174.234 to 174.295, inclusive, and section 1 of this act, the prosecuting attorney is deemed to be in constructive possession of all materials generated, collected or created by any and all law enforcement agencies.***~~

~~***5. Upon a motion made by the defendant, the district court shall:***~~

~~***(a) Schedule a hearing on the defendant's motion;***~~

~~***(b) Rule on the defendant's specific requests made pursuant to this section; and***~~

~~***(c) Enter an order consistent with the court's ruling on the motion.]*** **(Deleted by amendment.)**

Sec. 4. ~~[NRS 174.275 is hereby amended to read as follows:~~

~~174.275 Upon a sufficient showing [,] *that certain material subject to discovery or inspection pursuant to NRS 174.234 to 174.295, inclusive, and section 1 of this act is privileged,* the court may at any time order that discovery or inspection pursuant to NRS 174.234 to 174.295, inclusive, *and section 1 of this act* be denied, restricted or deferred, or make such other order as is appropriate. Upon motion by the defendant or prosecuting attorney, the court may permit the defendant or prosecuting attorney to make such showing, in whole or in part, in the form of a written statement to be inspected by the court in chambers. *If the court deems the material to be privileged, the court shall indicate by order the reasons for such determination.* If the court enters an order granting relief following a showing in chambers, the entire text of the written statement must be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.]~~ **(Deleted by amendment.)**

Sec. 5. ~~[NRS 174.285 is hereby amended to read as follows:~~

~~174.285 1. A request made pursuant to NRS 174.235 or 174.245 may be made only within 30 days after arraignment or at such reasonable later time as the court may permit. A subsequent request may be made [only upon a showing of cause why the request would be in the interest of justice.] *if a party learns additional material may exist, which was not known when the party made his or her initial request.*~~

~~2. A party shall comply with a request made pursuant to NRS 174.235 or 174.245 not less than 30 days before trial . [or at such reasonable later time as the court may permit.] *A request to comply made later than 30 days before trial must be upon motion to the court.]*~~ **(Deleted by amendment.)**

Sec. 6. ~~[NRS 174.295 is hereby amended to read as follows:~~

~~174.295 1. If, after complying with the provisions of NRS 174.235 to 174.295, inclusive, *and section 1 of this act,* and before or during trial, a party~~

~~discovers additional material previously requested which is subject to discovery or inspection under those sections, the party shall promptly notify the other party or the other party's attorney or the court of the existence of the additional material.~~

~~2. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with the provisions of NRS 174.234 to 174.295, inclusive, *and section 1 of this act, the court shall prohibit the party from introducing into evidence the material not disclosed unless the party proves, by a preponderance of the evidence, that the material was unknown to the party even though the party diligently complied with the provisions of NRS 174.234 to 174.295, inclusive, and section 1 of this act. If the court believes the material was unknown to the party, after the party diligently complied with the provisions of NRS 174.234 to 174.295, inclusive, and section 1 of this act,* the court may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances [.] *, and shall explain the basis for its decision on the record.*~~

~~*3. If at any time during the course of the proceedings it is brought to the attention of the court that the State has, in bad faith, destroyed, lost or failed to collect materials subject to the provisions of NRS 174.234 to 174.295, inclusive, and section 1 of this act, the court must dismiss the case against the defendant. If the court finds the destruction, loss or failure to collect was not in bad faith, the court shall instruct the jury that it must infer the destroyed, lost or uncollected evidence would have been favorable to the defendant.*~~

~~*4. For purposes of this section, "bad faith" means implying or involving actual or constructive fraud or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.*~~ **(Deleted by amendment.)**

Sec. 7. **NRS 174.315 is hereby amended to read as follows:**

174.315 1. A prosecuting attorney may issue subpoenas subscribed by the prosecuting attorney for witnesses within the State, in support of the prosecution or whom a grand jury may direct to appear before it, upon any investigation pending before the grand jury.

2. A prosecuting attorney or an attorney for a defendant may issue subpoenas subscribed by the issuer for:

(a) Witnesses within the State to appear before the court at which a preliminary hearing is to be held , ~~[or]~~ an indictment, information or criminal complaint is to be tried ~~[.]~~ ***or an evidentiary hearing is to be held.***

(b) Witnesses already subpoenaed who are required to reappear in any Justice Court at any time the court is to reconvene in the same case within 60 days, and the time may be extended beyond 60 days upon good cause being shown for its extension.

3. Witnesses, whether within or outside of the State, may accept delivery of a subpoena in lieu of service, by a written or oral promise to appear given by the witness. Any person who accepts an oral promise to appear shall:

(a) Identify himself or herself to the witness by name and occupation;

(b) Make a written notation of the date when the oral promise to appear was given and the information given by the person making the oral promise to appear identifying the person as the witness subpoenaed; and

(c) Execute a certificate of service containing the information set forth in paragraphs (a) and (b).

4. A peace officer may accept delivery of a subpoena in lieu of service, via electronic means, by providing a written promise to appear that is transmitted electronically by any appropriate means, including, without limitation, by electronic mail transmitted through the official electronic mail system of the law enforcement agency which employs the peace officer.

5. A prosecuting attorney shall orally inform any witness subpoenaed as provided in subsection 1 of the general nature of the grand jury's inquiry before the witness testifies. Such a statement must be included in the transcript of the proceedings.

6. Any subpoena issued by an attorney for a defendant for a witness to appear before the court at which a preliminary hearing is to be held must be calendared by filing a motion that includes a notice of hearing setting the matter for hearing not less than 2 full judicial days after the date on which the motion is filed. A prosecuting attorney may oppose the motion orally in open court. A subpoena that is properly calendared pursuant to this subsection may be served on the witness unless the court quashes the subpoena.

Sec. 8. **NRS 174.335 is hereby amended to read as follows:**

174.335 1. Except as otherwise provided in NRS 172.139, a subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein ~~,~~ ***in addition or as an alternative to appearing before the court.***

2. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive.

3. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time before the trial or before the time when they are to be offered in evidence and may, upon their production, permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

Sec. 9. **NRS 175.161 is hereby amended to read as follows:**

175.161 1. Upon the close of the argument, the judge shall charge the jury. The judge may state the testimony and declare the law, but may not charge the jury in respect to matters of fact. The charge must be reduced to writing before it is given, and no charge or instructions may be given to the jury otherwise than in writing, unless by the mutual consent of the parties. If either party requests it, the court must settle and give the instructions to the jury before the argument begins, but this does not prevent the giving of further instructions which may become necessary by reason of the argument.

2. In charging the jury, the judge shall state to them all such matters of law the judge thinks necessary for their information in giving their verdict.

3. Either party may present to the court any written charge, and request that it be given. If the court ~~[thinks it correct and]~~ ***believes that the charge is*** pertinent ~~[,]~~ ***and an accurate statement of the law, whether or not the charge has been adopted as a model jury instruction,*** it must be given ***.*** ~~[, if not,]~~ ***If the court believes that the charge is not pertinent or not an accurate statement of law, then*** it must be refused.

4. An original and one copy of each instruction requested by any party must be tendered to the court. The copies must be numbered and indicate who tendered them. Copies of instructions given on the court's own motion or modified by the court must be so identified. When requested instructions are refused, the judge shall write on the margin of the original the word "refused" and initial or sign the notation. The instructions given to the jury must be firmly bound together and the judge shall write the word "given" at the conclusion thereof and sign the last of the instructions to signify that all have been given. After the instructions are given, the

judge may not clarify, modify or in any manner explain them to the jury except in writing unless the parties agree to oral instructions.

5. After the jury has reached a verdict and been discharged, the originals of all instructions, whether given, modified or refused, must be preserved by the clerk as part of the proceedings.

6. Conferences with counsel to settle instructions must be held out of the presence of the jury and may be held in chambers at the option of the court.

7. When the offense charged carries a possible penalty of life without possibility of parole a charge to the jury that such penalty does not exclude executive clemency is a correct and pertinent charge, and must be given upon the request of either party.

~~[Sec. 7.]~~ ***Sec. 10.*** This act becomes effective on July 1, 2017.