

Amendment No. 410

Assembly Amendment to Assembly Bill No. 376	(BDR 14-1075)
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	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____	Adopted	<input type="checkbox"/>	Lost	<input type="checkbox"/>	_____
Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Concurred In	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____
Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____	Receded	<input type="checkbox"/>	Not	<input type="checkbox"/>	_____

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. 376—ASSEMBLYMAN OHRENSCHALL

MARCH 20, 2017

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to criminal procedure. (BDR 14-1075)

FISCAL NOTE: Effect on Local Government: No.
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; revising provisions governing the filing of a complaint after an arrest without a warrant; ~~revising provisions governing the conduct of discovery in criminal actions; requiring the prosecuting attorney, the attorney for the defendant and the lead investigating law enforcement officer to participate in a pretrial discovery conference; revising provisions governing evidentiary sanctions for failure to comply with discovery requirements; authorizing the issuance of subpoenas for witnesses in Nevada to appear for certain hearings and proceedings; requiring the court to give requested jury instructions under certain circumstances;~~ and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law requires a complaint to be filed forthwith when a person arrested without a warrant is brought before a magistrate. (NRS 171.178) **Section 1** of this bill requires the complaint to be filed within ~~48~~ **72** hours after the person is ~~brought before the magistrate~~ **arrested, unless the magistrate extends the time by an additional 48 hours for good cause shown. Thereafter, the magistrate may order additional extensions of 48 hours for good cause shown.**

~~Section 3 of this bill provides that, for the procedural purposes of discovery and inspection of discoverable materials in a criminal action, the prosecuting attorney is deemed to be in constructive possession of all materials that are created, generated or collected by any and all law enforcement agencies.~~

~~Section 4 of this bill requires the prosecuting attorney, defendant's attorney and lead investigating law enforcement officer to meet and exchange discoverable materials not less than 30 days before trial.~~

~~Existing law requires, with certain exceptions, the prosecuting attorney to permit the defendant, upon request by the defendant, to inspect and copy or photograph certain materials within the possession, custody or control of the State. (NRS 174.235) Section 5 of this bill adds to this requirement material which tends to exculpate the culpability of the defendant, adversely impact the credibility of the State's prospective witnesses or evidence or mitigate the potential punishment of the defendant. Section 5 also imposes on the prosecuting attorney an affirmative duty to seek out and disclose material which tends to exculpate or mitigate the culpability of the defendant, whether or not the defendant has made a request for such~~

material. Finally, section 5 requires the court to perform certain actions upon a written motion of the defendant for the discovery and inspection of certain items.

Existing law provides that the court may, upon a sufficient showing, order that discovery or inspection of discoverable materials be denied, restricted or deferred or make such other order as is appropriate. (NRS 174.275) Section 7 of this bill provides that the court may make the order upon a sufficient showing that the material otherwise subject to discovery or inspection is privileged. Section 7 also requires the court to state in its order granting relief the reason for its decision.

Existing law establishes certain periods and limitations for making initial and subsequent discovery requests and for complying with such requests. (NRS 174.295) Section 8 of this bill allows a subsequent discovery request to be made only if the party making the request learns of additional, previously unknown material. Section 8 also allows a party to comply with certain discovery requests less than 20 days before trial only upon written motion to the court.

Existing law imposes upon the parties a continuing duty to disclose discoverable materials and provides the court with the authority to effect certain remedies for failures to comply with discovery requirements. (NRS 174.295) Section 9 of this bill requires the court to prohibit a party that fails to comply with discovery requirements from introducing into evidence material which was not disclosed unless the court believes the existence of the undisclosed material was unknown to the party. Section 9 also requires the court to: (1) dismiss the action against the defendant if the State has, in bad faith, destroyed, lost or failed to collect materials which were subject to disclosure; or (2) instruct the jury that it must draw an inference that is favorable to the defendant if the destruction, loss or failure to collect was not in bad faith.

Existing law authorizes a prosecuting attorney or an attorney for a defendant to issue subpoenas for witnesses within this State to appear for a preliminary hearing or the trial of an indictment, information or criminal complaint. (NRS 174.315) Section 10 of this bill also authorizes the issuance of a subpoena for such witnesses to appear for any other hearing or proceeding.

Section 11 of this bill eliminates provisions authorizing the court to direct the production and inspection of certain materials and objects designated in a subpoena.

Existing law authorizes parties to present to the court, and request the giving to the jury of, written charges. (NRS 175.161) Section 12 of this bill requires the court to give the jury any written charge submitted by a party if the court thinks it is pertinent and an accurate statement of law, whether or not the charge has been issued or adopted by the Nevada Supreme Court or the State Bar of Nevada.

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

Section 1. NRS 171.178 is hereby amended to read as follows:

171.178 1. Except as otherwise provided in subsections 5 and 6, a peace officer making an arrest under a warrant issued upon a complaint or without a warrant shall take the arrested person without unnecessary delay before the magistrate who issued the warrant or the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada.

2. A private person making an arrest without a warrant shall deliver the arrested person without unnecessary delay to a peace officer. Except as otherwise provided in subsections 5 and 6 and NRS 171.1772, the peace officer shall take the arrested person without unnecessary delay before the nearest available magistrate empowered to commit persons charged with offenses against the laws of the State of Nevada.

3. If an arrested person is not brought before a magistrate within 72 hours after arrest, excluding nonjudicial days, the magistrate:

(a) Shall give the prosecuting attorney an opportunity to explain the circumstances leading to the delay; and

(b) May release the arrested person if the magistrate determines that the person was not brought before a magistrate without unnecessary delay.

4. When a person arrested without a warrant is brought before a magistrate, a complaint must be filed ~~forthwith~~ within 72 hours after the person is brought before the magistrate arrested, unless the magistrate extends the time by an additional 48 hours for good cause shown. Thereafter, the magistrate may order additional extensions of 48 hours for good cause shown.

5. Except as otherwise provided in NRS 178.484 and 178.487, where the defendant can be admitted to bail without appearing personally before a magistrate, the defendant must be so admitted with the least possible delay, and required to appear before a magistrate at the earliest convenient time thereafter.

6. A peace officer may immediately release from custody without any further proceedings any person the peace officer arrests without a warrant if the peace officer is satisfied that there are insufficient grounds for issuing a criminal complaint against the person arrested. Any record of the arrest of a person released pursuant to this subsection must also include a record of the release. A person so released shall be deemed not to have been arrested but only detained.

Sec. 2. ~~Chapter 174 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 4 of this act.~~ (Deleted by amendment.)

Sec. 3. ~~For the purposes of this section, NRS 174.234 to 174.295, inclusive, and section 4 of this act, the prosecuting attorney is deemed to be in constructive possession of all materials that are created, generated or collected by any and all law enforcement agencies.~~ (Deleted by amendment.)

Sec. 4. ~~1. Not less than 30 days before trial, the prosecuting attorney, the defendant's attorney and the law enforcement officer who is in charge of the investigation of the case shall meet and exchange all materials which are discoverable pursuant to this section and NRS 174.234 to 174.295, inclusive, and section 3 of this act.~~

~~2. Upon the conclusion of the meeting described in subsection 1, the prosecuting attorney and the defendant's attorney shall sign and file with the court an affidavit attesting to their compliance with this section.~~ (Deleted by amendment.)

Sec. 5. ~~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 sections 3 and 4 of this act, at the request of a defendant, the prosecuting attorney shall 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 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 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 and which are 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. [] and~~

~~(d) Material which tends to exculpate the defendant, mitigate the culpability of the defendant, adversely impact the credibility the State's prospective witnesses or evidence or mitigate the potential punishment of the defendant.~~

~~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.~~

~~(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 prosecuting attorney has an affirmative obligation to seek out and disclose to the defendant any and all material which tends to exculpate or mitigate the culpability of the defendant, whether or not the defendant has made a request for such material pursuant to subsection 1.~~

~~4. Upon a written motion of the defendant for the discovery and inspection of any item described in paragraphs (a) to (d), inclusive, of subsection 1, the court shall~~

~~(a) Schedule a hearing on the motion;~~

~~(b) Rule on each specific request made by the defendant in the motion; and~~

~~(c) Enter an order consistent with the court's ruling on each request.~~

~~5. Except as otherwise provided in this section, 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.] (Deleted by amendment.)~~

Sec. 6. ~~[NRS 174.245 is hereby amended to read as follows:~~

~~174.245 1. Except as otherwise provided in NRS 174.233 to 174.295, inclusive, and sections 3 and 4 of this act, at the request of the prosecuting attorney, the defendant shall permit the prosecuting attorney to inspect and to copy or photograph any:~~

~~(a) Written or recorded statements made by a witness the defendant intends to call during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant;~~

~~(b) Results or reports of physical or mental examinations, scientific tests or scientific experiments that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant; and~~

~~(c) Books, papers, documents or tangible objects that the defendant intends to introduce in evidence during the case in chief of the defendant, or copies thereof, within the possession, custody or control of the defendant, the existence of which is known, or by the exercise of due diligence may become known, to the defendant.~~

~~2. The prosecuting attorney 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 defendant or the defendant's attorney in connection with the investigation or defense of the case.~~

~~(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.] (Deleted by amendment.)~~

1 Sec. 7. ~~NRS 174.275 is hereby amended to read as follows:~~

2 ~~174.275 1. Upon a sufficient showing [.] that material otherwise subject to~~
3 ~~discovery or inspection pursuant to NRS 174.234 to 174.295, inclusive, and~~
4 ~~sections 3 and 4 of this act is privileged, the court may at any time order that such~~
5 ~~discovery or inspection [pursuant to NRS 174.234 to 174.295, inclusive,] be denied,~~
6 ~~restricted or deferred, or make such other order as is appropriate.~~

7 ~~2. Upon motion by the defendant or prosecuting attorney, the court may~~
8 ~~permit the defendant or prosecuting attorney to make such showing, in whole or in~~
9 ~~part, in the form of a written statement to be inspected by the court in chambers.~~

10 ~~3. If the court enters an order granting relief following a showing in chambers~~
11 ~~[, the] :~~

12 ~~(a) The court must state in its order the reasons for its decision; and~~

13 ~~(b) The entire text of the written statement described in subsection 2 must be~~
14 ~~sealed and preserved in the records of the court to be made available to the~~
15 ~~appellate court in the event of an appeal.] (Deleted by amendment.)~~

16 Sec. 8. ~~NRS 174.285 is hereby amended to read as follows:~~

17 ~~174.285 1. A request made pursuant to NRS 174.235 or 174.245 may be~~
18 ~~made only within 30 days after arraignment or at such reasonable later time as the~~
19 ~~court may permit. A subsequent request may be made only [upon a showing of~~
20 ~~cause why the request would be in the interest of justice.] if the party making the~~
21 ~~subsequent request has learned of additional material, the existence of which the~~
22 ~~party was not aware when the party made its initial request pursuant to NRS~~
23 ~~174.235 or 174.245.~~

24 ~~2. A party shall comply with a request made pursuant to NRS 174.235 or~~
25 ~~174.245 not less than 30 days before trial or , as provided in this subsection, at~~
26 ~~such [reasonable] later time as the court may permit. A party may request leave of~~
27 ~~court to comply with a request made pursuant to NRS 174.235 or 174.245 less~~
28 ~~than 30 days before trial only upon written motion to the court.] (Deleted by~~
29 ~~amendment.)~~

30 Sec. 9. ~~NRS 174.295 is hereby amended to read as follows:~~

31 ~~174.295 1. If, after complying with the provisions of NRS 174.235 to~~
32 ~~174.295, inclusive, and sections 3 and 4 of this act and before or during trial, a~~
33 ~~party discovers additional material previously requested which is subject to~~
34 ~~discovery or inspection under those sections, the party shall promptly notify the~~
35 ~~other party or the other party's attorney or the court of the existence of the~~
36 ~~additional material.~~

37 ~~2. If at any time during the course of the proceedings it is brought to the~~
38 ~~attention of the court that [a] :~~

39 ~~(a) A party has failed to comply with the provisions of NRS 174.234 to~~
40 ~~174.295, inclusive, and sections 3 and 4 of this act, the court shall prohibit the~~
41 ~~party from introducing into evidence the material which was not disclosed unless~~
42 ~~the party proves, by a preponderance of the evidence, that the party was not~~
43 ~~aware of the existence of the material even though the party diligently complied~~
44 ~~with the provisions of NRS 174.234 to 174.295, inclusive, and sections 3 and 4 of~~
45 ~~this act. If the court believes that the party was not aware of the existence of the~~
46 ~~material after the party diligently complied with NRS 174.234 to 174.295,~~
47 ~~inclusive, and sections 3 and 4 of this act, the court may order the party to permit~~
48 ~~the discovery or inspection of materials not previously disclosed, grant a~~
49 ~~continuance [, or prohibit the party from introducing in evidence the material not~~
50 ~~disclosed, or it may] or enter such other order as it deems just under the~~
51 ~~circumstances. The court shall explain the basis for its decision on the record.~~

52 ~~(b) The State has, in bad faith, destroyed, lost or failed to collect materials~~
53 ~~which are subject to the provisions of NRS 174.234 to 174.295, inclusive, and~~

~~sections 3 and 4 of this act, the court must dismiss the case against the defendant. If the court finds the destruction, loss or failure to collect such materials was not in bad faith, the court shall instruct the jury that it must infer the destroyed, lost or uncollected material would have been favorable to the defendant. As used in this paragraph, "bad faith" means implying or involving actual or constructive fraud, 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. 10. [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 any other hearing or proceeding 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. (Deleted by amendment.)~~

Sec. 11. [NRS 174.325 is hereby amended to read as follows:

~~174.325 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.~~

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

~~[2. 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.] (Deleted by amendment.)~~

Sec. 12. ~~[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] *that the charge is pertinent [.] and an accurate statement of law, whether or not the charge has been issued or adopted as a jury instruction by the Supreme Court or the State Bar of Nevada,* it must be given . [; if not.] *If the court thinks 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.] (Deleted by amendment.)~~