

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; and providing other matters properly relating thereto.

Legislative Counsel’s Digest:

1 In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the United States Supreme Court
2 held that the due process clause of the Fourteenth Amendment of the United States
3 Constitution requires a prosecuting attorney to disclose evidence material either to
4 guilt or to punishment. Existing law requires a prosecuting attorney disclose certain
5 information on request, including evidence that he or she intends to introduce
6 during the case in chief of the State. (NRS 174.235) **Section 3** of this bill: (1)
7 requires the prosecuting attorney to disclose such information only if the
8 information is in the actual or constructive possession of the State; (2) provides that
9 the prosecuting attorney is deemed to be in actual or constructive possession of any
10 materials generated, collected or created by any law enforcement agency; and (3)
11 adds to the list of information required to be disclosed by requiring the disclosure
12 of any material that tends to exculpate the defendant, adversely impact a
13 government witness’s credibility or evidence’s credibility, mitigate the defendant’s
14 culpability or mitigate the defendant’s potential punishment. In addition, **section 3**
15 specifies that the prosecuting attorney has an affirmative obligation to seek out and
16 disclose exculpatory materials to the defendant, regardless of whether the defendant



17 has requested such material. Finally, **section 3** requires the court to hold a hearing
18 on a request for such information if the defendant files a motion with the court
19 concerning the request.

20 **Section 1** of this bill requires the prosecuting attorney, defendant's attorney and
21 lead investigating law enforcement officer to meet and exchange all discoverable
22 materials not less than 30 days before trial. **Section 1** also requires the prosecuting
23 attorney and defendant to certify compliance with such requirement.

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

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

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

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

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

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

7 *2. Upon the conclusion of the discovery conference, both the*
8 *prosecuting attorney and defendant's attorney shall sign and file*



1 *with the court an affidavit attesting to their compliance with this*
2 *section.*

3 **Sec. 2.** NRS 174.234 is hereby amended to read as follows:

4 174.234 1. Except as otherwise provided in this section, not
5 less than 5 judicial days before trial or at such other time as the
6 court directs:

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

42 (b) Impose sanctions pursuant to subsection 2 *or* 3 of NRS
43 174.295 for the failure to comply with the provisions of this section.



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

6 **Sec. 3.** NRS 174.235 is hereby amended to read as follows:

7 174.235 1. Except as otherwise provided in NRS 174.233 to
8 174.295, inclusive, *and section 1 of this act*, at the *oral or written*
9 request of a defendant ~~+~~ *pursuant to NRS 174.285*, the prosecuting
10 attorney shall ~~permit~~ *provide to the defendant, subject to*
11 *reimbursement of costs by the defendant, or permit* the defendant
12 to inspect and to copy or photograph any:

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

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

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

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

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

40 (a) An internal report, document or memorandum that is
41 prepared by or on behalf of the prosecuting attorney in connection
42 with the investigation or prosecution of the case ~~+~~ *unless the*
43 *forementioned satisfies the criteria set forth in paragraph (d) of*
44 *subsection 1.*



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

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

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

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

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

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

22 (c) *Enter an order consistent with the court's ruling on the*
23 *motion.*

24 **Sec. 4.** NRS 174.275 is hereby amended to read as follows:

25 174.275 Upon a sufficient showing ~~H~~ *that certain material*
26 *subject to discovery or inspection pursuant to NRS 174.234 to*
27 *174.295, inclusive, and section 1 of this act is privileged,* the court
28 may at any time order that discovery or inspection pursuant to NRS
29 174.234 to 174.295, inclusive, *and section 1 of this act* be denied,
30 restricted or deferred, or make such other order as is appropriate.
31 Upon motion by the defendant or prosecuting attorney, the court
32 may permit the defendant or prosecuting attorney to make such
33 showing, in whole or in part, in the form of a written statement to be
34 inspected by the court in chambers. *If the court deems the material*
35 *to be privileged, the court shall indicate by order the reasons for*
36 *such determination.* If the court enters an order granting relief
37 following a showing in chambers, the entire text of the written
38 statement must be sealed and preserved in the records of the court to
39 be made available to the appellate court in the event of an appeal.

40 **Sec. 5.** NRS 174.285 is hereby amended to read as follows:

41 174.285 1. A request made pursuant to NRS 174.235 or
42 174.245 may be made only within 30 days after arraignment or at
43 such reasonable later time as the court may permit. A subsequent
44 request may be made ~~{only upon a showing of cause why the~~
45 ~~request would be in the interest of justice.}~~ *if a party learns*



1 *additional material may exist, which was not known when the*
2 *party made his or her initial request.*

3 2. A party shall comply with a request made pursuant to NRS
4 174.235 or 174.245 not less than 30 days before trial . ~~for at such~~
5 ~~reasonable later time as the court may permit.~~ *A request to comply*
6 *made later than 30 days before trial must be upon motion to the*
7 *court.*

8 **Sec. 6.** NRS 174.295 is hereby amended to read as follows:

9 174.295 1. If, after complying with the provisions of NRS
10 174.235 to 174.295, inclusive, *and section 1 of this act*, and before
11 or during trial, a party discovers additional material previously
12 requested which is subject to discovery or inspection under those
13 sections, the party shall promptly notify the other party or the other
14 party's attorney or the court of the existence of the additional
15 material.

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

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

42 4. *For purposes of this section, "bad faith" means implying*
43 *or involving actual or constructive fraud or a design to mislead or*
44 *deceive another, or a neglect or refusal to fulfill some duty or*



- 1 *some contractual obligation, not prompted by an honest mistake as*
- 2 *to one's rights or duties, but by some interested or sinister motive.*
- 3 **Sec. 7.** This act becomes effective on July 1, 2017.

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