

CS FOR HOUSE BILL NO. 25(FIN)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - SECOND SESSION

BY THE HOUSE FINANCE COMMITTEE

Offered: 1/26/96

Referred: Rules

Sponsor(s): REPRESENTATIVES PARNELL, Porter, Green, Bunde, Toohey

SENATORS Halford, Taylor, Kelly, Leman, Donley

A BILL

FOR AN ACT ENTITLED

1 "An Act revising Rule 16, Alaska Rules of Criminal Procedure, relating to
2 discovery and inspection in criminal proceedings; and providing for an effective
3 date."

4 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

5 * **Section 1.** Rule 16, Alaska Rules of Criminal Procedure, is repealed and reenacted to
6 read:

7 Rule 16. Discovery.

8 (a) Objectives of Pretrial Discovery.

9 (1) Procedures before trial should, consistent with the constitutional
10 rights of the defendant, the victim, and the prosecution,

11 (i) promote a fair and expeditious disposition of the charges;

12 (ii) provide the defendant with sufficient information to make
13 an informed plea;

14 (iii) permit thorough preparation for trial and minimize surprise

1 at trial;

2 (iv) reduce interruptions and complications during trial and
3 avoid unnecessary and repetitious trials by identifying and resolving before trial
4 a procedural, collateral, or constitutional issue;

5 (v) minimize the procedural and substantive inequities among
6 similarly situated defendants;

7 (vi) effect economies in time, money, judicial resources, and
8 professional skills by minimizing paperwork, avoiding repetitious assertions of
9 issues, and reducing the number of separate hearings; and

10 (vii) minimize the burden upon victims and witnesses.

11 (2) These needs can be served by

12 (i) full and free exchange of appropriate discovery;

13 (ii) simpler and more efficient procedures; and

14 (iii) procedural pressures for expediting the processing of cases.

15 (b) Disclosure to the Defendant. Except as is otherwise provided as to matters
16 not subject to disclosure and protective orders, the prosecuting attorney shall disclose
17 the following to the defense and make available for inspection and copying, as
18 appropriate:

19 (1) the names, addresses, and phone numbers, if known, of persons
20 known by the government to have knowledge of relevant facts and their written or
21 recorded statements;

22 (2) any written or recorded statements and any oral statements made
23 by the defendant;

24 (3) any written or recorded statements and any oral statements made
25 by a co-defendant;

26 (4) any books, papers, documents, photographs, or tangible objects,
27 which the prosecuting attorney is likely to use as evidence in the hearing or trial, or
28 which were obtained from or belong to the defendant, other than models, charts,
29 pictures, compilations of evidence, or other demonstrative evidence created by or on
30 behalf of the prosecuting attorney;

31 (5) any record of prior criminal convictions of the defendant and of

1 persons whom the prosecuting attorney is likely to call as witnesses at the hearing or
2 trial;

3 (6) any material, documents, or information relating to lineups,
4 showups, and picture or voice identifications in relation to the case;

5 (7) any material or information within the prosecuting attorney's
6 possession or control that tends to negate the guilt of the defendant as to the offense
7 or would tend to reduce the defendant's punishment therefor;

8 (8) any relevant material or information relating to the guilt or
9 innocence of the defendant that has been provided by an informant, and any electronic
10 surveillance, including wiretapping, of conversations to which the defendant or the
11 defendant's attorney was a party, or of premises of the defendant or the defendant's
12 attorney;

13 (9) any relevant material or information regarding the relationship, if
14 any, of witnesses to the prosecuting authority, including the nature and circumstances
15 of any agreement, understanding, or representation between the prosecution and the
16 witness that constitutes an inducement for the cooperation or testimony of the witness;
17 however, the prosecution does not have to disclose any payments or provision for
18 witness travel, housing, or meals in order to enable the witness to attend a specific
19 court proceeding;

20 (10) any relevant material and information regarding

21 (i) searches and seizures of the property or person of the
22 defendant; and

23 (ii) the acquisition of statements from the defendant;

24 (11) if the prosecution is likely to use character, reputation, or other act
25 evidence relating to the defendant, notice of that likelihood and disclosure of the
26 substance of that evidence;

27 (12) unless a different date is set by the court, as soon as known and
28 no later than 45 days before trial, the prosecution shall provide the defense with any
29 written report or written statement of experts made in connection with the case; with
30 respect to each expert the prosecution is likely to call at trial or another court
31 proceeding, (i) the prosecution shall also provide to the defendant the address, phone

1 number, and a curriculum vitae of the expert, and (ii) if a written report by the expert
2 is not made or is not adequate to provide fair notice of the expert's opinion and the
3 basis for that opinion, (aa) the prosecution shall provide the defendant with a written
4 description of the substance of the proposed testimony, including the expert's opinion
5 and the basis for that opinion, and (bb) upon request, the defense is entitled to conduct
6 a telephonic or in-person deposition or recorded interview of the expert, at the expense
7 of the defense; failure to provide timely disclosure entitles the defendant to a
8 continuance; if the court finds that a continuance is not an adequate remedy under the
9 circumstances of the case, the court may impose other sanctions, including prohibiting
10 the prosecutor from calling the expert at trial or declaring a mistrial;

11 (13) upon a reasonable request showing materiality to the preparation
12 of the defense, the court in its discretion may require disclosure to defense counsel of
13 relevant and admissible information not covered by (b)(1) - (12) of this rule.

14 (c) Disclosure to the Prosecution. Except as is otherwise provided as to
15 matters not subject to disclosure and protective orders, the defense shall disclose the
16 following to the prosecution and make available for inspection and copying, as
17 appropriate:

18 (1) the names, addresses, and phone numbers, if known, of persons the
19 defendant is likely to call as witnesses and their written or recorded statements;

20 (2) any books, papers, documents, photographs, or tangible objects the
21 defense is likely to use as evidence at a hearing or trial and which are not otherwise
22 disclosed under (b) of this rule, other than models, charts, pictures, compilations of
23 evidence, or other demonstrative evidence created by or on behalf of the defendant's
24 attorney;

25 (3) if the defense is likely to use character, reputation, or other act
26 evidence not relating to the defendant, notice of that likelihood and disclosure of the
27 substance of that evidence;

28 (4) any relevant material or information regarding the relationship, if
29 any, of witnesses to defense counsel and the defendant, including the nature and
30 circumstances of any agreement, understanding, or representation between the defense
31 and the witness that constitutes an inducement for the cooperation or testimony of the

1 witness; however, the defense does not have to disclose any payments or provisions
2 for witness travel, housing, or meals in order to enable the witness to attend a specific
3 court proceeding;

4 (5) unless a different date is set by the court, no later than 10 days
5 before trial in misdemeanor cases and 30 days in felony cases, notice of defenses if
6 the defendant is likely to rely upon a defense of alibi, justification, duress, entrapment,
7 or other statutory or affirmative defense; failure to provide timely notice shall entitle
8 the prosecutor to a continuance; if the court finds that a continuance is not an adequate
9 remedy under the circumstances of the case, the court may impose other sanctions,
10 including prohibiting the defendant from asserting the designated defense;

11 (6) unless a different date is set by the court, as soon as known and no
12 later than 30 days before trial, the defense shall provide the prosecution with the
13 address, phone number, curriculum vitae, and any report or written statement of any
14 expert witness likely to be called at trial or another court proceeding; with respect to
15 each expert, if a written report by the expert is not made or is not adequate to provide
16 fair notice of the expert's opinion and the basis for that opinion, (i) the defense shall
17 provide the prosecution with a written description of the substance of the proposed
18 testimony, including the expert's opinion and the basis for that opinion, and (ii) upon
19 request, the prosecution is entitled to conduct a telephonic or in-person deposition or
20 recorded interview of the expert, at the expense of the prosecution; failure to provide
21 timely disclosure entitles the prosecution to a continuance; if the court finds that a
22 continuance is not an adequate remedy under the circumstances of the case, the court
23 may impose other sanctions, including prohibiting the defense from calling the expert
24 at trial or declaring a mistrial;

25 (7) notice of an insanity defense or a defense of diminished capacity
26 due to mental disease or defect in compliance with AS 12.47;

27 (8) turn over to the prosecutor any physical evidence of the offense
28 received by defense counsel; if the physical evidence is received from the attorney's
29 client or the client's agent or acquired as a direct result of information communicated
30 by the client, defense counsel may not be compelled to provide any information
31 concerning the source of the evidence or the manner in which it was obtained; in such

1 cases, the prosecutor may not reveal the source of the evidence to the jury; if the
2 physical evidence is not received from the client or the client's agent or acquired as
3 a direct result of information communicated by the client, defense counsel shall reveal
4 the manner in which the physical evidence was obtained unless that information is
5 otherwise privileged;

6 (9) upon a reasonable request showing materiality to the preparation of
7 the prosecution, the court in its discretion may require disclosure to the prosecution of
8 relevant and admissible information not covered by (c)(1) - (8) of this rule.

9 (d) Regulation of Discovery.

10 (1) Timing of Discovery.

11 (i) Defense counsel has an immediate obligation to disclose
12 evidence subject to (c)(8) of this rule.

13 (ii) When the prosecution has provided the discovery required
14 under (b)(1) - (8) of this rule, the prosecuting attorney shall provide written
15 notice to defense counsel or to the defendant if the defendant is not
16 represented by counsel. Within 10 days of receiving notice from the
17 prosecuting attorney, or such later date as agreed by the prosecuting attorney
18 or ordered by the court, the defense shall provide to the prosecution the
19 discovery required under (c)(1) and (2) of this rule.

20 (iii) Discovery required of the prosecution under (b)(9) - (11)
21 and of the defense under (c)(3) and (4) of this rule shall be provided as agreed
22 by the parties or as ordered by the court.

23 (iv) Other discovery required by (b) and (c) of this rule shall be
24 provided as set out in the specific provision or as ordered by the court.

25 (2) Advice to Refrain From Discussing Case. Except as is otherwise
26 provided as to matters not subject to disclosure and protective orders, neither counsel
27 for the parties nor other prosecution or defense personnel shall advise persons (except
28 the defendant) having relevant material or information to refrain from discussing the
29 case with opposing counsel or showing opposing counsel any relevant material, nor
30 shall they otherwise impede opposing counsel's investigation of the case.

31 (3) Additional or Newly Discovered Information. If, subsequent to

1 compliance with these rules or orders issued pursuant thereto, a party discovers
2 additional material or information which is subject to disclosure, that party shall
3 promptly notify the other party or the other party's counsel of its existence. If the
4 additional material or information is discovered during trial, the court shall also be
5 notified.

6 (4) Materials to Remain in Exclusive Custody of Attorney.

7 (i) Materials furnished to an attorney pursuant to these rules
8 shall remain in the attorney's exclusive custody, shall be used only for the
9 purposes of conducting the case, and shall be subject to other terms and
10 conditions that the court may provide if the information is

11 (aa) a criminal history record of a victim or witness;

12 (bb) a medical, psychiatric, psychological, or counseling
13 record of a victim or witness;

14 (cc) an adoption record;

15 (dd) a record that is confidential under AS 47.10.090 or
16 a similar law in another jurisdiction;

17 (ee) a report of a presentence investigation of a victim
18 or witness prepared pursuant to Criminal Rule 32 or a similar law in
19 another jurisdiction;

20 (ff) a record of the Department of Corrections other than
21 an incident report relating to the crime with which the defendant is
22 charged; or

23 (gg) any other record that the court orders be kept in the
24 exclusive custody of the attorney.

25 (ii) An attorney shall not disclose to a defendant the residence
26 or business address or telephone number of a victim or witness, obtained from
27 information provided under this rule, even if the defendant is acting as co-
28 counsel. If the address and telephone numbers of all victims and witnesses
29 have been obliterated, materials that had contained the address or telephone
30 number of a victim or witness may be provided to a defendant proceeding
31 without counsel only as allowed by AS 12.61.120.

1 (iii) Notwithstanding a defendant's status as co-counsel,
2 materials covered by (d)(4)(i) or (ii) of this rule shall remain in the exclusive
3 custody of the defendant's attorney. If an attorney violates (d)(4)(i) or (ii) of
4 this rule, regardless of whether the defendant is co-counsel, the court shall refer
5 the attorney's violation to the Disciplinary Board of the Alaska Bar Association
6 as a grievance.

7 (iv) If a defendant is proceeding without counsel, materials
8 covered by (d)(4)(i) of this rule may be provided to the defendant. If materials
9 are provided to an unrepresented defendant under this paragraph, the court shall
10 order that the materials remain in the defendant's exclusive custody, be used
11 only for purposes of conducting the case, and be subject to other terms,
12 conditions, and restrictions that the court may provide. The court shall also
13 inform the defendant that violation of an order issued under this paragraph is
14 punishable as a contempt of court.

15 (5) Restriction or Deferral of Disclosure of Information. Upon a
16 showing of cause, the court may at any time order that specified disclosure be
17 restricted or deferred, or make such other order as is appropriate, provided that all
18 material and information to which a party is entitled shall be disclosed in time to
19 permit the party's counsel to make beneficial use thereof.

20 (6) Material Partially Discoverable. When some parts of certain
21 material are discoverable under these rules, and other parts are not discoverable, as
22 much of the material shall be disclosed as is consistent with this rule. Excision of
23 certain material and disclosure of the balance shall be preferred to withholding of the
24 whole. Material excised pursuant to court order shall be sealed and preserved in the
25 records of the court, and shall be made available to the court of appeals and the
26 supreme court in the event of an appeal.

27 (7) Denial or Regulation of Disclosure--Disclosure to Court in Camera--
28 Record of Proceedings. Upon request of any party, the court may permit:

29 (i) any showing of cause for denial or regulation of disclosure;

30 or

31 (ii) any portion of any showing of cause for denial or regulation

1 of disclosure to be made to the court in camera ex parte; a record shall be
2 made of such proceedings; if the court enters an order granting relief following
3 such a showing, the entire record of the proceedings shall be sealed and
4 preserved in the records of the court, to be made available to the court of
5 appeals and the supreme court in the event of an appeal.

6 (8) Information Within Possession or Control of Other Members of
7 Prosecuting Attorney's or Defense Counsel's Staff. The prosecuting attorney's or
8 defense counsel's obligations under this rule extend to material and information in the
9 possession or control of

10 (i) members of the prosecuting attorney's or defense counsel's
11 staff, respectively; and

12 (ii) any others who have participated in the investigation or
13 evaluation of the case and who either regularly report or with reference to the
14 particular case have reported to the prosecuting attorney's office or defense
15 counsel, respectively.

16 (9) Legal Research and Records of Prosecuting Attorney or Defense
17 Counsel. Disclosure shall not be required of legal research or those portions of
18 records, correspondence, reports or memoranda that contain the opinions, theories, or
19 conclusions of the

20 (i) prosecuting attorney or members of the prosecuting
21 attorney's legal staff; or

22 (ii) defense counsel or members of the defense counsel's legal
23 staff.

24 (e) Sanctions.

25 (1) Failure to Comply with Discovery Rule or Order. If at any time
26 during the course of the proceedings it is brought to the attention of the court that a
27 party has failed to comply with an applicable discovery rule or an order issued
28 pursuant thereto, the court shall order such party to permit the discovery of material
29 and information not previously disclosed or enter such other order as it deems just
30 under the circumstances.

31 (2) Willful Violations. Willful violation by counsel of an applicable

discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

(f) Omnibus Hearing.

(1) Time for Hearing--When Set. If the defendant is charged with a felony, the court shall set a time for an omnibus hearing when a plea of not guilty is entered. The omnibus hearing shall be scheduled for a time when the briefing of pretrial motions should be complete.

The omnibus hearing may be canceled by the court only upon the stipulation of counsel that there are no motions which require hearing and that discovery is complete. Counsel shall also provide the information outlined in (f)(2)(iv) of this rule.

The court may set an omnibus hearing in a misdemeanor case.

(2) Duties of Trial Court at Hearing. At the omnibus hearing the court shall:

- (i) ensure that discovery under this rule is complete;
- (ii) rule on any pending motions which are ripe for decision;
- (iii) schedule any necessary evidentiary hearings; and
- (iv) obtain case management information from the parties, including the expected length of trial, the likelihood of trial, and any anticipated scheduling difficulties.

(g) Non-Testimonial Identification Procedures.

(1) Authority. Upon application of the prosecuting attorney, the court by order may direct any person to participate in one or more of the procedures specified in (g)(2) of this rule if affidavit or testimony shows probable cause to believe that:

- (i) an offense has been committed by one of several persons comprising a narrow focal group that includes the subject person;
- (ii) the evidence sought may be of material aid in identifying who committed the offense; and
- (iii) the evidence sought cannot practicably be obtained from other sources.

(2) Scope. An order issued under (g)(1) of this rule may direct the

1 person to do or submit to any and all of the following:

- 2 (i) appear in a line-up;
- 3 (ii) speak words, phrases or sentences relevant to the case for
- 4 identification by witnesses;
- 5 (iii) be fingerprinted;
- 6 (iv) pose for photographs not involving reenactment of a scene;
- 7 (v) try on articles of clothing;
- 8 (vi) permit the taking of specimens of material under the
- 9 person's fingernails;
- 10 (vii) permit the taking of samples of blood, hair, and other
- 11 materials of the person's body which involve no unreasonable intrusion thereof;
- 12 (viii) provide specimens of the person's handwriting;
- 13 (ix) submit to a reasonable physical or medical inspection of the
- 14 person's body.

15 (3) Right to Counsel. When issuing an order under (g)(1) of this rule,
16 the court shall also order that the person be represented by counsel or waive the right
17 to be represented by counsel before being required to appear in a lineup, give a
18 specimen of handwriting, or speak for identification by witnesses to an offense.

19 (h) Material not in Possession or Control of Prosecuting Attorney; Confidential
20 Records.

21 (1) Whenever defense counsel provides notice to the prosecuting attorney
22 and designates and requests production of material or information that is not in the
23 possession or control of the prosecuting attorney, other than confidential records under
24 (h)(2) of this rule, but would be discoverable if in the possession or control of the
25 prosecuting attorney, the court shall issue suitable subpoenas or orders to cause such
26 material to be made available to defense counsel.

27 (2) If a defendant makes a particularized showing that confidential
28 records not in the possession of the prosecuting attorney are likely to contain relevant
29 information that would negate guilt or reduce the defendant's punishment, the court may
30 conduct an in camera review of the records after providing an opportunity to be heard
31 to the person who is the subject of the records and the agency keeping the records. If
32 the court determines during its in camera review that such information exists, the court

1 shall (i) provide a copy of that portion of the records that contains the information to the
2 defense, (ii) provide a copy of the material provided to the defense to the prosecution,
3 except for any statements by the defendant the disclosure of which would violate the
4 defendant's right against compulsory self-incrimination, and (iii) enter an order that a
5 hearing be held before the information may be introduced, used, or mentioned during an
6 open court proceeding. The hearing conducted by the court under (iii) of this section
7 will be outside the presence of the jury, and the court shall determine how the records
8 may be used after taking into consideration, among other things the court may find
9 appropriate, whether use of the records violates the right of privacy of the subject of the
10 records, hampers the ability of the agency to collect records, or violates the constitutional
11 or statutory rights of crime victims. The hearing to determine admissibility shall be
12 conducted in camera if there is a danger of unwarranted invasion of privacy.

13 (i) As used in this rule,

14 (1) "oral statement" means the substance of a statement of any kind by
15 a person, whether or not reflected in any existing writing or recording;

16 (2) "written or recorded statement" means

17 (i) any statement made by a person in writing that is signed,
18 adopted, or approved by that person; or

19 (ii) a statement of any kind made by a person that is embodied
20 or summarized in a writing or recording, whether or not specifically signed or
21 adopted by that person; the term is intended to include statements contained in
22 police or investigative reports, or notes taken by police officers or investigators,
23 but does not include attorney work product or notes taken by the attorney.

24 * **Sec. 2.** PROVISIONS OF SEC. 1 NOT SEVERABLE. Notwithstanding AS 01.10.030,
25 the provisions of sec.1 of this Act are not severable.

26 * **Sec. 3.** RETROACTIVITY. This Act is retroactive and applies to all criminal cases
27 pending on or arising after the effective date of this Act.

28 * **Sec. 4.** This Act supersedes Criminal Rule 16 and amendments to Criminal Rule 16
29 adopted by the Alaska Supreme Court before the effective date of this Act.

30 * **Sec. 5.** This Act takes effect July 1, 1996.