

CS FOR HOUSE BILL NO. 25(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered: 3/29/95
Referred: Finance

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

A BILL

FOR AN ACT ENTITLED

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

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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 Rule 16, Alaska Rules of Criminal Procedure, is repealed and reenacted to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

6 Rule 16. Discovery.

7 (a) Objectives of Pretrial Discovery.

8 (1) Procedures before trial should, consistent with the constitutional
9 rights of the defendant,

10 (i) promote a fair and expeditious disposition of the charges,
11 whether by diversion, plea, or trial;

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

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

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at trial;

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

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

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

(vii) minimize the burden upon victims and witnesses.

(2) These needs can be served by

(i) full and free exchange of appropriate discovery;

(ii) simpler and more efficient procedures; and

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

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

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

(2) any written or recorded statements and any oral statements made by the accused;

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

(4) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney is likely to use as evidence in the hearing or trial, other than models, charts, pictures, compilations of evidence, or other demonstrative evidence created by or on behalf of the prosecuting attorney;

(5) any record of prior criminal convictions of the defendant and of persons whom the prosecuting attorney is likely to call as witnesses at the hearing or

1 trial;

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

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

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

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

19 (10) any relevant material and information regarding

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

22 (ii) the acquisition of statements from the accused;

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

26 (12) unless a different date is set by the court, as soon as known and
27 no later than 45 days before trial, the prosecution shall provide the name, address,
28 phone number, and curriculum vitae of any expert witness performing work in
29 connection with the case, and (i) a written report by the expert, setting out the expert's
30 opinion and the underlying basis of that opinion, or (ii) a written description of the
31 substance of the proposed testimony of the expert, the expert's opinion, and the

1 underlying basis of that opinion; however, notwithstanding Criminal Rule 15, if a
2 written report by the expert has not been provided under (b)(12)(i) of this rule, the
3 defense is entitled to conduct a telephonic or in-person deposition of the expert, at the
4 expense of the defense; failure to provide timely disclosure shall entitle the defendant
5 to a continuance; if the court finds that a continuance is not an adequate remedy under
6 the circumstances of the case, the court may impose other sanctions, including
7 prohibiting the prosecutor from calling the expert at trial or declaring a mistrial;

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

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

15 (1) the names and addresses of persons the defendant is likely to call
16 as witnesses and their written or recorded statements;

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

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

25 (4) any relevant material or information regarding the relationship, if
26 any, of witnesses to defense counsel and the defendant, including the nature and
27 circumstances of any agreement, understanding, or representation between the defense
28 and the witness that constitutes an inducement for the cooperation or testimony of the
29 witness; however, the defense does not have to disclose any payments or provisions
30 for witness travel, housing, or meals in order to enable the witness to attend a specific
31 court proceeding;

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

8 (6) unless a different date is set by the court, as soon as known and no
9 later than 30 days before trial, the defense shall provide the name, address, phone
10 number, and curriculum vitae of any expert witness likely to be called at trial or
11 another court proceeding, and (i) a written report by the expert, setting out the expert's
12 opinion and the underlying basis of that opinion, or (ii) a written description of the
13 substance of the proposed testimony of the expert, the expert's opinion, and the
14 underlying basis of that opinion; however, notwithstanding Criminal Rule 15, if a
15 written report by the expert has not been provided under (c)(6)(i) of this rule, the
16 prosecution is entitled to conduct a telephonic or in-person deposition of the expert,
17 at the expense of the prosecution; failure to provide timely disclosure shall entitle the
18 prosecutor to a continuance; if the court finds that a continuance is not an adequate
19 remedy under the circumstances of the case, the court may impose other sanctions,
20 including prohibiting the defendant from calling the expert at trial;

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

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

1 otherwise privileged;

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

5 (d) Regulation of Discovery.

6 (1) Timing of Discovery.

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

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

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

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

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

29 (3) Additional or Newly Discovered Information. If, subsequent to
30 compliance with these rules or orders issued pursuant thereto, a party discovers
31 additional material or information which is subject to disclosure, that party shall

1 promptly notify the other party or the other party's counsel of its existence. If the
2 additional material or information is discovered during trial, the court shall also be
3 notified.

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

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

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

10 (bb) a medical, psychiatric, psychological, or counseling
11 record of a victim or witness;

12 (cc) an adoption record;

13 (dd) a record that is confidential under as 47.10.090 or
14 a similar law in another jurisdiction;

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

18 (ff) a record of the department of corrections other than
19 Incident report relating to the crime with which the defendant is
20 charged; or

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

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

30 (iii) Notwithstanding a defendant's status as co-counsel,
31 materials covered by (d)(4)(i) or (ii) of this rule shall remain in the exclusive

1 custody of the defendant's attorney. If an attorney violates (d)(4)(i) or (ii) of
2 this rule, regardless of whether the defendant is co-counsel, the court shall refer
3 the attorney's violation to the Disciplinary Board of the Alaska Bar Association
4 as a grievance.

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

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

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

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

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

28 or

29 (ii) any portion of any showing of cause for denial or regulation
30 of disclosure to be made to the court in camera ex parte; a record shall be
31 made of such proceedings; if the court enters an order granting relief following

1 such a showing, the entire record of the proceedings shall be sealed and
2 preserved in the records of the court, to be made available to the court of
3 appeals and the supreme court in the event of an appeal.

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

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

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

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

18 (i) prosecuting attorney or members of the prosecuting attorney's
19 legal staff; or

20 (ii) defense counsel or members of the defense counsel's legal
21 staff.

22 (e) Sanctions.

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

29 (2) Willful Violations. Willful violation by counsel of an applicable
30 discovery rule or an order issued pursuant thereto may subject counsel to appropriate
31 sanctions by the court.

1 (f) Omnibus Hearing.

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

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

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

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

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

18 (g) Non-Testimonial Identification Procedures.

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

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

29 (2) Scope. An order issued under (g)(1) of this rule may direct the
30 person to do or submit to any and all of the following:

- 31 (i) appear in a line-up;

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

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

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

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

25 (2) If a defendant makes a particularized showing that confidential
26 records not in the possession of the prosecuting attorney are likely to contain relevant
27 information that would negate guilt, reduce the defendant's punishment, or establish bias
28 on the part of a witness, the court may conduct an in camera review of the records upon
29 prior notice to the person who is the subject of the records and the agency keeping the
30 records. If the court determines during its in camera review that such information exists,
31 the court shall provide (i) a copy of that portion of the records that contains the
32 information to the defense, (ii) a copy of the material provided to the defense to the

1 prosecution, except for any statements by the defendant the disclosure of which would
2 violate the defendant's right against compulsory self-incrimination, and shall enter an
3 order that a hearing be held before the information may be introduced, used, or
4 mentioned during an open court proceeding. The hearing conducted by the court will
5 be outside the presence of the jury in order to determine whether the probative value of
6 the evidence is outweighed by an unwarranted invasion of privacy of the subject of the
7 records or an unwarranted hampering of the ability of the agency to collect records. The
8 hearing to determine admissibility shall be conducted in camera if there is a danger of
9 unwarranted invasion of privacy.

10 (i) As used in this rule,

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

13 (2) "written or recorded statement" means

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

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

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

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

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

27 * **Sec. 5.** This Act takes effect July 15, 1995.