

SENATE BILL NO. 170

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY THE SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

Introduced: 4/4/03

Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the Code of Criminal Procedure; relating to defenses, affirmative
2 defenses, and justifications to certain criminal acts; relating to rights of prisoners after
3 arrest; relating to discovery, immunity from prosecution, notice of defenses,
4 admissibility of certain evidence, and right to representation in criminal proceedings;
5 relating to sentencing, probation, and discretionary parole; amending Rule 16, Alaska
6 Rules of Criminal Procedure, and Rules 404, 412, 609, and 803, Alaska Rules of
7 Evidence; and providing for an effective date."

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

9 * **Section 1.** AS 11.41.115(a) is amended to read:

10 (a) In a prosecution under AS 11.41.100(a)(1)(A) or 11.41.110(a)(1), it is **an**
11 **affirmative** [A] defense that the defendant acted in a heat of passion, before there had
12 been a reasonable opportunity for the passion to cool, when the heat of passion
13 resulted from a serious provocation by the intended victim.

1 * **Sec. 2.** AS 11.81.330 is amended by adding new subsections to read:

2 (c) Except as provided in (d) of this section, the justification specified in (a) of
3 this section is an affirmative defense.

4 (d) The justification specified in (a) of this section is a defense if the person is

5 (1) on premises that the person owns or leases, the person is not the
6 initial aggressor, and the other person is not a household member as defined in
7 AS 18.66.990; or

8 (2) a peace officer acting within the scope and authority of the officer's
9 employment or is a person assisting a peace officer under AS 11.81.380.

10 * **Sec. 3.** AS 11.81.335(a) is amended to read:

11 (a) Except as provided in (b) **and (c)** of this section, a person may use deadly
12 force upon another person when and to the extent

13 (1) the use of nondeadly force is justified under AS 11.81.330; and

14 (2) the person reasonably believes the use of deadly force is necessary
15 for self defense against death, serious physical injury, kidnapping, sexual assault in the
16 first degree, sexual assault in the second degree, or robbery in any degree.

17 * **Sec. 4.** AS 11.81.335 is amended by adding new subsections to read:

18 (c) A person may not use deadly force under this section if the person brought
19 a deadly weapon to an encounter with reckless disregard that the encounter would
20 result in combat.

21 (d) Except as provided in (e) of this section, the justification specified in (a) of
22 this section is an affirmative defense.

23 (e) The justification specified in (a) of this section is a defense if the person is

24 (1) on premises that the person owns or leases, the person is not the
25 initial aggressor, and the other person is not a household member as defined in
26 AS 18.66.990; or

27 (2) a peace officer acting within the scope and authority of the officer's
28 employment or is a person assisting a peace officer under AS 11.81.380.

29 * **Sec. 5.** AS 11.81.340 is amended by adding new subsections to read:

30 (b) Except as provided in (c) of this section, the justification specified in (a) of
31 this section is an affirmative defense.

1 (c) The justification specified in (a) of this section is a defense if the person
2 claiming the defense of justification

3 (1) reasonably believes that the third person is on premises that the
4 third person owns or leases and the third person is not the initial aggressor;

5 (2) is a peace officer acting within the scope and authority of the
6 officer's employment or is a person assisting a peace officer under AS 11.81.380.

7 * **Sec. 6.** AS 12.25.150(b) is repealed and reenacted to read:

8 (b) Immediately after an arrest, a prisoner has the right to (1) telephone or
9 otherwise communicate with the prisoner's attorney; (2) telephone or otherwise
10 communicate with any relative or friend; (3) a visit from an attorney at law entitled to
11 practice in the courts of Alaska requested by the prisoner; and (4) a visit from a
12 relative or friend requested by the prisoner. This subsection does not provide a
13 prisoner with the right to initiate communication or attempt to initiate communication
14 under circumstances proscribed under AS 11.56.755.

15 * **Sec. 7.** AS 12.45 is amended by adding a new section to article 2 to read:

16 **Sec. 12.45.117. Admissibility of prior convictions.** (a) In a prosecution for
17 a crime that has a prior conviction as an element of the offense, the following are
18 admissible to prove any element of the offense:

19 (1) evidence of the prior conviction of the defendant;

20 (2) a stipulation made by the defendant to the prior conviction.

21 (b) In a prosecution for a crime that has a prior conviction as an element of the
22 offense, the defendant may raise a legal challenge to the validity of a prior conviction
23 only by proving, by a preponderance of evidence to a judge sitting without a jury, that
24 the prior conviction is invalid because the defendant was denied the right to counsel or
25 the right to a jury trial.

26 (c) In this section,

27 (1) "denied the right to counsel" means that under the law of the
28 jurisdiction in which the conviction was entered, the defendant had no right to court-
29 appointed counsel and in that particular case the defendant did not retain counsel;

30 (2) "right to a jury trial" means that under the law of the jurisdiction in
31 which the conviction was entered, the defendant was entitled to a trial by a jury of six

1 or more persons.

2 * **Sec. 8.** AS 12.50.101(a) is amended to read:

3 (a) If a witness refuses on the basis of the privilege against self-incrimination
 4 to testify or provide other information in a criminal proceeding before or ancillary to a
 5 court or grand jury of this state, and a judge issues an order under (b) of this section,
 6 the witness may not refuse to comply with the order on the basis of the privilege
 7 against self-incrimination. If the witness fully complies with the order, **the witness**
 8 **may not be prosecuted for an offense about which the witness is compelled to**
 9 **testify** [NO TESTIMONY OR OTHER INFORMATION COMPELLED UNDER
 10 THE ORDER, OR INFORMATION DIRECTLY OR INDIRECTLY DERIVED
 11 FROM THAT TESTIMONY OR OTHER INFORMATION, MAY BE USED
 12 AGAINST THE WITNESS IN A CRIMINAL CASE], except in a prosecution based
 13 on perjury, giving a false statement[,], or otherwise knowingly providing false
 14 information, or hindering prosecution.

15 * **Sec. 9.** AS 12.50.101(b) is amended to read:

16 (b) In the case of an individual who has been or may be called to testify or
 17 provide other information in a criminal proceeding before or ancillary to a court or a
 18 grand jury of this state, a superior or district court for the judicial district in which the
 19 proceeding is or may be held shall issue, upon the application of the **prosecutor**
 20 [ATTORNEY GENERAL OR THE ATTORNEY GENERAL'S DESIGNEE] in
 21 accordance with (d) of this section, an order requiring the individual to give testimony
 22 or provide other information that the individual refuses to give or provide based on the
 23 privilege against self-incrimination.

24 * **Sec. 10.** AS 12.50.101(d) is amended to read:

25 (d) The **prosecutor** [ATTORNEY GENERAL OR THE ATTORNEY
 26 GENERAL'S DESIGNEE] may apply for an order under (b) of this section when, in
 27 the judgment of the **prosecutor** [ATTORNEY GENERAL OR THE ATTORNEY
 28 GENERAL'S DESIGNEE],

29 (1) the testimony or other information may be necessary to the
 30 administration of criminal justice; and

31 (2) the individual who is the subject of the application has refused or is

1 likely to refuse to testify or to provide other information on the basis of the privilege
2 against self-incrimination.

3 * **Sec. 11.** AS 12.50.101(e) is amended by adding a new paragraph to read:

4 (2) "proffer" means a written or oral statement by the attorney for the
5 witness, stating the attorney's good faith belief of the substance of the witness's
6 testimony or other information.

7 * **Sec. 12.** AS 12.50.101 is amended by adding new subsections to read:

8 (f) If a witness refuses, or there is reason to believe that a witness will refuse,
9 to testify or provide other information based on the privilege against self-
10 incrimination, and if the prosecutor has not applied for an order under (b) of this
11 section, the court shall inform the witness of the right to be represented by an attorney
12 and that an attorney will be appointed for the witness if the witness qualifies for
13 representation by an attorney under AS 18.85. The court shall recess the proceeding
14 to allow the witness to consult with the attorney for the witness.

15 (g) If the prosecutor declines to seek an order under (b) of this section after the
16 witness has had an opportunity to consult with the attorney for the witness, and the
17 witness continues to refuse to testify or provide other information, the court shall hold
18 a hearing to determine the validity of the claim of privilege by the witness. The
19 hearing shall be in camera. The court shall permit the prosecutor to be present at the
20 hearing under this subsection.

21 (h) At the hearing under (g) of this section, the attorney for the witness, in the
22 form of a written or oral proffer, shall describe the testimony or other information that
23 the witness claims is privileged. The proffer must include a description of how the
24 testimony or other information could connect the witness with a crime. The proffer is
25 privileged and inadmissible for any other purpose. A copy of any written proffer shall
26 be provided to the prosecutor. The court shall allow the prosecutor an opportunity to
27 be heard at the hearing under (g) of this section on the merits of the claim. If the
28 witness establishes a factual basis that there is a real or substantial danger that the
29 testimony or other information to be compelled would support a conviction or would
30 furnish a link in the chain of evidence leading to conviction of a crime, the court may
31 find that the witness has a valid claim of privilege. If the court finds that the witness

1 has a valid claim of privilege, it shall specify the crimes to which the privilege applies.

2 * **Sec. 13.** AS 12.55.025(c) is amended to read:

3 (c) Except as provided in (d) [AND (e)] of this section, when a defendant is
4 sentenced to imprisonment, the term of confinement commences on the date of
5 imposition of sentence unless the court specifically provides that the defendant must
6 report to serve the sentence on another date. If the court provides another date to
7 begin the term of confinement, the court shall provide the defendant with written
8 notice of the date, time, and location of the correctional facility to which the defendant
9 must report. A defendant shall receive credit for time spent in custody pending trial,
10 sentencing, or appeal, if the detention was in connection with the offense for which
11 sentence was imposed. A defendant may not receive credit for more than the actual
12 time spent in custody pending trial, sentencing, or appeal. The time during which a
13 defendant is voluntarily absent from official detention after the defendant has been
14 sentenced may not be credited toward service of the sentence.

15 * **Sec. 14.** AS 12.55 is amended by adding a new section to read:

16 **Sec. 12.55.127. Consecutive terms of imprisonment.** (a) If a defendant is
17 required to serve a term of imprisonment under a separate judgment, any term of
18 imprisonment imposed in a later judgment, amended judgment, or probation
19 revocation shall be consecutive.

20 (b) Except as provided in (c) of this section, if a defendant is being sentenced
21 for two or more crimes in a single judgment, terms of imprisonment may be
22 concurrent or partially concurrent.

23 (c) If the defendant is being sentenced for

24 (1) escape, the term of imprisonment shall be consecutive to the term
25 for the underlying crime;

26 (2) two or more crimes under AS 11.41, a consecutive active term of
27 imprisonment shall be imposed for at least

28 (A) the mandatory minimum term under AS 12.55.125(a) for
29 each additional crime that is murder in the first degree;

30 (B) the mandatory minimum term for each additional crime
31 that is an unclassified felony governed by AS 12.55.125(b);

1 (C) the presumptive term specified in AS 12.55.125(c) or the
 2 active term of imprisonment, whichever is less, for each additional crime that
 3 is

4 (i) manslaughter; or

5 (ii) kidnapping that is a class A felony;

6 (D) two years or the active term of imprisonment, whichever is
 7 less, for each additional crime that is criminally negligent homicide;

8 (E) one-fourth of the presumptive term under AS 12.55.125(c)
 9 or (i) for each additional crime that is sexual assault in the first degree under
 10 AS 11.41.410 or sexual abuse of a minor in the first degree under
 11 AS 11.41.434, or an attempt, solicitation or conspiracy to commit those
 12 offenses; and

13 (F) some active term of imprisonment for each additional
 14 crime, or each additional attempt or solicitation, under AS 11.41.200 -
 15 11.41.250, 11.41.420 - 11.41.432, 11.41.436 - 11.41.458, or 11.41.500 -
 16 11.41.520.

17 (d) In this section,

18 (1) "active term of imprisonment" means the total term of
 19 imprisonment imposed for a crime, minus suspended imprisonment;

20 (2) "additional crime" means a crime that is not the primary crime;

21 (3) "primary crime" means the crime

22 (A) for which the sentencing court imposes the longest active
 23 term of imprisonment; or

24 (B) that is designated by the sentencing court as the primary
 25 crime when no single crime has the longest active term of imprisonment.

26 * **Sec. 15.** AS 12.55.145 is amended by adding new subsections to read:

27 (h) For purposes of imposing a sentence under this chapter, a defendant may
 28 challenge the legal validity of a prior conviction only if the defendant was denied the
 29 right to counsel or the right to a jury trial. The burden of proof for a challenge under
 30 this subsection is on the defendant by a preponderance of evidence.

31 (i) In this section,

1 (1) "denied the right to counsel" means that under the law of the
 2 jurisdiction in which the conviction was entered, the defendant had no right to court-
 3 appointed counsel and in that particular case the defendant did not retain counsel;

4 (2) "right to a jury trial" means that under the law of the jurisdiction in
 5 which the conviction was entered, the defendant was entitled to a trial by a jury of six
 6 or more persons.

7 * **Sec. 16.** AS 12.55.155(d) is amended by adding a new paragraph to read:

8 (18) in a conviction for an offense under AS 11.41.410 - 11.41.470, the
 9 defendant reduced the impact of the offense on the victim by entering a plea of guilty
 10 or no contest within 30 days of being arraigned in superior court on the charge.

11 * **Sec. 17.** AS 18.85.100 is amended by adding a new subsection to read:

12 (f) Notwithstanding (a) of this section, an indigent person is entitled to the
 13 representation and necessary services and facilities of representation as provided in (a)
 14 of this section, when the person is a witness who refuses, or there is reason to believe
 15 will refuse, to testify or provide other information based on the privilege against self-
 16 incrimination.

17 * **Sec. 18.** AS 33.16.090(b) is amended to read:

18 (b) Except as provided in (e) of this section, a prisoner is not eligible for
 19 discretionary parole during the term of a presumptive sentence; however, a prisoner is
 20 eligible for discretionary parole during a term of sentence enhancement imposed under
 21 AS 12.55.155(a) or during the term of a consecutive or partially consecutive
 22 presumptive sentence imposed under AS 12.55.127 [AS 12.55.025(e) OR (g)]. A
 23 prisoner sentenced to a mandatory 99-year term under AS 12.55.125(a) or a definite
 24 term under AS 12.55.125(l) is not eligible for discretionary parole during the entire
 25 term.

26 * **Sec. 19.** AS 33.16.090(c) is amended to read:

27 (c) Except as provided in (e) of this section, a prisoner eligible for
 28 discretionary parole during a period of sentence enhancement imposed under
 29 AS 12.55.155(a) or during a consecutive or partially consecutive presumptive sentence
 30 imposed under AS 12.55.127 [AS 12.55.025(e) OR (g)] shall serve the unenhanced
 31 portion of the sentence or the initial presumptive sentence before being otherwise

1 eligible for discretionary parole under AS 33.16.100(c) or (d). For purposes of this
 2 subsection, the sentence for the most serious offense in the case of consecutive or
 3 partially consecutive presumptive sentences shall be considered the initial presumptive
 4 sentence. The unenhanced sentence or the initial presumptive sentence is considered
 5 served for purposes of discretionary parole on the date the unenhanced or initial
 6 presumptive sentence is due to expire less good time earned under AS 33.20.010.

7 * **Sec. 20.** AS 12.55.025(e), 12.55.025(g), and 12.55.025(h) are repealed.

8 * **Sec. 21.** The uncodified law of the State of Alaska is amended by adding a new section to
 9 read:

10 DIRECT COURT RULE AMENDMENT. Rule 16(c)(5), Alaska Rules of Criminal
 11 Procedure, is amended to read:

12 (5) Notice of Defenses. Unless a different date is set by the court, no
 13 later than **30** [10] days **before** [PRIOR TO] trial, the defendant shall inform the
 14 prosecutor **if** [OF] the **defendant is likely** [DEFENDANT'S INTENTION] to rely
 15 upon a defense of alibi, justification, duress, entrapment, or other statutory or
 16 affirmative defense. Failure to provide [TIMELY] notice **30 days before trial**
 17 **entitles** [UNDER THIS RULE SHALL ENTITLE] the prosecutor to a continuance. If
 18 the court finds that a continuance is not an adequate remedy under the circumstances
 19 of the case, the court may impose other sanctions, including prohibiting the defendant
 20 from asserting the designated defense; **however, if the defendant fails to provide**
 21 **notice at least seven days before trial, the court shall prohibit the defendant from**
 22 **asserting the designated defense.** The defendant shall give notice of an insanity
 23 defense or a defense of diminished capacity due to mental disease or defect in
 24 compliance with AS 12.47.

25 * **Sec. 22.** The uncodified law of the State of Alaska is amended by adding a new section to
 26 read:

27 DIRECT COURT RULE AMENDMENT. Rule 16(e)(1), Alaska Rules of Criminal
 28 Procedure, is amended to read:

29 (1) Failure to Comply with Discovery Rule or Order. **In addition to**
 30 **any other consequences provided in statute or these rules, if** [IF] at any time
 31 during the course of the proceedings it is brought to the attention of the court that a

1 party has failed to comply with an applicable discovery rule or an order issued
 2 pursuant thereto, the court shall order such party to permit the discovery of material
 3 and information not previously disclosed or enter such other order as it deems just
 4 under the circumstances.

5 * **Sec. 23.** The uncodified law of the State of Alaska is amended by adding a new section to
 6 read:

7 DIRECT COURT RULE AMENDMENT. Rule 16, Alaska Rules of Criminal
 8 Procedure, is amended by adding new subsections to read:

9 (g) **Mandatory disclosure of expert witnesses.**

10 (1) No later than 45 days before the first trial date set by the court, the
 11 prosecution and defense shall provide opposing counsel with the following
 12 information:

13 (A) the prosecution shall provide the defense with the name,
 14 address, telephone number, and curriculum vitae of any expert witness

15 (i) that the prosecution may call at trial or other court
 16 proceeding;

17 (ii) who has performed work, other than solely for the
 18 purpose of trial preparation, in connection with the case;

19 (B) the defense shall provide the prosecution with the name,
 20 address, telephone number, and curriculum vitae of any expert witness that the
 21 defense may call at trial or other court proceeding.

22 (2) At the time of disclosure under (1) of this rule, each party shall
 23 provide the opposing party with a written report by the expert witness made in
 24 connection with the case. If a written report is not made by the expert, or the written
 25 report does not provide fair notice of the expert's opinion and the basis for the opinion,
 26 counsel shall provide a good faith written description of the substance of the proposed
 27 testimony. The written description may be used for cross-examination of the expert to
 28 the same extent as a report by the expert. The written description by counsel shall
 29 include the expert's opinion and the basis for the opinion. Upon request, counsel shall
 30 make the expert available for a telephonic or in-person deposition or recorded
 31 interview, with fees for the expert being paid by the party that has retained the expert.

1 (3) If a party retains an expert in response to discovery exchanged
 2 under (1) and (2) of this subsection, the party's counsel shall provide opposing counsel
 3 with the information described in (1) of this subsection within 15 days, or 30 days
 4 before trial, whichever is later. A written report by the expert or the written
 5 description by counsel under (2) of this subsection must be provided to opposing
 6 counsel at a time before trial set by the court.

7 (4) The disclosure requirements in this subsection do not apply to
 8 peace officers and other crime investigators regarding their on-scene observations, and
 9 conclusions drawn from their observations, if (A) their observations are made in the
 10 normal course of duties at or near the time of the offense; (B) their conclusions are
 11 based on their training and experience; and (C) the witness prepared a written report
 12 that was exchanged in discovery under this rule. In this paragraph, "other crime
 13 investigator" means a person retained or employed by a party to interview witnesses
 14 and gather evidence.

15 (5) At any time in the course of the proceedings, if it is brought to the
 16 attention of the court that a party has failed to comply with the requirements of this
 17 subsection or an order issued under it, the court

18 (A) shall order the nondisclosing party to provide the
 19 information required to be disclosed;

20 (B) if requested, shall grant a party a continuance to investigate
 21 or otherwise respond to the undisclosed material or information;

22 (C) if disclosure under (1) and (2) of this subsection is not
 23 complete within seven days before trial, or disclosure under (3) of this
 24 subsection is not made at the time ordered by the court, shall prohibit the
 25 nondisclosing party from presenting the witness's testimony.

26 (h) **Definition.** In this rule, if disclosure is required at a specified time before
 27 trial, "trial" means the first day of jury selection or, if there is no jury, the first day on
 28 which testimony is presented.

29 * **Sec. 24.** The uncodified law of the State of Alaska is amended by adding a new section to
 30 read:

31 DIRECT COURT RULE AMENDMENT. Rule 412, Alaska Rules of Evidence, is

1 amended to read:

2 **Rule 412. Evidence Illegally Obtained.** Evidence illegally obtained shall not
3 be used over proper objection by the defendant in a criminal prosecution for any
4 purpose except:

5 (1) a statement illegally obtained in violation of the right to warnings
6 under *Miranda v. Arizona*, 384 U.S. 436 (1966), may be used in a prosecution for
7 perjury if the statement is relevant to the issue of guilt or innocence **or to impeach the**
8 **person who made the statement** [AND] if the prosecution shows that the statement
9 was otherwise voluntary and not coerced; and

10 (2) other evidence illegally obtained may be admitted in a prosecution
11 for perjury if it is relevant to **the** issue of guilt or innocence **or to impeach a witness**
12 [AND] if the prosecution shows that the evidence was not obtained in substantial
13 violation of rights.

14 * **Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to
15 read:

16 DIRECT COURT RULE AMENDMENT. Rule 609(b), Alaska Rules of Evidence, is
17 amended to read:

18 (b) **Time Limit.** Evidence of a conviction under this rule is inadmissible if a
19 period of more than five years has elapsed since the date of **unconditional discharge**
20 **from** the conviction. The court may, however, allow evidence of the conviction of the
21 witness other than the accused in a criminal case after more than five years have
22 elapsed if the court is satisfied that admission in evidence is necessary for a fair
23 determination of the case.

24 * **Sec. 26.** The uncodified law of the State of Alaska is amended by adding a new section to
25 read:

26 DIRECT COURT RULE AMENDMENT. Rule 803, Alaska Rules of Evidence, is
27 amended by adding a new paragraph to read:

28 (24) **Domestic Violence Report.** A statement reporting or describing
29 a crime involving domestic violence made within 24 hours of the alleged offense,
30 either by the alleged victim or by another person who saw or heard the offense.

31 * **Sec. 27.** The uncodified law of the State of Alaska is amended by adding a new section to

1 read:

2 REPEAL OF COURT RULES. Rules 16(b)(1)(B) and 16(c)(4), Alaska Rules of
3 Criminal Procedure, are repealed.

4 * **Sec. 28.** The uncodified law of the State of Alaska is amended by adding a new section to
5 read:

6 INDIRECT COURT RULE AMENDMENT. AS 12.45.117(a), added by sec. 7 of this
7 Act, has the effect of changing Rule 404, Alaska Rules of Evidence, by requiring that
8 evidence of prior convictions or stipulations made by the defendant of the prior conviction,
9 when the prior convictions are an element of an offense, be admissible in the prosecution's
10 initial presentation of its case.

11 * **Sec. 29.** The uncodified law of the State of Alaska is amended by adding a new section to
12 read:

13 CONDITIONAL EFFECT. AS 12.45.117(a), added by sec. 7 of this Act, takes effect
14 only if sec. 28 of this Act receives the two-thirds majority vote of each house required by art.
15 IV, sec. 15, Constitution of the State of Alaska.

16 * **Sec. 30.** The uncodified law of the State of Alaska is amended by adding a new section to
17 read:

18 APPLICABILITY. (a) The changes made in secs. 1 - 5, 14, and 18 - 20 of this Act
19 apply to offenses committed on or after the effective date of this Act.

20 (b) The changes made in secs. 6 - 13, 15 - 17, and 21 - 29 of this Act apply to criminal
21 proceedings for offenses committed before, on, or after the effective date of this Act.

22 * **Sec. 31.** This Act takes effect July 1, 2003.