

**HB**

**25**

**HFIN**

**FILE**

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. CSHB 25 (FIN)

Title: "An Act revising Rule 14, AK. Rules of Criminal Procedure, relating to discovery...."  
Sponsor: Representative Parnell  
Requestor: \_\_\_\_\_

Dept. Affected Public Safety  
BRU: DPS Statewide  
Components: Commissioner's Office  
Serial # 523

**EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)**

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants, Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
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REVENUE	0.0	0.0	0.0	0.0	0.0	0.0
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**FUNDING: (THOUSANDS OF DOLLARS)**

General Fund	0.0	0.0	0.0	0.0	0.0	0.0
Federal Fund	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS :**

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

**ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)**

see attached analysis

Prepared by: House Finance Committee  
Rep. Mark Hanley, Co-Chair *MH*  
Rep. Richard Foster, Co-Chair *RF*

Date: 1/25/96  
Phone: 465-4939  
Phone: 465-3789

FISCAL NOTE

STATE OF ALASKA  
1995 LEGISLATIVE SESSION

Bill Version: CSHB 25 (JUD)  
(H) Publish Date: 3/29/95

Revision Date: \_\_\_\_\_  
Title: "An Act revising Rule 16, Alaska Rules of Criminal Procedure relating to discovery"  
Sponsor: Representative Parnell  
Requestor: Representative Porter

Department Affected: Administration  
BRU: Public Defender Agency  
Component: Public Defender Agency  
COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES	364.7	380.7	397.4	414.8	433.0	452.0
TRAVEL	6.0	6.0	6.0	6.0	6.0	6.0
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	370.7	386.7	403.4	420.8	439.0	458.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ( )						
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FUND SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	370.7	386.7	403.4	420.8	439.0	458.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	370.7	386.7	403.4	420.8	439.0	458.0

Estimate of any current year (FY 95) cost: \$ 0

POSITIONS:

FULL-TIME	6.0	6.0	6.0	6.0	6.0	6.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared by: John B. Salemi, Director *John B. Salemi*  
Division: Public Defender Agency

Phone: (907) 264-4412  
Date: \_\_\_\_\_

Approved by Commissioner: Mark Bover *Mark Bover*  
Agency: Department of Administration

Date: 2/3/95

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FISCAL NOTE

STATE OF ALASKA  
1995 LEGISLATIVE SESSION

BILL NO. CSHB 25

ANALYSIS: (continued)

This bill proposes a profound change in the way criminal cases are litigated in Alaska. Under current court rule, the defense is entitled to all relevant materials concerning a case which is in the possession or control of the police/prosecutor. Under this proposal a defendant will receive full discovery only if he or she agrees to turn over information to the prosecution concerning the defense case.

The State of Alaska has long had a plea bargaining ban. Additionally, Alaska has strict sentencing provisions as regards mandatory sentences and enhanced sentences for repeat offenders. Parole release is restricted in many instances and good time deductions are not as liberal as in other jurisdictions. Ordinarily the combination of these factors would create more litigation of criminal matters. Fortunately, Alaska's full discovery provisions under Criminal Rule 16 provide the defense with an opportunity to review and evaluate the prosecution's case. Specifically, a defendant and his/her lawyer can make a knowing determination as to the propriety of pleading guilty versus exercising trial rights because of the full fund of information which is required to be provided under the current rule. As a result, more than 90 percent of Public Defender (PD) clients plead guilty or no contest.

If the rule is changed some percentage of criminal defendants will choose not to participate in reciprocal discovery. The effects will be as follows:

1. Fewer dispositions at the felony intake stage;
2. More pretrial hearings, including evidentiary hearings to "discover" facts;
3. More discovery disputes, involving lawyer and court time;
4. More gamesmanship generally with respect to criminal litigation; and
5. More trials (the most labor-intensive and costly component of criminal litigation).

It is difficult to determine to what extent individuals will opt out of the receipt of discovery from the prosecution. Until there is an experiential basis for making such a determination, the PD takes a very conservative approach to fiscal impact. No additional lawyers or clerical support are being requested. At the minimum, however, each of the 13 PD offices will need investigative support. Currently there are five offices which have no investigator position. Therefore, five investigators will be added to accommodate these offices. Additionally, the Anchorage PD office will require one additional investigator given the high volume caseload in that office location.

FISCAL ANALYSIS

6 Investigator II

Anchorage	51.5	
Sitka	51.5	
Kotzebue	71.0	
Kodiak	55.7	
Barrow	71.0	
Dillingham	<u>64.0</u>	
	364.7	
Personal Services		364.7
Travel		<u>6.0</u>
TOTAL		370.7

Position Title Investigator II		No. of Positions 6	Range / Step 16A	Barg. Unit GGU
Time Status PFT	Staff Months 72	Location MEA, DAA EBA, ARA, KAA, CAA.		Election District 10-26, 2, 37, 6, 37, 39
TYPE OF EXPENDITURE		AMOUNT		
Salary		262,404		
Benefits		102,274		
Premium Pay				
Other				
Total Personal Services	0	364,678		
Travel		6,000		
Contractual				
modities				
Equipment				
Other				
Total Cost		370,678		
FUNDING SOURCE FOR TOTAL COST				
Federal Receipts	1002			
G.F. Match	1003			
General Fund	1004	370,678		
I-A Receipts	1007			
CIP Receipts	1061			
Other				

**Justification**  
 These six investigator positions will be necessary to meet the increased demands for defense investigation where the defendant has "opted out" the reciprocal discovery provisions. In those cases the defense lawyer/defendant will not have the benefit of police reports, witness statements, and other discovery which would ordinarily be used to prepare and evaluate the strength of the prosecution's case. Instead, the defense attorney will have to rely on defense staff investigators to interview witnesses and gather other factual information concerning the case. Except for the Anchorage position, these new positions are for PD offices where there is no investigator position.

**BUDGET ANALYSIS:**

6 Investigators II

Anchorage	51.5
Sitka	51.5
Kotzebue	71.0
Kodiak	55.7
Barrow	71.0
Dillingham	<u>64.0</u>

364.7

Personal Services	364.7
Travel	<u>6.0</u>
TOTAL	370.7

8/eg95/17/eslib25np.kp6

**Request For  
New Position**

AGENCY ADMINISTRATION

BRU PUBLIC DEFENDER AGENCY

COMPONENT PUBLIC DEFENDER AGENCY

**FY 96**

Page 3 of 3  
Revised Date:

Adopted  
1/25/94

9-LS0146N ✓  
Luckhaupt  
1/12/96

CS FOR HOUSE BILL NO. 25( )  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
NINETEENTH LEGISLATURE - SECOND SESSION

BY

Offered:  
Referred:

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, the victim, and the prosecution,

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

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

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

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

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

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

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

10 (2) These needs can be served by

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

12 (ii) simpler and more efficient procedures; and

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

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

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

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

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

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

30 (5) any record of prior criminal convictions of the defendant and of  
31 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 defendant as to the offense  
6 or would tend to reduce the defendant's punishment therefor;
- 7 (8) any relevant material or information relating to the guilt or  
8 innocence of the defendant that has been provided by an informant, and any electronic  
9 surveillance, including wiretapping, of conversations to which the defendant or the  
10 defendant's attorney was a party, or of premises of the defendant or the defendant'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 defendant;
- 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 defense with any  
28 written report or written statement of experts made in connection with the case; with  
29 respect to each expert the prosecution is likely to call at trial or another court  
30 proceeding, (i) the prosecution shall also provide to the defendant the address, phone  
31 number, and a curriculum vitae of the expert, and (ii) if a written report by the expert

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

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

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

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

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

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

27 (4) any relevant material or information regarding the relationship, if  
28 any, of witnesses to defense counsel and the defendant, including the nature and  
29 circumstances of any agreement, understanding, or representation between the defense  
30 and the witness that constitutes an inducement for the cooperation or testimony of the  
31 witness; however, the defense does not have to disclose any payments or provisions

1 for witness travel, housing, or meals in order to enable the witness to attend a specific  
2 court proceeding;

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

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

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

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

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

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

8 (d) Regulation of Discovery.

9 (1) Timing of Discovery.

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

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

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

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

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

30 (3) Additional or Newly Discovered Information. If, subsequent to  
31 compliance with these rules or orders issued pursuant thereto, a party discovers

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

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

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

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

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

13 (cc) an adoption record;

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

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

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

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

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

31 (iii) Notwithstanding a defendant's status as co-counsel,

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

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

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

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

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

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

29 or

30 (ii) any portion of any showing of cause for denial or regulation  
31 of disclosure to be made to the court in camera ex parte; a record shall be

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

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

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

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

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

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

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

23 (e) Sanctions.

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

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

1 sanctions by the court.

2 (f) Omnibus Hearing.

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

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

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

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

13 (i) ensure that discovery under this rule is complete;

14 (ii) rule on any pending motions which are ripe for decision;

15 (iii) schedule any necessary evidentiary hearings; and

16 (iv) obtain case management information from the parties,  
17 including the expected length of trial, the likelihood of trial, and any  
18 anticipated scheduling difficulties.

19 (g) Non-Testimonial Identification Procedures.

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

24 (i) an offense has been committed by one of several persons  
25 comprising a narrow focal group that includes the subject person;

26 (ii) the evidence sought may be of material aid in identifying  
27 who committed the offense; and

28 (iii) the evidence sought cannot practicably be obtained from  
29 other sources.

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

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

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

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

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

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

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

12 (i) As used in this rule,

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

15 (2) "written or recorded statement" means

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

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

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

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

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

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

## Discovery

The Network supports the concept of reciprocal discovery. We should not try by surprise, but rather conduct a search for truth. Such a search would be better able to reach its goal if each seeker has the necessary information to perform his part of the search as thoroughly as possible.

We do have a significant concern which the committee substitute ~~will~~ addresses and although we would prefer stronger language, we are ~~willing to accept~~ the language in the CS.   
*will accept* ~~support~~

Our concern is over a victim's right to confidentiality. In 1992, the legislature passed a law providing for privileged communication between the victim of domestic violence or sexual assault, and a victim counselor. Approximately ten states that have established privilege for domestic violence and sexual assault victims have absolute privilege.

Alaska is one of several states that has established privilege with exceptions. The exceptions primarily address suspected child abuse and child cases, excited utterances, and circumstances in which the victim may have committed a crime.

Only two states require an in-camera hearing upon defense submission of a pretrial discovery motion. HB25 adds Alaska to this list. We hope enough safeguards surround the opportunity for in-camera review so that the privilege remains viable and victims will continue to come forward to seek help in ending the violence being perpetrated against them.

~~Leg committee support CS~~

# HOUSE COMMITTEE REPORT

(11)

Date Referred: March 29, 1995

FURTHER REFERRALS:

Date of Committee Action: 1/25/96

The FINANCE Committee considered:

HB 25

HOUSE BILL NO. 25

CRIMINAL DISCOVERY RULES

"An Act revising Rule 16, Alaska Rules of Criminal Procedure, relating to discovery and inspection in criminal proceedings, to adopt the comparable federal rule."

recommends it be replaced with the following committee substitute CSHB 25 (Fin)  the same title  a new title

additional referral to \_\_\_\_\_ Committee  
 attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept) \_\_\_\_\_ APPROVES PREVIOUS: (Dept/Date) \_\_\_\_\_

fiscal note(s) \_\_\_\_\_  fiscal note(s) \_\_\_\_\_

5  zero fiscal note(s) (2) DOA, 1-DPS 1-COURTS 1-LAW  zero fiscal note(s) \_\_\_\_\_

SIGNING WITH RECOMMENDATIONS		DP	DNP	NR	AM
<i>Mark Hanley</i>	Hanley	X			
<i>Terry Martin</i>	Martin	X			
<i>Jack Parnell</i>	Parnell	X			
<i>Vic Kohring</i>	Kohring	X			
<i>Bar Grussendorf</i>	Grussendorf	X			
<i>Peter Kelly</i>	Kelly	X			
<i>Mike Navarre</i>	Navarre	X			
<i>Gene Therriault</i>	Therriault	X			
<i>Richard [unclear]</i>	[unclear]	X			

CO-CHAIR'S SIGNATURE *Mark Hanley* *Richard [unclear]*  
Hanley

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. CSHB 25 (FIN)

Title: "An Act revising Rule 16. AK. Rules of Criminal Procedure. relating to discovery...."  
Sponsor: Representative Parnell  
Requestor: \_\_\_\_\_

Dept. Affected Public Safety  
BRU: DPS Statewide  
Components: Commissioner's Office  
Serial #: 523

**EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)**

OPERATING	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants, Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL	0.0	0.0	0.0	0.0	0.0	0.0
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REVENUE	0.0	0.0	0.0	0.0	0.0	0.0
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**FUNDING: (THOUSANDS OF DOLLARS)**

General Fund	0.0	0.0	0.0	0.0	0.0	0.0
Federal Fund	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS :**

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

**ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)**

see attached analysis

Prepared by: House Finance Committee  
Rep. Mark Hanley, Co-Chair *MH*  
Rep. Richard Foster, Co-Chair *RF*

Date: 1/25/96  
Phone: 465-4939  
Phone: 465-3789

# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. CSHB 25 (FIN )

Revision Date: \_\_\_\_\_  
 Title: "An Act revising Alaska Rule of Criminal Procedure 16,  
 relating to discovery and inspection in criminal proceedings..."  
 Sponsor: Rep. Pamell  
 Requestor: (H) Fin

Dept. Affected: Administration  
 BRJ: Office of Public Advocacy  
 Component: Office of Public Advocacy

COMPONENT SERIAL NO. 43

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0	0	0	0	0	0
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CHANGE IN REVENUES ( )	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

**FUND SOURCE:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: \$ -0-

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary.)

There is no fiscal impact to the Office of Public Advocacy.

Prepared by: Brant McGee, Public Advocate  
 Division: Office of Public Advocacy

Phone: 274-1684  
 Date: \_\_\_\_\_

Approved by Commissioner: Mark Boyer  
 Agency: Department of Administration

Date: 1/23/96

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# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. CSHB 25 (FIN)

Revision Date: 1/22/96  
 Title: "An Act revising Alaska Rule of Criminal Procedure 16, relating to discovery and inspection in criminal proceedings..."  
 Sponsor: Rep. Parnell  
 Requestor: (H) Fin

Dept. Affected: Administration  
 BRU: Public Defender Agency  
 Component: Public Defender Agency  
 COMPONENT SERIAL NO. 1631

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES	0	0	0	0	0	0
----------------------	---	---	---	---	---	---

CHANGE IN REVENUES ( )	0	0	0	0	0	0
------------------------	---	---	---	---	---	---

**FUND SOURCE:** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
OTHER						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY 96) cost: \$ -0-

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary.)

There is no fiscal impact to the Public Defender Agency.

Prepared by: John Salemi, Director  
 Division: Public Defender Agency

Phone: 264-4400  
 Date: \_\_\_\_\_

Approved by Commissioner: Mark Boyer *MP Boyer*  
 Agency: Department of Administration

Date: 1/23/96

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# FISCAL NOTE

Work Draft  
1/12/96

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. CSHB 25 ( )

Revision Date: <u>1/23/96</u>	Dept. Affected: <u>Department of Law</u>
Title: <u>"...revising Alaska Rule of Criminal Procedure 16. relating to discovery and inspection in criminal proceedings..."</u>	BRU: <u>Criminal Division</u>
Sponsor: <u>Representative Parnell</u>	Component: <u>Criminal Division</u>
Requester: <u>Representative Parnell</u>	COMPONENT SERIAL NO. <u>2085</u>

**Expenditures/Revenues** (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

FUND SOURCE	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

**POSITIONS**

POSITIONS	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

**ANALYSIS:** (Attach a separate page if necessary)

This bill imposes a duty on both the prosecution and the defense for making full and fair disclosure of information in criminal cases. This version of the bill differs from previous versions in that it is less burdensome on the defense. As we advised in our original fiscal analysis, of 1/23/95, the department believes that the bill will result in fairer verdicts and, in some cases, may avoid trials when the prosecution is given early notice of a viable defense. Consequently, the bill will not have a fiscal impact.

Prepared by: Richard I. Peques, Director  
 Division: Administrative Services Division  
 Approved by Commissioner: Bruce M. Botelho, Attorney General  
 Agency: Department of Law

Phone: 465-3672  
 Date: 1/23/96  
 Date: 1/23/96

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# FISCAL NOTE

STATE OF ALASKA  
1996 LEGISLATIVE SESSION

BILL NO. CSHB 25 (FIN)

Revision Date: 01/23/96 Dept. Affected: Alaska Court System  
 Title: An Act revising Rule 16, Alaska Rules of BRU: Trial Courts  
Criminal Procedure, relating to discovery Component: \_\_\_\_\_  
 Sponsor: Reps: Farnell, Porter  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 768

Expenditures/Revenues		(Thousands of Dollars)					
OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02	
PERSONAL SERVICES							
TRAVEL							
CONTRACTUAL							
SUPPLIES							
EQUIPMENT							
LAND & STRUCTURES							
GRANTS & CLAIMS							
MISCELLANEOUS							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

Fund Source		(Thousands of Dollars)					
1002 Federal Receipts							
1003 GF Match							
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0	
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other							
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	

Estimate of any current year (FY 96) cost: None

Positions						
Full-Time						
Part-Time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel *[Signature]* Phone: 264-8228  
 Agency: Alaska Court System Date: 01/23/96  
 Approved by: Arthur H. Snowden, II, Administrative Director *[Signature]* Date: 01/23/96  
 Agency: Alaska Court System

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## Proposed amendments to CSHB 25(JUD), version J:

Page 1 line 9: at the end of the line add "the victim and the prosecution"  
line 11: delete the entire line

In several places on pages 2 and 3, change the word "accused" to "defendant"

Page 2: line 17: following "inspection", change "and" to "or"  
line 27: following "trial," add "or which were obtained from or belong to the defendant,"

Page 3 line 26: Replace the entire subsection with:

(12) unless a different date is set by the court, as soon as known and no later than 45 days before trial, the prosecution shall provide the defense with any written report or written statement of experts made in connection with the case. With respect to each expert the prosecution is likely to call at trial or another court proceeding,

(A) the prosecution shall also provide to the defendant the address, phone number and a curriculum vitae of the expert, and

(B) if a written report by the expert is not made or is not adequate to provide fair notice of the expert's opinion and the basis for that opinion, (i) the prosecution shall provide the defendant with a written description of the substance of the proposed testimony, including the expert's opinion and the basis for that opinion and, (ii) upon request, the defense is entitled to conduct a telephonic or in-person deposition or recorded interview of the expert, at the expense of the defense.

Failure to provide timely disclosure under this subsection entitles the defendant to a continuance. If the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the prosecutor from calling the expert at trial or declaring a mistrial.

Page 4 line 10: replace "material and" with "and admissible"  
line 13: following "inspection" change "and" to "or"  
line 15: after "addresses" add ", and phone numbers, if known," in order to conform to similar provision in (b)(1).  
line 19: change "(c)" to "(b)"

Page 5 line 2: after "trial" add "in misdemeanor cases and 30 days in felony cases"  
line 8: Replace the entire subsection with:

(6) unless a different date is set by the court, as soon as known and no later than 30 days before trial, the defense shall provide the prosecution with the

address, phone number, curriculum vitae and any report or written statement of any expert witness likely to be called at trial or another court proceeding. With respect to each such expert, if a written report by the expert is not made or is not adequate to provide fair notice of the expert's opinion and the basis for that opinion, (i) the defense shall provide the prosecution with a written description of the substance of the proposed testimony, including the expert's opinion and the basis for that opinion and, (ii) upon request, the prosecution is entitled to conduct a telephonic or in-person deposition or recorded interview of the expert, at the expense of the prosecution.

Failure to provide timely disclosure under this subsection entitles the prosecution to a continuance. If the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the defense from calling the expert at trial or declaring a mistrial.

Page 7 line 19: replace "Incident" with "an incident"

Page 11 line 14: after the word "be" delete "represented by counsel or" and add "given the opportunity to be represented by counsel, including the public defender if the person qualifies under AS 18.85.100, or to"

lines 15-16: delete "give a specimen of handwriting"

line 27: after "guilt," add "or"

lines 27-28: delete "or establish bias on the part of a witness."

lines 28-29: replace "upon prior notice" with "after providing an opportunity to be heard"

line 31: switch positions of "provide" and "(i)"

line 32: add "provide" after "(ii)"

Page 12 line 2: delete "shall" and add "(iii)"

line 4: before "will" add "under (iii) of this subsection"

line 5: after "jury" delete the remainder of the sentence and add

", and the court shall determine how the records may be used, after taking into consideration, among other things the court may find appropriate, whether use of the records violates the right of privacy of the subject of the records, hampers the ability of the agency to collect records or violates the constitutional or statutory rights of crime victims."

line 16: delete "the substance of"

line 19: after the word "reports" add "or notes taken by police officers or investigators,"

Page 12 line 27: change effective date to "July 1, 1996"

HOUSE COMMITTEE REPORT

(7)

Date Referred: January 16, 1995

FURTHER REFERRALS:

Finance

Date of Committee Action: 3-24-95

The JUDICIARY Committee considered:

HB 25

HOUSE BILL NO. 25

CRIMINAL DISCOVERY RULES

"An Act revising Rule 16, Alaska Rules of Criminal Procedure, relating to discovery and inspection in criminal proceedings, to adopt the comparable federal rule."

recommends it be replaced with the following committee substitute CSHB 25 (JUD)  the same title  a new title

additional referral to \_\_\_\_\_ Committee

attached amendment(s)

ADOPTS: \_\_\_\_\_ Letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal note(s) Admin (PDA)

fiscal note(s) \_\_\_\_\_

zero fiscal note(s) Law, Pub Saf, Courts  zero fiscal note(s) \_\_\_\_\_

SIGNING WITH RECOMMENDATIONS	DP	DNP	NR	AM
<i>Don Bunde</i>	<input checked="" type="checkbox"/>			
<i>John P. ...</i>	<input checked="" type="checkbox"/>			
<i>...</i>	<input checked="" type="checkbox"/>			
<i>Brian D. Fortes</i>	<input checked="" type="checkbox"/>			

CHAIR'S SIGNATURE Brian D Fortes

# Alaska State Legislature

REPRESENTATIVE  
SEAN R. PARNELL



710 WEST 4TH AVENUE, SUITE 400  
ANCHORAGE, ALASKA 99501  
(907) 258-3104

While in Session  
STATE CAPITOL  
JUNEAU, ALASKA 99801  
(907) 465-2005 • FAX (907) 465-2013

## HOUSE OF REPRESENTATIVES

### SPONSOR STATEMENT House Bill 25

"An act revising Rule 16, Alaska Rules of Criminal Procedure, relating to discovery and inspection in criminal proceedings."

HB 25 changes Alaska Rules of Criminal Procedure to allow for reciprocal discovery between the prosecution and the defense, a system used in many other jurisdictions.

The Alaska Supreme Court's *Scott v. State* decision (No. 1968), handed down 20 years ago, created the most extreme discovery system in all 50 states and the only system that denied virtually all discovery to protect a persons constitutional right against "self-incrimination." This use of Section 9 (Alaska Constitution's "self-incrimination" clause modeled almost word for word after Article V of the US Constitution) to prevent discovery of non-defendant statements is completely out of step with federal and other state judicial practice.

The *Scott* decision was a "snapshot" in time that permanently froze the judicial beliefs of the 70's into Alaska law. Unfortunately this was at a time of extremes and not before or since has any court come remotely close to this type of opinion on "self-incrimination" and discovery. Given that the federal courts have only held "self-incrimination" to protect defendant statements and not expert or alibi witness names and addresses, and given that Alaska modeled its language after the federal "self-incrimination" clause, it is not unreasonable to interpret similarly for Alaska's discovery laws.

The "self-incrimination" clause was designed to protect defendants from coerced confessions by unscrupulous prosecutorial powers. Reciprocal discovery does not coerce a defendant's statement, but simply requires that if either the prosecution or defense is likely to use particular information in their case, apart from defendants statements, that they disclose it beforehand to

encourage timely and fair justice. This accelerated discovery notion has been articulated in many courts where some form of reciprocal discovery is used.

In practice, Alaska's current Rule 16 does not require the defense to divulge virtually any information to the prosecution, but allows for one-sided discovery by the defense, a most inequitable result. Alaska's rule enables defense attorneys to ambush the prosecution mid-trial with previously undisclosed evidence, which causes costly continuances of trials while the prosecution tries desperately to prepare for this new evidence. These delays can result in a failed case, not because of the innocence of the accused, but because the prosecution lacked the time to adequately prepare for this new evidence.

The Alaska Supreme Court recently adopted a new rule 16 (effective 7/95), which would establish partial reciprocal discovery for alibi defense and expert witnesses, saying that if you are likely to use this evidence than you should disclose it before trial in the interest of fair and speedy justice. However, discovery issues protected at the heart of Alaska Supreme Court's *Scott* decision did not change, and could not be changed by a simple court rule change. If the Alaska Supreme court wanted to overturn the *Scott* decision they would need a court case in which *Scott* was violated. This will never happen unless the court rules are changed by law to allow for complete reciprocal discovery. Since the Alaska supreme court has adopted reciprocal discovery, where it did not violate *Scott*, it seems appropriate to allow the courts the opportunity to complete the reciprocal discovery package.

HB 25 is motivated by the philosophy that justice is better served when both sides have full and free discovery in a timely and cost effective manner. I respectfully request your support.



# The CRIMINAL LAW REPORTER

Text No. 1

October 5, 1994

THE BUREAU OF NATIONAL AFFAIRS, INC.

Volume 56, No. 1

## ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY (THIRD EDITION)

Reprinted below are black letter American Bar Association Standards for Criminal Justice concerning Discovery. They were approved by the ABA's House of Delegates in August 1994.

The ABA's Criminal Justice Standards Committee, chaired by William H. Jeffress Jr., of Washington, D.C., and the Discovery Standards Task Force, chaired by Justice Ben F. Overton of the Florida Supreme Court, will be reviewing the proposed commentary to these Standards over the next year. The commentary is being prepared by Niki Kuckes of Miller, Cassidy, Larroca & Lewin in Washington, D.C. and by Professor Gerald Bennett of the University of Florida Law School. Upon completion, these Standards and supporting Commentary will be published in soft-cover by the ABA as part of the Third Edition ABA Standards for Criminal Justice.

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11-6.4 Custody of materials .....	2005
11-6.5 Protective orders .....	2005
11-6.6 Excision .....	2005
11-6.7 In camera proceedings .....	2005
Part VII. Sanctions .....	2005
11-7.1 Sanctions .....	2005

### PART I. GENERAL PRINCIPLES

#### Standard 11-1.1 Objectives of pretrial procedures

- (a) Procedures prior to trial should, consistent with the constitutional rights of the defendant:
- (i) promote a fair and expeditious disposition of the charges, whether by diversion, plea, or trial;
  - (ii) provide the defendant with sufficient information to make an informed plea;
  - (iii) permit thorough preparation for trial and minimize surprise at trial;
  - (iv) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving prior to trial any procedural, collateral, or constitutional issues;
  - (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.
- (b) 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.

#### Standard 11-1.2. Applicability

These standards should be applied in all criminal cases. Discovery procedures may be more limited than those described in these standards in cases involving minor offenses, provided the procedures are sufficient to permit the party adequately to investigate and prepare the case.

#### Standard 11-1.3. Definition of "statement"

- (a) When used in these standards, a "written statement" of a person shall include

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(i) any statement in writing that is made, signed or adopted by that person; and

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

(b) When used in these standards, an "oral statement" of a person shall mean the substance of any statement of any kind by that person, whether or not reflected in any existing writing or recording.

## PART II. DISCOVERY OBLIGATIONS OF THE PROSECUTION AND DEFENSE

### Standard 11-2.1. Prosecutorial disclosure

(a) The prosecution should, within a specified and reasonable time prior to trial, disclose to the defense the following information and material and permit inspection, copying, testing and photographing of disclosed documents or tangible objects:

(i) All written and all oral statements of the defendant or of any codefendant that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged, and any documents relating to the acquisition of such statements.

(ii) The names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person that are within the possession or control of the prosecution and that relate to the subject matter of the offense charged. The prosecution should also identify the persons it intends to call as witnesses at trial.

(iii) The relationship, if any, between the prosecution and any witness it intends to call at trial, including the nature and circumstances of any agreement, understanding or representation between the prosecution and the witness that constitutes an inducement for the cooperation or testimony of the witness.

(iv) Any reports or written statements of experts made in connection with the case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons. With respect to each expert whom the prosecution intends to call as a witness at trial, the prosecutor should also furnish to the defense a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

(v) Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which pertain to the case or which were obtained from or belong to the defendant. The prosecution should also identify which of these tangible objects it intends to offer as evidence at trial.

(vi) Any record of prior criminal convictions, pending charges, or probationary status of the defendant or of any codefendant, and, insofar as known to the prosecution, any record of convictions, pending charges, or probationary status that may be used for

impeachment of any witness to be called by either party at trial.

(vii) Any material, documents or information relating to lineups, showups, and picture or voice identifications in relation to the case.

(viii) Any material or information within the prosecutor's possession or control which tends to negate the guilt of the defendant as to the offense charged or which would tend to reduce the punishment of the defendant.

(b) If the prosecution intends to use character, reputation or other act evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used.

(c) If the defendant's conversations or premises have been subjected to electronic surveillance (including wiretapping) in connection with the investigation or prosecution of the case, the prosecution should inform the defense of that fact.

(d) If any tangible object which the prosecutor intends to offer at trial was obtained through a search and seizure, the prosecution should disclose to the defense any information, documents or other material relating to the acquisition of such objects.

### Standard 11-2.2. Defense disclosure

(a) The defense should, within a specified and reasonable time prior to trial, disclose to the prosecution the following information and material and permit inspection, copying, testing and photographing of disclosed documents and tangible objects:

(i) The names and addresses of all witnesses (other than the defendant) whom the defense intends to call at trial, together with all written statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness. Disclosure of the identity and statements of a person who will be called for the sole purpose of impeaching a prosecution witness should not be required until after the prosecution witness has testified at trial.

(ii) Any reports or written statements made in connection with the case by experts whom the defense intends to call at trial, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons that the defendant intends to offer as evidence at trial. For each such expert witness, the defense should also furnish to the prosecution a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

(iii) Any tangible objects, including books, papers, documents, photographs, buildings, places, or any other objects, which the defense intends to introduce as evidence at trial.

(b) If the defense intends to use character, reputation or other act evidence not relating to the defendant, the defense should notify the prosecution of that intention and of the substance of the evidence to be used.

(c) If the defense intends to rely upon a defense of alibi or insanity, the defense should notify the prosecution

tion of that intent and of the names of the witnesses who may be called in support of that defense.

#### **Standard 11-2.3. The person of the defendant**

(a) After the initiation of judicial proceedings, the defendant should be required, upon the prosecution's request, to appear within a time specified for the purpose of permitting the prosecution to obtain fingerprints, photographs, handwriting exemplars, or voice exemplars from the defendant, or for the purpose of having the defendant appear, move, or speak for identification in a lineup or try on clothing or other articles. Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place of such appearance should be given by the prosecuting attorney to the defendant and the defendant's counsel.

(b) Upon motion by the prosecution, with reasonable notice to defendant and defendant's counsel, the court should upon an appropriate showing order the defendant to appear for the following purposes:

(i) to permit the taking of specimens of blood, urine, saliva, breath, hair, nails, and material under the nails;

(ii) to permit the taking of samples of other materials of the body;

(iii) to submit to a reasonable physical or medical inspection of the body; or

(iv) to participate in other reasonable and appropriate procedures.

(c) The motion and order pursuant to paragraph (b) above should specify the following information where appropriate: the authorized procedure, the scope of the defendant's participation, the name or job title of the person who is to conduct the procedure, and the time, duration, place, and other conditions under which the procedure is to be conducted.

(d) The court should issue the order sought pursuant to paragraph (b) above if it finds that:

(i) the appearance of the defendant for the procedure specified may be material to the determination of the issues in the case; and

(ii) the procedure is reasonable and will be conducted in a manner which does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual; and

(iii) the request is reasonable.

(e) Defense counsel may be present at any of the foregoing procedures unless, with respect to a psychiatric examination, it is otherwise ordered by the court.

### **PART III. SPECIAL DISCOVERY PROCEDURES**

#### **Standard 11-3.1. Obtaining nontestimonial information from third parties**

(a) Upon motion by either party, if the court finds that there is good cause to believe that the evidence sought may be material to the determination of the issues in the case, the court should in advance of trial issue compulsory process for the following purposes:

(i) To obtain documents and other tangible objects in the possession of persons not parties to the case.

(ii) To allow the entry upon property owned or controlled by persons not parties to the case. Such process should be issued if the court finds that the party requesting entry has met the standard that the government would be required to meet to obtain access to the property at issue.

(iii) To obtain from a third party fingerprints, photographs, handwriting exemplars, or voice exemplars, or to compel a third party to appear, move or speak for identification in a lineup, to try on clothing or other articles, to permit the taking of specimens of blood, urine, saliva, breath, hair, nails, or other materials of the body, to submit to a reasonable physical or medical inspection of the body, or to participate in other reasonable and appropriate procedures. Such process should be issued if the court finds that:

(1) the procedure is reasonable and will be conducted in a manner which does not involve an unreasonable intrusion of the body or an unreasonable affront to the dignity of the individual the individual; and

(2) the request is reasonable.

(b) The motion and the order should specify the following information where appropriate: the authorized procedure; the scope of participation of the third party; the name or job title of the person who is to conduct the procedure; and the time, duration, place and other conditions under which the procedure is to be conducted.

(c) A person whose interests would be affected by the compulsory process sought should have the right and a reasonable opportunity to move to quash the process on the ground that compliance would subject the person to an undue burden, or would require the disclosure of material that is privileged or otherwise protected from disclosure, or would otherwise be unreasonable.

#### **Standard 11-3.2. Preservation of evidence and testing or evaluation by experts**

(a) If either party intends to destroy or transfer out of its possession any objects or information otherwise discoverable under these standards, the party should give notice to the other party sufficiently in advance to afford that party an opportunity to object or take other appropriate action.

(b) Upon motion, either party should be permitted to conduct evaluations or tests of physical evidence in the possession or control of the other party which is subject to disclosure. The motion should specify the nature of the test or evaluation to be conducted, the names and qualifications of the experts designated to conduct evaluations or tests, and the material upon which such test will be conducted. The court may make such orders as are necessary to make the material to be tested or examined available to the designated expert.

(i) The court should condition its order so as to preserve the integrity of the material to be tested or evaluated.

(ii) If the material is contraband material or a controlled substance, the entity having custody of the material may elect to have a representative present during the testing of the material.

## PART IV. TIMING AND MANNER OF DISCLOSURE

### Standard 11-4.1. Timely performance of disclosure

(a) Each jurisdiction should develop time limits within which discovery should be performed. The time limits should be such that discovery is initiated as early as practicable in the process. The time limit for completion of discovery should be sufficiently early in the process that each party has sufficient time to use the disclosed information adequately to prepare for trial.

(b) The time limits adopted by each jurisdiction should provide that, in the general discovery sequence, disclosure should first be made by the prosecution to the defense. The defense should then be required to make its correlative disclosure within a specified time after prosecution disclosure has been made.

(c) Each party should be under a continuing obligation to produce discoverable material to the other side. If, subsequent to compliance with these standards or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the other party should promptly be notified of the existence of such additional material. If the additional material or information is discovered during or after trial, the court should also be notified.

### Standard 11-4.2. Manner of performing disclosure

Disclosure may be accomplished in any manner mutually agreeable to the parties. Absent agreement, the party having the burden of production should:

(a) notify opposing counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed during specified reasonable times; and

(b) make available to opposing counsel at the time specified such material and information and suitable facilities or other arrangements for inspection, testing, copying, and photographing of such material and information.

### Standard 11-4.3. Obligation to obtain discoverable material

(a) The obligations of the prosecuting attorney and of the defense attorney under these standards extend to material and information in the possession or control of members of the attorney's staff and of any others who either regularly report to or, with reference to the particular case, have reported to the attorney's office.

(b) The prosecutor should make reasonable efforts to ensure that material and information relevant to the defendant and the offense charged is provided by investigative personnel to the prosecutor's office.

(c) If the prosecution is aware that information which would be discoverable if in the possession of the prosecution is in the possession or control of a government agency not reporting directly to the prosecution, the prosecution should disclose the fact of the existence of such information to the defense.

(d) Upon a party's request for, and designation of, material or information which would be discoverable if in the possession or control of the other party and which

is in the possession or control of others, the party from whom the material is requested should use diligent good faith efforts to cause such material to be made available to the opposing party. If the party's efforts are unsuccessful and such material or others are subject to the jurisdiction of the court, the court should issue suitable subpoenas or orders to cause such material to be made available to the party making the request.

(e) Upon a showing that items not covered in the foregoing standards are material to the preparation of the case, the court may order disclosure of the specified material or information.

## PART V. DEPOSITIONS

### Standard 11-5.1. Depositions to perpetuate testimony

(a) After an indictment or information upon which a defendant is to be tried is filed, upon motion of the defense or the prosecution, the court may order a deposition taken to perpetuate the testimony of a prospective material witness if the court finds that there is reason to believe that the witness will be unable to be present and to testify at trial because of serious illness or other comparably serious reason, and that it is necessary to take the witness's deposition to prevent a failure of justice. The motion should be verified or the grounds for the motion supported by affidavit.

(b) In the order for the deposition, the court may also require that any designated books, papers, documents or tangible objects, not privileged, be produced at the time and place of the deposition.

(c) The court should make provision for the defendant to be present at the taking of the deposition and should make such other provisions as are necessary to preserve the defendant's right to confrontation of witnesses.

(d) A deposition so taken and any evidentiary material produced at such deposition may be introduced in evidence at trial, subject to applicable rules of evidence. However, no deposition taken under this section should be used or read in evidence when the attendance of the deposed witness can be procured, except for the purpose of contradicting or impeaching the testimony of the deponent.

### Standard 11-5.2. Discovery depositions

(a) On motion of either the prosecution or the defense, the court should order the taking of a deposition upon oral examination of any person other than the defendant, concerning information relevant to the offense charged, but only upon a showing that:

(i) the name of the person sought to be deposed has been disclosed to the movant by the opposing party through the exchange of names and addresses of witnesses or has been discovered during the movant's investigation of the case; and

(ii) no writing, summarizing the relevant knowledge of the person sought to be deposed, adequate to prevent surprise at trial, has been furnished to the movant; and

(iii) the movant has taken reasonable steps to obtain a voluntary oral or written statement from the witness, but the witness has refused to cooperate in giving a voluntary statement; and

(iv) the taking of a deposition is necessary in the interests of justice.

(b) The defendant may not be present at the deposition unless the court orders otherwise for good cause shown.

(c) The procedure for taking a discovery deposition, including the scope of the examination, should be in accordance with express rules to be written for depositions in criminal proceedings.

(d) Unless otherwise stipulated by the parties, a discovery deposition should be admissible at a trial or hearing only for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(e) A person whose deposition is sought should have the right to move to quash on the ground that compliance would subject the person to an undue burden, or would require the disclosure of material that is privileged or otherwise protected from disclosure, or would otherwise be unreasonable.

## PART VI. GENERAL PROVISIONS GOVERNING DISCOVERY

### Standard 11-6.1. Restrictions on disclosure

(a) Disclosure should not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting attorney or the defense attorney, or members of the attorney's legal staff.

(b) Disclosure of an informant's identity should not be required where such identity is a prosecution secret and where a failure to disclose will not infringe the constitutional rights of the defendant. Disclosure should not be denied of the identity of witnesses to be produced at a hearing or trial.

(c) Disclosure should not be required where it involves a substantial risk of grave prejudice to national security and where a failure to disclose will not infringe the constitutional rights of the defendant. Disclosure should not be denied regarding witnesses or material to be produced at a hearing or trial.

(d) Disclosure should not be required from the defense of any communications of the defendant, or of any other materials which are protected from disclosure by the state or federal constitutions, statutes or other law.

(e) The court should have the authority to deny, delay, or otherwise condition disclosure authorized by these standards if it finds that there is substantial risk to any person of physical harm, intimidation, or bribery resulting from such disclosure which outweighs any usefulness of the disclosure.

### Standard 11-6.2. Failure of a party to use disclosed material at trial

The fact that a party has indicated during the discovery process an intention to offer specified evidence or to call a specified witness is not admissible in evidence at a hearing or trial.

### Standard 11-6.3. Investigations not to be impeded

Neither the counsel for the parties nor other prosecution or defense personnel should advise persons (other than the defendant) who have relevant material or infor-

mation to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor should they otherwise impede opposing counsel's investigation of the case.

### Standard 11-6.4. Custody of materials

Any materials furnished to an attorney pursuant to these standards should be used only for the purposes of preparation and trial of the case, and should be subject to such other terms and conditions as the court may provide.

### Standard 11-6.5. Protective orders

Upon a showing of cause, the court may at any time order that specified disclosures be restricted, conditioned upon compliance with protective measures, or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled is disclosed in sufficient time to permit counsel to make beneficial use of the disclosure.

### Standard 11-6.6. Excision

When some parts of material or information are discoverable under these standards and other parts are not discoverable, the discoverable parts should be disclosed. The disclosing party should give notice that nondiscoverable parts have been withheld and the nondiscoverable parts should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

### Standard 11-6.7. In camera proceedings

Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing, to be made in camera. A record should be made of both in court and in camera proceedings. Upon the entry of an order granting relief following a showing in camera, all confidential portions of the in camera portion of the showing should be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

## PART VII. SANCTIONS

### Standard 11-7.1. Sanctions

(a) If an applicable discovery rule or an order issued pursuant thereto is not promptly implemented, the court should do one or more of the following:

(i) order the noncomplying party to permit the discovery of the material and information not previously disclosed;

(ii) grant a continuance;

(iii) prohibit the party from calling a witness or introducing into evidence the material not disclosed, subject to the defendant's right to present a defense and provided that the exclusion does not work an injustice either to the prosecution or the defense; or

(iv) enter such other order as it deems just under the circumstances.

(b) The court may subject counsel to appropriate sanctions, including a finding of contempt, upon a finding that counsel willfully violated a discovery rule or order.



Rick Mystrom,  
Mayor

# ANCHORAGE POLICE DEPARTMENT

4501 South Bragaw Street • Anchorage, Alaska 99507-1599  
Telephone (907) 786-8500



Service since 1921

January 24, 1995

Representative Sean R. Parnell  
Alaska State Legislature  
Juneau, Alaska 99801-1182

Dear Representative Parnell:

The Anchorage Police Department supports House Bill 25, which is an Act revising Rule 16 of the Alaska Rules of Criminal Procedure. We feel that it is important and expeditious to the administration of justice that the rules relating to discovery and inspection in criminal proceedings conform to the comparable federal rules.

Sincerely,

Kevin M. O'Leary  
Chief of Police



## Alaska Women's Resource Center

111 W. 9th Avenue • Anchorage, Alaska 99501 • (907) 276-0528 • Fax: (907) 278-8944

January 22, 1996

VIA FAX

Representative Sean Parnell  
State Capitol, Room 515  
Juneau, AK 99801-1182

Dear Representative Parnell:

I am writing on behalf of the Alaska Women's Resource Center to express our support of House Bill No. 25.

For all citizens of the State of Alaska to enjoy a healthy and safe community in which to live, laws must be enforced in a thorough and timely manner. House Bill No. 25 addresses the sharing of information and evidence for the purpose of promoting a fair and expeditious disposition of the charges. This will not only facilitate the trial process, but it will also assure victims and non-victims in the community that perpetrators will be held accountable for their actions.

The Alaska Women's Resource Center favors House Bill No. 25 as a means of promoting fully informed and timely law enforcement for the protection of the citizens of Alaska.

Sincerely,

  
Diane J. Heard  
Executive Director