HB

25

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. HB 25

Revision Date:
Title: "An Act revising Rule 16, Alaska Rules of Criminal Procedure...discovery..."
Sponsor: Representative Parnell
Requester: Representative Parnell

Dept. Affected: Department of Law
BRU: Prosecution
Component: All
COMPONENT SERIAL NO. 0085-0090

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY95) cost: $ 0.0

POSITIONS

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 revises Rule 16, Alaska Rules of Criminal Procedure, relating to discovery and inspection of evidence in criminal proceedings and, in so doing, adopts the comparable federal rule. The bill will have the effect of providing full and fair discovery to both sides in a criminal proceeding, as opposed to the existing rule which allows only the defense to discover evidence held by the prosecution. Consequently, 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.

Richard I. Peques

Prepared by: Richard I. Peques, Director
Division: Administrative Services Division
Phone: 465-3672
Date: 1/23/95

Approved by Commissioner: Richard I. Peques for Bruce M. Botelho, Attorney General
Agency: Department of Law
Date: 1/23/95

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO: HB 25

Revision Date: _____ Dept. Affected: Public Safety

Title: "An Act revising Rule 16, Alaska Rules of Criminal Procedure, relating to discovery...." BRU: DPS Statewide

Component: Commissioner's Office

Sponsor: Representative Parnell

Requestor: (H) Judiciary COMPONENT SERIAL NO. 0523

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL EXPENDITURES	-0-	-0-	-0-	-0-	-0-	-0-
CHANGE IN REVENUES ( ) Revenue Code	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 95) impact: $ 0.00

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.)
No significant impact on the Division of Fish and Wildlife Protection.

Prepared By: Ken Bischoff Phone: (907) 465-4336

Division: Administrative Services Date: 01/25/95

Approved by Commissioner: Ronald L. Otte Date: 01/25/95

Agency: Ronald L. Otte, Dept. of Public Safety

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Luckhaupt
3/23/95

CS FOR HOUSE BILL NO. 25( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

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

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

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

Rule 16. Discovery.

(a) Objectives of Pretrial Discovery.

(1) Procedures before 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 before trial a procedural, collateral, or constitutional issue;

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

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

(vii) minimize the burden upon victims and witnesses.

(2) These needs can be served by

(i) full and free exchange of appropriate discovery;

(ii) simpler and more efficient procedures; and

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

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

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

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

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

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

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

trial;

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

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

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

(9) any relevant material or information regarding the relationship, if any, of witnesses to the prosecuting authority, 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; however, the prosecution does not have to disclose any payments or provision for witness travel, housing, or meals in order to enable the witness to attend a specific court proceeding;

(10) any relevant material and information regarding

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

(ii) the acquisition of statements from the accused;

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

(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 name, address, phone number, and curriculum vitae of any expert witness performing work in connection with the case, and (i) a written report by the expert, setting out the expert's opinion and the underlying basis of that opinion, or (ii) a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the

underlying basis of that opinion; however, notwithstanding Criminal Rule 15, if a written report by the expert has not been provided under (b)(12)(i) of this rule, the defense is entitled to conduct a telephonic or in-person deposition of the expert, at the expense of the defense; failure to provide timely disclosure shall entitle 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;

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

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

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

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

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

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

(5) unless a different date is set by the court, no later than 10 days before trial, notice of defenses if the defendant is likely to rely upon a defense of alibi, justification, duress, entrapment, or other statutory or affirmative defense; failure to provide timely notice shall entitle the prosecutor 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 defendant from asserting the designated defense;

(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 name, address, phone number, and curriculum vitae of any expert witness likely to be called at trial or another court proceeding, and (i) a written report by the expert, setting out the expert's opinion and the underlying basis of that opinion, or (ii) a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion; however, notwithstanding Criminal Rule 15, if a written report by the expert has not been provided under (c)(6)(i) of this rule, the prosecution is entitled to conduct a telephonic or in-person deposition of the expert, at the expense of the prosecution; failure to provide timely disclosure shall entitle the prosecutor 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 defendant from calling the expert at trial;

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

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

otherwise privileged;

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

(d) Regulation of Discovery.

(1) Timing of Discovery.

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

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

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

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

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

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

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

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

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

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

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

(cc) an adoption record;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Sanctions.

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

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

(f) Omnibus Hearing.

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

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

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

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

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

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

(iii) schedule any necessary evidentiary hearings; and

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

(g) Non-Testimonial Identification Procedures.

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

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

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

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

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

(i) appear in a line-up;

(ii) speak words, phrases or sentences relevant to the case for identification by witnesses;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of a scene;

(v) try on articles of clothing;

(vi) permit the taking of specimens of material under the person's fingernails;

(vii) permit the taking of samples of blood, hair, and other materials of the person's body which involve no unreasonable intrusion thereof;

(viii) provide specimens of the person's handwriting;

(ix) submit to a reasonable physical or medical inspection of the person's body.

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

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

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

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

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

(i) As used in this rule,

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

(2) "written or recorded statement" means

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

(ii) the substance of a statement of any kind made by a person that is embodied or summarized in a 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 or notes taken by the attorney.

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. CSHB 25 (JUD)

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. Pamell
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						
TOTAL OPERATING	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						
TOTAL	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
Agency: Department of Administration
Date: 1/23/96

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Rev: 12/95
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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. CSHB 25

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						
CHANGE IN REVENUES ( )						

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
Division: Public Defender Agency
Phone: (907) 264-4412
Date: _____

Approved by Commissioner: Mark Bover
Agency: Department of Administration
Date: 2/3/95

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Rev: 01/95
a/leg95/17/cshb25fn.kp6

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	64.0
	364.7

Personal Services	364.7
Travel	6.0
TOTAL	370.7

Position Title	No. of Positions	Range / Step	Barg. Unit
Investigator II	6	16A	GGU

Time Status	Staff Months	Location	Election District
PFT	72	EBA, ARA, KAA, CAA, MEA, DAA	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		
Commodities		
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	64.0
	364.7

Personal Services	364.7
Travel	6.0
TOTAL	370.7

8/leg95/17/cshb25np.kp6

Request For New Position

AGENCY ADMINISTRATION

BRU PUBLIC DEFENDER AGENCY

COMPONENT PUBLIC DEFENDER AGENCY

FY 96

Revised Date:

Specific Issues/Concerns

Section 1, Page 2, line 19--This subsection contains the requirement that the prosecutor provide information regarding persons who have knowledge regarding relevant facts of the case. Absent is the requirement that the phone numbers of these individuals be given to defense. This is a particularly important consideration given the dearth of investigation resources the Public Defender Agency has available. Five PD offices have no investigator whatsoever. Two offices have only a half-time person.

This section should also require disclosure of "oral statements" (as defined on page 11 of the draft) of individuals having knowledge of relevant facts. This seems only fair since the defense has to provide the prosecution with oral statements from witnesses likely to be called by the defense. See page 4, line 7.

Page 2, line 25--Subsection (b)(4) relates to tangible items which the prosecuting attorney has a duty to "discover" to the defense. It should not be limited to items "that were obtained from or belonged to the defendant". It is suggested that phrase be removed. Please note that on page 4 under subsection (c) "Disclosure to the Prosecution" the defendant has an open-ended obligation with respect to disclosing tangible objects. It does not make sense that the defense should have a larger obligation than does the prosecution.

Page 2, line 28--Subsection (b)(5) is an appropriate place to add the requirement that the prosecutor provide defense with the list of witnesses likely to be called at trial. This witness list should be provided 45 days prior to trial. See ABA Standard 11-2.1 (a)(ii).

Page 3, lines 12 and 17--The phrase "upon request of defense counsel" should be removed from both subsection (9) and (10). These provisions should be self-executing, rather than be premised on a request from defense counsel. Having such language will only foster the practice of filing boiler plate discovery motions in every case by defense counsel. This creates unneeded/unwanted paperwork for the court.

Page 4, line 12--The provision that defense counsel provide the prosecution with records of prior criminal convictions relating to witnesses is not logical. First of all, the defense does not have as ready access to computer banks regarding criminal convictions as does the prosecution. Furthermore, it is not the defendant's role to provide the prosecution with potential impeachment evidence of its own witnesses. The prosecution has adequate resources for this purpose.

Page 4, line 14--Subsection (c)(4) requires that the defense disclose "character, reputation, or other act evidence". This is the kind of provision that is going to invite discovery disputes. These disputes will be contentious, protracted and time consuming for the court and the parties. It is one thing to require the defense to provide notice of potential defenses and witnesses likely to be called. This provision goes too far in that it invades defense tactical considerations, strategy and work product. This provision must be deleted.

Page 4, line 16--Subsection (c)(5) is a mystery to me. The defense cannot provide inducements in exchange for a witness' testimony. The provision should be deleted.

Page 4, line 21--This provision (6) embraces the "notice of defense" requirement. The final phrase "...including prohibiting the defendant from asserting the designated defense" is ill advised. The notice requirements are imposed on counsel. Penalizing a defendant because of counsel's failure to give proper notice is unfair and violative of basic notions of due process. That potential sanction should be removed from the rule.

Page 4, line 28--This is the "expert witness notice" requirement (7). It should be rewritten so that a written report has to be turned over by the defense only if one has been prepared. I suggest the language "if available" be added at line 31 after the words "written report". Not every expert witness or forensic consultant should be required to write a report if they fall into the category "likely to be called at trial". Whereas the prosecution does not have to pay for reports from the crime lab, the FBI or the state medical examiner, each report prepared for defense counsel costs money. For example, a psychological evaluation in written form typically costs between $750 and $900. This is in addition to the hourly charge levied against defense for evaluation time and testing. If the legislature wishes to increase the contractual budget of the Public Defender Agency, then this provision would not be so burdensome. It should be noted that the ABA Standard regarding this provision is written in a way which does not require that a written report be prepared. The ABA Standard, found at 11-2.1(iv) should be substituted for subsections (c)(7).

Page 5, line 21--Concerning the "timing of discovery". The prosecution should notify the defendant that discovery is complete by written notice. That way there will be no dispute as to said notification. It is suggested that at line 26 the words be added after "shall notify" "in writing". In this same paragraph there is a requirement that the defense provide discovery within ten days of receiving said notice. This is not a reasonable time frame--at least not for the Public Defender Agency--given present attorney and investigation resources. The PD has 11 investigator positions statewide. As noted above, several offices are without investigative support. There is no contractual money for investigation. Similarly, the Public Defender Agency has no paralegal positions. Unlike the prosecution and Public Safety, the Public Defender Agency receives no federal funds. In the smaller Public Defender offices I can envision the timing obligation which is presently imposed on defense counsel under this proposal passing without the attorney having even read the prosecution discovery, let alone having made an investigation request and obtaining defense investigation information. It should also be noted that there doesn't appear to be any absolute deadline for the prosecution to provide discovery. With the 120-day speedy trial rule as backdrop, I believe that the timing requirement for the defense should be triggered by the trial date. I suggest we use the same timing requirement as appears on page 4, subsection (c)(7) ("30 days before trial").

Page 6, line 6--Concerning the subsection "Advice to Refrain From Discussing Case", this provision should be strengthened. It should also contain a provision for sanctions. It is the Public Defender's experience that law enforcement agents and prosecution witness/victim

coordinators sometimes engage in the practice of discouraging prosecution witnesses from meeting with defense lawyers/investigators. If we are going to have free and fair discovery, this practice should be condemned. I suggest the following change, beginning at line 7 after "protective orders": "neither counsel for the prosecution or defense or any agent thereof (including paralegals, victim/witness coordinators, investigators, law enforcement agents) shall advise...". At the end of this paragraph it is suggested that a sanction provision be added. Something on the order of "Violation of this provision can result in the individual being held in contempt of court and/or paying a monetary sanction. If a monetary sanction is imposed, it shall be paid by the individual, not by the entity for whom he/she is employed".

Page 6, line 29--I don't understand why subsection (ee) is needed. Furthermore, the proscription is not clearly stated. Are you referring to a report within a presentence investigation report, or the entire presentence investigation report?

Page 7, line 6--Subsection (ii) seems to preclude an individual proceeding without counsel from obtaining the address or telephone number of prosecution victims/witnesses. How do they investigate their case? Maybe I'm missing something.

Page 11, line 14--This subsection involves a defendant making a request for confidential information not in possession of the prosecution. The proposal requires the court, if it determines that the information exists and is relevant, to turn it over not only to the defendant, but also to the prosecution. There may be instances where this information is not subject to disclosure to the prosecution, pretrial. Therefore the requirement that the material be turned over to both parties should be excised. The court should be given discretion as to the dissemination of these materials to the prosecution.

Page 11, lines 28-32--This is part of the "oral statement" definition. On line 32 the phrase "notes taken by the attorney" is used to preclude discovery of same. What does this provision mean in the context of situations where a prosecuting attorney interviews a witness pretrial, learns additional relevant information from said interview, and naturally takes notes regarding same. The notes are a summary of an oral statement of a prosecution witness. Shouldn't this be discoverable?

Conclusion

If the legislature is going to usher in a new era with respect to criminal discovery, and this draft is the vehicle, it is the Public Defender position that the above-mentioned comments/changes are in order. As we continue to consider this proposal we may find other sections which we feel need redrafting.

Thank you for the opportunity to comment on this work draft.

JBS:sh

TONY KNOWLES, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

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January 23, 1995

Alaska Supreme Court
303 K Street
Anchorage, AK 99501

Ref: Comments on Proposed Amendments to
Criminal Rule 16 Governing Discovery

Dear Justices of the Supreme Court:

You have requested comments on proposed amendments to Criminal Rule 16 which governs discovery in criminal cases. The amendments proposed by a majority of the Criminal Rules Committee tinker with the existing discovery procedure, but they do not achieve the state's primary objective: full and fair discovery by both sides in a criminal case. At the same time, state legislators have introduced several bills which would adopt most of the federal provisions governing discovery. (Copies of Senate Bill No. 10 and House Bill No. 25 are attached.)

I urge the Court to adopt the Department of Law's reciprocal discovery proposal (copy attached). I believe that this proposal represents a more balanced and equitable approach to the discovery issue than does either the current rule or the proposed legislation. Under the current rule and the committee's proposed amendments, discovery is essentially a one-way street where the government is required to provide everything to the defendant and the defendant provides little in return. As a result, the government is often ambushed at trial with surprise witnesses and other evidence. Reciprocal discovery, on the other hand, accords the same discovery rights to the government and to the defendant. The Department of Law's reciprocal discovery proposal is preferable to the federal rule contained in the legislative bills because it provides both the state and defendants with witness' statements as part of the discovery process.

The current rule is simply wasteful of resources and not fair to the government. Defendants and defense counsel are thoroughly familiar with the government's case by the commencement of trial because they have had weeks, and often months, to study the government's evidence. State and municipal prosecutors, on the other hand, know little, if anything, about witnesses the defendant will call at trial or the evidence the defendant will introduce. Often, the first time they learn the identity of a defense witness is when defense counsel states in open court before the jury, "The defense calls witness X." The police have little or no time to verify the witness' testimony, and the prosecutor has little time to prepare for cross-examination of the witness. This situation occurs not only with lay witnesses, but also with expert witnesses.

Two recent murder prosecutions -- State v. Pommenville and State v. Blevins -- illustrate one of the problems with the current rule. The defendant in Pommenville was charged with killing a child; his defense was that another individual (the child's mother) inflicted the fatal injuries. The defendant provided the prosecutor a copy of an expert witness' curriculum vitae before trial, but did not provide a report setting out the substance of the expert's proposed testimony. Defense counsel did not consent to an interview of the expert by the prosecutor until approximately one hour before the expert was to take the stand at trial. After speaking with the expert, the prosecutor determined that the state could not prove causation beyond a reasonable doubt and negotiated a mid-trial plea. Had the prosecutor been able to speak with the expert and negotiate the plea prior to trial, three weeks of the judge's time, the jurors' time, the prosecutor's time and the defense attorney's time could have been saved.

The defendant in Blevins was charged in Unalaska with murdering two people. He claimed that he was insane at the time and the court ordered that he be examined by a psychiatrist, as required by AS 12.47.070. The court also ordered bifurcation of the trial into a guilt phase and an insanity phase. The court entered an order prohibiting the state from reviewing both the reports of the defense *and* state psychiatrists until the conclusion of the guilt phase of the trial. Because this would have left little time for the prosecutor in rural Alaska to prepare for the insanity phase of the proceeding (and because the court of appeals denied the state's petition for review), a pretrial plea to a lesser charge was negotiated.

The proposed amendments to Criminal Rule 16 are inadequate to cure existing problems. The prosecutors had notice of the experts in the Pommenville and Blevins cases, but they did not have the experts' reports. The judge in the Blevins case ruled that she had the authority to keep the experts' reports from the prosecutor until the middle of a bifurcated trial even though the current version of Criminal Rule 16(c)(5) expressly states that the psychiatrist's report "shall be made available to both parties." It is unlikely that the proposed amendments will change existing practice because, as in the cases discussed above, judges could construe the amendments to allow defense counsel to withhold an expert's report until the middle of trial. And, the problem is exacerbated because some defense attorneys request expert witnesses to *not* write reports of their findings, specifically to avoid having to make discovery. In an affidavit filed in State v. Olson, 1SI-S93-55 Cr., defense attorney Galen Paine made the following statement:

> I have had clients evaluated prior to trial; I cannot remember when I have ever asked for a report from an expert, no matter what the area of expertise, when I expected that I would go to trial. I do not believe I have ever asked for a report. In my experience reports simply allow the state to impeach or to attack my expert on the basis of the report itself. If I had expected trial in this matter I would not have asked for reports.

The "notice of defenses" provision in the Criminal Rules Committee's majority proposal is of little utility because it provides no information regarding what witnesses or evidence will be used to support the defense. Prosecutors will still learn the identity of defense lay witnesses in the middle of trial. Within days or weeks of its adoption, the defense bar will likely draft a checklist of defenses and defense attorneys could then file notices with numerous defenses checked in hopes of sending the prosecution on wild goose chases during the 10 days prior to trial (I understand that this defense tactic was discussed during Criminal Rules Committee meetings). Since there is nothing in the rule that would discourage defense counsel from over-designating possible defenses, over-designation is likely to become common and the notice of defenses will become meaningless.

Because the current one-sided rule is not working, this court should adopt a rule that treats the parties more equitably. Reciprocal discovery does just that. The reciprocal discovery provisions proposed by the Department of Law gives the defendant the option of "opting in" to the discovery process; that is, the defendant elects whether to participate in discovery. If the defendant requests and obtains discovery from the government, the defendant must comply with the government's requests for similar information. If the defendant elects not to participate in the discovery process, he or she receives little information from the government. [Of course, under Brady v. Maryland, 373 U.S. 83 (1963), the government must provide exculpatory evidence to the defendant, even if the defendant does not wish to participate in reciprocal discovery.] Our proposal also provides grand jury transcripts regardless of a defendant's willingness to participate in discovery.

Although the reciprocal discovery proposals by the Department of Law and state legislators are similar, there are some differences. Under the legislative proposals, all that defendants would be entitled to is discovery of their statements and criminal records. Defendants could then choose which limited types of information they wished to obtain from the government. The bill sets out three categories of evidence in the government's possession which are subject to reciprocal discovery: (1) documents and tangible objects, (2) reports of examinations and tests, and (3) expert witnesses. Defendants can chose which, if any, of these categories they wish to obtain from the government. If a defendant requests only the government's documents and tangible objects, the defendant need only provide the government with defense documents and tangible objects. Statements of witnesses are simply not available to defendants under the legislative approach.

The Department of Law's proposal does not distinguish among the categories of evidence in the government's possession. A defendant who opts in to discovery would be entitled to all discoverable information, and would be required to disclose all discoverable information in the defense's possession.

Probably the most important difference between the two proposals is their treatment of statements of government witnesses and disclosure of defense witnesses. The legislative proposals do not provide for production of a statement of a government witness under any circumstance, so production to the defendant would be

governed by Alaska's Little Jencks Act contained in AS 12.45.050-.080. Under these statutory provisions, defendants are not entitled to production of a witness' statement until the witness testifies at a preliminary hearing or at trial. The government is similarly entitled to the statements of defense witnesses after the witness has testified. Lowery v. State, 762 P.2d 457, 459-60 (Alaska App. 1988); Evidence Rule 613. Because the legislative proposal does not contain a provision allowing the defendant to request the statements of government witnesses, the defendant is not required to provide the government with statements of potential defense witnesses.

The Department of Law's proposal, on the other hand, provides for reciprocal discovery of witnesses' statements. If the defendant requests statements of the government's witnesses, the defendant must supply the names, addresses and statements of potential defense witnesses. The Department believes that its proposal leads to more discovery of the facts by both sides and is, therefore, preferable to the legislative proposal.

Criminal Rule 16 does not aid in the search for the truth; it results in trials in which one side is prepared and the other side is ambushed. I respectfully request that this Court adopt the more balanced approach contained in the Department of Law's proposal on reciprocal discovery.

Very truly yours,

Bruce M. Botelho
Attorney General

PROPOSED REVISIONS TO CRIMINAL RULE 16

(a) Leave as is.

Renumber subsection (b) as (c) and insert the following:

(b) Notice of Election to Participate in Discovery. Within 10 days of arraignment, a defendant shall file a written notice stating whether he elects to participate in discovery under this rule. The failure to file a notice shall be deemed an election not to proceed under this rule. If the defendant elects not to proceed under this rule, discovery shall be governed by AS 12.45.050-.080. The filing of a notice to participate in the discovery process under this rule shall be deemed a waiver of the privilege against self-incrimination as to the information and materials required to be disclosed to the prosecution under subsection (d). If any defendant knowingly shares in discovery obtained by a codefendant under this rule, the defendant shall be deemed to have elected to participate in the discovery process.

Current subsection (c), renumbered subsection (d) would be amended as follows (new language in bold, old language in brackets):

[(c)] (d) Disclosure to the Prosecuting Attorney.

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

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

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

(iii) The evidence sought cannot practicably be obtained from other sources.

(2) Non-Testimonial Identification Procedures -- Scope. An order issued under

subsection (c)(1) of this rule may direct the person to do or submit to any and all of the following:

(i) Appear in a line-up;

(ii) Speak words, phrases or sentences relevant to the case for identification by witnesses;

(iii) Be fingerprinted;

(vi) Pose for photographs not involving reenactment of a scene;

(v) Try on articles of clothing;

(vi) Permit the taking of specimens of material under his fingernails;

(vii) Permit the taking of samples of blood, hair and other materials of his body which involve no unreasonable intrusion thereof;

(viii) Provide specimens of his handwriting;

(ix) Submit to a reasonable physical or medical inspection of his body.

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

(4) Reports or Statements of Experts. The trial court shall require that the prosecuting attorney be informed of and permitted to inspect and to copy or photograph any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons. [which are intended by the defendant to be used at trial.] Information obtained by the state under the provisions of this section

shall be used only for cross-examination or rebuttal of defense testimony.

(5) Notice of Intent to Raise Insanity Defense. Following substantial compliance by the state with section [(b)] (c) of this rule a defendant who intends to offer evidence of a defense of insanity shall inform the state of such intention at the time of plea or at such other time as may be designated by the trial court. The court [may] shall order the defendant to submit to a psychiatric examination by a psychiatrist or psychologist selected by the court, and the report shall be made available to both parties. Notice of intent to raise a defense of insanity shall not be commented on by the prosecution at trial.

(6) Defenses. The defendant shall inform the state of all defenses which the defendant intends to make at hearings or trial and shall furnish the state with the following material within the defendant's possession or control:

(i) The names and addresses of persons he may call as witnesses and their written or recorded statements or summaries of statements;

(ii) Any record of prior criminal convictions known to the defendant relating to the potential defense witnesses; and

(iii) Any books, papers, documents, photographs, or tangible objects the defense may use as evidence or for impeachment at a hearing or trial.

Renumber remaining subsections.

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 18, 1995

SUBJECT: Sectional Summary of HB 25. (Work Order No. 9-LS0146\A)

TO: Representative Sean Parnell
Attn: Richard Vitale

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have requested a sectional summary of the above-described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill repeals the current version of Alaska Rule of Criminal Procedure 16, dealing with discovery in criminal cases, and adopts in its place, as the Alaska rule, Federal Rule of Criminal Procedure 16.

GPL:glc
95-063.glc

SECTIONAL SUMMARY

NOTES TO DECISIONS

Failure to comply with production order results in striking testimony or in mistrial. — Failure of the state to comply with a production order results either in striking the testimony of the witness or in a mistrial. Wright v. State, 501 P.2d 1360 (Alaska 1972).

Destruction of notes prior to trial as device to avoid production. — See note to AS 12.45.060, Notes to Decisions.

Duty of state to preserve evidence. — See note to AS 12.45.060, Notes to Decisions.

Applied in Putnam v. State, 629 P.2d 35 (Alaska 1980).

Quoted in Miller v. State, 462 P.2d 421 (Alaska 1969).

Cited in Martinez v. State, 423 P.2d 700 (Alaska 1967).

Sec. 12.45.082. Definition of "statement". In AS 12.45.060 — 12.45.080 the term "statement," in relation to any witness called by the state, means

(1) a written statement made by the witness and signed or otherwise adopted or approved by the witness; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription of the statement which is a substantially verbatim recital of an oral statement made by the witness to an agent of the state and recorded contemporaneously with the making of the oral statement. (§ 6.09 ch 34 SLA 1962)

Revisor's notes. — Formerly AS 12.45.160. Renumbered in 1984.

NOTES TO DECISIONS

For the purposes of AS 12.45.060, "statement" is defined in subsections (1) and (2) of this section. Wright v. State, 501 P.2d 1360 (Alaska 1972).

Secs. 12.45.083 — 12.45.115. Mental disease or defect excluding responsibility and incompetency to stand trial; procedure. [Repealed, § 42 ch 143 SLA 1982. For present provisions, see AS 12.47.]

Sec. 12.45.120. Authority to compromise misdemeanors for which victim has civil action. If a defendant is held to answer on a charge of misdemeanor for which the person injured by the act constituting the crime has a remedy by a civil action, the crime may be compromised except when it was committed

(1) by or upon a peace officer, judge, or magistrate while in the execution of the duties of that office;

(2) riotously;

(3) with an intent to commit a felony;

(4) larcenously;

(5) against

(A) a spouse or a former spouse of the defendant;

(B) a parent, grandparent, child, or grandchild of the defendant;

MEMORANDUM

State of Alaska

Department of Law
Criminal Division

To: Laurie Otto
Deputy Attorney General
CDCO - Juneau

Date: March 3, 1995

DEPT. OF LAW
MAR 06 1995
CRIMINAL DIVISION

File No:

Telephone: 269-6250

From: Cynthia M. Hora Cindy
Asst. Attorney General
OSPA - Anchorage

Subject: Discovery in Criminal Cases: An Overview of the 50 States, the Feds, and the ABA

I have reviewed the discovery statutes and court rules in other states, the federal rules governing discovery, and the old and new ABA Standards. The provisions appear to fall into five broad categories:

(1) the essentially "one-way street" approach that Alaska has adopted where the state is required to turn over a substantial amount of information and the defendant's obligation is minimal;

(2) the "mandatory" reciprocal discovery approach in which disclosure is required by both parties (I drew no distinction between discovery obligations triggered automatically and by request; note that items subject to disclosure may not be as broad as what is required in Alaska under Criminal Rule 16);

(3) the "opt-in" approach adopted in Florida in which the defendant elects to participate in discovery; if the defendant chooses to obtain discovery of the government's case, the defendant must disclose information regarding the defense case;

(4) the "hybrid" approach adopted in Georgia where disclosure of some items is mandatory, but the defendant can opt-in to reciprocal discovery of other items; and

(5) the "case law" approach where no statute or court rule governs discovery, and the "rules" are developed through case law.

The characterizations of the various provisions are based upon my review of the statute or court rule that expressly dealt with discovery. If a statute or court rule existed, no research into case law interpreting the provision was conducted due to time constraints. If the state had different procedures for felony and misdemeanor cases, I looked only at the felony provisions. I also ignored special provisions for capital cases. Case law was examined when research disclosed no governing statute or rule. Many states address alibi and mental disease or defect defenses separate from other evidence such as statements, tangible objects and scientific reports (e.g. ballistics). I note the different treatment of alibi defenses in my summaries, but not mental disease or defect defenses.

I have attached copies of the relevant provisions or case law of all 50 states, the D.C. Circuit and federal rules, and the ABA Standards. The states are in alphabetical order; the D.C., federal and ABA rules are at the end. If someone in the Department uses this summary of what other states do, I suggest she or he skims several provisions to get a better idea of what's out there.

ONE - WAY STREET -- 3 states

ALASKA CRIMINAL RULE 16

> Defendant entitled to broad discovery; court can order defendant to produce reports of experts defendant intends to call at trial

TEXAS, CH. 39, art. 39.14

> Court can order discovery "upon motion of the defendant showing good cause therefore"; government not entitled to any discovery.

UTAH CRIMINAL RULE 16

> Mandatory disclosure by government of most items upon request of defendant; defendant's duty to disclose information regarding alibi governed by statute

MANDATORY -- 19 states and New ABA Standards

ARIZONA CRIMINAL RULE 15.1

Mandatory disclosure by both sides

ARKANSAS CRIMINAL RULE 17

Defendant entitled broad discovery if request made; government has right to request production of expert reports and notice of defenses and witnesses

CALIFORNIA PENAL CODE § 1053-54

Mandatory disclosure by government; mandatory disclosure of witnesses, reports and physical evidence by defendant

CONNECTICUT RULES § 731 et. seq.

Defense entitled to the following upon request: exculpatory evidence, tangible objects, expert reports, defendant's criminal record, statements of defendant and codefendants; government can request discovery of tangible objects; government can request names of alibi witnesses, when defendant produces, government must disclose names of its witnesses; court has discretion to order government to name witnesses

HAWAII CRIMINAL RULE 16

Government disclosure triggered by defendant's written request; defendant's disclosure triggered by government's written request

IDAHO CRIMINAL RULE 16

Mandatory disclosure of Brady material; each side obtains discovery from the other by filing a written request; the failure to make a written request is deemed a waiver of the right to discovery

ILLINOIS SUPREME COURT RULES 412 and 413

Government's discovery obligation triggered by defendant's request; defendant's obligation triggered by government's request; government's right to discovery does not appear to be conditioned on defense request

MAINE CRIMINAL RULES 16 & 16A

Mandatory disclosure by government of searches, identification of defendant, statements of defendant, and Brady material; both sides can request discovery; production not dependant on other side's request. See Rule 16A(b) for an interesting provision authorizing the court to order defense experts to prepare a written report.

MINNESOTA CRIMINAL RULE 9

Both sides can request discovery from the opposing side; government's right to discovery not conditioned on defendant's request

MISSISSIPPI CRIMINAL RULE 4.06

Defendant's request for discovery triggers mandatory reciprocal obligation; defendant's obligation to provide information on alibi defense triggered by government's request; after defendant's disclosure, government must

disclose information it may use to rebut the alibi defense

MISSOURI CRIMINAL RULE 25.03 et. seq.

Both sides entitled to discovery upon written motion or request by opposing side

MONTANA 46-15-322 et. seq.

Both sides entitled to discovery

NEW MEXICO CRIMINAL PROCEDURE 5-501 and 5-502

Automatic mandatory disclosure by prosecution and defendant

NEW YORK CRIMINAL PROCEDURE LAW § 240.10 et. seq.

Both sides entitled to discovery upon demand; disclosure of witness statements for both sides does not come into play until beginning of trial

NORTH CAROLINA § 15A-901 et. seq.

Both sides entitled to request discovery

OREGON 135.805 et. seq.

Mandatory disclosure by both sides

PENNSYLVANIA RULE 305

Mandatory disclosure of statements, identifications, and prior record of defendant, expert reports, tangible objects and information regarding electronic surveillance; mandatory

disclosure of alibi witnesses, which triggers government obligation to disclose witnesses to rebut alibi

VERMONT CRIMINAL RULES 16 and 16.1

Defendant entitled to discovery upon request; defendant must disclose names and addresses of witnesses if government makes request; court has discretion to order production of medical and scientific reports of defense experts

WASHINGTON CRIMINAL RULE 4.7

Automatic mandatory disclosure by prosecution and defendant

NEW ABA STANDARDS

Broad mandatory discovery for both sides

OPT-IN -- 6 states

FLORIDA RULE 3.220

Defendant elects to engage in reciprocal discovery by filing notice; government provides information, then defendant reciprocates

NEBRASKA CRIMINAL PROCEDURE §29-1912 et. seq.

If defendant requests discovery, court may condition order on defendant's disclosure; contains specific provision that defendant waives privilege against self-incrimination for purposes of reciprocal discovery provisions.

NEW JERSEY CRIMINAL RULE 3:10 et. seq.

If defendant makes written request for discovery, defendant must provide discovery to government; defendant is required to give notice and particulars, including names of alibi witnesses

OHIO CRIMINAL RULE 16

Defendant can request various items, such as documents and tangible objects, witnesses' names and addresses, reports of experts; defendant's request triggers reciprocal obligation for same item, but government must make request

RHODE ISLAND CRIMINAL RULE 16

Defendant can ask for discovery; if request is made, government can request discovery, including names of alibi witnesses

VIRGINIA RULE 3A:11

Defendant must move for court order for discovery; court required to condition order on defendant providing discovery to government, if government request discovery

HYBRID -- 20 states, D.C. Circuit and federal courts, Old ABA Standard

ALABAMA CRIMINAL RULE 16.1

Defendant entitled to discovery of statements made by defendant or codefendants; if defendant asks for discovery of tangible objects and expert reports, government can request the same of defendant

COLORADO CRIMINAL RULE 16

Defendant must give notice of alibi defense and witnesses; prosecution must disclose various items; court may order disclosure of expert reports and defense witnesses

DELAWARE CRIMINAL RULE 16

Mandatory disclosure of defendant's statements and criminal record; if defendant asks for discovery of other items, government entitled to like items upon request

GEORGIA §17-16-1 et.seq.

Mandatory disclosure of alibi witnesses upon request of prosecution; mandatory production of witness statements by both sides at least 10 days prior to hearing or proceeding at which the witness may testify; defendant can opt-in to discovery of other evidence in the possession of the prosecution, but this triggers reciprocal obligation

IOWA CRIMINAL RULE 13

Government must turn over defendant's statements and criminal record if defense makes request; if defendant asks for discovery of tangible objects and reports of experts, government may request like items

KANSAS §22-3212

Mandatory disclosure of defendant's statements. If defendant requests discovery of other information, defendant must provide discovery to government; defendant's disclosure of alibi defense and witnesses mandatory

KENTUCKY CRIMINAL RULE 7.24

Mandatory disclosure of defendant's statements and scientific test results; defendant can request disclosure of additional items, government can request reciprocal discovery

LOUISIANA CH. 5 ART. 716 et. seq.

Mandatory disclosure of defendant's statements, criminal record; defendant's request for documents and tangible objects, and expert reports triggers mandatory reciprocal disclosure of like items; government's request for alibi evidence triggers mandatory disclosure by defendant

MARYLAND RULE 4-263

Mandatory disclosure of Brady material, defendant's statements and information regarding searches and seizures; defendant's request triggers state's disclosure obligation with respect to other items; state's request triggers defendant's obligation; defendant need not ask first

MASSACHUSETTS CRIMINAL PROCEDURE RULE 14

Mandatory disclosure of defendant's statements, statements of grand jury witnesses and Brady material. Government can request disclosure of alibi witnesses; defendant may request discovery of other items; if defendant makes request and government say it also wants discovery, court orders reciprocal discovery. Good reporter's notes on reasoning for reciprocal discovery, etc.

NEW HAMPSHIRE RULE 99

Defendant must provide notice of alibi and alibi witnesses, triggering government's duty to disclose witnesses; court has discretion to order discovery to either or both sides

NEVADA 174.235

Mandatory discovery of defendant's statements; if defendant requests other discovery, state can request court to order reciprocal discovery

NORTH DAKOTA CRIMINAL RULES 16 and 12.1

Disclosure of defendant's statements and record upon request; if defendant asks for more information, prosecution can request like items; defendant must give notice of alibi and names of alibi witnesses and then government must disclose names of witnesses to rebut alibi

SOUTH CAROLINA CRIMINAL RULE 5

Mandatory disclosure of defendant's statements and prior criminal record; if defendant requests discovery of other items, government can ask for discovery; mandatory disclosure of alibi witnesses upon government's request

SOUTH DAKOTA Chapter 23A-13 and 23A-9

Mandatory disclosure of defendant's statements and criminal record upon written request of the defendant; if defendant asks to inspect tangible objects and review expert reports, defendant must comply with government's request for disclosure of like items; statements of prosecution witnesses are not discoverable

until the witness testifies at trial; defendant must disclose names of alibi witnesses upon government's request and government must then give defendant names of witnesses

TENNESSEE RULE 12.1

If government asks, defendant must disclose alibi witnesses, triggering government's disclosure of witnesses to rebut alibi; government must disclose defendant's statements and prior record; if defendant asks for discovery, government can request reciprocal discovery of like items

WEST VIRGINIA RULE 16

Mandatory discovery of defendant's statements and record; if defendant asks for other items, government entitled to discovery upon request

WISCONSIN 971.23

Mandatory of record and statements of defendant and statements of witnesses government plans to call at trial; mandatory disclosure of alibi witnesses; defendant's offer to give witness list to government triggers reciprocal discovery of witness lists

WYOMING CRIMINAL RULE 16.1 and 18

Defendant required to disclose alibi witnesses if asked; government must then provide names of witnesses to rebut alibi; government must disclose defendant's statements; defendant may ask for more and if court grants, government can request like items

D.C. CIRCUIT RULE 16

Mandatory disclosure of defendant's statements and record; if defendant asks for discovery of other items, government entitled to like items upon request

OLD ABA STANDARDS 11.1.1 - 11.4.8

Defendant's request triggers broad disclosure; if defendant requested discovery, government entitled to reports; government can request names of witnesses

FEDERAL CRIMINAL RULES 16 and 12.1

Defendant entitled to production of his/her statements and criminal record; if defendant requests production of tangible objects and reports, government gets reciprocal discovery; government can demand names of alibi witnesses, then it must disclose names of its witnesses; production of statements of witnesses governed by Jencks Act, 18 U.S.C. §3500

CASE LAW -- 2 states

INDIANA

No discovery rules, or statutes; recent case law indicates that court granted defendant's pretrial request for Brady material.

OKLAHOMA

Recent case law indicates that discovery in Oklahoma state criminal cases is primarily controlled by case law. Appellate court seems to adopt the occasional ABA Standard as the spirit strikes. Only statutory provisions require names and addresses of witnesses be

endorsed on information (22 O.S. 303) and that defendant receive copies of sworn statements of witnesses (22 O.S. 749)

MEMORANDUM

State of Alaska

Department of Law
Criminal Division

To: Christine Johnson
Court Rules Attorney

Date: December 8, 1994

File No:

Telephone: 269-6250

From: Cynthia M. Hora
Asst. Attorney General
OSPA - Anchorage

Subject: Minority Report on Amending Criminal Rule 16

Alaska's Criminal Rule 16 governing discovery was adopted in the mid-70's. It was modeled after the American Bar Associations Standards which favored broad disclosure by the government to the defendant, but only limited disclosure from the defendant to the government. The new proposed ABA Standards embrace a more balanced discovery procedure commonly referred to as "Reciprocal Discovery." The federal courts and various state courts are currently operating under reciprocal discovery provisions.

Alaska's current rule is not working. The government (the State of Alaska and various municipalities) gets sandbagged on a regular basis. The defendant who knows all of the cards in the prosecutor's hand can call witnesses whose names the prosecutor has not heard until the witnesses are called to the stand. Trial judges may grant a continuance to allow the state the opportunity to obtain information which could be used for meaningful cross-examination. Most of the time these continuances are too short to do more than run a criminal records check. Although Criminal Rule 16(d)(4) requires the defendant give advance notice to the government of the defendant's intent to call an expert, many defense attorneys claim they did not form the "intent" to call the expert until the night before or the morning the expert is called to the stand. The prosecutor again generally does not get a continuance of sufficient length to prepare a meaningful cross-examination. This is particularly true in the bush where the prosecutor's staff is small.

Many states have mandatory reciprocal discovery provisions. Such provisions are desirable because neither side is ambushed at trial. Such a provision cannot be adopted in Alaska, however, without overruling Scott v. State, 519 P.2d 774 (Alaska 1974). The Alaska supreme court in Scott considered the constitutionality of a trial court order requiring the defendant to provide discovery materials not currently listed in Criminal Rule 16(c).

The court held that the Alaska constitutional privilege against self-incrimination prohibits extensive prosecutorial discovery in criminal proceedings.

The proposed "Opt-in" version of reciprocal discovery complies with Scott. Under this proposal, a defendant would have the option of participating in the broad discovery currently allowed by Criminal Rule 16. If the defendant elected to participate in the Rule 16 discovery process, the defendant would file a notice of intent to participate in discovery, which would be deemed a waiver of his constitutional privileges against self-incrimination to the extent he would be required to produce to the state notices of defenses, names and addresses of witnesses, statements of witnesses, and reports of experts. Discovery in a case in which the defendant elects not to participate will be governed by AS 12.45.050-.080 (Alaska's Little Jencks Act).

A minority of the members of the Criminal Rules Committee believe that the "Opt-in" proposal is workable in Alaska and will not result in a significant increase in the number of trials. A similar provision is working in the federal courts and the number of trials vs. pleas is not unmanageable. Moreover, the number of trials might actually decrease because defendants' chances of winning at trial by ambush are removed.

The proposal will not result in more collateral attacks on convictions and more allegations of ineffective assistance of counsel. A large percentage of convicted defendants already file applications for post-conviction relief under the current rule. Some even inform the court they want to allege ineffective assistance of trial counsel before sentence is pronounced. This is due to the fact indigent defendants are automatically entitled to court-appointed counsel. A change in Criminal Rule 16 may change the specific complaints about a trial attorney's performance, but it will not have any impact on the number of post-conviction relief applications filed.

Lengthy mid-trial continuances will not become the norm. They do not occur in federal court, and they do not occur now in the Alaska courts when the state finds out about a witness or expert as the defense counsel calls the person to the stand.

The public is demanding a fair trial for both the accused and the government. Reciprocal discovery allows for the exchange of information and will result in trials with more reliable results

-- i.e. the guilty will not go free because the accused sandbagged the prosecution. Given the constraints imposed by the Scott decision, a reciprocal discovery provision in Alaska must contain an opt-in provision.

TO: Supreme Court
FROM: Criminal Rules Committee (majority report)
RE: Consideration of the Department of Law's opt-in/opt-out reciprocal discovery proposal
PREPARED BY: Marcia E. Holland
DATE: December 12, 1994

PROPOSAL:

The Department of Law submitted a proposal to the Criminal Rules Committee requesting that Criminal Rule 16 (which governs discovery in criminal prosecutions) be amended to provide for reciprocal discovery. The current rule places an obligation on the state to provide pretrial discovery to the defense, but only in limited circumstances must the defense provide pretrial discovery to the state. The Department of Law recognized that because of the decision in Scott v. State, 519 P.2d 744 (Alaska 1974), wherein the supreme court held that the Alaska constitutional privilege against self-incrimination prohibits prosecutorial discovery in criminal proceedings, the state would be able implement a reciprocal discovery rule only if the defendant waived his/her privilege against self-incrimination and opted into such a procedure.

If a defendant so chose, then under the state's proposal the current Criminal Rule 16 would govern disclosure by the state to the defense and proposed amendments to the rule would govern disclosure by the defendant to the state. Under the proposed amendments, a defendant would then be obligated to inform the state of all defenses to be used at hearings or trial, to provide the names and addresses of all witnesses which the defendant may call at trial or hearings as well as their written or recorded statements or summaries of statements, and provide any documents and tangible objects which the defense may use at trial.

If a defendant chose not to waive his/her privilege, then discovery would be governed solely by the Little Jencks Act, A.S. 12.45.050-.080. The state would also be obligated to provide any exculpatory discovery. Brady v. Maryland, 373 U.S. 83, 10 L.3d. 2d 215 (1963).

SUMMARY OF DISCUSSION:

The committee discussed the viability of recommending an opt-in/opt-out reciprocal discovery rule as a proposed rule change to Criminal Rule 16, but a majority of the committee recommended against doing so.

The committee first concluded that no incentive existed for a defendant to choose to opt into such a discovery process generally. A majority of criminal

defense attorneys contacted by committee members indicated that they would prefer operating under an opt-out procedure if given the choice between an opt-in or opt-out procedure. Little incentive existed under the state's proposal for a defendant to choose to waive his/her privilege against self-incrimination and opt into the reciprocal discovery process.

A discussion of the problems which arise when the criminal justice system operates solely or primarily on discovery provided by the state under the provisions of the Little Jencks Act, A.S. 12.45.050-.080, resulted in the committee concluding that the opt-in/opt-out procedure would be unworkable in state courts in Alaska.

The concerns as to the viability/efficiency of such an opt-out framework (where the defendant is entitled only to Little Jencks Act materials), included a discussion of how the current federal system works. The concerns were as follows.

First, more unreliable results may occur at trial--i.e., more innocent people may be convicted because of the varying abilities of and resources available to defense counsel to independently investigate the case and to evaluate the discovery received mid-trial. A corollary to this result is that two additional matters are likely to result. The number of claims of ineffective assistance against attorneys who have either less resources to prepare for trial or less skill to deal with the trial by surprise approach will increase and will have to be litigated. Also, post-conviction litigation about the reliability of the jury's verdict will increase (e.g., either through motions for new trial based on newly discovered evidence or based on other claims such as violations by the state of disclosure of Brady materials).

Second, the opt-out procedure fails to consider how to identify conflicts of interest in representation prior to trial. The procedure does not allow a defense attorney to identify conflicts of interest involving dual representation by the defense counsel (and his/her firm or agency) of state's trial witnesses and the defendant at an early stage of the process. Therefore, the system does not allow for conflict counsel to be appointed without disrupting the scheduled proceedings and trials (since the federal system does not have the high volume caseload, especially at the misdemeanor level, conflict issues involving potential witnesses/defendants rarely arise).

Third, mid-trial delays would become the norm--the delays necessitated by mid-trial resolution of what are now pretrial issues, the delays necessitated to afford defense counsel an adequate period of time to review the Little Jencks Act materials, delays necessitated by the appointment of conflict counsel, and the delays necessitated to conduct any necessary investigation and/or testing of any physical evidence or investigation/review of the testing performed by state expert

witnesses or independent retesting. Criminal defense practitioners in federal court indicated that it was not unusual to have week-long mid-trial continuances to deal with Jencks Act materials. These practitioners also pointed out that there are very few federal misdemeanor offenses prosecuted and that the types of federal felony offenses prosecuted are much more limited in scope than the types and varieties of state felony offenses prosecuted. Therefore, it is much easier to anticipate the nature of the government's case and prepare for trial with no pretrial discovery in federal prosecutions than it would be to do so in state prosecutions.

Discussion also focused on mid-trial continuances to allow the defense adequate time to deal with state expert witnesses--for example, at the misdemeanor level (e.g., with DWI intoximeter testing), the result could be that a two day trial would be delayed mid-trial for a substantial period of time to allow the defense to independently test any blood samples concerning which a state's witness is testifying. This problem is exacerbated by the reality that in Alaska testing facilities available to criminal defense attorneys often are located only in Anchorage or out of state (which adds lengthier mid-trial delay).

Additionally, resolution of issues concerning constitutional and statutory violations currently occurs prior to trial and with no disruption to the orderly administration of criminal justice. Moreover, the parties now have the option of avoiding a trial and taking an appeal directly to litigate a ruling on a dispositive issue in the case. See Cooksey v. State, 524 P.2d 1251 (Alaska 1974) and Oveson v. Anchorage, 574 P.2d 801 (Alaska 1978). It would likely become necessary to resolve such issues mid-trial (and with the jury on hold) under the opt-out procedures, making it unlikely that dispositive legal issues could be appealed without the expense of a trial.

Moreover, there is incentive for the Department of Law to ignore the mandatory language concerning timing of discovery found in the Little Jencks Act and to continue to provide pretrial discovery notwithstanding the proposed change. Criminal defense attorneys who practice in federal court indicated that the assistant U.S. Attorneys often violate the literal language of the Jencks Act which prohibits the government from turning over the discoverable materials until after the witness has testified on direct examination. The government will frequently provide discovery pretrial in those cases that the government wants to resolve short of trial.

The probability that the state would ignore the same mandatory language found in the Alaska Little Jencks Act, A.S. 12.45.050, and supply discovery prior to trial in those cases which the state would like to resolve without the necessity of a trial is strong statewide and is especially strong in Anchorage given the longstanding institutionalized pre-indictment procedures established there.

Thus, the committee recognized that a proposed rule change to an opt-in/opt-out reciprocal procedure may be ignored in a large number of criminal cases if the pre-indictment procedures are to have continued viability.

Similarly, the incentive in the high volume area of misdemeanors to resolve cases short of trial would lead the state to ignore the prohibition against pretrial discovery provided to the defendant in misdemeanor cases. As to misdemeanors generally, the committee discussed the application of the opt-out procedures to the high volume misdemeanor caseload in state courts and came to the conclusion that in this area the opt-out procedure would be close to unworkable. The committee discussed but rejected a reciprocal discovery rule which treated misdemeanor cases differently than felony cases or excluded misdemeanors from the proposed changes.

The committee discussed at length the broader impact of the opt-out procedure on the smooth functioning of a criminal justice system. The committee concluded that the procedure would have a significant adverse effect on the court system.

First, the committee discussed the role which pretrial discovery plays in client control concerning a defendant's decision to go to trial or not. Without the ability to know what the evidence against the defendant is, the defendant lacks the perspective to make an informed decision to either go to trial or not and the defense attorney lacks the evidence to back up an explanation to a client concerning the client's chances for an acquittal at trial (e.g., a DWI client may be far more inclined to plead to the charge if he/she has had the opportunity to review the video-tape at the police station which makes it very clear just how intoxicated the client was, where otherwise the client's memory is of only having three beers and of being fine).

Additionally, by allowing the defendant and defense counsel to review the state's evidence, the defense attorney is able to use the discovery process as a tool to negotiate resolutions to cases with the state without the necessity of trial. Thus, by taking away this tool, the criminal justice system suffers because more cases which could be resolved pretrial would therefore go to trial. The court system would be required to accomodate more jury trials.

Second, the mid-trial delays to deal with issues now dealt with prior to trial may result in more continuances which lead to mistrials and potentially result in criminal charges being dismissed if it becomes difficult to keep a jury assembled when the trial has been recessed for a month (e.g., to allow for testing of physical evidence). One judge indicated that in the judge's experience, it is very difficult to be able to hold on to a jury when a mid-trial delay of six weeks or more occurs. Given the presence of the double jeopardy clause (not at issue in civil cases), the outcome may be that the opt-out provisions would result in the

eventual dismissal of cases which most likely would have resulted in criminal convictions under the current system.

Third, the impact on jury service is adverse in a system where jurors are not able to be advised at the beginning of the trial about the likely length of jury service and where jury service may require that jurors serve in a piecemeal fashion. Similarly, witnesses for the state, including victims of crimes, and witnesses for the defense may find that they are being required to remain under subpoena for extended periods of time because of the uncertainty of the manner in which the trial will proceed.

Fourth, there will be little incentive for a defendant who is in custody to waive time for a preliminary hearing; the hearing will become a discovery tool as it was prior to the adoption of current Criminal Rule 16. Thus, the prosecutor is faced with the choice between presenting a case to a grand jury within ten days of the defendant's initial appearance in court or making arrangements for a preliminary hearing within those ten days.

Depending on the volume of felony cases in a particular jurisdiction and on how frequently the grand jury is convened to consider cases, the possible results include sloppy grand jury presentments and an increase in time, money, judicial resources, and professional skills at the preliminary hearing. Additionally, in some judicial districts, Bush preliminary hearings are set for the trial site of misdemeanor trials, rather than the trial site for felonies, and will require parties, defendant and witnesses to travel to the preliminary hearing site in the Bush.

Moreover, because of the lack of any pretrial discovery, defendants could choose to utilize the same tools used in the federal system - an increase in pretrial motion practice of identify the names of the witnesses against the defendant and the nature of their testimony (where the information obtained at evidentiary hearings substitutes for pretrial discovery). Thus, the system is burdened by additional proceedings which are currently not being held.

CONCLUSION:

The opt-in/opt-out reciprocal discovery procedures could result in disruptive pretrial and trial practice and in burdening the system with more trials, more preliminary hearings and more pretrial evidentiary hearings. According to the ABA Standards for Criminal Justice Discovery, pretrial discovery procedures are intended to promote the orderly functioning of any criminal justice system. Among the objectives of pretrial discovery procedures identified by the ABA are to provide the defendant with sufficient information to make an informed plea; to 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; to effect economies in time, money, judicial resources, and professional skills by minimizing the number of separate hearings; and to minimize the burden of victims and witnesses. These goals would not be furthered by the adoption of the proposed opt-in/opt-out reciprocal discovery rule.

A majority of the committee voted against adoption of the proposed opt-in/opt-out reciprocal discovery rule.

Amendment to HB 25, Draft H

Page 4, line 16: following the first word "statements;"
add
"however, if the sole purpose of the testimony of the defense witness is to impeach a prosecution witness under Evidence Rules 608(a) or 609, disclosure of the identity or statements of the defense witness is not required until after the prosecution witness has testified, or at another time as ordered by the court;"

* **Sec. 2.** AS 12.45.045(a) is amended to read:

(a) In prosecutions for the crimes of sexual assault in any degree, sexual abuse of a minor in any degree, or unlawful exploitation of a minor, or an attempt to commit any of these crimes, evidence of the complaining witness' previous sexual conduct may not be admitted nor may reference be made to it in the presence of the jury except as provided in this section. When the defendant seeks to admit the evidence for any purpose, the defendant shall apply for an order of the court **at least 10 days before the court proceeding for which the defendant seeks to admit the evidence, or at an earlier time ordered by the court** [AT ANY TIME BEFORE OR DURING THE TRIAL OR PRELIMINARY HEARING]. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and that the probative value of the evidence offered is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness, the court shall make an order stating what evidence may be introduced and the nature of the questions that may be permitted. The defendant may then offer evidece under the order of the court.

* **Sec. 3.** PROVISIONS OF SECTION 1 NOT SEVERABLE. Notwithstanding AS 01.10.030, the provisions of Section 1 of this Act are not severable.

* **Sec. 4.** Sections 1 - 3 of this Act are retroactive and apply to all criminal cases pending on or arising after the effective date of this Act.

* **Sec. 5.** Section 2 and 4 of this Act takes effect immediately.

* **Sec. 6.** Sections 1 and 3 of this Act take effect July 15, 1995.

#1

* **Sec. 2.** PROVISIONS OF SECTION 1 NOT SEVERABLE. Notwithstanding AS 01.10.030, the provisions of Section 1 of this Act are not severable.

* **Sec. 3.** Sections 1 and 2 of this Act are retroactive and apply to all criminal cases pending on or arising after the effective date of this Act.

* **Sec. 4.** Sections 1 - 3 of this Act take effect July 15, 1995, and supersede the amendments to Criminal Rule 16 adopted by the Alaska Supreme Court in Order No. 1191, dated February 21, 1995.

Page 2, line 26, following the word "trial", add ", other than models, charts, pictures, compilations of evidence or other demonstrative evidence created by or on behalf of the prosecuting attorney;"

INSERT 1

Page 4, line 11, following the word "rule", add ", other than models, charts, pictures, compilations of evidence or other demonstrative evidence created by or on behalf of the defendant's attorney;"

INSERT 2

Page 3, line 23:

(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 name, address, phone number and curriculum vitae of any expert witness performing work in connection with the case, and

(i) a written report by the expert, setting out the expert's opinion and the underlying basis of that opinion; or

(ii) a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion; however, notwithstanding Criminal Rule 15, if a written report by the expert has not been provided under subparagraph (i), the defense is entitled to conduct a telephonic or in-person deposition of the expert, at the expense of the defense;

failure to provide . . . .

Page 4, line 28:

(12) 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 name, address, phone number and curriculum vitae of any expert witness likely to be called at trial or another court proceeding, and

(i) a written report by the expert, setting out the expert's opinion and the underlying basis of that opinion; or

(ii) a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion; however, notwithstanding Criminal Rule 15, if a written report by the expert has not been provided under subparagraph (i), the prosecution is entitled to conduct a telephonic or in-person deposition of the expert, at the expense of the prosecution;

failure to provide . . . .

Page 2, line 20: after the word "statements" add "and any
relevant information of a material nature not otherwise di

Page 4, line 8: after the word "statements" add "and any or
relevant information of a material nature not otherwise disclosed

OUT ALL TOGETHER

OPTION 1

convey OPTION 2

Page 3, line 12: delete "upon request of defense counsel,"
line 13: delete "specified"
line 16: after "witness;" add "however, the prosecution need not disclose any payments or provision for witness travel, housing or meals in order to enable the witness to attend a specific court proceeding;"

OPTION 3

Page 4, line 16: delete "upon request of the prosecution,"
line 17: delete "specified"
line 20: after "witness;" add "however, the defense need not disclose any payments or provision for witness travel, housing or meals in order to enable the witness to attend a specific court proceeding;"

OPTION 4

Page 3, line 17: delete "upon request of defense counsel,"
line 19: reword to read "searches and seizures of the property or person of the defendant"
line 20: delete "specified"

OPTION 5

Page 4, line 8: following the first word "statements", add "; however, if the sole purpose of the testimony of the defense witness is to impeach a prosecution witness under Evidence Rules 608(a) or 609, disclosure of the identity or statements of the defense witness is not required until after the prosecution witness has testified;"

OPTION 6

?

9-LS0146\D
Luckhaupt
3/15/95

CS FOR HOUSE BILL NO. 25( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

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

A BILL

FOR AN ACT ENTITLED

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

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

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

Rule 16. Discovery.

(a) Objectives of Pretrial Discovery.

(1) Procedures before 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 before trial a procedural, collateral, or constitutional issue;

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

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

(vii) minimize the burden upon victims and witnesses.

(2) These needs can be served by

(i) full and free exchange of appropriate discovery;

(ii) simpler and more efficient procedures; and

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

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

and phone numbers, if known,

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

OPTION 1 "oral statements"

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

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

(4) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney is likely to use as evidence in the hearing or trial ~~that~~ were ~~/~~ obtained ~~/~~ from or belong to the defendant;

INSERT 1

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

(6) any material, documents, or information relating to lineups,

showups, and picture or voice identifications in relation to the case;

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

(8) any

(i) relevant material or information relating to the guilt or innocence of the defendant which has been provided by an informant, and

(ii) electronic surveillance, including wiretapping, of

(aa) conversations to which the accused or the accused's attorney was a party,

(bb) premises of the accused or the accused's attorney; OPTION 3

(9) upon request of defense counsel, any relevant material or information regarding the relationship, if any, of specified witnesses to the prosecuting authority, 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;

(10) upon request of defense counsel, any relevant material and information regarding OPTION #5

(i) specified searches and seizures; and

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

(11) if the prosecution is likely to use character, reputation, or other act evidence relating to the defendant, notice of that likelihood and disclosure of the substance of that evidence; 1

(12) unless a different date is set by the court, as soon as known and no later than 45 days before trial, the names and addresses of any expert witnesses performing work in connection with the case and shall provide a curriculum vitae and a written report by each expert witness of the expert's opinion and the underlying basis of that opinion; failure to provide timely disclosure shall entitle 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; Re-word 1

(13) upon a reasonable request showing materiality to the preparation

of the defense, the court in its discretion may require disclosure to defense counsel of relevant material and information not covered by (b)(1) - (12) of this rule.

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

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

(2) any books, papers, documents, photographs, or tangible objects the defense is likely to use as evidence at a hearing or trial and which are not otherwise disclosed under (c) of this rule;

(3) any record of prior criminal convictions known to the defense relating to the witnesses the defense is likely to call at trial;

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

(5) upon request of the prosecution, any relevant material or information regarding the relationship, if any, of specified witnesses to defense counsel and the defendant, including the nature and circumstances of any agreement, understanding, or representation between the defense and the witness that constitutes an inducement for the cooperation or testimony of the witness;

(6) unless a different date is set by the court, no later than 10 days before trial, notice of defenses if the defendant is likely to rely upon a defense of alibi, justification, duress, entrapment, or other statutory or affirmative defense; failure to provide timely notice shall entitle the prosecutor 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 defendant from asserting the designated defense;

(7) unless a different date is set by the court, as soon as known and no later than 30 days before trial, the names and addresses of any expert witnesses that are likely to be called at trial by the defendant and shall provide a curriculum vitae and a written report by each expert witness of the expert's opinion and the underlying basis

OPTION 6 "impeachment"

OPTION 2 "oral statements"

INSERT 2

OPTION C

Re-word 2

of that opinion; failure to provide timely disclosure shall entitle the prosecutor 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 defendant from calling the expert at trial;

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

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

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

(d) Regulation of Discovery.

(1) Timing of Discovery.

(i) Defense counsel has an immediate obligation to disclose evidence subject to (c)(9) of this rule.

(ii) When the prosecution has provided the discovery required under (b)(1) - (8) of this rule, the prosecuting attorney shall provide written notice to ~~notify~~ defense counsel or ~~shall notify~~ to the defendant if the defendant is not represented by counsel. Within 10 days of receiving notice from the prosecuting attorney, or such later date as agreed by the prosecuting attorney or ordered by the court, the defense shall provide to the prosecution the discovery required under (c)(1) - (3) of this rule.

(iii) Discovery required of the prosecution under (b)(9) -

(11) and of the defense under (c)(4) and (5) of this rule shall be provided as agreed by the parties or as ordered by the court.

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

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

(3) Additional or Newly Discovered Information. If, subsequent to compliance with these rules or orders issued pursuant thereto, a party discovers additional material or information which is subject to disclosure, that party shall promptly notify the other party or the other party's counsel of its existence. If the additional material or information is discovered during trial, the court shall also be notified.

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

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

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

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

(cc) an adoption record;

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

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

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

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

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

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

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

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

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

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

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

(ii) any portion of any showing of cause for denial or regulation of disclosure to be made to the court in camera ex parte; a record shall be made of such proceedings; if the court enters an order granting relief following such a showing, the entire record of the proceedings shall be sealed and preserved in the records of the court, to be made available to the court of appeals and the supreme court in the event of an appeal.

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

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

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

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

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

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

(e) Sanctions.

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

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

(f) Omnibus Hearing.

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

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

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

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

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

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

(iii) schedule any necessary evidentiary hearings; and

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

(g) Non-Testimonial Identification Procedures.

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

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

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

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

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

(i) appear in a line-up;

(ii) speak words, phrases or sentences relevant to the case for identification by witnesses;

(iii) be fingerprinted;

(iv) pose for photographs not involving reenactment of a scene;

(v) try on articles of clothing;

(vi) permit the taking of specimens of material under the person's fingernails;

(vii) permit the taking of samples of blood, hair, and other materials of the person's body which involve no unreasonable intrusion thereof;

(viii) provide specimens of the person's handwriting;

(ix) submit to a reasonable physical or medical inspection of the person's body.

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

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

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

(2) If a defendant makes a particularized showing that confidential records not in the possession of the prosecuting attorney are likely to contain relevant information that would negate guilt, reduce the defendant's punishment or establish bias on the part of a witness, the court may order disclosure of that portion of the records only after conducting an in camera review of the records upon prior notice to the person who is the subject of the records and the agency keeping the records. If the court determines during its in camera review that such information exists, the court shall provide both parties with that information and enter an order that a hearing be held before the information may be introduced, used, or mentioned during an open court proceeding. court will be outside the presence of the jury in order to d e value of the evidence is outweighed by an unwarranted subject of the records or an unwarranted hampering o collect records. The hearing to determine admissibility if there is a danger of unwarranted invasion of privacy.

(i) As used in this rule,

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

(2) "written or recorded statement" means

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

(ii) the substance of a statement of any kind made by a person that is embodied or summarized in a 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 or notes taken by the attorney.

Proposed amendment to HB 25, "D" draft

page 11, line 10: after the word "records" add the words "to the defense"

line 12: after the word "records" delete "." and add ","
change "If" to "if"

line 13: after the word "exists," delete, "the court shall provide both parties with that information and enter"

add in its place

if the court
(i) provides a copy of the records to the prosecution, with the exception of any statements by the defendant that violate the defendant's rights against compulsory self-incrimination; and
(ii) enters

Richard:

Here is the change to the "in camera" process.

Also, I had an idea about the reference to Evidence Rule 608(b). Perhaps we could include that in the impeachment provision, but then we would have to amend AS 12.45.045(a) so that they are required to apply for a court order to introduce "rape shield" info "no later than 10 days prior to the start of the trial or preliminary hearing, or another time set by the court."

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To Richard V	From Alan C
Co.	Co.
Dept.	Phone #
Fax # 6572	Fax #

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

(2) If a defendant makes a particularized showing that confidential records not in the possession of the prosecuting attorney are likely to contain relevant information that would negate guilt, reduce the defendant's punishment or establish bias on the part of a witness, the court may order disclosure of that portion of the records only after conducting an in camera review of the records upon prior notice to the person who is the subject of the records and the agency keeping the records. If the court determines during its in camera review that such information exists, the court shall provide both parties with that information and enter an order that a hearing be held before the information may be introduced, used, or mentioned during an open court proceeding. The hearing conducted by the court will be outside the presence of the jury in order to determine whether the probative value of the evidence is outweighed by an unwarranted invasion of privacy of the subject of the records or an unwarranted hampering of the ability of the agency to collect records. The hearing to determine admissibility shall be conducted in camera if there is a danger of unwarranted invasion of privacy.

(i) As used in this rule,

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

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

(ii) the substance of a statement of any kind made by a person that is embodied or summarized in a 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 or notes taken by the attorney.

HOUSE BILL NO. 25

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES PARNELL, Porter

Introduced: 1/16/95
Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

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

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

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

Rule 16. DISCOVERY AND INSPECTION. (a) Government Disclosure of Evidence.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. On request of a defendant, the prosecution shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies of the statements, within the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; that portion of any written record containing the substance of any relevant oral statement made by

New Text Underlined [DELETED TEXT BRACKETED]

the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be an agent of the prosecution; and recorded testimony of the defendant before a grand jury that relates to the offense charged. The prosecution shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant, whether before or after arrest, in response to interrogation by any person then known by the defendant to be an agent of the prosecution if the prosecution intends to use that statement at trial. If the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, on its motion, discovery of relevant recorded testimony of any witness before a grand jury who was

(i) at the time of that testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense; or

(ii) at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(B) Defendant's Prior Record. On request of the defendant, the prosecution shall furnish to the defendant a copy of the defendant's prior criminal record, if any, in the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.

(C) Documents and Tangible Objects. On request of the defendant, the prosecution shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions of them that are in the possession, custody, or control of the prosecution, and that are material to the preparation of the defendant's defense, or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. On request of a defendant, the prosecution shall permit the defendant to inspect and copy or

NEW TEXT: Underlined [DELETED TEXT BRACKETED]

photograph results or reports of physical or mental examinations, and of scientific tests or experiments, or copies of them that are in the possession, custody, or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney, and that are material to the preparation of the defense or are intended for use by the prosecution as evidence in chief at the trial.

(E) Expert Witnesses. At the defendant's request, the prosecution shall disclose to the defendant a written summary of testimony the prosecution intends to use under Rules 702, 703, or 705 of the Alaska Rules of Evidence during its case in chief at trial. This summary must describe the witnesses' opinions, the bases and the reasons for them, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure. Except as provided in (1)(A), (B), (D), and (E) of this subsection, this rule does not authorize

(A) the discovery or inspection of reports, memoranda, or other internal government documents made by the prosecuting attorney or other government agents in connection with the investigation or prosecution of the case; or

(B) the discovery or inspection of statements made by prosecution witnesses or prospective prosecution witnesses unless the discovery or inspection of statements by those witnesses and prospective witnesses is otherwise explicitly authorized by law.

(3) Information in Grand Jury Transcripts. Except as provided in Rule 6 of the Alaska Rules of Criminal Procedure and (a)(1)(A) of this rule, this rule does not authorize discovery or inspection of the recorded proceedings of a grand jury.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under (a)(1)(C) or (D) of this rule, when the prosecution complies with that request, the defendant, on request of the prosecution, shall permit the prosecution to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions of them that are in the

possession, custody, or control of the defendant and that the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under (a)(1)(C) or (D) of this rule, when the prosecution complies with that request, the defendant, on request of the prosecution, shall permit the prosecution to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies of them in the possession or control of the defendant, that the defendant intends to introduce as evidence in chief at the trial or that were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(C) Expert Witnesses. If the defendant requests disclosure under (a)(1)(E) of this rule and the prosecution complies, the defendant, at the prosecution's request, must disclose to the prosecution a written summary of testimony the defendant intends to use under Rules 702, 703, and 705 of the Alaska Rules of Evidence as evidence at trial. This summary must describe the opinions of the witnesses, the bases and reasons for them, and the witnesses' qualifications.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subsection does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents, in connection with the investigation or defense of the case, or statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution or defense witnesses, to the defendant, the defendant's agents, or attorneys.

(c) Continuing Duty to Disclose. If, before or during trial, a party discovers additional evidence or material previously requested or ordered that is subject to discovery or inspection under this rule, the party shall promptly notify the other party, that other party's attorney, or the court of the existence of the additional evidence or material.

(d) Regulation of Discovery.

(1) Protective and Modifying Orders. Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make any other order as is appropriate. Upon motion by a party, the court may permit the party to make the showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) Failure to Comply With a Request. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with this rule, the court may order the party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter an order it deems just under the circumstances. The court may specify the time, place, and manner of making the discovery and inspection and may prescribe any terms and conditions as are just.

Proposed Amendments to HB 25 and SB 10

Page 1, line 10: following the word "enforcement,"
add "the constitutional rights of crime victims, the right of privacy of witnesses"

Page 2, line 9: delete "intends to use"
insert "is likely to use as evidence"

Page 4, lines 10-11: delete "the prosecutor shall also make available for inspection and copying any other reports or written statements of these experts;"

Page 4, line 21: delete "intends to use"
insert "is likely to use as evidence"

Page 6, line 10: before the word "no", insert "as soon as known and"

Page 6, lines 12-13: delete "performing work in connection with the case"
insert "are likely to be called at trial"

Page 6, lines 15-16: delete "The defendant shall also make available for inspection and copying any other reports or writtten statements of these experts."

Page 6, line 28: delete "may"
insert "is likely to"

Page 7, line 4-5: delete: "may use as evidence or for impeachment"
insert: "is likely to use as evidence"

Page 13: Add a new subsection.
(h) As used in this rule, "statement" has the meaning given in AS 12.45.082.

Page 6, line 3 or as a new subsection at the end of the bill: Add

If a defendant makes a particularized showing that confidential records not in the possession of the prosecuting attorney are likely to contain relevant information that would negate guilt, reduce the defendant's punishment or establish bias on the part of a witness, the court may order disclosure of that portion of the records only after conducting an *in camera* review of the records upon prior notice to the person who is the subject of the records and the agency keeping the records. If the court determines during its *in*

camera review that such information exists, the court shall provide both parties with that information and enter an order that a hearing be held before the information may be introduced, used or mentioned during an open court proceeding. The hearing conducted by the court will be outside the presence of the jury in order to determine whether the grounds for admissibility of the evidence are outweighed by an unwarranted invasion of privacy of the subject of the records or an unwarranted hampering of the ability of the agency to collect records. The hearing to determine admissibility shall be conducted *in camera* if there is a danger of unwarranted invasion of privacy.

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Alaska State Legislature

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SEAN R. PARNELL

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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, to adopt the comparable federal rule."

HB 25 changes Alaska Rules of Criminal Procedure to allow for reciprocal discovery if the defense chooses to "opt" into discovery by waiving the defendant's right against self-incrimination. If the defense does not offer its own evidence to the prosecution, prior to trial, then the prosecution will not be required to divulge its evidence to the defense.

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.

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.

ANCHORAGE POLICE DEPARTMENT

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

Rick Mystrom, Mayor

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

Kevin M. O'Leary
Chief of Police