

**HB**

**26**

# Alaska State Legislature

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REPRESENTATIVE  
SEAN R. PARNELL



## HOUSE OF REPRESENTATIVES

### SPONSOR STATEMENT House Bill 26

"An act revising Rule 15, Alaska Rules of Criminal Procedure, relating to depositions, to adopt the comparable federal rule."

HB 26 changes Alaska Rules of Criminal Procedure to permit depositions of victims and adverse witnesses only in exceptional circumstances. Under the bill, the defense will retain access to statements taken by police and grand jury testimony of the victim and witnesses, as well as the ability to face the accuser at the trial.

In practice, Alaska's current Rule 15 enables defense attorneys to take numerous depositions of victims and witnesses, and provides fertile ground for discovery abuse. The mishandling of this privilege slows due process, unnecessarily burdens the courts, and serves to harass victims rather than promoting the ends of justice. I respectfully request your support.

Unsubstantiated

...of prejudice to the defendant has been made. *Montes v. State*, Op. No. 289, 669 P2d 961 (Alaska App. 1983).

...the court erred in denying severance of two similar charges involving the same defendant where the evidence did not establish a common scheme or plan, whether the evidence of the assault on each victim would have been admissible in a trial for assault on the other victim. *Montes v. State*, Op. No. 668, 730 P2d 175 (Alaska App. 1987).

...When prior conviction, admissible as an element of felon possession of firearm charges, would have been inadmissible in a separate trial on theft by receiving charges, trial court erred in denying defendant's severance motion without offering the alternative of bifurcation, requiring reversal of the conviction by receiving conviction but not the felon in possession conviction. *Erickson v. State*, Op. No. 679, 732 P2d 192 (Alaska App. 1987).

...By waiting until the date of trial to move for severance, defendant waived his ability to do so. *Knutson v. State*, Op. No. 702, 736 P2d 775 (Alaska App. 1987).

...Trial court erred in not granting defendants' motion to sever cocaine and murder charges where substantial risk existed that their defense on the cocaine charges was severely prejudiced by the evidence of murder; accordingly, the appellate court vacated the cocaine convictions but affirmed the murder convictions. *Mathis v. State*, Op. No. 951, 778 P2d 1161 (Alaska App. 1989).

...Where defendant was charged with a murder which occurred on August 5 and several murders which occurred on August 6, joinder of the offenses was proper, since the August 6 murders resulted from defendant's belief that he was going to be killed because of his role in the August 5 murder; furthermore, the trial court did not err in denying defendant's motion for severance given the relevance of the August 5 murder to the August 6 murders and the absence of any specific and convincing showing of prejudice resulting from joinder. *Collins v. State*, Op. No. 962, 778 P2d 1171 (Alaska App. 1989).

...There was a close nexus between the drug charges against defendant and drug charges against his codefendants, thus defendant's argument that he was prejudiced by the trial court's failure to sever his trial from that of the codefendants because there was little evidence linking him to their activities was rejected. *Badolno v. State*, Op. No. 1002, 785 P2d 39 (Alaska App. 1990).

...Where a perjury charge is joined with a closely related substantive offense, the evidence pertaining to the perjury charge is admissible in the prosecution for the substantive offense and vice versa. *Machado v. State*, Op. No. 1067, 797 P2d 677 (Alaska App. 1990).

...Evidence of defendant's perjury and evidence relating to charges against him arising out of a car bombing would have been cross-admissible, thus trial court did not err in refusing to grant defendant's motion to sever the perjury and car bombing charges. *Machado v. State*, Op. No. 1067, 797 P2d 677 (Alaska App. 1990).

...To be entitled to severance under this rule, defendant must show actual prejudice from joinder. *Newcomb v. State*, Op. No. 1088, 800 P2d 935 (Alaska App. 1990).

Evidence relating to Count 1, selling cocaine, was relevant to prove Count 2, possession with intent to deliver cocaine, regardless of its technical sufficiency to support a finding of guilt beyond a reasonable doubt on Count 1, thus trial court did not err in failing to sever the two charges or to order a mistrial as to Count 2 after granting a judgment of acquittal on Count 1. *McLaughlin v. State*, Op. No. 1159, 818 P2d 683 (Alaska App. 1991).

Trial court decision to deny severance is to be overturned only for abuse of discretion; abuse of discretion is to be found only where defendant shows prejudice from joinder. *Erickson v. State*, Op. No. 1179, 824 P2d 725 (Alaska App. 1991).

Evidence did not establish that defendant, charged with initiating murder plan, was prejudiced by joinder of codefendant, charged with attempting the murder; defendant's inability to call codefendant as a witness was not prejudiced since there was no showing that codefendant was willing to testify or that his testimony would have been significantly exculpatory, and admission of codefendant's statements into evidence was not prejudicial since in the statements codefendant denied knowing anything about defendant's involvement. *Erickson v. State*, Op. No. 1179, 824 P2d 725 (Alaska App. 1991).

**Rule 15. Depositions.**

(a) **When Taken.** Upon order of the court for good cause shown, the testimony of a prospective witness may be taken by either party for discovery upon notice and after the deposing party has disclosed all statements, exhibits, and witness lists required by Rule 16. Any designated book, paper, document, record, recording, or other material not privileged may be subpoenaed at the same time and place of the taking of the deposition. If a witness is committed for failure to give bail or appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness. In considering a request for the taking of depositions, the court shall grant such motion only if the taking of such deposition will not cause unreasonable delay in the trial of the action.

(b) **Notice of Taking.** The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) **How Taken.** Subject to such additional conditions as the court shall provide and except as otherwise provided in these rules a deposition shall be taken and filed in the manner provided in Civil Rules 26, 28, 29, 30, 31 and 32. In no event shall a deposition be taken of a party defendant without that defendant's consent.

*Handwritten notes:*  
 - Defendant's motion for severance was denied.  
 - The court found that the evidence was admissible.  
 - The court found that the evidence was relevant.

(d) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used by stipulation of the parties or if the witness is unavailable, as defined in section (e) of this rule, or if the witness gives testimony at the trial or hearing inconsistent with the witness' deposition. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it which is relevant to the part offered and any party may offer other parts.

(e) Unavailability. A witness is "unavailable" when the witness is:

(1) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the witness' statement; or

(2) Persistent in refusing to testify despite an order of the judge to do so; or

(3) Unable to be present or testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(4) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of the witness' statement has exercised reasonable diligence but has been unable to procure the witness' attendance.

(f) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof, may be made as provided in civil actions.

(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

(h) Joint Defendants. Where persons are jointly tried, the court for good cause shown may refuse to permit the use at the trial of a deposition taken at the instance of a defendant over the objection of any other defendant.

(Adopted by SCO 4 October 4, 1959; amended by SCO 157 effective February 15, 1973; by SCO 639 effective May 30, 1985; amended by SCO 157 effective February 15, 1973; and by SCO 1153 effective July 15, 1994)

#### Annotations

#### Cases

Denial of motion to take depositions of witnesses who had testified before the grand jury was no error where appellants had not made a showing sufficient under this rule. *Merrill v. State*, Op. No. 392, 423 P2d 686 (Alaska 1967).

Where the direct penalty for conviction of an offense may be incarceration, loss of a valuable license, or a fine heavy enough to indicate criminality, such offense is a "serious crime" within the public defender statute. A defendant who is charged with any such misdemeanor and who cannot afford to

hire his own lawyer is eligible for representation by a public defender. *Alexander v. City of Anchorage*, Op. No. 738, 497 P2d 910 (Alaska 1971).

Expansion of discovery beyond provisions contained in court rules is most appropriately done through amendment of existing rules after thorough study. *Buchanan v. State*, Op. No. 1316, 561 P2d 1997 (Alaska 1977).

Where statements of juvenile codefendants were taken in juvenile proceedings, but juveniles testified at trial and statements were not introduced, no violation of the right to notice of a deposition occurred. *Linden v. State*, Op. No. 1905, 598 P2d 960 (Alaska 1979).

The admission of a witness' pretrial videotaped deposition at trial was reversible error where the state failed to subpoena the witness despite advance knowledge of her plan to be out of the state during the trial. *Stores v. Seattle*, Op. No. 2252, 625 P2d 820 (Alaska 1981).

Trial court did not err in denying defense motion to admit video deposition of expert witness where defendant failed to demonstrate either that the witness was beyond the jurisdiction of the court or that due diligence was exercised in attempting to secure her appearance. *Dunbar v. State*, Op. No. 347, 677 P2d 1275 (Alaska App. 1984).

In sexual abuse case, trial court did not abuse its discretion in refusing to allow defendant to depose his sons, who had given statements to the police and testified before the grand jury, but did not wish to be interviewed further, where on appeal the defense did not argue surprise at the children's trial testimony but instead argued, without further amplification, that the denial of discovery impaired its ability to adequately prepare for trial. *State v. Covington*, Op. No. 557, 711 P2d 1183 (Alaska App. 1985).

## Rule 16. Discovery.

(a) Scope of Discovery. In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system.

### (b) Disclosure to the Accused.

(1) *Information within Possession or Control of Prosecuting Attorney.* Except as is otherwise provided as to matters not subject to disclosure and protective orders, the prosecuting attorney shall disclose the following information within the prosecuting attorney's possession or control to defense counsel and make available for inspection and copying:

(i) The names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of statements;

(ii) Any written or recorded statements and summaries of statements and the substance of any oral statements made by the accused;

9-LS0147C ✓  
Luckhaupt  
1/25/95

CS FOR HOUSE BILL NO. 26( )

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

1 "An Act amending Rule 15, Alaska Rules of Criminal Procedure, relating to  
2 depositions."

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

4 \* Section 1. Rule 15(a), Alaska Rules of Criminal Procedure, is amended to read:

5 (a) When Taken. The deposition of a prospective witness may be taken by  
6 either party, upon notice as provided in (b) of this rule and upon motion filed with  
7 the court if the court finds by clear and convincing evidence that (1) the witness will  
8 not be present to testify at trial; or (2) due to exceptional circumstances, the  
9 deposition is necessary to prevent a failure of justice. [UPON ORDER OF THE  
10 COURT FOR GOOD CAUSE SHOWN, THE TESTIMONY OF A PROSPECTIVE  
11 WITNESS MAY BE TAKEN BY EITHER PARTY FOR DISCOVERY UPON  
12 NOTICE AND AFTER THE DEPOSING PARTY HAS DISCLOSED ALL  
13 STATEMENTS, EXHIBITS, AND WITNESS LISTS REQUIRED BY RULE 16.] Any  
14 designated book, paper, document, record, recording, or other material not privileged

1 may be subpoenaed at the same time and place of the taking of the deposition. If a  
2 witness is committed for failure to give bail or appear to testify at a trial or hearing, the  
3 court on written motion of the witness and upon notice to the parties may direct that the  
4 witness' deposition be taken. After the deposition has been subscribed the court may  
5 discharge the witness. In considering a request for the taking of depositions, the court  
6 shall grant such motion only if the taking of such deposition will not cause unreasonable  
7 delay in the trial of the action and shall apply a presumption against granting a  
8 deposition under (a)(2) of this rule if, in regard to that action, the witness has  
9 testified before the grand jury or in a prior court proceeding, or has given a  
10 recorded statement to a law enforcement agency and the moving party had the  
11 opportunity to obtain such a recorded statement.

12 \* Sec. 2. Rule 15(c), Alaska Rules of Criminal Procedure, is amended to read:

13 (c) How Taken. The court shall preside over a deposition it orders under (a)  
14 of this rule. The deposition shall be conducted in a closed proceeding and recorded  
15 in the same manner as other closed court proceedings. This rule does not preclude  
16 a party from also recording the deposition by other means approved by the court.  
17 [SUBJECT TO SUCH ADDITIONAL CONDITIONS AS THE COURT SHALL  
18 PROVIDE AND EXCEPT AS OTHERWISE PROVIDED IN THESE RULES A  
19 DEPOSITION SHALL BE TAKEN AND FILED IN THE MANNER PROVIDED IN  
20 CIVIL RULES 26, 28, 29, 30, 31 AND 32.] In no event shall a deposition be taken of  
21 a party defendant without that defendant's consent.

MD 26 Deposition in Crim Cases  
Proposed (not US)

Changes rule to follow FRule now closely

1. Reverses standard for when court may order deposition from "good cause shown"

to "exceptional circumstances"

∴ limits circumstances

2. Changes rules for use  
Present rule - use only if A absent & beyond jurisd of court

to local Dep use standard

"Unavailable" despite reasonable means used

allows Ct to  
3. A Required Prosecution to pay if A cannot

Proposed US

1. Reverses present State Rule

T stand to 2 part Standard

(1) Clear & Conveying word of

(2) Either

1/ will not be present to testify at trial  
or

2/ exceptional circumstances

Dep is nec for to prevent miscar of Justice

+ (3) Presump against

deposition under (a)(2)  
if W has testified at a jury

or  
given - Recorded Stmt to police  
& party can get Stmt

(2) Requires Ct to preside  
over depositions

FNU

Recommended committee substitute for HB 26

\* Section 1. Criminal Rule 15 is amended to read:

(a) The deposition of a prospective witness may be taken by either party, upon notice as provided in (b) of this rule and upon motion filed with the court, if the court finds by clear and convincing evidence that (1) the witness will not be present to testify at trial; or (2) due to exceptional circumstances the deposition is necessary to prevent a failure of justice. [UPON ORDER OF THE COURT FOR GOOD CAUSE SHOWN, THE TESTIMONY OF A PROSPECTIVE WITNESS MAY BE TAKEN BY EITHER PARTY FOR DISCOVERY UPON NOTICE AND AFTER THE DEPOSING PARTY HAS DISCLOSED ALL STATEMENTS, EXHIBITS, AND WITNESS LISTS REQUIRED BY RULE 16.] Any designated book, paper, document, record, recording, or other material not privileged may be subpoenaed at the same time and place of the the taking of the deposition. If a witness is committed for failure to give bail or appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that the witness' deposition be taken. After the deposition has been subscribed the court may discharge the witness. In considering a request for the taking of depositions, the court shall grant such motion only if the taking of such deposition will not cause unreasonable delay in the trial of the action and shall apply a presumption against granting a deposition under (a)(2) of this rule if the witness has testified before the grand jury or in a prior court proceeding, or has

given a recorded statement to a law enforcement agency, and the moving party had the opportunity to obtain such a recorded statement of the witness under Rule 16.

\* Sec. 2. Criminal Rule 15(c) is amended to read:

(c) The court shall preside over a deposition it orders under (a) of this rule. The deposition shall be conducted in a closed proceeding and recorded in the same manner as other closed court proceedings. Nothing in this rule precludes a party from also recording the deposition by other means approved by the court, [SUBJECT TO SUCH ADDITIONAL CONDITIONS . . . IN THE MANNER PROVIDED IN CIVIL RULES 26, 28, 30, 31 AND 32.] In no event shall a deposition be taken of a party defendant without that defendant's consent.

FN

*Comes up with  
no deposition  
not met*

*no does (precludes)  
this rule a deposition taken  
or used under (g) of  
this rule.*

Diff.

Standards for taking

① Present -

Good cause shown

Merrill v. State,

423 P.2d 686 (Ak. 1967)

Insufficient showing

by A's to depose

W's (Gr. Jury) -

No discussion -

not too helpful!

2 Proposed

" Exceptional

circumstances "

## Differences

### ① Present Rule

a. Use →

(1). Upon stipulation  
of the parties

(2) If W is unavailable  
there together of  
of availability  
on

(3) Impeachment

### ② Proposed

(1) Upon Stipulation

(2) If W is unavailable  
under 804 (Hearsay  
evidence)

HOUSE BILL NO. 26

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE PARNELL

Introduced: 1/16/95

Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act revising Rule 15, Alaska Rules of Criminal Procedure, relating to depositions,  
2 to adopt the comparable federal rule."

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

4 \* Section 1. Rule 15, Alaska Rules of Criminal Procedure, is repealed and reenacted to read:

5 Rule 15. DEPOSITIONS. (a) When Taken. When, due to exceptional  
6 circumstances of the case, it is in the interest of justice that the testimony of a prospective  
7 witness of a party be taken and preserved for use at trial, the court may, on motion of the  
8 party and notice to the parties, order that testimony of the witness be taken by deposition  
9 and that any designated book, paper, document, record, recording, or other material not  
10 privileged be produced at the same time and place. If a witness is detained under  
11 AS 12.30.050, the court, on written motion of the witness and on notice to the parties,  
12 may direct that the witness' deposition be taken. After the deposition has been subscribed,  
13 the court may discharge the witness.

14 (b) Notice of Taking. The party at whose instance a deposition is to be taken shall

*now read,  
"good  
cause  
shown"  
now  
"do not  
read  
& preserve  
for use at  
trial"*

1 give to every party reasonable written notice of the time and place for taking the  
2 deposition. The notice shall state the name and address of each person to be examined.  
3 On motion of a party on whom the notice is served, the court for cause shown may extend  
4 or shorten the time or change the place for taking the deposition. The party at whose  
5 instance a deposition is to be taken should notify the officer having custody of a  
6 defendant of the time and place set for the examination and shall, unless the defendant  
7 waives in writing the right to be present, produce the defendant at the examination and  
8 keep the defendant in the presence of the witness during the examination, unless, after  
9 being warned by the court that disruptive conduct will cause the defendant's removal  
10 from the place of the taking of the deposition, the defendant persists in conduct to justify  
11 exclusion from that place. A defendant not in custody shall have the right to be present  
12 at the examination on request subject to terms as may be fixed by the court, but a failure,  
13 absent good cause shown, to appear after notice and tender of expenses under (c) of this  
14 rule shall constitute a waiver of that right and of an objection to the taking and use of the  
15 deposition based on that right.

*A may  
waive  
Rt by  
not shown  
ng'*

16 (c) Payment of Expenses. When a deposition is taken at the instance of the  
17 prosecution, or when a deposition is taken at the instance of a defendant who is unable  
18 to bear the expenses of the taking of the deposition, the court may direct that the expense  
19 of travel and subsistence of the defendant and the defendant's attorney for attendance at  
20 the examination and the cost of the transcript of the deposition be paid by the  
21 prosecution.

22 (d) How Taken. Subject to the additional conditions the court may provide, and  
23 except as otherwise provided in these rules, a deposition shall be taken and filed in the  
24 manner provided in civil actions provided that (1) a deposition may not be taken of a  
25 party defendant without that defendant's consent, and (2) the scope and manner of  
26 examination and cross-examination shall be as would be allowed in the trial itself. The  
27 prosecution shall make available to the defendant or the defendant's counsel for  
28 examination and use at the taking of the deposition any statement of the witness being  
29 deposed that is in the possession of the prosecution and that the defendant would be  
30 entitled at the trial.

31 (e) Use. At the trial or a hearing, a part or all of a deposition, otherwise

1. Privilege  
2. Refusal (pernicious)  
3. Lack of Memory  
4. Unavailable  
5. Absent  
+ reas  
+ mens  
+ incluty  
+ orces

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admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as defined in Rule 804(a) of the Alaska Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with that witness' deposition. A deposition may be used by a party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of the deposition that is relevant to the part offered and any party may offer other parts.

(f) Objections to Deposition Testimony. Objections to deposition testimony or evidence, or parts of that testimony or evidence, and the grounds for the objection must be stated at the time of the taking of the deposition.

(g) Deposition by Agreement Not Precluded. This rule does not preclude the taking of a deposition, orally or upon written questions, or the use of a deposition by agreement of the parties with the consent of the court.

present rule is tougher  
in absence - present rule  
is absent & beyond purview  
of court + proponent has  
exercised diligence

This does not include Joint Defendants  
section

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Unavailable

Showing of prejudice to the defendant has been made. *Montes v. State*, Op. No. 289, 669 P2d 961 (Alaska App. 1983).

Trial court erred in denying severance of two similar assault charges involving the same defendant where the evidence did not establish a common scheme or plan, whether or not the evidence of the assault on each victim would have been admissible in a trial for assault on the other victim. *Johnson v. State*, Op. No. 668, 730 P2d 175 (Alaska App. 1987).

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(e) Unavailability. A witness is "unavailable" when the witness is:

(1) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of the witness' statement; or

(2) Persistent in refusing to testify despite an order of the judge to do so; or

(3) Unable to be present or testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(4) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of the witness' statement has exercised reasonable diligence but has been unable to procure the witness' attendance.

(f) Objections to Admissibility. Objections to receiving in evidence a deposition or part thereof, may be made as provided in civil actions.

(g) Deposition by Agreement Not Precluded. Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

(h) Joint Defendants. Where persons are jointly tried, the court for good cause shown may refuse to permit the use at the trial of a deposition taken at the instance of a defendant over the objection of any other defendant.

(Adopted by SCO 4 October 4, 1959; amended by SCO 157 effective February 15, 1973; by SCO 639 effective May 30, 1985; amended by SCO 157 effective February 15, 1973; and by SCO 1153 effective July 15, 1994)

Annotations

Cases

Denial of motion to take depositions of witnesses who had testified before the grand jury was no error where appellants had not made a showing sufficient under this rule. *Merrill v. State*, Op. No. 392, 423 P2d 686 (Alaska 1967).

Where the direct penalty for conviction of an offense may be incarceration, loss of a valuable license, or a fine heavy enough to indicate criminality, such offense is a "serious crime" within the public defender statute. A defendant who is charged with any such misdemeanor and who cannot afford to

hire his own lawyer is eligible for representation by a public defender. *Alexander v. City of Anchorage*, Op. No. 738, 499 P2d 910 (Alaska 1971).

Expansion of discovery beyond provisions contained in court rules is most appropriately done through amendment of existing rules after thorough study. *Buchanan v. State*, Op. No. 1316, 561 P2d 1997 (Alaska 1977).

Where statements of juvenile codefendants were taken in juvenile proceedings, but juveniles testified at trial and statements were not introduced, no violation of the right to notice of a deposition occurred. *Linden v. State*, Op. No. 1905, 598 P2d 960 (Alaska 1979).

The admission of a witness' pretrial videotaped deposition at trial was reversible error where the state failed to subpoena the witness despite advance knowledge of her plan to be out of the state during the trial. *Stores v. Seattle*, Op. No. 2252, 625 P2d 820 (Alaska 1981).

Trial court did not err in denying defense motion to admit video deposition of expert witness where defendant failed to demonstrate either that the witness was beyond the jurisdiction of the court or that due diligence was exercised in attempting to secure her appearance. *Dunbar v. State*, Op. No. 347, 677 P2d 1275 (Alaska App. 1984).

In sexual abuse case, trial court did not abuse its discretion in refusing to allow defendant to depose his sons, who had given statements to the police and testified before the grand jury, but did not wish to be interviewed further, where on appeal the defense did not argue surprise at the children's trial testimony but instead argued, without further amplification, that the denial of discovery impaired its ability to adequately prepare for trial. *State v. Covington*, Op. No. 557, 711 P2d 1183 (Alaska App. 1985).

Rule 16. Discovery.

(a) Scope of Discovery. In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system.

(b) Disclosure to the Accused.

(1) Information within Possession or Control of Prosecuting Attorney. Except as is otherwise provided as to matters not subject to disclosure and protective orders, the prosecuting attorney shall disclose the following information within the prosecuting attorney's possession or control to defense counsel and make available for inspection and copying:

(i) The names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of statements;

(ii) Any written or recorded statements and summaries of statements and the substance of any oral statements made by the accused;

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## Rule 14

Note 298

prejudiced by being tried with the other defendants. U.S. v. Loyd, C.A.Fla.1984, 743 F.2d 1555.

No abuse of discretion occurred in denying two defendants' motions for severance, in prosecution of four defendants for receiving stolen cars, where only bases for claims of prejudice were convictions of all four defendants, existence of some disparity in level of illegal activities engaged in by defendants, and fact that jury had before it nine counts against four defendants. U.S. v. Thomas, C.A.Ind. 1980, 676 F.2d 239, certiorari denied 101 S.Ct. 837, 1392, 449, 450 U.S. 1091, 931, 66, 67 L.Ed.2d 820, 364.

Review of decision on motion for severance ultimately focuses on the verdict; convictions will invariably be sustained if it may be inferred from the verdict that the jury meticulously sifted the evidence. U.S. v. Phillips,

## RULES OF CRIMINAL PROCEDURE

C.A.Fla.1981, 664 F.2d 971, certiorari denied 102 S.Ct. 2965, 457 U.S. 1136, 73 L.Ed.2d 1371, certiorari denied 103 S.Ct. 208, 459 U.S. 974, 74 L.Ed.2d 166.

### 299. Weight and sufficiency of evidence for conviction

In determining whether abuse of discretion by district court in denying a defendant a severance was prejudicial, inquiry could not be as to whether there was enough evidence to support defendant's conviction apart from statement of codefendant implicating defendant, upon which motion for severance was made, since the court of appeals could not substitute itself for the jury whose duty it was to pass upon guilt or innocence of the defendant. Barton v. U.S., C.A.Tex.1959, 263 F.2d 894.

## Rule 15. Depositions

(a) **When Taken.** Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is detained pursuant to section 3144 of title 18, United States Code, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) **Notice of Taking.** The party at whose instance a deposition is to be taken shall give to every party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition. The officer having custody of a defendant shall be notified of the time and place set for the examination and shall, unless the defendant waives in writing the right to be present, produce him at the examination and keep him in the presence of the witness during the examination, unless, after being warned by the court that disruptive conduct will cause him to be removed from the place of the taking of the deposition, he persists in conduct which is such as to justify his being excluded from that place. A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

(c) **Payment of Expenses.** Whenever a deposition is taken at the instance of the government, or whenever a deposition is taken at the instance of a defendant who is unable to bear the expenses of the taking of the deposition, the court may direct that the expense of travel and subsistence of the defendant and his attorney for attendance at the examination and the cost of the transcript of the deposition shall be paid by the government.

## DEPOSITIONS AND INTERVIEW

(d) **How Taken.** Subject to the provisions of this rule, and unless otherwise provided, a deposition shall be taken in accordance with the rules of civil actions except as otherwise provided. In no event shall a deposition be taken without the consent of the party to be deposed, and (2) the scope of the deposition shall be such as would be relevant to the subject matter in dispute. Any deposition shall make available to the trier of fact the use of the deposition which is in the possession, custody, or control of the deponent which is in the possession, custody, or control of the defendant would be entitled to use.

(e) **Use.** At the trial or hearing, evidence so far as otherwise admissible under the rules of substantive evidence if it is material and defined in Rule 804(a) and (b) may be given testimony at the trial or hearing. Any deposition may also be used to impeach or corroborate any testimony or to attack or support the credibility of a deposition if it is otherwise admissible. Any party may offer other par-

(f) **Objections to Deposition.** Objections to the admissibility of a deposition or part thereof shall be stated at the time of the deposition.

(g) **Deposition by Agreement.** The parties may stipulate to the taking of a deposition, and the use of a deposition, by the court.

(As amended Apr. 22, 1971, P.L. 91-354, § 3(15)-(19), 89 Stat. 373, 1975 Stat. 1986.)

### Notes

Note to Subdivision (a). 1. This rule continues the existing law permitting the taking of depositions in certain limited cases under *dedimus potestatem tuam rei memoriam*, [former § 644. This statute has been applicable to criminal cases, C.A.9, 10 Cir., 38 F.2d 581; United States, 9 Cir., 118 F.2d 1544; 313 U.S. 589, 61 S.Ct. 1544; United States v. Cameron, 15 F.794; United States v. Hof, N.Y., 24 F.Supp. 847. Contr. United States, 4 Cir., 45 F.2d 1436. The rule continues the statute that the taking of depositions is restricted to cases in which the court is satisfied that "in order to prevent a failure of justice."

2. Unlike the practice in which depositions may be taken by notice without permission of the court (Rules 26(a) and 30, Federal Rules of Criminal Procedure), this rule permits the taking of a deposition only by order of the court, and the exercise of discretion and

Fla.1981, 664 F.2d 971, certiorari denied 103 S.Ct. 2965, 457 U.S. 1136; 73 L.Ed.2d 166.  
S.Ct. 2965, 457 U.S. 1136; 73 L.Ed.2d 166.  
certiorari denied 103 S.Ct. 208, 459 U.S. 1000, 72 L.Ed.2d 166.

**Weight and sufficiency of evidence on conviction**

determining whether abuse of discretion by district court in denying a defendant's motion for severance was prejudicial, inquiry could be directed to whether there was enough evidence to support defendant's conviction apart from the testimony of codefendant implicating defendant upon which motion for severance was granted. Since the court of appeals could not remand the case for the jury whose duty it is to determine guilt or innocence of the defendant. *Barton v. U.S.*, C.A.Tex.1959, 263 F.2d 1000.

In exceptional circumstances of the case, the testimony of a prospective witness for use at trial, the court may, at the parties' order, that testimony of a witness at any designated book, paper, or other material not privileged, be produced to the court as detained pursuant to section 804(a) of the Federal Rules of Evidence. The court on written motion of the party may direct that his deposition be taken in the manner prescribed by the court may discharge the witness.

In an instance a deposition is to be taken, the written notice of the time and place shall state the name and address of the party upon whom the deposition is to be taken. The officer having the custody of the witness may extend or shorten the time and place set for the deposition. The officer having the custody of the witness waives in writing the right to be present and keep him in the presence of the court, after being warned by the court to be removed from the place of deposition, and his conduct which is such as to constitute contempt of court.

A defendant not in custody of the court may, upon request subject to the payment of his failure, absent good cause shown, to pay the expenses in accordance with the rule, a waiver of that right and of any other right of the defendant based upon that right.

If a deposition is taken at the instance of the party, the expenses of the taking of the deposition, the cost of travel and subsistence of the witness, and the expense of the examination and cross-examination shall be paid by the government.

**(d) How Taken.** Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The government shall make available to the defendant or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the government and to which the defendant would be entitled at the trial.

**(e) Use.** At the trial or upon any hearing, a part or all of a deposition, so far as it is otherwise admissible under the rules of evidence, may be used as substantive evidence if the witness is unavailable, as unavailability is defined in Rule 804(a) of the Federal Rules of Evidence, or the witness gives testimony at the trial or hearing inconsistent with his deposition. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

**(f) Objections to Deposition Testimony.** Objections to deposition testimony or evidence or parts thereof and the grounds for the objection shall be stated at the time of the taking of the deposition.

**(g) Deposition by Agreement Not Precluded.** Nothing in this rule shall preclude the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties with the consent of the court.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(15)-(19), 89 Stat. 373, 374; Oct. 12, 1984, Pub.L. 98-473, Title II, § 209(b), 98 Stat. 1986.)

**Notes of Advisory Committee on Rules**

**Note to Subdivision (a).** 1. This rule continues the existing law permitting defendants to take depositions in certain limited classes of cases under *dedimus potestatem* and *in perpetuam rei memoriam*, [former] 28 U.S.C.A. § 644. This statute has been generally held applicable to criminal cases, *Clymer v. United States*, 10 Cir., 38 F.2d 581; *Wong Yim v. United States*, 9 Cir., 118 F.2d 667—certiorari denied, 313 U.S. 589, 61 S.Ct. 1112, 85 L.Ed. 1544; *United States v. Cameron*, C.C.E.D.Mo., 15 F.794; *United States v. Hoffmann*, D.C.S.D. N.Y. 24 F.Supp. 847. *Contra*, *Luxenberg v. United States*, 4 Cir., 45 F.2d 497—certiorari denied, 283 U.S. 820, 51 S.Ct. 345, 75 L.Ed. 1436. The rule continues the limitation of the statute that the taking of depositions is to be restricted to cases in which they are necessary "in order to prevent a failure of justice."

2. Unlike the practice in civil cases in which depositions may be taken as a matter of right by notice without permission of the court (Rules 26(a) and 30, Federal Rules of Civil Procedure), this rule permits depositions to be taken only by order of the court, made in the exercise of discretion and on notice to all

parties. It was contemplated that in criminal cases depositions would be used only in exceptional situations, as has been the practice heretofore.

3. This rule introduces a new feature in authorizing the taking of the deposition of a witness committed for failure to give bail (see Rule 46(b)). This matter is, however, left to the discretion of the court. The purpose of the rule is to afford a method of relief for such a witness, if the court finds it proper to extend it.

**Note to Subdivision (b).** This subdivision, as well as subdivisions (d) and (f), sets forth the procedure to be followed in the event that the court grants an order for the taking of a deposition. The procedure prescribed is similar to that in civil cases, Rules 28-31, Federal Rules of Civil Procedure.

**Note to Subdivision (c).** This rule introduces a new feature for the purpose of protecting the rights of an indigent defendant.

**Note to Subdivision (d).** See Note to Subdivision (b), supra.



defendant to pay travel expenses of government attorney plus a per diem rate of \$17 per day for period of time spent in Spain where there was no evidence that defendant did not have the ability to meet such conditions and where defendant had failed to arrange depositions when government counsel was previously in Spain interviewing witnesses. *U.S. v. Bronston*, D.C.N.Y.1971, 321 F.Supp. 1269.

Defendants who were not indigent would be required to bear all costs, except for travel and subsistence expenses of the government, in connection with taking depositions in Japan. *U.S. v. Sun Myung Moon*, D.C.N.Y.1982, 93 F.R.D. 558, certiorari denied 104 S.Ct. 2344, 80 L.Ed.2d 818.

Refusal of government to comply with court order to provide funds for taking of deposition of informer by indigent defendant's counsel and for reasonable and necessary expenses incurred in viewing scene of alleged crime constituted "denial of counsel" within U.S.C.A. Const. Amend. 6 and entitled defendant to dismissal of indictment and release from incarceration. *U.S. v. Germany*, D.C.Ala.1963, 32 F.R.D. 421.

Although a court order authorizing an indigent defendant to accompany his attorney overseas to take depositions of foreign nationals does not come within the specific terms of this rule, authorizing expenses of counsel, this rule may be accepted as proper authority for payment of the defendant's travel if his presence at the deposition taking is so necessary to his defense as to be considered a part of the adequacy of his representation by counsel, and since it is only by relation to authority for payment of counsel's expenses that the defendant's travel is authorized, expenses should be paid from appropriations of the Administrative Office of the United States Courts. 1965, 44 Comp.Gen. 749.

#### 14. Method of taking deposition

Given practical and legal difficulties inherent in telephone depositions, somewhat tangential focus and generalized character of offer of proof, and failure to explain why more traditional methods could not be used, district court was not shown to have abused its discretion in denying request by defendant to take deposition by telephone of business associate who was in Mexico City at time of defendant's trial in Massachusetts on charge of transporting fraudulently obtained checks in interstate commerce. *U.S. v. Ferrera*, C.A.Mass.1984, 746 F.2d 908.

District court in criminal case had authority to authorize taking of depositions in Bermuda pursuant to letter rogatory. *U.S. v. Steele*, C.A.N.J.1982, 685 F.2d 793, certiorari denied 103 S.Ct. 213, 459 U.S. 908, 74 L.Ed.2d 170.

#### 15. Persons subject to deposition—Generally

Court would not issue order to take deposition of witness sought by some defendants while it appeared that the witness was so ill

that the taking of such a deposition could seriously jeopardize the witness' health. *U.S. v. Mitchell*, D.C.D.C.1974, 385 F.Supp. 1190, affirmed 559 F.2d 31, 181 U.S.App.D.C. 254, certiorari denied 97 S.Ct. 2641, 431 U.S. 933, 53 L.Ed.2d 250, rehearing denied 97 S.Ct. 2992, 433 U.S. 916, 53 L.Ed.2d 1103.

Defendants charged with conspiring to transmit to foreign government information relating to national defense of the United States and to acting as agents of foreign government in United States without prior notification to Secretary of State were entitled to order to take depositions of foreign nationals alleged to be coconspirators, even though defendants did not know whereabouts of prospective witnesses and could not ascertain whether they would consent to be permitted to be examined, and, if so, nature and extent of their testimony. *U.S. v. Egorov*, D.C.N.Y.1963, 34 F.R.D. 130.

#### 16. — Fugitives

District court's adoption of absolute rule that deposition of a fugitive would be an injustice was not harmless error on ground that evidence of guilt was overwhelming as jury might have concluded that fugitive's testimony was no more suspect than that of the convicted felons who testified for the Government and reviewing court could not determine whether defendant proffered insufficient evidence to justify an order for depositions. *U.S. v. Mills*, C.A.11 (Fla.) 1985, 760 F.2d 1116.

Fact that the person whose deposition defendants sought to take and introduce at trial was a fugitive did not provide a basis for denying the motion. *U.S. v. Wilson*, C.A.Pa. 1979, 601 F.2d 95.

Trial court did not abuse its discretion in denying defendants' motions to depose four Mexican nationals, three of whom were fugitive codefendants, and one of whom was an unindicted coconspirator whose location was not known. *U.S. v. Richardson*, C.A.Cal.1978, 588 F.2d 1235, certiorari denied 99 S.Ct. 1426, 440 U.S. 947, 59 L.Ed.2d 636, rehearing denied 99 S.Ct. 2064, 441 U.S. 937, 60 L.Ed.2d 667, certiorari denied 99 S.Ct. 2049, 441 U.S. 931, 60 L.Ed.2d 658.

To allow testimony of fugitive to be taken by deposition would amount to an injustice. *U.S. v. Murray*, C.A.Cal.1973, 492 F.2d 178, certiorari denied 95 S.Ct. 98, 210, 419 U.S. 854, 942, 42 L.Ed.2d 87, 166.

Evidence sustained denial of motion before trial to take deposition of member of brokerage firm, as he was then fugitive from justice, in prosecution for conspiracy to defraud public by distribution of oil company stock at grossly inflated prices. *U.S. v. Kelly*, C.A.N.Y. 1965, 349 F.2d 720, certiorari denied 86 S.Ct. 1467, 384 U.S. 947, 16 L.Ed.2d 544.

Defendant would not be permitted to take deposition of person who was presently fugitive from justice subject to arrest pursuant to outstanding order of contempt issued by dis-

trict court. *U.S. v. Ros*, 303 F.Supp. 210.

Where codefendant who had willfully absented himself from trial with which United States sought protection against espionage and diplomatic relations sought for perjurious testimony showing that codefendant's trial of defendant's trial of defendant would not be tainted by written interrogatory. *U.S. v. Figueroa*, F.Supp. 1215.

Motion to take deposition was sought thereby testify and still remain in custody. *Allen*, D.C.N.Y.1961, 28

#### 17. — Party defendant

Defendants remained within meaning of the defendant from being codefendants and thus government proposed defendants' simple denial learned that defendant of immunity, related alleged coconspirator, had each pleaded guilty to crimes indictment, had *U.S. v. Cassese*, C.A.

#### 18. — Prosecution

Defendant was not before grand jury in might take deposition of evidence given upon to seek a conviction motion was not one within provisions of discovery and inspection right, and was within provisions of discovery as a demonstrative trial auxiliary. *U.S. v. ...*, 1974, 502 F.2d 581.

Defendant was not of government's main witness who *v. Grado*, D.C.Mo.1957

#### 19. Use of deposition

The confrontation clause of Amend. 6 does not prohibit an out-of-court deposition and subject to prove the truth of the when the declarant is in trial. *California v. ...*, 1930, 399 U.S. 149, 2

Use of videotaped deposition when he was because of a stroke present at deposition which witness was e



Rick Mysterom,  
Mayor

# ANCHORAGE POLICE DEPARTMENT

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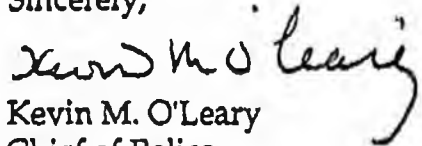
January 24, 1995

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

Dear Representative Parnell:

The Anchorage Police Department supports House Bill 26, which is an Act revising Rule 15 of the Alaska Rules of Criminal Procedure. This change will facilitate an equal administration of justice related to the taking of depositions by adopting the comparable federal rule.

Sincerely,



Kevin M. O'Leary  
Chief of Police

# FISCAL NOTE

STATE OF ALASKA  
1995 LEGISLATIVE SESSION

BILL NO: HB 26

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: "An Act revising Rule 15, Alaska Rules... relating to depositions, to adopt federal rule." BRU: DPS Statewide Support  
 Sponsor: Representative Parnell Component: Commissioner's Office  
 Requestor: (H) JUD 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						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CAPITAL EXPENDITURES</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CHANGE IN REVENUES ( )</b>	-0-	-0-	-0-	-0-	-0-	-0-
<small>Revenue Code</small>						

**FUNDING: (Thousands of Dollars)**

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

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 fiscal impact is anticipated by the Division of Fish and Wildlife Protection with the passage of this legislation.

11/24/95  
 Prepared By: Lee Ann Lucas, Special Assistant to the Commissioner Phone: (907) 465-4322  
 Division: Commissioner's Office Date: 01/24/95  
 Approved by Commissioner: [Signature] Date: 01/24/95  
 Agency: for Ronald L. Orte, Dept. of Public Safety

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**MEMORANDUM**

January 18, 1995

**SUBJECT:** Sectional Summary of HB 26. (Work Order No. 9-LS0147A)

**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 15, dealing with depositions of witnesses in criminal cases, and adopts in its place, as the Alaska rule, Federal Rule of Criminal Procedure 15.

GPL:glc  
95-064.glc

SECTIONAL SUMMARY