

SB

10

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. SB 10

Revision Date:

Dept. Affected: Alaska Court System

Title: An Act revising Rule 18, Alaska Rules of
Criminal Procedure, relating to discovery

BRU: Trial Courts

Sponsor: Sen. Leman

Components:

Requestor:

COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES

(Thousands of Dollars)

OPERATING EXPENDITURES	FY 95	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	0.8					
SUPPLIES	0.2					
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	1.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES

CHANGE IN REVENUES ()

FUND SOURCE

(Thousands of Dollars)

FUND SOURCE	FY 95	FY 97	FY 98	FY 99	FY 00	FY 01
1002 Federal Receipts						
1003 GF Match						
1004 GF	1.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	1.0	0.0	0.0	0.0	0.0	0.0

POSITIONS

POSITIONS	FY 95	FY 97	FY 98	FY 99	FY 00	FY 01
FULL-TIME						
PART-TIME						
TEMPORARY						

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

None

ANALYSIS: (Attach a separate page if necessary)

See attached analysis.

Prepared by: C. S. Christensen III, Staff Counsel

Phone:

264-8228

Agency: Alaska Court System

Date:

02/01/95

Approved by: Arthur H. Snowden, II, Administrative Director

Date:

02/01/95

Agency: Alaska Court System

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Alaska Court System
Fiscal Analysis
SB 10

This legislation will require revision of Criminal Rule 16 of the Alaska Rules of Court. It is anticipated that the rule will be drafted by the court rules attorney and circulated to all Bar members.

Contractual

Postage to mail the revised Criminal Rule to 2,800 members of the Bar \$832

Supplies

Printing supplies: copier paper, envelopes, per page copier maintenance charges, etc. 182

Total \$1,014

FISCAL NOTE

STATE OF ALASKA

BILL NO: SB 10

1995 LEGISLATIVE SESSION

Revision Date: _____ Dept. Affected: Public Safety
 Title: "An act revising Rule 16, Alaska Rules of Criminal Procedure, to adopt comparable federal rule." BRU: DPS Statewide
 Component: Commissioner's Office
 Sponsor: Senator Leman
 Requestor: (S) 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 () <small>Revenue Code</small>	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1008 GF/MHTIA						
Other						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

Estimate of current year (FY 95) impact: \$ -0-

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 is anticipated.

Prepared By: Ken Bischoff Phone: 465-4336
 Division: Administrative Services Date: 03/26/95
 Approved by Commissioner: *Ronald L. Otte* Date: 11/30/95
 Agency: Ronald L. Otte, Dept. of Public Safety

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FISCAL NOTE

**STATE OF ALASKA
1995 LEGISLATIVE SESSION**

BILL NO. SB 10

Revision Date: _____ Department Affected: Administration

Title: "An Act revising Rule 16, Alaska Rules of Criminal Procedure relating to discovery and inspection in criminal proceedings"
BRU: Public Defender Agency

Component: Public Defender Agency

Sponsor: Senator Leman

Requestor: Senator Leman COMPONENT SERIAL NO. 1031

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING EXPENDITURES	FY 96	FY 97	FY 98	FY 89	FY 00	FY 01
PERSONAL SERVICES	384.7	380.7	397.4	414.8	433.0	452.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	370.7	380.7	403.4	420.8	439.0	458.0

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

1002 Federal Receipts						
1003 GF Match						
1004 GF	370.7	380.7	403.4	420.8	439.0	458.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	370.7	380.7	403.4	420.8	439.0	458.0

Estimate of any current year (FY 86) cost: \$ 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.)

See attached.

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

Phone: (907) 264-4412
Date: _____

Approved by Commissioner: Mark Boyer
Agency: Department of Administration

Date: _____

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. SB 10

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% of Public Defender 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 5 offices which have no investigator position. Therefore, 5 investigators will be added to accommodate these offices. Additionally, the Anchorage PD office will require 1 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	39.7
Barrow	71.0
Dillingham	<u>64.0</u>
	364.7

Personal Services 364.7

Travel 6.0

TOTAL 370.7

Position Title Investigator II		No. of Positions 6	Range / Step 16A	Barg. Unit GGU
Time Status PFT	Staff Months 72	Location EBA, ARA, KAA, CAA, MEA, DAA		Election District 10-21, 2, 37, 6, 37, 39
TYPE OF EXPENDITURE		AMOUNT	Justification	
Salary		262,404	These 6 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.	
Benefits		102,274		
Premium Pay				
Other				
Total Personal Services		364,678		
Travel		6,000		
Contractual				
Commodities				
Equipment				
Other				
Total Cost		370,678	BUDGET ANALYSIS:	
FUNDING SOURCE FOR TOTAL COST			6 Investigator II	
Federal Receipts	1002		Anchorage	51.5
G.F. March	1003		Sitka	51.5
General Fund	1004	370,678	Kotzebue	71.0
IA Receipts	1007		Kodiak	39.7
CIP Receipts	1041		Barrow	71.0
Other			Dillingham	64.0
				364.7
			Personal Services	364.7
			Travel	6.0
			TOTAL	370.7

Request For New Position

AGENCY ADMINISTRATION
 BRU PUBLIC DEFENDER AGENCY
 COMPONENT PUBLIC DEFENDER AGENCY

FY 96

Page 1 of 1
 Revised Date: _____

FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. SB 10

Revision Date: _____
 Title: An Act revising Rule 16, Alaska Rules of Criminal Procedure relating to discovery and inspection in criminal proceedings.
 Sponsor: Senator Leman
 Requestor: Senator Leman

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	0	0	0	0	0	0
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CHANGE IN REVENUES ()	0	0	0	0	0	0
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FUND SOURCE:

(Thousands of Dollars)

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

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary.)

See attached.

Prepared by: John B. Salton
 Division: Public Defender Agency

Phone: (907) 264-4412
 Date: _____

Approved by Commissioner: Mark Royer
 Agency: Department of Administration

Date: 2/21/95

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FISCAL NOTE

STATE OF ALASKA
1995 LEGISLATIVE SESSION

BILL NO. SB 10

ANALYSIS: (continued)

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

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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
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FISCAL ANALYSIS

6 Investigators II

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Sitka	51.5
Kotzebue	71.0
Kodiak	39.7
Barrow	71.0
Dillingham	<u>64.0</u>
	364.7
Personal Services	364.7
Travel	<u>6.0</u>
TOTAL	\$ 370.7

9-LS0138C
Luckhaupt
1/31/95

CS FOR SENATE BILL NO. 10()
IN THE LEGISLATURE OF THE STATE OF ALASKA
NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Kelly, Halford, Green

A BILL

FOR AN ACT ENTITLED

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

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

4 * Section I. Rule 16, Alaska Rules of Criminal Procedure, is amended to read:

5 Rule 16. Discovery.

6 (a) Scope of Discovery.

7 (1) In order to provide adequate information for informed pleas,
8 expedite trial, minimize surprise, afford opportunity for effective cross-examination,
9 and meet the requirements of due process, discovery prior to trial should be as full and
10 free as possible consistent with protection of persons, effective law enforcement, and
11 the adversary system. The following discovery shall be provided:

12 (i) Disclosure to the Accused. The prosecuting attorney shall
13 disclose to defense counsel

14 (aa) any material or information within the

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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;

(bb) upon request, grand jury materials as provided under Criminal Rule 6(n);

(cc) disclosure required, and in the manner provided, by AS 12.45.050 - 12.45.082;

(dd) any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial which were obtained from or belong to the accused.

(ii) Disclosure to the Prosecuting Attorney. The defendant shall

(aa) unless a different date is set by the court, no later than 10 days before trial, inform the prosecutor if the defendant may rely upon a defense of alibi, justification, duress, heat of passion, 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;

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

(cc) participate in non-testimonial identification procedures when ordered by the court under (g) of this rule;

(dd) disclose to the prosecuting attorney disclosure required, and in the manner provided, by AS 12.45.050 - 12.45.082;

(ee) turn over to the prosecutor any physical evidence of the offense received by defense counsel; if the physical evidence

1 is received from the attorney's client or acquired as a direct result
2 of information communicated by the client, defense counsel may not
3 be compelled to provide any information concerning the source of
4 the evidence or the manner in which it was obtained; in such cases,
5 the prosecutor may not reveal the source of the evidence to the
6 jury; if the physical evidence is not received from the client or
7 acquired as a direct result of information communicated by the
8 client, defense counsel shall reveal the manner in which the physical
9 evidence was obtained unless that information is otherwise
10 privileged.

11 (2) Within 10 days of arraignment, a defendant shall file a written
12 notice, personally executed by the defendant, stating whether the defendant elects
13 to participate in additional discovery under (b) and (c) of this rule. If the
14 defendant fails to file a notice or if the defendant elects not to participate in
15 additional discovery under this rule, (b) and (c) of this rule do not apply. The
16 filing of a notice to participate in the additional discovery process under this rule
17 shall be deemed a waiver of the defendant's privilege against self-incrimination
18 as to the information and materials that the defendant is required to disclose to
19 the prosecution under (c) of this rule. If any defendant knowingly shares in
20 additional discovery obtained by a codefendant under this rule, the defendant
21 shall be deemed to have elected to participate in the additional discovery process
22 as provided in this rule.

23 (b) Additional Disclosure to the Accused.

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

29 .) The names and addresses of persons known by the
30 government to have knowledge of relevant facts and their written or recorded
31 statements or summaries of statements:

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

3 (iii) Any written or recorded statements and summaries of
4 statements and the substance of any oral statements made by a co-defendant;

5 (iv) Unless a different date is set by the court, as soon as
6 known and no later than 45 days before trial, the prosecutor shall inform
7 the defendant of the names and addresses of any expert witnesses
8 performing work in connection with the case; the prosecutor shall also
9 make available for inspection and copying any reports or written
10 statements of these experts; failure to provide timely notice under this rule
11 shall entitle the defendant to a continuance; if the court finds that a
12 continuance is not an adequate remedy under the circumstances of the
13 case, the court may impose other sanctions, including prohibiting the
14 prosecutor from calling the expert at trial [ANY REPORTS OR
15 STATEMENTS OF EXPERTS, MADE IN CONNECTION WITH THE
16 PARTICULAR CASE, INCLUDING RESULTS OF PHYSICAL OR MENTAL
17 EXAMINATIONS OF AND SCIENTIFIC TESTS, EXPERIMENTS OR
18 COMPARISONS];

19 (v) Any books, papers, documents, photographs or tangible
20 objects, which the prosecuting attorney intends to use in the hearing or trial
21 and which are not otherwise disclosed under (a)(1)(i)(aa) of this rule
22 [WHICH WERE OBTAINED FROM OR BELONG TO THE ACCUSED]; and

23 (vi) Any record of prior criminal convictions of the defendant
24 and of persons whom the prosecuting attorney intends to call as witnesses at
25 the hearing or trial.

26 (2) Information Provided by Informant--Electronic Surveillance. The
27 prosecuting attorneys shall inform defense counsel:

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

30 (ii) of any electronic surveillance, including wiretapping, of

31 (aa) conversations to which the accused or the accused's

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attorney was a party.

(bb) premises of the accused or the accused's attorney.

(3) [INFORMATION TENDING TO NEGATE GUILT OR REDUCE PUNISHMENT. THE PROSECUTING ATTORNEY SHALL DISCLOSE TO DEFENSE COUNSEL ANY MATERIAL OR INFORMATION WITHIN THE PROSECUTING ATTORNEY'S POSSESSION OR CONTROL WHICH TENDS TO NEGATE THE GUILT OF THE ACCUSED AS TO THE OFFENSE OR WOULD TEND TO REDUCE THE ACCUSED'S PUNISHMENT THEREFOR.

(4) Information Within Possession or Control of Other Members of Prosecuting Attorney's Staff. The prosecuting attorney's obligations extend to material and information in the possession or control of

(i) members of the prosecuting attorney's staff, 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.

(4) [(5)] Availability of Information to Defense Counsel. Whenever defense counsel designates and requests production of material or information which is not in the possession or control of the prosecuting attorney 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.

(5) [(6)] Information Regarding Searches and Seizures--Statements From the Accused--Relationship of Witnesses to Prosecuting Attorney. Except as otherwise provided the prosecuting attorney shall, upon request of defense counsel, disclose and permit inspection, testing, copying and photographing of any relevant material and information regarding:

(i) Specified searches and seizures;

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

and

(iii) The relationship, if any, of specified witnesses to the prosecuting authority.

1 (6) [(7)] Other Information. Upon a reasonable request showing
2 materiality to the preparation of the defense, the court in its discretion may require
3 disclosure to defense counsel of relevant material and information not covered by
4 [SUBSECTIONS] (b)(1), (b)(2), [(b)(3),] and (b)(5) of this rule [(b)(6)].

5 (7) [(8)] Legal Research and Records of Prosecuting Attorney.
6 Disclosure shall not be required of legal research or those portions of records,
7 correspondence, reports or memoranda [TO THE EXTENT] that [THEY] contain the
8 opinions, theories or conclusions of the prosecuting attorney or members of the
9 prosecuting attorney's legal staff.

10 (c) Additional Disclosure to the Prosecuting Attorney.

11 (1) Expert Witnesses. Unless a different date is set by the court,
12 no later than 30 days before trial, the defendant shall inform the prosecutor of
13 the names and addresses of any expert witnesses that are performing work in
14 connection with the case for the defendant. The defendant shall also make
15 available for inspection and copying any reports or written statements of these
16 experts. Failure to provide timely notice under this rule shall entitle the prosecutor
17 to a continuance. If the court finds that a continuance is not an adequate remedy
18 under the circumstances of the case, the court may impose other sanctions,
19 including prohibiting the defendant from calling the expert at trial.

20 (2) Legal Research and Records of Defense Counsel. Disclosure
21 shall not be required of legal research or those portions of records,
22 correspondence, reports or memoranda that contain the opinions, theories or
23 conclusions of the defense counsel or members of the defense counsel's legal staff.

24 (3) Other Information. Unless a different date is set by the court,
25 no later than 10 days before trial the defendant shall furnish the state with the
26 following material within the defendant's possession or control:

27 (i) The names and addresses of persons the defendant may
28 call as witnesses and their written or recorded statements or summaries of
29 statements;

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

1 INVOLVE NO UNREASONABLE INTRUSION THEREOF:

2 (viii) PROVIDE SPECIMENS OF THE PERSON'S
3 HANDWRITING:

4 (ix) SUBMIT TO A REASONABLE PHYSICAL OR
5 MEDICAL INSPECTION OF THE PERSON'S BODY.

6 (3) RIGHT TO COUNSEL. WHEN ISSUING AN ORDER UNDER
7 SUBSECTION (c)(1) OF THIS RULE, THE COURT SHALL ALSO ORDER THAT
8 THE PERSON BE REPRESENTED BY COUNSEL OR WAIVE THE RIGHT TO BE
9 REPRESENTED BY COUNSEL BEFORE BEING REQUIRED TO APPEAR IN A
10 LINEUP, GIVE A SPECIMEN OF HANDWRITING, OR SPEAK FOR
11 IDENTIFICATION BY WITNESSES TO AN OFFENSE.

12 (4) REPORTS OR STATEMENTS OF EXPERTS. THE TRIAL
13 COURT MAY REQUIRE THAT THE PROSECUTING ATTORNEY BE INFORMED
14 OF AND PERMITTED TO INSPECT AND TO COPY OR PHOTOGRAPH ANY
15 REPORTS OR STATEMENTS OF EXPERTS MADE IN CONNECTION WITH THE
16 PARTICULAR CASE, INCLUDING RESULTS OF PHYSICAL OR MENTAL
17 EXAMINATIONS AND OF SCIENTIFIC TESTS, EXPERIMENTS OR
18 COMPARISONS WHICH ARE INTENDED BY THE DEFENDANT TO BE USED
19 AT TRIAL. INFORMATION OBTAINED BY THE STATE UNDER THE
20 PROVISIONS OF THIS SECTION SHALL BE USED ONLY FOR CROSS-
21 EXAMINATION OR REBUTTAL OF DEFENSE TESTIMONY.

22 (5) NOTICE OF INTENT TO RAISE INSANITY DEFENSE.
23 FOLLOWING SUBSTANTIAL COMPLIANCE BY THE STATE WITH SECTION
24 (b) OF THIS RULE A DEFENDANT WHO INTENDS TO OFFER EVIDENCE OF
25 A DEFENSE OF INSANITY SHALL INFORM THE STATE OF SUCH INTENTION
26 AT THE TIME OF PLEA OR AT SUCH OTHER TIME AS MAY BE
27 DESIGNATED BY THE TRIAL COURT. THE COURT MAY ORDER THE
28 DEFENDANT TO SUBMIT TO A PSYCHIATRIC EXAMINATION BY A
29 PSYCHIATRIST OR PSYCHOLOGIST SELECTED BY THE COURT, AND THE
30 REPORT SHALL BE MADE AVAILABLE TO BOTH PARTIES. NOTICE OF
31 INTENT TO RAISE A DEFENSE OF INSANITY SHALL NOT BE COMMENTED

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ON BY THE PROSECUTION AT TRIAL.]

(d) Regulation of Discovery.

(1) 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.

(2) 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.

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

(A) 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

(i) A CRIMINAL HISTORY RECORD OF A VICTIM OR WITNESS;

(ii) A MEDICAL, PSYCHIATRIC, PSYCHOLOGICAL, OR COUNSELING RECORD OF A VICTIM OR WITNESS;

(iii) AN ADOPTION RECORD;

(iv) A RECORD THAT IS CONFIDENTIAL UNDER AS 47.10.090 OR A SIMILAR LAW IN ANOTHER JURISDICTION;

(v) A REPORT OF A PRESENTENCE INVESTIGATION OF A VICTIM OR WITNESS PREPARED PURSUANT TO CRIMINAL RULE 32 OR A SIMILAR LAW IN ANOTHER JURISDICTION;

(vi) A RECORD OF THE DEPARTMENT OF

1 CORRECTIONS OTHER THAN INCIDENT REPORT RELATING
2 TO THE CRIME WITH WHICH THE DEFENDANT IS CHARGED;
3 OR

4 (vii) ANY OTHER RECORD THAT THE COURT
5 ORDERS BE KEPT IN THE EXCLUSIVE CUSTODY OF THE
6 ATTORNEY].

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

14 (C) Notwithstanding a defendant's status as co-counsel,
15 materials covered by [SUBSECTION] (d)(3)(A) of this rule shall remain in the
16 exclusive custody of the defendant's attorney.

17 (D) If a defendant is proceeding without counsel, materials
18 covered by [SUBSECTION] (d)(3)(A) of this rule may be provided to the
19 defendant. If materials are provided to an unrepresented defendant under this
20 paragraph, the court shall order that the materials remain in the defendant's
21 exclusive custody, be used only for purposes of conducting the case, and be
22 subject to other terms, conditions, and restrictions that the court may provide.
23 The court shall also inform the defendant that violation of an order issued
24 under this paragraph is punishable as a contempt of court.

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

30 (5) Material Partially Discoverable. When some parts of certain
31 material are discoverable under these rules, and other parts are not discoverable, as

1 much of the material shall be disclosed as is consistent with this rule. Excision of
2 certain material and disclosure of the balance shall be preferred to withholding of the
3 whole. Material excised pursuant to court order shall be sealed and preserved in the
4 records of the court, and shall be made available to the court of appeals and the
5 supreme court in the event of an appeal.

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

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

9 or

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

16 (e) Sanctions.

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

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

26 (f) Omnibus Hearing.

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

31 The omnibus hearing may be cancelled by the court only upon the stipulation

1 of counsel that there are no motions which require hearing and that discovery is
2 complete. Counsel shall also provide the information outlined in [SECTION] (f)(2)(D)
3 of this rule.

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

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

7 (A) ensure that discovery under this rule is complete;

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

9 (C) schedule any necessary evidentiary hearings; and

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

13 (g) Non-Testimonial Identification Procedures.

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

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

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

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

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

26 (i) Appear in a line-up;

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

29 (iii) Be fingerprinted;

30 (iv) Pose for photographs not involving reenactment of a
31 scene;

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(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 (2)(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,

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1191Amending Criminal Rule 16
concerning discovery in
criminal cases.

IT IS ORDERED:

1. Criminal Rule 16 is amended to read as follows:

(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.** (A) 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:

(iv) Any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the

Supreme Court Order No. 1191
Effective Date: July 15, 1995
Page 2

hearing or trial or which were obtained from or belong to the accused; and

(v) Any record of prior criminal convictions of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(B) *Expert Witnesses.* Unless a different date is set by the court, as soon as known and no later than 45 days prior to trial, the prosecutor shall inform the defendant of the names and addresses of any expert witnesses performing work in connection with the case or whom the prosecutor is likely to call at trial. The prosecutor shall also make available for inspection and copying any reports or written statements of these experts. With respect to each expert whom the prosecution is likely to call at trial, the prosecutor shall also furnish to the defendant a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion. Failure to provide timely disclosure under this rule 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.

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Effective Date: July 15, 1995
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(c) Disclosure to the Prosecuting Attorney.

(4) *Expert Witnesses.* Unless a different date is set by the court, no later than 30 days prior to trial, the defendant shall inform the prosecutor of the names and addresses of any expert witnesses the defendant is likely to call at trial. The defendant shall also make available for inspection and copying any reports or written statements of these experts. For each such expert witness, the defendant shall also furnish to the prosecutor a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion. Failure to provide timely disclosure under this rule 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. Information obtained by the prosecutor under this rule may be used only for cross-examination or rebuttal of defense testimony.

(5) *Notice of Defenses.* Unless a different date is set by the court, no later than 10 days prior to trial, the defendant

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shall inform the prosecutor of the defendant's intention to rely upon a defense of alibi, justification, duress, entrapment, or other statutory or affirmative defense. Failure to provide timely notice under this rule 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. The defendant shall give notice of an insanity defense or a defense of diminished capacity due to mental disease or defect in compliance with AS 12.47.

(6) *Physical Evidence.* Defense counsel shall turn over to the prosecutor any physical evidence of the offense received by counsel. If the physical evidence is received from the 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.

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(e) Sanctions.

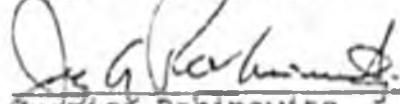
(1) Failure to Comply with Discovery Rule or Order. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court shall order such party to permit the discovery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

DATED: February 21, 1995

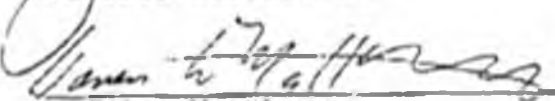
EFFECTIVE DATE: July 15, 1995



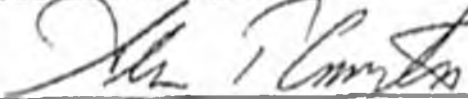
Chief Justice Moore



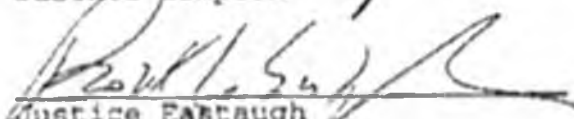
Justice Rabinowitz



Justice Matthews



Justice Compton



Justice Eastaugh

9-LS0138K
Luckhaupt
2/27/95

CS FOR SENATE BILL NO. 10(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

**Offered:
Referred:**

Sponsor(s): SENATORS LEMAN, Kelly, Halford, Green

A BILL

FOR AN ACT ENTITLED

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

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

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

6 (a) Scope of Discovery.

7 (1) In order to provide adequate information for informed pleas, expedite
8 trial, minimize surprise, afford opportunity for effective cross-examination, and meet the
9 requirements of due process, discovery prior to trial should be as full and free as possible
10 consistent with protection of persons, effective law enforcement, the constitutional rights
11 of crime victims, the right of privacy of witnesses, and the adversary system. The
12 following discovery shall be provided:

13 (i) Disclosure to the Accused. The prosecuting attorney shall
14 disclose to defense counsel

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

5 (bb) upon request, grand jury materials as provided under
6 Criminal Rule 6(m);

7 (cc) disclosure required, and in the manner provided, by
8 AS 12.45.050 - 12.45.082;

9 (dd) any books, papers, documents, photographs or
10 tangible objects, which the prosecuting attorney is likely to use as evidence
11 in the hearing or trial which were obtained from or belong to the accused.

12 (ii) Disclosure to the Prosecuting Attorney. The defendant shall

13 (aa) unless a different date is set by the court, no later than
14 10 days before trial, inform the prosecutor if the defendant is likely to rely
15 upon a defense of alibi, justification, duress, entrapment, or other statutory
16 or affirmative defense; failure to provide timely notice shall entitle the
17 prosecutor to a continuance; if the court finds that a continuance is not an
18 adequate remedy under the circumstances of the case, the court may
19 impose other sanctions, including prohibiting the defendant from asserting
20 the designated defense;

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

24 (cc) participate in non-testimonial identification procedures
25 when ordered by the court under (g) of this rule;

26 (dd) disclose to the prosecuting attorney statements of
27 defense witnesses to the same extent and in the same manner as is required
28 of the prosecuting attorney under AS 12.45.050 - 12.45.082;

29 (ee) turn over to the prosecutor any physical evidence of
30 the offense received by defense counsel; if the physical evidence is
31 received from the attorney's client or the client's agent or acquired as a
32 direct result of information communicated by the client, defense counsel

1 may not be compelled to provide any information concerning the source
2 of the evidence or the manner in which it was obtained; in such cases, the
3 prosecutor may not reveal the source of the evidence to the jury; if the
4 physical evidence is not received from the client or the client's agent or
5 acquired as a direct result of information communicated by the client,
6 defense counsel shall reveal the manner in which the physical evidence
7 was obtained unless that information is otherwise privileged.

8 (2) Within 10 days of arraignment, a defendant shall file a written notice,
9 personally executed by the defendant, stating whether the defendant elects to participate
10 in additional discovery under (b) and (c) of this rule. If the defendant fails to file a notice
11 or if the defendant elects not to participate in additional discovery under this rule, (b) and
12 (c) of this rule do not apply. The filing of a notice to participate in the additional
13 discovery process under this rule shall be deemed a waiver of the defendant's privilege
14 against self-incrimination as to the information and materials that the defendant is required
15 to disclose to the prosecution under (c) of this rule. If any defendant knowingly shares in
16 additional discovery obtained by a codefendant under this rule, the defendant shall be
17 deemed to have elected to participate in the additional discovery process as provided in
18 this rule.

19 (b) Additional Disclosure to the Accused.

20 (1) Information within Possession or Control of Prosecuting Attorney.

21 Except as is otherwise provided as to matters not subject to disclosure and protective
22 orders, the prosecuting attorney shall disclose the following information within the
23 prosecuting attorney's possession or control to defense counsel and make available for
24 inspection and copying:

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

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

29 (iii) any written or recorded statements and summaries of
30 statements and the substance of any oral statements made by a co-defendant;

31 (iv) unless a different date is set by the court, as soon as known and
32 no later than 45 days before trial, the prosecutor shall inform the defendant of the

1 names and addresses of any expert witnesses performing work in connection with
2 the case and shall provide a curriculum vitae and a written report by each expert
3 witness of the expert's opinion and the underlying basis of that opinion; failure to
4 provide timely disclosure under this rule shall entitle the defendant to a
5 continuance; if the court finds that a continuance is not an adequate remedy under
6 the circumstances of the case, the court may impose other sanctions, including
7 prohibiting the prosecutor from calling the expert at trial or declaring a mistrial;

8 (v) any books, papers, documents, photographs or tangible objects,
9 which the prosecuting attorney is likely to use as evidence in the hearing or trial
10 and which are not otherwise disclosed under (a)(1)(i)(aa) of this rule; and

11 (vi) any record of prior criminal convictions of the defendant and
12 of persons whom the prosecuting attorney is likely to call as witnesses at the
13 hearing or trial.

14 (2) Information Provided by Informant--Electronic Surveillance. The
15 prosecuting attorneys shall inform defense counsel:

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

18 (ii) of any electronic surveillance, including wiretapping, of

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

21 (bb) premises of the accused or the accused's attorney.

22 (3) Availability of Information to Defense Counsel. Whenever defense
23 counsel designates and requests production of material or information which is not in the
24 possession or control of the prosecuting attorney, other than confidential records under (h)
25 of this rule, but would be discoverable if in the possession or control of the prosecutir
26 attorney, the court shall issue suitable subpoenas or orders to cause such material to be
27 made available to defense counsel.

28 (4) Information Regarding Searches and Seizures--Statements From the
29 Accused--Relationship of Witnesses to Prosecuting Attorney. Except as otherwise
30 provided the prosecuting attorney shall, upon request of defense counsel, disclose and
31 permit inspection, testing, copying and photographing of any relevant material and
32 information regarding:

- 1 (i) specified searches and seizures;
2 (ii) the acquisition of specified statements from the accused; and
3 (iii) the relationship, if any, of specified witnesses to the
4 prosecuting authority.

5 (5) Other Information. Upon a reasonable request showing materiality to
6 the preparation of the defense, the court in its discretion may require disclosure to defense
7 counsel of relevant material and information not covered by (b)(1) - (4) of this rule.

8 (c) Additional Disclosure to the Prosecuting Attorney.

9 (1) Expert Witnesses. Unless a different date is set by the court, as soon
10 as known and no later than 30 days before trial, the defendant shall inform the prosecutor
11 of the names and addresses of any expert witnesses that are likely to be called at trial by
12 the defendant and shall provide a curriculum vitae and a written report by each expert
13 witness of the expert's opinion and the underlying basis of that opinion. Failure to provide
14 timely disclosure under this rule shall entitle the prosecutor to a continuance. If the court
15 finds that a continuance is not an adequate remedy under the circumstances of the case, the
16 court may impose other sanctions, including prohibiting the defendant from calling the
17 expert at trial.

18 (2) Other Information. Unless a different date is set by the court, no later
19 than 10 days before trial the defendant shall furnish the state with the following material
20 within the defendant's possession or control:

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

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

25 (iii) any books, papers, documents, photographs, or tangible
26 objects the defense is likely to use as evidence at a hearing or trial and which are
27 not otherwise disclosed under (a)(1)(ii)(cc) of this rule.

28 (d) Regulation of Discovery.

29 (1) Advice to Refrain From Discussing Case. Except as is otherwise
30 provided as to matters not subject to disclosure and protective orders, neither counsel for
31 the parties nor other prosecution or defense personnel shall advise persons (except the
32 accused) having relevant material or information to refrain from discussing the case with

1 opposing counsel or showing opposing counsel any relevant material, nor shall they
2 otherwise impede opposing counsel's investigation of the case.

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

8 (3) Materials to Remain in Exclusive Custody of Attorney.

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

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

20 (iii) Notwithstanding a defendant's status as co-counsel, materials
21 covered by (d)(3)(i) of this rule shall remain in the exclusive custody of the
22 defendant's attorney.

23 (iv) If a defendant is proceeding without counsel, materials covered
24 by (d)(3)(i) of this rule may be provided to the defendant. If materials are provided
25 to an unrepresented defendant under this paragraph, the court shall order that the
26 materials remain in the defendant's exclusive custody, be used only for purposes
27 of conducting the case, and be subject to other terms, conditions, and restrictions
28 that the court may provide. The court shall also inform the defendant that violation
29 of an order issued under this paragraph is punishable as a contempt of court.

30 (4) Restriction or Deferral of Disclosure of Information. Upon a showing
31 of cause, the court may at any time order that specified disclosure be restricted or deferred,
32 or make such other order as is appropriate, provided that all material and information to

1 which a party is entitled shall be disclosed in time to permit the party's counsel to make
2 beneficial use thereof.

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

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

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

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

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

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

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

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

32 (i) prosecuting attorney or members of the prosecuting attorney's

1 legal staff; or

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

3 (c) Sanctions.

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

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

12 (f) Omnibus Hearing.

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

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

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

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

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

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

25 (iii) schedule any necessary evidentiary hearings; and

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

29 (g) Non-Testimonial Identification Procedures.

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

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

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

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

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

9 (i) appear in a line-up;

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

12 (iii) be fingerprinted;

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

14 (v) try on article: of clothing;

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

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

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

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

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

26 (h) Confidential Records. If a defendant makes a particularized showing that
27 confidential records not in the possession of the prosecuting attorney are likely to contain
28 relevant information that would negate guilt, reduce the defendant's punishment or
29 establish bias on the part of a witness, the court may order disclosure of that portion of the
30 records only after conducting an in camera review of the records upon prior notice to the
31 person who is the subject of the records and the agency keeping the records. If the court
32 determines during its in camera review that such information exists, the court shall provide

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

8 (i) As used in this rule, "written or recorded statement" means

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

11 (B) a stenographic, mechanical, electrical, or other recording, or
12 a transcription of the statement that is a substantially verbatim recital of an oral
13 statement made by the witness to an agent of the party and recorded
14 contemporaneously with the making of the oral statement.

ALASKA PUBLIC DEFENDER AGENCY

900 West Fifth Avenue, Suite 200
Anchorage, Alaska 99501
(907) 264-4400/269-5476 FAX

February 27, 1995

Senator Robin Taylor
State Capitol
Room 30
Juneau, Alaska 99801-1182

RE: SB 10 (Reciprocal Discovery in Criminal Cases)

Dear Senator Taylor:

As you are aware, the Alaska Supreme Court recently amended Alaska Criminal Rule 16 regarding the regulation of discovery in criminal cases. It is my belief that the changes made by the Supreme Court obviate the need for legislation in this area. The amendments resolve the issues which are at the core of the "discovery" debate.

Expert Witnesses. The Supreme Court has established specific rules to deal with this area of controversy. Expert witnesses now need to be properly noticed up at least 30 days in advance of the trial date. Reports of experts must be provided to the opposing party along with a summary of the expert's opinion and proposed testimony. This rule change will eliminate claims of surprise, expedite trial matters and facilitate dispositions short of trial.


Notice of Affirmative and Statutory Defenses. This considerably expands the number of and kind of defenses which must be "noticed up" prior to trial. This change also will work to eliminate surprise during trials (although it is rare for a prosecutor not to know what defense is going to be proposed prior to trial). Under this amendment self defense, defense of others, duress, coercion, compulsion, defense of property, diminished capacity and other claims of defense can only be presented with proper notification to opposing counsel and the court.

As I mentioned in my testimony before your committee, approximately 95 percent of criminal matters in Alaska result in pleas of no contest or guilty. With our history of no plea bargaining and presumptive sentencing one would expect a much higher trial rate. Our current rules of discovery promote disposition of cases short of trial. Moving to reciprocal discovery, with the attendant requirement that a defendant waive his/her Fifth Amendment privilege in order to receive full discovery, will likely usher in a more contentious processing of criminal matters. I'm not one for cliches, but I think the old saw "if it ain't broke, don't fix it" applies here.

As a former judge, and as a lawyer, I urge you to carefully consider the ramifications of SB 10.

I would appreciate it if you would share this letter with the other members of the Senate Judiciary Committee.

Very truly yours,

A handwritten signature in black ink, appearing to read "JBS", written over the typed name "John B. Salemi".

John B. Salemi
Public Defender

JBS:sh

9-LS0138G
Luckhaupt
2/10/95

CS FOR SENATE BILL NO. 10(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
NINETEENTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Kelly, Halford, Green

A BILL

FOR AN ACT ENTITLED

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

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

4 * Section 1. Rule 16, Alaska Rules of Criminal Procedure, is amended to read:

5 Rule 16. Discovery.

6 (a) Scope of Discovery.

7 (1) In order to provide adequate information for informed pleas, expedite
8 trial, minimize surprise, afford opportunity for effective cross-examination, and meet the
9 requirements of due process, discovery prior to trial should be as full and free as possible
10 consistent with protection of persons, effective law enforcement, the constitutional
11 rights of crime victims, the right of privacy of witnesses, and the adversary system.

12 The following discovery shall be provided:

13 (i) Disclosure to the Accused. The prosecuting attorney shall
14 disclose to defense counsel

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

5 (bb) upon request, grand jury materials as provided
6 under Criminal Rule 6(m);

7 (cc) disclosure required, and in the manner provided,
8 by AS 12.45.050 - 12.45.082;

9 (dd) any books, papers, documents, photographs or
10 tangible objects, which the prosecuting attorney is likely to use as
11 evidence in the hearing or trial which were obtained from or belong
12 to the accused.

13 (ii) Disclosure to the Prosecuting Attorney. The defendant
14 shall

15 (aa) unless a different date is set by the court, no later
16 than 10 days before trial, inform the prosecutor if the defendant may
17 rely upon a defense of alibi, justification, duress, heat of passion,
18 entrapment, or other statutory or affirmative defense; failure to
19 provide timely notice shall entitle the prosecutor to a continuance; if
20 the court finds that a continuance is not an adequate remedy under
21 the circumstances of the case, the court may impose other sanctions,
22 including prohibiting the defendant from asserting the designated
23 defense;

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

27 (cc) participate in non-testimonial identification
28 procedures when ordered by the court under (g) of this rule;

29 (dd) disclose to the prosecuting attorney statements of
30 defense witnesses to the same extent and in the same manner as is

1 required of the prosecuting attorney under AS 12.45.050 - 12.45.082:
2 (ee) turn over to the prosecutor any physical evidence
3 of the offense received by defense counsel; if the physical evidence is
4 received from the attorney's client or acquired as a direct result of
5 information communicated by the client, defense counsel may not be
6 compelled to provide any information concerning the source of the
7 evidence or the manner in which it was obtained; in such cases, the
8 prosecutor may not reveal the source of the evidence to the jury; if
9 the physical evidence is not received from the client or acquired as a
10 direct result of information communicated by the client, defense
11 counsel shall reveal the manner in which the physical evidence was
12 obtained unless that information is otherwise privileged.

13 (2) Within 10 days of arraignment, a defendant shall file a written
14 notice, personally executed by the defendant, stating whether the defendant elects
15 to participate in additional discovery under (b) and (c) of this rule. If the defendant
16 fails to file a notice or if the defendant elects not to participate in additional
17 discovery under this rule, (b) and (c) of this rule do not apply. The filing of a notice
18 to participate in the additional discovery process under this rule shall be deemed a
19 waiver of the defendant's privilege against self-incrimination as to the information
20 and materials that the defendant is required to disclose to the prosecution under (c)
21 of this rule. If any defendant knowingly shares in additional discovery obtained by
22 a codefendant under this rule, the defendant shall be deemed to have elected to
23 participate in the additional discovery process as provided in this rule.

24 (b) Additional Disclosure to the Accused.

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

30 (i) The names and addresses of persons known by the government

1 to have knowledge of relevant facts and their written or recorded statements or
2 summaries of statements;

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

5 (iii) Any written or recorded statements and summaries of
6 statements and the substance of any oral statements made by a co-defendant;

7 (iv) Unless a different date is set by the court, as soon as
8 known and no later than 45 days before trial, the prosecutor shall inform the
9 defendant of the names and addresses of any expert witnesses performing
10 work in connection with the case and shall provide a written report by each
11 expert witness of the tests conducted, if any, and the conclusions reached by
12 the expert witness; failure to provide timely notice under this rule shall
13 entitle the defendant to a continuance; if the court finds that a continuance
14 is not an adequate remedy under the circumstances of the case, the court
15 may impose other sanctions, including prohibiting the prosecutor from
16 calling the expert at trial [ANY REPORTS OR STATEMENTS OF EXPERTS,
17 MADE IN CONNECTION WITH THE PARTICULAR CASE, INCLUDING
18 RESULTS OF PHYSICAL OR MENTAL EXAMINATIONS OF AND
19 SCIENTIFIC TESTS, EXPERIMENTS OR COMPARISONS];

20 (v) Any books, papers, documents, photographs or tangible
21 objects, which the prosecuting attorney is likely [INTENDS] to use as evidence
22 in the hearing or trial and which are not otherwise disclosed under (a)(1)(i)(aa)
23 of this rule [WHICH WERE OBTAINED FROM OR BELONG TO THE
24 ACCUSED]; and

25 (vi) Any record of prior criminal convictions of the defendant and
26 of persons whom the prosecuting attorney is likely [INTENDS] to call as
27 witnesses at the hearing or trial.

28 (2) Information Provided by Informant--Electronic Surveillance. The
29 prosecuting attorneys shall inform defense counsel:

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

1 (ii) of any electronic surveillance, including wiretapping, of

2 (aa) conversations to which the accused or the accused's
3 attorney was a party.

4 (bb) premises of the accused or the accused's attorney.

5 (3) [INFORMATION TENDING TO NEGATE GUILT OR REDUCE
6 PUNISHMENT. THE PROSECUTING ATTORNEY SHALL DISCLOSE TO
7 DEFENSE COUNSEL ANY MATERIAL OR INFORMATION WITHIN THE
8 PROSECUTING ATTORNEY'S POSSESSION OR CONTROL WHICH TENDS TO
9 NEGATE THE GUILT OF THE ACCUSED AS TO THE OFFENSE OR WOULD
10 TEND TO REDUCE THE ACCUSED'S PUNISHMENT THEREFOR.

11 (4) Information Within Possession or Control of Other Members of
12 Prosecuting Attorney's Staff. The prosecuting attorney's obligations extend to material
13 and information in the possession or control of

14 (i) members of the prosecuting attorney's staff, and

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

18 (4) [(5)] Availability of Information to Defense Counsel. Whenever
19 defense counsel designates and requests production of material or information which is
20 not in the possession or control of the prosecuting attorney but would be discoverable if
21 in the possession or control of the prosecuting attorney, the court shall issue suitable
22 subpoenas or orders to cause such material to be made available to defense counsel.

23 (5) [(6)] Information Regarding Searches and Seizures--Statements From
24 the Accused--Relationship of Witnesses to Prosecuting Attorney. Except as otherwise
25 provided the prosecuting attorney shall, upon request of defense counsel, disclose and
26 permit inspection, testing, copying and photographing of any relevant material and
27 information regarding:

28 (i) Specified searches and seizures;

29 (ii) The acquisition of specified statements from the accused; and

30 (iii) The relationship, if any, of specified witnesses to the
31 prosecuting authority.

1 (6) [(7)] Other Information. Upon a reasonable request showing
2 materiality to the preparation of the defense, the court in its discretion may require
3 disclosure to defense counsel of relevant material and information not covered by
4 [SUBSECTIONS] (b)(1), (b)(2), [(b)(3),] and (b)(5) of this rule [(b)(6)].

5 (7) [(8)] Legal Research and Records of Prosecuting Attorney.
6 Disclosure shall not be required of legal research or those portions of records,
7 correspondence, reports or memoranda [TO THE EXTENT] that [THEY] contain the
8 opinions, theories or conclusions of the prosecuting attorney or members of the
9 prosecuting attorney's legal staff.

10 (c) Additional Disclosure to the Prosecuting Attorney.

11 (1). Expert Witnesses. Unless a different date is set by the court, as
12 soon as known and no later than 30 days before trial, the defendant shall inform the
13 prosecutor of the names and addresses of any expert witnesses that are likely to be
14 called at trial by the defendant and shall provide a written report by each expert
15 witness of the tests conducted, if any, and the conclusions reached by the expert
16 witness. Failure to provide timely notice under this rule shall entitle the prosecutor
17 to a continuance. If the court finds that a continuance is not an adequate remedy
18 under the circumstances of the case, the court may impose other sanctions,
19 including prohibiting the defendant from calling the expert at trial.

20 (2) Legal Research and Records of Defense Counsel. Disclosure shall
21 not be required of legal research or those portions of records, correspondence,
22 reports or memoranda that contain the opinions, theories or conclusions of the
23 defense counsel or members of the defense counsel's legal staff.

24 (3) Other Information. Unless a different date is set by the court, no
25 later than 10 days before trial the defendant shall furnish the state with the
26 following material within the defendant's possession or control:

27 (i) The names and addresses of persons the defendant is likely
28 to call as witnesses and their written or recorded statements or summaries
29 of statements;

30 (ii) Any record of prior criminal convictions known to the

1 defendant relating to the potential defense witnesses; and

2 (iii) Any books, papers, documents, photographs, or tangible
3 objects the defense is likely to use as evidence at a hearing or trial and which
4 are not otherwise disclosed under (a)(1)(ii)(ee) of this rule (NON-
5 TESTIMONIAL IDENTIFICATION PROCEDURES--AUTHORITY. UPON
6 APPLICATION OF THE PROSECUTING ATTORNEY, THE COURT BY
7 ORDER MAY DIRECT ANY PERSON TO PARTICIPATE IN ONE OR
8 MORE OF THE PROCEDURES SPECIFIED IN SUBSECTION (c)(2) OF THIS
9 RULE IF AFFIDAVIT OR TESTIMONY SHOWS PROBABLE CAUSE TO
10 BELIEVE THAT:

11 (i) AN OFFENSE HAS BEEN COMMITTED BY ONE OF
12 SEVERAL PERSONS COMPRISING A NARROW FOCAL GROUP THAT
13 INCLUDES THE SUBJECT PERSON;

14 (ii) THE EVIDENCE SOUGHT MAY BE OF MATERIAL AID
15 IN IDENTIFYING WHO COMMITTED THE OFFENSE; AND

16 (iii) THE EVIDENCE SOUGHT CANNOT PRACTICABLY BE
17 OBTAINED FROM OTHER SOURCES.

18 (2) NON-TESTIMONIAL IDENTIFICATION PROCEDURES--SCOPE.
19 AN ORDER ISSUED UNDER SUBSECTION (c)(1) OF THIS RULE MAY DIRECT
20 THE PERSON TO DO OR SUBMIT TO ANY AND ALL OF THE FOLLOWING:

21 (i) APPEAR IN A LINE-UP;

22 (ii) SPEAK WORDS, PHRASES OR SENTENCES RELEVANT
23 TO THE CASE FOR IDENTIFICATION BY WITNESSES;

24 (iii) BE FINGERPRINTED;

25 (iv) POSE FOR PHOTOGRAPHS NOT INVOLVING
26 REENACTMENT OF A SCENE;

27 (v) TRY ON ARTICLES OF CLOTHING;

28 (vi) PERMIT THE TAKING OF SPECIMENS OF MATERIAL
29 UNDER THE PERSON'S FINGERNAILS;

30 (vii) PERMIT THE TAKING OF SAMPLES OF BLOOD, HAIR
31 AND OTHER MATERIALS OF THE PERSON'S BODY WHICH INVOLVE

1 NO UNREASONABLE INTRUSION THEREOF;

2 (viii) PROVIDE SPECIMENS OF THE PERSON'S
3 HANDWRITING;

4 (ix) SUBMIT TO A REASONABLE PHYSICAL OR MEDICAL
5 INSPECTION OF THE PERSON'S BODY.

6 (3) RIGHT TO COUNSEL. WHEN ISSUING AN ORDER UNDER
7 SUBSECTION (c)(1) OF THIS RULE, THE COURT SHALL ALSO ORDER THAT
8 THE PERSON BE REPRESENTED BY COUNSEL OR WAIVE THE RIGHT TO BE
9 REPRESENTED BY COUNSEL BEFORE BEING REQUIRED TO APPEAR IN A
10 LINEUP, GIVE A SPECIMEN OF HANDWRITING, OR SPEAK FOR
11 IDENTIFICATION BY WITNESSES TO AN OFFENSE.

12 (4) REPORTS OR STATEMENTS OF EXPERTS. THE TRIAL
13 COURT MAY REQUIRE THAT THE PROSECUTING ATTORNEY BE INFORMED
14 OF AND PERMITTED TO INSPECT AND TO COPY OR PHOTOGRAPH ANY
15 REPORTS OR STATEMENTS OF EXPERTS MADE IN CONNECTION WITH THE
16 PARTICULAR CASE, INCLUDING RESULTS OF PHYSICAL OR MENTAL
17 EXAMINATIONS AND OF SCIENTIFIC TESTS, EXPERIMENTS OR
18 COMPARISONS WHICH ARE INTENDED BY THE DEFENDANT TO BE USED AT
19 TRIAL. INFORMATION OBTAINED BY THE STATE UNDER THE PROVISIONS
20 OF THIS SECTION SHALL BE USED ONLY FOR CROSS-EXAMINATION OR
21 REBUTTAL OF DEFENSE TESTIMONY.

22 (5) NOTICE OF INTENT TO RAISE INSANITY DEFENSE.
23 FOLLOWING SUBSTANTIAL COMPLIANCE BY THE STATE WITH SECTION (b)
24 OF THIS RULE A DEFENDANT WHO INTENDS TO OFFER EVIDENCE OF A
25 DEFENSE OF INSANITY SHALL INFORM THE STATE OF SUCH INTENTION AT
26 THE TIME OF PLEA OR AT SUCH OTHER TIME AS MAY BE DESIGNATED BY
27 THE TRIAL COURT. THE COURT MAY ORDER THE DEFENDANT TO SUBMIT
28 TO A PSYCHIATRIC EXAMINATION BY A PSYCHIATRIST OR PSYCHOLOGIST
29 SELECTED BY THE COURT, AND THE REPORT SHALL BE MADE AVAILABLE
30 TO BOTH PARTIES. NOTICE OF INTENT TO RAISE A DEFENSE OF INSANITY
31 SHALL NOT BE COMMENTED ON BY THE PROSECUTION AT TRIAL].

32 (d) Regulation of Discovery.

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

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

12 (3) Materials to Remain in Exclusive Custody of Attorney.

13 (A) Materials furnished to an attorney pursuant to these rules shall
14 remain in the attorney's exclusive custody, shall be used only for the purposes of
15 conducting the case, and shall be subject to other terms and conditions that the
16 court may provide [IF THE INFORMATION IS

17 (i) A CRIMINAL HISTORY RECORD OF A VICTIM
18 OR WITNESS:

19 (ii) A MEDICAL, PSYCHIATRIC, PSYCHOLOGICAL,
20 OR COUNSELING RECORD OF A VICTIM OR WITNESS:

21 (iii) AN ADOPTION RECORD:

22 (iv) A RECORD THAT IS CONFIDENTIAL UNDER
23 AS 47.10.090 OR A SIMILAR LAW IN ANOTHER JURISDICTION:

24 (v) A REPORT OF A PRESENTENCE
25 INVESTIGATION OF A VICTIM OR WITNESS PREPARED
26 PURSUANT TO CRIMINAL RULE 32 OR A SIMILAR LAW IN
27 ANOTHER JURISDICTION:

28 (vi) A RECORD OF THE DEPARTMENT OF
29 CORRECTIONS OTHER THAN INCIDENT REPORT RELATING TO
30 THE CRIME WITH WHICH THE DEFENDANT IS CHARGED; OR

31 (vii) ANY OTHER RECORD THAT THE COURT
32 ORDERS BE KEPT IN THE EXCLUSIVE CUSTODY OF THE

1 ATTORNEY].

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

9 (C) Notwithstanding a defendant's status as co-counsel, materials
10 covered by [SUBSECTION] (d)(3)(A) of this rule shall remain in the exclusive
11 custody of the defendant's attorney.

12 (D) If a defendant is proceeding without counsel, materials
13 covered by [SUBSECTION] (d)(3)(A) of this rule may be provided to the
14 defendant. If materials are provided to an unrepresented defendant under this
15 paragraph, the court shall order that the materials remain in the defendant's
16 exclusive custody, be used only for purposes of conducting the case, and be
17 subject to other terms, conditions, and restrictions that the court may provide.
18 The court shall also inform the defendant that violation of an order issued under
19 this paragraph is punishable as a contempt of court.

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

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

31 (6) Denial or Regulation of Disclosure--Disclosure to Court in Camera--

1 Record of Proceedings. Upon request of any party, the court may permit:

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

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

9 (e) Sanctions.

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

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

18 (f) Omnibus Hearing.

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

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

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

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

29 (A) ensure that discovery under this rule is complete;

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

31 (C) schedule any necessary evidentiary hearings; and

32 (D) obtain case management information from the parties.

1 including the expected length of trial, the likelihood of trial, and any anticipated
2 scheduling difficulties.

3 (g) Non-Testimonial Identification Procedures.

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

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

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

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

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

16 (i) Appear in a line-up;

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

19 (iii) Be fingerprinted;

20 (iv) Pose for photographs not involving reenactment of a
21 scene;

22 (v) Try on articles of clothing;

23 (vi) Permit the taking of specimens of material under the
24 person's fingernails;

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

28 (viii) Provide specimens of the person's handwriting;

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

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

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

20 (i) As used in this rule, "statement" has the meaning given in AS 12.45.082.

9-LS0138F/
Luckhaupt
2/4/95

CS FOR SENATE BILL NO. 10()

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): SENATORS LEMAN, Kelly, Halford, Green

A BILL

FOR AN ACT ENTITLED

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

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

4 • Section 1. Rule 16, Alaska Rules of Criminal Procedure, is amended to read:

5 Rule 16. Discovery.

6 (a) Scope of Discovery.

7 (1) In order to provide adequate information for informed pleas, expedite
8 trial, minimize surprise, afford opportunity for effective cross-examination, and meet the
9 requirements of due process, discovery prior to trial should be as full and free as possible
10 consistent with protection of persons, effective law enforcement, and the adversary
11 system. The following discovery shall be provided:

12 (i) Disclosure to the Accused. The prosecuting attorney shall
13 disclose to defense counsel

14 (aa) any material or information within the

1 prosecuting attorney's possession or control that tends to negate the
2 guilt of the accused as to the offense or would tend to reduce the
3 accused's punishment therefor;

4 (bb) upon request, grand jury materials as provided
5 under Criminal Rule 6(m);

6 (cc) disclosure required, and in the manner provided,
7 by AS 12.45.050 - 12.45.082;

8 (dd) any books, papers, documents, photographs or
9 tangible objects, which the prosecuting attorney intends to use in the
10 hearing or trial which were obtained from or belong to the accused,

11 (ii) Disclosure to the Prosecuting Attorney. The defendant
12 shall

13 (aa) unless a different date is set by the court, no later
14 than 10 days before trial, inform the prosecutor if the defendant may
15 rely upon a defense of alibi, justification, duress, heat of passion,
16 entrapment, or other statutory or affirmative defense; failure to
17 provide timely notice shall entitle the prosecutor to a continuance; if
18 the court finds that a continuance is not an adequate remedy under
19 the circumstances of the case, the court may impose other sanctions,
20 including prohibiting the defendant from asserting the designated
21 defense;

22 (bb) give notice of an insanity defense or a defense of
23 diminished capacity due to mental disease or defect in compliance
24 with AS 12.47;

25 (cc) participate in non-testimonial identification
26 procedures when ordered by the court under (g) of this rule;

27 (dd) disclose to the prosecuting attorney statements of
28 defense witnesses to the same extent and in the same manner as is
29 required of the prosecuting attorney under AS 12.45.050 - 12.45.082;

30 (ee) turn over to the prosecutor any physical evidence

1 of the offense received by defense counsel; if the physical evidence is
2 received from the attorney's client or acquired as a direct result of
3 information communicated by the client, defense counsel may not be
4 compelled to provide any information concerning the source of the
5 evidence or the manner in which it was obtained; in such cases, the
6 prosecutor may not reveal the source of the evidence to the jury; if
7 the physical evidence is not received from the client or acquired as a
8 direct result of information communicated by the client, defense
9 counsel shall reveal the manner in which the physical evidence was
10 obtained unless that information is otherwise privileged.

11 (2) Within 10 days of arraignment, a defendant shall file a written
12 notice, personally executed by the defendant, stating whether the defendant elects
13 to participate in additional discovery under (b) and (c) of this rule. If the defendant
14 fails to file a notice or if the defendant elects not to participate in additional
15 discovery under this rule, (b) and (c) of this rule do not apply. The filing of a notice
16 to participate in the additional discovery process under this rule shall be deemed a
17 waiver of the defendant's privilege against self-incrimination as to the information
18 and materials that the defendant is required to disclose to the prosecution under (c)
19 of this rule. If any defendant knowingly shares in additional discovery obtained by
20 a codefendant under this rule, the defendant shall be deemed to have elected to
21 participate in the additional discovery process as provided in this rule.

22 (b) Additional Disclosure to the Accused.

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

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

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

3 (iii) Any written or recorded statements and summaries of
4 statements and the substance of any oral statements made by a co-defendant;

5 (iv) Unless a different date is set by the court, as soon as
6 known and no later than 45 days before trial, the prosecutor shall inform the
7 defendant of the names and addresses of any expert witnesses performing
8 work in connection with the case and shall provide a written report by each
9 expert witness of the tests conducted, if any, and the conclusions reached by
10 the expert witness; the prosecutor shall also make available for inspection
11 and copying any other reports or written statements of these experts; failure
12 to provide timely notice under this rule shall entitle the defendant to a
13 continuance; if the court finds that a continuance is not an adequate remedy
14 under the circumstances of the case, the court may impose other sanctions,
15 including prohibiting the prosecutor from calling the expert at trial [ANY
16 REPORTS OR STATEMENTS OF EXPERTS, MADE IN CONNECTION
17 WITH THE PARTICULAR CASE, INCLUDING RESULTS OF PHYSICAL
18 OR MENTAL EXAMINATIONS OF AND SCIENTIFIC TESTS,
19 EXPERIMENTS OR COMPARISONS];

20 (v) Any books, papers, documents, photographs or tangible
21 objects, which the prosecuting attorney intends to use in the hearing or trial and
22 which are not otherwise disclosed under (a)(1)(i)(aa) of this rule [WHICH
23 WERE OBTAINED FROM OR BELONG TO THE ACCUSED]; and

24 (vi) Any record of prior criminal convictions of the defendant and
25 of persons whom the prosecuting attorney intends to call as witnesses at the
26 hearing or trial.

27 (2) Information Provided by Informant--Electronic Surveillance. The
28 prosecuting attorneys shall inform defense counsel:

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

31 (ii) of any electronic surveillance, including wiretapping, of

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

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

4 (3) [INFORMATION TENDING TO NEGATE GUILT OR REDUCE
5 PUNISHMENT. THE PROSECUTING ATTORNEY SHALL DISCLOSE TO
6 DEFENSE COUNSEL ANY MATERIAL OR INFORMATION WITHIN THE
7 PROSECUTING ATTORNEY'S POSSESSION OR CONTROL WHICH TENDS TO
8 NEGATE THE GUILT OF THE ACCUSED AS TO THE OFFENSE OR WOULD
9 TEND TO REDUCE THE ACCUSED'S PUNISHMENT THEREFOR.

10 (4) Information Within Possession or Control of Other Members of
11 Prosecuting Attorney's Staff. The prosecuting attorney's obligations extend to material
12 and information in the possession or control of

13 (i) members of the prosecuting attorney's staff, and

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

17 (4) [(5)] Availability of Information to Defense Counsel. Whenever
18 defense counsel designates and requests production of material or information which is
19 not in the possession or control of the prosecuting attorney but would be discoverable if
20 in the possession or control of the prosecuting attorney, the court shall issue suitable
21 subpoenas or orders to cause such material to be made available to defense counsel.

22 (5) [(6)] Information Regarding Searches and Seizures--Statements From
23 the Accused--Relationship of Witnesses to Prosecuting Attorney. Except as otherwise
24 provided the prosecuting attorney shall, upon request of defense counsel, disclose and
25 permit inspection, testing, copying and photographing of any relevant material and
26 information regarding:

27 (i) Specified searches and seizures;

28 (ii) The acquisition of specified statements from the accused; and

29 (iii) The relationship, if any, of specified witnesses to the
30 prosecuting authority.

31 (6) [(7)] Other Information. Upon a reasonable request showing

1 materiality to the preparation of the defense, the court in its discretion may require
2 disclosure to defense counsel of relevant material and information not covered by
3 [SUBSECTIONS] (b)(1), (b)(2), [(b)(3),] and (b)(5) of this rule [(b)(6)].

4 (7) [(8)] Legal Research and Records of Prosecuting Attorney.
5 Disclosure shall not be required of legal research or those portions of records,
6 correspondence, reports or memoranda [TO THE EXTENT] that [THEY] contain the
7 opinions, theories or conclusions of the prosecuting attorney or members of the
8 prosecuting attorney's legal staff.

9 (c) Additional Disclosure to the Prosecuting Attorney.

10 (1) Expert Witnesses. Unless a different date is set by the court, no
11 later than 30 days before trial, the defendant shall inform the prosecutor of the
12 names and addresses of any expert witnesses that are performing work in
13 connection with the case for the defendant and shall provide a written report by
14 each expert witness of the tests conducted, if any, and the conclusions reached by
15 the expert witness. The defendant shall also make available for inspection and
16 copying any other reports or written statements of these experts. Failure to provide
17 timely notice under this rule shall entitle the prosecutor to a continuance. If the
18 court finds that a continuance is not an adequate remedy under the circumstances
19 of the case, the court may impose other sanctions, including prohibiting the
20 defendant from calling the expert at trial.

21 (2) Legal Research and Records of Defense Counsel. Disclosure shall
22 not be required of legal research or those portions of records, correspondence,
23 reports or memoranda that contain the opinions, theories or conclusions of the
24 defense counsel or members of the defense counsel's legal staff.

25 (3) Other Information. Unless a different date is set by the court, no
26 later than 10 days before trial the defendant shall furnish the state with the
27 following material within the defendant's possession or control:

28 (i) The names and addresses of persons the defendant may call
29 as witnesses and their written or recorded statements or summaries of
30 statements;

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

3 (iii) Any books, papers, documents, photographs, or tangible
4 objects the defense may use as evidence or for impeachment at a hearing or
5 trial and which are not otherwise disclosed under (a)(1)(ii)(ee) of this rule
6 [NON-TESTIMONIAL IDENTIFICATION PROCEDURES--AUTHORITY.
7 UPON APPLICATION OF THE PROSECUTING ATTORNEY, THE COURT
8 BY ORDER MAY DIRECT ANY PERSON TO PARTICIPATE IN ONE OR
9 MORE OF THE PROCEDURES SPECIFIED IN SUBSECTION (c)(2) OF THIS
10 RULE IF AFFIDAVIT OR TESTIMONY SHOWS PROBABLE CAUSE TO
11 BELIEVE THAT:

12 (i) AN OFFENSE HAS BEEN COMMITTED BY ONE OF
13 SEVERAL PERSONS COMPRISING A NARROW FOCAL GROUP THAT
14 INCLUDES THE SUBJECT PERSON;

15 (ii) THE EVIDENCE SOUGHT MAY BE OF MATERIAL AID
16 IN IDENTIFYING WHO COMMITTED THE OFFENSE; AND

17 (iii) THE EVIDENCE SOUGHT CANNOT PRACTICABLY BE
18 OBTAINED FROM OTHER SOURCES.

19 (2) NON-TESTIMONIAL IDENTIFICATION PROCEDURES--SCOPE.
20 AN ORDER ISSUED UNDER SUBSECTION (c)(1) OF THIS RULE MAY DIRECT
21 THE PERSON TO DO OR SUBMIT TO ANY AND ALL OF THE FOLLOWING:

22 (i) APPEAR IN A LINE-UP;

23 (ii) SPEAK WORDS, PHRASES OR SENTENCES RELEVANT
24 TO THE CASE FOR IDENTIFICATION BY WITNESSES;

25 (iii) BE FINGERPRINTED;

26 (iv) POSE FOR PHOTOGRAPHS NOT INVOLVING
27 REENACTMENT OF A SCENE;

28 (v) TRY ON ARTICLES OF CLOTHING;

29 (vi) PERMIT THE TAKING OF SPECIMENS OF MATERIAL
30 UNDER THE PERSON'S FINGERNAILS;

31 (vii) PERMIT THE TAKING OF SAMPLES OF BLOOD, HAIR

1 AND OTHER MATERIALS OF THE PERSON'S BODY WHICH INVOLVE
2 NO UNREASONABLE INTRUSION THEREOF;

3 (viii) PROVIDE SPECIMENS OF THE PERSON'S
4 HANDWRITING;

5 (ix) SUBMIT TO A REASONABLE PHYSICAL OR MEDICAL
6 INSPECTION OF THE PERSON'S BODY.

7 (3) RIGHT TO COUNSEL. WHEN ISSUING AN ORDER UNDER
8 SUBSECTION (c)(1) OF THIS RULE, THE COURT SHALL ALSO ORDER THAT
9 THE PERSON BE REPRESENTED BY COUNSEL OR WAIVE THE RIGHT TO BE
10 REPRESENTED BY COUNSEL BEFORE BEING REQUIRED TO APPEAR IN A
11 LINEUP, GIVE A SPECIMEN OF HANDWRITING, OR SPEAK FOR
12 IDENTIFICATION BY WITNESSES TO AN OFFENSE.

13 (4) REPORTS OR STATEMENTS OF EXPERTS. THE TRIAL
14 COURT MAY REQUIRE THAT THE PROSECUTING ATTORNEY BE INFORMED
15 OF AND PERMITTED TO INSPECT AND TO COPY OR PHOTOGRAPH ANY
16 REPORTS OR STATEMENTS OF EXPERTS MADE IN CONNECTION WITH THE
17 PARTICULAR CASE, INCLUDING RESULTS OF PHYSICAL OR MENTAL
18 EXAMINATIONS AND OF SCIENTIFIC TESTS, EXPERIMENTS OR
19 COMPARISONS WHICH ARE INTENDED BY THE DEFENDANT TO BE USED AT
20 TRIAL. INFORMATION OBTAINED BY THE STATE UNDER THE PROVISIONS
21 OF THIS SECTION SHALL BE USED ONLY FOR CROSS-EXAMINATION OR
22 REBUTTAL OF DEFENSE TESTIMONY.

23 (5) NOTICE OF INTENT TO RAISE INSANITY DEFENSE.
24 FOLLOWING SUBSTANTIAL COMPLIANCE BY THE STATE WITH SECTION (b)
25 OF THIS RULE A DEFENDANT WHO INTENDS TO OFFER EVIDENCE OF A
26 DEFENSE OF INSANITY SHALL INFORM THE STATE OF SUCH INTENTION AT
27 THE TIME OF PLEA OR AT SUCH OTHER TIME AS MAY BE DESIGNATED BY
28 THE TRIAL COURT. THE COURT MAY ORDER THE DEFENDANT TO SUBMIT
29 TO A PSYCHIATRIC EXAMINATION BY A PSYCHIATRIST OR PSYCHOLOGIST
30 SELECTED BY THE COURT, AND THE REPORT SHALL BE MADE AVAILABLE
31 TO BOTH PARTIES. NOTICE OF INTENT TO RAISE A DEFENSE OF INSANITY
32 SHALL NOT BE COMMENTED ON BY THE PROSECUTION AT TRIAL.]

1 (d) Regulation of Discovery.

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

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

13 (3) Materials to Remain in Exclusive Custody of Attorney.

14 (A) Materials furnished to an attorney pursuant to these rules shall
15 remain in the attorney's exclusive custody, shall be used only for the purposes of
16 conducting the case, and shall be subject to other terms and conditions that the
17 court may provide [IF THE INFORMATION IS

18 (i) A CRIMINAL HISTORY RECORD OF A VICTIM
19 OR WITNESS;

20 (ii) A MEDICAL, PSYCHIATRIC, PSYCHOLOGICAL,
21 OR COUNSELING RECORD OF A VICTIM OR WITNESS;

22 (iii) AN ADOPTION RECORD;

23 (iv) A RECORD THAT IS CONFIDENTIAL UNDER
24 AS 47.10.090 OR A SIMILAR LAW IN ANOTHER JURISDICTION;

25 (v) A REPORT OF A PRESENTENCE
26 INVESTIGATION OF A VICTIM OR WITNESS PREPARED
27 PURSUANT TO CRIMINAL RULE 32 OR A SIMILAR LAW IN
28 ANOTHER JURISDICTION;

29 (vi) A RECORD OF THE DEPARTMENT OF
30 CORRECTIONS OTHER THAN INCIDENT REPORT RELATING TO
31 THE CRIME WITH WHICH THE DEFENDANT IS CHARGED; OR

32 (vii) ANY OTHER RECORD THAT THE COURT

1 ORDERS BE KEPT IN THE EXCLUSIVE CUSTODY OF THE
2 ATTORNEY].

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

10 (C) Notwithstanding a defendant's status as co-counsel, materials
11 covered by [SUBSECTION] (d)(3)(A) of this rule shall remain in the exclusive
12 custody of the defendant's attorney.

13 (D) If a defendant is proceeding without counsel, materials
14 covered by [SUBSECTION] (d)(3)(A) of this rule may be provided to the
15 defendant. If materials are provided to an unrepresented defendant under this
16 paragraph, the court shall order that the materials remain in the defendant's
17 exclusive custody, be used only for purposes of conducting the case, and be
18 subject to other terms, conditions, and restrictions that the court may provide.
19 The court shall also inform the defendant that violation of an order issued under
20 this paragraph is punishable as a contempt of court.

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

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

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

- 3 (i) any showing of cause for denial or regulation of disclosure, or
4 (ii) any portion of any showing of cause for denial or regulation
5 of disclosure to be made to the court in camera ex parte. A record shall be made
6 of such proceedings. If the court enters an order granting relief following such
7 a showing, the entire record of the proceedings shall be sealed and preserved in
8 the records of the court, to be made available to the court of appeals and the
9 supreme court in the event of an appeal.

10 (e) Sanctions.

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

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

19 (f) Omnibus Hearing.

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

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

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

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

- 30 (A) ensure that discovery under this rule is complete;
31 (B) rule on any pending motions which are ripe for decision;
32 (C) schedule any necessary evidentiary hearings; and

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

4 (g) Non-Testimonial Identification Procedures.

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

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

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

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

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

17 (i) Appear in a line-up;

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

20 (iii) Be fingerprinted;

21 (iv) Pose for photographs not involving reenactment of a
22 scene;

23 (v) Try on articles of clothing;

24 (vi) Permit the taking of specimens of material under the
25 person's fingernails;

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

29 (viii) Provide specimens of the person's handwriting;

30 (ix) Submit to a reasonable physical or medical inspection of

1 the person's body.

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

Proposed Amendments to [REDACTED] 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 written 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.

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 accommodate 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.

MEMORANDUM

State of Alaska

Department of Law
Criminal Division

To: Christine Johnson
Court Rules Attorney

Date: December 8, 1994

File No:

Telephone: 259-6250

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

Subject: Minority Report on Amend-
ing 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

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12/9/94

-- 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.

MEMORANDUM

TO: Senator Robin Taylor
FROM: John Salemi
RE: SB10 (Crim. Discovery)
DATE: 2-8-95

During the 2-6-95 Senate Judiciary hearing re: the above bill, you asked that send you, in written form, the suggestions I made during my testimony. Here goes:

Introduction

The current proposal substitutes "opt in/opt out" for the present system where an accused person receives full discovery from the prosecution. The present system works well in that it facilitates early resolutions of cases, reduces the number of cases which must be presented to a grand jury and minimizes pre-trial and trial litigation.

The original "fix" would have been an adoption of the Federal Rule, which permits the government to "hide the ball" from the defense. Through discussions with prosecution, it appears the legislators who are considering this bill in committee recognized this profound change was ill-conceived.

The current proposal is supported as a way of minimizing surprise at trial. I believe we can reduce/eliminate the "surprise" element without fundamentally changing the way we engage in criminal litigation. I think it is desirable to maintain our present full and fair discovery rule, with the following changes:

1) Defense Expert Witnesses-

I suggest we amend Rule 16 along these lines:

"(c)Disclosure to the prosecuting attorney.. .

(4)Notice of Use of Expert Witnesses.

Unless a different date is set by the court, no later than 30 days before trial, the defendant shall provide notice to the prosecutor of the names and addresses of any expert witness(es) who the defendant intends to call on a witness at trial. Additionally, defendant is required, at that time, to provide the prosecution with any report which was prepared in conjunction with the case by said expert(s). If no report has been prepared, defendant must prepare and provide prosecution

with a concise summary of the proposed trial testimony of said expert(s)."

This eliminates the biggest issue regarding prosecution claims of "trial by ambush".

2) Notice of Defenses-

While I haven't had time to draft language, I propose that the defense be required to give notice, pre-trial (30 days in advance in felony cases) of affirmative and statutory defenses, including alibi. This would include, self-defense, necessity, mistake, coercion, defense of property, entrapment, etc. See generally, AS 11.81.300 et seq.

3) Names and other info. re alibi witnesses-

Again I propose no specific language (due to time constraints only). I suggest that "alibi witnesses" be noticed up by name and address/ph. number.

Conclusion

Reciprocal Discovery as an opt in/out process isn't going to work well in a jurisdiction with a long history of a plea bargaining ban and stiff mandatory sentencing, especially since the defendant will have to give up a constitutional right (waive 5th Amendment) in order to opt in. There is no need to make this change if the above suggestions are adopted. Reciprocal discovery will only increase the gamesmanship of criminal litigation, and will result in more trials and fewer early dispositions of cases. Cases will linger on court calendars longer, creating problems for judges and lawyers alike.

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Juneau Alaska 99801-2105

MEMORANDUM

February 6, 1995

SUBJECT: Criminal Rule 16 and CSSB 10(), "F" version
(Work Order No. 9-LS0138\F)

TO: Senator Robin Taylor
Attn: Laura

FROM: Gerald P. Luckhaupt, *GL*
Legislative Counsel

You have asked for a comparison of current Criminal Rule 16 and the rule as it is amended in CSSB 10(), "F" version. CSSB 10() has been drafted in the "amended to read" format so that the current language of Criminal Rule 10, if it is being retained, is in regular type, and if it is being deleted it is bracketed and capitalized. All new language is underlined and bold. This comparison will refer to each subsection of Criminal Rule 16 as it is amended in CSSB 10().

Subsection (a) retains the current language of Criminal Rule 16(a) without change and adds to it various paragraphs and subparagraphs. The additions clarify what discovery must be provided by each side in every criminal case. **Subparagraph (a)(1)(i)** lists the discovery that must be made by the prosecution to the accused: (aa) - is the discovery of exculpatory materials, so called Brady materials, disclosure of which is currently provided for in Criminal Rule 16(b)(3); (bb) - is the disclosure of grand jury materials, disclosure of which is required under Criminal Rule 6(m), Criminal Rule 16 currently does not refer to this disclosure; (cc) - is disclosure of witness statements by the prosecution required under Alaska's version of the Jenck's Act, Criminal Rule 16 currently does not refer to these materials; (dd) - is disclosure of books, papers, etc., that the state is going to use which were obtained from or belong to the accused, Criminal Rule 16 currently requires the state to disclose these materials under subparagraph (b)(1)(v). **Subparagraph (a)(1)(ii)** lists the discovery that the defense must make to the prosecution in every criminal case: (aa) - is disclosure of defenses the defendant may rely upon at trial, Criminal Rule 16 currently does not require the defendant to give the state notice of these defenses; (bb) - is disclosure of an insanity or diminished capacity defense, Criminal Rule 16 currently requires disclosure of insanity defenses in paragraph (c)(5); (cc) - is a requirement that the defendant participate in nontestimonial identification procedures under subsection(g) of the CS(), Criminal Rule 16 currently requires the

Senator Robin Taylor

February 6, 1995

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defendant to participate in these procedures under paragraphs (c)(1) - (3); (dd) - is disclosure of statements of defense witnesses to the same extent as the state is required to provide disclosure under Alaska's version of the Jenck's Act under (a)(1)(cc) above. Criminal Rule 16 currently does not require this disclosure; (ee) - is a requirement that defense counsel turn over to the prosecution any physical evidence. Criminal Rule 16 currently does not contain this requirement although the requirement or something similar to it is probably required under court decisions. Paragraph (a)(2) provides a waiver procedure for the defendant to obtain discovery from the state that is in addition to that provided in Paragraph (a)(1). If the defendant agrees to this additional discovery the defendant will receive the disclosures provided for in subsection (b) but will have to provide the state with the disclosure provided for in subsection (c). This provision and this procedure does not exist in current Criminal Rule 16.

Subsection (b) details the additional discovery the state must provide to the defendant if the defendant opts for the additional discovery under paragraph (a)(2). Subparagraphs (b)(1)(i) - (iii) and (iv) are unchanged in language from current Criminal Rule 16 but the current rule requires their disclosure to the defendant in every case not just when the defendant opts to participate in the additional discovery under the CS(). Subparagraph (iv) relates to disclosure of expert witnesses by the state to the defense, this language is changed from the current provision relating to expert witnesses so that the CS() requires disclosure of not just expert witness statements and reports (as under the current rule) but also their names, addresses, and a written report by each expert that discloses the tests they have conducted and their conclusions. Subparagraph (v) requires the disclosure of books, papers, etc., that the prosecution will use and which were not obtained from or belong to the defendant, current Criminal Rule 16 does not have this disclosure requirement. Paragraph (b)(2) - (7) are unchanged from current Criminal Rule 16 other than disclosure is now contingent upon the defendant's agreeing to participate in additional discovery.

Subsection (c) details the additional discovery that the defendant must make to the prosecution if the defendant chooses to participate in the additional discovery process outlined in (a)(2) of the CS(). Paragraph (c)(1) relates to disclosure of expert witnesses the defense has performing work in connection with the case and mirrors the requirements of prosecution expert witnesses discussed in reference to subparagraph (b)(1)(iv) above. Under current Criminal Rule 16 defense disclosure of expert witness statements and reports was mandatory in all criminal cases but under the CS() would be conditioned on the defendant's decision to participate in additional disclosure. Paragraph (c)(2) provides that defense counsel work product is not discoverable and mirrors the protection provided for prosecution work product. Current Criminal Rule 16 while providing protection for prosecution work product in current paragraph (b)(8) does not mention defense work product. Paragraph (c)(3) requires the defense to make other disclosures concerning their witnesses and evidence that mirror additional disclosure requirements of the prosecution in (b)(1) of the CS(). Current Criminal Rule 16 does not contain a requirement for these disclosures by the defense.

Senator Robin Taylor
February 6, 1995
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Subsection (d) is for the most part unchanged from current Criminal Rule 16. The only material change is in regard to the materials that must remain in the defense counsel's sole possession under (d)(3). Current Criminal Rule 16 provides a list of the items that must remain in the possession of the attorney and the CS() eliminates the list.

Subsections (e) and (f) are essentially unchanged from current Criminal Rule 16.

Subsection (g) is merely the provisions of current Criminal Rule 16(c)(1) - (3) that have been moved and renumbered without any material change.

GPL/pl glc
95-028 plm



SENATOR LOREN LEMAN

Northwest Anchorage

716 W 4th Ave, Ste 540, Anchorage AK 99501 258-8189

Session: State Capitol, Juneau AK 99801 465-2095

SPONSOR STATEMENT

SENATE BILL 10

"An Act revising Rule 16, Alaska Rules of Criminal Procedure, relating to depositions, to adopt the comparable federal rule."

Alaska's Rule 16, as well as Federal Rule 16 concern "discovery" -- the rules under which evidence is shared by the prosecution and the defense in a criminal case.

Unlike the Federal Rule 16, which is used in all 50 states and applies to Alaskans who are prosecuted in a federal case, Alaska Rule 16 was written by and heavily biased in favor of the criminal defense bar. Alaska Rule 16 provides for one-way discovery in which the prosecution must virtually open its files to the defense. In practice, virtually none of the evidence in the defense's possession is provided to the prosecution until they are surprised at trial.

Senate Bill 10 strikes the current version of the Alaska Rule 16 and substitutes Federal Rule 16, which is already in use in criminal trials in Alaska's federal courts and has been constitutionally tested all the way up the United States Supreme Court.

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Juneau, Alaska 99801-2105

MEMORANDUM

January 23, 1995

SUBJECT: Sectional Summary of SB 10

TO: Senator Loren Leman
Attn: Mary

FROM: Gerald P. Luckhaupt *GL*
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:pl
95-010.plm

(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 1152 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 626 (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, 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, 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, 577 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;

(iii) Any written or recorded summaries of statements and the substance of any oral statements made by a witness;

(iv) Any reports or statements in connection with the particular case of physical or mental examination, diagnosis, experiments or comparisons;

(v) Any books, papers, photographs, or tangible objects, which the prosecutor intends to use in the hearing and which are obtained from or belong to the accused;

(vi) Any record of prior conviction of the defendant and of persons whose testimony the prosecutor intends to call as a witness at trial.

(2) Information Provided by Electronic Surveillance. The prosecutor shall inform defense counsel:

(i) of any relevant information relating to the guilt or innocence of the accused which has been provided to the prosecutor;

(ii) of any electronic surveillance of the accused;

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

(bb) premises of the accused.

(3) Information Tended to Reduce Punishment. The prosecutor shall disclose to defense counsel information within the prosecutor's possession or control which tends to reduce the sentence of the accused as to the offense or offenses of which the accused is being punished.

(4) Information Within Possession or Control of Prosecuting Attorney's Office. The prosecutor shall disclose to defense counsel information in the possession or control of the prosecuting attorney's office:

(i) members of the prosecuting attorney's staff and

(ii) any others who are assisting in the investigation or evaluation of the case, either regularly or for a particular case have reported to the prosecuting attorney's office.

(5) Availability of Information. Whenever defense counsel requests production of material which is not in the possession or control of the prosecuting attorney but would be in the possession or control of the prosecutor, the prosecutor shall issue suitable subpoenas for such material to be produced to the prosecuting attorney's office.

(6) Information Regarding Statements From the Accused. The prosecutor shall disclose to defense counsel the substance of any oral statements made by the accused.

(iii) Any written or recorded statements and summaries of statements and the substance of any oral statements made by a co-defendant;

(iv) 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;

(v) Any books, papers, documents, photographs or tangible objects, which the prosecuting attorney intends to use in the hearing or trial which were obtained from or belong to the accused; and

(vi) Any record of prior criminal convictions of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(2) *Information Provided by Informant — Electronic Surveillance.* The prosecuting attorneys shall inform defense counsel:

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

(ii) of any 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.

(3) *Information Tending to Negate Guilt or Reduce Punishment.* The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession or control which tends to negate the guilt of the accused as to the offense or would tend to reduce the accused's punishment therefor.

(4) *Information Within Possession or Control of Other Members of Prosecuting Attorney's Staff.* The prosecuting attorney's obligations extend to material and information in the possession or control of

(i) members of the prosecuting attorney's staff, 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.

(5) *Availability of Information to Defense Counsel.* Whenever defense counsel designates and requests production of material or information which is not in the possession or control of the prosecuting attorney 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.

(6) *Information Regarding Searches and Seizures — Statements From the Accused — Relationship of Witnesses to Prosecuting Attorney.* Except as otherwise

provided the prosecuting attorney shall, upon request of defense counsel, disclose and permit inspection, testing, copying and photographing of any relevant material and information regarding:

(i) Specified searches and seizures;

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

(iii) The relationship, if any, of specified witnesses to the prosecuting authority.

(7) *Other Information.* Upon a reasonable request showing materiality to the preparation of the defense, the court in its discretion may require disclosure of defense counsel of relevant material and information not covered by subsections (b) (1), (b) (2), (b) (3), and (b) (6).

(8) *Legal Research and Records of Prosecuting Attorney.* Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of the prosecuting attorney's legal staff.

(c) *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;

(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 subsection (c) (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.

(4) *Reports or Statements of Experts.* The trial court may 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) 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 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.

(d) *Regulation of Discovery.*

(1) *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.

(2) *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.

(3) *Materials to Remain in Exclusive Custody of Attorney.*

(A) 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

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

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

(iii) an adoption record;

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

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

(vi) a record of the Department of Corrections other than incident report relating to the crime with which the defendant is charged; or

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

(B) 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.

(C) Notwithstanding a defendant's status as co-counsel, materials covered by subsection (d)(3)(A) shall remain in the exclusive custody of the defendant's attorney.

(D) If a defendant is proceeding without counsel, materials covered by subsection (d)(3)(A) 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.

(4) *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.

(5) *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 with this rule. disclosure of it withholding of it to court order of records of the court of appeal event of an appeal

(6) *Denial of Disclosure to Court Proceedings.* Upon permit:

(i) any show of disclosure, or

(ii) any portion denied or regulated court in camera of such proceedings ing relief following of the proceeding the records of the court of appeals of an appeal.

(c) *Sanctions*

(1) *Failure to Order.* If at any proceedings it is that a party has discovery rule of the court may order of material disclosed or entered under the circum

(2) *Willful Violation of Counsel of an Appellate.* If an order issued pursuant appropriate sanctions

(f) *Omnibus*

(1) *Time for Hearing*

(1) *Time for Hearing.* If a defendant is charged with a crime and a time for an omnibus hearing is entered, and a motion is scheduled for a trial, motions should be

The omnibus hearing is court only upon there are no motions and discovery is complete information outline

The court may misdemeanor case.

(2) *Duties of Trial Court at Omnibus Hearing.*

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.

(6) *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.

(c) *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 may 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 section (f)(2)(D).

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:

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

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

(C) schedule any necessary evidentiary hearings; and

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

(Adopted by SCO 4 October 4, 1959; amended by SCO 157 effective February 15, 1973; by SCO 211 effective July 15, 1975; by SCO 212 effective July 15, 1975; by SCO 329 effective January 1, 1979; by SCO 331 effective January 1, 1979; by SCO's 640 and 641 effective September 15, 1985; by SCO 1086 effective July 15, 1992; by SCO 1092 effective July 15, 1992; by SCO 1126 effective July 15, 1993; and by SCO 1153 effective July 15, 1994)

Note: AS 12.61.120, added by ch. 57, § 13, SLA 1991, amended Criminal Rule 16 by restricting discovery available to criminal defendants.

Annotations

Cases

- I. General
- II. Disclosure to Accused
- III. Disclosure to Prosecution

I. In General

This rule affords limited discovery in criminal cases. *Martinez v. State*, Op. No. 389, 423 P2d 700 (Alaska 1967).

Where a defendant's substantive rights are not affected by the introduction into evidence of a reference to physical evidence which had been negligently destroyed by the police, the admission of the testimony is not "plain error." *Torres v. State*, Op. No. 1017, 519 P2d 788 (Alaska 1974).

Existence of this rule gives notice to state that evidence might be the object of discovery and should be preserved. *Lauderdale v. State*, Op. No. 1254, 548 P2d 376 (Alaska 1976).

This rule is designed to further discovery in order to eliminate jockeying for tactical advantage and trial by surprise. *Des Jardins v. State*, Op. No. 1245, 551 P2d 181 (Alaska 1976).

Where there is a violation of this rule not of constitutional dimensions the "harmless error" test will be applied. *Des Jardins v. State*, Op. No. 1245, 551 P2d 181 (Alaska 1976).

Even where violations of this rule did not prejudice defendant, matter would be remanded to trial court for hearing on sanctions that might be imposed on prosecutor under Rule 16(e)(2). *Des Jardins v. State*, Op. No. 1245, 551 P2d 181 (Alaska 1976).

Expansion of discovery beyond provisions contained in court rules is most appropriately done through amendment of