

**ALASKA LEGISLATURE COMMITTEE FILES 1995-1996 8672**

**8584 HOUSE JUDICIARY**

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

TENNESSEE RULE 12.1

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

WEST VIRGINIA RULE 16

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

WISCONSIN 971.23

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

WYOMING CRIMINAL RULE 16.1 and 18

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

D.C. CIRCUIT RULE 16

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

OLD ABA STANDARDS 11.1.1 - 11.4.8

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

FEDERAL CRIMINAL RULES 16 and 12.1

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

CASE LAW -- 2 states

INDIANA

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

OKLAHOMA

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

Discovery - 13  
3/3/95

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

# MEMORANDUM

State of Alaska

Department of Law  
Criminal Division

To: Christine Johnson  
Court Rules Attorney

Date: December 8, 1994

File No:

Telephone: 269-6250

From: Cynthia M. Hora *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 Association 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.

Minority Report - 3  
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.

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 Cooksev 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.

Amendment to HB 25, Draft H

608(a)  
Prior  
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608(a)  
question  
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however

Can impeach w/ con  
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Page 4, line 16: following the first word "statements;"  
add

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

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

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

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

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

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

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

*effective*

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

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

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

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

INSERT  
1

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

INSERT  
2

yes

Page 3, line 23:

(12) unless a different date is set by the court, as soon as known and no later than 45 days before trial, the prosecution shall provide the name, address, phone number and curriculum vitae of any expert witness performing work in connection with the case, and

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

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

*Re-word  
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Page 4, line 28:

(12) unless a different date is set by the court, as soon as known and no later than 30 days before trial, the defense shall provide the name, address, phone number and curriculum vitae of any expert witness likely to be called at trial or another court proceeding, and

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

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

*Re-word  
2*

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

OUT  
ATTI DOZIER

OPTION 1  
convey OPTION 2

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

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Page 3, line 12: delete "upon request of defense counsel,"

line 13: delete "specified"

line 16: after "witness;" add "however, the prosecution need not disclose any payments or provision for witness travel, housing or meals in order to enable the witness to attend a specific court proceeding;"

OPTION 3  
OPTION 4

Page 4, line 16: delete "upon request of the prosecution,"

line 17: delete "specified"

line 20: after "witness;" add "however, the defense need not disclose any payments or provision for witness travel, housing or meals in order to enable the witness to attend a specific court proceeding;"

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Page 3, line 17: delete "upon request of defense counsel,"

line 19: reword to read "searches and seizures of the property or person of the defendant"

line 20: delete "specified"

OPTION 5

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

OPTION 6

P

9-LS0146D ✓  
Luckhaupt  
3/15/95

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

BY

Offered:  
Referred:

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

A BILL

FOR AN ACT ENTITLED

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

6 Rule 16. Discovery.

7 (a) Objectives of Pretrial Discovery.

8 (1) Procedures before trial should, consistent with the constitutional  
9 rights of the defendant,

10 (i) promote a fair and expeditious disposition of the charges,  
11 whether by diversion, plea, or trial;

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

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

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- at trial;
- (iv) reduce interruptions and complications during trial and avoid unnecessary and repetitious trials by identifying and resolving before trial a procedural, collateral, or constitutional issue;
- (v) minimize the procedural and substantive inequities among similarly situated defendants;
- (vi) effect economies in time, money, judicial resources, and professional skills by minimizing paperwork, avoiding repetitious assertions of issues, and reducing the number of separate hearings; and
- (vii) minimize the burden upon victims and witnesses.

(2) These needs can be served by

- (i) full and free exchange of appropriate discovery;
- (ii) simpler and more efficient procedures; and
- (iii) procedural pressures for expediting the processing of cases.

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

*and phone numbers, if known,*

- (1) the names, ~~and~~ addresses/<sup>and phone numbers, if known,</sup> of persons known by the government to have knowledge of relevant facts and their written or recorded statements;
- (2) any written or recorded statements and any oral statements made by the accused;
- (3) any written or recorded statements and any oral statements made by a co-defendant;
- (4) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney is likely to use as evidence in the hearing or trial ~~that~~ were obtained from or belong to the defendant;
- (5) any record of prior criminal convictions of the defendant and of persons whom the prosecuting attorney is likely to call as witnesses at the hearing or trial;
- (6) any material, documents, or information relating to lineups,

OPTION 1  
"oral statements"

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

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

5 (8) any

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

8 (ii) electronic surveillance, including wiretapping, of

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

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

12 (9) upon request of defense counsel, any relevant material or  
13 information regarding the relationship, if any, of specified witnesses to the prosecuting  
14 authority, including the nature and circumstances of any agreement, understanding, or  
15 representation between the prosecution and the witness that constitutes an inducement  
16 for the cooperation or testimony of the witness;

17 (10) upon request of defense counsel, any relevant material and  
18 information regarding

19 (i) specified searches and seizures; and

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

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

*relating to the defendant*  
↑

23 (12) unless a different date is set by the court, as soon as known and  
24 no later than 45 days before trial, the names and addresses of any expert witnesses  
25 performing work in connection with the case and shall provide a curriculum vitae and  
26 a written report by each expert witness of the expert's opinion and the underlying basis  
27 of that opinion; failure to provide timely disclosure shall entitle the defendant to a  
28 continuance; if the court finds that a continuance is not an adequate remedy under the  
29 circumstances of the case, the court may impose other sanctions, including prohibiting  
30 the prosecutor from calling the expert at trial or declaring a mistrial;

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

*OPTION 3*

*OPTION 5*

*Re-word 1*

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

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

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

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

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

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

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

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

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

OPTION 6  
"inspections"  
OPTION 2  
"oral statements"

INSERT  
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~~OPTION 1~~

OPTION 1

RE-WORD  
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1 of that opinion; failure to provide timely disclosure shall entitle the prosecutor to a  
 2 continuance; if the court finds that a continuance is not an adequate remedy under the  
 3 circumstances of the case, the court may impose other sanctions, including prohibiting  
 4 the defendant from calling the expert at trial;

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

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

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

20 (d) Regulation of Discovery.

21 (1) Timing of Discovery.

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

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

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

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

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

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

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

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

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

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

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

(cc) an adoption record;

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

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

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

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

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

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

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

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

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

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

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

11 or

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

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

22 (i) members of the prosecuting attorney's or defense counsel's  
23 staff, 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 (9) Legal Research and Records of Prosecuting Attorney or Defense  
29 Counsel. Disclosure shall not be required of legal research or those portions of  
30 records, correspondence, reports or memoranda that contain the opinions, theories, or  
31 conclusions of the

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

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

5 (e) Sanctions.

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

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

15 (f) Omnibus Hearing.

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

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

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

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

- 26 (i) ensure that discovery under this rule is complete;  
27 (ii) rule on any pending motions which are ripe for decision;  
28 (iii) schedule any necessary evidentiary hearings; and  
29 (iv) obtain case management information from the parties,  
30 including the expected length of trial, the likelihood of trial, and any  
31 anticipated scheduling difficulties.

1 (g) Non-Testimonial Identification Procedures.

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

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

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

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

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

14 (i) appear in a line-up;

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

17 (iii) be fingerprinted;

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

19 (v) try on articles of clothing;

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

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

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

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

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

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

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

7 (2) If a defendant makes a particularized showing that confidential  
 8 records not in the possession of the prosecuting attorney are likely to contain relevant  
 9 information that would negate guilt, reduce the defendant's punishment or establish bias  
 10 on the part of a witness, the court may order disclosure of that portion of the records  
 11 only after conducting an in camera review of the records upon prior notice to the person  
 12 who is the subject of the records and the agency keeping the records. If the court  
 13 determines during its in camera review that such information exists, the court shall  
 14 provide both parties with that information and enter an order that a hearing be held  
 15 before the information may be introduced, used, or mentioned during an open court  
 16 proceeding.

17 in order to d  
 18 unwarranted  
 19 hampering o  
 20 admissibility  
 21 of privacy.

*is used and P. Use*

court will be outside the presence of the jury  
 e value of the evidence is outweighed by an  
 subject of the records or an unwarranted  
 collect records. The hearing to determine  
 if there is a danger of unwarranted invasion

22 (i) As used in this rule,

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

25 (2) "written or recorded statement" means

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

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

Proposed amendment to HB 25, "D" draft

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

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

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

add in its place

if the court

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

(ii) enters

Richard:

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

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

Post-It™ brand fax transmittal memo 7671 # of pages 1

To <i>Richard V</i>	From <i>Alan G</i>
Co.	Co.
Dept.	Phone #
Fax # <i>6592</i>	Fax #

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

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

22 (i) As used in this rule,

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

25 (2) "written or recorded statement" means

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

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

**HOUSE BILL NO. 25**

**IN THE LEGISLATURE OF THE STATE OF ALASKA**

**NINETEENTH LEGISLATURE - FIRST SESSION**

**BY REPRESENTATIVES PARNELL, Porter**

Introduced: 1/16/95

Referred: Judiciary, Finance

**A BILL**

**FOR AN ACT ENTITLED**

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

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 AND INSPECTION. (a) Government Disclosure of  
6 Evidence.

7 (1) Information Subject to Disclosure.

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

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

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

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

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

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

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

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

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

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

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

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

22 (3) Information in Grand Jury Transcripts. Except as provided in Rule  
23 6 of the Alaska Rules of Criminal Procedure and (a)(1)(A) of this rule, this rule does not  
24 authorize discovery or inspection of the recorded proceedings of a grand jury.

25 (b) Disclosure of Evidence by the Defendant.

26 (1) Information Subject to Disclosure.

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

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

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

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

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

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

31 (d) Regulation of Discovery.

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

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

Proposed Amendments to HB 25 and SB 10

Handwritten note: "This is redundant" with a line pointing to the right of the first amendment.

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

Handwritten note: "OK" next to the first amendment.

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*

Handwritten note: "Covered under" with a bracket pointing to the new subsection text.

Handwritten note: "p. 14"

Handwritten signature and initials.

Handwritten notes at the bottom right: "1) Why limit to this type...", "2) 'Particularized' - must be true"

Handwritten notes on the right side: "3) ...", "4) ...", "5) ...", "6) ...", "7) ...", "8) ...", "9) ...", "10) ...", "11) ...", "12) ...", "13) ...", "14) ...", "15) ...", "16) ...", "17) ...", "18) ...", "19) ...", "20) ...", "21) ...", "22) ...", "23) ...", "24) ...", "25) ...", "26) ...", "27) ...", "28) ...", "29) ...", "30) ...", "31) ...", "32) ...", "33) ...", "34) ...", "35) ...", "36) ...", "37) ...", "38) ...", "39) ...", "40) ...", "41) ...", "42) ...", "43) ...", "44) ...", "45) ...", "46) ...", "47) ...", "48) ...", "49) ...", "50) ...", "51) ...", "52) ...", "53) ...", "54) ...", "55) ...", "56) ...", "57) ...", "58) ...", "59) ...", "60) ...", "61) ...", "62) ...", "63) ...", "64) ...", "65) ...", "66) ...", "67) ...", "68) ...", "69) ...", "70) ...", "71) ...", "72) ...", "73) ...", "74) ...", "75) ...", "76) ...", "77) ...", "78) ...", "79) ...", "80) ...", "81) ...", "82) ...", "83) ...", "84) ...", "85) ...", "86) ...", "87) ...", "88) ...", "89) ...", "90) ...", "91) ...", "92) ...", "93) ...", "94) ...", "95) ...", "96) ...", "97) ...", "98) ...", "99) ...", "100) ..."

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

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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.

# Alaska State Legislature

REPRESENTATIVE  
SEAN R. PARNELL



716 WEST 4TH AVENUE, SUITE 120  
ANCHORAGE, ALASKA 99501  
(907) 258-8194

While in Juneau  
STATE CAPITOL  
JUNEAU, ALASKA 99801-1182  
(907) 465-2995

## HOUSE OF REPRESENTATIVES

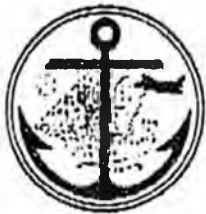
### SPONSOR STATEMENT House Bill 25

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

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

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

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



Rick Mystrom,  
Mayor

# ANCHORAGE POLICE DEPARTMENT

4501 South Bragaw Street • Anchorage, Alaska 99507-1599

Telephone (907) 786-8500



Service since 1921

January 24, 1995

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

Dear Representative Parnell:

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

Sincerely,

Kevin M. O'Leary  
Chief of Police

**HB**

**26**

# Alaska State Legislature

716 WEST 4TH AVENUE, SUITE 320  
ANCHORAGE, ALASKA 99501  
(907) 258-8194

While in Juneau  
STATE CAPITOL  
JUNEAU, ALASKA 99801-1182  
(907) 465-2995

REPRESENTATIVE  
SEAN R. PARNELL



## HOUSE OF REPRESENTATIVES

### SPONSOR STATEMENT House Bill 26

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

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

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

Unsubstantiated

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 15. Depositions.

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

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

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

Handwritten notes and signatures at the bottom of the page, including "Newcomb v. State" and "Machado v. State".

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

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

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

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

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

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

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

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

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

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

#### Annotations

#### Cases

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

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

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

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

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

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

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

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

## Rule 16. Discovery.

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

### (b) Disclosure to the Accused.

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

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

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

9-LS0147C ✓

Luckhaupt

1/25/95

CS FOR HOUSE BILL NO. 26( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:

Referred:

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

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

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

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

MD 26 Deposition in Crim Cases  
Proposed (not US)

Changes rule to follow FRule now closely

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

to "exceptional circumstances"

∴ limits circumstances

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

to local Dep use standard

"Unavailable" despite reasonable means used

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

Proposed US

1. Reverses present State Rule

Stand to 2 part Standard

(1) Clear & Conveying word of

(2) Either

1/ Will not be present to testify at trial  
or

2/ Exceptional circumstances

Dep is nec for to prevent miscar of Justice

+ (3) Presump against

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

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

(2) Requires Ct to preside  
over depositions

Recommended committee substitute for HB 26

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

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

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

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

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

FN

*Comes up with  
no deposition  
got out*

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

Diff.

Standards for taking

① Present -

Good cause shown

Merrill v. State,

423 P.2d 686 (Ak. 1967)

Insufficient showing

by A's to depose

W's (Gr. Jury) -

No discussion -

not too helpful!

2 Proposed

"Exceptional

circumstances"

## Differences

### ① Present Rule

a. Use →

(1). Upon stipulation  
of the parties

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

(3) Impeachment

### ② Proposed

(1) Upon Stipulation

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

HOUSE BILL NO. 26

IN THE LEGISLATURE OF THE STATE OF ALASKA  
NINETEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVE PARNELL

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

A BILL

FOR AN ACT ENTITLED

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

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

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

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

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

*now read,  
"good  
cause  
shown"  
now  
"does not  
read  
"preserved  
for use at  
trial"*

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

*A may  
waive  
Rt by  
not shown  
ng'*

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

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

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

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

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

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

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

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

This does not include Joint Defendants  
section

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Rule 15. Depositions.**

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

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

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

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

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

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

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

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

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

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

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

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

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

Annotations

Cases

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

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

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

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

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

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

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

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

Rule 16. Discovery.

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

(b) Disclosure to the Accused.

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

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

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

(iii) A summary of oral statements

(iv) A copy of any written or recorded statements of witnesses, experts, etc.

(v) A copy of any written or recorded statements of witnesses, experts, etc. obtained

(vi) A copy of the defendant's attorney's trial.

(2) A copy of any electronic information

(i) relating to which

(ii) wiretap

(aa) accused

(bb) attorney

(3) Reduced disclosure

(4) Other proposed and

(i) and

(i) investigate the parties' attorney

(i) select request is not allowed since such

(i) investigate the parties' attorney

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## Rule 14

Note 298

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

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

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

## RULES OF CRIMINAL PROCEDURE

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

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

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

## Rule 15. Depositions

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

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

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

## DEPOSITIONS AND INTERVIEW

(d) **How Taken.** Subject to the provisions of this rule, and unless the court otherwise orders, a deposition shall be taken in accordance with the Federal Rules of Civil Procedure, except that in no event shall a deposition be taken without the consent of the party to be deposed, and (2) the scope of the deposition shall be such as would make available to the trier of fact the testimony of the deponent which is in the best interests of justice and the defendant would be entitled to a fair trial.

(e) **Use.** At the trial or hearing, evidence otherwise admissible in a criminal case may be admitted in whole or in part if it is otherwise admissible under the Federal Rules of Evidence. Any deposition may also be used to impeach or corroborate any testimony, and for any other purpose permitted by the Federal Rules of Evidence. Any deposition may also be used to impeach or corroborate any testimony, and for any other purpose permitted by the Federal Rules of Evidence. Any deposition may also be used to impeach or corroborate any testimony, and for any other purpose permitted by the Federal Rules of Evidence.

(f) **Objections to Deposition.** Objections to the admission of a deposition into evidence shall be made at the time of the deposition, and shall be stated at the time of the deposition.

(g) **Deposition by Agreement.** A deposition may be taken by agreement of the parties, and the taking of a deposition by agreement shall not preclude the taking of a deposition by the court.

(As amended Apr. 22, 1973, § 3(15)-(19), 89 Stat. 373, 1976 Stat. 1986.)

### Notes

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

2. Unlike the practice in civil cases, depositions may be taken by notice without permission of the court (Rules 26(a) and 30, Federal Rules of Criminal Procedure), this rule permits the taking of depositions only by order of the court, and the exercise of discretion and the taking of depositions in criminal cases is limited to cases in which the court is satisfied that "in order to prevent a failure of justice."

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

**Weight and sufficiency of evidence on conviction**

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

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

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

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

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

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

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

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

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

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

**Notes of Advisory Committee on Rules**

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

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

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

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

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

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

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



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

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

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

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

#### 14. Method of taking deposition

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

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

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

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

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

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

#### 16. — Fugitives

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

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

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

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

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

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

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

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

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

#### 17. — Party defendant

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

#### 18. — Prosecution

Defendant was not called with the names of witnesses before grand jury in might take deposition of evidence gathered upon to seek a conviction motion was not one within provisions of rule 16 of discovery and inspection right, and was within provisions of 11 situations as a demonstrative trial auxiliary. *U.S. v. ...*, 1974, 502 F.2d 581.

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

#### 19. Use of deposition

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

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



Rick Mstrom,  
Mayor

# ANCHORAGE POLICE DEPARTMENT

4501 South Bragaw Street • Anchorage, Alaska 99507-1599

Telephone (907) 786-8500



Service since 1921

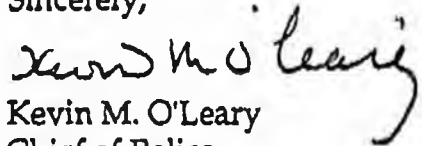
January 24, 1995

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

Dear Representative Parnell:

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

Sincerely,



Kevin M. O'Leary  
Chief of Police

# FISCAL NOTE

STATE OF ALASKA  
1995 LEGISLATIVE SESSION

BILL NO: HB 26

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: "An Act revising Rule 15, Alaska Rules... relating to depositions, to adopt federal rule." BRU: DPS Statewide Support  
 Sponsor: Representative Parnell Component: Commissioner's Office  
 Requestor: (H) JUD COMPONENT SERIAL NO. 0523

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

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CAPITAL EXPENDITURES</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CHANGE IN REVENUES ( )</b> <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						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	-0-	-0-	-0-	-0-	-0-	-0-

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

**POSITIONS:**

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

**ANALYSIS: (Attach a separate page if necessary.)**  
 No fiscal impact is anticipated by the Division of Fish and Wildlife Protection with the passage of this legislation.

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

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

**MEMORANDUM**

January 18, 1995

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

**TO:** Representative Sean Parnell  
Attn: Richard Vitale

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

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

Section 1 of the bill repeals the current version of Alaska Rule of Criminal Procedure 15, dealing with depositions of witnesses in criminal cases, and adopts in its place, as the Alaska rule, Federal Rule of Criminal Procedure 15.

GPL:glc  
95-064.glc

SECTIONAL SUMMARY

**HB**

**27**

① Registration  
Use in Antiques  
& Proceedings  
②

① Request  
for Hearing  
for Sunday  
the 27th

HOUSE BILL NO. 27

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES PARNELL, B.Davis, Porter

Introduced: 1/16/95

Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 "An Act directing the Department of Public Safety to establish and maintain a  
2 deoxyribonucleic acid (DNA) identification registration system and requiring DNA  
3 registration by persons convicted of a felony sex offense; and providing for an  
4 effective date."

*Certain felony offenses*

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

6 \* Section 1. LEGISLATIVE FINDINGS. The legislature finds that

7 (1) recent developments in molecular biology and genetics have important  
8 applications for forensic science; it has been scientifically established that there is a unique  
9 pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of  
10 the human body; the process for identifying this pattern is called "DNA identification"; and

11 (2) the accuracy of identification provided by this method is superior to that of  
12 any presently existing technique and recognizes the importance of this scientific breakthrough  
13 in providing a reliable and accurate tool for the investigation and ~~prosecution of sex offenses.~~

*prosecution of sex offenses*  
*Why?*

1 \* Sec. 2. AS 44.41 is amended by adding a new section to read:

2 Sec. 44.41.035. DNA IDENTIFICATION SYSTEM. (a) To support criminal  
3 justice services in this state, the Department of Public Safety shall establish a  
4 deoxyribonucleic acid (DNA) identification registration system. The DNA identification  
5 registration system as established shall be compatible with that utilized by the Federal  
6 Bureau of Investigation. *(violent felony offense)*

7 (b) A person convicted in this state of a sex offense shall have a blood sample  
8 drawn for purposes of DNA identification analysis. A blood sample taken under this  
9 section may be used only for the purpose of providing DNA or other blood grouping tests  
10 for identification analysis <sup>or for the</sup> ~~and prosecution of a sex offense.~~ *also not... Criminal*

11 (c) The Department of Public Safety may provide *Violent Felony Offense*

12 (1) DNA analysis services to law enforcement agencies throughout the  
13 state;

14 (2) assistance to law enforcement officials and prosecutors in the  
15 preparation and utilization of DNA evidence for presentation in court; and

16 (3) expert testimony in court on DNA evidentiary issues. *- already provided by court rules*

17 *do not  
of one kind  
must be  
concerned* (d) Except as provided in (e) of this section, a local law enforcement agency may  
18 not establish or operate a DNA identification registration system unless

19 (1) the equipment of the local system is compatible with that of the state  
20 system under (a) of this section;

21 (2) the local system is equipped to receive and answer inquiries from the  
22 department's DNA identification registration system and transmit data to the department's  
23 DNA identification registration system; and

24 (3) procedure and rules for the collection, analysis, storage, expungement,  
25 and use of DNA identification data do not conflict with procedures and rules applicable  
26 to the department's DNA identification registration system.

27 (e) Nothing in (d) of this section prohibits a local law enforcement agency from  
28 performing DNA identification analysis in individual cases to assist law enforcement  
29 officials and prosecutors in the preparation and use of DNA evidence for presentation in  
30 court.

31 (f) DNA identification data may not be used for any purpose that is not related

1 to a criminal investigation or to improving the operation of the system authorized by this  
2 section.

3 (g) In this section, "sex offense" has the meaning given in AS 12.63.100.

4 \* Sec. 3. This Act takes effect January 1, 1996.

CS for House Bill No. 27( )

Page 3, lines 2 - 4 : Offenses include:

- AS 11.41.100 - Murder in the first degree; Unclassified felony.
- AS 11.41.110 - Murder in the second degree; Unclassified felony.
- AS 11.41.120 - Manslaughter - Class A felony.
- AS 11.41.130 - Criminally negligent homicide; Class C felony.
- AS 11.41.200 - Assault in the first degree - Class A felony.
- AS 11.41.210 - Assault in the second degree - Class B felony.
- AS 11.41.220 - Assault in the third degree - Class C felony.
- AS 11.41.260 - Stalking in the first degree; Class C felony.
- AS 11.41.300 - Kidnapping; Unclassified felony or Class A felony, depending on affirmative defense.
- AS 11.41.410 - Sexual assault in the first degree; Unclassified felony.
- AS 11.41.420 - Sexual assault in the second degree; Class B felony.
- AS 11.41.425 - Sexual assault in the third degree; Class C felony.
- AS 11.41.434 - Sexual abuse of a minor in the first degree; Unclassified felony.
- AS 11.41.436 - Sexual abuse of a minor in the second degree; Class B felony.
- AS 11.41.438 - Sexual abuse of a minor in the third degree; Class C felony.
- AS 11.41.450 - Incest; Class C felony.
- AS 11.41.455 - Unlawful exploitation of a minor; Class B felony.
- AS 11.41.500 - Robbery in the first degree; Class A felony.
- AS 11.41.510 - Robbery in the second degree; Class B felony.
- AS 11.41.520 - Extortion; Class B felony.
- AS 11.46.400 - Arson in the first degree; Class A felony.

The CS also requires DNA identification analysis of persons convicted of attempts to commit felonies under AS 11.41 or AS

11.46.400 if the attempt is itself a felony. AS 11.41.320 (Custodial interference) is excluded from the requirements of the bill.



*Rick Mystrom,  
Mayor*

# ANCHORAGE POLICE DEPARTMENT

4501 South Bragaw Street • Anchorage, Alaska 99507-1599

Telephone (907) 786-8500



*Service since 1921*

January 24, 1995

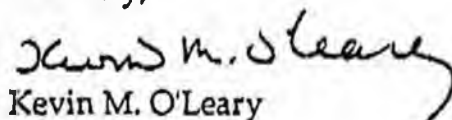
Representative Sean R. Parnell  
Alaska State Legislature  
Juneau, Alaska 99801-1182

Dear Representative Parnell:

The Anchorage Police Department strongly supports the passage of House Bill 27, which establishes a deoxyribonucleic acid (DNA) registration system for convicted felony sex offenders. It has long been known that sex offenders have a higher rate of recidivism than those convicted of most other crimes.

This law would provide criminal justice agencies with an important scientific tool in the apprehension of those who continue to prey on innocent victims.

Sincerely,

  
Kevin M. O'Leary  
Chief of Police

HB27

RESUME OF  
RICHARD A. GUERRIERI  
103 Old Bellows Court  
Raleigh, North Carolina 27607  
Home: (919) 859-3954  
Work: (919) 361-7761

Professional Experience

Forensic Scientist  
Assistant Director  
Forensic Identity Laboratory  
Roche Biomedical Laboratories  
Research Triangle Park, NC  
1992 - Present

Forensic Scientist  
DNA Section Supervisor  
Virginia Division of Forensic Sciences  
Commonwealth of Virginia  
1988 - 1992

Forensic Scientist  
Serology Section  
United States Army Criminal Investigation Laboratory  
Fort Gilliam  
Forest Park, GA  
1987 - 1988

Forensic Scientist  
Serology Section  
Suffolk County Crime Laboratory  
Hauppauge, NY  
1986

Forensic Scientist  
Serology Section  
Virginia Division of Forensic Sciences  
Commonwealth of Virginia  
1981 - 1986

Instructor (Part-time)  
Biology/Chemistry/Mathematics  
Learning Resource Center  
Virginia Beach, VA  
1990 - 1992

Instructor (Part-time)  
Mathematics  
Tidewater Community College  
Chesapeake, VA  
1984 - 1988

#### Expert Witness Testimonies

1983 - 1989	Forensic Serology: 50+ Appearances
1989 - 1994	Forensic DNA (RFLP): 50+ Appearances
1994 - Present	Forensic DNA (PCR): 16 Appearances

#### Education

Master of Science  
Forensic Chemistry (1980)  
University of Pittsburgh  
Pittsburgh, PA

Bachelor of Science Equivalence  
Chemistry (1979)  
University of Pittsburgh  
Pittsburgh, PA

Bachelor of Science  
Biology (1978)  
University of Pittsburgh  
Pittsburgh, PA

#### Invited Instructor

Forensic Applications of PCR Technology  
Southwestern Association of Forensic Scientists  
Houston, TX (1994)

Forensic PCR Applications  
Southern Association of Forensic Scientists  
Little Rock, AR (1994)

Forensic Applications of PCR Technology  
Florida Department of Law Enforcement  
Orlando, Florida (1994)

Forensic PCR Workshop  
Southwestern Association of Forensic Scientists  
Little Rock, Arkansas (1994)

Forensic DNA Training Coordinator  
Virginia Division of Forensic Sciences  
Commonwealth of Virginia (1988 - 1992)

Crime Scene Evidence Collection and Analysis  
Hampton Roads Regional Academy of Criminal Justice  
Hampton, VA (1988 - 1992)

Speaker - Forensic DNA Interpretation  
Criminal Lab Seminar  
Arlington Criminal Bar Association  
Arlington, VA (1992)

Speaker - Forensic DNA Applications  
Office of the Commonwealth Attorney  
Richmond, VA (1991)

Speaker - Forensic DNA Applications  
Newport News Bar Association  
Newport News, VA (1990)

Speaker - Forensic DNA Applications  
Virginia Beach Police Department  
Sex Crimes and Homicide Unit  
Virginia Beach, VA (1989)

Speaker - Forensic DNA Analysis  
Naval Investigative Services  
United States Navy  
Norfolk, VA (1989)

#### Continuing Education

Forensic DNA (RFLP) Training  
Lifecodes Corporation  
1988

Recombinant DNA (RFLP/PCR) Training  
Federal Bureau of Investigations  
1989

Recombinant DNA (RFLP/PCR) Training  
University of Virginia  
1989

International Symposium on Forensic Aspects of DNA Analysis  
Federal Bureau of Investigation  
1989

Advanced DNA Typing  
Federal Bureau of Investigation  
1991

International Symposium on Forensic Applications of PCR Technology  
Federal Bureau of Investigations  
1991

Amplitype HLA DQ Alpha Workshop  
Perkin Elmer Corporation  
1992

International Symposium on Human Identification  
Promega Corporation  
1992

PCR Workshop  
Florida Department of Law Enforcement  
1993

American Academy of Forensic Sciences  
Annual Meeting (Boston, MA)  
1993

Second International Symposium on Forensic Aspects of DNA Analysis  
Federal Bureau of Investigation  
1993

PCR Workshop  
Florida Department of Law Enforcement  
1994

PCR Workshop  
American Academy of Forensic Sciences  
1994

PCR Workshop  
Southern Association of Forensic Scientists  
1994

PCR Workshop  
Southwestern Association of Forensic Scientists  
1994

Mid-Atlantic Association of Forensic Scientists  
Annual Meeting (Virginia Beach, VA)  
1994

### Presentations

"Implementation and Consequences of New DNA Technologies in the Forensic Laboratory" Presented at the 46<sup>th</sup> Annual Meeting of the American Academy of Forensic Sciences (1994) DNA Workshop

"A Consolidated Validation Approach for RFLP and PCR Technologies in Forensic Applications"  
Presented at the Second International Symposium on Forensic Aspects of DNA Analysis (1993), FBI Academy

"An Evaluation of PCR and RFLP Based Analysis Techniques on Forensic Specimens"  
Presented at the American Academy of Forensic Sciences (1993) Annual Meeting

"Comparisons of Restriction Fragment Length Polymorphisms in Primates with Single Locus Probes"  
Presented at American Academy of Forensic Sciences Meeting (1989), Mid-Atlantic Association of Forensic Sciences (1989)

"Consistency of RFLP Patterns in Human Tissue Samples"  
Presented at American Academy of Forensic Sciences Meeting (1989)

"Stability and Detectability of Peptidase A in Bloodstains."  
Presented at American Academy of Forensic Sciences Meeting (1988)

### Professional Associations

Technical Working Group for Establishing DNA Analysis Methodologies (TWGDAM)  
in Forensic Laboratories on a National Level

FBI Training and Research Center

Quantico, VA

Original Member (1983 - 1992)

Technical Working Group for Establishing a Combined DNA Index System (CODIS)

FBI Training and Research Center

Quantico, VA

Original Member (1989 - 1992)

American Society of Crime Laboratory Directors (ASCLD)

Laboratory Accreditation Board Inspector (1991 - Present)

### Professional Membership

American Academy of Forensic Sciences

1985 - Present

Mid-Atlantic Association of Forensic Scientists

1980 - Present

American Electrophoresis Society

1989 - Present

### Honors

Regional:

1989 Mid-Atlantic Association of Forensic Scientists (MAAFS)

Outstanding Forensic Scientist

National:

1989 American Academy of Forensic Sciences (AAFS)

General Section Awardee

RECORD OF COURTROOM TESTIMONY

Roche Biomedical Laboratories, Inc.

Forensic Identity Laboratory

Richard A. Guerrieri

Assistant Director

1994

Date	Lab	Case	Testing	Testified
1/94	F9300062	State of Michigan vs. Ken Norton	PCR-DQ alpha	Yes
3/94	F9300047	State of Tennessee vs. Bobby Begley	PCR-DQ alpha	Yes
3/94	F9300079	State of Arkansas vs. Eric Nance	RFLP PCR DQ alpha DIS80 HUMTHO1	Yes
5/94	F9400052	State of Virginia vs. Darrell Blaine Jennell	PCR-Polymarker, DIS80	Yes
5/94	F9400091	State of Georgia vs. Kenneth Redding	PCR-DQ alpha, DIS80	Yes
6/94	F9300059	State of Missouri vs. Phillip David Padilla	PCR-DQ alpha	Yes
7/94	F9400061	State of Virginia vs. John Mario Robinson	PCR-DQ alpha, Polymarker, DIS80	Yes
8/94	F9400022	State of North Carolina vs. Timothy Malloy	PCR-DQ alpha, Polymarker	Yes
8/94	F9400027	State of Maryland vs. Alphonso Quinn	PCR-DQ alpha, Polymarker	Yes
8/94	F9400029	State of Maryland vs. Alphonso Quinn	PCR-DQ alpha, Polymarker	Yes
9/94	F9400106	State of Alaska vs. Scott Brodine	PCR DQ alpha Polymarker DIS80	Yes Fryc Hearing
10/94	F9400106	State of Alaska vs. Scott Brodine	PCR DQ alpha Polymarker DIS80	Yes
11/94	F9400116	State of North Carolina vs. Darrell Hunt	PCR DQ alpha Polymarker DIS80 HUMTHO1	Yes Admissibility Hearing
11/94	F9300045	State of New Mexico vs. Anthony Stills	PCR DQ alpha	Yes Admissibility Hearing
12/94	F9400045	State of New Mexico vs. Anthony Stills	PCR DQ alpha	Yes
12/94	F9400199	State of Illinois vs. William C. Reinbold	PCR DQ alpha Polymarker	Yes Frye Hearing

11/25/95

9-LS0148F  
Luckhaupt  
1/25/95

CS FOR HOUSE BILL NO. 27( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVES PARNELL, Toohy, B.Davis, Porter, Green, Bunde

A BILL

FOR AN ACT ENTITLED

1 "An Act directing the Department of Public Safety to establish and maintain a  
2 deoxyribonucleic acid (DNA) identification registration system and requiring DNA  
3 registration by persons convicted of a felony crime against a person; and providing  
4 for an effective date."

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

6 \* Section 1. LEGISLATIVE FINDINGS. The legislature finds that

7 (1) recent developments in molecular biology and genetics have important  
8 applications for forensic science; it has been scientifically established that there is a unique  
9 pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of  
10 the human body; the process for identifying this pattern is called "DNA identification"; and

11 (2) the accuracy of identification provided by this method is superior to that of  
12 any presently existing technique and recognizes the importance of this scientific breakthrough  
13 in providing a reliable and accurate tool for the investigation and prosecution of offenses.

1 \* Sec. 2. AS 44.41 is amended by adding a new section to read:

2 Sec. 44.41.035. DNA IDENTIFICATION SYSTEM. (a) To support criminal  
3 justice services in this state, the Department of Public Safety shall establish a  
4 deoxyribonucleic acid (DNA) identification registration system. The DNA identification  
5 registration system as established shall be compatible with that utilized by the Federal  
6 Bureau of Investigation.

7 (b) A person convicted in this state of a crime against a person shall have a blood  
8 sample drawn for purposes of DNA identification analysis. A blood sample taken under  
9 this section may be used only for the purpose of providing DNA or other blood grouping  
10 tests for identification analysis, for preparation of statistical blind analysis, and  
11 prosecution of criminal offenses.

12 (c) The Department of Public Safety may provide

13 *Support Technology removed* (1) DNA analysis services to law enforcement agencies throughout the  
14 state, and

15 (2) assistance to law enforcement officials and prosecutors in the  
16 preparation and utilization of DNA evidence for presentation in court.

17 (d) Except as provided in (e) of this section, a local law enforcement agency may  
18 not establish or operate a DNA identification registration system unless

19 (1) the equipment of the local system is compatible with that of the state  
20 system under (a) of this section;

21 (2) the local system is equipped to receive and answer inquiries from the  
22 department's DNA identification registration system and transmit data to the department's  
23 DNA identification registration system; and

24 (3) procedure and rules for the collection, analysis, storage, expungement,  
25 and use of DNA identification data do not conflict with procedures and rules applicable  
26 to the department's DNA identification registration system.

27 (e) Nothing in (d) of this section prohibits a local law enforcement agency from  
28 performing DNA identification analysis in individual cases to assist law enforcement  
29 officials and prosecutors in the preparation and use of DNA evidence for presentation in  
30 court.

31 (f) DNA identification data may not be used for any purpose that is not related  
32 to a criminal investigation or to improving the operation of the system authorized by this

1 section.

2 (g) In this section, "crime against a person" means a felony offense, or a felony  
3 attempt to commit an offense, under AS 11.41, other than AS 11.41.320, or under  
4 AS 11.46.400. *- A Attempt*

5 \* Sec. 3. APPLICABILITY. This Act applies to all convictions occurring on or after the  
6 effective date of this Act for a crime against a person, as that term is defined in sec. 2 of this Act.

7 \* Sec. 4. This Act takes effect January 1, 1996.

9-LS0148C

Luckhaupt

1/24/95

## CS FOR HOUSE BILL NO. 27( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINETEENTH LEGISLATURE - FIRST SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVES PARNELL, Toohey, B.Davis, Porter, Green, Bunde

A BILL

FOR AN ACT ENTITLED

1 "An Act directing the Department of Public Safety to establish and maintain a  
2 deoxyribonucleic acid (DNA) identification registration system and requiring DNA  
3 registration by persons convicted of a felony sex or violent offense; and providing for  
4 an effective date."

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

6 \* Section 1. LEGISLATIVE FINDINGS. The legislature finds that

7 (1) recent developments in molecular biology and genetics have important  
8 applications for forensic science; it has been scientifically established that there is a unique  
9 pattern to the chemical structure of the deoxyribonucleic acid (DNA) contained in each cell of  
10 the human body; the process for identifying this pattern is called "DNA identification"; and

11 (2) the accuracy of identification provided by this method is superior to that of  
12 any presently existing technique and recognizes the importance of this scientific breakthrough  
13 in providing a reliable and accurate tool for the investigation and prosecution of offenses.

1 \* Sec. 2. AS 44.41 is amended by adding a new section to read:

2 Sec. 44.41.035. DNA IDENTIFICATION SYSTEM. (a) To support criminal  
3 justice services in this state, the Department of Public Safety shall establish a  
4 deoxyribonucleic acid (DNA) identification registration system. The DNA identification  
5 registration system as established shall be compatible with that utilized by the Federal  
6 Bureau of Investigation.

7 (b) A person convicted in this state of a sex or violent offense shall have a blood  
8 sample drawn for purposes of DNA identification analysis. A blood sample taken under  
9 this section may be used only for the purpose of providing DNA or other blood grouping  
10 tests for identification analysis, for preparation of statistical blind analysis, and  
11 prosecution of criminal offenses.

12 (c) The Department of Public Safety may provide

13 (1) DNA analysis services to law enforcement agencies throughout the  
14 state; and

15 (2) assistance to law enforcement officials and prosecutors in the  
16 preparation and utilization of DNA evidence for presentation in court.

17 (d) Except as provided in (e) of this section, a local law enforcement agency may  
18 not establish or operate a DNA identification registration system unless

19 (1) the equipment of the local system is compatible with that of the state  
20 system under (a) of this section;

21 (2) the local system is equipped to receive and answer inquiries from the  
22 department's DNA identification registration system and transmit data to the department's  
23 DNA identification registration system; and

24 (3) procedure and rules for the collection, analysis, storage, expungement,  
25 and use of DNA identification data do not conflict with procedures and rules applicable  
26 to the department's DNA identification registration system.

27 (e) Nothing in (d) of this section prohibits a local law enforcement agency from  
28 performing DNA identification analysis in individual cases to assist law enforcement  
29 officials and prosecutors in the preparation and use of DNA evidence for presentation in  
30 court.

31 (f) DNA identification data may not be used for any purpose that is not related  
32 to a criminal investigation or to improving the operation of the system authorized by this

*See  
includes*

1 section.

2 (g) In this section, "sex or violent offense" means a felony offense, or a felony  
3 attempt to commit an offense, under AS 11.41, other than AS 11.41.320, or under  
4 AS 11.46.400.

5 \* Sec. 3. APPLICABILITY. This Act applies to all convictions occurring on or after the  
6 effective date of this Act for a sex or violent offense, as that term is defined in sec. 2 of this Act.

7 \* Sec. 4. This Act takes effect January 1, 1996.

**DIVISION OF LEGAL SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA**

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

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

**MEMORANDUM**

January 23, 1995

**SUBJECT:** DNA Database of Sex and Violent Offenders  
(Work Order No. 9-LS0148A.1)

**TO:** Representative Brian Porter  
Attn: Ann Carpenetti

**FROM:** Gerald P. Luckhaupt *JEP*  
Legislative Counsel

Ann asked for a short listing of the offenses included within the definitions of "sex offense" and "violent offense" in Amendment A.1. Here goes:

**"Sex offense"**

- AS 11.41.410 - Sexual Assault in the First Degree. Unclassified felony.
- AS 11.41.420 - Sexual Assault in the Second Degree. Class B felony.
- AS 11.41.425 - Sexual Assault in the Third Degree. Class C felony.
- AS 11.41.434 - Sexual Abuse of a Minor in the First Degree. Unclassified felony.
- AS 11.41.436 - Sexual Abuse of a Minor in the Second Degree. Class B felony.
- AS 11.41.438 - Sexual Abuse of a Minor in the Third Degree. Class C felony.
- AS 11.41.450 - Incest. Class C felony.
- AS 11.41.455 - Unlawful Exploitation of a Minor. Class B felony.

**"Violent offense"**

- AS 11.41.100 - Murder in the First Degree. Unclassified felony. ✓
- AS 11.41.110 - Murder in the Second Degree. Unclassified felony. ✓
- AS 11.41.120 - Manslaughter. Class A felony. ✓
- AS 11.41.130 - Criminally Negligent Homicide. Class C felony. ✓
- AS 11.41.200 - Assault in the First Degree. Class A felony. ✓
- AS 11.41.210 - Assault in the Second Degree. Class B felony. ✓
- AS 11.41.220 - Assault in the Third Degree. Class C felony. ✓
- AS 11.41.300 - Kidnapping. Unclassified felony (if affirmative defense in AS 11.41.300(d) is proven by the defendant then the crime is reduced to a Class A felony). ✓
- AS 11.41.500 - Robbery in the First Degree. Class A felony. ✓
- AS 11.46.300 - Burglary in the First Degree. Class B felony. ✓
- AS 11.46.400 - Arson in the First Degree. Class A felony. ✓
- AS 11.56.300 - Escape in the First Degree. Class A felony. ✓

*Ann  
1/23/95  
checked  
A.1.1*

*11.41.100  
11.41.110  
11.41.120  
11.41.130*

*11.41.200  
11.41.210  
11.41.220  
11.41.300*