ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 8672
10849 HOUSE JUDICIARY

We, the undersigned, hereby support and request passage of House Bill 0385
"An Act relating to awarding child custody; and providing for an effective date."

	Sign	Date	Name and Address (print clearly)
63	Dennis McCarty	3/1/04	Dennis L McCarty 300 mill suite 2a Ketchikan
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			

We, the undersigned, hereby support and request passage of House Bill 0385
"An Act relating to awarding child custody; and providing for an effective date."

	Sign	Date	Name and Address (print clearly)
1		2/29/04	Jessica Pilcher 2533 4th Ave. Ketchikan AK 9901
2		3/1/04	Pamela Standley P.O Box 9625 KTN, AK. 99901
3		3.1.04	Lonnie Monsen PO Box 9372 KTN AK 99901
4		3/1/04	Kendall Sawa P.O. Box 7893 KTN AK 99901
5		3/1/04	Joan Nugent 1320 Water St. Ktn. Ak. 99901
6		3/1/04	Gayle Nichols, PO Box 745, Ward Cove AK 99928
7		3/1/04	Timmy G. Osborne 713 Hill Rd. Ketchikan AK 99901
8		3.1.04	Cody Davis 326 Brown Deer Rd. Ketchikan AK 99901
9		3-1-04	James Cowin 11377 Rocky Pt. Rd. Ketchikan AK 99901
10		3-1-04	Gigi Pickle 2749 Third Ave Ketchikan, AK.
11		3-1-04	JESICA STONE 1256 WATER ST Ketchikan AK 99901
12		3/1/04	P.O. Box 2310 Ktn. AK. 99901
13		3/1/04	BOX 1122 Ward Cove AK 99928
14		3/1/04	1441 South Tongass Ketchikan 99901
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
29			
27			
30			
31			
32			

(1)

Ref. HB 385

3/1/04 My name is Loretta Lundberg, 7446 South Tongass, Ketchikan, Alaska.

The reason for my presence today for public comment on HB 385 is very interesting. If asked about this bill one week ago I wouldn't have known anything about it or interest in participating in public comment.

The events of last week and a tragedy we have experienced has caused pause for Thought. HB 385 is very important and needs to be closely looked at. After a brief review of HB385 I continue to Wonder if There is a better, fail-safe Way to be a voice for the Silent and be a voice for the young innocent victims.

One item that comes quickly to ~~my~~ mind is the need for a "Cooling Off" period, post ruling in a Custody case. As you be aware, cases brought forth always are ridden with emotion. Even Though a Cooling Off period (suggest 30 days) isn't an Absolute guarantee, it does provide time for improvement or more Thorough assessm

Cooling Off period means That

Alaska State Legislature

Please enter into the record my testimony to the HOUSE JUDICIARY
committee name

Committee on HB 385
bill # / subject

Date, JANUARY 22, 2004

MEMBERS OF THE HOUSE JUDICIARY COMMITTEE:

HB 385 is a fantastic bill with the potential for solving some very important issues that we Alaskan's are facing. Protecting children from domestic violence should be a nonpartisan priority! I believe that HB 385 will impact so many families in a positive way, by giving the Judicial system an expected standard when dealing with child custody cases which involve domestic violence. Passing HB 385 can save the state of Alaska a lot of money just by its enactment. HB 385 will reduce the involvement of Division of Family and Youth Services, as a preventive measure. By simply avoiding the placement of children with people who are violent, we could avoid placing these children into the DFYS system. We would see a dramatic & immediate effect. A reduction in the number of Children In Need of Aide cases!

The best result of HB 385 passing will be an improvement in safety with children's lives. We are not doing enough to protect children, who are innocent victims, from domestic violence. As Governor Murkowsi pointed out in his State of the State address, a full third of Alaska's population are under 20 years of age. Passing HB 385 will send a strong clear message to the entire United States of America. Alaska values our most precious resource. The children who are living within the great state of Alaska !

I can see only one area for improvement in HB 385. Right now it's set out to be in effect on July 1, 2004 if the bill is passed and enacted into the statutes. I would much rather see HB 385 become effective immediately after it's passed into law, rather than waiting until July 1, 2004. PLEASE AMMEND HB 385 TO GO INTO AFFECT AS SOON AS IT'S PASSED !!!

Signed: LAURIE CHURCHILL
Testifier

SELF
Representing (optional)

P.O. BOX 7043 NIKISKI, AK 99635
Address

907-776-3499
Phone number

HB

397

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM March 31, 2004

SUBJECT: Parental Permission vs. Child's Permission (SCS HB 397(JUD))
(Work Order No. 23-LS1510\Q)

TO: Representative Lesil McGuire
Attn: Vanessa Tondini

FROM: Gerald P. Luckhaupt
Legislative Counsel

You have asked what would happen under the changes made by SCS HB 397(JUD) if a child wished to speak with defense counsel but the parents did not want them to speak, would the parents' desires trump the child's? Frankly, I do not have a firm answer for this question. Normally, parents are granted great leeway in caring for and controlling their children,[1] including who the children may see and with whom they may consort.[2] But, the Alaska courts have allowed children to waive their right of parental notification or their right to remain silent when they have been arrested when normally children would not be permitted to make a waiver of such import.[3] In allowing these waivers the courts have looked to the knowledge and maturity of the child and other circumstances, and not just the age of the child, to see if the child's decision, waiver in these instances, was knowing and voluntary. Obviously for young or younger children parental permission will always be required. The problem will be with the worldly, mature beyond his or her years 16 or 17 year old who has prior contacts with the criminal justice system - it is not inconceivable to me that a court could find that a child could make this decision themself.

GPL:med
04-354.med

---

[1] *Scntosky v. Kramer*, 455 U.S. 745 (1982).

[2] See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000).

[3] See, e.g., *State v. J.R.N.*, 861 P.2d 578 (Alaska 1993); *B. v. State*, 614 P.2d 786 (Alaska 1980); *Quick v. State*, 599 P.2d 712 (Alaska 1979)

by permitting a trier of fact to determine that the civil plaintiff, who no longer stands convicted of any crime, probably committed the crime for which he or she has not been convicted, violates principles of our criminal justice system and our civil tort system. The civil plaintiff has already proven, by post-conviction relief in the criminal proceeding, that the former defense attorney's skill fell below minimal standards of a lawyer with ordinary skill and training in criminal law, and that this defective performance contributed to the conviction.

If at all, I would only recognize an affirmative defense that despite the attorney's negligence, the civil plaintiff would have been convicted of the crime originally charged, beyond a reasonable doubt, at a trial in which all constitutional and procedural safeguards were afforded.

STATE of Alaska, Petitioner,

v.

J.R.N., Respondent.

No. S–4528.

Supreme Court of Alaska.

Oct. 28, 1993.

Rehearing Denied Nov. 17, 1993.

Juvenile charged with first-degree murder, robbery, burglary and theft moved to suppress confession and evidence obtained as result of confession. The Superior Court, Third Judicial District, Anchorage, Peter A. Michalski, J., denied motion. Juvenile appealed. The Court of Appeals, 809 P.2d 416, reversed. On state's petition for hearing, the Supreme Court, Matthews, J., held that juveniles are not per se incapable of waiving their right to have their parents immediately notified of their arrest and detention.

Reversed and remanded.

1. Infants ⇐198

Delinquency rule and statute requiring police to notify juvenile's parents "immediately" upon arrest were not inconsistent despite fact that term "immediately" in statute was modified by phrase, "and in no event more than 12 hours later"; term "immediately" in both rule and statute meant same thing, and statute merely set outside time limit for parental notification. Delinquency Rule 7(b); AS 47.10.140(b).

2. Infants ⇐198

Statutory right of parental notification runs both to arrested juvenile and to arrested juvenile's parents. Delinquency Rule 7(b); AS 47.10.140(b).

3. Criminal Law ⇐394.5(2)

One accused of crime may assert violation of another's rights as basis for suppression of evidence only where violation involves deliberate or shocking police misconduct.

4. Infants ⇐200

Juvenile lacked standing to raise statutory violation of parents' rights for police failure to immediately notify parents of his arrest, given that violation did not involve deliberate or shocking police misconduct. Delinquency Rule 7(b); AS 47.10.140(b).

5. Infants ⇐198

Arrested juvenile may waive statutory right to parental notification through knowing and voluntary waiver. Delinquency Rule 7(b); AS 47.10.140(b).

John A. Scukanec, Cynthia M. Hora, Asst. Attys. Gen., Anchorage, Charles E. Cole, Atty. Gen., Juneau, for petitioner.

Suzanne Weller, Asst. Public Defender, John B. Salemi, Public Defender, Anchorage, for respondent.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

MATTHEWS, Justice.

When police arrest and detain a juvenile, Alaska Delinquency Rule 7(b)[1] and AS 47.10.140[2] require that they "immediately" notify the juvenile's parents. Police arrested sixteen-year-old J.R.N. for murder. He confessed and led the police to critical evidence before the police notified his father. The court of appeals ordered that J.R.N.'s confession and the evidence be suppressed based on the court's conclusion that the police violated DR 7(b). We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

In early October 1989, Duane Samuels was shot three times and killed; his car was stolen. On October 6, 1989, at approximately 8:45 a.m., the police found J.R.N. riding in the stolen vehicle and arrested him. They brought him to an Anchorage police station.

Shortly after J.R.N.'s arrest, Anchorage Police Sergeant Michael Grimes contacted the District Attorney's Office to determine the proper procedure for questioning juveniles. An assistant district attorney advised Grimes that juveniles must be asked if they want a parent notified or present before questioning, but that in the absence of a request by the juvenile the parents need not be notified before questioning.

Before questioning J.R.N., Sgt. Grimes asked J.R.N. if he wanted his parents notified. J.R.N. said that he did not. Sgt. Grimes also read J.R.N. his *Miranda*[3] rights, which J.R.N. acknowledged. He agreed to talk to the police. At approximately 1:00 p.m. the police interviewed J.R.N. The police videotaped this interview. During the interview, J.R.N. confessed to killing Samuels and stealing the automobile.

After the interview, J.R.N. showed the police the location of the murder weapon and other incriminating evidence. At 4:00 p.m. the police notified J.R.N.'s father that they had arrested J.R.N. The father had been available throughout the day and asserted that he would have come to the police station earlier if he had been notified of J.R.N.'s arrest.

On October 8, 1989, the State petitioned to prosecute J.R.N. as an adult, charging him with first-degree murder, robbery, burglary and theft. Prior to the hearing, J.R.N. moved to suppress the confession and the evidence obtained as a result of the confession. The superior court granted the State's petition and denied J.R.N.'s motion. J.R.N. appealed. On appeal, the court of appeals reversed the superior court, concluding that the police had violated DR 7(b) by not immediately notifying J.R.N.'s parents as soon as he was arrested and taken to the police station. *J.R.N. v. State*, 809 P.2d 416 (Alaska App.1991). It further

1. When J.R.N. was arrested, Delinquency Rule 7(b) provided:

> If a juvenile is arrested, the juvenile must be taken immediately to a detention facility or placement facility designated by the Department [of Health and Social Services] or released pursuant to paragraph (c) of this rule. The arresting officer shall immediately notify the parents, guardian and Department of the arrest and detention or placement, and shall make and retain a record of the notification. If the juvenile is arrested under subparagraph (a)(3) of this rule, prompt notification must also be given to the Department of Law.

2. AS 47.10.140(a) and (b) provide:

> (a) A peace officer may arrest a minor who violates a law or ordinance in the officer's presence, or whom the officer reasonably believes is a fugitive from justice. A peace officer may continue a lawful arrest made by a citizen. The officer may have the minor detained in a juvenile detention facility if in the officer's opinion it is necessary to do so to protect the minor or the community.
>
> (b) A peace officer who has a minor detained under (a) of this section shall immediately, and in no event more than 12 hours later, notify the court, the minor's parents or guardian, and the department of the officer's action. The department may file with the court a petition alleging delinquency before the detention hearing.

3. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

concluded that exclusion of the confession and the resulting evidence was the appropriate remedy for the violation. The State filed a petition for hearing from this decision.

DISCUSSION

[1] The State contends that DR 7(b) and AS 47.10.140(b) are inconsistent, and that the statute controls. The State argues that the statute implies a more relaxed definition of "immediately" than the rule, because the term "immediately" is modified by the phrase "and in no event more than 12 hours later...." in the statute, but not in the rule. The State also argues that this court went beyond its constitutional power to make rules of "practice and procedure" "in all courts" [4] in promulgating DR 7 because this rule governs conduct by the police which is not in-court practice or procedure.

While the State's perceived inconsistency is plausible, the statute and rule can also be reasonably reconciled. We interpret the term "immediately" to mean the same thing in both the rule and the statute. In our view the language "in no event more than 12 hours later" in the statute is not a modification of "immediately," but merely sets an outside time limit for parental notification. Since the rule and the statute have the same meaning, the fact that the rule may be *ultra vires* would not be a basis for overturning the court of appeals' decision, for the decision would be equally supported by the statute.[5]

The State also contends that the court of appeals' decision is inconsistent with our decision in *Quick v. State*, 599 P.2d 712 (Alaska 1979). We agree.

[2-4] It is not disputed that the police asked J.R.N. whether he wanted his parents notified before questioning began. He answered that he did not want them notified. The dispositive issue in this case is whether J.R.N. waived his right to have his parents notified.[6] Underlying this issue are two questions. The first is whether a juvenile may waive his or her right to parental notification. If the right may be waived, the second question is whether J.R.N. effectively waived his right to have his parents notified under the circumstances of this case.

[5] We hold that a juvenile may waive his or her right to parental notification. The waiver must be a knowing and voluntary one. Whether J.R.N.'s waiver of his right was knowing and voluntary must be

4. Art. IV § 15 of the Alaska Constitution provides:

> The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

5. The court's power to make rules extends beyond the confines of in-court practice and procedure in some cases. We have expressed the view that the court has the power to make rules which interpret common-law, statutory, or constitutional rights as an adjunct of the judicial power grant contained in article IV, section 1 of the Alaska Constitution. In the note to the rule establishing guidelines for child support, Civil Rule 90.3, we authorized the following statement:

> This rule is adopted under the supreme court's interpretive authority pursuant to Article IV, Section 1 of the Alaska Constitution. Thus, it may be superseded by legislation even if the legislation does not meet the procedural requirements for changing rules promulgated under Article IV, Section 15.

Interpretive rules which concern a common-law or statutory right do not occupy the same place in the legal hierarchy as rules of practice and procedure; such interpretive rules may not be inconsistent with statutes and they may be repealed or modified by statute without the two-thirds legislative majority required for the change of a rule of practice and procedure under article IV, section 15. In our view DR 7(b) is a rule of interpretation.

6. The right of parental notification runs both to the arrested juvenile and to the arrested juvenile's parents. In this case the juvenile is asserting the right. One accused of crime may assert a violation of another's rights as a basis for suppression of evidence only where the violation involves deliberate or shocking police misconduct. *Waring v. State*, 670 P.2d 357 (Alaska 1983). Since these conditions do not exist based on the record before us, J.R.N. has no standing to raise a violation of his parents' rights. The focus in this case must therefore be on J.R.N.'s right to have his parents notified of his arrest.

assessed by the totality of the circumstances as they existed when he stated that he did not want his parents notified. This inquiry should be conducted by the trial court on remand.[7]

These conclusions are governed by our decision in *Quick*. In *Quick*, police interrogated a seventeen-year-old juvenile at a police station in connection with a murder investigation. When he made an incriminating statement the police considered him to be in custody and advised him of his *Miranda* rights. 599 P.2d at 716. He stated that he wished to waive these rights and, after further questioning, he confessed to participating in the murder. *Id.* The juvenile argued that his confession should be suppressed because his *Miranda* waiver was ineffective "as he was not given an opportunity to consult with a neutral adult or guardian before waiving his rights." *Id.* at 718. On appeal, we affirmed, rejecting a rule of *per se* exclusion of a juvenile's confession absent a protective adult's presence. *Id.* at 719–20.

We defined the issue in *Quick* as "whether and to what extent a juvenile can waive *Miranda* rights without the guidance of an adult...." *Id.* at 718. We noted that while some states had followed a rule of *per se* prohibition on *Miranda* waivers unless a fully informed adult is present, other states had adopted a " 'totality of the circumstances' test in which the age of the defendant is an important but not decisive factor." *Id.* at 719. We adopted the totality of the circumstances approach, stating:

> The mere fact that a person is under the age of majority does not automatically render him incapable of making a knowing and voluntary waiver. The surrounding circumstances must be considered in each case to determine whether a particular juvenile had sufficient knowledge and maturity to make a reasoned decision. Among the factors to be considered are age, intelligence, length of the questioning, education, prior experience with law enforcement officers, mental state at the time of the waiver, and whether there has been any prior opportunity to consult with a parent, guardian, or attorney.

Id. We also noted:

> It is unquestionably a better practice to see to it that a juvenile consults with an adult before he waives his *Miranda* rights, but, at least in those cases where it has not been requested, we decline to adopt a rule requiring such consultation.

Id. at 719–720.

Since juveniles under arrest can waive their constitutional privilege against self-incrimination and their constitutional right to counsel during interrogation, it logically follows that they can also waive their statutory right to have their parents immediately notified. The constitutional rights concerning self-incrimination and the right to counsel are legally of a higher order than the statutory right of parental notification. It would be inconsistent to hold that a juvenile may waive these constitutional rights but may not waive the additional statutory right.

CONCLUSION

Juveniles are not *per se* incapable of waiving their right to have their parents immediately notified of their arrest and detention. Whether J.R.N.'s statement that he did not want his parents present was a knowing and voluntary waiver of his right remains for decision. On remand, the trial court should make such a determination in light of all the circumstances which existed when he made the statement. The decision of the court of appeals is REVERSED and this case is REMANDED to the superior court. We retain jurisdiction.

7. We retain jurisdiction of this case pending the trial court's waiver determination. If the trial court decides that there was no waiver we will proceed to determine whether the violation of J.R.N.'s right of parental notification warrants the exclusionary remedy required by the court of appeals. If the trial court decides that there was a waiver we will remand this case for further proceedings. Such proceedings, of course, may include the right to seek review of the superior court's waiver decision.

Sec. 47.10.110. Appointment of guardian or custodian. When, in the course of a proceeding under this chapter, it appears to the court that the welfare of a minor will be promoted by the appointment of a guardian or custodian of the minor's person, the court may make the appointment. The court shall have a summons issued and served upon the parents of the minor, if they can be found, in a manner and within a time before the hearing that the court considers reasonable. The court may determine whether the father, mother, another suitable person, or the department shall have the custody and control of the minor. If the minor is of sufficient age and intelligence to state desires, the court shall consider them. (§ 12 art I ch 145 SLA 1957; am § 6 ch 104 SLA 1971; am § 22 ch 63 SLA 1977; am § 37 ch 59 SLA 1996)

Effect of amendments. — The 1996 amendment, effective September 10, 1996, inserted "another suitable person," in the next-to-last sentence.

NOTES TO DECISIONS

Stated in C.W. v. State, 23 P.3d 52 (Alaska 2001).

Collateral references. — 39 Am. Jur. 2d, Guardian and Ward, § 17.

39 C.J.S., Guardian and Ward, §§ 20-29.

Right of infant to select his own guardian. 85 ALR2d 921.

Sec. 47.10.120. Support of child. (a) When a child in need of aid is committed under this chapter, the court shall, after giving the parent a reasonable opportunity to be heard, adjudge that the parent pay to the department in a manner that the court directs a sum to cover in full or in part the maintenance and care of the child. The support obligation shall be calculated under Rule 90.3(i) of the Alaska Rules of Civil Procedure.

(b) If a parent wilfully fails or refuses to pay the sum fixed, the parent may be proceeded against as provided by law in cases of family desertion and nonsupport.

(c) The sum collected from a parent under this section shall be directly credited to the general fund of the state.

(d) *[Repealed, § 28 ch 90 SLA 1991.]* (§ 13 art I ch 145 SLA 1957; am § 1 ch 31 SLA 1959; am § 1 ch 141 SLA 1959; am § 23 ch 63 SLA 1977; am §§ 88, 89 ch 138 SLA 1986; am § 28 ch 90 SLA 1991; am § 38 ch 59 SLA 1996)

Effect of amendments. — The 1991 amendment, effective July 3, 1991, repealed subsection (d).

The 1996 amendment, effective September 10, 1996, rewrote subsection (a).

NOTES TO DECISIONS

Support of minor until 19 years old. — This section imposes a duty of support on the parents of an institutionalized "delinquent minor" and under AS 47.10.080(b)(2), (b)(3), (c)(1), and (c)(2) and AS 47.10.100(a) and (c) an institutionalized delinquent is a "minor" until the delinquent becomes 19. In re S.C.Y., 736 P.2d 353 (Alaska 1987) (decided under former provisions of AS 47.10.080 and 47.10.100).

Cited in L.O. v. State, 816 P.2d 1352 (Alaska 1991).

Sec. 47.10.130. Detention. [Repealed, § 55 ch 59 SLA 1996. For current law, see AS 47.12.240.]

Sec. 47.10.140. Temporary detention and detention hearing. [Repealed, § 55 ch 59 SLA 1996. For current law, see AS 47.12.250.]

Sec. 47.10.141. Runaway and missing minors. (a) Upon receiving a written, telephonic, or other request to locate a minor evading the minor's legal custodian or to locate a minor otherwise missing, a law enforcement agency shall make reasonable efforts to locate the minor and shall immediately complete a missing person's report

(h) In this section,

(1) "correctional facility" has the meaning given in AS 33.30.901 whether the facility is operated by the state, a municipality, a village, or another entity;

(2) "official detention" has the meaning given in AS 11.81.900. (§ 46 ch 59 SLA 1996; am § 30 ch 107 SLA 1998; am §§ 1, 2 ch 79 SLA 2001)

Effect of amendments. — The 1998 amendment, effective July 1, 1998, added paragraph (c)(4) and made related stylistic changes.

The 2001 amendment, effective July 4, 2001, added the exception in subparagraph (c)(1)(A) and rewrote subsection (e).

NOTES TO DECISIONS

This section prescribes conditions of confinement after the court has lawfully determined that a child should be confined in an institution. In re E.M.D., 490 P.2d 658 (Alaska 1971) (decided under former AS 47.10.190).

A detention which was twice continued by the master of the children's court for a total period of six days exemplifies a usurpation of judicial power. P.H. v. State, 504 P.2d 837 (Alaska 1972) (decided under former AS 47.10.130).

"Juvenile" used interchangeably with "minor". — The term "juvenile" is not defined, but throughout this section is used interchangeably with "minor." Davenport v. McGinnis, 522 P.2d 1140 (Alaska 1974) (decided under former AS 47.10.190).

The apparent intent of the legislature was the two terms "minor" and "juvenile" and to be construed identically. Davenport v. McGinnis, 522 P.2d 1140 (Alaska 1974) (decided under former AS 47.10.190).

Thus, instruction that "juvenile" defined identically to minor is correct. — Since, for the purposes of this section, a minor is a person under 18 years of age, an instruction that "juvenile" is identically defined is correct. Davenport v. McGinnis, 522 P.2d 1140 (Alaska 1974) (decided under former AS 47.10.190).

Department need not incarcerate over-18-year olds apart from adults. — The department is not limited in its options pertaining to the selection of a suitable facility for those over 18 years of age by the requirement of incarceration apart from adult offenders. Davenport v. McGinnis, 522 P.2d 1140 (Alaska 1974) (decided under former AS 47.10.190).

Problems when juvenile reaches 18 years before incarceration. — Difficult problems are presented when one who has committed an offense while under 18 years of age is ordered incarcerated at a later age. Great care must be exercised by the Department of Health and Social Services to provide for custody in an appropriate institution geared to the dual constitutional dictates of reformation of the juvenile and protection of the public. Davenport v. McGinnis, 522 P.2d 1140 (Alaska 1974) (decided under former AS 47.10.190).

Quoted in B.A.M. v. State, 528 P.2d 437 (Alaska 1974) (decided under former AS 47.10.190).

Sec. 47.12.245. Arrest. (a) A peace officer may

(1) arrest a minor

(A) for the commission of an act that subjects the minor to the provisions of this chapter under the same circumstances and in the same manner as would apply to the arrest of an adult for violation of a criminal law of the state or a municipality of the state;

(B) if the peace officer reasonably believes the minor is a fugitive from justice;

(C) if the peace officer has probable cause to believe that the minor has violated a condition of the minor's release or probation; or

(D) if the peace officer reasonably believes that the minor has been adjudicated a delinquent and has escaped from an institution or absconded from probation, parole, or the jurisdiction of a court;

(2) continue the lawful arrest of a minor that is made by a citizen.

(b) A probation officer may arrest a minor if the probation officer has probable cause to believe that the minor has violated conditions of the minor's release or probation. (§ 31 ch 107 SLA 1998)

Effective dates. — Section 59, ch. 107, SLA 1998 makes this section effective July 1, 1998.

Editor's notes. — Section 57, ch. 107, SLA 1998 provides that this section applies "to all offenses committed on or after July 1, 1998."

Sec. 47.12.250. Temporary detention and detention hearing. (a) A peace officer or a probation officer who has arrested or a peace officer who has continued the arrest of a minor under AS 47.12.245 may

(1) have the minor detained in a juvenile detention facility if in the opinion of the peace officer making or continuing the arrest it is necessary to do so to protect the minor or the

community; however, the department may direct that a minor who was arrested or whose arrest was continued be released from detention before the hearing required by (c) of this section;

(2) before taking the minor to a juvenile detention facility, release the minor to the minor's parents or guardian if detention is not necessary to

(A) protect the minor or the community; or

(B) ensure the minor's attendance at subsequent court hearings.

(b) A peace officer who has a minor detained under (a) of this section shall immediately, and in no event more than 12 hours later, notify the court and make reasonable efforts to notify the minor's parents or guardian, the minor's foster parent, and the department of the officer's action. The department may file with the court a petition alleging delinquency before the detention hearing.

(c) The court shall immediately, and in no event more than 48 hours later, hold a hearing at which the minor and the minor's parents or guardian if they can be found shall be present. For those minors held securely in correctional facilities that house adult prisoners, the court shall immediately, and in no event more than 24 hours after the custody begins, hold a hearing at which the minor and the minor's parents or guardian if they can be found shall be present. The court shall determine whether probable cause exists for believing the minor to be delinquent. The court shall inform the minor of the reasons alleged to constitute probable cause and the reasons alleged to authorize the minor's detention. The minor is entitled to counsel. The court shall give the minor's foster parent the opportunity to be heard at the hearing.

(d) If the court finds that probable cause exists, it shall determine whether the minor should be detained pending the hearing on the petition or released. It may either order the minor held in detention or released to the custody of a suitable person pending the hearing on the petition. If the court finds no probable cause, it shall order the minor released and close the case.

(e) Except for temporary detention pending a detention hearing, a minor may be detained only by court order. (§ 46 ch 59 SLA 1996; am §§ 32, 33 ch 107 SLA 1998; am §§ 7, 8 ch 40 SLA 1999; am § 3 ch 79 SLA 2001)

Cross references. — For court rule governing emergency detention, see Delinquency Rule 7.

For effect of the amendments made by §§ 7 and 8, ch. 40, SLA 1999 on the Alaska Delinquency Rules, see § 10, ch. 40, SLA 1999 in the 1999 Temporary & Special Acts.

For effect of the amendment to (c) of this section by § 3, ch. 79, SLA 2001 on Rule 12, Alaska Delinquency Rules, see § 4, ch. 79, SLA 2001 the 2001 Temporary & Special Acts.

Effect of amendments. — The 1998 amendment, effective July 1, 1998, rewrote subsection (a) and in subsection (c) deleted "and to confrontation of adverse witnesses" from the end of the last sentence.

The 1999 amendment, effective August 30, 1999, inserted "the minor's foster parent," in subsection (b), and added the last sentence in subsection (c).

The 2001 amendment, effective July 4, 2001, added the second sentence in subsection (c).

NOTES TO DECISIONS

Annotator's notes. — Many of the cases set forth below were decided under former AS 47.10.140.

Meaning of "immediately". — Delinquency Rule 7(b) and this section are not inconsistent. The term "immediately" means the same thing in both the rule and the statute. The language "in no event more than 12 hours later" in the statute is not a modification of "immediately," but merely sets an outside time limit for parental notification. State v. J.R.N., 861 P.2d 578 (Alaska 1993).

Waiver of parental notification by juvenile. — A juvenile may waive his or her right to parental notification. The waiver must be a knowing and voluntary one. Whether the juvenile's waiver of his right was knowing and voluntary must be assessed by the totality of the circumstances as they existed when he stated that he did not want his parents notified. State v. J.R.N., 861 P.2d 578 (Alaska 1993).

Former AS 47.10.140(c) seems to require detention orders to be based upon first-hand testimony in which the adverse witness is subject to cross-examination. D.G. v. State, 754 P.2d 1128 (Alaska Ct. App. 1988).

Detention orders neither based on competent testimony nor accompanied by the required statement of facts are invalid. P.H. v. State, 504 P.2d 837 (Alaska 1972).

Appeal of detention order. — See notes under this catchline, AS 47.10.080, A.M. v. State, 653 P.2d 346 (Alaska Ct. App. 1982).

(HOUSE COMMITTEE REP(T

(7)
Date Referred to Committee: January 23, 2004 **FURTHER REFERRALS:**

Date of Committee Action: February 9, 2004

The JUDICIARY Committee considered: **HB 397**

HOUSE BILL NO. 397 **DEFENSE CONTACTS WITH VICTIMS & WITNESSES**

"An Act relating to defense contacts with and recordings of statements of victims or witnesses; and amending Rule 16, Alaska Rules of Criminal Procedure."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 397 (JUD)
***For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR*______ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to ____________Committee
[ ] Letter of Intent___________Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

***NEW* FISCAL NOTES** (*Assigned by Chief Clerk's Office)

List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW				✓
ADM				✓
ADM				✓

***PREVIOUS* FISCAL NOTES**

List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
[signature]	Holm			✓	
[signature]	Samuels	X			
[signature]	Anderson	X			
[signature]	Gara			✓	
Chair: [signature]	McGuire	✓			
Chair:					

23-LS1510\H
Luckhaupt
2/4/04

CS FOR HOUSE BILL NO. 397(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MCGUIRE, Samuels, Dahlstrom, Stoltze

A BILL

FOR AN ACT ENTITLED

"An Act relating to defense contacts with and recordings of statements of victims and witnesses of sexual offenses; and amending Rule 16, Alaska Rules of Criminal Procedure."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new subsection to read:

SHORT TITLE. This Act may be known as the Brooke Act.

*** Sec. 2.** AS 12.61.125(a) is amended to read:

(a) The defendant accused of a sexual offense, the defendant's counsel, or an investigator or other person acting on behalf of the defendant, may not

(1) notwithstanding AS 12.61.120, contact the victim of the offense or a witness to the offense if the victim or witness, or the parent or guardian of the victim or witness if the victim or witness is a minor, has informed the defendant or the defendant's counsel in writing or in person that the victim or witness does not wish to

be contacted by the defense; a victim or witness who has not informed the defendant or the defendant's counsel in writing or in person that the victim does not wish to be contacted by the defense is entitled to rights as provided in AS 12.61.120;

(2) obtain a statement from the victim of the offense or a witness to the offense, unless,

(A) if the statement is taken as a recording, the recording is taken in compliance with AS 12.61.120**, and written authorization is first obtained from the victim or witness, or from the parent or guardian of the victim or witness if the victim or witness is a minor; the written authorization must state that the victim or witness is aware that there is no legal requirement that the victim or witness talk to the defense**; or

(B) if the statement is not taken as a recording, written authorization is first obtained from the victim or witness, or from the parent or guardian of the victim or witness if the victim or witness is a minor; the written authorization must state that the victim or witness is aware that there is no legal requirement that the victim or witness talk to the defense; a victim or witness making a statement under this subparagraph remains entitled to rights as provided in AS 12.61.120.

Representative Nancy Dahlstrom
Representative Lesil McGuire
Representative Ralph Samuels
Representative Bill Stoltze

HB 397 – "The Brooke Act"

"An Act relating to defense contacts with and recordings of statements of victims or witnesses; and amending Rule 16, Alaska Rules of Criminal Procedure"

Sponsor Statement

Victims and witnesses to crime are unfortunately placed at risk of harassment, intimidation, and unwarranted invasions of privacy when their lives are unwillingly thrust into the legal system. These potential harms increase when a victim or witness is a minor. HB 397, also know as the Brooke Act, clarifies current protections and adds further safeguards for minor crime victims and witnesses to ensure that a parent or guardian act as a point of contact between the minor and the defense team. These additional protections are consistent with Alaska's laws and policies and thus, the initial omission of such language in AS 12.61 was likely an oversight. In almost all other areas where minor's rights are implicated, a juvenile is not deemed competent to waive important rights without guidance from a responsible adult.

HB 397 would require criminal defense attorneys and investigators to first obtain the consent of a minor's parent or guardian prior to contacting the minor. Also, prior to such contact, the parent or guardian of a minor victim would be informed of the victim's rights.

In addition, HB 397 would require criminal defense attorneys and investigators to first obtain the consent of a minor's parent or guardian prior to conducting a tape-recorded interview with the minor. When a criminal defense attorney or defense investigator speaks to a minor victim or witness, and the interview is not recorded, written authorization must first be obtained from the parent or guardian of the victim or witness. However, if the statement *is* recorded, there is no present requirement in the law that the minor's parent or guardian be consulted to decide whether the minor should waive his or her rights not to speak with defense

representatives. This loophole in the law leaves juvenile victims vulnerable and parents in the dark. This bill would also allow a parent or guardian to obtain a transcript of any recorded statement made by a minor victim or witness.

This bill also includes an important exception that does not allow a defendant who is the parent or guardian of a minor victim or witness to provide the requisite authorization or consent. In such cases, to the extent possible, another parent, guardian, or appropriate person designated by the court would be required to serve that role for the minor.

In sum, HB 397 will help parents and guardians of minors to learn what is going on in their lives and empower them to make smart decisions about what is in their best interests, not the best interests of criminal attorneys or their clients.

STATE OF ALASKA
OFFICE OF VICTIMS' RIGHTS

Representative Lesil McGuire, Chair
House Judiciary Committee
716 W. 4th Avenue Ste 430
Anchorage, AK 99501-2133

December 10, 2003

Re: Proposed amendment to AS 12.61.120(d)

Dear Representative McGuire:

I am writing to ask for your help to close a loophole that was unintentionally created in 1996 when the legislature enacted AS 12.61.120 to protect victims and witnesses from criminal defense attorneys and their investigators. Since then, this oversight has hurt sexual assault and other victims as well as the prosecutors who have pursued their cases in court. I personally witnessed this when prosecuting cases and was reminded of it recently when it happened again to here in Anchorage. My office now represents . The District Attorney's office is prosecuting her assailant and the case is in the pre-indictment stage at this time.[1]

16-year-old was sexually assaulted at a party in May. Her assailant was a friend and fellow classmate in a Junior ROTC class. He was a graduating senior and is being prosecuted as an adult. There were witnesses at the party and at the time of his arrest he made incriminating admissions to the police so the chances of securing a conviction for sexual assault looked promising. Or at least that *was* the case until November 2003 when AS 12.61.120(d) helped the defense undermine and weaken the evidence against 's attacker.

1007 WEST 3RD AVENUE, SUITE 205 • ANCHORAGE, ALASKA 99501-1936
TELEPHONE: 1-907-272-2620 • FACSIMILE: 1-907-272-2640

In November, as the defense was beginning the investigative phase of their case, an investigator from the Alaska Public Defender's Agency called at home and spoke with her directly. The defense investigator, followed the letter of the law found in AS 12.61.120 and .125. He clearly informed that he worked for the defendant and told her that she need not speak with him and that if she decided to speak with him she could have a third party like the DA or her parents present, pursuant to AS 12.61.120. He then asked if she would speak to him about the case.

As is the case with many 16 year old girls was a naïve and vulnerable high schooler. Following the sexual assault she was very traumatized and confused and even felt concern for her classmate, a person it turned out she didn't really know after all. She was afraid that her former friend, although he had deeply hurt her, was also agonizing over what he had done to her. She wanted to hear from him that he was sorry for his crime. She also wanted to know that he was coping with the situation just as she was trying to do.

Sixteen-year old girls who have been raped do not understand the legal ramifications of speaking with a defense legal team and how that almost always undermines the prosecutor's ability to hold a criminal accountable for his crime. Nonetheless, she agreed to speak with the defense investigator. She drove herself down to the public defender's office and engaged in a two and a half hour recorded interview with the defense investigator and a paralegal that witnessed her interview. Even though she was a minor, 's parents had not been contacted. They had no idea that she had been called by the defense or had agreed to speak to them. Had they known, her parents would not have permitted the interview.

was led to believe by that she would be able to learn about case developments during the meeting. She was expecting a two-way discussion. Instead she was subjected to hostile questioning without the knowledge of the District Attorney or consent of her parents. Whenever she asked questions, claimed to know nothing about the case and refused to give any information. As a juvenile, was not competent to understand the implications of such a meeting with a skilled and very experienced adversary such as It is certain that what told the defense during the meeting will have grave consequences with regard to the strength of the prosecution's case against her assailant. Indeed, the very purpose of the meeting was not to learn details from about the crime since under the very liberal Alaska Criminal Rules of discovery the defense had already obtained a complete copy of all the police reports 's police statement, witness statements and the like. Instead, it was to trick into making arguably inconsistent statements about the crime –

statements that will be used by defense counsel at trial to impeach her and undermine her credibility before the jury. Even if the case is ultimately settled without a trial through a plea-bargain, the defense will now have more leverage to obtain a more lenient sentence since the state's case has been prejudiced.

This case came to our attention when 's parents finally learned from what had occurred. They were expecting to file a complaint against the Public Defender Agency for grave violations of their daughter's victim rights. Unfortunately, given the loophole that exists in AS 12.61.120(d), we had to inform her parents that the conduct of the investigator was not prohibited under present law. But the law needs to be changed. The legislature should act to close this loophole and prevent such an unfair result from ever happening again to other victims and witnesses, as it surely will. Here's the specific problem with 12.61.120.

AS 12.61.120 deals with situations where a defense representative wishes to obtain information or a statement from a victim or witness. It provides in pertinent part that:

> (c) If a defendant or a person acting on behalf of a defendant contacts the victim of an offense with which the defendant is or could be charged, the person shall clearly inform the victim
>
> (1) of the person's identity and specific association with the defendant;
>
> (2) that the victim does not have to talk to the person unless the victim wishes; and
>
> (3) that the victim may have a prosecuting attorney or other person present during an interview.
>
> (d) If a defendant or a person acting on behalf of a defendant wishes to make a recording of statements of the victim of an offense with which the defendant is or could be charged in this or another jurisdiction, or of a witness, the person shall, before recording begins, obtain the consent of the victim or witness, to record the statement by clearly informing the victim or witness (1) of the information set out in (c) of this section, (2) that the statement will be recorded if the victim or witness consents, and (3) that the victim or witness may obtain a transcript or other copy of the recorded statement upon request. When recording begins, the person making

> the recording shall indicate in the recording that the victim or witness has been informed as required by this subsection, and the victim or witness shall state in the recording that consent of the victim or witness to the recording has been given.

Section (d), the section at issue, provides for a waiver of a victim or witnesses' right to avoid speaking to defense representatives. However, because of its careless language, section (d) allows even a *minor* victim or witness to consent to speaking with a defense representative without a requirement that the minor's parent or guardian be made aware of the defenses' effort to obtain the minor's statement. This must have been an oversight when the legislature drafted this section because in almost all other areas where minor's rights are implicated, a juvenile is not deemed competent to waive important rights without guidance from a responsible adult.

Even though it is sufficient, the logic of first checking with a minor's parent or guardian before signing away valuable rights alone does not provide the sole basis for my request that AS 12.61.120(d) be amended. More compelling support for my opinion that this statutory loophole was unintended by the legislature, and that section (d) needs to be quickly amended, can be found in AS 12.61.125, the section that immediately follows AS 12.61.120.

Unlike AS 12.61.120, which deals with defense efforts to obtain information or statements from victims and witnesses, AS 12.61.125 is a law that governs defense contacts with sexual assault victims and witnesses. In this law, the legislature *did require* the parent or guardian of a minor victim or witness to invoke rights on their behalf.

AS 12.61.125 provides in pertinent part:

> (a) The defendant accused of a sexual offense, the defendant's counsel, or an investigator or other person acting on behalf of the defendant, may not
>
> (1) notwithstanding AS 12.61.120, contact the victim of the offense or a witness to the offense **if the victim or witness, or the parent or guardian of the victim or witness if the victim or witness is a minor**, has informed the defendant or the defendant's counsel in writing or in person that the victim or witness does not wish to be contacted by the defense; a victim or witness who has not informed the defendant or the defendant's counsel in writing or in person that

> the victim does not wish to be contacted by the defense is entitled to rights as provided in AS 12.61.120;
>
> (2) obtain a statement from the victim of the offense or a witness to the offense, unless,
>
> (A) if the statement is taken as a recording, the recording is taken in compliance with AS 12.61.120; or
>
> (B) if the statement is not taken as a recording, **written authorization is first obtained from the victim or witness, or from the parent or guardian of the victim or witness if the victim or witness is a minor;** the written authorization must state that the victim or witness is aware that there is no legal requirement that the victim or witness talk to the defense; a victim or witness making a statement under this subparagraph remains entitled to rights as provided in AS 12.61.120.
>
> (b) A defendant who is the parent or guardian of a minor victim or witness may not provide the authorization required under (a) of the section. [Emphasis added].

In sum, where a victim or witness is a minor and wishes to have no contact with the defense, the parent or guardian of that individual must inform the defense agent in writing or in person that the victim does not wish to be contacted by the defense. Where a victim or witness is a minor, and a statement is taken *but not recorded*, written authorization must first be obtained from the parent or guardian of the victim or witness. However, pursuant to AS 12.61.120, if the statement is recorded as it was here, the victim or witness may waive his or her rights not to speak with defense representatives and *no consent or authorization* from the parent or guardian is required. This inconsistency leaves juvenile victims vulnerable to exploitation by the defense in the same way that B.A. was manipulated. It is well known that the best form of impeachment is found in the prior recorded statements of witnesses. Consequently, many contacts with minor victims are recorded such as occurred in this case and unless AS 12.61.120(d) is amended such abuses will continue.

This problem can be cured by adding the simple phrase "or the parent or guardian of the victim or witness if the victim or witness is a minor" to AS 12.61.120(d) as the legislature has already done in AS 12.61.120. Such a technical amendment will mean that many future child victims may be spared the trauma

December 10, 2003

and exploitation suffered by She has been deeply hurt by the rape and the subsequent events. Thanks to this loophole, I expect it can only get worse for her. But in the long run, it would materially advance her healing, and would be a great comfort to her family, to know that no future victims will be similarly misled and taken advantage of.

She and her parents have sought assistance from the OVR, and we in turn now seek your support for the proposed change to AS 12.61.125 that will bring it in line with the intent and spirit of the chapter. For your convenience I have attached a proposed amendment.

Respectfully,

Stephen E. Branchflower, Director
Alaska Office Of Victims' Rights

Cc: Representative Dahlstrom
Rex Shattuck

Representative Samuels
Sara Nielson

Representative Stoltze
Kelly Huber

Vanessa Tondini

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).

Trial court erred in denying motion by purchasers of land to amend their complaint for breach of contract to include request for damages; purchasers' previous attempt to amend complaint, which was unsuccessful because trial court had erroneously ruled that contract claim was barred by statute of limitations, could not be characterized as repeated failure to cure deficiencies. **Bauman v. Day**, Op. No. 4853, 942 P2d 1130 (Alaska 1997).

Where defendant's attorney sought to question foster families caring for abused animals, unless and until the court ordered a deposition and the foster families were properly subpoenaed to attend that deposition, the families were under no legal obligation to respond to the attorney's questionnaire; thus, the defense attorney was not entitled to a writ of assistance to have the police intimidate the families to answer her questionaires. **Mahan v. State**, Op. No. 1812, 51 P.3d 962 (Alaska Ct. App. 2002).

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.*

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

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

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

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

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

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

(B) *Expert Witnesses.* Unless a different date is set by the court, as soon as known and no later than 45 days prior to trial, the prosecutor shall inform the defendant of the names and addresses of any expert witnesses performing work in connection with the case or whom the prosecutor is likely to call at trial. The prosecutor shall also make available for inspection and copying any reports or written statements of these experts. With respect to each expert whom the prosecution is likely to call at trial, the prosecutor shall also furnish to the defendant a curriculum vitae and a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion. Failure to provide timely disclosure under this rule shall entitle the defendant to a continuance. If the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the prosecutor from calling the expert at trial or declaring a mistrial.

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

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

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

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

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

(3) *Information Tending to Negate Guilt or Reduce Punishment.* The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession or

control which tends to negate the guilt of the accused as to the offense or would tend to reduce the accused's punishment therefor.

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

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

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

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

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

(i) Specified searches and seizures;

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

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

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

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

(c) Disclosure to the Prosecuting Attorney.

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

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

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

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

(2) *Non-Testimonial Identification Procedures — Scope.* An order issued under subsection (c) (1) of this rule may direct the person to do or submit to any and all of the following:

(i) Appear in a line-up;

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

(iii) Be fingerprinted;

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

(v) Try on articles of clothing;

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

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

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

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

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

(4) *Expert Witnesses.* Unless a different date is set by the court, no later than 30 days prior to trial, the defendant shall inform the prosecutor of the names and addresses of any expert witnesses the defendant is likely to call at trial. The defendant shall also make available for inspection and copying any reports or written statements of these experts. For each such expert witness, the defendant shall also furnish to the prosecutor a curriculum vitae and a written description of the substance of the proposed

testimony of the expert, the expert's opinion, and the underlying basis of that opinion. Failure to provide timely disclosure under this rule shall entitle the prosecutor to a continuance. If the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the defendant from calling the expert at trial. Information obtained by the prosecutor under this rule may be used only for cross-examination or rebuttal of defense testimony.

(5) *Notice of Defenses.* Unless a different date is set by the court, no later than 10 days prior to trial, the defendant shall inform the prosecutor of the defendant's intention to rely upon a defense of alibi, justification, duress, entrapment, or other statutory or affirmative defense. Failure to provide timely notice under this rule shall entitle the prosecutor to a continuance. If the court finds that a continuance is not an adequate remedy under the circumstances of the case, the court may impose other sanctions, including prohibiting the defendant from asserting the designated defense. The defendant shall give notice of an insanity defense or a defense of diminished capacity due to mental disease or defect in compliance with AS 12.47.

(6) *Physical Evidence.* If defense counsel or defense counsel's agent acquires physical evidence of the offense, defense counsel must immediately notify the prosecutor and must make arrangements to turn over the evidence to the prosecutor within a reasonable time. Differences concerning what amount of time is "reasonable" shall be resolved by the court. Defense counsel must not test or substantively alter the evidence, unless defense counsel has first notified the prosecutor and given the prosecutor a reasonable opportunity to seek court action. Defense counsel must reveal all information concerning the manner in which the evidence was obtained and handled unless that information is privileged. When physical evidence is disclosed by the defense, the prosecutor cannot reveal to the jury that the evidence was obtained from the defense.

(d) **Regulation of Discovery.**

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

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

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

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

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

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

(iii) an adoption record;

(iv) a record that is confidential under AS 47.12.300 or a similar law in another jurisdiction;

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

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

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

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

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

(D) If a defendant is proceeding without counsel, materials covered by subsection (d)(3)(A) may be provided to the defendant. If materials are provided

to an unrepresented defendant under this paragraph, the court shall order that the materials remain in the defendant's exclusive custody, be used only for purposes of conducting the case, and be subject to other terms, conditions, and restrictions that the court may provide. The court shall also inform the defendant that violation of an order issued under this paragraph is punishable as a contempt of court.

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

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

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

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

(ii) any portion of any showing of cause for denial or regulation of disclosure

to be made to the court in camera ex parte. A record shall be made of such proceedings. If the court enters an order granting relief following such a showing, the entire record of the proceedings shall be sealed and preserved in the records of the court, to be made available to the court of appeals and the supreme court in the event of an appeal.

(e) **Sanctions.**

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

(2) *Willful Violations.* Willful violation b counsel of an applicable discovery rule or an ord issued pursuant thereto may subject counsel to appr priate sanctions by the court.

(f) **Omnibus Hearing.**

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

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

The court may set an omnibus hearing in misdemeanor case.

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

(A) ensure that discovery under this rule complete;

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

(C) schedule any necessary evidentiary hearin and

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

(Adopted by SCO 4 October 4, 1959; amended SCO 157 effective February 15, 1973; by SCO 2 effective July 15, 1975; by SCO 212 effective J 15, 1975; by SCO 329 effective January 1, 1979; SCO 331 effective January 1, 1979; by SCO's 6 and 641 effective September 15, 1985; by SCO 1(effective July 15, 1992; by SCO 1092 effective J 15, 1992; by SCO 1126 effective July 15, 1993; SCO 1153 effective July 15, 1994; by SCO 1 effective July 15, 1995; by SCO 1269 and 1: effective July 15, 1997; and by SCO 1444 effec October 15, 2001)

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

Note: Criminal Rule 16 was repealed and reenac by chapter 95 SLA 1996. In **State v. Summervi**

926 P.2d 465 (Alaska App. 1996), the Alaska Court of Appeals found that the legislature's version of the rule was unconstitutional. This decision was affirmed by the Alaska Supreme Court in **State v. Summerville**, 948 P.2d 469 (Alaska 1997). Thus, the pre-existing version of the rule remains in effect.

Annotations

Cases

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

I. In General

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

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

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

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

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

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

Expansion of discovery beyond provisions contained in court rules is most appropriately done through amendment of existing rules after thorough study. **Buchanan v. State**, Op. No. 1316, 561 P2d 1197 (Alaska 1977).

Paragraph (d) of this rule, does not justify conducting an ex parte in camera hearing to consider evidence in conjunction with a bail reduction proceeding. **Carman v. State**, Op. No. 1428, 564 P2d 361 (Alaska 1977).

Order denying motion for discovery is a final order and may be appealed even if motion is not renewed. **Batson v. State**, Op. No. 1486, 568 P2d 973 (Alaska 1977).

Failure to order discovery of relevant material was not reversible error where the material sought to be discovered would have been merely cumulative. **Braham v. State**, Op. No. 1522, 571 P2d 631 (Alaska 1977).

Superior court's in camera examination of kidnap victim's journal did not deprive defendant of "effective confrontation" or of access to evidence which was potentially helpful to his defense where that portion of journal pertaining to defendant was turned over to defense and where defense could reasonably have assumed that the remainder of the journal contained no references to the defendant or the alleged crime. **Morrell v. State**, Op. No. 1577, 575 P2d 1200 (Alaska 1978).

Where confession of co-defendant was disclosed by prosecution for the first time after the trial began, but out of the presence of the jury, the trial court acted properly in denying a motion by the other defendants for a mistrial, in granting a continuance, and in refusing to allow the prosecution to use the confession at trial. **Hawley v. State**, Op. No. 2137, 614 P2d 1349 (Alaska 1980).

The remedy of exclusion of significant evidence for a violation of the discovery rules should be imposed only in rare situations, and absent substantial prejudice to the nonoffending party, the appropriate remedies are the granting of continuances, imposition of monetary sanctions, or the exercise of contempt powers by the court. **State v. Lewis**, Op. No. 35, 632 P2d 547 (Alaska App. 1981).

In the absence of a timely pretrial objection, hearsay testimony presented to and considered by a grand jury should be regarded on appeal as constituting admissible and fully competent evidence. **Cassell v. State**, Op. No. 91, 645 P2d 219 (Alaska App. 1982).

Fact that indictment charged defendant with theft of ripper teeth but did not allege a specific theory of theft did not deny defendant due process since liberal discovery rules permit an accused to obtain adequate discovery of the state's case and to get adequate notice of the state's theory or theories of prosecution. **Williams v. State**, Op. No. 106, 648 P2d 603 (Alaska App. 1982).

Defendant's motion to strike telephone record evidence based upon his constitutional right of privacy after the state had already introduced much of the evidence was properly denied on the ground that defendant had waived the objection by not making the motion at the omnibus hearing prior to trial. **Hohman v. State**, Op. No. 290, 669 P2d 1316 (Alaska App. 1983).

Motion to dismiss grand jury indictment on the ground that improper information was presented to the grand jury was properly denied as untimely, since the motion was not raised until during or after jury selection, and because the other evidence presented was so strong that the grand jury's decision to indict was clearly not affected by the allegedly improper information. **Pritchard v. State**, Op. No. 319, 673 P2d 291 (Alaska App. 1983).

Where motion to suppress evidence was filed late but prior to trial, it was abuse of discretion for the trial court to deny the motion as untimely where defendant was not personally responsible for the late filing and his attorney did not act in bad faith for the purpose of delay. **Fox v. State**, Op. No. 394, 685 P2d 1267 (Alaska App. 1984).

Where charge of being a felon in possession of a firearm was properly joined to kidnapping and other charges, thereby allowing the jury to be informed of defendant's prior felony conviction, which would not have been the case had the firearm possession charge been severed, trial judge did not abuse his discretion in refusing as untimely defendant's severance motion made on the morning of trial. **Wortham v. State**, Op. No. 414, 689 P2d 1133 (Alaska App. 1984).

A party intending to rely upon a subsistence defense to charges of violating hunting laws must make a preliminary showing at a reasonable time before trial; failure to give notice of the defense before trial or in the manner prescribed in a

pretrial order may, unless excused for good cause, result in the forfeiture of the defense. **State v. Eluska**, Op. No. 456, 698 P2d 174 (Alaska App. 1985).

Argument that search warrants were improperly broad and premature was not made to trial court and would not therefore be considered on appeal. **Stuart v. State**, Op. No. 464, 698 P2d 1218 (Alaska App. 1985).

The broad rights to discovery granted a criminal defendant under the Alaska rules will render a bill of particulars unnecessary in most cases. **Covington v. State**, Op. No. 491, 703 P2d 436 (Alaska App. 1985).

Where the trial court permits an untimely pretrial challenge to the indictment and rules on the merits of that challenge, the challenge will not be deemed forfeited on appeal. **Abruska v. State**, Op. No. 502, 705 P2d 1261 (Alaska App. 1985).

An in camera examination of material submitted by the prosecutor must involve more than a cursory determination that the material is not discoverable; where there is a suggestion that the prosecutor has not submitted all the requested material, the court should inquire further. **Braaten v. State**, Op. No. 504, 705 P2d 1311 (Alaska App. 1985).

Where defendant's discovery request was for evidence which the state was under obligation to provide and defendant did not request action of the court regarding the request and no court action was taken, defendant's discovery request was not a discovery motion; accordingly, trial court erred in excluding the period during which the request was pending from the speedy trial computation. **Miller v. State**, Op. No. 511, 706 P2d 336 (Alaska App. 1985).

Violation of the affirmative duty to collect and preserve material evidence requires reversal on appeal only where the defendant is denied due process as a result of the violation; due process is violated only if the evidence, if collected and/or preserved, could possibly affect the outcome. **Klumb v. State**, Op. No. 575, 712 P2d 909 (Alaska App. 1986).

Failure to preserve tissue samples from the area of the victim's wounds did not violate defendant's due process rights where photographs of the wounds and the pathologist's reports provided the necessary evidence. **Klumb v. State**, Op. No. 575, 712 P2d 909 (Alaska App. 1986).

Although defendant had a right to be present at his omnibus hearing, his absence from the hearing was held harmless beyond a reasonable doubt despite his claim that attendance would have alerted him to the need to peremptorily challenge the trial judge and to affirmatively protect his speedy trial rights. **Trudeau v. State**, Op. No. 581, 714 P2d 362 (Alaska App. 1986).

Failure to raise an objection at trial to the state's reliance on testimony of a sexual assault victim's physician resulted in forfeiture of the objection. **Hilburn v. State**, Op. No. 800, 765 P2d 1382 (Alaska App. 1988).

Defendant forfeited his argument that the prosecutor, who had participated in a videotaped interrogation of defendant, should be recused, by failing to make a motion to that effect at the omnibus hearing prior to trial. **Kanulie v. State**, Op. No. 1070, 796 P2d 844 (Alaska App. 1990).

This rule requires disclosure of "rebuttal" witnesses. **Bostic v. State**, Op. No. 3659, 805 P2d 344 (Alaska 1991).

Constitutional challenge to statute under which defendant is indicted need not be raised before trial. **Gudmundson v. State**, Op. No. 3780, 822 P2d 1328 (Alaska 1991).

Argument that this rule precludes trial judge from ordering defendant to submit to independent psychiatric examination unless defendant intends to raise insanity defense was rejected. **Nelson v. State**, Op. No. 1346, 874 P2d 298 (Alaska App. 1994).

Criminal discovery in federal cases differs significantly from discovery as prescribed by this rule. Therefore, federal case law is not necessarily to be followed in construing the state rule. **Johnson v. State**, Op. No. 1390, 889 P2d 1076 (Alaska App. 1995).

There is no basis for categorically exempting pre-sentence reports from discovery under this rule. **Johnson v. State**, Op. No. 1390, 889 P2d 1076 (Alaska App. 1995).

This rule permits the state to withhold disclosure of records whose contents are potentially discoverable only if a two-step procedure has been met: first the state must make a threshold showing of good cause to maintain the records' confidentiality; second, but only if such showing is made, the trial judge must review the records **in camera** and determine that the material therein is not relevant. **Johnson v. State**, Op. No. 1390, 889 P2d 1076 (Alaska App. 1995).

Disclosure of presentence reports is expressly restricted by Criminal Rule 32(d)(2). However, before a presentence report of a complaining witness could be withheld from the defendant, the trial court would have to determine in an **in camera** review that the material in the report was not relevant to the case at bar. **Johnson v. State**, Op. No. 1390, 889 P2d 1076 (Alaska App. 1995).

Criminal Rule 16(c) as amended by chapter 95 of 1996 Session Laws was unconstitutional and invalid in its entirety thus pre-existing version of rule remained in effect. **State v. Summerville**, Op. No. 1496, 926 P2d 465 (Alaska App. 1996).

In trial of defendant for robbing sandwich shop of eighty dollars and meatball sandwich, trial court committed reversible error in denying defense motion to compel production of palm print of employee who handed money and sandwich bag to robber, since print did not match defendant and evidence of third person's print on bag might have altered jury's decision. appellate court rejected state's argument that trial court had no authority to compel employee to submit to fingerprinting or alternatively, that trial court's failure to exercise authority was not abuse of discretion. **Fathke v. State**, Op. No. 1549, 94 P2d 1243 (Alaska App. 1997).

Amendment to this rule in 1996 allowing reciprocal discovery was invalid, thus pre-existing version of rule remained in effect. **State v. Summerville**, Op. No. 4904, 94 P2d 469 (Alaska 1997).

In trial of defendant charged with sexually abusing his son, defense motion to use defendant's body as a demonstrative aid during cross-examination of prosecution witness was properly barred by trial judge unless defendant took the stand; the purpose of defendant's request was to demonstrate that he was too obese to touch his groin as the prosecution witness testified he did. **Schumacher v. State**, Op. No. 1697, 11 P3d 39 (Alaska App. 2000).

In a criminal trial where defendant was charged with prostitution for soliciting an undercover policewoman to have

oral sex with him, the defendant waived his entrapment claim by failing to raise it in a pre-trial motion. **Parrott v. Municipality of Anchorage,** 69 P.3d 1 (Alaska App. 2003).

II. Disclosure to Accused

The trial court should require the state to produce for in camera examination police reports of oral statements made to them by a witness called by the state who has testified, as well as any reports or summaries that may exist of pretrial statements made by such witness, when demand is made by the defendant. **Mahle v. State,** Op. No. 84, 371 P2d 21 (Alaska 1962).

The prosecution has an affirmative duty to disclose to an accused any information within its control which tends to negate the defendant's guilt. **Scott v. State,** Op. No. 1004, 519 P2d 774 (Alaska 1974).

Generally, rebuttal witnesses do not come within the requirement that the prosecution furnish a list of witnesses to the defense, so long as the rebuttal is true rebuttal and not an attempt to present the state's case-in-chief in the rebuttal. **McCurry v. State,** Op. No. 1173, 538 P2d 100 (Alaska 1975).

Where the state produces a rebuttal witness whose name has not been included on witness list, the court is bound on motion to grant a continuance to allow the defense to investigate the witness' background. **McCurry v. State,** Op. No. 1173, 538 P2d 100 (Alaska 1975).

District court properly exercised discretion in requiring production of ampules used in breathalyzer test. **Lauderdale v. State,** Op. No. 1254, 548 P2d 376 (Alaska 1976).

Where failure to disclose oral statements of defendant was harmless and introduction of statement was not objected to by defense, conviction would not be reversed nor would hearing be had on sanctions under Rule 16(e)(2). **Kristich v. State,** Op. No. 1264, 550 P2d 796 (Alaska 1976).

This rule imposes a duty on the prosecutor to disclose the information listed in subsection (b) and other information as the court may order. **Des Jardins v. State,** Op. No. 1245, 551 P2d 181 (Alaska 1976).

Prosecutor has an obligation to disclose evidence which tends to negate guilt, mitigate the degree of the offense or reduce punishment. **Des Jardins v. State,** Op. No. 1245, 551 P2d 181 (Alaska 1976).

Witness testifying in rebuttal need not be placed on prosecution's witness list. **Des Jardins v. State,** Op. No. 1245, 551 P2d 181 (Alaska 1976).

When prosecution fails to disclose evidence it is required to provide until just before it plans to use it, trial court should grant a continuance to allow defense adequate time to prepare. **Des Jardins v. State,** Op. No. 1245, 551 P2d 181 (Alaska 1976).

Prosecutor is obliged to use diligent good faith efforts to make discoverable material available to defense counsel. **Des Jardins v. State,** Op. No. 1245, 551 P2d 181 (Alaska 1976).

Where defense counsel was not furnished discoverable police reports until six days before testimony was taken, but after proceedings had commenced, defense was not entitled to dismissal. **Scharver v. State,** Op. No. 1397, 561 P2d 300 (Alaska 1977).

This rule requires only disclosure of information in prosecution's possession. **State v. Clark,** Op. No. 1497, 568 P2d 406 (Alaska 1977).

Expense logs showing amounts of money and gifts given to defendants by undercover officers were relevant to defense of entrapment and denial of discovery was improper. **Batson v. State,** Op. No. 1486, 568 P2d 973 (Alaska 1977).

If material of which discovery is sought is relevant to defense, it must be disclosed even if disclosure would be inconsistent with law enforcement or protection of persons, unless prosecution is abandoned. **Braham v. State,** Op. No. 1522, 571 P2d 631 (Alaska 1977).

If claim that disclosure of material sought to be discovered would be inconsistent with law enforcement or protection of persons fails, material must be disclosed to defense counsel and issue of relevance decided in adversary context. **Braham v. State,** Op. No. 1522, 571 P2d 631 (Alaska 1977).

Defense motion to prevent essential prosecution witness from testifying because of prosecution's failure to comply with court order to turn the witness' personal file over to defense was properly denied in the absence of a showing of prejudice to defendant of such a nature as likely to have a substantial effect on the outcome of the case, since failure of counsel to comply with discovery order should not be utilized as a basis for ultimate disposition of litigation. **Johnson v. State,** Op. No. 1596, 577 P2d 230 (Alaska 1978).

State's failure to preserve and produce the position and direction of fingerprints found on lamp at scene of crime did not violate Criminal Rule 16(b)(7) where the materiality of the evidence was marginal at best and there was no hint or suggestion of bad faith on the government's part. **White v. State,** Op. No. 1605, 577 P2d 1056 (Alaska 1978).

Trial court did not err in not dismissing the charge when the state failed to provide immediate discovery, since substantial rights of defendant were not impinged. **Christie v. State,** Op. No. 1644, 580 P2d 310 (Alaska 1978).

Failure of prosecution to disclose police report which contained information used on cross-examination by prosecution to impeach defendant's alibi witnesses clearly contravened the policies which underlie Criminal Rule 16. **Stevens v. State,** Op. No. 1658, 582 P2d 621 (Alaska 1978).

Failure of prosecution to disclose police report which it used on cross-examination constituted prejudicial error since it could not fairly be said that the error did not appreciably affect the jury's verdict. **Stevens v. State,** Op. No. 1658, 582 P2d 621 (Alaska 1978).

If a rebuttal witness is a person known by the prosecution to have knowledge of relevant facts, then his name, address and any statement he has given must be disclosed to defense counsel. **Howe v. State,** Op. No. 1780, 589 P2d 421 (Alaska 1979).

Non-disclosure of the names of rebuttal witnesses whose knowledge is reasonably not thought to be germane to the case, until a position taken by the defense during trial makes it so, is justified. **Howe v. State,** Op. No. 1780, 589 P2d 421 (Alaska 1979).

The state's failure to preserve and make available to the defendant the physical items from which fingerprint evidence was taken did not violate the defendant's statutory right of

discovery. **Wyrick v. State,** Op. No. 1790, 590 P2d 46 (Alaska 1979).

Where prosecution failed to produce documents pursuant to request for discovery, but violation was in good faith, and where defendant did not request a continuance, it was not error to admit documents. **Williams v. State,** Op. No. 1939, 600 P2d 741 (Alaska 1979).

State had a responsibility to disclose to defense the fact that reward for witness existed, that state's witness had been told early on that he was potential recipient, that witness had requested money when he first approached the police, and the fact that witness was paid money after he gave the initial statement. **Carman v. State,** Op No. 1994, 604 P2d 1076 (Alaska 1979).

Pre-trial request for a psychiatric report to which the state had access concerning the state's key witness was properly denied where the report would not have contributed in a meaningful way to a more effective cross-examination of the witness. **Gunnerud v. State,** Op. No. 2091, 611 P2d 69 (Alaska 1980).

Prosecution's failure to disclose oral statement of defendant which destroyed defense theory did not require new trial where the theory was not reasonably credible. **Hampton v. State,** Op. No. 2283, 623 P2d 318 (Alaska 1981).

Where, on the morning of trial, the prosecutor presented defendant's attorney for the first time with a newly discovered police report containing the name and address of an apparent witness to the alleged crime, it was error for the court to deny a defense motion for continuance, but the error was harmless. **Russell v. Municipality of Anchorage,** Op. No. 14, 626 P2d 586 (Alaska App. 1981).

The imposition of sanctions for the state's failure to make evidentiary material available to the defendant depends upon the degree of culpability as to the state weighed against the prejudice to the defendant. **Putnam v. State,** Op. No. 2251, 629 P2d 35 (Alaska 1981).

A tape which the prosecution inadvertently failed to disclose to the defendant prior to trial is admissible if the defendant does not suffer substantial prejudice from its admission. **Fields v. State,** Op. No. 2360, 629 P2d 46 (Alaska 1981).

Destruction of taped evidence which should be preserved under this rule does not deny defendant due process when the evidence merely would have been cumulative of other evidence on trial. **Williams v. State,** Op. No. 2366, 629 P2d 54 (Alaska 1981).

Trial court's failure to insure that prosecution witness, rather than the state, opposed disclosure of the witness' medical and psychiatric records was error, but the error was harmless where there was nothing in those records bearing on her credibility and competency that was not cumulative to her trial testimony and where those records were not inconsistent with her testimony. **Spencer v. State,** Op. No. 80, 642 P2d 1371 (Alaska App. 1982).

Failure of defendant at his first trial to request disclosure of evidence taken from the victim, which evidence was destroyed after the trial, waived any right he may have had to the evidence at his second trial on the same charge, reversal of his first conviction not having revived discovery rights which had already lapsed; consequently, the prosecution had no duty to preserve the evidence in question unless it was so clearly exculpatory that the prosecutor was obligated to preserve absent a request. **Carman v. State,** Op. No. 206, 658 P2d 13 (Alaska App. 1983).

Where defendant was charged with obtaining or attemptin to obtain money by deception from an elderly male friend, tri court's order that the State disclose all financial records upo which it intended to rely, rather than ordering production of a bank records of the victim from May 1980 through March 198 as requested by defendant, was proper. **Linne v. State,** Op. N 324, 674 P2d 1345 (Alaska App. 1983).

Although trial court should have allowed discovery of police report concerning rape victim's activities during th period the defendant claimed he met her, the error was harm less, since the police report itself did not contain any exculp tory material, nor was there any reason to believe that any oth statements taken by the police in connection with the repo disclosed exculpatory information. **Braaten v. State,** Op. N 504, 705 P2d 1311 (Alaska App. 1985).

Although the prosecution should have given drunk drivi defendant pretrial notice of its intent to call an expert witne to testify concerning an analysis of defendant's blood tak following his arrest, it was not an abuse of discretion for tri court to permit the witness to testify. **Russell v. Municipali of Anchorage,** Op. No. 514, 706 P2d 687 (Alaska App. 1985)

Trial court's decision not to compel disclosure of inform tion relating to the case obtained by police through calls to t "crime stoppers" program, a program which solicits inform tion from the public concerning crimes under investigation, d not substantially impair the fairness of defendant's trial, otherwise impermissibly infringe upon his constitutional protected trial rights. **Balentine v. State,** Op. No. 538, 707 P 922 (Alaska App. 1985).

Assuming without deciding that the State had a duty preserve police dispatch tape, the State met its burden establishing that the destruction of the tape was done in go faith and that the defendant was not prejudiced by the destn tion, thus trial court did not abuse its discretion in refusing sanction the State by dismissing the indictment against defe dant. **Abdulbaqui v. State,** Op. No. 659, 728 P2d 1211 (Alas App. 1986).

Failure of the prosecution to provide appropriate pretr discovery did not require preclusion of disputed testimo since the continuance offered by the trial court would ha cured any prejudice stemming from the discovery violati however, the lack of prejudice was purely fortuitous; in futu cases appellate courts will continue to scrutinize prosecutor conduct in this area, and will not hesitate to reverse where appears that the defendant has been prejudiced by such acti **Bostic v. State,** Op. No 932, 772 P2d 1089 (Alaska A 1989).

Where defendant made no showing that he was significan disadvantaged by the introduction without prior notice testimony regarding a statement he made to the police, the t court's offer of a continuance was the proper remedy for violation of this rule. **Longley v. State,** Op. No. 940, 776 F 339 (Alaska App. 1989).

Where prosecution violates this rule by not disclosing defense counsel a witness it intends to call, the prosecution l the burden of showing that the defendant has not been pre diced in the manner he specifically claims; if this burden is met in regard to a violation of this rule which surfaces dur

trial, and the prosecution deems the evidence too important to proceed without it, the proper remedy is a mistrial rather than a continuance. Bostic v. State, Op. No. 3659, 805 P2d 344 (Alaska 1991).

A prosecutor should disclose to the defense, upon request, criminal records of jurors, at least in cases where the prosecution intends to rely on them. Tagala v. State, Op. No. 1134, 812 P2d 604 (Alaska App. 1991).

In drug case where an issue was whether the police investigation was the product of an illegal search by police informants, and the state asserted its privilege not to identify the informants, upon which the judge conducted an in camera hearing in which he questioned the informants using questions submitted by the defendant and the state and concluded that the identity of informants did not have to be revealed, the defendant was entitled to see the transcript of the in camera hearing with all information deleted that might identify the informants. Peterson v. State, Op. No. 1139, 813 P2d 685 (Alaska App. 1991).

In prosecution of defendant for burglary, prosecutor was not required to disclose unrecorded oral statement of witness made during pre-trial preparation shortly before trial that hammer and putty knife found on defendant came from burglarized building. Sivertsen v. State, Op. No. 1600, 963 P2d 1069 (Alaska App. 1998).

III. Disclosure to Prosecution

The mere fact that a court orders an accused to submit pretrial information which is not specifically included in this rule does not establish that the court has abused its discretion. Scott v. State, Op. No. 1004, 519 P2d 774 (Alaska 1974).

An order requiring an accused to produce information not expressly provided for in these rules for criminal procedure does not constitute an improper promulgation of a new rule of criminal procedure. Scott v. State, Op. No. 1004, 519 P2d 774 (Alaska 1974).

The privilege against compelled self-incrimination under the Alaska Constitution prohibits extensive pretrial prosecutorial discovery in criminal proceedings. Scott v. State, Op. No. 1004, 519 P2d 774 (Alaska 1974).

The fundamental right not to incriminate one's self applies at every stage of a criminal inquiry or proceedings regardless of any judge-made exclusionary or evidentiary rules. Scott v. State, Op. No. 1004, 519 P2d 774 (Alaska 1974).

A pretrial order requiring an accused to disclose the names and addresses of witnesses, to produce for inspection and copying all written or recorded statements of prospective defense or government witnesses which the accused possesses, and to produce advance notice of the alibi defense together with information indicating any place or places he claims to have been, violates the accused's privilege against self-incrimination under the state Constitution. Scott v. State, Op. No. 1004, 519 P2d 774 (Alaska 1974).

A pretrial discovery order requiring an accused to furnish notice of the alibi defense does not violate an accused's privilege against self-incrimination under the state Constitution. Scott v. State, Op. No. 1004, 519 P2d 774 (Alaska 1974).

Where there was no indication that defendant ever intended to use the report of a firearms expert at trial, it was error for the court to compel its disclosure to the state. Gipson v. State, Op. No. 2066, 609 P2d 1038 (Alaska 1980).

Criminal Rule 16(c)(1) has no relevance when a person whose fingerprints are sought consents to give them. Henry v. State, Op. No. 2188, 621 P2d 1 (Alaska 1980).

This rule, as it pertains to obtaining identification evidence such as fingerprints, does not apply to persons lawfully in custody. Liston v. State, Op. No. 219, 658 P2d 1346 (Alaska App. 1983).

Trial court did not err in failing to suppress evidence of palm print taken from defendant without a warrant while defendant was lawfully in custody. Liston v. State, Op. No. 219, 658 P2d 1346 (Alaska App. 1983).

In a criminal trial where defendant was charged with prostitution for soliciting an undercover policewoman to have oral sex with him, the defendant waived his entrapment claim by failing to raise it in a pre-trial motion. Parrott v. Municipality of Anchorage, 69 P.3d 1 (Alaska App. 2003).

Rule 17. Subpoena.

(a) **For Attendance of Witnesses — Form — Issuance.**

(1) Subpoenas shall be issued by the clerk under the seal of the court, and shall be signed and sealed but otherwise in blank. The party requesting a subpoena shall fill in the blanks before the subpoena is served.

(2) A subpoena shall

(i) state the name of the court and the title, if any, of the proceeding, and

(ii) state whether the witness is to testify on behalf of the state, a municipality, city or borough, and order any witness testifying on behalf of the state, a municipality, city or borough, to appear without the prepayment of any witness fee, and

(iii) command each person to whom the subpoena is directed to attend and give testimony at the time and place specified therein.

(3) Magistrates may issue subpoenas in any proceeding before them.

(b) **Defendants Unable to Pay.** A subpoena shall be issued by the clerk as provided in section (a) for a defendant financially unable to pay the fees of the witness. The determination of financial inability shall be made in accordance with the criteria provided under Rule 39 (b) of these rules, and if the defendant is represented by court appointed counsel no further showing of financial inability shall be required. Subpoenas issued under this section (b) shall contain an order to appear without the prepayment of any witness fee. The cost incurred by the process and the fees of the witness so subpoenaed, shall be paid by the public agency providing representation.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

JOHN M. MURTAGH, JAMES H. McCOMAS, CYNTHIA STROUT, SIDNEY K. BILLINGSLEA, HARRY DEE TAYLOR, JOHN DOES I through X,

Plaintiffs,

vs.

STATE OF ALASKA,

Defendant.

Case No. 3AN-97-649 Civil

COMPLAINT

NATURE OF THE CASE

1. This is an action for declaratory relief to obtain a declaration of the unconstitutionality of AS 12.61.120(c)(2), .120(c)(3), .120(d), and .125 and, consequently, of the rights and duties of the parties with respect to the conduct covered by the statute.

2. A case and controversy exists among the parties respecting the obligation of the plaintiffs to abide by these statutes. Plaintiffs contend that these statutory provisions unconstitutionally interfere with a criminal defendant's right to investigate the charges against him and to prepare a defense to the charges. Plaintiffs also contend these statutes deny them the

opportunity to protect themselves against false charges of misconduct during an investigation.

3. A declaratory judgment is needed to resolve the dispute that exists and will continue to exist between the parties concerning the subject of this complaint.

PARTIES

4. Plaintiffs John Murtagh, James McComas, Cynthia Strout, and Sid Billingslea are citizens of the State of Alaska who are attorneys licensed to practice law in Alaska and who represent defendants in criminal cases in the state courts in Alaska, including Anchorage.

5. Plaintiff Harry Dee Taylor is a citizen of the State of Alaska who is a criminal investigator who works for attorneys who represent defendants in criminal cases in the state of Alaska, including Anchorage.

6. Plaintiffs John Does I-X are citizens of the State of Alaska who are current and potential criminal defendants in cases brought by the State of Alaska.

7. The legislature of the State of Alaska enacted the statutory provisions at issue in this action. Representatives of the Department of Law promoted passage of the challenged provisions. Attorneys within the Department of Law are expected to demand that defense attorneys and investigators comply with AS 12.61.120(c)(2) and (3), .120(d), and .125, and to seek

sanctions pursuant to AS 12.61.127 if they believe these statutes have been violated.

8. The plaintiff attorneys and investigator bring this action in order to clarify their own rights and obligations, because, at present, they are required to abide by laws that they believe are unconstitutional, that adversely affect their ability to represent their clients, and that deny them an opportunity to protect themselves against false charges of misconduct during an investigation. Thus, the ethical obligations of the plaintiff attorneys and investigator toward their clients conflict with their obligation to follow the law.

9. More important than advancing their own interests, the plaintiff attorneys and investigator bring this suit as representatives of their current and future clients, whose rights are being and will continue to be compromised on a daily basis until the improperly restrictive statutory provisions are declared unconstitutional.

JURISDICTION AND VENUE

10. This court has jurisdiction pursuant to AS 22.10.020(a), (b), and (g) and Alaska Civil Rule 57(a).

11. Venue is proper in Anchorage because the plaintiffs are and will be involved in criminal cases in Anchorage to which the challenged statutory provisions apply.

BACKGROUND OF THE DISPUTE

12. Criminal defendants, acting on their own and through counsel and investigators, are constitutionally entitled to investigate the charges against them and to prepare a defense to those charges.

13. Counsel for criminal defendants are obligated, pursuant to the constitution and the Alaska Rules of Professional Conduct, to investigate the charges against their clients and to prepare defenses to the charges. Interviewing witnesses, including alleged victims, is a critical step in any defense investigation.

14. AS 12.61.120(c)(2), .120(c)(3), .120(d) and .125, operating separately and together, deter witness participation in defense interviews and limit defense access to witnesses. Thus, these statutes interfere with criminal defendants' constitutional rights to investigate the charges against them and to prepare defenses and with criminal defense attorneys' corresponding obligations to investigate charges and to prepare defenses on behalf of their clients.

15. As a general rule, in the State of Alaska, a citizen is permitted to interview another citizen without specifically having to advise the other that the person does not have to talk to him or her and may have a prosecuting attorney or other person present during any interview.

16. As a general rule, in the State of Alaska, a citizen is permitted to tape record a conversation in which he or she

participates without providing notice to any other individual who participates in the conversation.

17. As a general rule, in the State of Alaska, a citizen is permitted to obtain a statement from another person without first receiving written authorization to obtain the statement.

18. Since at least 1978, when the Alaska Bar Association adopted Ethics Opinion No. 78-1, attorney rules of ethics in Alaska have prohibited criminal defense attorneys from taping conversations in which they participate without providing notice to other individuals participating in the conversation and from making use of tape recordings obtained without prior notice by anyone else, other than a police officer.

19. Alaska Ethics Opinion No. 78-1 adopted American Bar Association Formal Opinion 337. Opinion 337 contains a prosecution exception to the ban on surreptitious taping, providing that in some circumstances prosecutors may participate in surreptitious tape recordings in the course of an investigation.

20. Since at least 1984, when the Alaska Supreme Court decided City & Borough of Juneau v. Quinto, 684 P.2d 127 (Alaska 1984), it has been established in Alaska that uniformed police officers acting in the course of duty may secretly tape a conversation with a citizen with whom the officer interacts, without first obtaining a search warrant.

21. It is now common for law enforcement officials secretly to tape record conversations with both potential defendants and witnesses.

22. In at least four other states (Arizona, Kentucky, Louisiana, and Tennessee), the local court or bar association has recognized that it is fundamentally unfair to apply different rules for investigations by defense attorneys and their investigators as compared to prosecutors and police officers. Thus, these states have authorized criminal defense attorneys and their agents to tape record their conversations with witnesses in the course of an investigation on behalf of a criminal defendant without any requirement of prior notice or disclosure.

23. In 1991, the Alaska legislature adopted AS 12.61.120. This statute requires a person in Alaska representing a criminal defendant, including the defendant's attorney or investigator, when speaking with the alleged victim of an offense, first to inform the victim clearly of the person's identity and specific association with the defendant. These requirements, now contained in AS 12.61.120(c)(1), are not challenged in this lawsuit.

24. In March, 1995, the Alaska Bar Association Board of Governors adopted Ethics Opinion No. 95-5, which authorized criminal defense attorneys and others acting under their direction to tape record conversations with victims and witnesses in which they participated in the course of their investigations, without prior notice, provided they comply with AS 12.61.120(c). The Ethics Opinion states:

> The Board now concludes that ABA Formal Opinion No. 337 no longer justifies a prohibition against surreptitiously tape

> recording interviews of potential witnesses by defense counsel in criminal cases for two reasons. First, it seems unfair that law enforcement agencies can routinely record conversations with witnesses surreptitiously but agents of the defense cannot. Second, witnesses with testimony relevant to an alleged crime have a reduced expectation of privacy that their conversations will not be recorded by prosecutors or by defense counsel.

Because of controversy within the bar, the Board of Governors twice reconsidered Ethics Opinion No. 95-5. Following extensive hearings and public testimony, the Board of Governors reaffirmed Ethics Opinion No. 95-5.

25. As a response to the Alaska Bar Association action authorizing criminal defense attorneys and investigators to tape record certain statements without prior notice or disclosure, representatives of the State of Alaska proposed legislation to prohibit defense attorneys and investigators from taping any conversation without prior notice and disclosure.

26. Additionally, the State proposed legislation to prohibit defense attorneys and investigators from obtaining a nontaped statement from an alleged victim or witness in a sexual offense case, unless the defense representative first obtains a written authorization consenting to the statement.

27. The legislature passed a statute along the lines proposed by the State of Alaska. See 1996 SLA ch. 64 §§ 19, 20, codified as AS 12.61.120(d), .125, .127. These provisions took effect on July 1, 1996. As a result of these statutes, the Board of Governors withdrew Ethics Opinion 95-5.

28. The new statutory provisions specifically prohibit all tape recording by defense attorneys or investigators without prior notice. In sexual offense cases, the statute also specifically prohibits a defense attorney or investigator from obtaining any nontaped statement from an alleged victim or witness without first receiving written consent. AS 12.61.127 establishes a specific exclusionary rule, such that a statement obtained in violation of AS 12.61.120 or .125 is presumptively inadmissible in a criminal trial. Further, an attorney who participates in a violation of AS 12.61.125 is subject to disciplinary action by the Alaska Bar Association.

29. By deterring access to witnesses and deterring witnesses from speaking with defense investigators, the newly adopted statutes at issue in this action impair the ability of defense attorneys and investigators to investigate charges and to prepare defenses on behalf of their clients.

30. The ability to tape record a conversation can be very important in order to preserve an accurate record of what the witness said, in the event the witness changes his or her testimony at trial. In addition, taping protects the attorney or investigator against false charges of misconduct while interviewing a witness; such false charges are especially common when witnesses testify falsely in court and are confronted with their earlier statements. Tape recording contributes to the jury's ability to determine the truth at trial.

31. The ability to tape record without prior notice is important because some witnesses, while willing to speak to a police officer or a defense investigator, are unwilling to speak if they know the conversation is being recorded. Many witnesses are not alleged victims, but are themselves members of criminal class, who will not cooperate with any interview they know is being taped. If the defense is restricted to taped conversations only with witnesses who are willing to be taped, the defendant's ability to prepare a defense is impaired. A statement taped without prior notice may be the only effective way to prove the witness was neither coached nor intimidated. Further, under the new statutes, the defense is treated differently than the State, which is allowed to obtain taped statements from witnesses without revealing that the conversations are being taped. Additionally, the prosecutor's investigators receive a protection that defense investigators do not have.

32. In sexual offense cases, the ability to secure a nontaped statement from a potential witness without first receiving a written authorization for the statement is important because some witnesses who are willing to speak to a police officer or defense investigator are unwilling to sign any written document. The witnesses the defense needs to interview may include other suspects and members of the criminal class. If the defense is restricted to nontaped conversations only with witnesses who are willing to sign a statement saying they agree to be interviewed, the defendant's ability to prepare his defense is impaired. Further, the defense

is treated differently than the State, which is allowed to obtain untaped statements from witnesses without first receiving a written consent to be interviewed.

33. The requirement of prior written consent for any nontaped statement by a potential witness in a sexual offense case also virtually precludes any informal, untaped telephonic interview by an attorney or investigator representing the criminal defendant. This has a particularly drastic effect on the ability to investigate sexual offense charges arising in remote areas far from the defense attorney's and investigator's offices.

34. According to representatives of the State of Alaska and members of the legislature who spoke in favor of the bill enacting AS 12.61.120(d), .125, and .127, the purpose of these provisions is to protect victims and witnesses.

35. The new statutory provisions in fact hurt some victims and witnesses by discouraging taped statements, because taped statements help assure that any defense representatives conduct themselves appropriately during interviews and further help assure that witnesses' statements are accurately reported.

36. The new statutory provisions discussed above are not the only statutes that restrict defense access to witnesses. In 1991, the legislature adopted other provisions, now codified as AS 12.61.120(c)(2) and (3). These statutes require that, if anyone working on behalf of a criminal defendant wishes to speak with the alleged victim of the offense with which the defendant is charged, that defense representative must specifically state that the person

does not need to talk with the defense representative unless the person wishes and that the person may have a prosecuting attorney or other person present during any interview.

37. Apart from the requirements of AS 12.61.120(c)(2) and (3), as a general rule in Alaska one citizen may freely ask questions of another, without first having specifically to advise the other that he or she need not speak and may have an attorney or other person present during any conversation.

38. Prosecutors and police investigators may speak with alleged victims, witnesses, and suspects who are not in custody without having to advise the person that he or she need not speak and may have an attorney or other person present during any interview.

39. The requirements of AS 12.61.120(c)(2) and (3) tend to discourage otherwise willing witnesses from speaking with defense representatives during the pretrial investigation phase of a case.

40. Although originally drafted as applicable only to conversations with alleged victims, the warnings required by AS 12.61.120(c)(2) and (3) now apply to all conversations with any witness that the defense wishes to tape record. See AS 12.61.120(d). The warnings required by AS 12.61.120(c)(2) and (3) now also apply to all nontaped conversations with any witness in a sexual offense case.

41. The ability of the plaintiff attorneys and investigator to discharge their obligations to represent their

clients is adversely affected by AS 12.61.120(c)(2), .120(c)(3), .120(d), .125, and .127.

42. The ability of plaintiffs John Doe I-X, as current and potential criminal defendants, to have their legal representatives investigate and prepare their defense is adversely affected by AS 12.61.120(c)(2), .120(c)(3), .120(d), .125, and .127.

43. Criminal defendants cannot easily bring this action on their own behalf, because, once a specific criminal case is initiated, time is of the essence and the investigation must proceed in order to prepare a defense for trial. Further, to litigate the constitutionality of the statutes in the context of a particular case would require disclosing the defense strategy of whom the defense wishes to interview.

44. Declaratory relief will avoid delays in particular cases where this issue could have to be litigated and will avoid the risk that a case, where the statute was applied, will be overturned based on the statute's unconstitutional restriction of defense investigations. Declaratory relief will also protect the plaintiff attorneys, and other members of the bar, from the dilemma of having to decide whether to abide by a law they believe is unconstitutional and risk impairing their clients' defenses, or to break the law as a way of challenging the statute
but risk personal bar discipline.

FIRST CAUSE OF ACTION

45. Plaintiffs reallege and incorporate the allegations of paragraphs 1-34.

46. The legislation at issue in this complaint violates the equal protection guarantee of Alaska Constitution, Article I, § 1.

SECOND CAUSE OF ACTION

47. Plaintiffs reallege and incorporate the allegations of paragraphs 1-46.

48. The legislation at issue in this complaint violates the due process clause of the Alaska Constitution, Article I, § 7.

THIRD CAUSE OF ACTION

49. Plaintiffs reallege and incorporate the allegations of paragraphs 1-48.

50. The legislation at issue in this complaint unjustifiably impairs the rights to meaningful cross-examination, compulsory process, and effective assistance of counsel, in violation of the Alaska Constitution, Article I, § 11.

GROUNDS FOR DECLARATORY RELIEF

51. A controversy exists between plaintiffs and the State of Alaska that affects important rights, and by this complaint, plaintiffs seek a declaration that AS 12.61.120(c)(2),

.120(c)(3), .120(d), and .125 are unconstitutional under Alaska Constitution art. I, §§ 1, 7, and 11.

52. The injury to plaintiffs is immediate and tangible. Dozens of new criminal cases are filed each day. Hundreds of open criminal cases are affected by the statute that limits the defense right to investigate. Though this case is not filed as a class action, in practice resolution of this case will give guidance to all criminal defense attorneys and affect all current and future criminal cases in this state.

WHEREFORE, plaintiffs pray as follows:

(A) For a declaration that AS 12.61.120(c)(2), .120(c)(3), .120(d), and .125 are unconstitutional and that criminal defense attorneys and investigators have no obligation to adhere to these statutes;

(B) For plaintiffs' costs and attorneys' fees as provided by Alaska Civil Rule 82;

(C) For such other relief as the court deems just and proper.

DATED at Anchorage, Alaska this 27 day of January, 1997.

ALASKA CIVIL LIBERTIES UNION
Attorneys for Plaintiffs

By _____
Richard H. Friedman
AkCLU Cooperating Attorney

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355

February 10, 2004

Representative Lesil McGuire
House of Representatives
State Capitol
Juneau, Alaska 99801-1182

Dear Representative McGuire,

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for co-introducing HB 397, an act relating to defense contacts with and recording of statements of victims or witnesses; and amending Rule 16, Alaska Rules of Criminal Procedure.

This proposed legislation will better protect a minor witness or victim of a crime by consent first having to be obtained by a parent or guardian by a person acting on behalf of the defendant

We thank you for addressing this issue.

Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Leo J. Brandlen

Leo J. Brandlen
State President

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: HB397-LAW-CDCO-1-26
Bill Version: HB 397
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to defense contacts with and recrodings of statements of victims or witnesses..."
RDU Criminal
Component Criminal Justice Litigation
Sponsor Representative McGuire, Samuels, Dahlstrom, Stolze
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill amends AS 12.61 by adding an new act to be known as the Brooke Act. The amendments add further protection for minor crime victims or witnesses by requiring that a parent or guardian act as a point of contact with the minor, and consent before a defendant or person acting on behalf of a defendant may contact or make a recorded statement from a minor victim or witness of a crime for which the defendant may be charged. The bill also adds the requirement that the parent or guardian of a minor victim or witness be informed of certain victim's rights. The bill also allows a parent or guardian of a minor victim or witness to obtain a transcript of any recorded statement made by a minor victim or witness.

Passage of this legislation will have no foreseeable fiscal impact on The Department of Law.

Prepared by: Kathryn A. Daughhetee, Director
Phone 465-3673
Division Administrative Services
Date/Time 1/26/04 9:31 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/26/2004
Agency Department of Law

(Revised 12/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB397
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to defense contacts...
BRU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Representatives McGuire, Samuels
Requester: (H) Judiciary
Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill could impact the operations of the Public Defender Agency in that it may result in increased investigation costs.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 2/9/04 0:00 a.m.
Approved by: Mike Miller, Commissioner
Date
Agency: Administration

(Revised 9/2003 OMB)

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 397
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to defense contacts....
BRU: Legal and Advocacy Services
Component: Office of Public Advccacy
Sponsor: Representatives McGuire, Samuels, D Samuels & McGuire
Requester: (H) Judiciary
Component No.: 43

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill could impact the operations of the Office of Public Advocacy in that it may result in increased investigation costs.

Prepared by: Josh Fink, Director — Phone 907-269-3501
Division: Office of Public Advocacy — Date/Time 2-9-04 9:00 a.m.
Approved by: Mike Miller, Commissioner — Date 2/9/2004
Agency: Administration

(Revised 9/2003 OMB)

Alaska State Legislature

House Majority

For immediate release: December 16, 2003

Contact: Craig Johnson, House Majority Press Secretary, at (907) 269-0155

Office of Victims' Rights and House Majority Members to Introduce Key Crime Legislation Package

(Anchorage) -- Getting an early start on the 2004 legislative session, four seasoned legislators have been working cooperatively over the last several weeks to draft key crime bills that will close loopholes in the criminal law and protect the rights of crime victims in Alaska. "Victims that should be at the center of our system of justice are too often left on the outside looking in. They're treated as uninvolved bystanders with little or no say in the outcome of their case and the four of us really want to change all that. Just as we protect the rights of criminals, so too must we take equal care to protect the rights of victims" said Representative Ralph Samuels.

To accomplish that goal, Anchorage Representatives Nancy Dahlstrom (R), Lesil McGuire (R), Ralph Samuels (R), and Chugiak/Mat-Su Representative Bill Stoltze (R) will co-sponsor five Bills that are being pre-filed in Juneau. Their victim's rights package, described below, will help those that enforce criminal laws- our police, prosecutors and judges, to reshape our justice system, re-focusing the emphasis on victims and their rights.

1. **A Bill To Promote Truth Telling By Criminal Defendants Who Choose To Testify At Trial.**

Every criminal defendant has a constitutional right to testify in his defense. But that right must never be construed to include the right to commit perjury. When prosecutors are prevented from using suppressed prior inconsistent statements to challenge the credibility of defendants as they presently are in Alaska, the law perverts the truth finding process. It gives those who would lie under oath in a bid to escape justice a license to deceive jurors and judges as happened in a recent murder trial in Anchorage. Under the supervision of a judge, a new law will permit prosecutors to cross-examine defendants using prior suppressed statements and evidence. Passage of this Bill will bring Alaska into the mainstream of American and federal jurisprudence where such rules have been the law for years.

2. **A Bill To Provide Enabling Legislation To Permit Municipalities And Cities Throughout Alaska To Create A Domestic Violence Fatality Review Team If They So Choose.**

The goal of this legislation is to authorize municipalities around the state, if they so choose, to empanel a team that could systematically review facts and circumstances of escalating cases of domestic violence related fatalities in order to identify and develop a process for change in policies, procedures and protocols that can lead to the prevention of such crimes. For example, in 2002 there were 18 homicides in Anchorage. Eleven of them [61%] were domestic violence related. DV deaths are among the most preventable type of homicide and creation of such review teams will help stop such crimes.

3. **A Bill To Require Judges To Order Restitution From Criminals In *All* Cases Where A Victim Has Suffered A Financial Loss.**

When financial losses of victims are ignored, or given less priority than the rights of criminals, we cause them to be victimized again. A new law would require judges to order restitution in *every* case where a victim has suffered a financial loss. Under present law, a judge may, but is not required, to do so. This change will also ensure that offenders are ordered to make realistic restitution payments to help make the victim whole within a reasonable time. The act of ordering restitution serves as an acknowledgment by the criminal justice system that the victim sustained harm. Prompt and full payment of restitution can help rectify that harm.

4. **A Bill Requiring Police And Prosecutors To Notify Victims About The Alaska Office Of Victims' Rights**

The Alaska Office Of Victims' Rights (OVR) was created by the legislature in 2002 to protect and advance the rights of crime victims and to investigate complaints that their rights under the constitution and laws of the state have been denied to them in their dealings with criminal justice adult and juvenile agencies of the state. That office is funded 100% by forfeited PFDs from convicted criminals. In providing needed services, they have focused on facilitating a cooperative relationship between criminal justice agencies, the courts and the victims of crime who are their clients. But experience has taught that too often victims learn about the OVR only after a case has worked its way through the system rather than at the beginning of that process when OVR lawyers and support staff can be more vigilant and effective advocates of victims' rights as a case unfolds. A new law will require police and prosecutors to provide information about the OVR to victims of felony and other serious crimes up front -- upon first contact and without request by the victim.

5. **A Bill To Require Criminal Defense Attorneys And Investigators To First Obtain The Consent Of A Minor's Parent Or Guardian Prior To Conducting A Tape Recorded Interview With The Minor.**

   When a criminal defense attorney or defense investigator speaks to a minor victim or witness, and the interview is not recorded, written authorization must first be obtained from the parent or guardian of the victim or witness. However, if the statement *is* recorded, there is no present requirement in the law that the minor's parent or guardian be consulted to decide whether the minor should waive his or her rights not to speak with defense representatives. This loophole in the law leaves juvenile victims vulnerable and parents in the dark. The proposed Bill will help parents and guardians of minors to learn what is going on in their lives and empower them to make smart decisions about what is in their best interests, not the best interests of criminal attorneys or their clients.

These five Bills are expected to have a zero fiscal note, and it is anticipated that the proposals will have broad bi-partisan support in the next legislative session slated to start in Juneau on January 12, 2004.

###

HB

398

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 23, 2004 **FURTHER REFERRALS:**

Date of Committee Action: January 30, 2004

The JUDICIARY Committee considered: **HB 398**

HOUSE BILL NO. 398 **DOMESTIC VIOLENCE FATALITY REVIEW TEAM**

"An Act relating to domestic violence fatality review teams."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 398 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[X] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
ADM				✓
CRT				✓
DPS				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP (5)	DNP	NR	AM
Gara	Garc	✓			
	SAMUELS	–			
Tom Anderson	ANDERSON	X			
Mark Gruenberg	Gruenberg	–			
Chair:	McKee	✓			
Chair:					

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Gerry Luckhaupt, Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: January 30, 2004

Re: CS Request

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS1321\I, CSHB 398 (JUD), incorporating the attached amendment. The bill was passed out of committee today.

If you have any questions, please call me at 4990. Thank you!

CS/SB 398 (JUD)

A#1 by Rep. Samuels – PASSED

P.1, L.10
After "or", delete "earlier"
After "or", insert "at an earlier appropriate time,"

Amendment: #2 - withdrawn
by Rep. Samuels

Pg. 1, Line 7 after state Insert: for which the Department of Public Safety has primary responsibility for providing police services.

23-LS1321\I
Luckhaupt
1/29/04

CS FOR HOUSE BILL NO. 398(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): REPRESENTATIVES DAHLSTROM, Stoltze, Samuels, McGuire, Wilson

A BILL

FOR AN ACT ENTITLED

"An Act relating to domestic violence fatality review teams."

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

*** Section 1.** AS 18.66 is amended by adding a new section to read:

Article 4A. Domestic Violence Fatality Review Teams.

Sec. 18.66.400. Domestic violence fatality review teams. (a) The commissioner of public safety may establish domestic violence fatality review teams in areas of the state. A municipality may establish a domestic violence fatality review team in a municipality. When the investigation of fatal incidents of domestic violence and incidents of domestic violence involving serious physical injury has been completed or adjudicated by law enforcement or earlier, a domestic violence fatality review team may review those incidents for the purpose of preventing domestic violence-related fatalities, improving the response of law enforcement and other agencies to domestic violence, and providing consultation and coordination for agencies involved in the prevention and investigation of domestic violence. The review may include a review of events leading up to the domestic violence incident,

L

New Text Underlined [DELETED TEXT BRACKETED]

available community resources, current laws and policies, actions taken by agencies and persons related to the incident and persons involved in the incident, and other information the team determines to be relevant to the review. The confidential and other records of a department or agency of the state or a municipality relating to the domestic violence incident may be examined by the domestic violence fatality review team or a member of the team. The domestic violence fatality review team and each member of the team shall preserve the confidentiality of any records examined. In this subsection, "serious physical injury" has the meaning given in AS 11.81.900.

(b) The membership of a domestic violence fatality review team shall be determined by the commissioner of public safety or the municipality, as appropriate. Membership may include representatives from

(1) law enforcement agencies within the area or municipality;

(2) the district attorney for the area or municipality and municipal prosecutor if created by a municipality;

(3) the office of the chief medical examiner;

(4) the department of corrections;

(5) employees of the Department of Health and Social Services who deal with domestic violence;

(6) local agencies and organizations involved with crime victim and domestic violence protection, reporting, and counseling and assistance;

(7) other organizations, departments, and agencies determined to be appropriate.

(c) The victims' advocate under AS 24.65 is an ex officio member of each domestic violence fatality review team created under this section and may attend any meeting and review any information available to or considered by a team.

(d) Except for a public report issued by a domestic violence fatality review team that does not contain confidential information, records or other information collected by a team or any member of a team related to duties under this section are confidential and not subject to public disclosure under AS 40.25.100 and 40. 25.110. Meetings of a domestic violence fatality review team are closed to the public and are not subject to the provisions of AS 44.62.310 and 44.62.312.

(e) The determinations, conclusions, and recommendations of a domestic violence fatality review team or its members are not admissible in a civil or criminal proceeding. A member may not be compelled to disclose a determination, conclusion, recommendation, discussion, or thought process through discovery or testimony in a civil or criminal proceeding. Records and information collected by the team are not subject to discovery or subpoena in connection with a civil or criminal proceeding.

(f) Notwithstanding (e) of this section, an employee of a state or a municipal agency may testify in a civil or criminal proceeding concerning cases reviewed by a domestic violence fatality review team even though the agency's records were reviewed by a team and formed the basis of that employee's testimony and the team's report.

(g) A person who serves on a domestic violence fatality review team is not liable for damages or other relief in an action brought by the reason of the performance of a duty, function, or activity of the team.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB398
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An Act relating to domestic violence fatality review teams
BRU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Representative, Dahlstrom, Stoltze
Requester: (H) Judiciary
Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2004) cost: 0.0
Mark this box (X) If funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
This bill should have minimal fiscal impact on the operations of the Public Defender Agency.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)-334-4416
Division: Public Defender Agency
Date/Time 1/26/04 11:25 A.M.
Approved by: Mike Miller, Commissioner
Date
Agency: Administration

(Revised 9/2003 OMB)

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. Jim Holm
Rep. Dan Ogg
Rep. Ralph Samuels
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: January 29, 2004

Re: CS Request

Please create a work draft House Judiciary Committee Substitute for work order # 23-LS1321\H, HB 398, incorporating the attached four amendments (Amendments # 1, 2, 4, and 5) and addressing the questions below. The bill was heard in committee yesterday and the CS will be reheard tomorrow 1/30. Although the amendments don't state so, please treat them as conceptual for the purposes of making them grammatically correct and conforming to the rest of the section.

The following were not adopted as amendments, but were technical questions for the drafters to address. Please correct if you see fit:

1) Page 2, Line 31: Should "or" be changed to "and"?
2) Page 3, Line 11: Should "damage" be changed to "damages"?

If you have any questions, please call me at 4990. Thank you!

Samuels, Gara

HB398

Amendment #1 - PASSED

p1 line 9

Delete "terminated"

Insert "completed or adjudicated"

Insert at after "enforcement,"

the words "or earlier"

HB398 Amendment #2 - PASSED
by Rep. Gruenberg

Add a "definitions section" to the bill and include the definition of "domestic violence" as defined in AS 18.66.990.

Amendment #3 - withdrawn
by Rep. Gruenberg

Amendment #4 - PASSED
by Rep. Gruenberg

1) P.1, Line 8-9
Delete "near-fatal incidents of domestic violence"
After "fatal", Insert, "incidents of domestic violence and domestic violence incidents involving serious physical injury"

2) In the "definitions section" add the definition of "serious physical injury" as defined in AS 11.81.900.

HB 398 Amendment #5 – PASSED
by Rep. Samuels

Page 2, Line 13
Before "Chief", Insert "office of the"
(So it reads "the office of the Chief Medical examiner;")

ALASKA STATE LEGISLATURE

Vice Chair:
Joint Armed Services Committee

Member:
Military and Veterans Affairs Committee
Labor and Commerce Committee
State Affairs Committee
Economic Development, Trade, &
Tourism Committee

Session:
Alaska State Capitol
Juneau, AK 99801-1182
Phone: (907) 465-3783
Fax: (907) 465-2293
Toll Free (877) 460-3783

Interim:
716 West 4th Avenue
Anchorage, AK 99501-2133
Phone: (907) 269-0174
Fax: (907) 269-0177

REPRESENTATIVE NANCY DAHLSTROM

ELMENDORF AFB • FORT RICHARDSON • BIRCHWOOD • FIRE LAKE • GOVERNMENT HILL • MULDOON

Representative_Nancy_Dahlstrom@legis.state.ak.us

To: Representative Lesil McGuire Chair, House Judiciary Committee
Fm: Rachel Essen
Date: January 27, 2004
Re: HB 398 **"Domestic Violence Fatality Review Teams"**

Please accept this memo and attached documents as a request for the House Judiciary Committee to schedule for hearing House Bill 398 **"Domestic Violence Fatality Review Teams."**
The bill will enable municipalities and cities throughout Alaska to create a Domestic Violence Fatality Review Team.

Thank you for your consideration of HB 398.

Attached: Sponsor Statement, HB 398, fiscal note, letters of support, and relevant articles.

Representative Nancy Dahlstrom
Representative Lesil McGuire
Representative Ralph Samuels
Representative Bill Stoltze

HB 398 Domestic Violence Fatality Review Team

Sponsor Statement

"An Act relating to domestic violence fatality review teams"

HB 398 is legislation empowering municipalities and cities throughout Alaska to create a Domestic Violence Fatality Review Team.

A growing number of homicides in Alaska are domestic violence related. In the year 2002 11 out of 18, or 61% of the homicides in Anchorage were a result of domestic violence.

This legislation authorizes the State of Alaska and its municipalities to empanel teams to systematically review facts of escalating cases of domestic violence fatalities. These teams could identify potential changes in policies, procedures, and protocols leading to the prevention of such crimes.

The legislation would provide state and local governments with additional tools to gather information on many aspects of domestic violence. This information could then be used to create legislation to combat domestic violence.

With the creation of such review teams the legislature will help stop these devastating crimes.

Amanda L. Matthews
2308 W 46th Ave.
Anchorage, AK 99517
907- 223- 6429

To Whom It May Concern:

I am writing in support of the proposed legislation to enact domestic violence fatality review teams. I think that it will give the community a better understanding of the challenges that victims face in the justice system related to domestic violence. Knowing that Alaska and Anchorage specifically, has a high rate of domestic violence and DV related homicides, it's important to put review teams in place to figure out how or why we have this rate. More importantly, to look at what needs to change in the current system to prevent domestic violence related fatalities.

Similar programs of review have proven to be useful in other communities across the United States, for example look at Florida, the first state to enact review teams. Since the teams started, they have identified possible changes in policy and/or procedures with the potential to prevent future domestic violence related deaths. I believe Anchorage has a strong core of people who are dedicated to assisting victims of domestic violence and many more who want to.

Please take this in to consideration when moving forward with this legislation.

Sincerely,

Amanda L. Matthews

Susan J. Pearson
814 W. 11th Avenue
Anchorage, AK 99501
907-272-7863

To whom it may concern,

I am writing in support of the proposed legislation to enact domestic violence fatality review teams. I feel that review of potentially fatal cases can help us better understand the benefits and challenges we face in the justice system as related to domestic violence cases.

This system of review has proven useful in other counties and states around the country and could shed light on the domestic violence issue in Alaskan municipalities.

Sincerely,

Susan J. Pearson

January 23, 2004

To Whom It May Concern:

I am writing this letter to inform you of my stand on the proposed legislation to initiate domestic violence fatality review teams. I am in support of this service being provided in the state of Alaska.

Sincerely,

Jacqueline Villalpando

Domestic Violence Fatality Reviews:

Implications for Law Enforcement

By Neil Websdale, Professor of Criminal Justice, Northern Arizona University, Flagstaff, Arizona, and Heather Moss, Research Associate, Fatality Review Initiative, and Byron Johnson, Director, Center for the Study and Prevention of Domestic Violence, University of Pennsylvania, Philadelphia, Pennsylvania

Each year in this country, male intimates kill anywhere from 1,000 to 1,600 female partners.[1] Only recently the federal government and some states began to explore the reasons for these domestic violence deaths in a systematic manner.[2] This article reviews the types of deaths linked to domestic violence, provides a few examples of domestic violence fatality reviews, and discusses the implications of these reviews for law enforcement. These fatality reviews, conducted appropriately and carefully, provide an important means of improving the response of law enforcement agencies to domestic violence. Review findings and recommendations can offer innovative suggestions for officer training, officer safety, and the coordination of policing activities with other agencies involved in dealing with family violence.

In the long term, such reviews offer the promise of a reduction in the number of domestic violence fatalities, officer injuries and deaths at these crime scenes, and dangerous hostage/barricade domestics. As a result, a reduction in the multiple liabilities associated with these (at times) complex and challenging cases is also likely. In short, fatality reviews are a powerful mechanism for enhancing police policies and procedures and developing innovations in training. The term "domestic violence fatality review" refers to a

> *[illegible] process for identification of deaths, both homicide and suicide, caused by domestic violence, for examination of the systemic interventions into known incidents of domestic violence occurring in the family of the deceased prior to the death, for consideration of altered systemic response to avert future domestic violence deaths, or for development of recommendations for coordinated community prevention and intervention initiatives to eradicate domestic violence.*[3]

This deliberative process can be formal or informal, relatively superficial, offering basic demographic details of victims and perpetrators, or very detailed. The scope of review activity varies enormously and has involved a review of one case, all such

deaths within a particular jurisdiction, all domestic violence-related deaths within a state, or other variations. The underlying objectives of these reviews are as follows:

- Prevent future domestic violence and domestic homicide
- Provide safer provisions for battered women and their children
- Hold accountable both the perpetrators of domestic violence and the multiple agencies and organizations that come into contact with the parties

Domestic violence fatalities are normally handled by the criminal justice system, which investigates the death and identifies and charges the perpetrator, where appropriate. However, such handling does little to review the effectiveness of the systems charged with serving and protecting those vulnerable to domestic violence and death. Sometimes ad hoc reviews are conducted through the media, but these reviews are often cursory, emphasizing the sensational aspects of the case. Such media analyses rarely access the deeper history of domestic violence, the entrapment of women, the escalation of abuse before death, and the twists and turns in relationships that appear to characterize a significant number of cases.

Domestic Violence-Related Fatalities

Domestic homicide takes a number of different forms, all of which might serve as the basis for a domestic violence death review. "Intimate partner homicide" usually involves a man killing his female partner, often after a long and escalating pattern of domestic violence. When women kill male partners, they typically do so in self-defense, although such defense may not qualify as such in a court of law. Non-intimate partner family members also kill each other in so-called "family homicides." Men sometimes kill other men over a woman in whom they are both interested. These "sexual competitor killings" are much smaller in number than either intimate partner or family homicides.

Many more Americans die from suicide than homicide. Research suggests that a large number of women who commit suicide do so because of their violent victimization at the hands of an intimate male partner. Authors Evan Stark and Anne Flitcraft note specifically, "in most cases we believe battered women are provoked to attempt suicide by the extent of control exercised over their lives."[4] According to these authors, the proximity between woman battering and women's suicide attempts, in general, strongly suggests that battering may be one of the principal causes of the suicide attempts. Stark and Flitcraft point out that a number of studies show abuse as a factor in as many as 44 percent of female suicide attempts.[5] For these researchers, it is very telling that more than a third of the battered women in their sample[6] "visited the hospital with an abuse-related injury or complaint on the same day as their suicide attempt."[7]

As the elderly population in the United States continues to increase, researchers have become more aware of domestic violence between older partners. Social service providers and law enforcement agencies sometimes wrongly assume that because people are elderly they are not capable of committing or being victimized by domestic violence. This attitude can translate into an assumption that homicide-suicides among the elderly usually take the form of "mercy killings" or suicide pacts. Police officers or others who investigate the homicide-suicide and find a note telling authorities that the couple could not live on with ailing health might hastily assume "mercy killing."

Upon further investigation, we find it is nearly always men who commit these

killings and that in a significant number of cases their female victims had expressed to other family members a desire to live not die.[8] Indeed, gerontologist Donna Cohen found that homicide-suicides involving elderly women in west central Florida accounted for 20 percent of the total homicides of people over the age of 55.[9] Cohen also notes that while the health had deteriorated for 50 percent of the women, two-thirds had expressed "no desire to die."[10] Evidence that women killed in so-called mercy killings or suicide pacts had previously expressed "no desire to die" suggests there may have been battering before their demise.

The scope of reviews is broadened considerably if we include deaths of women traceable to domestic violence or directly linked to domestic violence. One might argue that because battered women appear more vulnerable to HIV infections than non-battered women, some deaths of women attributed to HIV, or some complication thereof, might be traceable to the women's compromised status as battered.[11] The same could be said of homeless women dying on the streets, as roughly half of homeless women report "fleeing abuse" as the reason for their homelessness.[12]

Examples of Domestic Violence Fatality Reviews

The Commission on the Status of Women in San Francisco in 1991 conducted one of the earliest and most detailed domestic violence fatality reviews. This review, held in a public forum, highlighted the widespread breakdown of systems in the case of Veena Charan, whose husband Joseph murdered her and then committed suicide. For 15 months before her death, Veena sought the help of various government agencies and made numerous reports to the police. She separated from Joseph and secured custody of their nine-year-old son.

Immediately before Veena's death, Joseph was arrested for felony wife beating and malicious mischief. As a result of his conviction for this offense, Joseph received a 12-month suspended jail sentence. He was put on probation through the Adult Probation Department with the following three conditions: (1) mandated domestic violence counseling; (2) a stay away order; and (3) 30 days in jail, of which he was given four days, the remainder to be served in the Sheriff's Work Alternative Program. Veena also obtained a restraining order that Joseph violated on several occasions. He also attempted to kidnap his son from school. Joseph killed his wife at the school, in front of teachers

The ensuing fatality review identified a range of problems in the system: gaps in communication and coordination between agencies involved, a failure to collect adequate data on domestic violence cases, a lack of sensitivity to multicultural and sexual orientation issues, a failure to train agencies in multicultural awareness, and a lack of appropriate translation services. With respect to law enforcement, the report found that an investigator at the San Francisco Police Department minimized the prior injuries to the victim. Specifically, the report notes, "had the investigator looked at the pattern of violence established by Mr. Charan, and presented that information to the district attorney's office, stronger measures and responses to the situation may have prevented Joseph Charan from continuing the escalation of violence that led to the murder-suicide."[13] It was also noted that probation services had not adequately trained officers in the dynamics of domestic violence.

While high-profile reviews such as the Charan investigation can reveal many systemic problems, there may be a tendency for other reviews to blame one person or agency for the breakdown. Given that the batterer is the person responsible for the killing, the blame and shame that may arise from such fingerpointing can be counterproductive to long term system change. A blaming approach to the fatality review process, often referred to as "tombstone technology" in fields such as aviation and nuclear power, might encourage the covering up of information in cases of death.[14] It is also the case that men who batter women blame their victims for much that it is negative in their lives. Using reviews to blame others merely perpetuates that negative and destructive style of thinking and contributes little to healing.

Fatality reviews provide an important means of improving the response of law enforcement agencies to domestic violence.

In the years since the Charan investigation, different models have emerged to review domestic violence deaths, many of which report aggregate data rather than the details of individual cases. Without any funding or legislation, the Philadelphia Department of Public Health, with support from the district attorney's offi began the Philadelphia Women's Deat Review Team in 1997 to examine all deaths (not just domestic violence cases) of women from 15 to 60 years of age.[15] These deaths could either be directly related to domestic violence or indirectly related in cases where battered women were unable to access health care. Such an approach also means the team is open to studying suicides for any history of domestic violence.

In Florida, death reviews emerged following a recommendation from a statewide research initiative to examine the idiosyncrasies of all domestic homicides.[16] Sixteen teams now operate in Florida, and their deliberations are protected by immunity legislation. Team deliberations

> *are not subject to discovery or introduction into evidence in any civil action or disciplinary proceeding by any department or employing agency . . . and any person who was in attendance at a meeting of such an organization may not be permitted or required to testify in any civil action or disciplinary proceeding as to any evidence or other matters*

officers themselves serve on death review teams and provide feedback to departments on the use of such instruments in light of individual or aggregate deaths in their jurisdictions.

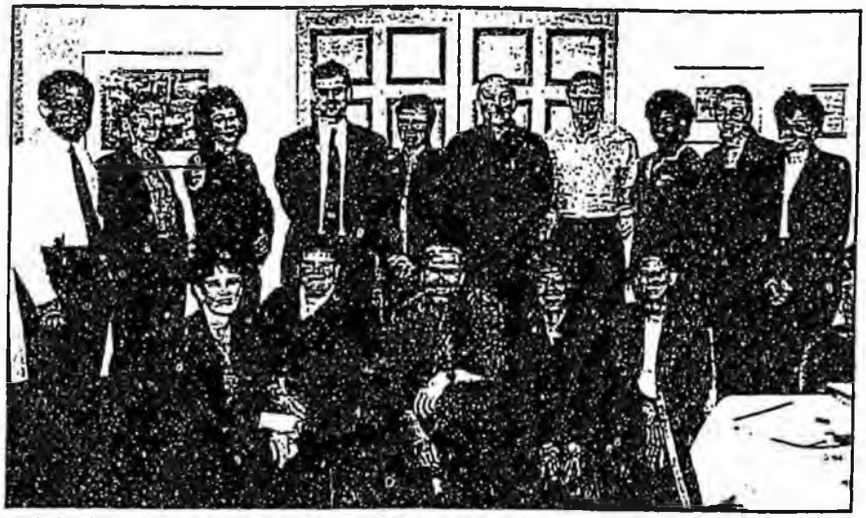
Some death review teams have argued for the use of risk assessment tools as an integral part of coordinated community responses to domestic violence cases. For example, in New Hampshire from January 1990 until October 31, 2000, 47 percent of the 224 homicides were domestic violence-related. In a recent report, the review team recommended that "domestic violence should be a topic included among continuing professional education requirements for all relevant disciplines . . . including law enforcement."[22] The report goes on to state that "all professionals working on cases involving domestic violence should conduct an ongoing risk assessment. The results of that risk assessment will be shared with other providers to the extent allowable by their profession's ethical guidelines."[23]

In Florida, the Pinellas County team believes that death reviews have sharpened existing coordinated community responses to domestic violence. From its discussions with local law enforcement, the Pinellas team identified an approach to educate men who commit domestic violence. These discussions led to the installation of a VCR at the sheriff's holding cell where perpetrators are shown videos on domestic violence. The Pinellas team is now moving toward creating a tracking system to monitor perpetrators more carefully. In the past, if perpetrators were ordered to probation and re-offended before the order was put into the computer, the perpetrator was typically not charged with a violation of probation. Through its work with probation, the courts, and the police, the team is working to close this loophole.

In Washoe County, Nevada, the death review team recommended that police reports of domestic violence contain information on prior domestic calls to the residence involving the same victim and perpetrator. In Maine, review recommendations include increased instruction on evidence collection at domestic violence crime scenes, better preparation on the use of 911 tapes, and improvement in the way officers conduct interviews. The Hamilton County, Ohio, death reviews recommended stronger enforcement of violations of protection orders and parole conditions.

Most review teams across the country have called for greater education in the dynamics of domestic violence for law enforcement and other agencies working with battered women and their families. Some recommendations call for recognizing the significance of specific warning signs. For example, in Washington State, reviewers noted the dangers posed by suicidal abusers and recommended that "officers should routinely ask victims about the abuser's history of making homicidal or suicidal threats." If such threats have been made, officers should "urge the victim to call a domestic violence program for help with safety planning."[24] The report also recommends expanding the sections of the Washington Association of Sheriffs and Police Chiefs Model Operating Procedures on "screening for suicide and responding to suicidal abusers."[25]

A number of statewide reviews recognize the urgent need for translation services in cases of domestic violence involving victims and perpetrators whose first language is not English.[26] The Washington State report recommends that "Institutions such as law enforcement, hospitals, domestic violence programs, and Temporary Aid to Needy Families (TANF) offices should create collaborative relationships with grassroots organizations based in limited English-speaking communities."[27] The report continues: "Consistent with our state law, law enforcement agencies should conduct investigations of do-



IACP's advisory team on domestic violence fatality review.

IACP Takes on Domestic Violence Fatality Review

In March the IACP's Police Response to Violence Against Women Project convened the first meeting of advisors chosen to help develop a model protocol for law enforcement on domestic violence fatality review. The meeting, held in Santa Fe, New Mexico, brought together experts in the fields of social science research, law enforcement, and victim advocacy. Under a grant from the Department of Justice's Violence Against Women Office, the advisory team will guide the development of a *Training Key* on danger assessment, gather information through visits to communities engaged in fatality reviews, and draft protocols to direct law enforcement's participation in the review process. Site visits to Florida and Delaware have been completed. Visits to Tennessee, Colorado, and Maine are planned for this summer.

IACP's Police Response to Violence Against Women Project is pleased to be working with this distinguished team of advisors: Chief James Roberts, Shreveport, Louisiana, Police Department; Lt. (Retired) Mark Wynn, Nashville; Captain Randy Lockmiller, Knoxville Police Department; Phyllis Sharps, George Washington University, Washington, D.C.; Neil Websdale, Northern Arizona University; Bryon Johnson and Heather Moss, University of Pennsylvania; Jackie Campbell, Johns Hopkins University; Judge Susan Carbon; Rhonda Martinson, Battered Women's Justice Project; David Adams, EMERGE; and advocates Margaret Hobart, Felicia Collins Correia, S. E. Chase, and Robin Hassler Thompson.

At the 108th Annual IACP Conference later this year in Toronto, two of our advisors, Dr. Websdale and Dr. Johnson, will facilitate a roundtable discussion on domestic violence fatality review. Please look for the roundtable in the conference schedule and join us for an exciting and challenging exchange.

Chief of Police

St. Cloud, Minnesota

St. Cloud (population 59,107) is located in central Minnesota approximately 60 miles northwest of the Minneapolis/St. Paul metropolitan area. The department consists of 90 sworn personnel and 20 civilians and has an annual budget of $8.3 million.

The St. Cloud Police Department is a highly professional agency requiring a minimum of a baccalaureate degree for entry-level police officers. The department fully embraces the principles of community-oriented policing and is dedicated to the professional, ethical delivery of law enforcement services to the community. The chief of police is appointed by and reports to the mayor.

The ideal candidate is a seasoned, decisive, results-oriented leader, experienced in all aspects of professional policing, with a minimum of 5 years at the command level, preferably in an urban setting. In addition, candidates should have a proven commitment to community policing, a track record of improving service delivery, and demonstrated ability to build and maintain strong relationships with the community, elected officials, employees, and other law enforcement agencies. A bachelor's degree is required; a master's degree is preferred. Salary depends on qualifications.

To apply, please send a resume summarizing your qualifications and salary requirements by Friday, August 3, 2001, to Harry Brull, Personnel Decisions International, 45 S. 7th Street, Suite 2000, Minneapolis, MN 55402; Harry.Brull@personneldecisions.com; fax 612/337-3695.

mestic violence crimes with qualified interpreters."[28] In one domestic homicide case in Washington State "a law enforcement officer asked a six-year-old child to translate for the family member on the scene who had discovered the bodies of the two victims."[29] In another case "a hostage situation went on for at least an hour, and because no translator was present, the young hostage had to provide translation while the murderer held a gun to her head."[30]

In addition to the potentially traumatizing effects on nonprofessional on-scene translators, the use of imprecise translators may also impede the subsequent case investigation in both domestic homicides and non-lethal domestics. The report concludes that the use of the AT&T translation service is a "compromise step" that may be "awkward" or uncomfortable for some battered women "but [is] preferable to using children or neighbors or not seeking out translation at all." Hobart goes on to note that "some departments have officers tape the entire conversation, even while using translation, so that the opportunity to transcribe and obtain professional translation services exists in the future."[31]

The problems regarding translation services in domestic violence cases echo much broader issues involving services for communities of color, especially in the inner city. Many African American battered women living in inner-city housing projects display a deep suspicion of police. So too, do their communities. The community and certain members therein might label a battered woman a "snitch" if she calls to seek protection for herself or her children. Community policing and its emphasis on greater and more varied forms of surveillance seems to make little difference on domestic violence crimes in these acutely disadvantaged areas. Given that the domestic homicide rate is many times higher among inner-city blacks than it is among whites, fatality reviews offer the potential for enhancing dialogue between inner-city minority citizens and the police. This dialogue might include discussion of the management of the war on drugs, public housing rules and regulations, welfare-to-work initiatives, and other policies that limit battered women's ability to leave dangerous intimate relationships.

Conclusion

Domestic violence and the thousands of deaths that stem from it utilize large proportions of police department budgets, result in a significant number of liability claims against departments each year, and directly result in the death and injury of responding officers. Fatality reviews, when conducted carefully and appropriately, can

- improve the response of police to these cases;
- enhance collaboration, communication, and cooperation between and among police and other involved agencies;
- reduce liability; and
- save lives and extend protections to battered women and their families.

The deliberations from domestic violence fatality reviews can augment community education about this persistent social and criminal justice problem. At the same, time law enforcement agencies can engage in deeper and more meaningful discussions about issues that affect the ability of women to escape these dangerous relationships. As the practice spreads and the sophistication of these reviews grows across the country, we urge leaders in the law enforcement community to embrace this opportunity to enhance their agency's response and improve the lives of many American families. ❖

[1] Male intimates killed 1,600 women in 1976 and 1,218 in 1999 (Bureau of Justice Statistics, 2001). See

also James Fox and Marianne Zawitz, *Homicide Trends in the United States* (Washington, D.C.: Government Printing Office).

[2] From our work-in-progress survey of 44 states, the following have some form of domestic violence death reviews. The letter L in parentheses after a state denotes the presence of legislation that supports the review process: Alaska, Arizona, California (L), Colorado, Delaware (L), District of Columbia, Florida (L), Illinois, Iowa (L), Kansas, Kentucky, Maine (L), Michigan, Minnesota (one county with a team, local legislation), Nevada (L), New Hampshire (executive order), New Jersey (executive order), New Mexico, North Carolina, Ohio, Oklahoma Oregon, Pennsylvania, Tennessee (L), Virginia (L), Washington (L).

[3] Barbara Hart, Legal Committee, "Domestic Violence Death Review," National Council of Juvenile and Family Court Justices, February 9, 1995.

[4] Evan Stark and Anne Flitcraft, "Killing the Beast Within: Woman Battering and the Female Suicidality," *International Journal of Health Services* 25, no. 1 (1995): 55.

[5] Stark and Flitcraft, "Killing the Beast Within," 46.

[6] These authors investigated the medical records of women who came to the emergency room at Yale-New Haven Hospital as attempted suicides over a one-year period. They identified 176 such women who had attempted suicide at least once during the study year (see Stark and Flitcraft, "Killing the Beast Within," 48).

[7] Stark and Flitcraft, "Killing the Beast Within," 53.

[8] The 1999 report by the New Mexico Female Intimate Partner Violence Death Review Team, titled "Getting Away with Murder," notes that the law enforcement investigation of intimate partner homicides "may lack vigor and consistency, especially homicides in which the perpetrator then commits suicide" (19).

[9] Charles Patrick Ewing, *Fatal Families: The Dynamics of Intrafamilial Homicide* (Thousand Oaks, C Sage, 1997), 143.

[10] Cited in Ewing, *Fatal Families*, 143.

[11] N. Websdale and B. Johnson, "Battered Women's Vulnerability to HIV Infection," *Justice Professional* 10, no. 4 (1997): 183-198.

[12] Joan Zorza, "Woman Battering: A Major Cause of Homelessness," *Clearinghouse Review* 25, no. 4 (1991).

[13] *Report*, 7.

[14] See L.L. Leape, "Error in Medicine," *Journal of the American Medical Association* 272 (1994): 1851-1857.

[15] This includes deaths classified as homicides, suicides, unintentional injury, undetermined cause, those with inadequate certificates, and peculiar circumstances (asthma, AIDS). This is not to suggest that the deaths of women over 60 are not due to domestic violence. For example, "suicide pacts" where elderly men kill their female partners and then themselves cannot be assumed to be free of a history of domestic violence. Indeed, gerontologist Donna Cohen found that homicide-suicides involving elderly women in west central Florida from 1988 from 1994 doubled. In all, such homicides accounted for 20 percent of the total homicides of people aged over 55. Cohen also notes that while the health of half of women had deteriorated, two-thirds had expressed "no desire to die." Evidence that women killed in so-called suicide pacts had expressed "no desire to die" may suggest they were being battered before their demise (Cited in Charles Ewing, *Fatal Families*, 143).

[16] See Neil Websdale, *Understanding Domestic Homicide* (Boston, Mass.: Northeastern University Press, 1999). For the most recent statement on the status of the Florida fatality review teams, see Neil W dale and Byron Johnson, "Implementing and Mon ing New Fatality Review Teams" (available from the Florida Department of Children and Families, Tallahassee, Florida, 2001).

[17] Florida Statutes 741.2165 s. 1(2).

[18] Florida Statutes 741.316 s. 1 (4).

[19] M. Hobart, "Honoring Their Lives, Learning from their Deaths: Findings and Recommendations from the Washington State Domestic Violence Fatality Review," Washington State Coalition Against Domestic Violence (2000).

[20] *Thurman v. City of Torrington, Connecticut*, 595 F. Supp. 1521 (Dist. Conn. 1984). See also *Bruno v. Codd*, 396 N.Y.S.2d 974 (1977).

[21] See Neil Websdale, "Lethality Assessment Tools: A Critical Analysis," VAWNET Violence Against Women Grants Office Applied Research Series (2000).

[22] New Hampshire Governor's Commission on Domestic and Sexual Violence, Nashua, New Hampshire, (November 2000): 7.

[23] New Hampshire Governor's Commission on Domestic and Sexual Violence, Nashua, New Hampshire, (November 2000): 7.

[24] Hobart, "Honoring Their Lives," 12.

[25] Hobart, "Honoring Their Lives," 11. The report recommends that law enforcement officers immediately call in mental health professionals when batterers threaten suicide (35).

[26] New Hampshire Governor's Commission on Domestic and Sexual Violence, Nashua, New Hampshire, (November 2000): 16. Santa Clara County Death Review Committee, *Final Report, October 1993-September 1997*, 13. Charan Investigation, 6. Hobart, "Honoring Their Lives," 47-51.

[27] Hobart, "Honoring Their Lives," 9.

[28] Hobart, "Honoring Their Lives," 9.

[29] Hobart, "Honoring Their Lives," 45.

[30] Hobart, "Honoring Their Lives," 49.

[31] Hobart, "Honoring Their Lives," 50.

Domestic Violence Fatality Reviews: From a Culture of Blame to a Culture of Safety

BY NEIL WEBSDALE, PH.D., JUDGE MICHAEL TOWN AND BYRON JOHNSON, PH.D.

Introduction

As courts and communities try to confront domestic violence, the question of what to do about domestic violence fatalities continually resurfaces. Normally, these fatalities are handled by the criminal justice system, which investigates the deaths and identifies and charges the perpetrators, when appropriate. Such criminal justice handling, however, does little to review the effectiveness of the various systems charged with serving and protecting those vulnerable to domestic violence and death. This shortcoming is all the more significant given that most communities have experienced a high profile domestic violence homicide.

Traditionally, these tragedies have resulted in finger pointing, anger, fear, frustration, and distrust. Sometimes, this finger pointing has found voice in the form of editorials, lawsuits, and legislative hearings. These forms of finger pointing, sometimes referred to as "tombstone technology" in fields such as aviation and nuclear power, have not been productive.[1] They can result in accusations of stonewalling and cover-ups. Consequently, many community members, including judges, court administrators, elected officials, prosecutors, law enforcement officials, and battered women's advocates are looking for workable and fair models to review domestic violence fatalities, with a view to preventing future deaths.

This search is not for the fainthearted since it requires a paradigm shift from a culture of blame to a culture of safety in which domestic violence deaths are reviewed through the lens of preventive accountability. Fortunately, there are workable models in the fields of medicine and aviation upon which to draw. These models teach courts and communities that, with vigor, honesty, and candor, they can build reliable systems that value accountability and help prevent future death and injury from domestic violence. Because domestic violence deaths exhibit predictable patterns and etiologies, they are preventable.

We argue that the establishment of domestic violence fatality review teams is one effective way of reducing domestic violence homicides. After briefly outlining the scope and extent of domestic violence related deaths, this article discusses the history of domestic violence fatality reviews and presents several models that appear to be both effective and fair. In particular, we emphasize that these models form part of an emerging process that will take years to unfold. We especially recommend judicial leadership in promoting and establishing local review processes. This is particularly so in jurisdictions where a unified family court or closely coordinated juvenile/family court exists.

It is not our intent to present a formula for conducting such reviews. Rather, this article presents a variety of apparently effective models, since the authors believe communities will review "domestic violence deaths" in their own unique ways. By raising key questions and presenting workable

Neil S. Websdale is an Associate Professor of Criminal Justice at Northern Arizona University, presently completing a research sabbatical at Vanderbilt University.
Judge Michael A. Town is a Circuit Court Judge in Honolulu, Hawaii.
Byron R. Johnson is the Director of the Center for Crime and Justice Policy at Vanderbilt University.

models, the authors hope to contribute to the discussion about domestic violence fatality reviews within the framework of a culture of safety rather than a culture of blame.

Scope and Extent of Domestic Violence Related Deaths: An Outline

Each year deaths attributable to domestic violence constitute a significant proportion of the total number of homicides. These homicides take a number of forms. The largest sub-category of domestic violence deaths is "intimate partner homicide." This form of domestic homicide involves the killing of a person by her/his intimate or former intimate partner.[2] The other major sub-category consists of "family homicide," which involves the killing of a victim by that person's relative by blood or marriage. Examples of family homicide include cases in which parents or guardians kill children (filicide), brothers kill brothers (fratricide), sisters kill sisters (sororicide), or children kill parents (parricide).[3]

Intimate partner and family homicides are not the only deaths attributable to domestic violence. A number of researchers have argued that many women who commit suicide do so within the context of battering relationships, thus making it possible to argue that domestic violence was a prime causal factor in their self-killing.[4] Similarly, because battered women appear more vulnerable to HIV infections than non-battered women,[5] one might argue that some deaths of women attributed to HIV, or some complication thereof, might be traceable to their status as battered women.

The Emergence of Domestic Violence Fatality Reviews

MEDICAL FATALITY REVIEWS

The emergence of child and adult domestic violence fatality reviews is traceable to death reviews in the medical profession. Often, these reviews are called morbidity and mortality reviews. The medical fatality review model is based on the internal reviews of deaths that occur in hospital settings. Personnel involved with patients who die in questionable circumstances present information to the review team. The team gathers the information together and reaches a conclusion about the reasons for the fatality.

One of the initial problems identified in implementing effective medical reviews was their emphasis on "catching rascals, rather than on improving hospital wide performance" (Rosen and Susman, 1983). This blaming approach was highlighted in an October 1998 editorial in the Journal of the American Medical Association (JAMA). The editorial notes that the health care system continues to rely upon "requiring individual error-free performance enforced by punishment, a strategy abandoned long ago by safer industries such as aviation and nuclear power."[6]

CHILD FATALITY REVIEWS

Unfortunately, many child fatality review teams also emerged with a similarly punitive ethos.[7] In some cases, review teams inappropriately blamed battered mothers for failing to protect children killed by abusive male partners.[8] Other child death review teams appropriately sought to identify breakdowns in the system of service delivery, focusing less on individual accountability and more on system-wide service coordination.

The most progressive child review teams currently recognize the need to blend multiple systems-wide accountability with a non-punitive ethos. This does not mean there is no accountability. Rather, there is recognition that risk and error are inevitable aspects of the coordinated delivery of complex services. Errors, therefore, should be identified and rectified within an open climate of honesty and healing.

As the Colorado Child Death Review Committee points out, if cases are handled improperly, or if a crime is committed, agencies with the greatest involvement and clearest responsibility are asked to put things right. In especially egregious situations, matters can be submitted to a grand jury.[9] This philosophy seems to have permeated through to the review of adult domestic violence deaths in this jurisdiction. For example, the mission statement of Project Safeguard (Denver) recognizes that "perpetrators of domestic violence are ultimately responsible for the death of victims. Thus, the goal of this committee is not to place blame but rather to better understand the dynamics of domestic violence when death is involved and thereby diminish the possibilities of future fatalities."[10]

Most child death reviews involve child fatalities caused by abuse and/or neglect and as such constitute a form of domestic violence death review. However, child fatality review teams have not always been quick to recognize the key links between adult domestic violence and the killing of children. There are notable exceptions and some

teams have begun to work on identifying these links.[11] For example, Detective Linda Burton, who heads up the Child Death Review Team in Hillsborough County, Florida, reports that at least two-thirds of children killed in homicides in Hillsborough County from 1994-1998 had mothers or other female caretakers who had been beaten by their intimate male partners.[12]

THE CHARAN INVESTIGATION

One of the first domestic violence death reviews, the "Charan investigation," involved the very detailed public analysis of a domestic homicide-suicide in San Francisco. The Charan investigation pinpointed the widespread breakdown of several systems.

The Facts. On January 15, 1990, Joseph Charan killed his wife, Veena Charan, and then took his own life. For a period of 15 months prior to her death, Veena Charan sought the support of various government agencies. Veena had been separated from Joseph and was awarded custody of their nine-year-old son. During the 15 months preceding her death she made numerous reports to the police. Immediately prior to her death, Joseph was arrested for felony wife beating and malicious mischief. As a result of his conviction for this offense, Joseph received a 12-month suspended jail sentence. He was put on probation through the Adult Probation Department with the following three conditions: (1) mandated domestic violence counseling; (2) a stay away order; and (3) 30 days jail time, of which he was ordered to serve four days, with the remainder to be served in the Sheriff's Work Alternative Program. Veena Charan had obtained a restraining order, which Mr. Charan violated on several occasions. He also attempted to kidnap his son at the son's school. It was at the school that Mr. Charan killed his wife in front of schoolteachers and school children, before committing suicide.

Questions raised by the investigation. The San Francisco Domestic Violence Consortium, which commissioned the Charan investigation, requested answers to three clusters of questions:

1. Do the departments of the City and County of San Francisco have policies and procedures relating to domestic violence? If so, what are they and how adequate are they?
2. Is there sufficient information-sharing among the departments in these particular types of cases?
3. Are there sufficient data to evaluate the effectiveness of the system? If not, what additional data need to be collected? What changes, if any, to current procedures can be adopted to avert future tragedies?

Gaps in service delivery identified. As a result of this investigation, the case files and public testimony identified four essential gaps in service delivery in the Charan case:

1. Communication and Coordination.
Aside from the communication between the San Francisco Police Department and the District Attorney's Office, there was little communication among the multiple agencies that had contact with Veena Charan. These multiple agencies included the municipal court, adult probation, family court services, and social services. The review committee called for centralization of information and better coordination of service delivery.

2. Data Collection.
The commission recognized the need for systematic information about domestic violence cases. The investigation noted, "Data on the number of domestic violence cases handled by the departments ranged from very limited to none at all."[13] The Commission deemed the data to be of central importance in the identification of the level of need for services and the subsequent delivery of those services.

3. Access to Services.
The Commission pointed out that a lack of sensitivity to and an understanding of multicultural and gay/lesbian issues in city departments increases the numbers of those suffering from domestic violence.

4. Training.
Most of the training recommendations concerned multicultural awareness.[14] Translation services were lacking. Specifically, there was a lack of translators in the Superior Court, Civil Division, and a limited number of translators in the Criminal Division. This problem created delays and mis-