"THE JUDGE SAID, 'SON, WHAT IS YOUR ALIBI . . . ?'" A SURVEY OF ALASKA CRIMINAL DISCOVERY PRINCIPLES[†]

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ABSTRACT

In this Article, the Author provides a general overview of the Alaska law of criminal discovery. The Article first discusses the prosecutor's discovery obligation and then discusses the major aspects of Rule 16 of the Alaska Rules of Criminal Procedure and how Alaska courts have interpreted these provisions. The final part of the Article discusses a variety of issues

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[†] *See* LEFTY FRIZZELL, THE LONG BLACK VEIL (Cedarwood 1959). This Article's title is from the lyrics to the bluegrass ballad, *The Long Black Veil*. The song's narrator is accused of murder, but he refuses to reveal his alibi, even as his execution nears:

> The judge said son what is your alibi
> If you were somewhere else, then you won't have to die.
> I spoke not a word, though it meant my life
> For I'd been in the arms of my best friend's wife.

As we will see, under Alaska law, the protagonist could have steadfastly refused to answer the judge's question for reasons unrelated to chivalrous discretion—up until the moment he called his paramour as a defense witness at trial. *See* Scott v. State, 519 P.2d 774, 787 (Alaska 1974). However, timely pre-trial notice of his intent to assert an alibi defense would have been required. *See* ALASKA R. CRIM. P. 16(c)(5).

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This Article is a revision of a paper originally prepared for presentation at the May 2008 Alaska Bar Association Convention. Because the author is a state prosecutor, this article reflects a prosecutorial focus. However, the author hopes this survey will be useful to the criminal defense bar and the bench as well.

The opinions expressed here are the author's alone. This paper is not a policy statement of the State of Alaska, Department of Law.

commonly encountered by criminal law practitioners, including discovery of juror information, the timing of discovery disclosures, and information the prosecution is not required to disclose.

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INTRODUCTION

Modern criminal law practitioners cannot approach the subject of pre-trial discovery without acknowledging a debt to the late Supreme Court Associate Justice William Brennan. In an influential 1963 lecture,

Justice Brennan argued that defense discovery should be expanded to help turn the criminal trial from a sporting contest into a search for the truth.[1]

Justice Brennan's call for expanded pre-trial discovery has prevailed in Alaska criminal practice, at least for the defense bar. In Alaska state courts, criminal defendants have far broader rights of pre-trial discovery than do those in federal courts. However, in day-to-day Alaska state criminal practice, discovery disputes are still common.[2]

Disputes over discovery scope, timing, and sufficiency are daily topics in Alaska state court pre-trial hearings. This survey of Alaska's criminal discovery court rules and case law is intended as an aid to our criminal bench and bar. As with my previously-published survey of Alaska self-defense law, this survey is a practitioner's guide. Aside from a few practical suggestions, there is no normative argument presented here. My intent is to provide criminal law practitioners and the criminal bench with a fairly comprehensive survey of court rule and case law authority that defines the scope of both prosecutors' and defense attorneys' criminal discovery obligations.

This survey is organized as a section-by-section survey of Alaska's primary discovery court rules followed by a topical survey. Part I briefly surveys the sources of the prosecutor's discovery obligations. Parts II, III, and IV examine Rule 16 of the Alaska Rules of Criminal Procedure. These sections collect and annotate significant reported and unreported[3] appellate opinions that have interpreted each subsection. Part V is a topical survey of commonly encountered issues that appear in practice.

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1. *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 2 (1990). Brennan argued that expanded pre-trial discovery would dispel the notion that a criminal trial was a game, and that review of the state's case would be of greatest value to indigent defendants who often could not afford their own investigation. Brennan also argued that expanded disclosure of the defendant's case to the prosecution might cause more cases to be resolved short of trial. *Id.* at 285–88.

2. In August 2008, the Alaska Criminal Justice Working Group concluded that discovery delay constituted the greatest impediment to efficient criminal case processing and also contributed to overcrowding in pretrial jail facilities. Memorandum from Larry Cohn, Executive Director, Alaska Judicial Council to Christine Johnson, Alaska Court System (Aug. 19, 2008) (on file with author). *But see Improving Criminal Caseflow Management in the Alaska Superior Court in Anchorage*; Technical Assistance Report, Table 4 (Jan. 30, 2009) (finding that discovery caused delay in 8.7% of felony trial cases, falling behind "new attorney" (19.3%), "motions" (14.5%), "new agency" (9.2%), and equal to "defense attorney unready" (8.7%) as a source of trial delay).

3. This outline cites many unreported opinions. The court of appeals has held that litigants may cite unpublished opinions, not as binding precedent, but for "whatever persuasive power" the opinion may hold. McCoy v. State, 80 P.3d 757, 764 (Alaska Ct. App. 2002).

I. THE PROSECUTOR'S DUE PROCESS DISCOVERY OBLIGATIONS AND ETHICAL OBLIGATIONS

The place to begin any examination of a prosecutor's due process and ethical responsibilities is Justice Sutherland's oft-quoted description of the role of a prosecutor:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[4]

A. Constitutional Sources of the Prosecutor's Discovery Obligation

A prosecutor's obligation to disclose exculpatory information to a criminal defendant is not rooted in state or federal court rules, but rather in the Due Process Clause of the Fifth Amendment. A defendant's constitutional right to prepare and present a full defense at trial entitles him to disclosure of exculpatory and impeachment evidence.[5]

In *Brady v. Maryland*,[6] the defendant and his accomplice were found guilty of murder in the first degree and were sentenced to death.[7] They were convicted at separate trials.[8] At his trial, Brady testified and admitted his participation in the crime but claimed that his accomplice was the actual killer.[9] Prior to Brady's trial, his lawyer demanded to examine his accomplice's police statements.[10] Several were shown to him, but the prosecution withheld one statement in which the accomplice admitted the actual homicide.[11] The prosecution did not disclose the statement until after Brady had been tried, convicted, sentenced to death, and had his conviction affirmed.[12]

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4. Berger v. United States, 295 U.S. 78, 88 (1935).
5. *See* United States v. Agurs, 427 U.S. 97, 107 (1976); Brady v. Maryland, 373 U.S. 83, 86 (1963).
6. 373 U.S. 83 (1963).
7. *Id.* at 84.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

Justice Douglas, writing for the Court, found that due process was violated where the prosecution suppresses evidence which is either material to guilt or to punishment, regardless of the good faith or malice of the prosecution: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[13]

In *Giglio v. United States*,[14] the Court expanded this rule to cover exculpatory impeachment evidence.[15] Next, in *United States v. Agurs*,[16] the Court further extended the *Brady* principle and held that a prosecutor has a constitutional duty to voluntarily disclose exculpatory information to the defense, even in the absence of a specific defense request.[17] Finally, in *Kyles v. Whitley*,[18] the Court held that the prosecutor has a duty to learn of any favorable evidence known to others acting on its behalf in the case, including the police.[19]

The *Brady-Giglio-Kyles* rule thus extends the prosecutor's obligation to not only ensure that all exculpatory information is provided to the defense but also undertake reasonable steps to ensure that the prosecutor is aware of all such material in the government's possession. Because this line of cases stems from the defendant's Fifth and Fourteenth Amendment due process rights, the prosecutor's obligation is independent of any state discovery court rule or statute.

B. A Prosecutor's Ethical Duty: Alaska Rule of Professional Conduct 3.8(d)

In addition to a prosecutor's due process obligations, Alaska's Rules of Professional Conduct impose an ethical duty upon prosecutors to disclose exculpatory or mitigating evidence to the defense.[20]

13. *Id.* at 87.
14. 405 U.S. 150 (1972).
15. *Id.* at 154.
16. 427 U.S. 97 (1976).
17. *Id.* at 111–13; s*ee also* United States v. Bagley, 473 U.S. 667 (1985) (abolishing distinction between the defense's specific and generalized requests for disclosure).
18. 514 U.S. 419 (1995).
19. *Id.* at 437.
20. Anecdotally, it seems no Alaska prosecutor has ever faced professional discipline for violations of this rule. According to Bar Counsel Steve Van Goor, complaints filed under this rule with the Alaska Bar Association are infrequent, and none has ever resulted in formal professional discipline. E-mail from Steve Van Goor, Bar Counsel, Alaska Bar Ass'n, to Author (Sept. 17, 2008) (on file with author). Mr. Van Goor has been bar counsel since 1983.

Rule 3.8 of the Alaska Rules of Professional Conduct (Special Responsibilities of a Prosecutor) states that a prosecutor in a criminal case shall:

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal . . . .[21]

Therefore, the prosecutor is ethically bound to make available to the defense evidentiary material that must be disclosed under the due process requirements established in *Brady* and Alaska Rule of Criminal Procedure 16(b)(3). Interestingly, at sentencing, the professional responsibility rule requires disclosure of mitigating information to the court as well as to the defendant. In contrast, the criminal procedure rule only requires disclosure to the court if new information emerges at trial.[22]

II. A SURVEY OF CRIMINAL RULE 16: WHAT DISCLOSURE IS EXPRESSLY REQUIRED BY ALASKA'S CRIMINAL PROCEDURE RULE?

Discovery in criminal cases is governed by Criminal Rule 16.[23] Alaska's Criminal Rule 16 was promulgated by supreme court order and became effective in 1973.[24] The supreme court essentially adopted most

21. ALASKA R. PROF. CONDUCT 3.8(d). This rule remained unchanged through the recent major revision of Alaska's professional legal ethics code. *See* Rescinding the Current Alaska Rules of Professional Conduct & Readopting New Alaska Rules of Professional Conduct, Supreme Court Order 1680, effective Apr. 15, 2009, http://state.ak.us/courts/sco/sco1680.pdf.

22. *Compare* ALASKA R. PROF. RESP. 3.8(d) (disclosure to court and defense at sentencing), *with* ALASKA R. CRIM. P. 16(b)(3) (disclosure only to defense), *and* ALASKA R. CRIM. P. 16(d)(2) (disclosure to court only if newly discovered information emerges in trial).

23. Criminal discovery practice is not governed by the Alaska Rules of Civil Procedure. Thomas v. State, No. A-6015, 1997 WL 235504, at *9 (Alaska Ct. App. May 7, 1997) ("Discovery in criminal cases is not governed by Civil Rules 26 *et seq.*, but rather by Criminal Rule 16(b)–(d)."); Jerrel v. State, Nos. A-3380, A-3873, 1992 WL 12153274, at *1 (Alaska Ct. App. Nov. 4, 1992) (criminal discovery rules govern criminal cases), *rev'd on other grounds,* Allen v. Municipality of Anchorage, 168 P.3d 890 (Alaska Ct. App. 2007).

24. Supreme Court Order 157, effective Feb. 15, 1973. Alaska Supreme Court Order 157 is only available in print at the Anchorage, Fairbanks, and Juneau law libraries. Copies can be obtained by contacting the Anchorage Law Library. *See* http://state.ak.us/courts/sco.htm.

of the provisions of the 1970 American Bar Association Standards for Criminal Justice, "Discovery and Procedure Before Trial," Standard 2.1(a).[25]

With the 1973 enactment of Criminal Rule 16, the largely "one-way" traffic pattern of Alaska's criminal discovery process was set:[26] criminal defendants were granted broad criminal discovery rights but bore few obligations in return. The new rule required the prosecutor to disclose, for the first time, names and addresses of prospective witnesses, written or recorded witness statements, defendant and co-defendant statements, and expert reports.[27] In contrast, the defendant was merely required to submit to non-testimonial identification procedures and to provide notice of intent to raise an insanity defense; disclosure of prospective defense expert witnesses was discretionary.[28] As we will see, this traffic pattern resembles a busy commuter highway at morning rush hour: most information heads "inbound" in the defense direction, and little traffic flows the other way. With few exceptions, that portrait remains essentially unchanged today.

A. Witness Identity, Statements, and Criminal Conviction Records

Criminal Rule 16(b)(1) states that the prosecutor shall disclose:

(i) The names and addresses of persons known . . . to have knowledge of relevant facts and their written or recorded statements or summaries of statements;[29]
(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;

25. *See* Sivertsen v. State, 963 P.2d 1069, 1072 (Alaska Ct. App. 1998), *disapproved in part on other grounds,* 981 P.2d 564 (Alaska 1999).

26. Scott v. State, 519 P.2d 774, 784 (Alaska 1974) ("[P]retrial criminal discovery is not a 'two-way street.'").

27. Supreme Court Order 157, *supra* note 24.

28. *Id.*

29. *See* ALASKA STAT. § 12.45.060 (2008) ("After a witness called by the state has testified on direct examination, the court shall, on motion of the defendant, order the state to produce any statement of the witness in the possession of the state that relates to the subject matter as to which the witness has testified. If the entire contents of the statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for examination and use.").

(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.[30]

As explained above, Alaska's discovery rule was based on the 1970 American Bar Association (ABA) Standards. However, in this very first substantive section, we encounter some critical differences between the ABA Standards and the Alaska rule. For example, the ABA Standards required the prosecutor only to disclose the statements of persons the prosecutor "intended" to call at trial.[31] If the prosecutor subjectively decided not to call the witness (or so claimed later), then the witness's statement need not be disclosed. The Alaska Supreme Court specifically rejected this limitation when it adopted Alaska Criminal Rule 16. Under the rule, the triggering criterion is relevance, not the prosecutor's intent.[32]

Second, the ABA Standards only required disclosure of a co-defendant's statement if the trial was to be a joint trial.[33] In addition, the ABA Standards required disclosure of "written or recorded statements."[34] The Alaska rule broadened this requirement to include "written or recorded statements or summaries of statements" of defendants and co-defendants.[35]

Despite these changes, the Alaska rule retained an important distinction regarding disclosure of unrecorded, non-codefendant witness statements. The Alaska Supreme Court followed the ABA Standards and omitted the phrase "the substance of any oral statements" from section (b)(1)(i). [36]

In other words, the prosecutor is required to disclose "written and recorded statements" of *all* persons with knowledge of relevant facts.

30. ALASKA R. CRIM. P. 16(b)(1)(A).

31. *See* Howe v. State, 589 P.2d 421, 424 (Alaska 1979) (explaining the distinction between the ABA Standard and the Alaska rule).

32. *Id.*

33. Shaw v. State, No. A-3697, 1992 WL 12153173, at *9 (Alaska Ct. App. May 6, 1992).

34. *Howe*, 589 P.2d at 424.

35. *Shaw*, 1992 WL 12153173, at *9 (explaining these distinctions between the 1970 ABA Standards and Alaska Criminal Rule 16).

36. *Id.* (explaining why the Government was not required to create and disclose the "substance," or a summary, of a witness's unrecorded oral interview).

Yet, the prosecutor must disclose "summaries of statements and the substance of any oral statements" only of *the accused and any co-defendant*.[37] This quirk governs a frequently encountered criminal trial practice issue: the prosecutor's obligation to disclose new information revealed in a pre-trial, unrecorded interview with a percipient witness.

The rule's first clause requires disclosure of the names and addresses of witnesses and disclosure of their "written or recorded" statements. However, the rule does not require disclosure of the "substance" of a mere witness's oral statement. The court of appeals discussed this distinction in *Sivertsen v. State*.[38]

Sivertsen was charged with burglary.[39] At trial, a witness testified that the hammer and knife Sivertsen possessed when arrested came from inside the burglarized premises.[40] The prosecutor learned this inculpatory fact when he interviewed the witness a week before trial but did not disclose this fact to the defense.[41] When the prosecutor elicited these facts at trial, the defense alleged a discovery violation.[42] The court of appeals rejected the claim, explaining that the prosecutor had no duty to disclose a summary of an unrecorded oral statement made during a trial preparation interview.[43]

As the *Sivertsen* court recognized, this quirk creates the potential for a clever prosecutor to avoid disclosure and cultivate unfair surprise by

37. *See* Hampton v. State, 623 P.2d 318, 319–20 (Alaska 1981) (finding error where police chief did not inform prosecutor or defense attorney of an unrecorded oral statement of the accused and police chief disclosed the statement in response to cross-examination question in the midst of trial); *see also* Marshall v. State, 198 P.3d 567, 574 (Alaska Ct. App. 2008) (holding a state's failure to disclose a recorded interview with a cooperating informant constituted a discovery violation). Where a pretrial interview discloses a statement attributable to the defendant, reported by a third-party witness, the substance of that statement is discoverable, whether the witness's interview is recorded or not. *Id.*

38. 963 P.2d 1069, 1071–72 (Alaska Ct. App. 1998), *disapproved in part on other grounds*, 981 P.2d 564 (Alaska 1999) (holding that Criminal Rule 16(b)(1) does not normally require a prosecutor to disclose oral statements made by a witness during a trial preparation interview); *see also* Nook v. State, No. A-7837, 2004 WL 1336268, at *5 (Alaska Ct. App. June 16, 2004) (same); Buie v. State, No. A-4706, 1995 WL 17220362, at *10–11 (Alaska Ct. App. Mar. 29, 1995) (applying this principle and finding no violation where prosecutor failed to disclose content of fifteen minute mid-trial conversation with state's expert medical examiner); *Shaw*, 1992 WL 12153173, at *7–10 (discussing this point at length).

39. *Sivertsen*, 963 P.2d at 1070.

40. *Id.* at 1070–72.

41. *Id.* at 1071.

42. *Id.* at 1070–71.

43. *Id.*

doggedly refusing to record or create a written "summary" of an oral, unrecorded, pre-trial witness interview.[44]

In fact, the court of appeals had squarely confronted this allegation years earlier in *Elson v. State*.[45] In *Elson*, the victim of a sexual assault initially lied to police when she denied that she had been using cocaine with Elson before the sexual assault.[46] The victim admitted this lie on cross examination, but the prosecutor rehabilitated her testimony by asking, "Did you, within a short time after that, call our office to indicate that you had not told the truth about the slip of cocaine?"[47] The victim said she had.[48]

Elson's counsel objected and alleged a discovery violation.[49] She argued that she had planned her whole attack on the victim's credibility based on the victim's failure to candidly disclose drug use.[50] She claimed that the prosecutor's rehabilitation had ambushed her because the prosecutor had never disclosed the victim's self-report.[51]

The court of appeals held that there was no discovery violation because the victim's self-report was not reduced to writing.[52] In other words, because the informal telephone call was (seemingly) not documented in writing or tape-recorded, the failure to disclose the statement did not run afoul of Rule 16.

However, Elson's appellate attorney raised a powerful argument: the prosecutor's office must have reduced the victim's self-report to writing in some form.[53] How else could the prosecutor have been able to provide the approximate time frame of the self-report telephone call in his rehabilitating question? In fact, Elson's appellate attorney pointed out that the prosecutor had referred to the date of the victim's telephone call during argument.[54] Unfortunately, the court of appeals dodged this issue and held that Elson had not raised this precise argument in the trial court.[55] The issue had been litigated in the trial court as if the self-

44. *See id.* at 1072 ("We recognize that this interpretation of Criminal Rule 16(b)(1)(i) could be abused.").
45. Nos. A-2898, A-4297, 1993 WL 13156823 (Alaska Ct. App. Jul. 28, 1993).
46. *Id.* at *2 n.1.
47. *Id.* at *11.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at *12.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

report was *not* reduced to writing; therefore, Elson had waived the claim on appeal.[56]

Do Alaska's criminal rules offer any remedy to this problem? Yes. Although Rule 16(b)(1) does not require the prosecutor to create and disclose a witness's pre-trial interview,[57] Rule 16(b)(3) (and *Brady* itself) *do* require disclosure of "exculpatory" information—whether the prosecutor has reduced it to writing or not.[58] Therefore, a prosecutor may not wear *Sivertsen* or *Elson* on her sleeve: if her pre-trial interview discloses *exculpatory* information, she must disclose it to the defense attorney.[59]

Moreover, if the prosecutor learns new facts in a pre-trial (or mid-trial) posture and fails to disclose those facts to the defense based on an expansive reading of *Sivertsen*, she may be in tiger country. Why? Because it is impossible for a prosecutor to conclusively predict whether a reviewing judge or appellate court will decide that the newly disclosed information was not exculpatory when made. The cautious prosecutor should avoid a charge of sharp discovery practice by creating a summary of the interview (perhaps even an informal one) and disclosing it to the defense.

Next, prosecutors should be mindful that courts have found error where the prosecutor failed to disclose clearly discoverable information such as the accused's own statements and written summaries of witness statements.[60] As the Rule makes explicitly clear, the government has a

56. *Id.* at *14 n.5. *Elson* is an easy opinion to criticize. The victim's report of mutual drug use could easily be characterized as "exculpatory" or "mitigating" within the meaning of Rule 16(b)(3). Therefore, it should have been disclosed to the defense.

57. Sivertsen v. State, 963 P.2d 1069, 1072 (Alaska Ct. App. 1998), *disapproved in part on other grounds,* 981 P.2d 564 (Alaska 1999).

58. *See infra* Part II.D.

59. *See* Latonio v. State, No. A-4147, 1993 WL 13156678, at *1 (Alaska Ct. App. May 19, 1993) (discussing approvingly a trial judge's ruling that Rule 16 required disclosure of exculpatory information regardless of whether a written summary had been prepared).

60. Hampton v. State, 623 P.2d 318, 319–20 (Alaska 1981) (finding violation of Rule 16(b) where the evidence in question was an undisclosed oral statement of the defendant, although this was not considered reversible error); Stevens v. State, 582 P.2d 621, 624–25 (Alaska 1978) (holding that government's failure to reveal the prior statements of a defense alibi witness was reversible error); Mahle v. State, 371 P.2d 21, 22–24 (Alaska 1962) (holding that police reports of oral statements by witnesses should have been disclosed under former statute governing discovery); Braaten v. State, 705 P.2d 1311, 1320 (Alaska Ct. App. 1985) ("The two page report submitted by the prosecutor was apparently a summary of G.J.'s statements to the police concerning her activities during the period Braaten claimed he met her. The complaining witness, G.J., was clearly a person 'known by the government to have knowledge of relevant facts,' so that

duty to make pretrial disclosure of all "summaries of statements and the substance of any oral statements made by the accused."[61] Most commonly, this rule will trigger disclosure of statements made by an accused directly to a law enforcement officer.[62] However, it is unclear whether a statement that is made in open court, and therefore equally available to all parties, must be disclosed in formal criminal discovery.[63]

The government's duty to disclose names of witnesses "known" to have relevant evidence is broad and includes persons "known" to have relevant information, even if the police conclude that the witness's information is cumulative of other witnesses, and they decline to formally interview the witness.[64]

The government's duty to disclose information under this subsection is self-executing, and it may not rely on the defense's failure to make a specific request.[65]

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the summary of her statements on any area of the investigation would seem to fall within the scope of Criminal Rule 16(b)(1)(i).").

61. ALASKA R. CRIM. P. 16(b)(1)(A)(ii).

62. Alaska law has long required that a suspect's custodial interrogation in a place of detention be audio recorded. Stephan v. State, 711 P.2d 1156, 1159–60 (Alaska 1985).

63. Riney v. State, 935 P.2d 828, 838 (Alaska Ct. App. 1997) (where the accused made inculpatory statements to the magistrate at his bail hearing, "it was just five dollars' worth [of cocaine] I just forgot it was in my pocket . . ."; the prosecutor noted the statements in her file, but did not disclose them to the defense lawyer until trial; the defendant was not entitled to suppression of the statements; court characterized the discoverable nature of the in-court statements as "a close question.").

64. *See, e.g.*, Jurco v. State, No. A-4983, 1995 WL 17220755, at *2–4(Alaska Ct. App. Apr. 5, 1995) (requiring state to turn over identity of witness when state knows of witness and there is "substantial probability" that witness has knowledge of facts of case, even if state declines to interview witness). This principle applies only where the police have actually gathered the questioned evidence or are actually aware of the identity of the particular witness. Due process does not require the police to use state-of-the-art investigative techniques in every reported crime, or to actually gather the names of every conceivable witness at every crime scene. But, "[e]vidence in question should not be destroyed based on an investigating officer's evaluation of its usefulness." Catlett v. State, 585 P.2d 553, 558 n.5 (Alaska 1978). *See also* Singleton v. State, 921 P.2d 636, 639–40 (Alaska Ct. App. 1996) (finding no due process violation where police failed to record names of bystanders at crime scene). *Cf.* Nicholson v. State, 570 P.2d 1058, 1064 (Alaska 1977) (requiring the state to track down "every conceivable investigative lead" would be an "extremely difficult burden for the state"); March v. State, 859 P.2d 714, 716 (Alaska Ct. App. 1993) (the due process clause does not require a state-of-the-art investigation of all crimes).

65. Rodes v. City of Kenai, No. A-5536, 1996 WL 33686482, at *4–5 (Alaska Ct. App. Feb. 21, 1996) (holding that prosecution may move for ex parte, in camera review and may seek restriction or deferral, but the burden is on the prosecution to take those steps).

A prosecutor may not suppress Rule 16(b)(1) evidence by styling the information as "rebuttal" testimony. That was apparently the rule in Alaska between 1975 and 1979 but has now been overruled.[66]

What about the discoverability of witnesses' "full arrest record"? Rule 16(b)(1)(A)(v) only requires disclosure of "convictions," and then, only of "persons whom the prosecuting attorney intends to call as witnesses at . . . trial."[67] What if the defense demands a printout of "all police contacts" or "all arrests"—whether or not the contact resulted in a conviction? Such a request would be beyond the scope of Rule 16(b)(1)(A)(v). But, if a defender articulates particular relevance (or "materiality") to the arrest record of a particular witness (such as a police informant), the request would fall within the scope of Rule 16(b)(7).[68] The rule's link between the prosecutor's subjective intention and her disclosure obligation is problematic. The *Howe* court articulated the flaw with tying a discovery obligation to the prosecutor's subjective intention. The rule mistakenly assumes that at an early stage in the case, the prosecutor will be able to predict, with precision, the identity of the witnesses she intends to call months later at trial. But, as the *Howe* court explained, this is often not the case. A prosecutor often cannot predict witness availability and degree of witness cooperation at an early stage of the litigation.[69] Also, in street crime prosecution, given the volume of casework in a hectic prosecution office, serious trial preparation does not occur until shortly before trial.[70] Additionally, the defense is not required to reveal its specific defense theory until ten days before trial.[71] Each of those variables may change the precise identity of trial witnesses.

For example, in *Coney v. State*,[72] the defense demanded a copy of the robbery victim's full arrest record because, according to the defense, the victim fabricated the robbery report.[73] The trial judge refused to order its production.[74] On appeal, the court of appeals remanded, reasoning that if the victim had reported a crime or had been a suspect,

66. *See* Bostic v. State, 805 P.2d 344, 346 n.4 (Alaska 1991) (overruling old rule and not allowing prosecutor to suppress self-styled rebuttal evidence); Howe v. State, 589 P.2d 421 (Alaska 1979) (overruling McCurry v. State, 538 P.2d 100 (Alaska 1975)).

67. ALASKA R. CRIM. P. 16(b)(1)(A)(v).

68. ALASKA R. CRIM. P. 16(b)(7).

69. *Howe*, 589 P.2d at 424 n.7.

70. *Id*.

71. ALASKA R. CRIM. P. 16(c)(5).

72. 699 P.2d 899 (Alaska Ct. App. 1985).

73. *Id*. at 900.

74. *Id*. at 901.

the printout might have led to impeachment evidence.[75] Because the court could not determine what all the abbreviations on the police printout meant, it could not determine whether the printout was discoverable and remanded to allow the defense to inspect the printout and argue its materiality.[76] Contemporary Alaska criminal defense practitioners often rely on *Coney* when seeking full arrest records of state witnesses.[77]

In *Braham v. State*,[78] the supreme court confronted a similar problem.[79] Police reports that revealed a critical prosecution witness's dealings with the police as an informant in drug cases had been withheld from the defendant.[80] The court held that the reports should have been disclosed "because they showed that [the witness] was deeply involved in working for the police, which would create the material inference that he might be biased in favor of the prosecution."[81]

Thus, defense counsel should argue that *Braham* supports a defense request for reports involving an informant's participation in an undercover operation. Defense counsel should also cite *Coney* and Rule 16(b)(7) in support of a request for full arrest records of important witnesses. Prosecutors should argue that these cases are limited to *critical* government witnesses and should review a defense discovery demand for a showing of "materiality."[82] Prosecutors should argue for in camera review under Rule 16(d)(6)(i) of the Alaska Rules of Criminal Procedure.

B. Government Expert Disclosure

Rule 16(b)(1)(B) states that, "as soon as known and no later than 45 days prior to trial," the prosecutor shall disclose: (1) The name and address of each expert witness who performed work in connection with the case or who is likely to be called at trial; (2) Any reports or written statements of the expert; (3) A curriculum vitae; and (4) A "written

75. *Id.*
76. *Id.*
77. As a practical matter, *Coney*'s impact has been blunted over time. The Alaska Public Defender Agency and the Alaska Office of Public Advocacy's investigative staffs now have online access to the full arrest and conviction records of every criminal defendant in Alaska via the Alaska Public Safety Information Network (ASPIN) database. *See* Ingles v. State, Nos. A-6157, A-3731, 1997 WL 796504, at *1–2 (Alaska Ct. App. Dec. 24, 1997) (mentioning Public Defender Agency APSIN access).
78. 571 P.2d 631 (Alaska 1977).
79. *Id.* at 641–48.
80. *Id.* at 642–43.
81. *Id.* at 647.
82. *See* ALASKA R. CRIM. P. 16(b)(7).

description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion."[83]

This rule has sanction and timing components. The court may impose sanctions, including preclusion, for violations.[84] Absent contrary specific order, government expert discovery is to be accomplished no later than forty-five days prior to trial.[85]

Prosecutors should note that the rule's first clause is written disjunctively; it directs discovery of experts who are likely to be called *or* who have performed work on the case.[86] In other words, if expert work yields seemingly inconclusive results, the expert's identity, report, and resume must be discovered. The prosecutor may not suppress the results because she regards the test as "neutral" or inconclusive and then subjectively abandons any intent to call the expert at trial.[87]

The court of appeals has questioned whether the expert discovery rule pertains to testimony from a police officer who testifies as an "expert" based upon police experience. In *Collins v. State*,[88] the court of appeals expressed doubt that expert discovery rules applied to a police detective who testified about the similarity of crack houses to the defendant's apartment.[89] "[I]t is not clear to us that Criminal Rule 16(b)(1)(B) applies to police officers, like Bryant, who testify to their on-the-scene observations and conclusions based on their training and experience."[90] *Collins* and *Basurto v. State*[91] are consistent with an emerging line of cases that hold police officers and other professionals who offer opinion testimony based on a combination of on-scene

83. ALASKA R. CRIM. P. 16(b)(1)(B).

84. *Id*. Criminal Rule 16(e) also authorizes sanctions for "willful" discovery violations. *See* Davis v. Superior Court, Fourth Judicial Dist., No. A-3114, 1990 WL 10509739, at *1 (Alaska Ct. App. June 13, 1990) (affirming $25 sanction against the Fairbanks District Attorney).

85. ALASKA R. CRIM. P. 16(b)(1)(B). Notwithstanding the rule's text, the court of appeals held that the remedy for late notice under this rule is a continuance, not preclusion. Bourdon v. State, Nos. A-7689, A-7699, 2002 WL 31761482, at *5–6 (Alaska Ct. App. Dec. 11, 2002).

86. ALASKA R. CRIM. P. 16(b)(1)(B).

87. Mujahid v. State, No. A-9573, 2008 WL 4757152, at *2–4 (Alaska Ct. App. Oct. 29, 2008) (holding that whether crime lab result was "neutral" or "exculpatory" was irrelevant and the test result was discoverable pursuant to ALASKA R. CRIM. P. 16(b)(1)(B)).

88. 977 P.2d 741 (Alaska Ct. App. 1999).

89. *Id*. at 745.

90. *Id*. (failing to decide this issue, noting that the proper remedy for non-compliance with discovery under this rule would have been a continuance).

91. No. A-8010, 2003 WL 23011812, at *8 (Alaska Ct. App. Dec. 24, 2003) (police sergeant testimony that did not rest on scientific research "does not appear to be the type of 'expert' testimony covered by the pre-trial discovery provisions of Alaska Criminal Rule 16(b)(1)(B)").

observation, training, and experience are not "experts" to whom full pre-trial disclosure obligations apply. These witnesses are deemed to be "hybrid" witnesses, exempt from Rule 16 disclosure obligations.[92]

Must each expert witness supply the defense with the scientific studies that support her expert opinion? The court of appeals has implied, at least in a case where an expert has not relied "on any particular study," that the answer is no.[93]

C. Informant and Surveillance Information

Rule 16(b)(2) states that 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, [and]
> (bb) premises of the accused or the accused's attorney.[94]

Note that search warrant disclosure should be addressed at the charging stage. Alaska Criminal Rule 37(e)(2) requires that the prosecutor shall disclose the court numbers of all search warrants "in relation to the case" on the "initial charging document," unless the court waives this requirement for "good cause shown."[95]

In a situation involving an ongoing criminal investigation (especially if the safety of confidential informants or undercover officers is involved), the prosecutor should seek an ex parte, in camera order

92. *See* Getchell v. Lodge, 65 P.3d 50, 55–56 (Alaska 2003) (state trooper who offered his opinion of cause of traffic collision based on his on-scene observations and training was a "hybrid" witness); Voyles v. State, Nos. A-9377, A-9397, 2008 WL 4951416, at *8 (Alaska Ct. App. Nov. 19, 2008) (police crime scene analyst); Hunter v. State, No. 8868, 2007 WL 2405208, at *12–13 (Alaska Ct. App. Aug. 22, 2007) (specially-trained sexual assault nurse).

93. Calix v. State, No. A-6854, 1999 WL 34002417, at *4–5 (Alaska Ct. App. Oct. 13, 1999) (rejecting claimed discovery violation where expert relied on examination of the victim and on her years of professional experience and not upon any "particular studies"); Bremond v. State, No. A-5019, 1994 WL 16196672, at *2 (Alaska Ct. App. Nov. 23, 1994) (affirming admission of expert testimony about scientific studies even though the studies had not been disclosed in pretrial discovery).

94. ALASKA R. CRIM. P. 16(b)(2).

95. The court rule governing the content of the initial charging document repeats this requirement. *See* ALASKA R. CRIM. P. 3(e) (requiring complaint to have "a listing of the numbers of any search warrants issued in relation to the case").

deferring discovery pursuant to Alaska Criminal Rule 16(d)(4) and (6)(ii).[96]

D. All Exculpatory Evidence

Rule 16(b)(3) states, "The prosecutor 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."[97]

This rule is really a codification of the *Brady-Giglio* holdings.[98] In *Batson v. State*,[99] the Alaska Supreme Court stated that this rule essentially parallels *Brady* and held that the prosecution was required to disclose the record of undercover narcotics officers' "non-drug" expense logs in the course of an investigation.[100] Batson relied on an entrapment theory and hoped to establish that the undercover officers "bought" the defendants' trust and friendship over a five-month period by giving them gifts, loans, drinks, and promises of financial reward.[101] The court held that denial of the discovery request was error, citing this rule.[102]

E. The Extent of the Prosecutor's Obligation

Rule 16(b)(4) states:

> The prosecuting attorney's [discovery] 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.[103]

96. *See infra* Part IV.D.
97. ALASKA R. CRIM. P. 16(b)(3).
98. *See supra* Part I.A.
99. 568 P.2d 973 (Alaska 1977).
100. *Id.* at 980.
101. *Id.* at 978–79.
102. *Id*. *See* Elson v. State, Nos. A-2898, A-4297, 1993 WL 13156823, at *14 (Alaska Ct. App. July 28, 1993) (stating that Rule 16(b)(3) and *Brady* had the same function: requiring disclosure of exculpatory evidence). The court said that "even though Rule 16(b)(1)(i) does not require disclosure of [informal pretrial] oral statements . . . due process still limits the prosecutor's ability to withhold the details of witnesses' statements from the defense"). *Id.*
103. ALASKA R. CRIM. P. 16(b)(4).

The government's discovery obligation extends to the police agency responsible for investigating the case. Under this rule, the knowledge of the officer is essentially imputed to the prosecution.[104]

In *Butler v. State*,[105] the court of appeals considered mid-trial disclosure of a 911 dispatch log.[106] The case arose from Palmer, where an interagency office maintains the 911 emergency communications center. In *Butler*, the 911 logs precisely identified the date and time of a citizen's complaint of a man exposing himself to children,[107] but the dispatch log was only discovered and disclosed in the midst of Butler's trial.[108] Clarifying the date and time of the exposure event, the log powerfully corroborated the witness's trial testimony.[109]

Writing for the court, Judge Mannheimer noticed and commented upon an intriguing aspect of the case: at trial, the parties simply *assumed* that knowledge of the dispatch log was imputed to the prosecution under Criminal Rule 16(b)(4)(ii) and was therefore subject to automatic pretrial disclosure.[110] The judge implied that the imputed-knowledge conclusion was unsound and that the interagency group which operated the regional 911 switchboard might not fall within the ambit of Rule 16(b)(4)(ii).[111] However technically intriguing, the approach Judge Mannheimer tacitly suggests is not persuasive. The record of the case was clear that the interagency communications center "participated in the investigation" and "had reported" to the prosecutor's office in the sense that multiple 911 calls triggered the police investigation.[112] It is

104. Hampton v. State, 623 P.2d 318, 320 n.1 (Alaska 1981) (police chief's knowledge of unrecorded statement of defendant imputed to prosecution); Russell v. Anchorage, 626 P.2d 586, 590–91 n.14 (Alaska Ct. App. 1981); *see also* O'Neill v. State, 675 P.2d 1288, 1292 (Alaska Ct. App. 1984) (Singleton, J., concurring) (writing for himself, Judge Singleton concluded, intriguingly, that this issue was governed by agency principles, and that an officer's "private audio recording" of a disputed arrest, which he made to protect himself from civil lawsuit, was not within the "scope of his employment," and therefore, the State's discovery obligation did not attach to the tape; in view of the sparse subsequent citations to Judge Singleton's concurrence, his approach does not seem to have achieved broad acceptance).

105. No. A-5399, 2008 WL 4890238 (Alaska Ct. App. Nov. 12, 2008).

106. *Id.* at *1.

107. *Id*. at *6–7.

108. *Id.* at *1.

109. *Id*. at *7–13. Butler argued that the mid-trial disclosure of the dispatch log prejudiced him because it undercut his alibi defense. *Id.* at *1. The court of appeals ultimately rejected this claim, noting that Butler had elected to proceed to trial, even though he knew that there was considerable imprecision regarding the date of the offense. *Id.* at *12.

110. *Id*. at *10.

111. *Id*.

112. *Id*. at *2; ALASKA R. CRIM. P. 16(b)(4)(ii).

equally clear that the center had a close working relationship with the investigating police agency and the district attorney's office.[113]

A ruling that the 911 emergency communications center was *not* subject to Rule 16(b) discovery would frustrate the rule's fundamental purposes: facilitation of informed pleas, expedition of trial, and minimization of trial surprise.[114] The ruling would also trigger indefensibly contrary results in Alaskan communities like Palmer-Wasilla, where the 911 center is staffed by interagency personnel, and Anchorage, where a single municipal police agency staffs the 911 emergency center. Therefore, if this issue is ever squarely presented in another case, a prosecutor should assume that a trial judge would impute knowledge of 911 emergency dispatch center data to the prosecuting agency under Rule 16(b)(4)(ii).

F. The Defense Power to Compel Production of Favorable Information

Rule 16(b)(5) states that:

> 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.[115]

This rule, combined with Criminal Rule 16(b)(7) (which requires a showing of "materiality") and with Criminal Rule 17(c), gives the defense broad powers of subpoena and protects a defendant's due process and compulsory process rights.[116]

Where the police have not collected evidence and the defense seeks it, the proper procedural vehicle is a defense motion for a Rule 17(c)

113. *Butler*, 2008 WL 4890238, at *6–7 (describing prosecution's free access to 911 dispatch database).

114. *See* ALASKA R. CRIM. P. 16(a).

115. ALASKA R. CRIM. P. 16(b)(5).

116. *See* Page v. State, Nos. A-3551, A-5754, 1997 WL 45119, at *5–6 (Alaska Ct. App. Feb. 5, 1997) (holding that defendant was "probably entitled" to an order for a subpoena compelling sexual victim's physician to disclose her prescription records for in camera inspection). The *Page* court noted that Alaska Rule of Criminal Procedure 17(c) contemplates document "production before the court" and the court's determination regarding further disclosure to the parties, not direct delivery by the custodian to an attorney. *Id.* at *6 n.7.

subpoena deuces tecum, issued under authority of Rule 16(b)(5).[117] In *Short v. Municipality of Anchorage*,[118] the defendant requested security tapes that were not collected by the police department, and, by the time of trial, the parties learned that one security camera had malfunctioned and the other tape had been erased.[119] The court of appeals found no discovery violation because the police had no duty to collect the tapes as evidence and Short offered no "explanation why he could not have subpoenaed the tapes earlier under Criminal Rule 17."[120]

In *Fathke v. State*,[121] the court of appeals relied on Rule 17(c) and held that a defendant may invoke it to compel an order requiring "other suspects" to submit to non-testimonial identification procedures.[122] Fathke sought an order to compel a specific third party to provide inked fingerprint and palm print samples.[123] The defense argued that the third party was responsible for a latent print left on an item at the scene of a robbery, but the trial court denied the motion.[124] The court of appeals reversed, finding the denial an abuse of discretion.[125] *Fathke* is an important Rule 17(c) case. Every defender should have its holding in her back pocket.

G. Search, Seizure, and Witness "Relationship" Information

Rule 16(b)(6) states that:

> [T]he prosecuting attorney shall, upon request of defense counsel, disclose and permit inspection, testing, copying and

117. Rule 16(b)(5) is not an unlimited license for a defense demand for production of every imaginable document. The rule requires a showing that the information sought, "would be discoverable if in the possession or control of the prosecuting attorney . . . ." *Id.* Therefore, if the document would not have been discoverable under Rule 16(b), the defense may not rely upon Rule 16(b)(5). Rather, the defense must make a reasonable showing of "materiality" under Rule 16(b)(7).

118. Nos. A-6825, A-3982, 1999 WL 60993 (Alaska Ct. App. Feb. 10, 1999).

119. *Id.*

120. *Id.* Here is a clear example of what could have been a proper defense use of Rule 16(b)(5) and Rule 17(c). If the police had seized these tapes, they would clearly have been discoverable under Rule 16(b)(1)(ii)–(iii) (recorded statements) and probably also under Rule 16(b)(1)(iv) (photographs or documents intended to be introduced by prosecution at trial). Therefore, had the defender spotted the issue before trial, the tapes would have been a proper subject of a Rule 16(b)(5) and Rule 17(c) subpoena.

121. 951 P.2d 1226 (Alaska Ct. App. 1998).

122. *Id.* at 1229–30.

123. *Id.* at 1227–28.

124. *Id.*

125. *Id.* at 1230.

> 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.[126]

This rule essentially codifies *Giglio* because "the relationship" between witnesses and the prosecuting authority refers to incentives or inducements to testify. Note that the rule does not distinguish between tacit "deals" or express ones. If the witness has been extended any promise or inducement, *Giglio,* its progeny, and this rule require disclosure of those facts to the defense.[127]

In "undercover informant" and "ongoing investigation" scenarios, this rule will often implicate the government's ability to seek ex parte, in camera review of the relationship between cooperating witnesses and the police under Rule 16(d)(6). The Alaska Supreme Court has approved resolution of "informant" issues, ex parte, and in camera.[128]

H. The Discovery Obligation Does Not Extend to the Prosecutor's Work Product

Rule 16(b)(8) states that the prosecutor is not required to disclose "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."[129]

The court has relied on this rule to affirm denials of defense requests to compel production of a prosecutor's proposed list of questions to an expert witness,[130] in-house potential juror voir dire

126. ALASKA R. CRIM. P. 16(b)(6).

127. *See, e.g.*, Carman v. State, 604 P.2d 1076, 1080–82 (Alaska 1979) In this case, the Alaska Supreme Court reversed a murder conviction when the prosecutor failed to disclose that the informant, who was later a trial witness, sought a reward when he contacted the police and was subsequently paid $1500 shortly after trial. *Id*. at 1079–80. The court concluded that the error was compounded by the prosecutor's closing argument, in which he suggested that the informant "had no motive to lie." *Id*. at 1080.

128. *See* Braham v. State, 571 P.2d 631, 643 (Alaska 1977) (approving use of ex parte, in camera hearings to resolve issues regarding informants and ongoing investigations).

129. ALASKA R. CRIM. P. 16(b)(8).

130. Thomas v. State, No. A-6015, 1997 WL 235504, at *8–9 (Alaska Ct. App. May 7, 1997).

information,[131] and the chief investigating officer's in-court notes made during trial.[132]

III. WHAT INFORMATION MUST THE DEFENSE GIVE THE PROSECUTOR? CRIMINAL RULE 16(c)

Alaskan defendants have never been subject to broad disclosure requirements of their defense investigations, work product, or planned cases-in-chief. *Scott v. State*[133] is the seminal Alaska case regarding defense pre-trial disclosure. In *Scott*, the Alaska Supreme Court found that a trial court's order compelling broad discovery of the defense case[134] violated the defendant's right to remain silent under Article I, section 9 of the Alaska Constitution.[135] However, the court upheld a pretrial order requiring the defendant to disclose his intention to present an alibi defense, reasoning that the general nature of the trial defense was analogous to a "pre-trial plea" and therefore was not privileged.[136]

In 1995, the Alaska Supreme Court expanded defendants' pre-trial discovery obligations. The court amended Criminal Rule 16(c) to require criminal defendants to disclose the general nature of some statutory and special trial defenses, provide increased expert discovery, and surrender physical evidence.[137] In addition, criminal defendants may be subject to non-testimonial identification orders.[138]

131. Ingles v. State, Nos. A-6157, A-3731, 1997 WL 796504, at *2 (Alaska Ct. App. Dec. 24, 1997); Hiser v. State, No. A-4980, 1994 WL 16196673, at *1 n.1 (Alaska Ct. App. Nov. 23, 1994).

132. Smith v. State, No. A-6183, 1997 WL 688646, at *2 (Alaska Ct. App. Nov. 5, 1997).

133. 519 P.2d 774 (Alaska 1974).

134. These include: the names and addresses of defense witnesses (other than the defendant), any written or recorded witness statements, and a list of places the defendant claimed to have been pursuant to his alibi defense. *Id.* at 786.

135. *Id.* at 786–87.

136. *Id.* at 787.

137. *See* Amending Criminal Rule 16 Concerning Discovery in Criminal Cases, Supreme Court Order 1191, effective July 15, 1995. For a discussion of the 1995 amendments to Rule 16, and the unsuccessful 1994 to 1996 attempts to impose an "opt-in, opt-out" reciprocal discovery system in Alaska, *see* Cameron J. Williams, Note, *Sidestepping* Scott*: Modifying Criminal Discovery in Alaska,* 15 ALASKA L. REV. 33, 45–49 (1998). The 1995 amendments to Rule 16(c) discussed in this section are the sole surviving legacy of the 1994 to 1996 discovery reform initiative.

138. *See* Supreme Court Order 1191, *supra* note 137.

A. Non-testimonial Identification

Criminal Rule 16(c) provides that the prosecutor is entitled to court orders mandating that the defendant submit to a variety of non-testimonial identification procedures. The rule grants a judge authority to order a defendant to appear in a line-up; speak certain words; provide fingerprints; pose for photographs; try on articles of clothing; provide fingernail scrapings, blood, hair and other biological evidence; provide handwriting; and permit body inspections.[139] But the rule requires a probable cause finding that the defendant is a member of a "narrow focal group" who could have committed the offense and that the evidence cannot be obtained from another source.[140]

Therefore, in practice, this aspect of Criminal Rule 16 is practically useless to a prosecutor. Why? An application pursuant to this rule offers the chance for the defense to actively oppose and delay the prosecutor's request. Also, Rule 16 has no application in cases where a defendant has not yet been formally charged with a crime.[141] Therefore, Rule 16(c) non-testimonial identification procedures will rarely be invoked for an obvious reason: fundamental fact-gathering regarding the perpetrator's identity should have been gathered *before* the charging decision was made, not afterwards. In practice, a prosecutor (or a detective) seeking to gather non-testimonial identification evidence will seek a search warrant rather than apply for a Rule 16(c) order.[142]

B. Defense Expert Disclosure

No later than thirty days before trial, the defense is required by Criminal Rule 16(c)(4) to provide expert discovery to the prosecution.[143] This rule applies to any expert the defendant is "likely" to call, and includes any written statement or report by the expert, a curriculum vitae, a written description of the substance of his testimony, his

139. ALASKA R. CRIM. P. 16(c)(2).
140. ALASKA R. CRIM. P. 16(c)(1).
141. *See* ALASKA R. CRIM. P. 1 (stating that criminal procedure rules govern practice and procedure in all criminal court "proceedings," implying that the rule's discovery procedures are inapplicable to uncharged cases).
142. *See* ALASKA STAT. § 12.35.020(4) (2008) (stating that a judge may issue a search warrant for seizure of evidence tending to show the identity of a perpetrator). No provision of Alaska law prohibits a prosecutor from seeking a search warrant to further a criminal investigation *even after* formal charges are filed. *See* ALASKA STAT. § 12.35.010–020 (2008).
143. ALASKA R. CRIM. P. 16(c)(4).

opinion, and the underlying basis of the opinion.[144] The rule includes a preclusion component for failure to comply with the rule.[145]

The court of appeals recently construed this rule's "preclusion" clause in *Harris v. State*.[146] In *Harris*, the defense lawyer did not disclose a medical expert's report to the prosecutor until the first day of trial, in derogation of this rule and contrary to the judge's specific order.[147] The judge found that the defense's failure was specifically intended to obtain tactical advantage and precluded the expert from testifying to any matter that was not in the defense lawyer's previous, cursory memorandum to the prosecutor.[148]

On appeal, Harris argued that the preclusion order violated his constitutional right to present a defense.[149] The court of appeals noted that in 1995, the supreme court amended Criminal Rule 16 to expressly include preclusion clauses in both the government and defense expert disclosure rules.[150] The court of appeals held that preclusion under Rule 16(c)(4) was only permissible upon a judicial finding that (1) the defense's violation of the duty of disclosure was "willful" and (2) lesser sanctions (such as a continuance) are inadequate to cure the prejudice to the government and to ensure future discovery compliance.[151] Accordingly, the court affirmed the trial judge's preclusion order.[152] The *Harris* court also sustained Rule 16(c)(4)'s preclusion clause in the face of a direct constitutional attack.[153]

A related defense expert disclosure issue develops when the defense does not give notice to the prosecution of its intent to interject expert themes into the case. For instance, what if the defense plans to argue "absence of scientific evidence" as a theme at trial? In other words, what if the defense plans to argue that sophisticated scientific

144. *Id.*
145. *Id.*
146. Harris v. State, 195 P.3d 161, 169–71 (Alaska Ct. App. 2008).
147. *Id.* at 169–71.
148. *Id.* at 170–71.
149. *Id.* at 180–81.
150. *Id.*
151. *Id.* at 178–79.
152. *Id.* at 180 ("[W]hen a trial judge is confronted with willful disobedience to discovery rules and orders, the judge is not required to keep delaying the trial to protect the offending party's interest in a full hearing of the evidence. Rather, the judge has the discretion to order the trial to go forward with abridged evidence.").
153. *Id.* at 181; *see also* Earl v. State, No. A-7385, 2002 WL 531097, at *4–5 (Alaska Ct. App. Apr. 10, 2002) (affirming trial judge's order precluding out-of-state defense forensic testing of murder weapon by defense expert, where defense expert report would not be received until a few days before trial; defense had more than seven months to prepare case and no good reason why forensic testing could not have been pursued more timely).

testing was available to the police, but the police neglected to use it? Often, the defense will pursue this theme without providing notice that it intends to call an expert to explain why the scientific evidence would have been relevant. The problem is then compounded if the government gives mid-trial notice of a rebuttal expert.

French v. State[154] is illustrative. There, the defendant was tried for a gunshot assault.[155] In her opening statement, the defense lawyer accused the police of a shoddy investigation and claimed that the police never performed gunshot residue tests on her client's hands.[156] She argued that these tests could have shown that her client was not the shooter.[157] In response, the prosecutor stated that she intended to call a State Crime Lab expert to testify that these sorts of gunshot residue tests were unreliable and were not typically used by Alaska law enforcement.[158] The defense objected because the prosecution had given no notice of intent to call the expert before trial.[159]

In his majority opinion, Judge Mannheimer held that the prosecution had no reason to know that it would need expert gunshot residue testimony or that it would be relevant, until the defense offered its theory of an inadequate investigation.[160] Therefore, the trial judge was within his discretion to relax the usual expert witness disclosure deadline set by Criminal Rule 16(b)(1)(B).[161]

The *French* holding makes sense. "Absence of forensic evidence" can be a powerful defense theme.[162] However, an attorney may not rely upon popular conceptions (or misconceptions) of how probative the questioned scientific evidence might be. Instead, the lawyer should properly file notice of the expert and then call the expert to explain the scientific principles in play to the jury. So, for instance, in the *French* case, the defense lawyer should have filed notice of an independent

154. No. A-7861, 2002 WL 54619 (Alaska Ct. App. Jan. 16, 2002).
155. *Id.* at *1.
156. *Id.*
157. *Id.*
158. *Id.* at *2.
159. *Id.*
160. *Id.*
161. *Id.* at *2 n.1 (holding that Rule 16(b)(1)(i), as applied to lay witnesses, does not require the government to disclose before trial "the names of rebuttal witnesses whose knowledge was not thought to be germane to the case until a position taken by the defense during trial made it so").
162. This conclusion is especially true given the continued debate surrounding the so-called "CSI effect," whereby the popular crime sleuth drama series seems to have artificially elevated jurors' expectations regarding the swiftness, certainty, and availability of forensic testing. *See* Tom R. Tyler, Review, *Viewing* CSI *and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L. J. 1050, 1083–84 (2006).

expert to testify that gunshot residue tests were available and could have detected gunpowder residue (or its absence) on a suspect's hands. The defense attorney could then have called the investigating officer and elicited testimony that the forensic testing could have been done, but was not. Had French's defense attorney adopted this tactic, she would have then been entitled to argue a powerful "sloppy investigation" theme to the jury. But French's lawyer did not do that. She simply waited until her opening statement and sprang the forensic expert issue upon the prosecution. Therefore, the *French* court correctly ruled that the government should be fairly permitted to call an expert to explain that such tests were, in actuality, of very little value.[163]

C. Notice of Defenses

Criminal Rule 16(c)(5) requires the defense to inform the prosecution of the general nature of the defense no later than ten days before trial.[164] The rule requires notice of "the defendant's intention" to rely on alibi, justification (self-defense), duress, entrapment, or any other statutory or affirmative defense.[165] The rule states that defense notice of mental disease or defect or diminished capacity defenses is governed by statute.[166] The defense's failure to comply authorizes the court to grant the prosecution a continuance, or, if a continuance is inadequate, to "impose other sanctions" or preclude the defense.[167]

The pre-1995 version of this rule only required notice of an insanity defense.[168] However, in 1974, a trial court order requiring disclosure of intent to assert an alibi defense (a precursor to the present rule) survived a direct constitutional attack in *Scott v. State*.[169] In *Scott*, the supreme

163. *See also* Hunter v. State, No. A-8868, 2007 WL 2405208, at *14–15 (Alaska Ct. App. Aug. 22, 2007) (finding no discovery violation where prosecution gave mid-trial notice of intent to call a police vice detective to explain the prevailing street price for commercial sex because the state was not placed on notice that testimony about street prostitution prices would be relevant until the sexual assault defendant ran a "commercial sex" defense at trial) (citing Howe v. State, 589 P.2d 421 (Alaska 1979)).

164. ALASKA R. CRIM. P. 16(c)(5).

165. *Id.*

166. *Id.* Notice of diminished capacity and insanity defenses must be provided "within ten days of arraignment" absent a finding of good cause. ALASKA STAT. §§ 12.47.010(b), 12.47.020(a) (2008).

167. May a judge preclude defense witnesses from testifying to an alibi if the judge finds a willful failure to provide pretrial notice? In a pre-1995 case, the court of appeals faced this issue, characterized it as "close," and dodged it. Sellers v. State, No A-1454, 1988 WL 1511370, at *2 (Alaska Ct. App. Feb. 24, 1988) (declining to decide this issue).

168. *See* Williams, *supra* note 137, at 49 n.109.

169. 519 P.2d 774, 787 (Alaska 1974).

court held that the general nature of a defendant's trial defense was not privileged because it was analogous to a pre-trial plea.[170]

However, the *Scott* court also held that a broader pre-trial order, which compelled disclosure of places the defendant claimed to have been, violated the defendant's right against self-incrimination.[171] In 1997, the supreme court reaffirmed *Scott* and found the legislature's initiative to mandate reciprocal discovery in criminal cases a violation of the state constitution.[172]

What if the defense seeks to tactically thwart the purpose of Rule 16(c)(5)'s disclosure requirement and files an intentionally over-inclusive notice? For instance, what if a defense lawyer in a murder case opts to "play it safe" and file pre-trial notice of self-defense *and* alibi? One of those two defenses might be true, but they both are obviously not. What if a defense attorney goes a step further and files a notice which boldly asserts that the defendant "may intend" to assert one of a dozen affirmative defenses and every single justification theory recognized in Title 11? How could a prosecutor contend with such an over-designation tactic?

The best answer combines a professional responsibility component with a tactical threat. The Alaska Code of Professional Conduct states that lawyers may not knowingly violate the rules of a tribunal and must make reasonably diligent efforts to comply with the opponent's proper discovery requests.[173] Nor may an attorney make a false legal or factual statement.[174] The prospect of professional discipline should be reinforced with a very real threat that a disingenuous pleading itself may be admissible as a jury exhibit.

"[W]hen an attorney makes a formal statement in a brief or an in-court stipulation, that statement constitutes an admission."[175] Such evidence would not violate the defendant's right against self-incrimination.[176] The drafters of Criminal Rule 16(c)(5) clearly

170. *Id.*; *see also* Case v. Municipality of Anchorage, 128 P.3d 193, 195–96 (Alaska Ct. App. 2006) (affirming the trial court's finding in a speeding ticket case that there was no apparent infringement upon the privilege against self-incrimination, as the "'meritorious defense' rule merely requires defendants to give advance notice of their general theory of defense").

171. *Scott*, 519 P.2d at 787.

172. State v. Summerville, 948 P.2d 469, 469–70 (Alaska 1997) (per curiam).

173. ALASKA R. PROF. CONDUCT 3.4(c)–(d); Supreme Court Order 1690, effective Apr. 15, 2009.

174. ALASKA R. PROF. CONDUCT 3.3(a)(1).

175. David v. State, 123 P.3d 1099, 1102 (Alaska Ct. App. 2005); *see also* Brigman v. State, 64 P.3d 152, 166–67 & n.28 (Alaska Ct. App. 2003) (collecting cases).

176. *Scott*, 519 P.2d at 787 (Alaska 1974) (holding that court ordered disclosure of intent to assert alibi did not violate right against self-incrimination).

contemplated the admissibility of the defense notice, because an early draft of this proposed rule provided that the notice would not be admissible against the defendant if withdrawn at least ten days prior to trial.[177] The current version of Criminal Rule 16(c)(5) does not expressly address withdrawal or admissibility of the notice as a trial exhibit. Nevertheless, a prosecutor faced with over-designation may legitimately counter with a *David-Brigman*[178]-based motion to admit the document as a jury exhibit.

Trial practitioners should note that mere compliance with the notice provision of this rule does not automatically entitle the defendant to a jury instruction on the asserted defense. The defendant must still offer trial evidence to meet his burden of pleading and proof. If the defendant fails to meet that burden, the trial judge may deny a jury instruction on the asserted defense.[179]

D. Physical Evidence

Criminal Rule 16(c)(6) requires defense counsel to "immediately" notify the prosecutor of defense acquisition of physical evidence.[180] It requires surrender within a "reasonable" time and prohibits defense testing or alteration of the physical item without prior notification to the prosecution and the reasonable opportunity for court action.[181] The defense must reveal all information regarding the manner in which the items were obtained and handled, "unless that information is privileged."[182] Finally, the rule provides that if the evidence is ultimately presented to a jury, the jury may not be informed that the evidence was obtained from the defense.[183]

177. Letter from criminal rules committee member Judge Charles R. Pengilly to Assistant Public Defender Randall Patterson, September 12, 1994, page 2 (containing text of proposed Rule 16(c)(5): "Evidence of the notice provided pursuant to this provision is not admissible against the defendant if withdrawn at least ten days prior to trial.") (copy on file with author).

178. *See David*, 123 P.3d 1099; *Brigman*, 64 P.3d 152.

179. Marshall v. State, 198 P.3d 567, 573 (Alaska Ct. App. 2008) (". . . the fact that a defendant has given pretrial notice of that defense under Rule 16(c)(5) does not exempt him from the rule that, if there is no evidence offered to support each element of the proposed defense, a trial judge need not instruct the jury on that defense").

180. ALASKA R. CRIM. P. 16(c)(6).

181. *Id.*

182. *Id.*

183. *Id.*

This rule, enacted in 1995 and substantially revised in 2001,[184] codified the holding of *Morrell v. State*,[185] which held that a defense attorney has no privilege to obtain physical evidence and then withhold the physical evidence from the government.[186]

With this rule, the supreme court provided an answer to a recurring defense dilemma: what happens when a defense lawyer becomes aware of the location of important physical evidence? What if the source of the defense lawyer's knowledge is a confidential attorney-client communication?

Alaska law is now quite clear. Upon detection of physical evidence, the defense lawyer may do one of two things. First, the lawyer may leave the item in the field and refrain from seizing, altering, or moving it. The lawyer could then validly claim that any attorney-client communication that revealed the location of the item is privileged and rely upon familiar confidential attorney-client communication principles to resist the item's compelled disclosure.[187] On the other hand, if the attorney (or her investigator) physically *seizes* the item, the act of seizure operates as a waiver of attorney-client privilege as to the time, circumstances, manner, and subsequent handling of the item.[188]

This rule makes sense because, by seizing the item, the attorney deprives the police of the opportunity to discover and observe the item in its original location. The defense attorney who intentionally withholds the seized item from police runs the risk of being found in violation of a rule against evidence tampering or hindering prosecution.[189] Therefore, this rule prevents the defense lawyer and her investigator from engaging in a "race" against the police to seize and conceal physical evidence.

184. Amending Criminal Rule 16(c)(6) Concerning Disclosure of Physical Evidence by the Defense, Supreme Court Order 1444, effective Oct. 15, 2001; Supreme Court Order 1191, *supra* note 137.

185. 575 P.2d 1200, 1210–11 (Alaska 1978); *see also* McCormick v. Municipality of Anchorage, 999 P.2d 155, 163 (Alaska Ct. App. 2000) (holding that a motorist's blood drawn by and held by attorney following DWI arrest was subject to prosecution's search warrant and was not privileged); State v. Clark, No. A-2866, 1989 WL 1594926, at *2 (Alaska Ct. App. Apr. 7, 1989).

186. *Morrell*, 575 P.2d at 1210.

187. *See* ALASKA R. EVID. 503(b).

188. *See* Clutchette v. Rushen, 770 F.2d 1469, 1471–72 (9th Cir. 1985); People v. Meredith, 631 P.2d 46, 54 (Cal. 1981).

189. *See* ALASKA STAT. §§ 11.56.610(a), 770(a) (2006).

IV. REGULATION OF DISCOVERY: CRIMINAL RULES 16(d) AND 17

This part will deal with provisions of Rules 16 and 17 that govern both parties' conduct. In particular, this part will discuss what actions neither side may take, as well as the general discretionary power of the trial court to restrict discovery and also the use of the subpoena power to obtain evidence.

A. Neither Side May Instruct Witnesses Not to Speak to the Opposing Party

In *State v. Murtagh*,[190] the supreme court stated that Rule 16(d)(1) of the Alaska Rules of Criminal Procedure "prohibits both the prosecution and the defense from advising witnesses 'to refrain from discussing the case with opposing counsel' and likewise prohibits 'otherwise imped[ing] opposing counsel's investigation of the case.'"[191]

The *Murtagh* court approvingly quoted the 1993 ABA Standards for Criminal Justice, which states that, if asked by a witness, it is not improper for a criminal practitioner to inform witnesses that interviews with opposing counsel are not legally required.[192] Counsel may tell the witness that the witness may contact one attorney prior to speaking with the other attorney.[193] An attorney may inform the witness that it is proper to request an opportunity for both attorneys to be present at the interview—as long as the lawyer does not use this tactic as a means to block opposing counsel's investigation.[194] The supreme court also noted that it is proper to caution witnesses regarding signing a statement prepared by another person.[195] The *Murtagh* court noted that the ABA Standards place similar restrictions on the defense.[196] Similarly, the court of appeals has stated that it is ethically improper for a prosecutor to influence a witness to claim a privilege.[197]

B. Neither Party May Ignore Its Continuing Discovery Obligation

Both parties' discovery obligations are continuing ones.[198] If new, discoverable information is identified, opposing counsel must be

190. 169 P.3d 602 (Alaska 2007).
191. *Id.* at 610 (quoting ALASKA R. CRIM. P. 16(d)(1)) (alteration in original).
192. *Id.* at 610–11.
193. *Id.*
194. *Id.* at 610.
195. *Id.*
196. *Id.* at 610 n.39.
197. Spencer v. State, 642 P.2d 1371, 1376 n.3 (Alaska Ct. App. 1982).
198. ALASKA R. CRIM. P. 16(d)(2).

"promptly" notified.[199] If the new information is discovered "during trial," the party must also notify the court.[200]

A common application of this rule occurs when the prosecution decides to call rebuttal witnesses to contradict facts presented by the defense's case-in-chief. If the prosecution has not previously provided the rebuttal witnesses' record of criminal convictions, it is required to do so as soon as the prosecutor's intent to call the rebuttal witness is formed, which is probably in the midst of the defense's case-in-chief. Failure to do so constitutes a violation of this rule.[201]

C. Neither Party May Freely Disclose Certain Discovery Information to Third Parties

Rule 16(d)(3) states that discovery must be kept in the exclusive custody of counsel 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 [juvenile records] 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 an 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.[202]

Note that if either party wishes to prevent disclosure, the appropriate remedy is an application for a restriction order under Rule 16(d)(3)(A)(vii).[203]

The rule places limitations on how much information the defense lawyer may disclose directly to the defendant.[204] The rule also places

199. *Id.*
200. *Id.*
201. Herrera v. State, No. A-6171, 1997 WL 367214, at *5 (Alaska Ct. App. June 4, 1997) (holding that it was error for the Government not to produce conviction records of its rebuttal witnesses).
202. ALASKA R. CRIM. P. 16(d)(3)(A).
203. *Id.*
204. *See* ALASKA R. CRIM. P. 16(d)(3)(B)–(C).

restrictions on a pro se defendant's access to a witness's conviction record.[205]

D. The Court Retains Broad Discretion to Limit or Defer Discovery

Probably the most overlooked facet of Rule 16 is the provision that expressly permits either party to make applications for restriction of discovery ex parte and in camera.[206] Rule 16(d)(4) provides the trial judge with broad discretion, upon a showing of good cause, to order that discovery be "restricted or deferred" so long as the party that is entitled to the discovery receives it in time to permit "beneficial use thereof."[207] Rule 16(d)(6) expressly permits the application to be brought ex parte, without service upon opposing counsel, and in camera, undisclosed on the public record.[208]

As we have seen, Alaska criminal discovery is primarily a one-way street.[209] For this reason, it will be the prosecutor who most frequently invokes the rules that allow an ex parte application for deferral and restriction of otherwise mandatory discovery. And what a useful tool the rule provides. Considered together, Rules 16(d)(4) and (d)(6) place a powerful tool in the hands of the creative prosecutor-investigator team.

Consider this example: A homicide investigator informs the prosecutor that a jailhouse informant has contacted the police and disclosed that an in-custody, represented, pre-trial homicide defendant has made significant jailhouse admissions regarding the charged homicide.[210] The informant also claims that the suspect has made significant admissions regarding a second, uncharged violent crime.

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205. *See* ALASKA R. CRIM. P. 16(d)(3)(D) (stating that when criminal history records of witnesses are provided to a pro se defendant, the court shall order that the defendant restrict the custody and use of the records and advise the pro se defendant that a violation of the order is punishable as contempt); *see also* Rodes v. City of Kenai, No. A-5536, 1996 WL 33686482, at *4–5 (Alaska Ct. App. Feb. 21, 1996).

206. *See* ALASKA. R. CRIM. P. 16(d)(6).

207. ALASKA R. CRIM. P. 16(d)(4).

208. ALASKA R. CRIM. P. 16(d)(6).

209. *See* Scott v. State, 519 P.2d 774, 785 (Alaska 1974) (expressly pointing out that ascertainment of facts in criminal proceedings is "a one-way street" in which the defendant has the right to stand silent while the prosecutor attempts to meet his burden of proof) (quoting Jones v. Superior Court of Nevada County, 372 P.2d 919, 924 (Cal. 1962)).

210. This example is drawn from the author's practice. Several years ago, the author filed such an ex parte, in camera motion to defer discovery in a jailhouse homicide informant case. The judge granted the motion. *See* State v. Garrison, 3AN-S01-5461 Cr. (original documents on file with the author). Garrison has now been sentenced for two homicides. The cases are closed and the documents relating to this deferral motion are unsealed and open to public inspection.

Whether true or not, the informant's report is clearly discoverable by the target's defense counsel pursuant to Rule 16(b)(1)(ii).[211] However, the chief investigator tells the prosecutor that the investigative team needs time. Given several weeks of delay, the investigative team might be able to corroborate the admissions and further solidify the proof as to the charged homicide, and may be able to solve the uncharged case.

The prosecutor has a dilemma. The discovery rule requires disclosure, but delayed discovery is clearly in the interest of law enforcement and public safety. If the statements were immediately disclosed to the defense, the defendant might contact collaborators, destroy physical evidence, and silence third-party witnesses. The police officers' opportunity to interview other witnesses may evaporate, and the physical safety of the jailhouse informant may be jeopardized.

Rules 16(d)(4) and (d)(6) offer a realistic solution. The prosecutor should make an ex parte and in camera request for an order delaying discovery of the defendant's oral admissions. The prosecutor's motion should be filed under seal and supported by the investigator's affidavit which explains the suspect's admissions; the investigator's interest in pursuing the new leads; and the possible danger to the informant, to the investigation, and to third parties should the motion be denied. The prosecutor should ask for an order deferring discovery of the motion until a certain date (for instance, a specific date several weeks distant) or thirty days before trial, whichever occurs first. Finally, the prosecutor should ask that the motion remain sealed and retained in chambers until that date to avoid inadvertent dissemination within the court system. Such a procedure would allow the investigators precious time to track down new leads and to arrange for the informant's movement to another custody facility.[212]

Prosecutors could conceivably employ an ex parte, in camera request to defer discovery in other contexts. A prosecutor could request ex parte, in camera review of a crime victim's otherwise confidential psychological counseling,[213] medical,[214] or pre-sentence report records.[215]

211. ALASKA R. CRIM. P. 16(b)(1)(ii) (mandatory disclosure of the accused's statements, whether recorded or not); Marshall v. State, 198 P.3d 567, 574 (Alaska Ct. App. 2008) (state's failure to disclose statements attributable to defendant gleaned from an interview with a cooperating informant constituted a discovery violation).

212. Such an order would be consistent with one stated objective of Criminal Rule 16, albeit a seldom-cited one: the rule's deferential goal of "effective law enforcement." ALASKA R. CRIM. P. 16(a).

213. *See* Bourdon v. State, Nos. A-7689, A-7699, 2002 WL 31761482, at *4 (Alaska Ct. App. Dec. 11, 2002) (approving trial judge's conclusion that there was no good faith basis that an in camera review of counseling records would lead to disclosure of favorable evidence); *see also* Fox v. State, 685 P.2d 1267, 1273

Similarly, well-settled Alaska case law permits ex parte, in camera review of questioned police officer personnel records.[216]

E. Subpoena Power

Criminal Rule 17(c) allows either party to subpoena documents to court (subpoena duces tecum) from the records' custodian.[217] Upon application, meaning motion and order, the court may allow the parties' inspection of the materials prior to trial.[218] However, practitioners should note that litigants may not subpoena documents *to their offices*, as this is an abuse of process.[219]

V. PRACTICE ISSUES

This Part will deal with issues that typically arise during criminal trials and investigations. It is organized in three sections. First, discovery issues regarding juror information will be discussed. Second, the law concerning the timing of discovery disclosures will be reviewed. Third,

(Alaska Ct. App. 1984) (affirming the trial court's decision not to allow the defense to review the juvenile record of victim of alleged sexual assault after an in camera inspection); Spencer v. State, 642 P.2d 1371, 1375–76 (Alaska Ct. App. 1982) (agreeing with the trial court's decision not to release the mental records of defendant's estranged wife, a primary prosecution witness, after an in camera inspection).

214. *See* Page v. State, Nos. A-3551, A-5754, 1997 WL 45119, at *5–6 (Alaska Ct. App. Feb. 5, 1997) (upholding the trial court's decision to not disclose the victim's medical records after an in camera inspection).

215. *See* Johnson v. State, 889 P.2d 1076, 1081–82 (Alaska Ct. App. 1995) (denying disclosure of a victim's pre-sentence report records after an in camera inspection).

216. *See* March v. State, 859 P.2d 714, 717–18 (Alaska Ct. App. 1993). The fact that these ex parte procedures are established in Alaska procedural and decisional law is important because Alaska's Code of Judicial Conduct includes a presumptive ban on all ex parte litigant-judicial contacts, with certain limited exceptions, including when "expressly authorized by law." *See* ALASKA CODE OF JUDICIAL CONDUCT, Canon 3B(7)(a).

217. ALASKA R. CRIM. P. 17(c).

218. *Id.*

219. *See* Wyatt v. State, No. A-3607, 1997 WL 250441, at *6 (Alaska Ct. App. May 14, 1997) (approving in dicta that the trial judge properly imposed sanctions upon a prosecutor who used an ALASKA R. CRIM. P. 17(c) subpoena to compel delivery of bank records to his office rather than to the court), *aff'd*, Wyatt v. State, 981 P.2d 109 (Alaska 1999); s*ee also* Fajeriak v. State, 520 P.2d 795, 800 (Alaska 1974) (criticizing district attorney who subpoenaed witnesses to his office rather than to court); *Page*, 1997 WL 45119, at *6–7 (implying that ALASKA R. CRIM. P. 17(c) contemplates document production by the custodian to the court, not directly to the attorney).

this section will examine what information a prosecutor is not required to disclose.

A. Juror Information

In *Tagala v. State*,[220] the court of appeals stated:

> We believe that the prosecutor should disclose to the defense, upon request, criminal records of jurors, at least in cases where the prosecution intends to rely on them. If the state is entitled to examine criminal records of jurors for jury selection, it is fair for the defense to have access to the same information.[221]

However, if the prosecutor's office compiles more than a juror's "criminal records," such as background information or prior results in cases where that person served as a juror, the information is probably protected under Criminal Rule 16(b)(8) as work product.[222]

B. Timing of Disclosure

With few exceptions,[223] Criminal Rule 16 does not establish an express discovery timeline.[224] Rule 3.8(d) of the Alaska Rules of

220. 812 P.2d 604 (Alaska Ct. App. 1991).

221. *Id*. at 613.

222. Ingles v. State, Nos. A-6157, A-3731, 1997 WL 796504, at *1–2 (Alaska Ct. App. Dec. 24, 1997) (holding that in-house Fairbanks District Attorney's juror background records were not discoverable); Hiser v. State, No. A-4980, 1994 WL 16196673, at *1 n.1 (Alaska Ct. App. Nov. 23, 1994) (concluding that the trial judge properly denied request for juror police contact records and results of prior interviews on voir dire because, if such material existed, it was protected as government work product).

223. *See* ALASKA R. CRIM. P. 16(b)(1)(B) (requiring government expert disclosure "as soon as known and no later than forty-five days before trial"); ALASKA R. CRIM. P. 16(c)(4) (requiring defense expert disclosure thirty days before trial); ALASKA R. CRIM. P. 16(c)(5) (requiring notice of statutory and special defenses ten days before trial).

224. Some Alaska trial courts have attempted to impose "standing orders" which purport to establish rigid discovery timelines, but such "local orders" are of questioned validity. In Alaska, rulemaking authority is reserved to the Alaska Supreme Court, not the lower trial courts. *See* ALASKA CONST. art. IV, § 15. Rulemaking is governed by administrative rule. ALASKA R. OF ADMIN. 44(a), 46(b) (providing for statewide court system uniformity in rulemaking and vesting all rulemaking power in the supreme court). Of course, the nuanced constitutional argument regarding the validity of a local discovery rule would be of little utility to a prosecutor faced with a skeptical trial judge's pointed inquiry about why police reports and taped statements had not been disclosed to the defender within a certain number of days of arraignment, e.g., "*as is the long standing order in my courtroom*." The wise prosecutor would best leave the

Professional Conduct merely says that the prosecutor must provide "timely" discovery.[225] The professional conduct rule does not define "timely."

In *In Re Attorney C*,[226] the Colorado Supreme Court was recently required to construe an identically-worded ethical rule. There, the prosecutor did not disclose "witness recant statements" until *after* a preliminary hearing.[227] The Colorado court held that the prosecutor's obligation to disclose exculpatory evidence meant that disclosure should be accomplished prior to the next "critical stage" of the case.[228]

In 2007, a disciplinary hearing committee of the North Carolina Bar relied on this case when imposing disbarment upon Michael Nifong, prosecutor for the botched Duke lacrosse team sexual assault case.[229] In the wake of *Attorney C* and the Nifong disbarment hearing, no prosecutor should allow a preliminary hearing, a grand jury, or a motions deadline to pass with significant undisclosed discovery sitting on her desk.

The timing of government disclosure is a frequently recurring issue. Due to a criminal defendant's right to a speedy trial,[230] criminal cases proceed to trial far more quickly than civil lawsuits. Unlike civil practitioners, who have the luxury of deposing all important witnesses and compelling disclosure of most important facts months (or years) before jury trial, criminal practitioners are often thrust into trial with undiscovered facts lurking in the weeds.

There is no discovery violation if the government discovers new information or the identity of an important witness on the eve of (or in the midst of) trial and then discloses this information immediately because the prosecution and defense learn of the information at approximately the same time.[231]

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effete constitutional bickering for another day and comply with the local practice.

225. ALASKA R. PROF. CONDUCT 3.8(d).

226. 47 P.3d 1167 (Colo. 2002).

227. *Id.* at 1168.

228. *Id.* at 1171–72.

229. *See* N.C. State Bar v. Nifong, 06 D.H.C. 35 (June 16, 2007), *available at* http://www.ncbar.com/Nifong%20Findings.pdf.

230. ALASKA R. CRIM. P. 45.

231. *See* Buie v. State, No. A-4706, 1995 WL 17220362, *10–12 (Alaska Ct. App. Mar. 29, 1995) (finding no violation where prosecution immediatley disclosed identity of witness to defense); *see also* Butler v. State, No. A-9562, 2008 WL 4890238, at *9 (Alaska Ct. App. Nov. 12, 2008) ("From time to time, new information will be revealed at a criminal trial that aids one side or the other, or that hurts one side or the other. To a certain extent, this is an expectable consequence of calling witnesses into court to testify under oath and to be subjected to cross-examination.").

C. Is There Anything a Prosecutor May Refuse to Disclose?

1. *The Defense Is Not Entitled to the Prosecution's Witness List (and the Prosecutor Should Not Expect One From the Defense)*

The prosecution is not required to provide the defense a formal civil-litigation-like witness list. The defense is entitled to disclosure of the names and addresses, and disclosure of statements of witnesses and the accused.[232] But Rule 16 does not require the prosecutor to commit, before trial, to a detailed "script" of witnesses who will actually be called at trial.

In *Savo v. State*,[233] the defendant argued that he was unfairly surprised by two prosecution witnesses because he never received formal notice that the prosecutor would call the witnesses at trial.[234] The court of appeals rejected the argument and held that the rule merely required that the state provide Savo with "[t]he names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements or summaries of [their] statements."[235] The prosecution had done that.[236] Thus, the rule requires disclosure of a broader group of persons than intended witnesses, but it does not require the state to specify who it actually intends to call.[237]

In *Howe v. State*,[238] the supreme court explained why a rule requiring a definitive prosecution commitment of the identity of precise trial witnesses was impractical.[239] The supreme court noted that, often times, a prosecutor will not know until shortly before (or during) trial precisely whom he intends to call to the stand due to witness unpredictability and availability.[240] The court noted that, in criminal cases, serious trial preparation often does not commence until "shortly before trial" due to the "mass of the more routine criminal cases."[241]

May a trial judge require the defense to disclose a "witness list" of potential (non-expert) defense witnesses? As a matter of federal constitutional law, the answer is clearly "yes."[242] But, the answer is completely different as a matter of Alaska constitutional law. In the

232. ALASKA R. CRIM. P. 16(b)(1).
233. No. A-7884, 2002 WL 1467430 (Alaska Ct. App. July 10, 2002).
234. *Id.*
235. *Id.* at *1 (quoting ALASKA R. CRIM. P. 16(b)(1)(A)(i)).
236. *Id.*
237. *Id.* at *2; *see also* Bremond v. State, No. A-5019, 1994 WL 16196672, at *2 (Alaska Ct. App. Nov. 23, 1994) ("Criminal Rule 16 (b)(1)(i) does not require the state to provide the defendant with a list of its trial witnesses").
238. 589 P.2d 421 (Alaska 1979).
239. *See id.* at 424 n.7.
240. *Id.*
241. *Id.*
242. *See* Williams v. Florida, 399 U.S. 78, 86 (1970).

wake of *Scott v. State*,[243] one would think that the answer to this question in an Alaska state courtroom would be well-settled in the negative. However, in *Elson v. State*,[244] the trial judge ordered the defense to disclose its witness list to facilitate meaningful voir dire.[245] The judge coupled this order with another order barring the prosecution staff from contacting the witnesses whose names he compelled the defense lawyer to reveal in open court.[246] The defense lawyer objected but ultimately disclosed the names of several potential witnesses.[247] The court of appeals assumed, "without deciding," that the trial judge's order violated *Scott* but found the error harmless.[248]

In a trial held nine years after *Scott* was decided, a trial judge in another small Alaska community did the same thing. In *Smaker v. State*,[249] the trial judge not only required the defense attorney to announce the names of prospective witnesses, but when the defense lawyer sought to add another witness to the list in the midst of trial, the trial judge denied the request and precluded the witness's testimony.[250] The court of appeals found an abuse of discretion and reversed the conviction.[251]

In the wake of 1974's *Scott* holding and 1997's *State v. Summerville*,[252] no Alaska prosecutor should expect an Alaska trial judge to compel a defense non-expert witness list.

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243. 519 P.2d 774 (Alaska 1974). The *Scott* court held that a pre-trial order requiring a criminal defendant to reveal the names and addresses of his potential witnesses violated article I, section 9 of the Alaska Constitution because it was compelled, testimonial, and incriminating. *Id.* at 786–87.

244. Nos. A-2898, A-4297, 1993 WL 13156823 (Alaska Ct. App. July 28, 1993).

245. *Id.* at *5.

246. *Id.*

247. *Id.*

248. *Id. at* *6. It is clear that the *Elson* trial judge's order precluding the police from contacting any witness whose name was revealed by the defense compounded his error. The trial judge's order essentially ordered an executive branch police agency to stop investigating a crime. The judge had no such authority. Such an order is clearly contrary to public safety policy goals and runs squarely afoul of separation of powers principles. *See* Public Defender Agency v. Superior Court, Third Judicial Dist., 534 P.2d 947, 950 (Alaska 1975) ("When an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts.").

249. 695 P.2d 238 (Alaska Ct. App. 1985).

250. *Id.* at 239–40 ("The Court: 'You do have a duty to name the witnesses at jury selection. And I've always required that for nine years and I've told every counsel that they have a duty to do it and that's why I told you to put the []witnesses on the board.'").

251. *Id.* at 241.

252. 948 P.2d 469, 469–70 (Alaska 1997) (per curiam) ("[T]he names of non-alibi witnesses and their statements cannot be constitutionally compelled.").

2. The Defense Is Not Entitled to Force the Prosecutor to Distinguish Between Case-in-Chief and Rebuttal Witnesses

Criminal Rule 16 does not require the prosecutor to identify which potential witnesses may be called as rebuttal witnesses. The reason is obvious: the prosecutor will have no way to predict, at the beginning of trial, the content of the defense's case-in-chief or if the defense will present a case at all. Therefore, the rule does not require the prosecution to blindly handcuff itself to an advance script of its rebuttal case before it knows what it will be called upon to rebut.[253] Nor may a defendant demand that the prosecutor reveal its anticipated case-in-rebuttal plan before the defense rests.[254]

3. The Defense Is Not Entitled to the Prosecutor's Written List of Questions to Anticipated Witnesses

In Thomas v. State,[255] the prosecutor called a social worker to the stand in a child sexual abuse prosecution.[256] The witness brought with her a list of questions which the prosecutor had given her.[257] On the list, the witness had jotted her anticipated answers.[258] The defense attorney asked to see the list, and cited Evidence Rule 612.[259] The judge ordered disclosure of the witness's answers but denied discovery of the questions.[260] The trial judge ruled that disclosure of the list of questions was protected "work product."[261]

Perhaps surprisingly, the court of appeals affirmed the trial judge on this basis, concluding that the witness had not used the document to

253. Charles v. State, No. A-8546, 2003 WL 23011811, at *2 (Alaska Ct. App. Dec. 24, 2003) ("[T]he discovery contemplated by [Criminal Rule 16(b)(1)(A)(i)] is intended to take place at an early stage in the proceedings, and at that stage the prosecution often will have no clear idea who [among the persons having relevant knowledge] will be presented as witnesses at trial and who, among the witnesses, will be presented in the case in chief and who will be reserved for rebuttal." (quoting Howe v. State, 589 P.2d 421, 424 (Alaska 1979)) (alteration in original)).

254. Elson v. State, Nos. A-2898, A-4297, 1993 WL 13156823, at *8 (Alaska Ct. App. July 28, 1993) (rejecting defense's claim that the prosecution should have been required to reveal its intended case-in-rebuttal before deciding whether to rest the defense's case-in-chief).

255. No. A-6015, 1997 WL 235504 (Alaska Ct. App. May 7, 1997).

256. *Id.* at *8.

257. *Id.*

258. *Id.*

259. Under Alaska Rule of Evidence 612(a), a defendant is entitled to examine "[a]ny writing . . . used by [the witness] to refresh [her] memory while testifying." Rule 612(c) directs a trial judge to examine the document in camera, excise any privileged material from the document, then order disclosure of the rest.

260. *Thomas*, 1997 WL 235504, at *8.

261. *Id.*

refresh her recollection and that the list of questions was protected work product.[262] This outcome is questionable. An attorney should not rely on work-product principles to protect a document freely given to a witness and then carried by the witness to the stand.[263] However, the *Thomas* trial judge's ruling disclosing the witness's *written answers* was clearly correct. If the witness creates a written summary of anticipated *answers*, this "written statement" is clearly discoverable.[264]

4. The Defense Is Not Entitled to Discovery of the Prosecution's Chief Investigating Officer's Notes Made During Trial in the Courtroom

In Alaska criminal practice, the prosecutor is often permitted to have the investigative agency's chief investigating officer sit at counsel table with her in order to assist in the presentation of evidence. Especially in a complex case, the chief detective's assistance is often critical. Often, the chief investigating officer will also be a trial witness on the merits.[265]

What if a sharp-eyed defense lawyer spots the detective passing written notes back and forth with the prosecutor? Wouldn't such notes constitute a "written statement" of a witness and be subject to disclosure?[266] The answer is no. In *Smith v. State*,[267] this very issue arose. The court of appeals concluded that the notes which passed between the investigating officer were protected work product and were based upon the same trial testimony the defendant and his lawyer had witnessed.[268] Therefore, they were not discoverable.[269]

262. *Id.* at *9.

263. Lowery v. State, 762 P.2d 457, 460 (Alaska Ct. App. 1988) (stating that work-product protection is waived by calling the witness to the stand as to matters covered by the testimony).

264. *See* ALASKA R. CRIM. P. 16(b)(1)(A)(i); *cf.* Smith v. State, No. A-6183, 1997 WL 688646, at *3–4 (Alaska Ct. App. Nov. 5, 1997) (holding that the prosecutor's failure to preserve and disclose a diagram drawn by a witness during a pre-trial interview was harmless error beyond a reasonable doubt, primarily because the diagram was similar to an earlier diagram the witness had drawn for police).

265. Alaska's evidence rules allow the trial judge to exempt the chief investigating officer from the witness exclusion rule. *See* ALASKA R. EVID. 615(3).

266. *See* ALASKA R. CRIM. P. 16(b)(1)(i).

267. No. A-6183, 1997 WL 688646 (Alaska Ct. App. Nov. 5, 1997).

268. *Id.* at *2.

269. *Id.*

5. The Defense Is Not Entitled to the Prosecutor's Pre-trial Interview Notes of Witness Interviews—as Long as the Witness Statements are Inculpatory, and the Substance Has Already Been Disclosed

As explained above,[270] if a prosecutor conducts an unrecorded interview of a trial witness before trial—provided that the witness is not a co-defendant—and learns of new, inculpatory facts, Alaska's criminal discovery rule technically does not compel discovery of the new fact.[271] However, prosecutors must be cautious: this answer changes if the pre-trial interview is recorded,[272] reduced to writing,[273] or discloses an exculpatory or mitigating fact.[274] Finally, prosecutors who learn new, discoverable facts in the midst of trial are required to notify both the defense attorney and the court of the new development.[275]

Notwithstanding *Sivertsen v. State*, given the court of appeals' frequent suggestion that this quirk in Rule 16 is subject to prosecutorial manipulation,[276] and given Rule 16's stated objectives of minimizing trial delay and surprise,[277] the cautious prosecutor should voluntarily document and disclose newly discovered facts.

6. The Defense Is Not Entitled to Broad, "Anti-constitutionalist" Discovery

Alaska has no shortage of rugged individualists who vigorously assert personal and political independence from government control. Periodically, Alaska criminal courts are confronted with pro se litigants

270. *See supra* Part II.A.

271. Sivertsen v. State, 963 P.2d 1069, 1071–72 (Alaska Ct. App. 1998), *disapproved in part on other grounds*, 981 P.2d 564 (Alaska 1999) (holding that Criminal Rule 16(b)(1) does not normally require a prosecutor to disclose oral statements made by a witness during a trial preparation interview); *see also* Nook v. State, No. A-7837, 2004 WL 1336268, at *5 (Alaska Ct. App. June 16, 2004) (holding that pre-trial interview statement was not discoverable under *Brady*, or Rule 16(b)(3) because it was not exculpatory at the time it was made). In a pre-trial interview, witness claimed that defendant had kicked victim fifteen times causing death, but in a statement to police, witness claimed that defendant kicked victim twenty or twenty-five times. *Id*.

272. ALASKA R. CRIM. P. 16(b)(1)(A)(i).

273. *Id.*

274. ALASKA R. CRIM. P. 16(b)(3).

275. ALASKA R. CRIM. P. 16(d)(2).

276. *Sivertsen*, 963 P.2d at 1072. ("We recognize that this interpretation of Criminal Rule 16(b)(1)(i) could be abused."); *see also* Elson v. State, Nos. A-2898, A-4297, 1993 WL 13156823, at *12–14 (Alaska Ct. App. July 28, 1993) (recognizing that such a rule may encourage the prosecutor to abuse the system by simply refusing to make any recordings of interviews); Shaw v. State, No. A-3697, 1992 WL 12153173, at *10 (Alaska Ct. App. May 6, 1992) (acknowledging the potential for abuse by not creating written or recorded evidence).

277. ALASKA R. CRIM. P. 16(a).

who actively dispute the authority of Alaska's state court system, state political subdivisions, and state legal institutions. Some of these litigants deny the constitutional authority of the state to adjudicate their criminal misconduct at all.[278]

What if such "anti-constitutionalists" demand broad "discovery" aimed at disclosure of documents which they claim might undermine the authority of the government to bring the defendant before its courts? Such broad "anti-constitutionalist" discovery falls outside the ambit of Rule 16. For example, in *Collier v. Municipality of Anchorage*,[279] the defendant sought information concerning the creation of the courts, the chartering of Anchorage, "the true name of his 'government' accuser, IRS documents, and police operating procedures."[280] This request was denied at trial and the decision was affirmed by the court of appeals, which held that Rule 16 did not require any such disclosures and, furthermore, that the information requested was not relevant because it had no bearing on the defendant's guilt.[281]

7. The Defense Is Not Entitled to Have the Prosecution Gather Information for It

A fundamental premise underlying Rule 16 is that the government is required to disclose certain broad categories of existing information to a criminal defendant. However, Rule 16 does not compel the government to become the defense attorney's investigative or litigation research staff. In other words, the government is not required to actively assist the defendant in the preparation of her case by creating documents that do not already exist.

In *State v. Clark*,[282] the trial judge precluded an informant from testifying at trial because, immediately on the eve of trial, he revealed

278. One is struck by the frequency with which litigants' challenges to the authority of state legal institutions arise in cases from Palmer. *See, e.g.*, Crane v. State, 118 P.3d 1084 (Alaska Ct. App. 2005) (rejecting challenge upon the authority of the Bar Association); Winterrowd v. State, No. A-9588, 2007 WL 1378154, at *4 (Alaska Ct. App. May 9, 2007) (challenging police officers' authority).

279. 138 P.3d 719 (Alaska Ct. App. 2006)

280. *Id.* at 721.

281. *Id.* at 722; *see also* Gladden v. State, 153 P.3d 1028, 1033 (Alaska Ct. App. 2007) (refusing pro se defendant's request concering "lawyers" and "the bar association," or documents proving that his prosecutor and trial judge were "public officers of the State of Alaska"); *Winterrowd*, 2007 WL 1378154, at *4 (affirming decision refusing to compel prosecution to produce documents that would prove that police officers were "public officers with police powers"); Allen v. State, Nos. A-7183, A-4376, 2001 WL 357133, at *3–4 (Alaska Ct. App. Apr. 11, 2001) (affirming refusal to disclose correctional facility policies in a jailhouse assault on officer case).

282. 568 P.2d 406 (Alaska 1977).

that he had used an alias.[283] The trial judge ruled that the prosecution had not used due diligence in discovering the informant's true identity and ruled that he would be precluded from testifying at trial.[284] The prosecution appealed, and the supreme court reversed.[285] Justice Connor, writing for the court, explained that, "Nothing in Rule 16 requires the prosecution to discover information which it does not possess or control, or to prepare the defendant's case for him."[286] Instead, the rule is limited to instances where the state actually possessed the requested information.[287]

Prosecutors should be watchful for aggressive defense production requests and carefully identify those demanding production of documents which *already exist* and those demanding a government agency *create a document that does not yet exist*. Where the defense requests information that does not already exist, *Clark* precludes a trial judge from ordering its production.[288]

This issue occasionally arises where a defense lawyer points to a police computer dispatch printout that discloses that half a dozen police officers arrived on-scene at a street crime investigation. As is often the case, only two or three officers may have submitted formal, written reports. The defense attorney demands an explanation. The prosecutor responds that each of the officers that conducted substantive investigations wrote and submitted reports and the others did not. Unsatisfied, and wary of undisclosed significant facts, the defense attorney demands an affirmative showing that the other officers wrote no report or an affirmative statement from the other officers that they did no substantive investigation. May a judge order the other police

283. *Id.* at 407–08. Of course, an alias is merely a specific false claim of identity. As Judge Coats explained, "[n]either the cases nor Criminal Rule 16 specifically requires the state to produce for the defendant evidence showing that a witness has been dishonest on particular occasions." Burke v. State, No. A-4683, 1993 WL 13156813, at *1 n.2 (Alaska Ct. App. Aug. 4, 1993).

284. *Clark*, 568 P.2d at 407–08.

285. *Id.* at 408.

286. *Id.*

287. *Id.*; *see also* Rodes v. City Of Kenai, No. A-5536, 1996 WL 33686482, at *5 n.6 (Alaska Ct. App. Feb. 21, 1996) ("The city was not required to create and produce written or recorded statements that it did not possess or that did not exist.").

288. *See* Westbrook v. State, No. A-8464, 2003 WL 22723488, at *3 (Alaska Ct. App. Nov. 19, 2003). Of course, where a document exists in the possession of a third party, but it has not been seized by police, the defendant may move for a subpoena under Rules 16(b)(5) and (7), and 17(c). *See supra* Part II.F.

officers *to create* reports describing what they did or did not do at the scene? No. Such an order would run squarely afoul of *Clark*.[289]

8. Defense Fishing Expeditions

What if the defense files a pre-trial motion requesting that the prosecution provide police reports regarding every single witness's past law enforcement contacts?[290] Prosecutors should oppose such "fishing expeditions," and defenders should be prepared to counter and articulate why they have a good faith basis for the request.[291]

Alaska law restricts a defendant's ability to engage in a broad-ranging "fishing expedition" for impeachment and cross-examination material—especially where that "fishing expedition" will trigger a prosecution request for in camera review of any questioned materials.

In *Johnson v. State*,[292] the defendant was prosecuted for contributing to the delinquency of a minor.[293] Johnson engaged in "grooming" behavior with a 15-year-old boy and his 13-year-old sister and, on several occasions, had helped them run away from home.[294] Johnson's defense was that the children's father was abusive and, before trial, he filed discovery motions aimed at discovering specific details of the father's abusive behavior.[295] The trial judge denied the motions, and the court of appeals affirmed because there was no evidence that Johnson was aware of the abuse at the time of his alleged crime.[296]

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289. *See also* Charles v. State, No. A-8546, 2003 WL 23011811, at *2 (Alaska Ct. App. Dec. 24, 2003) ("[W]e have held that Criminal Rule 16(b) does not impose a duty on the prosecutor or police to create a written summary of a witness's oral statements made shortly before trial.") (citing Sivertsen v. State, 963 P.2d 1069, 1071–72 (Alaska Ct. App. 1998), *disapproved in part, but on other grounds,* 981 P.2d 564 (Alaska 1999)).

290. *Cf.* Coney v. State, 699 P.2d 899, 901 (Alaska Ct. App. 1985) (remanding to allow parties to argue the relevancy of victim's arrest record where the victim was the prosecution's most critical witness, and where the defense squarely pointed at the victim as the "real suspect.").

291. "[T]he party seeking judicial [in camera] review must provide the court with some reason to justify a detailed review of the materials—some reason to suppose that the materials will contain pertinent information. . . . [A] party has no right to demand that the trial judge conduct an *in camera* examination of confidential records or other privileged materials based merely on the possibility that these records might contain something that could be used to impeach a witness's general credibility or the witness's testimony on collateral issues." Risinger v. State, Nos. A-6374, A-3849, 1998 WL 411300, at *2 (Alaska Ct. App. July 22, 1998).

292. No. A-6402, 1998 WL 191152 (Alaska Ct. App. Apr. 22, 1998).

293. *Id.* at *1.

294. *Id*.

295. *Id.*

296. *Id.*

Johnson is consistent with subsequent Alaska cases holding that a defendant's discovery rights are broad but not limitless. To be entitled to disclosure of otherwise undiscoverable information, the defense must offer more than a generalized assertion that the information might lead to impeachment evidence.[297]

However, prosecutors should exercise great care in the area of self-defense and justification cases. At least one earlier unpublished opinion is seemingly at odds with *Johnson.* In *Roseman v. State*,[298] a police officer was prosecuted for use of excessive force upon an arrestee.[299] After conviction, he moved for a new trial, arguing that he was improperly denied discovery of a police report that showed the arrestee had fought with a police officer in the past.[300] The trial judge denied the motion, but the court of appeals reversed, reasoning that the prosecution's suppression of the police report was not harmless beyond a reasonable doubt.[301]

As an evidentiary issue, *Roseman* is of questioned validity now, because Roseman would be prohibited from introducing the arrestee's prior specific violent act at trial unless Roseman was subjectively aware of that event when he used force against him.[302]

But the prosecutor's obligation to discover exculpatory information is independent of the information's admissibility. Therefore, in a self-defense (or justification) case, the prosecutor's safest course is to discover a full, APSIN "arrest record" printout and invite a defense motion to compel disclosure of the full police report. If the prosecutor

297. *See, e.g.*, Cockerham v. State, 933 P.2d 537, 543–44 (Alaska 1997) (stating a "defendant's right to access information . . . is not absolute"); *see also* Linne v. State, 674 P.2d 1345, 1354 (Alaska Ct. App. 1983) (affirming the denial of a request for discovery of "all bank records of [the victim]" in a theft prosecution as too broad); Bourdon v. State, Nos. A-7689, A-7699, 2002 WL 31761482, at *3–4 (Alaska Ct. App. Dec. 11, 2002) (affirming denial of discovery motion seeking medical, mental health, alcohol counseling, and anger management records which were unrelated to charged offenses); Katelnikoff v. State, Nos. A-6848, A-4064, 1999 WL 396885, at *3 (Alaska Ct. App. June 16, 1999) (affirming denial of a "shotgun" discovery motion supported by nothing more than the hope that Crisis Center documents might contain impeachment evidence); Cytanovich v. State, Nos. A-6287, A-3762, 1998 WL 80110, at *3–4 (Alaska Ct. App. Feb. 25, 1998) (affirming trial judge who denied motion to disclose police reports about the victim's drug history and violent history; trial judge only required the prosecutor to disclose reports that she had reviewed).

298. No. A-659, 1985 WL 1078004 (Alaska Ct. App. Dec. 26, 1985).

299. *Id.* at *1.

300. *Id.* at *3–4.

301. *Id.* at *4–5.

302. Alaska law on this point was very confused before 1996. *See* James Fayette, *"'If You Knew Him Like I Did, You'd Have Shot Him, Too . . .' A Survey of Alaska's Law of Self–Defense*, 23 ALASKA L.R. 171, 213–14 (2006).

has subjectively reviewed prior reports, then those should be discovered.[303]

Where the defense establishes that the information it seeks is more than *Bourdon-Katelnikoff* tangential or "impeachment" evidence, the court of appeals has articulated that the trial judge must review the information in camera.[304]

9. Police Officer Personnel Records and Misconduct

If the defense shows that it has a "good faith basis for asserting that materials in an officer's personnel file may lead to the disclosure of favorable evidence, the trial court should conduct an in camera review" of the personnel file and rule on disclosure.[305] The defense's entitlement to an in camera review may be waived if it is not made in a timely manner. A mid-trial request is untimely.[306] The defense showing must be more than a speculative "fishing expedition."[307]

Prosecutors should be ever-wary of police officer misconduct issues. A comprehensive survey of this area of the law is beyond the scope of this article. However, prosecutors should be aware that the *Brady-Giglio-Kyles* line of cases may impose a duty of disclosure regarding verified incidents of police misconduct in the officer's personnel files.[308] A prosecutor should proceed very cautiously if she encounters any of the following categories of derogatory officer information: (1) a finding of misconduct, such as a disciplinary letter, that reflects on the officer-witness's truthfulness; (2) a finding of misconduct that indicates that the officer-witness may be biased; (3) a credible allegation of misconduct, subject to pending investigation, that reflects on the truthfulness or possible bias of the officer-witness; and (4)

303. *See* Cytanovich v. State, Nos. A-6287, A-3762, 1998 WL 80110, at *4 (Alaska Ct. App. Feb. 25, 1998).

304. *See* Johnson v. State, 889 P.2d 1076, 1081 (Alaska Ct. App. 1995).

305. March v. State, 859 P.2d 714, 718 (Alaska Ct. App. 1993) (italics omitted).

306. Dana v. State, 623 P.2d 348, 355 (Alaska Ct. App. 1981).

307. *Id.*; *see also* Allen v. State, Nos. A-7283, A-4376, 2001 WL 357133, at *3–4 (Alaska Ct. App. Apr. 11, 2001) (affirming refusal to disclose correctional facility policies in a jailhouse assault on officer case).

308. *See* United States v. Veras, 51 F.3d 1365, 1374 (7th Cir. 1995) (holding that the defendant was entitled to disclosure of information that arresting police officer was being investigated for fraud involving money used to pay informants, since allegations would have been valuable for impeachment purposes due to their unquestionably serious nature); Dreary v. Gloucester, 9 F.3d 191 (1st Cir. 1993) (holding that a 10-year old disciplinary finding that an officer falsified overtime records was admissible); *cf.* United States v. Ortiz, 5 F.3d 288 (7th Cir. 1993) (holding that a trial court was within its discretion in excluding a letter from an officer's personnel file indicating that he falsely reported hours of court attendance).

a past criminal charge or pending criminal charge brought against the officer-witness.

Often, the prosecutor's safest and most defensible course is to submit the issue to the trial judge by in camera, ex parte motion.[309] The prosecutor could seek the court's order either directing or denying discovery of the questioned misconduct report. If the misconduct is ordered to be discovered, the prosecutor could seek a re-disclosure prohibition, forbidding the defense from disseminating the report beyond the trial defense team. The court could also direct that the defense refrain from eliciting the derogatory information at trial absent a prior application brought outside the jury's presence.

D. Procedural Consequences of Discovery Practice

1. *Pre-trial Motions to Compel Discovery Toll Rule 45*

Alaska law is well-settled that, where a defendant seeks the court's order to compel the prosecution to provide requested discovery, the motion tolls Rule 45.[310]

2. *The Defense Remedy for a Perceived Discovery Violation Is a Continuance or a Mistrial—Rarely Suppression, Striking Testimony, or Preclusion*

When a discovery violation comes to light before trial, the defendant is entitled to a continuance to re-evaluate the defense case.[311] If there has been a discovery violation and new information comes to light after trial has already started,[312] and the defense has been prejudiced, "the trial court should ordinarily grant a defendant's request for a mistrial."[313] The defendant is rarely entitled to outright suppression or preclusion of the evidence. Many Alaska cases stand for this proposition.[314]

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309. *See* ALASKA R. CRIM. P. 16(d)(4), (6).

310. Snider v. State, 958 P.2d 1114, 1118–19 (Alaska Ct. App. 1998); Drake v. State, 899 P.2d 1385, 1388 (Alaska Ct. App. 1995).

311. Friedmann v. State, 172 P.3d 831, 833 (Alaska Ct. App. 2007).

312. Not every mid-trial emergence of new evidence is a discovery violation. If the police and the prosecution were unaware of a new fact, and that fact surfaces in the midst of trial, and the prosecution and the defense learn of the new fact at the same time, there is no discovery violation. *See* Buie v. State, No. A-4706, 1995 WL 17220362, at *9–10 (Alaska Ct. App. March 29, 1995).

313. *Friedmann*, 172 P.3d at 833.

314. *See, e.g.*, Bostic v. State, 805 P.2d 344, 347–48 (Alaska 1991); Christie v. State, 580 P.2d 310, 312 n.2 (Alaska 1978) (stating that "dismissal is rarely an appropriate remedy for untimely compliance with discovery"); Des Jardins v. State, 551 P.2d 181, 187 (Alaska 1976) (stating that "[t]he proper procedure for a trial court faced with prosecution failure to disclose to the defense evidence that

What if the government fails to appraise the defense of the current address of a potential witness? What if the defense alleges that, had they been informed of the witness's current address, they would have been able to interview the witness? Is the defense entitled to have the witness's testimony stricken? No.

The court of appeals explained that, to be entitled to any remedy, the defense must articulate prejudice, going beyond the mere inability to interview the witness. In *Calix v. State*,[315] a critical witness in a sexual assault prosecution gave a statement to police and then moved to California before trial.[316] The prosecution disclosed the witness's police statement but failed to update discovery when the witness moved out of state.[317] On appeal, Calix argued that the witness's testimony should have been stricken because he was unable to interview the witness prior to trial.[318] The court of appeals found this allegation insufficient to require the trial court to strike the witness's testimony.[319]

Where the defendant moves for a new trial and establishes that the prosecution wrongfully suppressed evidence of which it was aware, the analysis changes sharply. Where the prosecution violates its duty of disclosure regarding *known* evidence, the defendant is entitled to a new

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it is required to provide, until just before it plans to use such evidence, is to grant a continuance long enough to allow the defense attorney adequate time to prepare"); Riney v. State, 935 P.2d 828, 838 (Alaska Ct. App. 1997) (holding that a violation of Criminal Rule 16(b) justified a mistrial, but not suppression of the evidence); Russell v. State, 934 P.2d 1335, 1342 (Alaska Ct. App. 1997) (holding that the remedy for surprise evidence mid-trial is a continuance or mistrial, and not suppression of the evidence); Wortham v. State, 689 P.2d 1133, 1142 (Alaska Ct. App. 1984) (finding that defendant waived right to relief for alleged discovery violation when he did not make a motion for the material or ask for continuance, absent prejudice to him or bad faith); Mujahid v. State, No. A-9573, 2008 WL 4757152, at *3–4 (Alaska Ct. App. Oct. 29, 2008) (holding dismissal not warranted for discovery violation which was detected and remedied mid-trial); Yoder v. State, No. A-9882, 2008 WL 2853443, at *6 (Alaska Ct. App. July 23, 2008) ("Yoder was not entitled to a continuance or a mistrial because he did not show any plausible way in which his defense could have been prejudiced by these discovery problems."); French v. State, No. A-7861, 2002 WL 54619, at *3 (Alaska Ct. App. Jan. 16, 2002) (disclosure of 911 tape on first day of trial); Lyon v. State, Nos. A-3654, A-6219, 1997 WL 563137, at *3 (Alaska Ct. App. Sept. 10, 1997) (holding defendant was not entitled to suppression of disclosure of Intoximeter calibration on day of trial).

315. No. A-6854, 1999 WL 34002417 (Alaska Ct. App. Oct. 13, 1999).
316. *Id.* at *2–3.
317. *Id.* at *3.
318. *Id.*
319. *Id.*

trial unless the court is convinced that the failure to disclose the evidence was harmless beyond reasonable doubt.[320]

CONCLUSION

Alaska's criminal discovery rules place powerful tools in the hands of the criminal defender. The rules compel timely government disclosure of a broad spectrum of information and serve the important public policy goal that Alaska state court defendants have a better chance at a fair trial in state court than in other jurisdictions. One seldom encounters a defender who doubts that an Alaska defendant is more advantageously situated (at least in terms of discovery rights) than defendants in other jurisdictions—such as those jurisdictions where neither custodial interrogations nor grand jury presentations are tape-recorded and where discovery rights are not enshrined in directive criminal procedural rules. At least viewed from the defense perspective, there can be little doubt that the framers of Alaska's criminal discovery procedure rules heeded Justice Brennan's call that facts—not surprise and maneuver—should determine the outcome of criminal cases.

Alaska's rules certainly provide a restricted degree of discovery for the government. With very few exceptions, an Alaska prosecutor may not compel the defender to "tip her hand." But, an able Alaska prosecutor is not completely helpless. Alaska's rules do allow prosecutors to compel fundamental expert discovery, pre-trial notice of defenses, and disclosure of physical evidence and also expressly permit ex parte, in camera applications to restrict or delay discovery. As we have seen, many of these procedural devices are useful tools in sensitive cases.

As long as criminal justice is administered in the context of an adversarial litigation system populated by aggressive and skilled lawyers, discovery disputes will persist. This Article will not change that. But this survey is offered to my criminal bar colleagues in the hope that it will assist all criminal practitioners and judges to cogently navigate the boundaries of each party's discovery obligations. Lawyers will always disagree on the facts and outcome of specific cases, but they should at least be able agree on what the law requires and about how courts have decided similar issues in the past.

320. Roseman v. State, No. A-659, 1985 WL 1078004, at *5 (Alaska Ct. App. Dec. 26, 1985).