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Criminal Procedure in Alaska

Jeff M. Feldman
University of Washington School of Law

CRIMINAL PROCEDURE IN ALASKA

BY
JEFFREY M. FELDMAN*

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* B. A., 1972 and J. D., 1975, Northeastern University; Partner, Gilmore & Feldman; member, Alaska and Rhode Island Bars; Assistant Public Defender, Alaska Public Defender Agency, 1976-1978; Law Clerk, Alaska Supreme Court, 1975-1976.

INTRODUCTION

Two years ago this review published an article which reviewed search and seizure law in Alaska.[1] Because the local bar and bench seem to have found that article to be useful, it appeared worthwhile to put together a similar review of the remainder of Alaska's law of criminal procedure. Like its predecessor, this article will review and analyze the law of criminal procedure in Alaska, isolating those areas in which the Alaska Legislature or the Alaska Supreme Court has departed from the prevailing approach to procedure in criminal cases and predicting probable outcomes to procedural issues still unresolved in Alaska.

A. *Sources of Procedural Rights*

Procedural rights in Alaska, in addition to those provided by the United States Constitution emanate from four sources. First, Article I of the State Constitution contains various sections which parallel and broaden the provisions of the Bill of Rights found in the United States Constitution. For example, Section 7[2] of Article I expands the traditional entitlement to due process of law by adding "the right of all persons to fair and just treatment in the course of legislative and executive investigations." Similarly, Sections 11[3] and 12[4] of Article I establish a constitutional right to release on bail,[5] a matter not addressed in the Federal Constitution.

1. Feldman, *Search and Seizure in Alaska: A Comprehensive Review*, 7 UCLA-ALASKA L. REV. 75 (1977) [hereinafter cited as Feldman].

2. ALASKA CONST. art. I, § 7 provides: "No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of the legislative and executive investigations shall not be infringed."

3. ALASKA CONST. art. I, § 11 provides:

> In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve; except that the legislature may provide for a jury of not more than twelve nor less than six in courts of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

4. ALASKA CONST. art. I, § 12 provides: "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public."

5. The constitutional right to bail is codified in AS § 12.30.010 et seq; *see* Part II (B) of this Article *infra*. For other cases in which the Alaska Supreme Court has construed provisions of the Alaska Constitution more broadly than comparable provisions of the Federal Constitution, *see* Zehrung v. State, 569 P.2d 189 (Alaska 1977) *opinion on rehearing*, 573 P.2d 858 (Alaska 1978) (search and seizure); Woods & Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977) (search and seizure); Blue v. State, 558 P.2d 636 (Alaska 1977) (right to counsel at pre-indictment line-up); Isakson v. Rickey, 550 P.2d 359 (Alaska 1976) (equal protection); Yarbor v. State, 546 P.2d 564 (Alaska 1976) (speedy trial); Scott v. State, 519 P.2d 774 (Alaska 1974) (self-incrimination); RLR v. State, 487 P.2d 27 (Alaska 1971)

Title 12 of the Alaska Statutes provides a second source of procedural rights. In most instances, these rights have been codified from court decisions involving constitutional issues. Exceptions to this pattern of codification can be found in the provisions regulating misdemeanor arrests,[6] rights of a detainee after arrest,[7] and release on bail.[8]

The Alaska Rules of Criminal Procedure, adopted by the Alaska Supreme Court, constitute the third source of procedural rights. As will be discussed later in this article, the Criminal Rules, as adopted, construed, and applied by the Alaska Supreme Court, have provided a broad basis for the expansion of procedural rights in several important areas. For example, grand jury practice[9] and discovery[10] in criminal cases have been substantially modified by the provisions of Alaska's Criminal Rules.

In exercising its authority as the final arbiter of the meaning of the three sources noted above, the Alaska Supreme Court constitutes the fourth source of procedural rights. This article will highlight and analyze the court's more important decisions in criminal procedure.

The Alaska Supreme Court has noted in several cases that the protections afforded by various provisions of the State Constitution may be broader than those provided by parallel provisions of the federal constitution.[11] For example, in *Zehrung v. State*[12] the court interpreted Article I, Section 14[13] of the Alaska Constitution as affording arrestees a greater protection from warrantless pre-incarceration inventory searches than that provided by the United States Supreme Court in decisions applying parallel provisions of the Federal Constitution. Similarly, the decision in *Baker v. City of Fairbanks*[14] enlarged and broadened the right to a jury trial.

(jury trial in delinquency proceeding); Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970) (jury trial).

6. *See* AS § 12.25.030.
7. *See* AS § 12.25.150.
8. *See* AS § 12.30.010-.080.
9. *See* ALASKA R. CRIM. P. 6 and Part II (D) of this article, *infra.*
10. *See* ALASKA R. CRIM. P. 16 and Part II (E) of this article, *infra.*
11. Smith v. State, 510 P.2d 793 (Alaska 1973); Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).
12. 569 P.2d 189 (Alaska 1977).
13. ALASKA CONST. art. I, § 14 provides:

> The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated. No warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

14. 471 P.2d 386 (Alaska 1970).

B. *Remedies*

Once a procedural violation has been established, four remedies may be applied. First, evidence illegally obtained by law enforcement officers may be suppressed[15] by the trial court. Alaska follows the federal lead in this area and routinely applies the exclusionary rule adopted in *Wong Sun v. United States*.[16] Recent decisions of the Alaska Supreme Court indicate that the *Wong Sun* exclusionary rule has not lost favor in Alaska;[17] the court declined, however, to remedy use of excessive force by police officers in arresting a defendant by excluding evidence which was a product of the arrest. In *State v. Sundberg*[18] the Alaska Supreme Court reversed Superior Court Judge Victor Carlson who had granted the defendant's motion to suppress evidence derived from his arrest which was effectuated by a police officer who shot Sundberg as he fled. Because there were no facts supporting a reasonable belief by the officer that Sundberg was armed or dangerous (he fled from the scene of a property offense), Judge Carlson ruled that he had been subjected to an "unreasonable seizure" in being shot and, therefore, granted the defendant's motion. The Alaska Supreme Court reversed, holding that use of excessive force by police officers can be remedied by disciplinary action or civil suits and the exclusion of evidence is not warranted. These remedies exist, of course, for all constitutional violations by police officers including warrantless searches and oppressive and coercive interrogation. The Alaska Supreme Court distinguished *Sundberg* on the grounds that the use of excessive force by Alaska police officers has not been so widespread as to mandate application of the exclusionary rule as a remedy. The record on this issue, however was very "thin", and is the subject of considerable disagreement among attorneys, judges and commentators.

Certain procedural violations can be remedied by the granting of a continuance or other intermediate sanctions.[19] For example, the Alaska Supreme Court has stated that violations of discovery provisions should usually be remedied by the granting of a continuance or the imposition of monetary sanctions against the offending party.[20]

15. Anderson v. State, 555 P.2d 251 (Alaska 1976); State v. Spietz, 531 P.2d 521 (Alaska 1975).

16. 371 U.S. 471 (1963).

17. State v. Cassell, 602 P.2d 410 (Alaska 1979); Zehrung v. State, 569 P.2d 189 (Alaska 1977).

18. 611 P.2d 44 (Alaska 1980).

19. *See* Braham v. State, 571 P.2d 631 (Alaska 1977); Scharver v. State, 561 P.2d 300 (Alaska 1977). *But see* Stevens v. State, 582 P.2d 621 (Alaska 1978).

20. Des Jardins v. State, 551 P.2d 181 (Alaska 1976). The effectiveness of this approach is discussed in Part II (E), *infra*.

Dismissal of the prosecution constitutes a third possible remedy that can be appropriate in certain instances.[21] Serious violations of the rules regulating the grand jury process[22] require that the indictment be dismissed and the matter submitted again to the grand jury.[23] In certain instances where the trial court fails to correctly remedy procedural violations, the Alaska Supreme Court will reverse judgments of conviction on appeal.[24] It should be noted that Rule 47 of the Alaska Rules of Criminal Procedure[25] precludes the court from reviewing allegations of error at trial unless an objection was raised and properly preserved by the parties below. "Plain error"—error affecting "substantial rights of the accused"—will be reviewed by the court on appeal even if not raised below.[26] Finally, even if properly preserved, errors which are harmless beyond a reasonable doubt will result in the court's affirmance of the conviction on appeal.[27]

The remainder of this Article catalogs procedural rights in criminal cases at the various stages of the criminal proceeding. Part I discusses rights during investigation and arrest, including an update on search and seizure, identifications, statements, confessions, and entrapment. Part II considers procedural rights during the pretrial stage, subsequent to the initiation of charges. The right to counsel, bail, preliminary hearing, grand jury indictment, discovery, and speedy trial are included among these rights. Part III discusses procedural rights during trial, including the right to a jury trial, procedure on entry of guilty and nolo contendere pleas, severance, presence of the defendant, and sentencing. Part IV completes the discussion with a review of post-trial issues raised by the sentence modification petitions and double jeopardy problems.

I. RIGHTS DURING THE INVESTIGATIVE STAGE

A. *Arrests*

Authorization for making arrest is set forth in Chapter 25 of

21. Stevens v. State, 582 P.2d 621 (Alaska 1978).

22. ALASKA R. CRIM. P. 6, 7.

23. Adams v. State, 598 P.2d 503 (Alaska 1979); Coleman v. State, 553 P.2d 40 (Alaska 1976).

24. Kimoktoak v. State, 584 P.2d 25 (Alaska 1978); Anderson v. State, 555 P.2d 251 (Alaska 1977).

25. ALASKA R. CRIM. P. 47(a) provides: "*Harmless error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

26. ALASKA R. CRIM. P. 47(b) provides: "*Plain error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." *See also* Stork v. State, 559 P.2d 99 (Alaska 1977).

27. State v. Hannagan, 559 P.2d 1059 (Alaska 1977).

Title 12 of the Alaska Statutes.[28] Both private persons and peace officers are authorized to make arrests in Alaska. The procedure for arrests without a warrant is different, however, for felonies and misdemeanors. A warrantless arrest for a misdemeanor offense in Alaska may be made only when the crime is committed or attempted in the presence of the person making the arrest.[29] Thus, arrests for misdemeanors based upon statements obtained from third parties or other circumstantial evidence may be made only with a properly issued and executed arrest warrant.

With respect to arrests for felonies, Alaska follows federal procedure. A warrantless arrest for a felony offense may be made when a felony has in fact been committed and the person making the arrest has probable cause for believing that the arrestee committed it.[30] The probable cause requirement is satisfied where the facts and circumstances within the knowledge of the person making the arrest, which he has reason to believe are trustworthy, are sufficient to warrant a person of prudence and caution to believe that an offense has been or is being committed and that the arrestee committed it.[31] In *City of Nome v. Ailak*,[32] the Alaska Supreme Court held that probable cause cannot be established solely on the basis of a good faith belief on the part of the officer that probable cause to arrest exists. The details of any information obtained from informants and cooperative citizens must be verified before a valid arrest may be made.[33]

As will be observed in several instances throughout this article, the Alaska Supreme Court and the Alaska Legislature have carved out exceptions to certain procedural rights where the accused is charged with the offense of operating a motor vehicle while under the influence of intoxicating liquor (OMVI). OMVI is the only misdemeanor offense for which a valid warrantless arrest can be made merely on probable cause, even if not committed in the presence of the arresting officer.[34] Thus, if the officer arrives on the scene of a traffic accident and the driver is out of his vehicle, a valid arrest for OMVI may still be made if the officer can establish probable cause from witness statements or other cir-

28. *See* Jacobson v. State, 551 P.2d 935 (Alaska 1976); Howes v. State, 503 P.2d 1055 (Alaska 1972).

29. AS § 12.25.030; Miller v. State, 462 P.2d 421 (Alaska 1969).

30. *Compare* City of Nome v. Ailak, 570 P.2d 162 (Alaska 1977) *with* United States v. Santana, 427 U.S. 38 (1976) *and* United States v. Watson, 423 U.S. 411 (1976).

31. Pistro v. State, 590 P.2d 884 (Alaska 1979); Richardson v. State, 563 P.2d 266 (Alaska 1977).

32. 570 P.2d 162 (Alaska 1977).

33. *Id.*

34. *See* AS § 12.25.033 which authorizes a warrantless arrest for OMVI offenses, even if not committed in the presence of the officer, when the officer has probable cause to believe the offense has been committed less than eight hours prior to the arrest.

cumstantial evidence, even though the vehicle is not operated in the officer's presence.

As discussed in the prior article on search and seizure, the validity of an arrest is of critical importance.[35] A valid arrest permits searches, seizures, and other intrusions by law enforcement officers as lawfully incident to the arrest without a warrant.[36] Similarly, an unlawful arrest triggers suppression by the court of any evidence seized or statements obtained as a result of the arrest.[37]

B. *Other Detentions*

Alaska has adopted a more restrictive view of permissible detentions involving less than probable cause than have the United States Supreme Court and most state courts. In *Coleman v. State*,[38] the Alaska court held that a stop and frisk search on less than probable cause can be made in instances where the officer has a reasonable suspicion of imminent public danger or serious recent harm to persons or property. *Coleman* involved an investigatory stop for a recently committed rape-robbery. The stop on less than probable cause in that case was sustained by the Alaska court because of the seriousness of the offense committed and the very close geographical and temporal proximity of the stop to the commission of the offense.[39]

Following the *Coleman* decision, some confusion existed in Alaska's trial courts concerning the type of public danger or the seriousness of the harm to persons or property which would justify an investigatory stop or frisk. The matter was clarified by the subsequent decision in *Ebona v. State*.[40] In *Ebona*, the Alaska court confirmed that Alaska's temporary stop rule is more restrictive than the rule articulated by the United States Supreme Court in *Terry v. Ohio*.[41] *Ebona* involved an investigatory stop of a motor vehicle by a police officer who observed erratic and dangerous driving. The court sustained the stop, stating:

35. Feldman, *supra* note 1, at 105.

36. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Schraff v. State, 544 P.2d 834 (Alaska 1975).

37. Zehrung v. State, 569 P.2d 189 (Alaska 1977); McCoy v. State, 491 P.2d 127 (Alaska 1971).

38. 553 P.2d 40 (Alaska 1976).

39. The majority noted its concern that stops and frisks on less than probable cause should not be extended beyond situations requiring immediate police response to protect the public in serious cases where there is a likelihood of imminent danger or where serious harm has recently been perpetrated to persons or property. 553 P.2d at 45-46 n.17.

40. 577 P.2d 698 (Alaska 1978).

41. 392 U.S. 1 (1968). *See also* Sibron v. New York, 392 U.S. 40 (1968); La Fave, *Street Encounters and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 39 (1969).

> The significant dangers to persons or property that can possibly result when the operator's capacity to control a motor vehicle is impaired are apparent. A vehicle out of control, . . . poses a significant threat to the property or individuals in proximity to the vehicle.[42]

C. *Search and Seizure*

Both federal and Alaska decisions have held that the protection against unreasonable searches and seizures applies only to those areas in which a person has a reasonable expectation of privacy.[43] In *Smith v. State*,[44] Alaska adopted a two-pronged test for determining the reasonableness of a person's expectation of privacy. That test requires, first, that the person exhibit an actual, subjective expectation of privacy in the area and, second, that the expectation be one which is recognized as "reasonable" by society.[45] The expectations of privacy held by parolees and probationers were severely limited in *Roman v. State*[46] and *Gonzales v. State*.[47] In those cases, the Alaska Supreme Court held that parolees and probationers have diminished expectations of privacy and are subject to warrantless searches so long as there is a direct relationship between the purpose of the search and the underlying offense.[48] The court held that conditioning probation or parole upon consent by the probationer or parolee to periodic searches might be permissible in cases involving convictions for sale of narcotic drugs or concealing stolen property. The intrusions were justified by the need to ensure that the prohibited activities did not continue. On the other hand, a person who has been convicted of a felony such as reckless driving or manslaughter should not be subjected to searches and seizures just because he is a parolee. The goals of rehabilitation of the individual and protection of the public do not require that such a parolee be subject to searches in a manner different from any other member of the public.

In justifying the warrantless search in *Roman*, the court stated:

> [W]e . . . recognize that conditioning release on some forms of search by correctional authority is both consistent with the goal

42. 577 P.2d at 701.

43. Terry v. Ohio, 392 U.S. 1 (1968); Katz v. United States, 389 U.S. 347 (1967); Woods and Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977); Smith v. State, 510 P.2d 793 (Alaska 1973).

44. 510 P.2d 793 (Alaska 1973).

45. For further discussion *see* Feldman, *supra* note 1, at 86.

46. 570 P.2d 1235 (Alaska 1977).

47. 586 P.2d 178 (Alaska 1978).

48. *But see* Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968); United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975).

> of rehabilitation and necessary for the proper functioning of the parole system. To this extent, parolees have a diminished expectation of privacy. Depending on the nature of the crime involved, a condition of release granting authorities the right to search premises and persons at reasonable times could stand muster under both the Alaska and federal Constitutions. Released offenders subject to searches and seizures conducted pursuant to such conditions would be protected from undue harassment by the limitations of due process.[49]

Diminished expectations of privacy of parolees and probationers extends to entries into dwellings as well as searches. In *Soroka v. State*,[50] the Alaska Supreme Court upheld the warrantless entry by a probation officer into a probationer's trailer as a "justifiable visit."

Inventory searches made by prison guards of an arrestee's personal effects is another area where the Alaska court has provided broader privacy protection than have the federal courts. In *Zehrung v. State*,[51] the court held that an inventory search cannot be made of an arrestee's personal effects where he has been arrested for a petty offense and may post bail within a reasonable period of time. The *Zehrung* court did not define the procedures to be followed where the offense is not "petty" or where it is unclear when the arrestee might post bail. The issue was resolved in *Reeves v. State*.[52] That court stated that a general, unrestricted search of the personal effects of a person who is to be incarcerated may not be made by law enforcement or prison officials. Rather, any intrusion or search must be limited to the extent necessary to preclude the introduction of weapons and contraband into the prison community. In *Zehrung*, where the arrestee had been placed in custody for a minor traffic offense, a search of the arrestee's wallet revealed a stolen credit card ultimately linking the defendant to a rape charge. In *Reeves*, a search by prison officials of the arrestee's personal effects revealed a balloon in a shirt pocket which, when further examined, was found to contain heroin. Because the personal effects of the defendants in both cases were to be inventoried and held by prison officials, the court condemned both searches as unrelated to any reasonable security need of the prison.

Two recent cases have involved application of the "consent search" exception to the warrant requirement in drunk driving cases. In *Anchorage v. Geber*,[53] the Alaska Supreme Court held

49. 570 P.2d at 1242 (footnotes omitted).
50. 598 P.2d 69 (Alaska 1979).
51. 569 P.2d 189 (Alaska 1977).
52. 599 P.2d 727 (Alaska 1979).
53. 592 P.2d 1187 (Alaska 1979).

that the State's implied consent statute,[54] which imposes a ninety-day administrative suspension of a driver's license upon the operator's refusal to submit to a breathalyzer examination, does not permit the forcible extraction of blood samples from a drunk driving suspect. On the other hand, the court in *Wirz v. State*[55] held that a drunk driving suspect is not entitled to an affirmative warning by police officers of his right to withhold his consent and refuse to submit to a blood or breathalyzer examination. Because of the absence of a specific requirement to advise arrestees of their right to refuse the breathalyzer test, the court concluded that it would be inappropriate for it to engraft such a requirement in the implied consent statute.[56]

The emergency exception to the warrant requirement was the subject of concurrences in *State v. Myers*.[57] In *Myers*, police officers encountered an unlocked doorway of a Juneau movie theater. Suspecting criminal activity, the police officers entered the theater and arrested the defendant. On appeal, the majority of the Alaska Supreme Court found that as a search, the entrance to the theatre was "reasonable" under the circumstances.[58] The majority did not attempt to analyze the search in terms of any previously existing exceptions to the warrant requirement or to articulate any specific standards or guidelines limiting future intrusions of similar nature. Rather, the "wild card of general reasonableness"[59] was used to justify the search. The concurring opinion by Justice Rabinowitz and the dissenting opinion by Justice Boochever sustained the search as within the emergency exception to the warrant requirement.[60]

The decision in *State v. Glass*[61] is the most important addition to Alaska's tapestry of search and seizure cases. In that case, the Alaska Supreme Court held that law enforcement officers could no longer electronically eavesdrop on suspects through a "false friend" without a search warrant or application of one of

54. AS § 28.35.031. *See also* Layland v. State, 535 P.2d 1043 (Alaska 1975).

55. 577 P.2d 227 (Alaska 1978).

56. AS § 28.35.031. *Contrast with* State v. Freymuller, 552 P.2d 867, 868 (Or. App. 1976) *and* State v. Annen, 504 P.2d 1400 (Or. App. 1973) (OR. REV. STAT. § 487.805 was construed as granting a right to refuse the breathalyzer test).

57. 601 P.2d 239 (Alaska 1979).

58. The majority opinion seems to suggest reasonableness based on implied consent or, at least, the implied absence of objection on the part of the owner of the theater to entry by law enforcement officers.

59. *Id.* at 245 (Boochever, J., dissenting).

60. Justice Boochever previously considered the emergency exception in his concurring opinion in Schraff v. State, 544 P.2d 834, 848 (Alaska 1975).

61. 583 P.2d 872 (Alaska 1978).

the exceptions to the warrant requirement.[62] The decision in *Glass* was based on the right to privacy embodied in Article I, Section 22[63] of the State Constitution. In a majority opinion by then Chief Justice Boochever, the court stated:

> [W]e believe that Alaska's privacy amendment prohibits the secret electronic monitoring of conversations upon the mere consent of a participant. . . .The meaning of privacy of necessity must vary depending on the factual context and the often competing interests of society and the individual. The protection has been defined, for example, as the right "to be let alone," the right of persons "to determine for themselves when, how, and to what extent information about them is communicated to others," and the right which protects "the individual's interest in preserving his essential dignity as a human being."[64]

Thus, *Glass* recognized that individuals have a reasonable expectation of privacy in their conversations and personal affairs. The court directed that, with limited exceptions, a search warrant must be obtained before electronic monitoring of conversations is proper. The court declined to comment on whether the requirement of a warrant may be obviated by exigent circumstances.[65]

D. *Identifications*

Due process and right to counsel issues have been raised by Alaska cases discussing the appropriate procedures for suspect identifications. In *Kimble v. State*,[66] the Alaska Supreme Court held that an accused has no constitutional right to counsel at a pre-accusation photo identification by witnesses, but declined to follow the federal approach on the right to counsel at lineups. The court in *Blue v. State*[67] recognized an accused's right to counsel at a pre-indictment lineup absent exigent circumstances which

62. The supreme court subsequently decided in State v. Glass, 596 P.2d 10 (Alaska 1979), that the opinion in the first *Glass* case would not be applied retroactively.

63. ALASKA CONST. art. I, § 22 provides: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

See also State v. Erickson, 574 P.2d 1 (Alaska 1978) (possession of cocaine for personal use in the home not protected); Falcon v. Alaska Public Offices Comm'n, 570 P.2d 469 (Alaska 1977) (certain information communicated to physicians is within zone of privacy); Woods and Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977) (warrantless administrative inspections of private business premises prohibited); Anderson v. State, 562 P.2d 351 (Alaska 1977) (state may control sexual conduct of juveniles); Ravin v. State, 537 P.2d 494 (Alaska 1975) (possession of marijuana by adults for personal use in the home protected). *See also*, Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 928-37 (1976).

64. 583 P.2d at 879-80 (citations omitted).

65. *Id.* at 881. Compare Alaska's treatment of electronic eavesdropping with the United States Supreme Court opinion in On Lee v. United States, 343 U.S. 747 (1952).

66. 539 P.2d 73 (Alaska 1975).

67. 558 P.2d 636 (Alaska 1977).

precluded the presence of counsel.[68] The court held that where adequate time and opportunity exists and where there is no compelling immediacy, the right to counsel must be afforded at such lineups.

Both photo and lineup identifications must be fair and not unduly suggestive. Police conduct which tends to isolate or single out the defendant, such as the failure to provide a sufficient number of photographs or persons at a lineup, or the failure to achieve reasonable similarity among the photographs or persons in the array, constitutes a serious due process violation remediable by suppression of any identification made by the witness.[69] A subsequent in-court identification by the same witness at trial would similarly be suppressed unless the prosecution could establish an independent basis for the identification not tainted by the prior suggestive photo array or lineup.[70]

Although Rule 16 of the Alaska Rules of Criminal Procedure[71] obliges an accused to provide handwriting exemplars or other physical evidence which might be used for identification, the taking of such evidence after an indictment has been returned constitutes a critical stage of the criminal proceedings at which the accused has a right to counsel.[72]

E. *Statements and Confessions*

1. *General limitations.* With respect to statements and confessions, Alaska has followed *Miranda*[73] principles and federal applications of the fifth amendment,[74] with certain exceptions. The Alaska Supreme Court severely limited the fifth amendment pro-

68. *Id. Compare Blue with* Gilbert v. California, 388 U.S. 263 (1967).

69. Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967); Note, *Due Process Consideration in Police Show-up Practices*, 44 N.Y.U. L. REV. 377 (April 1969).

70. *See* cases collected in Annot., *Admissibility of Evidence of Photographic Identification as Affected by Allegedly Suggestive Identification Procedures*, 39 A.L.R. 3d 1000 (1971).

71. In accordance with the constitutional guidelines, ALASKA R. CRIM. P. 16(c) requires a defendant to disclose certain non-testimonial identification information, including participation in a lineup, providing voice samples, fingerprints, posing for photographs, trying on of articles of clothing, permitting the taking of physical specimens of blood, hair, and other materials of his body, and submission to a reasonable physical or medical inspection of his body.

72. Roberts v. State, 458 P.2d 340 (Alaska 1969).

73. Miranda v. Arizona, 384 U.S. 436 (1966). *See also* Escobedo v. Illinois, 378 U.S. 478 (1964).

74. The fifth amendment to the United States Constitution is paralleled by ALASKA CONST. art. I, § 8 which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return

tection available to juveniles in *E.L.L. v. State*.[75] In that case, the court required a juvenile to testify before a grand jury considering an indictment for statutory rape or face a contempt citation. The holding was based on the rationale that, as a juvenile, the witness was not subject to incarceration or criminal penalities for such testimony and therefore could not raise a fifth amendment privilege.[76]

The question of whether or not private persons are required to provide *Miranda* warnings to suspects was considered in *Tarnef v. State*.[77] In *Tarnef*, the court found that a private investigator had been working so closely with the police that he was required to provide *Miranda* warnings prior to questioning a suspect. The investigator had promised to turn over any statement he obtained to the police, the police consulted with the investigator to confirm the accuracy of the statement, and the investigator subjectively perceived his position to be part of the official team.[78]

A suspect is entitled to an admonition of his fifth amendment rights as soon as he is placed "in custody."[79] In *Quick v. State*[80] and *Hunter v. State*,[81] the Alaska Supreme Court adopted a reasonable person test for determining whether or not a suspect is deemed to be in custody.[82] The test focuses on whether a "reasonable person" in defendant's position would believe that he had been deprived of his freedom in any significant way. In making this determination, the court examines the manner and scope of the actual interrogation, events which took place before the interrogation (including those which explain how and why the defendant came to the place of questioning), and, where relevant, what happened at the interrogation.[83]

2. *Waiver*. While the right to remain silent and the right to the assistance of counsel may be waived by a suspect, any such

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an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.

75. 572 P.2d 786 (Alaska 1977).

76. Contrast with discussion of right to counsel in juvenile proceedings in Part II (A) *infra*.

77. 512 P.2d 923 (Alaska 1973).

78. Whether or not private persons, private security officers, private police or private detectives are within the prohibitions of *Miranda* depends upon the facts of the given case. *See* People v. Polk, 63 Cal. 2d 443, 406 P.2d 641, 47 Cal. Rptr. 1 (1965); People v. Price, 63 Cal. 2d 370, 406 P.2d 55, 46 Cal. Rptr. 775 (1965); People v. Wright, 249 Cal. App. 2d 692, 57 Cal. Rptr. 781 (1967); 31 A.L.R. 3d 565, 647-74 (1970); Comment, *Seizure by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967).

79. Tarnef v. State, 512 P.2d 923 (Alaska 1973).

80. 599 P.2d 712 (Alaska 1979).

81. 590 P.2d 888 (Alaska 1979).

82. *Id.* at 895.

83. *Id.* at 895. *But see* Oregon v. Mathiason, 429 U.S. 492 (1977).

waiver must be made knowingly and intelligently.[84] In *Ladd v. State*,[85] the Alaska Supreme Court held that retention of an attorney by an accused does not *per se* invalidate a waiver of *Miranda* rights.[86] In *R.L.R. v. State*,[87] the Alaska court declined to adopt a rule that juveniles are inherently incapable of knowingly and intelligently waiving their fifth amendment rights. Instead, the court held that such rights could be waived by the juvenile.[88] In *Quick v. State*,[89] however, the court softened the impact of this ruling by holding the state has a heavier burden in proving an intelligent waiver by a juvenile than by an adult.[90] In fifth amendment waiver cases, whether the suspect be an adult or a juvenile, the Alaska court has adopted a case-by-case approach for testing the integrity of the waiver.

3. *Voluntariness*. Like the federal courts, Alaska looks to the "totality of the circumstances" when deciding whether a confession or statement has been made voluntarily.[91] Voluntariness must be proved by a preponderance of the evidence[92] and may be negated by evidence of such factors which might have affected the judgment of the suspect as mental condition, age, education, and experience.[93]

4. *Additional requirements*. *Miranda* warnings must be made with clarity and precision. In *State v. Cassell*,[94] the Alaska Supreme Court affirmed the suppression of a defendant's statement where the officer had advised the defendant that he "could" have a lawyer. The court found the officer's admonition vague and imprecise and, under the circumstances, insufficient.[95]

Statements made by an accused which are not prompted by interrogation or questioning by law enforcement officers are not suppressed, even in the absence of a *Miranda* warning. In *Eben v. State*,[96] the court sustained the admission of statements made by the accused during the course of a telephone call to his girlfriend

84. Peterson v. State, 562 P.2d 1350 (Alaska 1977); Tarnef v. State, 512 P.2d 923 (Alaska 1973).
85. 568 P.2d 960 (Alaska 1977).
86. *Id.* at 966-67.
87. 487 P.2d 27 (Alaska 1971).
88. *Id.* at 33.
89. 599 P.2d 712 (Alaska 1979).
90. *Id.* at 720.
91. Peterson v. State, 562 P.2d 1350 (Alaska 1977); Schade v. State, 512 P.2d 907 (Alaska 1973).
92. Schade v. State, 512 P.2d 907, 917 (Alaska 1973).
93. Peterson v. State, 562 P.2d 1350, 1363 (Alaska 1977).
94. 602 P.2d 410 (Alaska 1979).
95. *Id.* at 418.
96. 599 P.2d 700 (Alaska 1979).

from the police station and made to his brother while at the jail which were overheard by police officers.

F. *Entrapment*

Traditionally, Alaska courts have applied an objective test for entrapment by police officers. In *Grossman v. State*,[97] the court held that it would examine whether the conduct by the officers would have induced an "average" person into the commission of the act.[98] This standard was relaxed in *Pascu v. State*.[99] Finding that sufficient evidence had been presented to establish the defense of entrapment, the majority held that law enforcement officials cannot implant in the mind of an innocent person the disposition to commit an offense and then induce commission of that offense in order to prosecute. Quoting language in *Grossman*, the court stated: "[U]nder standards of civilized justice, there must be some control on the kind of police conduct which can be permitted in the manufacture of crime."[100] An even more forceful articulation of this view was contained in the concurring opinion by Justice Pro Tem Dimond. Justice Dimond wrote:

> I believe it is essential to have objective morality and ethics in law, because this is essential to the "civilized justice" that the majority refers to. If I am correct, then it is repugnant to that concept to justify the apprehension of criminals on the basis that the end justifies the means—i.e., that it is proper to utilize the tools of lies and deceit to effect criminal justice.[101]

The precise limits of police conduct created by the entrapment doctrine are not clearly discernible from either *Grossman* or *Pascu*. *Pascu* does, however, suggest a shift from emphasis on the predisposition of the defendant to the conduct of the officers.

II. PRE-TRIAL RIGHTS

Between the formal initiation of criminal charges and trial, a variety of constitutional, statutory, and rule provisions furnish procedural rights for the accused. As will be discussed below, Alaska has adopted a particularly liberal view regarding pre-trial procedural rights. In defining a defendant's rights to counsel,[102]

97. 457 P.2d 226 (Alaska 1969).

98. Under *Grossman*, the accused must carry the burden of establishing a defense of entrapment by a preponderance of the evidence. *See also* Batson v. State, 568 P.2d 973, 978 (Alaska 1977).

99. 577 P.2d 1064 (Alaska 1978).

100. *Id.* at 1068. Compare with stricter standard in United States v. Russell, 411 U.S. 423 (1973).

101. 577 P.2d at 1069.

102. AS § 12.25.150; Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970). *Compare with* Martinez v. State, 423 P.2d 700 (Alaska 1967).

release on bail,[103] rapid arraignment,[104] fair grand jury proceedings,[105] discovery of the prosecution's case,[106] and a speedy trial,[107] the Alaska Legislature and Supreme Court have broadened the federal rules and protections afforded a criminal defendant. The expansion of pre-trial procedural rights is consistent with the policy articulated by the Alaska courts favoring full and fair disclosure by the prosecution and prompt adjudication as means of removing the prosecution's tactical advantage in criminal proceedings.[108]

A. *Right to Counsel*

The court has broadened the right to counsel during the pretrial stage following the initiation of criminal charges.

Article I, Section 11[109] of the Alaska Constitution parallels the right to counsel provision contained in the federal constitution.[110] Interpreting that state provision, the Alaska Supreme Court has held that an accused has a right to counsel at adversarial proceedings where formal charges are initiated.[111] It is important to segregate fifth amendment self-incrimination problems from sixth amendment right to counsel issues. An accused may have a right to counsel during interrogations and other evidence-gathering activities, even in the absence of formal charges or an adversarial proceeding, if fifth amendment (self-incrimination) problems are presented.[112]

In *Alexander v. City of Anchorage*,[113] the Alaska Supreme Court held that the right to counsel exists in any case where a defendant may lose a valuable license, be incarcerated, or be fined in an amount reflecting criminality.[114] Thereafter, the court in

103. AS § 12.30.010-080; Carman v. State, 564 P.2d 361 (Alaska 1977); Gilbert v. State, 540 P.2d 485 (Alaska 1975); Martin v. State, 517 P.2d 1389 (Alaska 1974).

104. AS § 12.25.150; ALASKA R. CRIM. P. 5.

105. State v. Gieffels, 554 P.2d 460 (Alaska 1976); Coleman v. State, 553 P.2d 40 (Alaska 1976).

106. ALASKA R. CRIM. P. 16; Howe v. State, 589 P.2d 421 (Alaska 1979); Stevens v. State, 582 P.2d 621 (Alaska 1978); Des Jardins v. State, 551 P.2d 181 (Alaska 1976).

107. ALASKA R. CRIM. P. 45; DeMille v. State, 581 P.2d 675 (Alaska 1978); Nickels v. State, 545 P.2d 163 (Alaska 1976).

108. Peterkin v. State, 543 P.2d 418 (Alaska 1975).

109. *See* note 3 *supra*.

110. U.S. CONST., amend. VI.

111. Eben v. State, 599 P.2d 700 (Alaska 1979). *Compare with* Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976); *and* Orozco v. Texas, 394 U.S. 324 (1969).

112. Quick v. State, 599 P.2d 712 (Alaska 1979); Tarnef v. State, 512 P.2d 923, (Alaska 1973).

113. 490 P.2d 910 (Alaska 1971).

114. The extension of the right to counsel in Alaska closely parallels the limit set on the right to a jury trial in Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970).

Alaska Public Defender Agency v. Superior Court[115] held that the right to counsel does not exist for an offense carrying a maximum fine of $100.00. Current practice in district court precludes a jury trial for any offense carrying a maximum fine of $300.00. Other areas in which the court has broadened the right to counsel include proceedings for civil contempt for failure to pay child support,[116] probation revocation hearings,[117] and prison disciplinary hearings.[118]

In addition, the court in *A.A. v. State*[119] recognized the right to counsel at juvenile disposition proceedings. The holding in *A.A.*, while recognizing the importance of representation at juvenile proceedings, is analytically inconsistent with the reasoning in *E.L.L. v. State*.[120] In *E.L.L.*, the court required a juvenile to testify or face a contempt citation. Even though the juvenile's testimony might have implicated her in a criminal act, the court held that the juvenile could not raise the fifth amendment privilege because she was subject to delinquency proceedings rather than to criminal prosecution and punishment. The recognition of the criminal nature of delinquency proceedings which supported the extension of the right to counsel by the court in *A.A.* is more durable under close scrutiny. While delinquency proceedings differ from formal criminal prosecutions, the stigma and effect on the juvenile of a declaration of delinquency is considerable. The punitive nature of detention bears greater similarity to incarceration (particularly in instances of serious conduct) than the court suggests in *E.L.L.*

On appeal, right to counsel violations do not *per se* constitute reversible error; instead, they are reviewed under the "harmless error" test that is routinely applied to other procedural violations.[121] In *Gipson v. State*,[122] the court held that the absence of counsel even at a critical stage of the proceedings (a preliminary hearing) may be harmless if harmlessness is established beyond a reasonable doubt.

B. *Bail*

Alaska's constitutional right to release on bail is codified in

115. 584 P.2d 1106 (Alaska 1978).
116. Otton v. Zaborac, 525 P.2d 537 (Alaska 1974).
117. Hoffman v. State, 404 P.2d 644 (Alaska 1965). *Compare with* Gagnon v. Scarpelli, 411 U.S. 778 (1973) *and* Mempa v. Rhay, 389 U.S. 128 (1967).
118. McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975). *Compare with* Wolff v. McDonnell, 418 U.S. 539 (1974) *and* Johnson v. Avery, 393 U.S. 483 (1969).
119. 538 P.2d 1004 (Alaska 1975). *See also* In re Gault, 387 U.S. 1 (1967).
120. 572 P.2d 786 (Alaska 1977).
121. Merrill v. State, 423 P.2d 686 (Alaska 1967).
122. 575 P.2d 782 (Alaska 1978).

AS § 12.30.020 *et seq.* Bail is a matter of right prior to the trial. Under the statute, the primary factors to be considered by the court in establishing bail are danger to the community and likelihood of flight prior to trial.[123] Although bail must be set in a "reasonable sum," in practice it is frequently set so high that it is unattainable by the defendant. Bail, in some amount however, must be set for nearly all offenses.[124]

Except for certain serious felonies,[125] the bail statute also allows for bail pending appeal or sentencing following conviction. As a matter of practice, local courts have required that a variety of conditions be satisfied prior to release of most defendants on serious offenses. Typically, the courts require that defendant be supervised by a third party, employed while released prior to trial, and regularly contacted by an attorney or other non-custodial person. Because there is not a competitive market for bail bonds in most parts of the state, the trial courts have been amenable to other means of satisfying monetary bail conditions, such as the posting of property bonds, unsecured personal surety bonds, and the deposit of ten percent of the established bail with the clerk of the court to be returned following completion of the case.

C. *Arraignment*

At arraignment, the accused is brought before the court for formal advisement of the charges which have been filed against him, advisement of his constitutional rights, and entry of a plea. Rule 5 of the Alaska Rules of Criminal Procedure[126] requires that a person be brought before a judge or magistrate for arraignment within twenty-four hours following his arrest. In *Padgett v. State*,[127] the Alaska Supreme Court ruled that a Rule 5 arraign-

123. AS § 12.30.020(c), permits the court to take the following factors into consideration: the nature and circumstances of the offense charged; the weight of the evidence against the person; the person's family ties; the person's employment; the person's financial resources; the person's character and mental condition; the length of the person's residence in the community; the person's record of appearance at court proceedings; and the flight of the accused to avoid prosecution or his failure to appear at court proceedings.

124. Gilbert v. State, 540 P.2d 485 (Alaska 1975); Martin v. State, 517 P.2d 1389 (Alaska 1974). The United States Supreme Court has declined vigorously to monitor bail provisions. *See* Schlib v. Kuebel, 404 U.S. 357 (1971).

125. AS § 12.30.040 permits release on bail following conviction except in instances of convictions for first-degree murder, armed robbery, kidnapping, or rape.

126. ALASKA R. CRIM. P. 5(a)(1) provides:

> Except when the person arrested is issued a citation for a misdemeanor and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay. Unnecessary delay within the meaning of this section (a) is defined as a period not to exceed twenty-four hours after arrest, including Sundays and holidays.

127. 590 P.2d 432 (Alaska 1979). *Compare with* Walton v. Arkansas, 371 U.S. 28 (1962).

ment proceeding is not a critical stage of the proceedings at which the accused is entitled to counsel. While a request for counsel at arraignment must be recognized by the court, failure to provide counsel at the arraignment is not, *per se*, reversible error.

Rule 25 of the Alaska Rules of Criminal Procedure[128] allows a defendant a single peremptory challenge to the judge assigned to his case. The Alaska Supreme Court limited the rule in *Gieffels v. State*,[129] holding that the right to challenge a judge peremptorily does not exist at ministerial proceedings such as arraignments so long as the substantive rights conferred by AS § 22.20.022[130] are not interfered with and the judge is not called upon to exercise a discretionary function.

D. *Preliminary Hearings and Grand Jury*

Because there is no statutory or constitutional right to a grand jury indictment or a preliminary hearing, misdemeanor charges may be initiated by complaint or information. Article I, Section 8[131] of the Alaska Constitution, however, like its federal counterpart,[132] mandates that felony charges be initiated by way of a grand jury indictment.

1. *Preliminary hearing*. After arrest and arraignment on a felony charge, an accused has a right to a preliminary hearing, at which time the State must establish probable cause before a district court judge or magistrate. The hearing must be held within ten days following arrest if the accused is in custody or within twenty days if he is not in custody.[133] Although a preliminary hearing is a critical stage of the proceedings at which an accused has a right to counsel, the absence of counsel may be harmless

128. ALASKA R. CRIM. P. 25(d)(1) states, in pertinent part, as follows: "In any criminal case in Superior or District Court, the prosecution and the defense shall each be entitled as a matter of right to one change of judge."

129. 552 P.2d 661 (Alaska 1976).

130. AS § 22.20.022 provides for peremptory disqualification of a judge in a district court action or a superior court action.

131. *See* note 74 *supra*.

132. U.S. CONST., amend. V, provides:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

133. ALASKA R. CRIM. P. 5.

error if harmlessness is established beyond a reasonable doubt.[134]

2. *Grand jury*. While establishment of probable cause at a preliminary hearing is sufficient to hold the defendant for trial, unless the constitutional and statutory right to indictment by a grand jury is waived by the accused, an indictment is still required for felony charges. Although the prosecution need only establish probable cause at a preliminary hearing,[135] the burden of proof before the grand jury is heavier. An indictment by the grand jury may be returned only if the evidence presented, if not contradicted or explained, would warrant a conviction at trial.[136]

Rule 6 of the Alaska Rules of Criminal Procedure[137] sets out a variety of regulations concerning the presentation of evidence before the grand jury. Hearsay evidence, for example, may not be presented to the grand jury without a "compelling justification."[138] In *State v. Gieffels*,[139] the court held that the cost of transporting witnesses, even from out of state, does not constitute a compelling justification for the use of hearsay testimony. In *Metler v. State*,[140] the court similarly rejected a claim of inconvenience to justify hearsay testimony. The admission of hearsay evidence, however, does not automatically invalidate an indictment. The Alaska court has adopted a "subtraction test": the indictment will not be dismissed if there is sufficient evidence to support the return of the indictment.[141]

An accused has a right to a fair grand jury proceeding consistent with due process and without improper influence over the grand jury by the prosecutor. To prevent the grand jury from becoming a tool or rubber stamp of the prosecutor, the trial courts have been directed to monitor the prosecutor's instructions of law and arguments to the grand jury and to identify instances of undue influence or unfairness.[142] Following the return of an indictment, the defendant is entitled to a transcript of the evidence presented to the grand jury.[143]

134. Martinez v. State, 423 P.2d 700 (Alaska 1967); Merrill v. State, 423 P.2d 686 (Alaska 1967).

135. ALASKA R. CRIM. P. 5(e).

136. ALASKA R. CRIM. P. 6(q).

137. *See, in particular*, ALASKA R. CRIM. P. 6(j), (m), (q) *and* (r).

138. ALASKA R. CRIM. P. 6(r); Webb v. State, 580 P.2d 295 (Alaska 1978); State v. Taylor, 566 P.2d 1016 (Alaska 1977); Galauska v. State, 527 P.2d 459 (Alaska 1974).

139. 554 P.2d 460 (Alaska 1976).

140. 581 P.2d 669 (Alaska 1978).

141. State v. Gieffels, 554 P.2d 460 (Alaska 1976); Coleman v. State, 553 P.2d 40 (Alaska 1976).

142. Coleman v. State, 553 P.2d 40 (Alaska 1976).

143. Burkholder v. State, 491 P.2d 754 (Alaska 1971); ALASKA R. CRIM. P. 6(m).

E. *Discovery*

1. *Discovery from the prosecution.* While Alaska affords defendants broad rights of discovery in Rule 16 of the Alaska Rules of Criminal Procedure, the supreme court has declined to enforce the rule aggressively. Pursuant to Rule 16, statements of witnesses, police reports, reports of convictions, and other materials must be disclosed to the accused. Like the federal rule in *Brady v. Maryland*,[144] a prosecutor must disclose all potentially exculpatory evidence.[145] In *Lauderdale v. State*,[146] the Alaska Supreme Court held that the prosecution is required to preserve and produce the test ampules used in connection with breathalyzer examinations in drunk driving cases because such evidence may, upon testing and examination, prove exculpatory.

As in instances of violations of other procedural rights, the Alaska Supreme Court applies the harmless error test in assessing and weighing the effect of discovery violations by the prosecution.[147] In *Des Jardins v. State*,[148] the Alaska Supreme Court observed that the lack of prejudice resulting from the prosecution's discovery violation was purely fortuitous. The court stated: "In future cases we will continue to scrutinize prosecutorial conduct in this area, and will not hesitate to reverse where it appears that the defendant has been prejudiced by such action."[149] Thereafter, however, the court in *Scharver v. State*[150] held that dismissals for failure to make discovery are frowned upon, especially where the information withheld is cumulative. In *Stevens v. State*,[151] the Alaska Supreme Court reversed a conviction because the prosecution failed to permit discovery. In that case, the prosecution failed to disclose a critical police report. In most cases of discovery violations, however, the courts have declined to severely sanction discovery violations by granting dismissals or reversals on appeal or by granting lesser sanctions such as continuances or fines.

Although the defendant has been granted broad rights of discovery, the courts have deprived Rule 16 of any significant bite.

144. 373 U.S. 83 (1963); *see also* Weatherford v. Bursey, 429 U.S. 545 (1977); United States v. Agurs, 427 U.S. 97 (1976); *and* Moore v. Illinois, 408 U.S. 986 (1972).

145. ALASKA R. CRIM. P. 16(b)(3) provides: "The prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense or would tend to reduce his punishment therefore."

146. 548 P.2d 376 (Alaska 1976).

147. Braham v. State, 571 P.2d 631 (Alaska 1977); Scharver v. State, 561 P.2d 300 (Alaska 1977).

148. 551 P.2d 181 (Alaska 1976).

149. *Id.* at 186.

150. 561 P.2d 300 (Alaska 1977).

151. 582 P.2d 621 (Alaska 1978).

Curiously, violations of procedural rights by police officers sometimes result in more serious sanctions than violations by prosecutors. Applying the exclusionary rule, police violations frequently result in suppression of critical evidence which sometimes leads to acquittal. In contrast, violations of procedural rights by prosecutors (who presumably have better training and knowledge of their obligations) seem to be sanctioned, wherever possible, with trial continuances and monetary fines.

Frequently, however, discovery violations cannot be adequately remedied by the granting of a continuance or other intermediate sanctions. Like justice delayed, late discovery often denies a defendant an important opportunity to examine, analyze, and meet the prosecution's evidence. Disclosure of important information on the eve or in the middle of trial frequently has a devastating effect on the presentation and defense of a criminal case. In the final analysis, the existing approach to the application and enforcement of the discovery provisions does not adequately protect the rights of the defendant.

2. *Discovery from accused.* Rule 16 also grants the prosecution certain discovery rights, including the rights to have a defendant appear in a lineup, provide other physical, nontestimonial evidence (hair, fingernail clippings, etc.), and provide reports of experts who will testify at trial.[152] Although notice of intent to rely upon a defense of alibi or insanity must be provided to the prosecution,[153] the Alaska Supreme Court in *Scott v. State*[154] held that an accused need not disclose a list of potential alibi witnesses.

F. *Speedy Trial*

Article I, Section 7[155] of the Alaska Constitution ensures the right to a speedy trial for persons charged with criminal offenses. The constitutional guarantee has been codified in Rule 45, Alaska Rules of Criminal Procedure.[156] That provision requires that an accused be brought to trial within 120 days of his arrest or the initiation of charges.

Referred to as the "four-month rule," Rule 45 requires that the prosecution bring an accused to trial within 120 days following

152. ALASKA R. CRIM. P. 16(c).

153. ALASKA R. CRIM. P. 16(c)(3).

154. 519 P.2d 774 (Alaska 1974). *Compare with* Wardius v. Oregon, 412 U.S. 470 (1973); Williams v. Florida, 399 U.S. 78 (1970); *and* Jones v. Superior Court, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962).

155. *See* note 2 *supra.*

156. ALASKA R. CRIM. P. 45(b) provides: "A defendant charged with either a felony or a misdemeanor shall be tried within 120 days from the time set forth in Section (c)."

his arrest or initiation of charges. In *Peterkin v. State*,[157] the court held that a period of 140 days following arrest violated that rule. Dismissal of the charges is the only remedy recognized by the court for Rule 45 violations. In computing the 120-day period, certain periods of delay resulting from defense motions[158] or caused by the unavailability of the defendant[159] are excluded in calculating the time for trial.

While an accused is under no affirmative obligation to demand a speedy trial, the defendant's silence in setting a trial date may constitute an acquiescence to any delay. In *DeMille v. State*,[160] the court held that the defendant, who was represented by counsel at the time of the trial setting, impliedly acquiesced to a trial setting beyond the 120-day rule. *DeMille* tempered the earlier decision in *Peterkin v. State*[161] where the court stated that for the purposes of determining whether a speedy trial violation existed it was not relevant that the defendant failed to affirmatively demand a trial.

Until *Peterson v. State*,[162] it was unclear whether the mandatory requirements of Rule 45 could be relaxed pursuant to Rule 53 of the Alaska Rules of Criminal Procedure.[163] In *Peterson v. State*,[164] the defendant was brought to trial on a multiple homicide charge 136 days after initiation of the case. On appeal, the court held that the requirements of Rule 45 can be relaxed in certain instances and that the relaxation in *Peterson* was justified because the case was brought in the Alaska bush, the delay was short, the crime was serious, and there was no apparent prejudice to the defendant.[165]

When Rule 45 was adopted, the trial courts were not prepared to monitor criminal cases and ensure that they come to trial within the 120-day period. After the Alaska Supreme Court made it clear in *Peterkin v. State*[166] that the responsibility of setting trials within the 120-day period rests with the courts, adequate pro-

157. 543 P.2d 418 (Alaska 1975).
158. ALASKA R. CRIM. P. 45(d)(1).
159. ALASKA R. CRIM. P. 45(d)(4).
160. 581 P.2d 675 (Alaska 1978).
161. 543 P.2d 418 (Alaska 1975).
162. 562 P.2d 1350 (Alaska 1977).
163. ALASKA R. CRIM. P. 53, provides: "These rules are designed to facilitate business and advance justice. They may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work injustice."
164. 562 P.2d 1350 (Alaska 1977).
165. *Id.* at 1360.
166. 543 P.2d 418 (Alaska 1975). Although Congress has adopted a speedy trial act similar to Rule 45, the Supreme Court has declined to adopt a set standard for speedy trial violations and has reviewed each case individually. *See* Barker v. Wingo, 407 U.S. 514 (1972).

cedures were developed. Now, at the time of arraignment in felony cases, the defense and the prosecution are asked to stipulate to or argue the date when the 120-day period is deemed to have commenced in the case. Similar procedures have been developed in the district courts. As a result, dismissals for speedy trial violations have significantly decreased.

III. RIGHTS DURING TRIAL

Unlike the liberal approach to various pre-trial rights, Alaska has followed the mainstream in adopting and enforcing procedural rights at the trial stage.

A. *Right to Jury Trial*

Rule 23 of the Alaska Rules of Criminal Procedure[167] provides that a jury trial shall be provided in instances where the accused is constitutionally entitled to one unless the right has been clearly waived by the defendant. The jury trial right is embodied in Article I, Section 11[168] of the Alaska Constitution. In construing the constitutional limits to the right to a jury trial, the Alaska Supreme Court has applied the same test that is used in determining the right to counsel. The court in *Baker v. City of Fairbanks*[169] held that a jury trial is afforded whenever the accused is subject to incarceration, loss of a valuable license, or a fine in an amount denoting criminality. In *Johansen v. State*,[170] the court held that a defendant in a civil contempt action for failure to pay child support is entitled to a jury trial because of the possibility of incarceration.

While the right to a jury trial, like other procedural rights, may be waived by the defendant,[171] the court is required to address the defendant personally and inquire whether the waiver is made knowingly and voluntarily.[172] An inquiry directed to the defendant's attorney will not suffice. The court in *Walker v. State*[173] held that the failure of the trial court to address the de-

167. ALASKA R. CRIM. P. 23(a) provides: "Cases required to be tried by a jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the State."

Rule 23 merely parrots the constitutional authorization for a jury trial. *See* Walker v. State, 578 P.2d 1388 (Alaska 1978).

168. *See* note 3 *supra*.

169. 471 P.2d 386 (Alaska 1970). *Compare with* Baldwin v. New York, 399 U.S. 66 (1970); Bloom v. Illinois, 391 U.S. 194 (1968); *and* Duncan v. Louisiana, 391 U.S. 145 (1968).

170. 491 P.2d 759 (Alaska 1971).

171. Walker v. State, 578 P.2d 1388 (Alaska 1978).

172. *Id.*

173. *Id.*

fendant personally constitutes error *per se*.

The defendant is entitled to a jury comprised of a representative cross section of the community.[174] To achieve this goal, Rule 24 of the Alaska Rules of Criminal Procedure[175] authorizes voir dire of prospective jurors and affords the state six peremptory challenges and the defendant ten in felony cases. In misdemeanor cases each party is permitted three peremptory challenges.

The Alaska Supreme Court has never considered the manner in which the voir dire of prospective jurors should be conducted. The practices in the trial courts vary throughout the state. Some judges permit an open-ended and unrestricted voir dire of the venire; other judges conduct most of the voir dire themselves, permitting limited questioning by counsel either directly or by written questions read by the trial judge.

B. *Nolo Contendere Pleas*

Rule 11 of the Alaska Rules of Criminal Procedure[176] authorizes the entry of guilty, not guilty, and nolo contendere pleas. The nolo plea has much the same effect as a guilty plea and, like a plea of guilty or a finding of guilty by the jury,[177] results in a judgment and conviction. Still, the plea has some special utility. A conviction following a plea of nolo contendere may not be used in subsequent civil proceedings involving the same conduct as that charged in the criminal case.[178] The nolo plea does not constitute an admission of civil liability and may not be used to establish civil liability.

In *Lowell v. State*,[179] the Alaska Supreme Court held that a conviction supported by a plea of nolo contendere may be used to impeach a defendant's testimony at a subsequent proceeding, assuming the offense is one involving dishonesty or false statement and meets the other criteria set forth in Rule 26 of the Alaska Rules of Criminal Procedure.[180]

174. *See* ALASKA R. CRIM. P. 24.1; *see also* Alvarado v. State, 486 P.2d 891 (Alaska 1971).

175. ALASKA R. CRIM. P. 24(d) provides for the exercise of peremptory challenges following the completion of all challenges for cause of prospective jurors. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

176. ALASKA R. CRIM. P. 11(a) provides: "A defendant may plead not guilty, guilty or nolo contendere. If a defendant refuses to plead, stands mute, or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

177. *See* ALASKA R. CRIM. P. 11(c); Oveson v. Municipality of Anchorage, 574 P.2d 801 (Alaska 1978); Cooksey v. State, 524 P.2d 1251 (Alaska 1974).

178. *See* Lowell v. State, 574 P.2d 1281 (Alaska 1978).

179. *Id.*

180. ALASKA R. CRIM. P. 26(f)(1), (2) provide:

(1) *General Rule.* For the purpose of attacking the credibility of a witness, evi-

Pleas of nolo contendere may be conditioned upon the preservation of the defendant's right to appeal certain issues. The *Cooksey* rule (named for *Cooksey v. State*,[181] which established the procedure by which issues could be reserved for appeal upon pleas of nolo contendere) was subsequently modified and limited in *Oveson v. Municipality of Anchorage*.[182] In that case, the Alaska Supreme Court held that an appeal may be taken following a plea of nolo contendere only in instances where the prosecution stipulates that resolution of the issue would be dispositive of the entire case. The *Oveson* gloss to the *Cooksey* rule was a product of the Supreme Court's frustration with hearing and deciding appeals involving issues not dispositive of the underlying case. An appeal following a plea of nolo contendere conditioned upon the right to appeal non-dispositive issues was viewed as a means of circumventing the standards for interlocutory review set out in Rules 23 and 24, Alaska Rules of Appellate Procedure.

C. *Guilty Pleas*

Rule 11 of the Alaska Rules of Criminal Procedure contains the guidelines for entering a guilty plea. The court is required to address the defendant personally and inquire as to whether the plea is made knowingly, intelligently, and voluntarily.[183] The court must advise the defendant of the various rights (right to confront witnesses, right to trial by jury, presumption of innocence, etc.) which he is waiving by entering his plea.[184] A court's failure to make a sufficient inquiry is not reversible error unless it affects important rights of the accused.[185]

In *Morgan v. State*,[186] the Alaska Supreme Court repudiated the rule of *Sieling v. Eyeman*.[187] The court in *Sieling* held that an accused need be "more competent" to waive trial rights than he

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dence that he has been convicted of a crime is admissible but only if the crime involved dishonesty or false statement.

(2) *Time Limit.* Evidence of a conviction under this Rule is inadmissible if a period of more than five years has elapsed since the date of the conviction of the witness.

See also Richardson v. State, 579 P.2d 1372 (Alaska 1978); Lowell v. State, 574 P.2d 1281 (Alaska 1978); Smith v. Beavers, 554 P.2d 1167 (Alaska 1976).

181. 524 P.2d 1251 (Alaska 1974).

182. 574 P.2d 801 (Alaska 1978).

183. *See* Joe v. State, 565 P.2d 508 (Alaska 1977); Else v. State, 555 P.2d 1210 (Alaska 1976); Gregory v. State, 550 P.2d 374 (Alaska 1976); Barrett v. State, 544 P.2d 830 (Alaska 1975); McKinnon v. State, 526 P.2d 18 (Alaska 1974); Ingram v. State, 450 P.2d 161 (Alaska 1969); Thompson v. State, 426 P.2d 995 (Alaska 1967); State v. Pete, 420 P.2d 338 (Alaska 1966).

184. *Id.*

185. Gregory v. State, 550 P.2d 374 (Alaska 1976).

186. 582 P.2d 1017 (Alaska 1978).

187. 478 F.2d 211 (9th Cir. 1973).

does to stand trial. The Alaska court, noting that few courts have approved the *Sieling* approach, denied the defendant's assertion (unsupported by the record) that he was incompetent when he entered his guilty plea.[188]

Alaska's criminal rules do not specifically address the issue of plea bargaining. Plea bargaining in most cases was abolished in 1975 by the Attorney General of the State of Alaska. In *State v. Buckalew*,[189] the Alaska Supreme Court held that trial judges could not participate in plea or sentence bargaining by indicating, prior to entry of the plea, the nature of the sentence that would be imposed upon the defendant by a plea.

D. *Severance*

1. *Severance of defendants.* Pursuant to Rule 14 of the Alaska Rules of Criminal Procedure,[190] any co-defendant who is being prosecuted in a joint proceeding can move for severance if the joinder is prejudicial. Unlike other procedural rights, the propriety of severance is left to the trial judge's discretion and on appeal, reversible error will not be found unless the defendant can establish both prejudice and an abuse of discretion on the part of the trial judge.[191]

In *Larson v. State*,[192] the Alaska Supreme Court held that the joinder of two brothers in a single proceeding was not prejudicial where one was charged with assault at a gas station and the other was charged in connection with a shooting at the same gas station. Where the prosecution seeks to introduce statements or confessions into evidence, joinder of co-defendants may pose *Bruton*[193]

188. 582 P.2d at 1021. *See also* Note, *Competence to Plead and the Retarded Defendant: United States v. Masthers, 539 F.2d 721 (1976)*, 9 CONN. L. REV. 176, 185 (1976). *See also* McKinney v. State, 566 P.2d 653, 660, *opinion on rehearing*, 570 P.2d 733 (Alaska 1977); Fajeriak v. State, 520 P.2d 795, 802-03 (Alaska 1974).

189. 561 P.2d 289 (Alaska 1977). Prior to the ban on plea bargaining, ALASKA R. CRIM. P. 11(e) required that counsel for the state and the defendant disclose to the court the terms and conditions of plea agreements and bargains whereby pleas of guilty and nolo contendere were entered by the defendant in the expectation that a specific sentence would be imposed or other charges before the court would be dismissed.

190. ALASKA R. CRIM. P. 14 provides:

> If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on the motion by a defendant for severance the court may order the attorney for the state to deliver to the court for inspection in camera any statements or confessions made by the defendants which the state intends to introduce at the trial.

191. Catlett v. State, 585 P.2d 553 (Alaska 1978); Richards v. State, 451 P.2d 359 (Alaska 1969); Selman v. State, 406 P.2d 181 (Alaska 1965).

192. 566 P.2d 1019 (Alaska 1977).

193. The *Bruton* rule is derived from Bruton v. United States, 391 U.S. 123 (1968); *see*

problems. As recognized in *Bruton v. United States*,[194] the joinder of co-defendants for trial may violate the right to confrontation where one co-defendant makes a statement or confession implicating the other. The confrontation problem arises when the statement or confession is admitted in the prosecution's case and the co-defendant making the statement declines to testify pursuant to his constitutional right to remain silent. In this situation, the implicated defendant is deprived the opportunity to confront the witness (his co-defendant) testifying against him.

Although some restriction of the *Bruton* rule can be detected in recent federal decisions,[195] the rule is still adhered to in Alaska. In *Mead v. State*,[196] the Alaska Supreme Court held that the admission of three confessions at trial violated the defendant's right to confrontation. Similarly, the court in *Benefield v. State*[197] held that the testimony of a police officer which summarized the confession of a co-defendant deprived the defendant of his right to confrontation and was therefore improperly admitted by the trial court.

2. *Severance of charges*. Rule 14 also permits the severance of multiple charges alleged against a single defendant. There are several ways in which prejudice results from the consolidation of multiple charges in a single proceeding. The first occurs where a defendant wishes to testify on one of the charges, but not on the other.[198] The nature and effect of this type of prejudice was concisely summarized by the United States Court of Appeals for the District of Columbia in *Cross v. United States*.[199] In that case, the court stated:

> If he [the defendant] testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus, he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent. It is not necessary to decide whether this invades his constitutional right to remain silent, since we think it constitutes prejudice within the

also Dutton v. Evans, 400 U.S. 74 (1970); Frazier v. Cupp, 394 U.S. 731 (1969); Douglas v. Alabama, 380 U.S. 415 (1965).

194. 391 U.S. 123 (1968).

195. *See, e.g.*, Parker v. Randolph, 442 U.S. 62 (1979); Schneble v. Florida, 405 U.S. 427 (1972); Nelson v. O'Neil, 402 U.S. 622 (1971).

196. 504 P.2d 855 (Alaska 1971).

197. 559 P.2d 91 (Alaska 1977).

198. *See* Gregory v. United States, 369 F.2d 185, 189 (2d Cir. 1966); Drew v. United States, 331 F.2d 85, 88, n.15 (D.C. Cir. 1964); 1 C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 222, at 437 (1969 & Supp. 1979).

199. 335 F.2d 987 (D.C. Cir. 1964).

meaning of Rule 14.[200]

The *Cross* analysis of the severance problem was adopted by the Alaska Supreme Court in *Cleveland v. State*.[201]

The possibility that the jury will draw an unfavorable inference about the defendant and cumulate the evidence against him has been recognized as the second type of possible prejudice caused by consolidation of charges.[202] This inference may become particularly prejudicial in cases where the proof of one count is stronger than that of the other. The jury may be induced to convict a defendant on a weaker count because it is swayed by proof supporting the stronger count.

The third type of prejudice posed by consolidation is the possiblity that the proof of the defendant's guilt of one crime may be used to convict him of another, even though the evidence proving guilt for the former crime would have been inadmissible in a separate trial.[203] In *Stevens v. State*,[204] the Alaska Supreme Court recognized the possibility of serious prejudice where a defendant is jointly tried for several similar offenses. Criticism of joinder of similar offenses has been extensive; only the federal courts and one-third of the states currently allow it; all other states prohibit such joinder entirely or upon the defendant's objection.[205]

In *Stevens*, the court stated:

> [W]e think it appropriate to note our agreement with the criticism which has been directed against a procedural rule which permits the joinder of offenses of the same or similar character. We think that in general such joinders are to be avoided and that in those instances where the prosecution has joined offenses of the same or similar character the court, on motion by the accused, should grant a severance of such charges.[206]

Thus, while the Alaska Supreme Court has left the disposition of severance issues to the trial court's discretion, the court in *Stevens* provided a strong statement favoring severance of similar charges whenever the accused objects to their joinder. This position is the same position that has been adopted by the American Bar Association in its Standards Relating to Joinder and Severance.

200. *Id.* at 989 (footnotes omitted).

201. 538 P.2d 1006 (Alaska 1975).

202. Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964).

203. Robinson v. United States, 459 F.2d 847 (D.C. Cir. 1972); Baker v. United States, 401 F.2d 958 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970); Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964).

204. 582 P.2d 621 (Alaska 1978).

205. *See* A.B.A. STANDARDS RELATING TO JOINDER AND SEVERANCE § 2.2; *see also* 8 J. MOORE, FEDERAL PRACTICE § 8.02[1], n.3 (2d ed. 1976); Dingler v. State, 211 S.E.2d 752 (Ga. 1955). Among the states prohibiting similar character joinder by statute are, Oregon (OR. REV. STAT. § 132.560 (1970)), Louisiana (LA. REV. STAT. ANN. § 226 (West 1951)), and Illinois (ILL. REV. STAT. ch. 38, §§ 111-14 (1970)).

206. 582 P.2d at 629 (footnotes and citations omitted).

E. *Presence of the Defendant*

It is well-recognized that a defendant has a right to be present during the proceedings against him. Still, the Alaska Supreme Court has been called upon to review several situations in which proceedings transpired in the defendant's absence.

1. *Playbacks.* In Alaska, trial testimony is electronically recorded. During the course of deliberations, juries frequently request playbacks of various portions of the testimony to assist them in rendering a verdict. In *State v. Hannagan*,[207] the Alaska Supreme Court construed Rule 38(a) of the Alaska Rules of Criminal Procedure,[208] which requires a defendant's presence at "every stage of the trial," to include playbacks of testimony. Furthermore, the court held that the defendant's right to be present while testimony is replayed may not be waived by his counsel, but that the violation of Rule 38 was harmless.

2. *Other situations.* Several cases have posed questions concerning the right of a defendant to be present during other stages in the criminal proceedings. In *Cox v. State*,[209] the Alaska Supreme Court held that communications by the court to the jury, out of the presence of the defendant and his attorney, was reversible error because there was no way of proving that the error was harmless beyond a reasonable doubt. Similarly, the court in *Kimoktoak v. State*[210] found error where the trial court, in the absence of the defendant, heard arguments of counsel on the jury's request for a playback on the issue of sequestration of the jury. Finally, in *Johnson v. State*[211] the court found error where the trial court, in violation of Rule 31 of the Alaska Rules of Criminal Procedure, ordered a sealed verdict without the defendant's consent.

207. 559 P.2d 1059 (Alaska 1977).

208. ALASKA R. CRIM. P. 38(a) provides:

> The defendant shall be present at the arraignment, at the preliminary hearing, at the time of plea, at the omnibus hearing, and at every stage of the trial, including the impaneling of the jury and return of the verdict, and at the imposition of sentence, except as otherwise provided in this rule.

209. 575 P.2d 297 (Alaska 1978). *See also* Koehler v. State, 519 P.2d 442 (Alaska 1974); Gafford v. State, 440 P.2d 405 (Alaska 1968); Egelak v. State, 438 P.2d 712 (Alaska 1968); Kugzruk v. State, 436 P.2d 962 (Alaska 1968); *and* Noffke v. State, 422 P.2d 102 (Alaska 1967).

210. 578 P.2d 594 (Alaska 1978).

211. 577 P.2d 1063 (Alaska 1978). Rule 31 has since been changed to permit authorization of a sealed verdict without the defendant's consent. *See* ALASKA R. CRIM. P. 31(f).

F. *Confrontation*

In 1979, the Alaska Supreme Court adopted the Alaska Rules of Evidence. The Rules apply to both civil and criminal cases. Because of the constitutional right to confront witnesses, criminal cases sometimes pose evidentiary problems not present in civil cases. Although confrontation problems are frequently confused with the prohibition against introducing hearsay evidence, it is important to recognize that the right to confront witnesses may be violated in criminal cases even where exceptions to the hearsay rule may render out-of-court statements admissible.

In *Davis v. State*,[212] the defendant sought to invade the statutory protection afforded juvenile delinquency proceedings in order to confront and cross-examine his juvenile accuser in an effort to establish bias and interest on the part of the witness. Although the Alaska Supreme Court rejected the defendant's confrontation claim, the United States Supreme Court reversed on appeal. In *Davis v. Alaska*,[213] the United States Supreme Court held that the secrecy of juvenile proceedings provided by statute must give way to the right of an accused to confront the witnesses against him. The Court ordered disclosure of the prior juvenile record of the prosecution's witness.

The Alaska Supreme Court faced a similar issue in *Salazar v. State*.[214] In that case, the defendant sought to limit the marital communications privilege in order fully to cross-examine and confront the prosecution witness concerning an inconsistent statement and bias. On appeal, the Alaska Supreme Court reversed the conviction and held that the privilege provided by Rule 26 of the Alaska Rules of Criminal Procedure would have to give way to the constitutional right of confrontation. The court in *Salazar* stated:

> When, as in *Davis* and this case, the defendant's right to confront effectively the witnesses against him by exploring their possible bias or prejudice is balanced against a rule based solely on policy grounds, the defendant's constitutional rights must prevail. . . . We thus hold that when conflict is found between the constitutional right of confrontation and the exercise of a privilege based on public policy, the constitutional right must control.[215]

Thus *Davis* and *Salazar*, taken together, firmly establish that neither statutory nor rule privileges of non-disclosure may obstruct the right of an accused to fully confront the witnesses

212. 499 P.2d 1025 (Alaska 1972).
213. 415 U.S. 308 (1974).
214. 559 P.2d 66 (Alaska 1976).
215. *Id.* at 79.

against him. These decisions recognize the importance of cross-examination in a criminal trial as a means of testing the evidence presented and establishing all the facts which might bear on the credibility of a witness.

G. *Sentencing*

Following conviction after trial or entry of a guilty plea, Rule 32 of the Alaska Rules of Criminal Procedure requires that a pre-sentence report be prepared prior to sentencing in all felony cases. The report may include references to arrests and charges which were not prosecuted if the defendant has an opportunity to explain such instances and present rebuttal evidence. In *Nukapigak v. State*,[216] the court held that mere police "contacts" which are not explained may not be used in the report or considered by the court in sentencing. When defense counsel believes that improper materials have been included in the pre-sentence report, a request may be made that a judge other than the sentencing judge review the pre-sentence report and delete improper items. This procedure avoids the possibility of the improper material tainting the sentencing judge's thoughts or attitude about the case.

In 1969, the Alaska Legislature granted to the Alaska Supreme Court the jurisdiction to hear and review appeals of sentences.[217] The expansion of the court's jurisdiction in this area was aimed at establishing guidelines to protect defendants against unsupportably harsh sentences and to achieve some measure of uniformity in sentencing in Alaska.

All sentences in excess of forty-five days may be appealed.[218] In examining the sentence imposed, however, the supreme court will not reverse a sentence unless it finds that the trial court was "clearly mistaken."[219] The appropriate factors to be considered by a trial court in imposing a sentence were articulated in *State v. Chaney*.[220] Alaska's new criminal code contains presumptive sentencing provisions which substantially alter the process by which sentences may be imposed and reviewed.[221]

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216. 562 P.2d 697 (Alaska 1977).
217. AS § 12.55.120.
218. ALASKA R. APP. P. 21.
219. McClain v. State, 519 P.2d 811 (Alaska 1974).
220. 477 P.2d 441 (Alaska 1970).
221. *See* AS § 12.55.125 et seq., *and particularly*, AS § 12.55.155, identifying factors in aggravation and mitigation to be considered by the court in applying the presumptive sentences set out in AS §§ 12.55.125, 12.55.135, 12.55.140. For a history of sentence appeals in Alaska, *see* Erwin, *Five Years of Sentence Review in Alaska*, 5 UCLA-ALASKA L. REV. 1 (1975).

IV. POST-CONVICTION RIGHTS

A. *Modification of Sentence*

Rule 35 of the Alaska Rules of Criminal Procedure permits the trial court to correct or reduce a sentence after it has been imposed. In addition to the authority of the trial court to modify sentences pursuant to Rule 35(a), Rule 35(b) permits convicted and sentenced persons to petition for relief where:

(1) The conviction or sentence was in violation of the State or Federal Constitution;
(2) The court was without jurisdiction to impose the sentence;
(3) The sentence imposed was not authorized by law;
(4) There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction in the interest of justice;
(5) The Defendant is unlawfully held in custody;
(6) The conviction or sentence is subject to collateral attack under any common law, statutory or other writ, proceeding, or remedy;
(7) There has been a significant change in law.

B. *Double Jeopardy*

Article I, Section 9[222] of the Alaska Constitution parallels the fifth amendment of the United States Constitution[223] and provides that no person shall be put in jeopardy twice for the same offense. In *Torres v. State*,[224] the Alaska Supreme Court followed the prevailing federal rule and held that jeopardy attaches when the trial jury is sworn. In a series of cases commencing with *Whitton v. State*,[225] the Alaska court has held that although defendants may be subjected to multiple charges arising out of a single course of conduct or action, a defendant may not be subjected to multiple punishments for the "same offense." In determining whether multiple charges constitute the "same offense" for purposes of punishment, the court must analyze whether the offenses involve differences in intent or conduct. Any such differences found must then be balanced against societal interests, taking into account whether the differences are substantial enough to warrant multiple punishments.[226] The Alaska Supreme Court stated in *Whitton* that the social interests to be considered include: "[t]he nature of personal, property or other rights sought to be protected, and the

222. ALASKA CONST. art. I, § 9 provides: "No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself."
223. *See* note 132 *supra*.
224. 519 P.2d 788 (Alaska 1974).
225. 479 P.2d 302 (Alaska 1970).
226. *Id.* at 312.

broad objectives of criminal law such as punishment of the criminal for his crime, rehabilitation of the criminal, and the prevention of future crimes."[227] If the multiple charges do not reflect significant or substantial differences in intent or conduct in relation to the social interests involved, multiple punishments may not be imposed without violating the prohibition against double jeopardy contained in the State and Federal Constitutions.[228]

CONCLUSION

This article has attempted to identify the areas of criminal procedure where Alaska has departed from established lines of authority and has enhanced the procedural rights afforded an accused. The greatest expansion of rights has occurred in the investigative and pre-trial stages of the proceedings. The procedural rights afforded an accused during a criminal trial and following his conviction do not significantly depart from those which are afforded by other states or the federal courts. Once formal charges have been initiated, and, more clearly, once an accused is brought to trial, he receives few benefits, rights, or protections not provided defendants in other jurisdictions.

In establishing the permissible limits of reasonable searches and seizures, the right to counsel, the right to fair and impartial grand jury proceedings, the right to discovery, and the right to a speedy trial, the Alaska Supreme Court has taken a more generous view of the rights of an accused. These five areas of procedure have an element in common. Each constitutes a point in the criminal process at which the prosecution has a clear advantage over the accused. The accused is not able to participate in or influence the acquisition of evidence, the conducting of a criminal investigation, and the initiation of charges. The protection of the individual during these stages of the criminal process can be viewed as an attempt by the Alaska Supreme Court to equalize the prosecution's procedural advantage over the accused. However, once formal charges are initiated and trial commences, the court has been reluctant to continue providing enhanced procedural protections to the accused.

227. *Id.*
228. *Id.*