NOTE

Sidestepping *Scott*: Modifying Criminal Discovery in Alaska

This Note analyzes the possibility of instituting reciprocal criminal discovery in Alaska. It begins by discussing the right against self-incrimination under federal and Alaska law and then traces the national trend expanding the exchange of information between the prosecution and defense through mandatory reciprocal discovery statutes. Next, the Note analyzes Scott v. State, *the case in which the Alaska Supreme Court held that discovery requests by the prosecution which are testimonial, incriminating, and compelled violate the defendant's right against self-incrimination. In light of the* Scott *holding, the Note discusses several failed and ineffective attempts to reform criminal discovery in Alaska, looks to several other states' reciprocal discovery systems, and concludes that an opt-in reciprocal discovery system would be the best option to expand criminal discovery in Alaska.*

I. INTRODUCTION

While the rest of the nation has moved gradually toward expanded criminal discovery,[1] the State of Alaska remains behind. The national move has embraced various forms of reciprocal discovery, which provides for the liberal exchange of information between the prosecution and the defense.[2] In its purest form, recip-

1. *See* AMERICAN BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996) [hereinafter 1996 STANDARDS]. In 1994, the American Bar Association adopted Criminal Justice Discovery Standards reflecting a significant change from previous standards. The ABA noted that "since the adoption of the Second Edition Standards, both state and federal criminal justice systems have continued the trend towards imposing expanded pretrial discovery obligations on the prosecution and the defense in criminal cases." *Id*. at xv. The new standards removed a "two-track" approach that "combined limited mandatory discovery with broad additional discovery at the election of the defense" in favor of an approach that applied mandatory discovery in all cases. *Id*. at xvi. The State of Alaska has not adopted this approach.

2. States that have enacted some form of reciprocal discovery include Ari-

rocal discovery is a "two-way street" wherein the parties exchange before trial virtually all information short of the attorneys' work product. A modified form of reciprocal discovery often referred to as "opt-in" reciprocal discovery provides greater discovery to the prosecution but only if the defendant chooses to participate. The growing acceptance of reciprocal discovery reflects a concern for fair criminal trials. Generally, without reciprocal discovery, the defense has access to more information than does the prosecution, which directly hinders the prosecution from putting on as strong a case as possible. Reciprocal discovery systems aim to rectify this imbalance by providing the prosecution with greater discovery access to the defendant's information.[3]

Alaskan jurisprudence has never adopted any form of reciprocal discovery. Impeded by the Alaska Supreme Court's decision in *Scott v. State*,[4] mandatory disclosures by the defendant have been curtailed to such an extent that true reciprocal discovery is impossible.[5] The legislative attempt to enact reciprocal discovery was ultimately unsuccessful because the reform initiative, Chapter 95, was found to violate the *Scott* holding and was therefore ruled unconstitutional by the Alaska Supreme Court in November of 1997.[6] A judicial committee initiative to expand criminal discovery does not reach the level of traditional reciprocal discovery and has yet to be tested in Alaska courts.

At the heart of the debate in Alaska is how the legislature may expand criminal discovery between the prosecution and the defense while remaining consistent with the *Scott* holding. This Note suggests that an "opt-in" reciprocal discovery system is desirable for its fairness and even-handed application of the law while still respecting the *Scott* holding. The passage of legislation in the Alaska legislature (although later found unconstitutional) indicates popular support exists for such discovery reform. Part II of the Note provides a historical background of the right against self-

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zona, California, Florida, Georgia, Iowa, Michigan, New Mexico, New York, North Dakota, Ohio, and West Virginia. For example, see CAL. PENAL CODE §§ 1054 - 1054.7 (West 1997). *See* People v. Johnson, 11 Cal. Rptr. 2d 652 (Ct. App. 1992) (stating that the criminal discovery statute "is intended to protect the public interest in a full and truthful disclosure of critical facts, to promote the [p]eople's interest in preventing a last minute defense, and to reduce the risk of judgments based on incomplete facts"). For a more complete examination of other jurisdictions, see *infra* Parts II.B & V.B.

3. For a comprehensive view of the arguments concerning the expansion of defendant-provided discovery, see Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversary Balance*, 74 CAL. L. REV. 1569 (1986).

4. 519 P.2d 774, 778 (Alaska 1974).

5. *See infra* Part IV.

6. *See* State v. Summerville, 948 P.2d 469, 470 (Alaska 1997).

incrimination and examines models of expanded criminal discovery. Part III analyzes the *Scott* holding, focusing on the constitutional difficulties any reciprocal discovery system will face in Alaska. Part IV introduces past Alaskan judicial and legislative attempts to modify criminal discovery, analyzes their conflict with the *Scott* holding, and examines and critiques the version of Criminal Rule 16 currently in effect. Part V looks to other jurisdictions for models of reciprocal discovery that would still satisfy the *Scott* holding and concludes that an "opt-in" regime is the most appropriate way for Alaska to reform criminal discovery.

II. *NEMO TENETUR SEIPSUM PRODERE*[7]: EVOLVING STATE CONSTITUTIONALISM AND THE RIGHT AGAINST SELF-INCRIMINATION

Few rights in the Western legal tradition have as prominent and erratic a history as the right against self-incrimination. From the courts of the Anglican Church to the proceedings of the Star Chamber, legal authorities and scholars have debated the extent to which persons should be compelled to testify against their own interests.[8] During the founding of our nation, George Mason lobbied the Constitutional Convention to include in the original Constitution a bill of rights that would have embraced protections against self-incrimination, modeled after rights already guaranteed under the Virginia constitution.[9] When Mason's efforts failed, James Madison, in the 1789 Congress, supported calls to establish a right against self-incrimination in any context, including civil matters.[10] In its final form, the Fifth Amendment to the U.S. Constitution states that no person "shall be compelled in any criminal case to be a witness against himself."[11] Article I, section 9 of the Alaska Constitution contains virtually identical language.[12] The Alaska Supreme Court has recognized that the drafters of the Alaska Constitution looked to the federal Constitution as a model, intending section 9 to guarantee the liberties then available under the U.S. Constitution.[13]

7. No one is bound to betray himself.

8. For a full discussion on the history of the right against self-incrimination, see MARK BERGER, TAKING THE FIFTH 1-23 (1980); LEWIS MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? 9-19 (1959).

9. *See* BERGER, *supra* note 8, at 22-23.

10. *See id*.

11. U.S. CONST. amend. V.

12. *See* ALASKA CONST. art. I, § 9 ("No person shall be compelled in any criminal proceeding to be a witness against himself."); *see also* Biele v. State, 371 P.2d 811 (Alaska 1962).

13. *See* State v. Gonzalez, 853 P.2d 526, 529-30 (Alaska 1993).

The right against self-incrimination however is not the only protection against governmental abuse afforded the accused. The accused citizen also is entitled to a fair, meaningful trial as a matter of due process.[14] Inherent to a meaningful trial is access to information, particularly the defendant's access to the prosecutor's information through discovery.[15] Protection from self-incrimination and the assurance of a fair trial often act in concert with each other, ensuring the accused a fair, informed adjudication. How these constitutional protections delimit the process of criminal discovery, however, is far from a determined and static concept in American jurisprudence. In particular, the amount of discovery that the defense must disclose to the state is an evolving debate.

Difficulties arise when important liberties, such as the right against self-incrimination, operate in varying degrees and on multiple standards. The Tenth Amendment to the federal Constitution includes a truism regarding sovereignty for the states: "powers not delegated to the United States, . . . nor prohibited by it to the [s]tates, are reserved to the [s]tates respectively, or to the people."[16] The Bill of Rights was originally intended to preclude federal interference with protected rights.[17] Thus, the states were limited only to the extent that similar provisions were written into their individual state constitutions. However, the Fourteenth Amendment's Due Process clause, enacted during Reconstruction, has been interpreted to apply most provisions to the states; this incorporation has continued gradually until nearly all liberties found in the Bill of Rights have been applied to the states.[18]

To the extent that a federal right has been extended to the states through the Fourteenth Amendment, the federal courts' interpretation of the right becomes a baseline, or a bare minimum amount of protection that the states must provide. However, a higher standard may be adopted by states if they so choose.[19] In

14. *See* U.S. CONST. amend. V; ALASKA CONST. art. I, § 7 ("No person shall be deprived of life, liberty, or property, without due process of law.").

15. *See* Maloney v. State, 667 P.2d 1258, 1264 (Alaska Ct. App. 1983). For a comprehensive discussion of the prosecutorial disclosure duties, see Emily D. Quinn, *Standards of Materiality Governing the Prosecutorial Duty to Disclose Evidence to the Defense*, 6 ALASKA L. REV. 147 (1989).

16. U.S. CONST. amend X.

17. *See* Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247-48 (1833) (holding that the federal Constitution's Fifth, Sixth, and Eighth Amendments have no application to state governments).

18. *See generally* Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964). For a more detailed account of the incorporation doctrine's progression and expansion, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

19. *See* California v. Trombletta, 467 U.S. 479, 491 n.12 (1984) ("[States] re-

essence, the states may extend greater rights to their respective citizens if they find the federal baseline to be insufficient. Many consider an expansion of rights at a state level consistent with, if not vital to, the concept of federalism.[20] When a state elects to expand its citizens' rights beyond the federal baseline, it must then decide to what extent it will rely upon federal judicial decisions in interpreting the state's constitutional stance.[21]

Criminal discovery is an example of this melange of federal baselines and state expansion of rights. In the early 1970s, the criminal justice system began to experience a revolution of sorts, particularly as to the rights of the accused.[22] During that time, the American Bar Association ("ABA") adopted and the Federal Rules of Criminal Procedure codified different versions of reciprocal discovery. While the ABA Discovery Standards did not insist upon the defendant's participation, it provided for an opt-in component that permitted broader disclosure from the prosecution to the defendant only if the defendant agreed to reciprocate with similar disclosure.[23] The revised Federal Rules of Criminal Procedure specifically sought to expand defense disclosure by mandating reciprocal discovery.[24] The defendant had no choice in discovery

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main free to adopt more rigorous safeguards governing the admissibility of scientific evidence than those imposed by the [f]ederal Constitution."). Alaskan courts long have viewed themselves as capable of expanding rights beyond U.S. constitutional constraints: "We are not bound in expounding the Alaska Constitution's Declaration of Rights by the decisions of the United States Supreme Court, past or future, which expound identical or closely similar provisions of the United States Constitution." Roberts v. State, 458 P.2d 340, 342 (Alaska 1969).

20. *See generally, e.g.*, Brennan, *supra* note 18; Peter J. Galie, *Other Supreme Court Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1982); Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1 (1995).

21. *See generally* Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970) (analyzing the scope of the right to jury trial under the U.S. and Alaska constitutions). The Alaska Supreme Court has taken the view that it has a "duty to move forward in those areas of constitutional progress which we view as necessary to the development of a civilized way of life in Alaska." *Id*. at 401. Quoting Justice Cardozo, the court stated, "'We take a false and one-sided view of history when we ignore its dynamic aspects. . . . [Books] cannot teach us that what was the beginning shall also be the end.'" *Id*. (quoting BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 104-05 (1924)).

22. *See* FED R. CRIM. P. 16 note to 1974 Amendment; AMERICAN BAR ASS'N, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (Approved Draft, 1970) [hereinafter 1970 STANDARDS].

23. *See* 1970 STANDARDS, *supra* note 22, at 43-46.

24. *See* FED. R. CRIM. P. 16 note to 1974 Amendment. The new amendments revised the rule "to give greater discovery to both the prosecution and the de-

format. In both systems, however, the goal was fairer, more balanced discovery under which constitutional rights were preserved, and the government received the information it needed to prosecute the defendant fully and fairly.

Various states adopted aspects of this new view of discovery, and some states began to push beyond the federal norms. For example, the State of Florida required that defendants give notice of an alibi defense.[25] Although the federal rules did not require the disclosure of alibi witnesses, in a challenge to the constitutionality of the Florida rule, the U.S. Supreme Court upheld the statute against a claim of Fifth Amendment privilege.[26] Elsewhere, states continued to expand discovery requirements, a movement that culminated in the ABA revising its Discovery Standards to support full, mandatory reciprocal discovery in criminal cases.[27]

A. ABA Standards for Reciprocal Discovery

The standards set by the ABA were designed to form the framework around which the individual states could structure their own rules. In drafting the new standards, the ABA "sought to produce a revised set of standards that would be widely implemented across the United States" and adaptable to each jurisdiction's particular situation.[28] In its purest form, the reciprocal discovery now advanced by the ABA requires equal participation by the prosecution and defense; it is viewed as a two-way street whereby information flows freely between the parties. All information, short of work product, is revealed in the pretrial phase, thus allowing full preparation by each side.

Specifically, the Discovery Standards require the prosecutor to produce "[a]ll written and oral statements of the defendant or of any codefendant that are within the possession or control of the prosecution,"[29] as well as "[t]he names and addresses of all persons known to the prosecution to have information concerning the offense charged, together with all written statements of any such person."[30] The prosecution must also provide (1) "[a]ny reports or written statements of experts made in connection with the case"[31];

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fense." *Id*. The Advisory Committee felt "that the two — prosecution and defense discovery — are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution." *Id*.

25. *See* FLA. R. CRIM. P. 3.220(a).
26. *See* Williams v. Florida, 399 U.S. 78, 86 (1970).
27. *See* 1996 STANDARDS, *supra* note 1.
28. *Id*. at xv.
29. *Id*. § 11-2.1(a)(i).
30. *Id*. § 11-2.1(a)(ii).
31. *Id*. § 11-2.1(a)(iv).

(2) a list of persons it intends to call as witnesses at trial[32]; (3) all tangible objects pertaining to the case, identifying which of these objects it intends to offer as evidence at trial and which objects it obtained through a search and seizure[33]; and (4) all prior conviction records, information relating to lineups, and information obtained from electronic surveillance.[34] Finally, if "the prosecution intends to use character, reputation, or other act evidence, the prosecution should notify the defense of that intention and of the substance of the evidence to be used."[35]

The Discovery Standards likewise demand specific disclosures from the defense. Under the new standards, the defendant must provide the following:

> [t]he names and addresses of all witnesses (other than the defendant) whom the defense intends to call at trial, together with all written statements of any such witness that are within the possession or control of the defense and that relate to the subject matter of the testimony of the witness.[36]

The defense must also provide "reports or written statements made in connection with the case by experts whom the defense intends to call at trial, including the results of physical or mental examinations and of scientific tests, experiments, or comparisons."[37] Additionally, tangible items that will be introduced at trial by the defense must be disclosed to the prosecution.[38]

B. California as a Reciprocal Model

As previously noted, many states have enacted reciprocal discovery statutes.[39] An illustrative example is Chapter 10 of the California Penal Code.[40] The stated purpose of the California recipro-

32. *See id*. § 11-2.1(a)(ii).
33. *See id*. § 11-2.1(a)(v), (d).
34. *See id*. § 11-2.1(a)(vi)-(vii), (c).
35. *Id*. § 11-2.1(b).
36. *Id*. § 11-2.2(a)(i).
37. *Id*. § 11-2.2(a)(ii).
38. *See id*. § 11-2.2(a)(iii).
39. *See supra* note 2.
40. CAL. PENAL CODE §§ 1054 -1054.7 (West 1997). Chapter 10 was added by Initiative Measure § 23 (Proposition 115), which was approved on June 5, 1990. Like Alaska, California was prohibited from enacting reciprocal discovery by an expansion of state self-incrimination rights under *In re Misener*, 698 P.2d 637 (Cal. 1985). Rather than selecting an opt-in provision, Proposition 115 attempted to circumvent the court's decision by including an amendment to the state constitution that permitted reciprocal discovery. *See* CAL. PENAL CODE §§1054 -1054.7. The California Supreme Court found no conflict between the new amendment and the existing self-incrimination provisions and upheld Proposition 115. *See* Izazaga v. Superior Court, 815 P.2d 304, 313-14 (Cal. 1991).

cal discovery statute is to "promote the ascertainment of truth in trials by requiring timely pretrial discovery . . . [t]o save court time in trial and avoid the necessity for frequent interruptions and postponements. . . . [and] [t]o protect victims and witnesses from danger, harassment, and undue delay of the proceedings."[41] The California statute addresses these goals by first listing with specificity those materials that the prosecuting attorney must disclose. The required disclosures include the following:

> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
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> (b) Statements of all defendants.
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> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
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> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
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> (e) Any exculpatory evidence.
>
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial . . . .[42]

The defense is also required to produce discovery, but with less specificity. The defendant's disclosures include a list of persons intended to be called "as witnesses at trial"[43] accompanied by all "relevant written or recorded statements of those persons . . . including any reports or statements of experts made in connection with the case."[44] The defense must also provide "[a]ny real evidence that the defendant intends to offer in evidence at trial."[45]

The California statute is a typical compelled reciprocal discovery system. The defense does not have the choice of opting-in, but is required to participate in discovery. Section 1054 provides time limits within which counsel must make the required discovery available.[46] The section also protects work product,[47] and applies various sanctions if requests for compliance are unheeded.[48] In return, the defendant is granted much more disclosure than required by the U.S. Constitution.

As is to be expected, the precise form of a criminal discovery rule will vary depending on the structure and preferences of each

41. CAL. PENAL CODE § 1054.
42. *Id*. § 1054.1.
43. *Id*. § 1054.3(a).
44. *Id*.
45. *Id*. § 1054.3(b).
46. *See id*. § 1054.7.
47. *See id*. § 1054.6.
48. *See id*. § 1054.5.

jurisdiction. Any form of required reciprocal discovery in Alaska, however, faces serious restrictions, largely due to an unprecedented expansion of self-incrimination rights established by the Alaska Supreme Court in *Scott v. State*.[49]

III. THE IMPEDIMENT TO RECIPROCAL DISCOVERY IN ALASKA: *SCOTT V. STATE*

In many respects, Alaska has been a forerunner in granting individual rights above and beyond federal requirements.[50] Broad interpretations of the Alaska Constitution have expanded the right of privacy,[51] the right against unreasonable search and seizure,[52] and the accused's right to counsel.[53] However, many have criticized the lack of Alaskan forays into expanding protections against self-incrimination.[54] While these criticisms are valid to a certain

49. 519 P.2d 774 (Alaska 1974).

50. *See* Nelson, *supra* note 20, at 11. Nelson illustrates Alaskan examples of "New Judicial Federalism" in the areas of equal protection, privacy, religious freedom, and access to natural resources. *See id*. The Nelson article criticizes claims made by James Gardner that suggest federalism has produced "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements." James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

The foundation for such judicial behavior may be traced back at least to *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970). There, the court stated that,

> while we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, *we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution*. . . . We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.

Id. at 401-02 (footnote omitted; emphasis added).

51. As opposed to the federal "zones of privacy," which rest within penumbras from the First, Third, Fourth, Fifth, and Ninth Amendments, as expressed by the Supreme Court in *Griswold v. Connecticut*, 381 U.S. 479, 480-81 (1965), the Alaska Constitution specifically provides that "[t]he right of the people to privacy is recognized and shall not be infringed." ALASKA CONST. art. I, § 22.

52. *See, e.g.*, Jackson v. State, 791 P.2d 1023 (Alaska 1990) (limiting patdown, warrantless searches and thus rejecting the Supreme Court's decision in *United States v. Robinson*, 414 U.S. 218 (1973)); Reeves v. State, 599 P.2d 727 (Alaska 1979) (expanding limits on preincarceration searches); Woods & Rhode, Inc. v. State, 565 P.2d 138 (Alaska 1977) (extending search and seizure protections to commercial property).

53. *See* Roberts v. State, 458 P.2d 340, 342-43 (Alaska 1969) (interpreting the Alaska constitutional provision, ALASKA CONST. art. I, § 11, to have a broader scope than the Sixth Amendment to the U.S. Constitution).

54. *See generally* G. Blair McCune, *Self-Incrimination Protection Under the*

extent, they underestimate the significance of the broad expansion of rights under *Scott v. State*.[55]

In *Scott*, the Alaska Supreme Court reviewed a superior court's order that had granted the prosecution's request for extremely broad discovery.[56] Stepping far beyond the discovery requirements of Criminal Rule 16(c),[57] the state had required that the defendant disclose

> (1) the names and addresses of all prospective defense witnesses, other than defendant himself.
>
> (2) the production or inspection and copying of any written or recorded statements in defendant's possession of prospective defense or government witnesses, other than defendant himself.
>
> (3) advance notice of an alibi defense, together with information indicating the place or places defendant claims to have been and the names of witnesses upon whom he intends to rely.[58]

The supreme court found that the trial court's order was within the broad latitude "accorded a trial court in the conduct and management of pretrial procedures,"[59] but then focused on what the court considered the most serious claim — "that the broad prosecutorial discovery order controvene[d] [the defendant's] privilege against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 9 of the Alaska [C]onstitution."[60]

After an extensive review of the evolution of criminal discovery in the United States and in Alaska,[61] the court ruled that an accused could not be compelled to disclose evidence related to an alibi defense, including the names and addresses of potential witnesses or statements by those witnesses.[62] However, the court did permit the state to require defendants to give pretrial notification that they might present an alibi defense.[63]

In its decision, the court relied not on the Fifth Amendment to

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Alaska Constitution: A Descriptive Analysis, 12 ALASKA L. REV. 43 (1995). McCune criticizes Alaskan efforts in, *inter alia*, the areas of right to counsel, custody, Miranda waivers, voluntariness, and interrogation. *See id*. at 58-69. In these areas, McCune suggests, "Alaska courts are generally reluctant to grant broader protection for self-incrimination rights under the Alaska Constitution than that afforded by the [f]ederal Constitution." *Id*. at 58.

55. 519 P.2d 774 (Alaska 1974).
56. *See id.* at 775.
57. *See* ALASKA R. CRIM. P. 16(c).
58. *Scott*, 519 P.2d at 775.
59. *Id.* at 777.
60. *Id*. (footnotes omitted).
61. *See id*. at 778-83.
62. *See id*. at 786-87.
63. *See id*. at 787.

the U.S. Constitution, but on article I, section 9 of the Alaska Constitution. Divergence from federal construction was necessary due to the U.S. Supreme Court's holding in *Williams v. Florida*.[64] The *Williams* Court, judging facts similar to those of *Scott*, ruled that the U.S. Constitution does not provide protection against disclosing alibi witnesses.[65] The Supreme Court stated that a trial is "not yet a poker game in which players enjoy an absolute right always to conceal their cards until played."[66] Focusing on the inevitable disclosure of the discovery items, the Court noted that the criminal rules "only compel[] [a defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the [defendant] from the beginning planned to divulge at trial."[67] With respect to the Fifth Amendment, the Court held that "[n]othing in the Fifth Amendment privilege entitles a defendant . . . to await the end of the [s]tate's case before announcing the nature of his defense."[68]

The Alaska Supreme Court refused to apply the *Williams* holding to self-incrimination rights enumerated under article I, section 9 of the Alaska Constitution.[69] In rejecting the reasoning of *Williams*, the court held that "the privilege against compelled self-incrimination under the Alaska Constitution prohibits extensive pretrial prosecutorial discovery in criminal proceedings."[70] The court applied a three-part test, disallowing discovery of information that is (1) testimonial, (2) incriminating, and (3) compelled.[71] Applying this test to Mr. Scott's situation, the court first found that the discovery was indeed testimonial since the witness list "constitutes a communication of cognizable information from one source to another."[72] Second, the disclosure was also incriminating to the extent that the released alibi information may reference "known felons, perjurers, accomplices, co-defendants, or individuals under suspicion or surveillance . . . . Moreover, the police may possess additional incriminating information about some of the witnesses and an accused's reference . . . may tend to implicate him

64. 399 U.S. 78 (1970).

65. *See id.* at 83.

66. *Id.* at 82.

67. *Id.* at 85.

68. *Id.*

69. *See* Scott v. State, 519 P.2d 774, 778 (Alaska 1974).

70. *Id.* at 785.

71. The court flatly applied this three-part test without reference to any source from which it derived this standard. *See id.* All three parts of this test must be met in order to prohibit discovery. *See* Gipson v. State, 609 P.2d 138 (Alaska 1980) (finding that the evidence at issue was incriminating and compelled, but not testimonial, and therefore was discoverable).

72. *Scott*, 519 P.2d at 785.

in criminal activities of such witness."[73] Finally, the court found that since the discovery was required by a court order, it was indeed compelled.[74]

Addressing the U.S. Supreme Court's "eventuality of disclosure" argument, the Alaska court offered a counter-scenario in which "the state's case may be so weak that the defendant will choose not to expose himself to further criminal liability by revealing incriminating evidence that was nonetheless exculpatory of the crime for that he stands charged."[75] The *Scott* court was simply unwilling to be limited to a federal baseline which it perceived as an insufficient protection of citizens' rights.[76] The court stated, "We are not bound to follow blindly a federal constitutional construction of a fundamental principle if we are convinced that the result is based on unsound reason or logic."[77]

In addition to being a sharp departure from the federal interpretation of rights, *Scott* foreclosed the possibility of adopting mandatory reciprocal discovery in Alaska. Any change in discovery requirements must not require disclosures that are testimonial, incriminating, and compelled. The subsequent efforts to enact reciprocal discovery measures have merely challenged the foundation of *Scott* and therefore have failed.[78] Successful reform must work within the *Scott* constraints while still providing for more fair, even-handed criminal discovery.

IV. ATTEMPTS AT REFORM

Under the former versions of Rule 16, discovery in Alaska was not reciprocal. Instead, it provided for extensive discovery to the defense, but the prosecution had to wait until the trial for revelation of certain persons' identities, testimonies, and reports.[79] Despite the restrictions on discovery by the prosecution established by *Scott*, Alaska has attempted moves toward a fairer, more

73. *Id.*
74. *See id.* at 786.
75. *Id.* at 787.
76. *See id.*
77. *Id.* at 783.
78. *See infra* Part IV.
79. *See* ALASKA R. CRIM. P. 16 (1973). Under this version of Rule 16, the prosecutor was required to disclose the "names and addresses of persons known by the government to have knowledge of relevant facts and their written or recorded statements." *Id.* The prosecution was also required to disclose any statements made by the defendant or any codefendant and any expert reports made in relation to the case. *See id.* In return, the defendant was to provide notice of intent to raise an insanity defense and court-ordered expert witness reports, and to submit to nontestimonial identification procedures. *See id.*

reciprocal discovery.

A. Efforts from the Judiciary

In 1995, the Alaska Department of Law proposed a version of reciprocal criminal discovery moderated by an "opt-in/opt-out" provision.[80] Defendants who agreed to opt-in would receive discovery from the prosecution pursuant to that provided by Criminal Rule 16.[81] In return, the defense would waive self-incrimination privileges and would be required to present the prosecution with more extensive discovery than they would be under *Scott*, including a notice of defenses, names and addresses of potential witnesses, statements from witnesses, and expert witness reports.[82] A defendant who chooses to opt out would lose access to discovery from the prosecution provided by Criminal Rule 16 and would be limited to the discovery rights under the Little Jencks Act.[83] Under this Act, which governs discovery during trial as opposed to pretrial, the prosecution is required to provide only statements made by prosecution witnesses once those witnesses have testified either in preliminary hearings or in the trial itself.[84] With no other discovery standards, this system would largely abrogate pretrial discovery in the criminal context except for exculpatory evidence which the prosecution is constitutionally bound to disclose.[85]

The majority of the Alaska Supreme Court Criminal Rules Committee voted against adopting the opt-in/opt-out reciprocal discovery proposal. The Committee's primary concern was the problems created by defendants who choose to opt out. The Committee asserted in its report "that no incentive existed for a defendant to choose to opt into such a discovery process."[86] To substantiate this assertion, the report stated that

80. *See* Alaska Department of the Law, Proposed Rule Changes to Criminal Rule 16, at 18 (1995) (on file with author) [hereinafter Proposed Rule Changes].

81. *See id.*

82. *See id.*

83. *See* ALASKA STAT. §§12.45.050-.080 (Michie 1996); *see also* Proposed Rule Changes, *supra* note 80, at 18. The "Little Jencks Act" was modeled after the federal Jencks Act, 18 U.S.C. § 3500 et seq. (1994). The Alaska Supreme Court has previously held that the Alaska model does not conflict with Criminal Rule 16 as the Rule addresses pretrial discovery, while the Act speaks only to discovery during trial. *See* Putnam v. State, 629 P.2d 35, 44 n.19 (Alaska 1980).

84. *See* 1996 Alaska Sess. Laws ch. 95.

85. *See* Brady v. Maryland, 373 U.S. 83 (1963).

86. Memorandum from Marcia E. Holland, for the majority of the Alaska Supreme Court Criminal Rules Committee, to the Alaska Supreme Court 1 (Dec. 12, 1994) (on file with author) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material . . . to guilt.").

> *[a] majority of criminal defense attorneys contacted by committee members indicated* that they would prefer operating under an opt-out procedure if given the choice between opt-in or opt-out procedure. Little incentive existed under the state's proposal for a defendant to choose to waive his/her privilege against self-incrimination and opt into the reciprocal discovery process.[87]

Since the opt-in procedure was undesirable to the defense attorneys polled, the report then moved to the problems "which arise when the criminal justice system operates solely or primarily on discovery provided by the state under the provisions of the Little Jencks Act."[88] Concerns included the potential for unreliable results, conflicts of representation, mid-trial delays, and the probability of prosecution continuing to release discovery in the interest of pre-indictment procedures.[89]

The Committee concluded by discussing the "broader impact of the opt-out procedure on the smooth functioning of a criminal justice system."[90] In its opinion, the opt-out discovery procedure would have "a significant adverse effect on the court system."[91] In particular, the report listed the difficulties faced by an opt-out defendant who lacks vital information, a jury delayed by required continuances, or a prosecution strained by an increasing number of preliminary hearings.[92]

Under the proposal, the defendant who chooses to opt out of reciprocal discovery has little access to discovery material important to deciding trial strategy. A defendant who lacks disclosure of the evidence "lacks the perspective to make an informed decision to either go to trial or not and the defense attorney lacks the evidence to back up an explanation to a client concerning the client's chances for an acquittal at trial."[93] Without the materials for a meaningful defense, the majority anticipated less negotiation and pretrial resolution, resulting in more cases going to trial and greater demands for juries.

The majority report predicted there would also be an adverse impact on juries. Mid-trial delays would frequently arise as defendants request continuances to counter new evidence. Trial lengths would become less predictable. These continuances would strain the jurors' ability to serve. As one judge lamented, "it is very difficult to be able to hold on to a jury when a mid-trial delay of six

87. *Id.* at 1-2 (emphasis added).
88. *Id.* at 2.
89. *See id.* at 2-3.
90. *Id.* at 4.
91. *Id.*
92. *See id.* at 4-5.
93. *Id.* at 4.

weeks or more occurs."[94]

Finally, the majority report predicted that if the proposal were adopted, preliminary hearings would again become a discovery tool. Preliminary hearings were a frequent occurrence under former versions of Rule 16.[95] In response to prosecutorial tactics, defendants would use pretrial motions to gain discovery, a technique common in federal courts. Responding to these motions would burden Alaska's court systems and already-overworked prosecutorial staffs. In light of its findings, the majority of the Criminal Rules Committee rejected the proposed rule, concluding that "opt-in/opt-out reciprocal discovery procedures could result in disruptive pretrial and trial practice and in burdening the system."[96]

While the majority reflected a preference for the current, pro-defendant system, the minority favored an approach that would either restrict defendant access to materials or broaden prosecutorial reach.[97] The minority report favored an "opt-in" version of reciprocal discovery, finding it an "exchange of information" that would "result in trials with more reliable results – i.e.[,] the guilty will not go free because the accused sandbagged the prosecution."[98] Raising issue with the majority's prediction of increased trial numbers, the minority cited the federal court system as an example of effective reciprocal discovery. According to the minority, "the number of trials vs. pleas [under the federal reciprocal discovery system] is not unmanageable."[99] The minority also asserted that the federal courts have not seen a large number of mid-trial continuances disrupting the judicial process.[100] However, the minority provided no empirical data to support this assertion.[101]

The minority suggested that the number of trials may actually decrease when the "defendants' chances of winning at trial by ambush are removed."[102] As for increased collateral attacks, it pointed to the large percentage of convicted defendants already filing for post-conviction relief and argued that the proposed rule

94. *Id.*

95. *See id.* at 5.

96. *Id.*

97. The crucial ideological division between the majority and minority reports is evidenced by the fact that the majority was written by Assistant Public Defender Marcia E. Holland, while the minority report was written by Assistant Attorney General Cynthia M. Hora.

98. Memorandum from Cynthia M. Hora, for the minority of the Alaska Supreme Court Criminal Rules Committee, to Christine Johnson, Court Rules Attorney 2-3 (Dec. 8, 1994) (on file with author) [hereinafter Hora Memorandum].

99. *Id.* at 2.

100. *See id.*

101. *See id.*

102. *Id.*

"may change the specific complaints about a trial attorney's performance, but it will not have any impact on the number of post-conviction relief applications filed."[103]

In examining the merits of reciprocal discovery, the Committee as a whole addressed several issues crucial to advancing the Alaskan criminal system toward a fairer discovery format. However, the actual viability of reciprocal discovery in Alaska is still unclear. In discussing reform measures, the Committee focused on the negative effects that defendants who opt out might encounter. While analysis of these effects are necessary, the examination was premature. The majority report largely dismissed any notion that defendants would actually opt in with regularity. Its discussion revolved around *why* the Rule's failure would be negative, rather than discussing *if* the Rule would fail. Neither side presented reliable or credible evidence to support its respective thesis. Although it may be true that the proposal's effects are unknown or unconsidered, both sides, rather than entertaining any true research or investigation, drew conclusions based on their differing ideologies of criminal law.

Both sides also predictably raised by implication the specter of institutional competence: whether the ideological and political aspect of the debate appropriately belongs in judicial committees, or whether such a question is best left to a more politically accountable branch of government – the legislature. Reciprocal discovery proponents have argued that the movement has grown out of the public backlash against crime and the perception that flaws in the criminal justice system unduly favor the accused.[104] The minority drew on this sentiment in its statement that "[t]he public is demanding a fair trial for both the accused and the government."[105] This assertion, however, was presented on its own merits and was not grounded in neutral, unbiased research.

Notwithstanding its rejection of reciprocal discovery, the Criminal Rules Committee did pass modifications to Criminal Rule 16 in an attempt to broaden discovery as much as possible within the limitations set by *Scott*.[106] The revisions to the discovery rule included mandatory defense disclosure of expert witnesses, defenses, and physical evidence, while prosecution disclosure re-

103. *Id.*

104. *See id.* at 2; *see also* 1996 STANDARDS, *supra* note 1, at xv. The ABA Discovery Standards suggest that "[t]here has . . . been a growing recognition on the state and federal levels that expanded pretrial discovery in criminal cases is beneficial to both parties and promotes the fair administration of the criminal justice system." *Id.*

105. Hora Memorandum, *supra* note 98, at 2.

106. *See generally* Proposed Rule Changes, *supra* note 80.

mained largely unchanged.[107]

Under the new Rule 16, defendants are required to present to the prosecutor not only reports and statements of expert witnesses (as was the previous practice), but also the names and addresses of expert witnesses who are likely to be called. Additionally, the defense, at least ten days prior to trial, must "inform the prosecutor of the defendant's intention to rely upon a defense of alibi, justification, duress, entrapment, or other statutory or affirmative defense."[108] The previous rule had limited mandatory disclosure to defendants asserting an insanity defense.[109] Finally, the revisions now require defendants to "turn over . . . any physical evidence of the offense received by counsel."[110] The defense counsel could not be "compelled to provide any information concerning the source of the evidence" nor could the prosecutor "reveal the source of the evidence to the jury."[111]

Without regard to the specific discovery formats preferred, both factions of the Committee focused on broadening the defendant's disclosures in an effort to achieve fairer, more liberal criminal discovery. However, the Committee's reform was limited to the *Scott* restrictions; as the Committee's report states, "Rule 16(c) should be revised to require [only] as much disclosure as is permitted by law."[112]

But the new Criminal Rule 16 had little immediate impact; the legislature, perhaps feeling unsatisfied by the Committee's lack of progress, attempted to resolve the matter by legislatively amending Criminal Rule 16 the following year.

B. Efforts from the Legislature

The latest attempt to reform criminal discovery in Alaska was the passage of Chapter 95 of the 1996 Session Laws, which amended Criminal Rule 16 to expand the discovery required of defendants.[113] The amendments provided for mandatory reciprocal discovery, including requiring the defense to furnish the identities and addresses of all prospective witnesses. Effective July 1, 1996, this Act directly challenged the basic tenets of *Scott*.

The most crucial revision to Criminal Rule 16, provision (c)(1), mandated disclosure to the prosecution of "the names, addresses, and phone numbers . . . of persons the defendant is likely

107. *See id.*
108. *Id.* at 19.
109. *See* ALASKA R. CRIM. P. 16 (1973).
110. Proposed Rule Changes, *supra* note 80, at 19.
111. *Id.*
112. *Id*. at 18.
113. 1996 Alaska Sess. Laws ch. 95, § 1.

to call as witnesses."[114] The former version of Rule 16 required no such disclosures from the defense.[115] The new rule also required notification "if the defendant is likely to rely upon a defense of alibi, justification, duress, entrapment, or other statutory or affirmative defenses."[116]

The first judicial review of Chapter 95 found the revision to Criminal Rule 16 unconstitutional.[117] The state had charged David Summerville with two counts of sexual assault and one count of sexual abuse of a minor.[118] Under the newly-amended version of Criminal Rule 16, the state requested discovery information including a list of alibi witnesses.[119] Summerville sought a protective order, claiming the disclosure of defense witnesses, the production or inspection of statements of any prospective witnesses, and disclosure of an alibi location and witnesses all violated the *Scott* restrictions on prosecutorial discovery.[120] The superior court agreed and granted the protective order, concluding that "certain portions of Rule 16(c) . . . stand in direct violation of *Scott*, which expressly held that the Alaska Constitution's bar against compulsory self-incrimination forbids these forms of court-ordered defense disclosure."[121]

On review, the court of appeals affirmed.[122] Dismissing the state's contentions that federal case law disagreed with *Scott*'s holding, it stated that

> [t]hese precedents decided under the [f]ederal Constitution, have no direct effect on the Alaska Supreme Court's interpretation of Alaska's constitution. They may, of course, provide occasion for the Alaska Supreme Court to reexamine the decision it reached . . . . But unless and until the Alaska Supreme Court revises *Scott*, its decision in that case remains binding on the superior court and on this court alike.[123]

In a brief, yet pointed, decision, the Alaska Supreme Court upheld the court of appeals's decision and explicitly declined to overrule *Scott*.[124] It declared the new discovery standards unconsti-

114. *Id.*

115. *See* ALASKA R. CRIM. P. 16(c) (1973).

116. 1996 Alaska Sess. Laws ch. 95, § 1.

117. *See* State v. Summerville, 926 P.2d 465 (Alaska Ct. App. 1996), *aff'd*, 948 P.2d 469 (Alaska 1997).

118. *See id.* at 466.

119. *See id.* at 466-67.

120. *See id.*

121. *Id.* at 466-67.

122. *See id.* at 467.

123. *Id.*

124. *See* State v. Summerville, 948 P.2d. 469, 469-70 (Alaska 1997).

tutional and reinstated the previous Alaska Criminal Rule 16.[125] The court held that

> [t]he decision in this case is controlled by *Scott v. State*, unless we are persuaded to overrule *Scott*.[126] In *State v. Dunlop*, we stated: "We do not lightly overrule our past decisions. . . . [I]t is a 'salutary policy to follow past decisions.' . . . [W]here we are 'clearly convinced the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent,' we will so depart." We are not persuaded that these standards are met, at least with respect to *Scott*'s holding that the production of the names of non-alibi witnesses and their statements cannot be constitutionally compelled. Because the reciprocal discovery provisions enacted in section 1 of Chapter 95 SLA 1996 are non-severable, and at least one of those provisions violates article I, section 9 of Alaska's constitution, the entire section is invalid. The pre-existing version of Alaska Criminal Rule 16 must remain in effect.[127]

C. Current Law

By declaring Chapter 95 unconstitutional, the *Summerville* opinion reinstated the Committee's Rule 16 as the operative criminal discovery procedure for Alaska.[128] That rule demands greater disclosure by the defense, including notification of seemingly all defenses, revelation of expert witness identities, and production of all physical evidence held by the defense.[129]

125. *See id.*

126. Here, the court appears to suggest it might overrule *Scott* should a sufficient argument be presented. It is unclear what arguments would persuade the court to overrule its decision in the present situation. The brevity of the *Summerville* opinion suggests the court does not view *Scott* as "originally erroneous." As *Scott* itself defied a federal move away from broadened self-incrimination rights, the "changed conditions" possibility seems slight. Thus, we are left to believe the strongest possibility of overruling *Scott* lies in showing "more good than harm would result from a departure from precedent." *Id.* at 469. The presentation of results from other jurisdictions may well be the starting place for such a showing.

127. *Id*.

128. *See id.* at 470.

129. The Rule 16 amendments proposed by the Committee were adopted by the Alaska Supreme Court, effective July 15, 1995. *See* Alaska Supreme Court Order No. 1191. The amendments themselves largely affected discovery that the accused was required to provide to the prosecution.

Under Rule 16(4) as amended, "the defendant [is to] inform the prosecutor of the names and addresses of any expert witnesses the defendant is likely to call at trial. Defendant shall also make available for inspection and copying any reports or written statements of these experts." ALASKA R. CRIM. P. 16(4). The new Rule 16(5) requires that "the defendant shall inform the prosecutor of the defendant's intention to rely upon a defense of alibi, justification, duress, entrapment, or

While not allowing for the discovery of alibi witness identities, the *Scott* court did allow discovery of a defendant's intent to use an alibi defense.[130] The court stated that it found "it difficult to conceive how a notice of this particular defense, standing by itself, might tend to be incriminating."[131] It seems probable that the addition of other defenses to the discovery requirement would follow a similar evaluation and be upheld.

Providing the identity of expert witnesses also seems proper. While facially similar to the discovery disallowed by *Scott*, the production of expert witnesses is distinguishable. *Scott* emphasized that alibi witnesses may include "felons, perjurers, accomplices, codefendants, or individuals under suspicion or police surveillance" that "may tend to implicate [the accused] in the criminal activities of such witness" and may provide "a link in the chain of evidence."[132] Such potential problems do not exist within the context of expert witnesses. Hence, expert witness testimony, while perhaps revealing, is not "incriminating" in the same way that alibi witness testimony is.

V. LOOKING TO OTHER STATES' MODELS FOR FUTURE EFFORTS

In the wake of *Scott* and *Summerville*, Criminal Rule 16 cannot require that the defendant disclose evidence that is testimonial, incriminating, and compelled. But, if the required disclosure meets only two of the three prongs, the Alaska Supreme Court's decision in *Gipson v. State*[133] suggests such disclosure would not

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other statutory or affirmative defense." *Id.* 16(5). Under both of these amendments, sanctions are provided for noncompliance.

Finally, the amended Rule 16(6) states that

> [d]efense counsel shall turn over to the prosecutor any physical evidence of the offense received by counsel. If the physical evidence is received from the attorney's client or acquired as a direct result of information communicated by the client, defense counsel may not be compelled to provide any information concerning the source of the evidence or the manner in which it was obtained. In such cases, the prosecutor may not reveal the source of the evidence to the jury. If the source of the physical evidence is not the client or the client's agent, defense counsel shall reveal the manner in which the physical evidence was obtained unless that information is otherwise prohibited.

Id. 16(6).

130. *See* Scott v. State, 519 P.2d 774, 787 (Alaska 1974).

131. *Id.*

132. *Id.* at 785.

133. 609 P.2d 1038 (Alaska 1980). In *Gipson*, the court distinguished *Scott*, finding that the compelled production of a firearm expert's report satisfied all prongs but the testimonial portion. The court found the report to be more "akin to evidence such as fingerprints, handwriting exemplars or photographs. . . . The non-testimonial nature of the challenged evidence is fatal to Gipson's constitutional argument." *Id.* at 1044 (citation omitted).

violate the *Scott* standard. Reform measures, therefore, should focus not on challenging the validity of *Scott*, but should focus on sidestepping *Scott* by avoiding at least one of the three elements.

The *Scott* court spoke only to what it characterized as "extensive pretrial prosecutorial discovery in criminal proceedings."[134] While the court spoke against discovery as a "two-way street,"[135] it is unclear whether an "opt-in" reciprocal discovery system would be contrary to the ruling. Certainly any *compelled* reciprocal discovery would violate *Scott's* reading of the Alaska Constitution. However, if the defendant waives his *Scott* rights in order to gain broader access to prosecution materials, the disclosure would no longer be compelled. Thus, it would appear that an opt-in reciprocal discovery would satisfy the *Scott* holding.

As discussed previously, the Criminal Rules Committee rejected a reciprocal discovery proposal because defense attorneys, informally polled, expressed the opinion that such discovery would not be widely accepted by defendants.[136] Such an informal, unscientific poll should not be the basis for rejecting a progressive and widely accepted legal movement.

Because Chapter 95 has been ruled unconstitutional, the Alaska legislature must take the initiative and pass appropriate reciprocal discovery measures.[137] As demonstrated by their previous attempt, the Criminal Rules Committee is unlikely to enact such changes due to the members' contrasting roles within the criminal justice system. Ideologies will not be set aside easily on such a crucial matter. If, as asserted by the minority report, the people of Alaska are demanding changes in the criminal rules,[138] the legislature is the proper forum for such changes. However, regardless of the public outcry, and short of amending the Alaska Constitution, the legislative efforts must remain within the confines of the *Scott* decision.

134. *Scott*, 519 P.2d at 785.

135. *Id.* at 784.

136. *See supra* Part IV.A.

137. The Alaska Constitution grants the primary responsibility for rule-making to the Alaska Supreme Court with secondary rule-making to the legislature:

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

ALASKA CONST. art. IV, §15.

138. *See supra* note 105 and accompanying text.

A. Difficulties in Adopting the California or ABA Models

The California rule[139] can only serve as a model of pure reciprocal discovery but not the actual discovery regime that might be enacted in Alaska. Applying the *Scott* three-part test to the California statute makes it clear that it would be deemed unconstitutional in Alaska. In particular, the required production of witness lists[140] parallels the disclosure required by Chapter 95, a requirement that did not withstand scrutiny under the *Scott* test, due to the testimonial, incriminating, and compelled nature of the discovery.[141]

Of particular significance to the present Alaska debate, the ABA Standards require that "[i]f the defense intends to rely upon a defense of alibi or insanity, the defense should notify the prosecution of that intent and of the names of the witnesses who may be called in support of that defense."[142] This provision alone demonstrates the difficulties facing Alaskan reform. Although placed in the Discovery Standards as merely "another set of witnesses to be disclosed," the list of alibi witnesses parallels those discovery requirements in *Scott* that the supreme court found unconstitutional.[143] Any attempt to include a list of alibi witnesses in the required defense disclosures would require an opt-in procedure to sidestep the *Scott* restrictions.

Notably, the ABA removed "opt-in" provisions found in the "two-track" approach of the previous edition, choosing what it deemed "a simpler approach which applies the same mandatory discovery rules in all cases."[144] It is also noteworthy that while the new Discovery Standards do not provide specific timing guidelines,[145] jurisdictions should "impose time limits for discovery sufficiently in advance of trial to give each party adequate time to use the disclosed information to prepare its case."[146]

An Alaskan measure might well follow the same legislative pattern of specifically delineating the discovery materials required by each party. The difficulty in analogizing or closely tracking the

139. *See supra* Part II.B.

140. *See* CAL. PENAL CODE § 1054.1 (West 1997).

141. *See* State v. Summerville, 926 P.2d 465 (Alaska Ct. App. 1996), *aff'd*, 948 P.2d 469 (Alaska 1997).

142. 1996 STANDARDS, *supra* note 1, at § 11-2.2(c).

143. *See* Scott v. State, 519 P.2d 774, 786-87 (Alaska 1974) (holding that the portion of the superior court's order that requires production of alibi information from the defendant offends the defendant's state constitutional privilege against self-incrimination).

144. 1996 STANDARDS, *supra* note 1, at xvi.

145. *See id*. § 11-4.1.

146. *Id*. § 11-4.1(a) commentary.

enactments of any other jurisdiction stems from Alaska's unique expansion of self-incrimination rights. No other state is required to include an "opt-in" provision to overcome constitutional restrictions. For this reason, the Alaska statute would be unique. Opting-in, however, is not an untested concept in other jurisdictions.

B. North Dakota and Florida as Possible Opt-In Models

Several states continue to provide an opt-in component to criminal discovery. These states can be models for Alaskan attempts to expand discovery while remaining within *Scott*'s expansion of self-incrimination rights. In examining two of these jurisdictions, North Dakota and Florida, Alaskan reformers should note the operation and structure of the opt-in provision and the disclosure provided in situations where defendants choose not to opt-in.

North Dakota, with a few notable exceptions, has followed the national trend toward broader criminal discovery. Prior to 1983, criminal discovery "proceeded on an informal basis," requiring prosecutorial disclosure of potentially exculpatory evidence only as required by the *Brady v. Maryland* decision.[147] In September of 1983, Rule 16 was amended to permit greater discovery, but only if the defendant chose such discovery.[148] Specifically, Rule 16(b)(1)(A) provides for disclosure of documents, tangible objects, and reports of examinations and tests, but only "[i]f the defendant, in writing, requests disclosure under subdivision (a)(1)(C) or (D)."[149] The cited subdivision states that "[u]pon written request of the defendant, the prosecuting attorney shall permit the defendant to inspect and copy or photograph" an assortment of materials, including virtually all related documents, examinations, and tangible objects.[150] After making the request, the defendant must release to the prosecution the same sort of discovery articles.[151]

Besides providing for opt-in reciprocal discovery, the North Dakota amendments broaden the discovery available to the prosecution, even if the defendant chooses not to opt-in. For instance, the defense must disclose all statements made by the defendant and a copy of the defendant's criminal record.[152] Another interesting feature of the North Dakota rule requires a "defendant who

147. 373 U.S. 83, 90-91 (1963) (holding that the defendant was not denied a federal constitutional right when his trial was restricted to the question of punishment); *see* N.D.R. CRIM. P. 16 explanatory note.

148. *See* N.D.R. CRIM. P. 16 explanatory note.

149. *Id.* 16(b)(1)(A).

150. *Id.* 16(a)(1)(C)-(D).

151. *See id.* 16(b)(1)(A)-(B).

152. *See id.*

intends to offer evidence of an alibi defense . . . [to] serve written notice upon the prosecuting attorney of that intention."[153] The rule also requires the filing of a notice that states "the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defendant intends to rely to establish the alibi."[154]

In a slightly clearer fashion, the Florida Rules of Criminal Procedure also permit reciprocal discovery, should the defendant choose it. Through a system entitled "Notice of Discovery," a Florida defendant "may elect to participate in the discovery process provided by these rules" by filing a notice with the court.[155] The rule further specifies that "[p]articipation by a defendant in the discovery process, including the taking of any deposition by a defendant, shall be an election to participate in discovery."[156]

Once the discovery process is chosen, the defendant is required to furnish a number of items, including witness lists, statements, and reports.[157] Most notable, however, is the degree to which the defendant is made available to the prosecution. Having submitted to discovery, the court may require the defendant to appear in a lineup, speak for identification by witnesses, be fingerprinted, pose for photographs, try on articles of clothing, permit the taking of specimens of material from under the defendant's fingernails, permit the taking of samples of blood and hair, provide handwriting samples, and submit to physical and mental inspections.[158] In exchange for furnishing this information, the defendant is eligible to receive similar information from the prosecution.[159]

Both the North Dakota and Florida versions of the opt-in reciprocal discovery may be useful in selecting appropriate standards for Alaskan measures. The concept of a formal notice filing, combined with certain acts that may be deemed acts of acceptance, provide a structure and procedure worthy of consideration. Further, following the North Dakota example of providing broadened discovery for the prosecution, even if the defendant decides not to opt-in, may bring a stronger sense of fairness to any proposed rule. One element that may not be duplicated, however, is the required release of alibi witnesses from all defendants. Should the defendant not choose to opt-in to reciprocal discovery and thus waive

153. *Id.* 12.1(a).

154. *Id.*

155. FLA. R. CRIM. P. 3.220(a).

156. *Id.*

157. *See id.* 3.220(d)(1).

158. *See id.* 3.220(c)(1). These requirements are recognized by the rule to be constrained by constitutional limitations. *See id.*

159. *See id.* 3.220(b).

article I, section 9 rights, the *Scott* decision would prohibit such a requirement.[160]

Regardless of the specific provisions and system selected, Alaskan efforts to enact reciprocal discovery statutes should borrow one aspect from the other states: restricting prosecution discovery to the constitutional minimum unless the accused provides discovery in return. Within this debate, it must be remembered that while discovery is widely used, and is now fully ingrained in the judicial mindset, most discovery provided to the defense by the prosecution is *not* constitutionally mandated. Discovery may be sharply curtailed from its present state. When prosecution materials are no longer regularly provided, reciprocal discovery becomes much more attractive to the defendant. Through the addition of an opt-in provision, the reciprocity becomes not only attractive to the defendant, but also constitutional under *Scott v. State*.

VI. CONCLUSION

Evolution and change, mitigated by the recognition of individual rights, are fundamental aspects of the Western legal tradition. The last twenty years have seen large changes in the area of criminal procedure. Whereas the middle of the century was characterized by the extension, development, and refinement of individual rights, the end of this era has brought a resurgence of public demand for increased crime prevention and less favorable treatment of criminal defendants. With respect to pretrial discovery in the criminal context, the trend is toward reducing defense access and increasing prosecutorial access. Such trends have not occurred in Alaska because of the expansion of criminal defendant's rights in *Scott v. State*. Defendants in Alaska possess greater freedoms and liberties, stemming not from federal decrees, but from state judicial activism. By declaring such opinions to be interpretations of the Alaska Constitution, the Alaska Supreme Court's decisions are changeable only upon supreme court initiative or by the amendment process.

However, this protection of personal freedoms and liberties through the expansion of self-incrimination rights is hindering fair criminal prosecution in Alaska. The Department of Law's recent proposal examined reciprocal systems where opt-in provisions would allow increased prosecutorial discovery while respecting *Scott*'s expansion of individual rights, but the concept was dismissed largely for ideological reasons. The legislative effort directly challenged the *Scott* holding by amending Rule 16. However, the Alaska supreme court upheld *Scott* and the attempt was

160. *See* Scott v. State, 519 P.2d 774, 785 (Alaska 1974).

futile. All previous attempts at reciprocal discovery have extended the prosecutorial reach to items that the courts view as testimonial and incriminating, and thus, in Alaska, not constitutionally subject to be compelled during pretrial discovery. The current version of Rule 16 remains within the basic tenets of *Scott* but fails to expand discovery to any significant degree.

In looking for areas in which to modify criminal procedure, proponents ought to reconsider an opt-in reciprocal discovery system. They system should pass constitutional muster, under both the federal and state constitutions, if it restricts defense discovery to the constitutional and Little Jencks Act minimum should the defendant choose not to opt-in. Broad discovery would not be eliminated, but placed behind a door that the defendant could open at his or her option. Discussions of this type have previously been frustrated by insufficient data and argument in improper fora. The Alaska legislature should decide whether modified reciprocal discovery is an appropriate method of criminal law reform. With an opt-in provision, Alaska could sidestep the court's restrictions in *Scott*, and rejoin the national legal trend towards more fair and equal criminal discovery.

Cameron J. Williams