

SENATE BILL NO. 90

INTRODUCED BY MAZUREK, FULLER

IN THE SENATE

January 11, 1985	Introduced and referred to Committee on Judiciary.
January 22, 1985	Committee recommend bill do pass as amended. Report adopted.
January 23, 1985	Bill printed and placed on members' desks.
January 24, 1985	Second reading, do pass.
January 25, 1985	Considered correctly engrossed.
January 26, 1985	Third reading, passed. Ayes, 27; Noes, 19.
	Transmitted to House.

IN THE HOUSE

January 28, 1985	Introduced and referred to Committee on Judiciary.
March 12, 1985	Committee recommend bill be concurred in as amended. Report adopted.
March 14, 1985	Second reading, concurred in.
March 16, 1985	Third reading, concurred in.
	Returned to Senate with amendments.

IN THE SENATE

March 16, 1985

Received from House.

March 21, 1985

Second reading, amendments
concurrent in.

March 23, 1985

Third reading, amendments
concurrent in. Ayes, 48;
Noes, 0.

Sent to enrolling.

Reported correctly enrolled.

1 Senate BILL NO. 90
2 INTRODUCED BY Thyequik, Jullon
3

4 A BILL FOR AN ACT ENTITLED: "AN ACT TO EXPAND DISCOVERY IN
5 CRIMINAL CASES; PROVIDING FOR MUTUAL AND RECIPROCAL
6 DISCOVERY IN CRIMINAL CASES; AND REPEALING SECTIONS
7 46-15-301 THROUGH 46-15-303, MCA."
8

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10 Section 1. Definitions. As used in [this act], unless
11 the context requires otherwise, the following definitions
12 apply:

13 (1) "Defendant" means the defense, including the
14 accused, his counsel, and defense counsel's staff or
15 investigators.

16 (2) "Make available for examination and reproduction"
17 means to make material and information subject to disclosure
18 available upon request at a designated place during
19 specified reasonable times and provide suitable facilities
20 or arrangements for reproducing it. The term does not mean
21 that the disclosing party is required to make copies at its
22 expense, to deliver the materials or information to the
23 other party, or to supply the facilities or materials
24 required to carry out tests on disclosed items. The parties
25 may by mutual consent make any other or additional

1 arrangements.

2 (3) "Statement" means:

3 (a) a writing signed or otherwise adopted or approved
4 by a person;

5 (b) a mechanical, electrical, or other recording of a
6 person's oral communications or a transcript thereof; and

7 (c) a writing containing a verbatim record as a
8 summary of a person's oral communications.

9 (4) "Superseded notes" means handwritten notes,
10 including field notes, that have been substantially
11 incorporated into a statement. Such notes may no longer
12 themselves be considered a statement.

13 Section 2. Disclosure by prosecution. (1) Within 10
14 days after arraignment in district court or at such later
15 time as the court may for good cause permit, the prosecutor
16 shall make available to the defendant for examination and
17 reproduction the following material and information within
18 his possession or control:

19 (a) a list of the names and addresses of all persons
20 whom the prosecutor intends to call as witnesses in the
21 case-in-chief, together with their relevant written or
22 recorded statements;

23 (b) all written or oral statements of the defendant
24 and of any person who will be tried with him;

25 (c) the names and addresses of experts who have



1 personally examined the defendant or any evidence in the
2 particular case, together with the results of physical
3 examinations, scientific tests, experiments, or comparisons,
4 including all written reports or statements made by them in
5 connection with the particular case;

6 (d) a list or copies of all papers, documents,
7 photographs, or tangible objects that the prosecutor will
8 use at trial or that were obtained from or purportedly
9 belong to the defendant; and

10 (e) all material or information that tends to mitigate
11 or negate the defendant's guilt as to the offense charged or
12 that would tend to reduce his punishment therefor.

13 (2) At the same time the prosecutor shall inform the
14 defendant of and make available to the defendant for
15 examination and reproduction any written or recorded
16 material or information within his possession or control
17 regarding:

18 (a) whether there has been any electronic surveillance
19 of any conversations to which the accused was a party;

20 (b) whether a search warrant has been executed in
21 connection with the case;

22 (c) whether the case has involved an informant, and,
23 if so, his identity if the defendant is entitled to know
24 either or both of these facts under Rule 502 of the Montana
25 Rules of Evidence and [section 4(2)].

1 (3) The prosecutor, upon written request, shall make
2 available to the defendant for examination, testing, and
3 reproduction any specified items contained in the list
4 submitted under subsection (1)(d). The prosecutor may impose
5 reasonable conditions, including an appropriate stipulation
6 concerning chain of custody, to protect physical evidence
7 produced under this section.

8 (4) The prosecutor's obligation of disclosure extends
9 to material and information in the possession or control of
10 members of his staff and of any other persons who have
11 participated in the investigation or evaluation of the case.

12 (5) Upon motion of the defendant showing that he has
13 substantial need in the preparation of his case for
14 additional material or information not otherwise provided
15 for and that he is unable without undue hardship to obtain
16 the substantial equivalent by other means, the court in its
17 discretion may order any person to make it available to him.
18 The court may, upon the request of any person affected by
19 the order, vacate or modify the order if compliance would be
20 unreasonable or oppressive.

21 (6) The prosecutor shall furnish to the defendant no
22 later than 5 days before trial or at such later time as the
23 court may for good cause permit, together with their
24 relevant written or recorded statements, a list of the names
25 and addresses of all persons whom he intends to call as

1 rebuttal witnesses to the defenses of alibi, compulsion,
2 entrapment, justifiable use of force, mistaken identity, or
3 good character or the defense that the defendant did not
4 have a particular state of mind that is an element of the
5 offense charged.

6 Section 3. Disclosure by defendant. (1) At any time
7 after the filing in district court of an indictment or
8 information, the defendant, in connection with the
9 particular crime with which he is charged, shall upon
10 written request of the prosecutor:

- 11 (a) appear in a line-up;
 - 12 (b) speak for identification by witnesses;
 - 13 (c) be fingerprinted, palm printed, footprinted, or
14 voiceprinted;
 - 15 (d) pose for photographs not involving reenactment of
16 an event;
 - 17 (e) try on clothing;
 - 18 (f) permit the taking of samples of his hair, blood,
19 saliva, urine, or other specified materials that involve no
20 unreasonable intrusions of his body;
 - 21 (g) provide specimens of his handwriting; or
 - 22 (h) submit to a reasonable physical or medical
23 inspection of his body; however, such inspection does not
24 include psychiatric or psychological examination.
- 25 (2) The defendant is entitled to the presence of

1 counsel at the taking of any evidence pursuant to subsection
2 (1). Subsection (1) supplements and does not limit any other
3 procedures established by law.

4 (3) Within 20 days after arraignment in district court
5 or at such later time as the court may for good cause
6 permit, the defendant shall provide the prosecutor with a
7 written notice of his intention to introduce evidence at
8 trial of good character or the defenses of alibi,
9 compulsion, entrapment, justifiable use of force, or
10 mistaken identity or the defense that the defendant did not
11 have a particular state of mind that is an essential element
12 of the offense charged. The notice must specify for each
13 defense the names and addresses of the persons that will be
14 called as witnesses at trial in support of the defense.
15 Prior to trial the defendant may, upon motion and showing of
16 good cause, add to the list of witnesses the names of any
17 additional witnesses. After the trial commences, no
18 witnesses may be called by the defendant in support of these
19 defenses unless the name of the witness is included on the
20 list, except for good cause shown.

21 (4) Simultaneously with the notice of defenses
22 submitted under subsection (3), the defendant shall make
23 available to the prosecutor for testing, examination, or
24 reproduction:

- 25 (a) the names and addresses of all persons, other than

1 the defendant, whom he will call as witnesses at trial,
2 together with all statements made by them in connection with
3 the particular case;

4 (b) the names and addresses of experts whom he will
5 call at trial, together with the results of their physical
6 examinations, scientific tests, experiments, or comparisons,
7 including all written reports and statements made by them in
8 connection with the particular case; and

9 (c) a list of all papers, documents, photographs and
10 other tangible objects that he will use at trial.

11 (5) The defendant's obligation under this section
12 extends to material and information within the possession or
13 control of the defendant or his attorneys and agents.

14 (6) Upon motion of the prosecutor showing that he has
15 substantial need in the preparation of his case for
16 additional material or information not otherwise provided
17 for, that he is unable without undue hardship to obtain the
18 substantial equivalent by other means, and that disclosure
19 thereof will not violate the defendant's constitutional
20 rights, the court in its discretion may order any person to
21 make such material or information available to him. The
22 court may, upon request of any person affected by the order,
23 vacate or modify the order if compliance would be
24 unreasonable or oppressive.

25 Section 4. Materials not subject to disclosure. (1)

1 Except as provided in subsection (2), disclosure is not
2 required for a work product that includes:

3 (a) legal research, records, correspondence, reports,
4 or memoranda to the extent that they contain the opinions,
5 theories, or conclusions of the prosecutor or members of his
6 legal or investigative staff, law enforcement officers, or
7 defense counsel or his legal or investigative staff; or

8 (b) documents made by law enforcement officials for
9 internal communications or law enforcement officers' field
10 notes.

11 (2) Disclosure of a work product referred to in
12 subsection (1) may be required if exculpatory information is
13 contained therein.

14 (3) Disclosure of the existence of an informant or of
15 the identity of an informant who will not be called to
16 testify is not required if:

17 (a) disclosure would result in substantial risk to the
18 informant or to his operational effectiveness; and

19 (b) the failure to disclose will not infringe the
20 constitutional rights of the accused.

21 Section 5. Failure to call a witness or raise a
22 defense. The fact that a witness' name is on a list
23 furnished pursuant to [this act] or that a matter contained
24 in a pretrial notice is not raised may not be commented upon
25 at trial unless the court, on motion of a party, allows such

1 comment after finding that the inclusion of the witness'
2 name or the pretrial notice constituted an abuse of the
3 applicable disclosure requirement.

4 Section 6. Use of materials. Any materials furnished
5 to an attorney pursuant to [this act] may not be disclosed
6 to the public but may be disclosed to others only to the
7 extent necessary for the proper conduct of the case.

8 Section 7. Continuing duty to disclose. If at any time
9 after a disclosure has been made any party discovers
10 additional information or material that would be subject to
11 disclosure had it been known at the time of disclosure, such
12 party shall promptly notify all other parties of the
13 existence of the additional information or material and make
14 an appropriate disclosure.

15 Section 8. Excision and protective orders. (1) Upon a
16 motion of any party showing good cause, the court may at any
17 time order that disclosure of the identity of any witness be
18 deferred for any reasonable period of time, not to extend
19 beyond 5 days prior to the date set for trial, or that any
20 other disclosures required by [this act] be denied,
21 deferred, or regulated when it finds:

22 (a) that the disclosure would result in a risk or harm
23 outweighing any usefulness of the disclosure to any party;
24 and

25 (b) that the risk cannot be eliminated by a less

1 substantial restriction of discovery rights.

2 (2) Whenever the court finds, on motion of any party,
3 that only a portion of a document or other material is
4 discoverable under [this act], it may authorize the party
5 disclosing it to excise that portion of the material which
6 is nondiscoverable and disclose the remainder.

7 (3) On motion of the party seeking a protective or
8 excision order or in submitting for the court's
9 determination the discoverability of any material or
10 information, the court may permit him to present the
11 material or information for the inspection of the judge
12 alone. Counsel for all other parties are entitled to be
13 present when such presentation is made.

14 (4) If the court enters an order that any material or
15 any portion thereof is not discoverable under [this act],
16 the entire text of the material must be sealed and preserved
17 in the record in the event of an appeal.

18 Section 9. Sanctions. If at any time during the course
19 of the proceeding it is brought to the attention of the
20 court that a party has failed to comply with any of the
21 provisions of [this act] or any order issued pursuant to
22 [this act], the court may impose any sanction that it finds
23 just under the circumstances, including but not limited to:

24 (1) ordering disclosure of the information not
25 previously disclosed;

- 1 (2) granting a continuance;
2 (3) holding a witness, party, or counsel in contempt;
3 (4) precluding a party from calling a witness,
4 offering evidence, or raising a defense not disclosed; or
5 (5) declaring a mistrial when necessary to prevent a
6 miscarriage of justice.

7 Section 10. Codification instruction. Sections 1
8 through 9 are intended to be codified as an integral part of
9 Title 46.

10 Section 11. Repealer. Sections 46-15-301 through
11 46-15-303, MCA, are repealed.

-End-

APPROVED BY COMMITTEE
ON JUDICIARY

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A BILL FOR AN ACT ENTITLED: "AN ACT TO EXPAND DISCOVERY IN
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investigators.

(2) "Make available for examination and reproduction"
means to make material and information subject to disclosure
available upon request at a designated place during
specified reasonable times and provide suitable facilities
or arrangements for reproducing it. The term does not mean
that the disclosing party is required to make copies at its
expense, to deliver the materials or information to the
other party, or to supply the facilities or materials
required to carry out tests on disclosed items. The parties
may by mutual consent make any other or additional

arrangements.

(3) "Statement" means:

(a) a writing signed or otherwise adopted or approved
by a person;

(b) a mechanical, electrical, or other recording of a
person's oral communications or a transcript thereof; and

(c) a writing containing a verbatim record as a
summary of a person's oral communications.

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including field notes, that have been substantially
incorporated into a statement. Such notes may no longer
themselves be considered a statement.

Section 2. Disclosure by prosecution. (1) Within 10
days after arraignment in district court or at such later
time as the court may for good cause permit, the prosecutor
shall make available to the defendant for examination and
reproduction the following material and information within
his possession or control:

(a) a list of the names and addresses of all persons
whom the prosecutor intends to call as witnesses in the
case-in-chief, together with their relevant written or
recorded statements;

(b) all written or oral statements of the defendant
and of any person who will be tried with him;

(c) the names and addresses of experts who have



1 personally examined the defendant or any evidence in the
 2 particular case, together with the results of physical
 3 examinations, scientific tests, experiments, or comparisons,
 4 including all written reports or statements made by them in
 5 connection with the particular case;

6 (d) a list or copies of all papers, documents,
 7 photographs, or tangible objects that the prosecutor will
 8 use at trial or that were obtained from or purportedly
 9 belong to the defendant; and

10 (e) all material or information that tends to mitigate
 11 or negate the defendant's guilt as to the offense charged or
 12 that would tend to reduce his punishment therefor.

13 (2) At the same time the prosecutor shall inform the
 14 defendant of and make available to the defendant for
 15 examination and reproduction any written or recorded
 16 material or information within his possession or control
 17 regarding:

18 (a) whether there has been any electronic surveillance
 19 of any conversations to which the accused was a party;

20 (b) whether a search warrant has been executed in
 21 connection with the case;

22 (c) whether the case has involved an informant, and,
 23 if so, his identity if the defendant is entitled to know
 24 either or both of these facts under Rule 502 of the Montana
 25 Rules of Evidence and [section 4+2+(3)].

1 (3) The prosecutor, upon written request, shall make
 2 available to the defendant for examination, testing, and
 3 reproduction any specified items contained in the list
 4 submitted under subsection (1)(d). The prosecutor may impose
 5 reasonable conditions, including an appropriate stipulation
 6 concerning chain of custody, to protect physical evidence
 7 produced under this section.

8 (4) The prosecutor's obligation of disclosure extends
 9 to material and information in the possession or control of
 10 members of his staff and of any other persons who have
 11 participated in the investigation or evaluation of the case.

12 (5) Upon motion of the defendant showing that he has
 13 substantial need in the preparation of his case for
 14 additional material or information not otherwise provided
 15 for and that he is unable without undue hardship to obtain
 16 the substantial equivalent by other means, the court in its
 17 discretion may order any person to make it available to him.
 18 The court may, upon the request of any person affected by
 19 the order, vacate or modify the order if compliance would be
 20 unreasonable or oppressive.

21 (6) The prosecutor shall furnish to the defendant no
 22 later than 5 days before trial or at such later time as the
 23 court may for good cause permit, together with their
 24 relevant written or recorded statements, a list of the names
 25 and addresses of all persons whom he intends to call as

1 rebuttal witnesses to the defenses of alibi, compulsion,
2 entrapment, justifiable use of force, mistaken identity, or
3 good character or the defense that the defendant did not
4 have a particular state of mind that is an element of the
5 offense charged.

6 Section 3. Disclosure by defendant. (1) At any time
7 after the filing in district court of an indictment or
8 information, the defendant, in connection with the
9 particular crime with which he is charged, shall upon
10 written request of the prosecutor:

- 11 (a) appear in a line-up;
- 12 (b) speak for identification by witnesses;
- 13 (c) be fingerprinted, palm printed, footprinted, or
14 voiceprinted;
- 15 (d) pose for photographs not involving reenactment of
16 an event;
- 17 (e) try on clothing;
- 18 (f) permit the taking of samples of his hair, blood,
19 saliva, urine, or other specified materials that involve no
20 unreasonable intrusions of his body;
- 21 (g) provide specimens of his handwriting; or
- 22 (h) submit to a reasonable physical or medical
23 inspection of his body; however, such inspection does not
24 include psychiatric or psychological examination.

25 (2) The defendant is entitled to the presence of

1 counsel at the taking of any evidence pursuant to subsection
2 (1). Subsection (1) supplements and does not limit any other
3 procedures established by law.

4 (3) Within ~~20~~ 30 days after arraignment in district
5 court or at such later time as the court may for good cause
6 permit, the defendant shall provide the prosecutor with a
7 written notice of his intention to introduce evidence at
8 trial of good character or the defenses of alibi,
9 compulsion, entrapment, justifiable use of force, or
10 mistaken identity or the defense that the defendant did not
11 have a particular state of mind that is an essential element
12 of the offense charged. The notice must specify for each
13 defense the names and addresses of the persons that will be
14 called as witnesses at trial in support of the defense.
15 Prior to trial the defendant may, upon motion and showing of
16 good cause, add to the list of witnesses the names of any
17 additional witnesses. After the trial commences, no
18 witnesses may be called by the defendant in support of these
19 defenses unless the name of the witness is included on the
20 list, except for good cause shown. ANY EVIDENCE THAT
21 REASONABLY BECOMES AVAILABLE AFTER THE INITIAL 30 DAYS SHALL
22 BE ADMITTED IF [SECTION 7] IS COMPLIED WITH.

23 (4) Simultaneously with the notice of defenses
24 submitted under subsection (3), the defendant shall make
25 available to the prosecutor for testing, examination, or

1 reproduction:

2 (a) the names and addresses of all persons, other than
3 the defendant, whom he will call as witnesses at trial,
4 together with all statements made by them in connection with
5 the particular case;

6 (b) the names and addresses of experts whom he will
7 call at trial, together with the results of their physical
8 examinations, scientific tests, experiments, or comparisons,
9 including all written reports and statements made by them in
10 connection with the particular case; and

11 (c) a list of all papers, documents, photographs and
12 other tangible objects that he will use at trial.

13 (5) The defendant's obligation under this section
14 extends to material and information within the possession or
15 control of the defendant or his attorneys and agents.

16 (6) Upon motion of the prosecutor showing that he has
17 substantial need in the preparation of his case for
18 additional material or information not otherwise provided
19 for, that he is unable without undue hardship to obtain the
20 substantial equivalent by other means, and that disclosure
21 thereof will not violate the defendant's constitutional
22 rights, the court in its discretion may order any person to
23 make such material or information available to him. The
24 court may, upon request of any person affected by the order,
25 vacate or modify the order if compliance would be

1 unreasonable or oppressive.

2 Section 4. Materials not subject to disclosure. (1)
3 Except as provided in subsection (2), disclosure is not
4 required for a work product that includes:

5 (a) legal research, records, correspondence, reports,
6 or memoranda to the extent that they contain the opinions,
7 theories, or conclusions of the prosecutor or members of his
8 legal or investigative staff, law enforcement officers, or
9 defense counsel or his legal or investigative staff; or

10 (b) documents made by law enforcement officials for
11 internal communications or law enforcement officers' field
12 notes.

13 (2) Disclosure of a work product referred to in
14 subsection (1) may be required if exculpatory information is
15 contained therein.

16 (3) Disclosure of the existence of an informant or of
17 the identity of an informant who will not be called to
18 testify is not required if:

19 (a) disclosure would result in substantial risk to the
20 informant or to his operational effectiveness; and

21 (b) the failure to disclose will not infringe the
22 constitutional rights of the accused.

23 Section 5. Failure to call a witness or raise a
24 defense. The fact that a witness' name is on a list
25 furnished pursuant to [this act] or that a matter contained

1 in a pretrial notice is not raised may not be commented upon
 2 at trial unless the court, on motion of a party, allows such
 3 comment after finding that the inclusion of the witness'
 4 name or the pretrial notice constituted an abuse of the
 5 applicable disclosure requirement OR THAT OTHER GOOD CAUSE
 6 IS SHOWN.

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 8 to an attorney pursuant to [this act] may not be disclosed
 9 to the public but may be disclosed to others only to the
 10 extent necessary for the proper conduct of the case.

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 12 after a disclosure has been made any party discovers
 13 additional information or material that would be subject to
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 15 party shall promptly notify all other parties of the
 16 existence of the additional information or material and make
 17 an appropriate disclosure.

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 19 motion of any party showing good cause, the court may at any
 20 time order that disclosure of the identity of any witness be
 21 deferred for any reasonable period of time, not to extend
 22 beyond 5 days prior to the date set for trial, or that any
 23 other disclosures required by [this act] be denied,
 24 deferred, or regulated when it finds:

25 (a) that the disclosure would result in a risk or harm

1 outweighing any usefulness of the disclosure to any party;
 2 and

3 (b) that the risk cannot be eliminated by a less
 4 substantial restriction of discovery rights.

5 (2) Whenever the court finds, on motion of any party,
 6 that only a portion of a document or other material is
 7 discoverable under [this act], it may authorize the party
 8 disclosing it to excise that portion of the material which
 9 is nondiscoverable and disclose the remainder.

10 (3) On motion of the party seeking a protective or
 11 excision order or in submitting for the court's
 12 determination the discoverability of any material or
 13 information, the court may permit him to present the
 14 material or information for the inspection of the judge
 15 alone. Counsel for all other parties are entitled to be
 16 present when such presentation is made.

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 18 any portion thereof is not discoverable under [this act],
 19 the entire text of the material must be sealed and preserved
 20 in the record in the event of an appeal.

21 Section 9. Sanctions. If at any time during the course
 22 of the proceeding it is brought to the attention of the
 23 court that a party has failed to comply with any of the
 24 provisions of [this act] or any order issued pursuant to
 25 [this act], the court may impose any sanction that it finds

1 just under the circumstances, including but not limited to:

2 (1) ordering disclosure of the information not
3 previously disclosed;

4 (2) granting a continuance;

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1 personally examined the defendant or any evidence in the
 2 particular case, together with the results of physical
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12 (5) Upon motion of the defendant showing that he has
 13 substantial need in the preparation of his case for
 14 additional material or information not otherwise provided
 15 for and that he is unable without undue hardship to obtain
 16 the substantial equivalent by other means, the court in its
 17 discretion may order any person to make it available to him.
 18 The court may, upon the request of any person affected by
 19 the order, vacate or modify the order if compliance would be
 20 unreasonable or oppressive.

21 (6) The prosecutor shall furnish to the defendant no
 22 later than 5 days before trial or at such later time as the
 23 court may for good cause permit, together with their
 24 relevant written or recorded statements, a list of the names
 25 and addresses of all persons whom he intends to call as

1 rebuttal witnesses to the defenses of alibi, compulsion,
2 entrapment, justifiable use of force, mistaken identity, or
3 good character or the defense that the defendant did not
4 have a particular state of mind that is an element of the
5 offense charged.

6 Section 3. Disclosure by defendant. (1) At any time
7 after the filing in district court of an indictment or
8 information, the defendant, in connection with the
9 particular crime with which he is charged, shall upon
10 written request of the prosecutor:

- 11 (a) appear in a line-up;
- 12 (b) speak for identification by witnesses;
- 13 (c) be fingerprinted, palm printed, footprinted, or
14 voiceprinted;
- 15 (d) pose for photographs not involving reenactment of
16 an event;
- 17 (e) try on clothing;
- 18 (f) permit the taking of samples of his hair, blood,
19 saliva, urine, or other specified materials that involve no
20 unreasonable intrusions of his body;
- 21 (g) provide specimens of his handwriting; or
- 22 (h) submit to a reasonable physical or medical
23 inspection of his body; however, such inspection does not
24 include psychiatric or psychological examination.

25 (2) The defendant is entitled to the presence of

1 counsel at the taking of any evidence pursuant to subsection
2 (1). Subsection (1) supplements and does not limit any other
3 procedures established by law.

4 (3) Within ~~20~~ 30 days after arraignment in district
5 court or at such later time as the court may for good cause
6 permit, the defendant shall provide the prosecutor with a
7 written notice of his intention to introduce evidence at
8 trial of good character or the defenses of alibi,
9 compulsion, entrapment, justifiable use of force, or
10 mistaken identity or the defense that the defendant did not
11 have a particular state of mind that is an essential element
12 of the offense charged. The notice must specify for each
13 defense the names and addresses of the persons that will be
14 called as witnesses at trial in support of the defense.
15 Prior to trial the defendant may, upon motion and showing of
16 good cause, add to the list of witnesses the names of any
17 additional witnesses. After the trial commences, no
18 witnesses may be called by the defendant in support of these
19 defenses unless the name of the witness is included on the
20 list, except for good cause shown. ANY EVIDENCE THAT
21 REASONABLY BECOMES AVAILABLE AFTER THE INITIAL 30 DAYS SHALL
22 BE ADMITTED IF [SECTION 7] IS COMPLIED WITH.

23 (4) Simultaneously with the notice of defenses
24 submitted under subsection (3), the defendant shall make
25 available to the prosecutor for testing, examination, or

1 reproduction:

2 (a) the names and addresses of all persons, other than
3 the defendant, whom he will call as witnesses at trial,
4 together with all statements made by them in connection with
5 the particular case;

6 (b) the names and addresses of experts whom he will
7 call at trial, together with the results of their physical
8 examinations, scientific tests, experiments, or comparisons,
9 including all written reports and statements made by them in
10 connection with the particular case; and

11 (c) a list of all papers, documents, photographs and
12 other tangible objects that he will use at trial.

13 (5) The defendant's obligation under this section
14 extends to material and information within the possession or
15 control of the defendant or his attorneys and agents.

16 (6) Upon motion of the prosecutor showing that he has
17 substantial need in the preparation of his case for
18 additional material or information not otherwise provided
19 for, that he is unable without undue hardship to obtain the
20 substantial equivalent by other means, and that disclosure
21 thereof will not violate the defendant's constitutional
22 rights, the court in its discretion may order any person to
23 make such material or information available to him. The
24 court may, upon request of any person affected by the order,
25 vacate or modify the order if compliance would be

1 unreasonable or oppressive.

2 Section 4. Materials not subject to disclosure. (1)
3 Except as provided in subsection (2), disclosure is not
4 required for a work product that includes:

5 (a) legal research, records, correspondence, reports,
6 or memoranda to the extent that they contain the opinions,
7 theories, or conclusions of the prosecutor or members of his
8 legal or investigative staff, law enforcement officers, or
9 defense counsel or his legal or investigative staff; or

10 (b) documents made by law enforcement officials for
11 internal communications or law enforcement officers' field
12 notes.

13 (2) Disclosure of a work product referred to in
14 subsection (1) may be required if exculpatory information is
15 contained therein.

16 (3) Disclosure of the existence of an informant or of
17 the identity of an informant who will not be called to
18 testify is not required if:

19 (a) disclosure would result in substantial risk to the
20 informant or to his operational effectiveness; and

21 (b) the failure to disclose will not infringe the
22 constitutional rights of the accused.

23 Section 5. Failure to call a witness or raise a
24 defense. The fact that a witness' name is on a list
25 furnished pursuant to [this act] or that a matter contained

1 in a pretrial notice is not raised may not be commented upon
 2 at trial unless the court, on motion of a party, allows such
 3 comment after finding that the inclusion of the witness'
 4 name or the pretrial notice constituted an abuse of the
 5 applicable disclosure requirement OR THAT OTHER GOOD CAUSE
 6 IS SHOWN.

7 Section 6. Use of materials. Any materials furnished
 8 to an attorney pursuant to [this act] may not be disclosed
 9 to the public but may be disclosed to others only to the
 10 extent necessary for the proper conduct of the case.

11 Section 7. Continuing duty to disclose. If at any time
 12 after a disclosure has been made any party discovers
 13 additional information or material that would be subject to
 14 disclosure had it been known at the time of disclosure, such
 15 party shall promptly notify all other parties of the
 16 existence of the additional information or material and make
 17 an appropriate disclosure.

18 Section 8. Excision and protective orders. (1) Upon a
 19 motion of any party showing good cause, the court may at any
 20 time order that disclosure of the identity of any witness be
 21 deferred for any reasonable period of time, not to extend
 22 beyond 5 days prior to the date set for trial, or that any
 23 other disclosures required by [this act] be denied,
 24 deferred, or regulated when it finds:

25 (a) that the disclosure would result in a risk or harm

1 outweighing any usefulness of the disclosure to any party;
 2 and

3 (b) that the risk cannot be eliminated by a less
 4 substantial restriction of discovery rights.

5 (2) Whenever the court finds, on motion of any party,
 6 that only a portion of a document or other material is
 7 discoverable under [this act], it may authorize the party
 8 disclosing it to excise that portion of the material which
 9 is nondiscoverable and disclose the remainder.

10 (3) On motion of the party seeking a protective or
 11 excision order or in submitting for the court's
 12 determination the discoverability of any material or
 13 information, the court may permit him to present the
 14 material or information for the inspection of the judge
 15 alone. Counsel for all other parties are entitled to be
 16 present when such presentation is made.

17 (4) If the court enters an order that any material or
 18 any portion thereof is not discoverable under [this act],
 19 the entire text of the material must be sealed and preserved
 20 in the record in the event of an appeal.

21 Section 9. Sanctions. If at any time during the course
 22 of the proceeding it is brought to the attention of the
 23 court that a party has failed to comply with any of the
 24 provisions of [this act] or any order issued pursuant to
 25 [this act], the court may impose any sanction that it finds

1 just under the circumstances, including but not limited to:

2 (1) ordering disclosure of the information not
3 previously disclosed;

4 (2) granting a continuance;

5 (3) holding a witness, party, or counsel in contempt;

6 (4) precluding a party from calling a witness,
7 offering evidence, or raising a defense not disclosed; or

8 (5) declaring a mistrial when necessary to prevent a
9 miscarriage of justice.

10 Section 10. Codification instruction. Sections 1
11 through 9 are intended to be codified as an integral part of
12 Title 46.

13 Section 11. Repealer. Sections 46-15-301 through
14 46-15-303, MCA, are repealed.

-End-

STANDING COMMITTEE REPORT

HOUSE

March 11 19 85

Page 1 of 3

March 11 19 85

Page 2 of 3 (SB 90)

MR. Speaker

We, your committee on Judiciary

having had under consideration Senate Bill No. 90

Third reading copy (Blue color)

EXPANSION OF DISCOVERY IN CRIMINAL CASES

Respectfully report as follows: That Senate Bill No. 90

be amended as follows:

1. Page 2, line 13. Following: "(1)" Strike: "Within" through "after" on line 14. Insert: "Upon"

2. Page 2, line 23. Strike: "defendant" Insert: "accused"

3. Page 3, line 1. Strike: "defendant" Insert: "accused"

4. Page 3, line 9. Strike: "defendant" Insert: "accused"

DDK/KAS

5. Page 3, line 11. Strike: "defendant's" Insert: "accused's"

6. Page 5, line 3. Strike: "defendant" Insert: "accused"

7. Page 5, line 6. Strike: "defendant" Insert: "accused"

8. Page 5, line 8. Strike: "defendant" Insert: "accused"

9. Page 5, line 10. Following: "prosecutor" Insert: "and for good cause shown"

10. Page 5, line 25. Strike: "defendant" Insert: "accused"

11. Page 6, line 10. Strike: "defendant" Insert: "accused"

12. Page 6, line 15. Strike: "may" Insert: "shall"

13. Page 7, line 3. Strike: "defendant" Insert: "accused"

14. Page 7, line 21. Strike: "defendant's" Insert: "accused's"

15. Page 8, line 4. Following: "for" Strike: "a" Insert: "the"

Following: "product" Strike: "that" through "notes" on line 12. Insert: "of the prosecuting or defense attorney"

(continued)

REP. TOM HANNAH, Chairman.

(continued)

Chairman.

March 11 19 85

Page 3 of 3 (SB 90)

16. Page 8, line 13.

Strike: "Disclosure" through "if" on line 14.

Insert: "If"

17. Page 8, line 15.

Following: "contained"

Strike: "therein"

Insert: "in the work product, that information must be disclosed"

18. Page 9, line 7.

Following: "materials."

Strike: "Any"

Insert: "Except as provided in 46-11-401, any"

Following: "materials" the second time it appears on line 7.

Insert: ", including witness lists,"

KHK
AND AS AMENDED,
BE CONCURRED IN

SL 3/11

Tom Hannah
REP. TOM HANNAH Chairman.

SENATE BILL NO. 90

INTRODUCED BY MAZUREK, FULLER

A BILL FOR AN ACT ENTITLED: "AN ACT TO EXPAND DISCOVERY IN CRIMINAL CASES; PROVIDING FOR MUTUAL AND RECIPROCAL DISCOVERY IN CRIMINAL CASES; AND REPEALING SECTIONS 46-15-301 THROUGH 46-15-303, MCA."

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

Section 1. Definitions. As used in [this act], unless the context requires otherwise, the following definitions apply:

(1) "Defendant" means the defense, including the accused, his counsel, and defense counsel's staff or investigators.

(2) "Make available for examination and reproduction" means to make material and information subject to disclosure available upon request at a designated place during specified reasonable times and provide suitable facilities or arrangements for reproducing it. The term does not mean that the disclosing party is required to make copies at its expense, to deliver the materials or information to the other party, or to supply the facilities or materials required to carry out tests on disclosed items. The parties may by mutual consent make any other or additional

arrangements.

(3) "Statement" means:

(a) a writing signed or otherwise adopted or approved by a person;

(b) a mechanical, electrical, or other recording of a person's oral communications or a transcript thereof; and

(c) a writing containing a verbatim record as a summary of a person's oral communications.

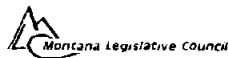
(4) "Superseded notes" means handwritten notes, including field notes, that have been substantially incorporated into a statement. Such notes may no longer themselves be considered a statement.

Section 2. Disclosure by prosecution. (1) ~~Within--10 days--after~~ UPON arraignment in district court or at such later time as the court may for good cause permit, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within his possession or control:

(a) a list of the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief, together with their relevant written or recorded statements;

(b) all written or oral statements of the defendant ACCUSED and of any person who will be tried with him;

(c) the names and addresses of experts who have



1 personally examined the defendant ACCUSED or any evidence in
 2 the particular case, together with the results of physical
 3 examinations, scientific tests, experiments, or comparisons,
 4 including all written reports or statements made by them in
 5 connection with the particular case;

6 (d) a list or copies of all papers, documents,
 7 photographs, or tangible objects that the prosecutor will
 8 use at trial or that were obtained from or purportedly
 9 belong to the defendant ACCUSED; and

10 (e) all material or information that tends to mitigate
 11 or negate the defendant's ACCUSED'S guilt as to the offense
 12 charged or that would tend to reduce his punishment
 13 therefor.

14 (2) At the same time the prosecutor shall inform the
 15 defendant of and make available to the defendant for
 16 examination and reproduction any written or recorded
 17 material or information within his possession or control
 18 regarding:

19 (a) whether there has been any electronic surveillance
 20 of any conversations to which the accused was a party;

21 (b) whether a search warrant has been executed in
 22 connection with the case;

23 (c) whether the case has involved an informant, and,
 24 if so, his identity if the defendant is entitled to know
 25 either or both of these facts under Rule 502 of the Montana

1 Rules of Evidence and [section 4(2)(3)].

2 (3) The prosecutor, upon written request, shall make
 3 available to the defendant for examination, testing, and
 4 reproduction any specified items contained in the list
 5 submitted under subsection (1)(d). The prosecutor may impose
 6 reasonable conditions, including an appropriate stipulation
 7 concerning chain of custody, to protect physical evidence
 8 produced under this section.

9 (4) The prosecutor's obligation of disclosure extends
 10 to material and information in the possession or control of
 11 members of his staff and of any other persons who have
 12 participated in the investigation or evaluation of the case.

13 (5) Upon motion of the defendant showing that he has
 14 substantial need in the preparation of his case for
 15 additional material or information not otherwise provided
 16 for and that he is unable without undue hardship to obtain
 17 the substantial equivalent by other means, the court in its
 18 discretion may order any person to make it available to him.
 19 The court may, upon the request of any person affected by
 20 the order, vacate or modify the order if compliance would be
 21 unreasonable or oppressive.

22 (6) The prosecutor shall furnish to the defendant no
 23 later than 5 days before trial or at such later time as the
 24 court may for good cause permit, together with their
 25 relevant written or recorded statements, a list of the names

1 and addresses of all persons whom he intends to call as
 2 rebuttal witnesses to the defenses of alibi, compulsion,
 3 entrapment, justifiable use of force, mistaken identity, or
 4 good character or the defense that the defendant ACCUSED did
 5 not have a particular state of mind that is an element of
 6 the offense charged.

7 Section 3. Disclosure by defendant ACCUSED. (1) At any
 8 time after the filing in district court of an indictment or
 9 information, the defendant ACCUSED, in connection with the
 10 particular crime with which he is charged, shall upon
 11 written request of the prosecutor AND FOR GOOD CAUSE SHOWN:

- 12 (a) appear in a line-up;
 13 (b) speak for identification by witnesses;
 14 (c) be fingerprinted, palm printed, footprinted, or
 15 voiceprinted;
 16 (d) pose for photographs not involving reenactment of
 17 an event;
 18 (e) try on clothing;
 19 (f) permit the taking of samples of his hair, blood,
 20 saliva, urine, or other specified materials that involve no
 21 unreasonable intrusions of his body;
 22 (g) provide specimens of his handwriting; or
 23 (h) submit to a reasonable physical or medical
 24 inspection of his body; however, such inspection does not
 25 include psychiatric or psychological examination.

1 (2) The defendant ACCUSED is entitled to the presence
 2 of counsel at the taking of any evidence pursuant to
 3 subsection (1). Subsection (1) supplements and does not
 4 limit any other procedures established by law.

5 (3) Within 20 30 days after arraignment in district
 6 court or at such later time as the court may for good cause
 7 permit, the defendant shall provide the prosecutor with a
 8 written notice of his intention to introduce evidence at
 9 trial of good character or the defenses of alibi,
 10 compulsion, entrapment, justifiable use of force, or
 11 mistaken identity or the defense that the defendant ACCUSED
 12 did not have a particular state of mind that is an essential
 13 element of the offense charged. The notice must specify for
 14 each defense the names and addresses of the persons that
 15 will be called as witnesses at trial in support of the
 16 defense. Prior to trial the defendant may SHALL, upon motion
 17 and showing of good cause, add to the list of witnesses the
 18 names of any additional witnesses. After the trial
 19 commences, no witnesses may be called by the defendant in
 20 support of these defenses unless the name of the witness is
 21 included on the list, except for good cause shown. ANY
 22 EVIDENCE THAT REASONABLY BECOMES AVAILABLE AFTER THE INITIAL
 23 30 DAYS SHALL BE ADMITTED IF [SECTION 7] IS COMPLIED WITH.

24 (4) Simultaneously with the notice of defenses
 25 submitted under subsection (3), the defendant shall make

1 available to the prosecutor for testing, examination, or
2 reproduction:

3 (a) the names and addresses of all persons, other than
4 the defendant ACCUSED, whom he will call as witnesses at
5 trial, together with all statements made by them in
6 connection with the particular case;

7 (b) the names and addresses of experts whom he will
8 call at trial, together with the results of their physical
9 examinations, scientific tests, experiments, or comparisons,
10 including all written reports and statements made by them in
11 connection with the particular case; and

12 (c) a list of all papers, documents, photographs and
13 other tangible objects that he will use at trial.

14 (5) The defendant's obligation under this section
15 extends to material and information within the possession or
16 control of the defendant or his attorneys and agents.

17 (6) Upon motion of the prosecutor showing that he has
18 substantial need in the preparation of his case for
19 additional material or information not otherwise provided
20 for, that he is unable without undue hardship to obtain the
21 substantial equivalent by other means, and that disclosure
22 thereof will not violate the defendant's ACCUSED'S
23 constitutional rights, the court in its discretion may order
24 any person to make such material or information available to
25 him. The court may, upon request of any person affected by

1 the order, vacate or modify the order if compliance would be
2 unreasonable or oppressive.

3 Section 4. Materials not subject to disclosure. (1)
4 Except as provided in subsection (2), disclosure is not
5 required for a THE work product that includes:

6 (a) ~~legal research, records, correspondence, reports,~~
7 ~~or memoranda to the extent that they contain the opinions,~~
8 ~~theories, or conclusions of the prosecutor or members of his~~
9 ~~legal or investigative staff, law enforcement officers, or~~
10 ~~defense counsel or his legal or investigative staff, or~~

11 (b) ~~documents made by law enforcement officials for~~
12 ~~internal communications or law enforcement officers' field~~
13 ~~notes~~ OF THE PROSECUTING OR DEFENSE ATTORNEY.

14 (2) ~~Disclosure of a work product referred to in~~
15 ~~subsection (1) may be required if~~ IF exculpatory information
16 is contained ~~therein~~ IN THE WORK PRODUCT, THAT INFORMATION
17 MUST BE DISCLOSED.

18 (3) Disclosure of the existence of an informant or of
19 the identity of an informant who will not be called to
20 testify is not required if:

21 (a) disclosure would result in substantial risk to the
22 informant or to his operational effectiveness; and

23 (b) the failure to disclose will not infringe the
24 constitutional rights of the accused.

25 Section 5. Failure to call a witness or raise a

1 defense. The fact that a witness' name is on a list
 2 furnished pursuant to [this act] or that a matter contained
 3 in a pretrial notice is not raised may not be commented upon
 4 at trial unless the court, on motion of a party, allows such
 5 comment after finding that the inclusion of the witness'
 6 name or the pretrial notice constituted an abuse of the
 7 applicable disclosure requirement OR THAT OTHER GOOD CAUSE
 8 IS SHOWN.

9 Section 6. Use of materials. Any EXCEPT AS PROVIDED IN
 10 46-11-401, ANY materials, INCLUDING WITNESS LISTS, furnished
 11 to an attorney pursuant to [this act] may not be disclosed
 12 to the public but may be disclosed to others only to the
 13 extent necessary for the proper conduct of the case.

14 Section 7. Continuing duty to disclose. If at any time
 15 after a disclosure has been made any party discovers
 16 additional information or material that would be subject to
 17 disclosure had it been known at the time of disclosure, such
 18 party shall promptly notify all other parties of the
 19 existence of the additional information or material and make
 20 an appropriate disclosure.

21 Section 8. Excision and protective orders. (1) Upon a
 22 motion of any party showing good cause, the court may at any
 23 time order that disclosure of the identity of any witness be
 24 deferred for any reasonable period of time, not to extend
 25 beyond 5 days prior to the date set for trial, or that any

1 other disclosures required by [this act] be denied,
 2 deferred, or regulated when it finds:

3 (a) that the disclosure would result in a risk or harm
 4 outweighing any usefulness of the disclosure to any party;
 5 and

6 (b) that the risk cannot be eliminated by a less
 7 substantial restriction of discovery rights.

8 (2) Whenever the court finds, on motion of any party,
 9 that only a portion of a document or other material is
 10 discoverable under [this act], it may authorize the party
 11 disclosing it to excise that portion of the material which
 12 is nondiscoverable and disclose the remainder.

13 (3) On motion of the party seeking a protective or
 14 excision order or in submitting for the court's
 15 determination the discoverability of any material or
 16 information, the court may permit him to present the
 17 material or information for the inspection of the judge
 18 alone. Counsel for all other parties are entitled to be
 19 present when such presentation is made.

20 (4) If the court enters an order that any material or
 21 any portion thereof is not discoverable under [this act],
 22 the entire text of the material must be sealed and preserved
 23 in the record in the event of an appeal.

24 Section 9. Sanctions. If at any time during the course
 25 of the proceeding it is brought to the attention of the

1 court that a party has failed to comply with any of the
2 provisions of [this act] or any order issued pursuant to
3 [this act], the court may impose any sanction that it finds
4 just under the circumstances, including but not limited to:

5 (1) ordering disclosure of the information not
6 previously disclosed;

7 (2) granting a continuance;

8 (3) holding a witness, party, or counsel in contempt;

9 (4) precluding a party from calling a witness,
10 offering evidence, or raising a defense not disclosed; or

11 (5) declaring a mistrial when necessary to prevent a
12 miscarriage of justice.

13 Section 10. Codification instruction. Sections 1
14 through 9 are intended to be codified as an integral part of
15 Title 46.

16 Section 11. Repealer. Sections 46-15-301 through
17 46-15-303, MCA, are repealed.

-End-