

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1464

Amending Criminal Rules 32, 32.1, 32.2, and 32.3 concerning sentencing and presentencing procedures, and adding new Criminal Rule 32.6 concerning restitution.

IT IS ORDERED:

- I. Criminal Rule 32 is amended to read as follows:

Rule 32. Sentence and Judgment.

(a) **Sentence.** Sentence shall be imposed without unreasonable delay. Sentencing in felony cases shall follow the procedures established in this rule and Rules 32.1 through 32.6. Sentencing in misdemeanor cases shall follow the procedures established in this rule and Rules 32.2, 32.3, 32.5, and 32.6. When imposing sentence, the judge or magistrate shall explain on the record the reasons for the sentence.

(b) **Judgment**

(1) *Conviction.* A judgment of conviction must, for each count, set forth the offense, including the statute or regulation violated, the defendant's plea, the verdicts or findings, and the sentence imposed. The judge or magistrate must sign the judgment.

(A) *Incarceration.* When the sentence includes a term of incarceration, the clerk promptly shall deliver a copy of the judgment to a peace officer or correctional facility. If the defendant does not appear at the correctional facility at the time specified, the peace officer or a

representative of the correctional facility promptly shall notify the court by sworn statement on the record or by affidavit.

(B) *Restitution.* When the sentence includes a requirement that the defendant pay restitution, the judge shall order restitution as described in Rule 32.6. The judgment for restitution is enforceable in the same manner as a judgment in a civil action. If the defendant is placed on probation, the judgment of conviction shall include the payment of restitution as a condition of probation.

(C) *Conviction of a Corporation.* If a corporation is convicted of any criminal offense, the judge shall enter judgment against the corporation and the judgment shall be enforced in the same manner as a judgment in a civil action, or as otherwise provided by law.

(2) *Discharge.* If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly.

(c) **Judgment for Sex Offenses or Child Kidnapping.** When a defendant is convicted of a sex offense defined in AS 12.63.100 or child kidnapping as defined in AS 12.63.100, the written judgment must state the requirements of AS 12.63.010 and the period of registration required under AS 12.63 if the required period can be determined by the court.

(d) **Judgment for Crimes Involving Domestic Violence.** In a case in which the defendant is convicted of an offense listed in AS 18.66.990(3) and the prosecution claims at sentencing that the offense is a crime involving domestic violence, the written judgment must set forth whether the offense is a crime involving domestic violence as

defined in AS 18.66.990(3) and (5). A factual and legal determination supporting this finding must be made on the record.

(e) **Judgment for Crime Against a Person.** In a case in which the defendant is convicted of a crime against a person as defined in AS 44.41.035(j), the written judgment must set out the requirements of AS 12.55.015(h).

II. Criminal Rule 32.1 is amended to read as follows:

Rule 32.1. Presentence Procedure for Felony Sentencings.

(a) **Scheduling & Preliminary Filings.**

(1) At the time guilt in a felony case is established by verdict or plea, the judge shall establish the date for a sentencing hearing and a presentencing hearing, if appropriate, and, except as provided in paragraph (g) of this rule, shall order a presentence investigation by the Department of Corrections. The judge may order a presentence investigation in a case in which an investigation is not required under paragraph (g). If the judge elects to schedule a single hearing, all of the procedures for the presentencing and sentencing hearings shall be applicable at the single hearing.

(2) At the time guilt is established as described in (a)(1) above, the parties shall be directed to make the following preliminary filings within ten days, unless otherwise ordered by the court:

(A) *Presumptive Sentencing.* The state shall file a notice indicating whether the defendant's sentence is governed by presumptive sentencing and, if so, listing the defendant's prior

convictions that qualify as prior felony convictions under AS 12.45.145, as well as any other factor that triggers a specific presumptive term; and

(B) *Financial Statement.* In cases where restitution may be ordered, the defendant shall submit a financial statement on a form designated by the Administrative Director to the probation office.

(b) **Presentence Investigation and Report.**

(1) *Contents and Filing.* The Department of Corrections shall prepare a presentence report. The report shall be filed with the court and served on counsel at least 30 days before the sentencing hearing, or 30 days before the presentencing hearing, if one is scheduled. The report shall contain all of the defendant's prior criminal convictions and findings of delinquency and any other information about the defendant's characteristics, financial condition, and the circumstances affecting the defendant's behavior that may be helpful in fashioning the defendant's sentence, a victim impact statement, and any other information required by the judge. The presentence report shall comply with the Victims' Rights Act, AS 12.61.100.150 and AS 12.55.022.

(2) *Restitution Information.* In cases where restitution may be ordered, the presentence report must include:

(A) defendant's financial statement completed under subparagraph (a)(2)(B) of this rule; and

(B) information and supporting documentation concerning the identity of any victims, the nature and amount of any damages incurred by the victims, a restitution amount recommendation, and the names of any co-defendants and their case numbers.

(3) *Disclosure.* Unless the judge finds that providing specific portions of the report to the defendant would prove detrimental to the rehabilitation of the defendant or the safety of the public, the defense attorney may give a full copy of the report to the defendant. Unless otherwise ordered, or except as specifically allowed by other provisions of law, further disclosure of the report shall be limited to agents of the state's attorney or the defendant's attorney, any reviewing courts, and the agencies having charge of the defendant's rehabilitation.

(4) *Plea Agreements.*

(A) If the parties request preparation of a presentence report to aid them in reaching a plea agreement, the judge may order the department to prepare such a report prior to the time stated in this rule. If a report is prepared prior to entry of a verdict or plea of guilty or no contest, the report shall be submitted only to the parties and not to the judge.

(B) Notwithstanding subparagraph (b)(4)(A), the judge may use the presentence report to determine whether to accept a plea agreement under Criminal Rule 11.

(5) *Service.* The parties must serve the Department of Corrections with all filings relating to sentencing, and the court must distribute all orders related to sentencing to the department.

(c) **Notice of Aggravating Factors, Extraordinary Circumstances, and Restitution.** Within seven days after service of the presentence report on the parties:

(1) The state shall list the aggravating factors and describe the nature of any extraordinary circumstances on which the state intends to

rely at sentencing. This notice shall include a written summary of the evidence that the state will rely on to establish each aggravating factor or extraordinary circumstance.

(2) The state shall give notice if it will seek restitution from the defendant in an amount different from the recommendation in the presentence report. The notice shall specify the amount of restitution sought and shall set forth the facts establishing the basis for this amount.

(3) The state shall give notice of any evidence on which it intends to rely at sentencing that is not contained in the presentence report. If the state intends to present any witness, the notice shall contain a brief summary of the witness's anticipated testimony. The notice need not include any information to be presented by a victim's oral or written statement.

(4) Notices under this rule shall be served by delivery to parties in the same community as the party making service, and by facsimile transmission ("fax") to parties in outlying communities. When service is made by fax, a paper copy of the notices shall also be mailed to the intended recipient.

(d) Notice of Mitigating Factors, Extraordinary Circumstances, and Responses to State's Notices. Within seven days after service of the notices required by paragraph (c):

(1) The defendant shall file a notice responding to each notice filed by the state under paragraphs (a)(2)(a) and (c)(1). The notice shall indicate whether the defendant concedes or disputes each felony conviction, aggravating factor and extraordinary circumstance and, if

so, shall include a description of the basis for the opposition.

(2) The defendant shall list the mitigating factors and describe the nature of any extraordinary circumstances on which the defense intends to rely at sentencing. This notice shall include a written summary of the evidence that the defendant will rely on to establish each mitigating factor or extraordinary circumstance.

(3) If the defendant objects to any recommendation for restitution included in the presentence report or in a notice filed by the state under paragraph (c)(2), the defendant shall file a notice disputing the factual basis for restitution or the amount sought and setting out the specific grounds for contesting the restitution.

(4) The defendant shall give notice of any evidence on which the defendant intends to rely at sentencing that is not contained in the presentence report. If the defendant intends to present any witness, the notice shall contain a brief summary of the witness's anticipated testimony. The notice need not include any information to be presented in the defendant's allocution.

(5) The defendant shall give notice of any objection to any information contained in the presentence report or to any other material the judge or the state has identified as a source of information to be relied upon at sentencing. The notice shall state the basis for the defendant's objection. If the defendant objects to information as inaccurate, the notice shall include any information upon which the defendant intends to rely to refute the objected-to information.

(6) Notices under this rule shall be served by delivery to parties in the same community as the party making service, and by fax

to parties in outlying communities. When service is made by fax, a paper copy of the notices shall also be mailed to the intended recipient.

(e) Disputing Mitigating Factors, Extraordinary Circumstances, and Objections to Restitution. Within seven days after service of the notices required by paragraph (d):

(1) The state shall file a notice responding to each notice filed by the defendant under paragraph (d)(2). The notice shall indicate whether the state concedes or disputes each mitigating factor and extraordinary circumstance, and shall include a description of the basis for the opposition.

(2) The state shall file a notice responding to each notice filed by the defendant under paragraph (d)(3). The notice shall indicate whether the state disagrees with the contention of the defendant concerning restitution and shall include a brief summary of the basis for its position.

(3) Notices under this rule shall be served by delivery to parties in the same community as the party making service, and by fax to parties in outlying communities. When service is made by fax, a paper copy of the notices shall also be mailed to the intended recipient.

(f) Adjudicating disputed factual and legal issues. The court shall give the parties the opportunity to present evidence and argument on the disputed factual and legal issues related to sentencing at the sentencing hearing or at any presentencing hearing or other supplemental evidentiary hearings that the court may order.

(1) The court shall enter findings regarding whether the defendant's sentence is governed by presumptive sentencing, the

number of the defendant's prior felonies as defined in AS 12.55.145, and the existence of any other factor that triggers a specific presumptive term.

(2) The court shall enter findings regarding the aggravating factors, mitigating factors, and extraordinary circumstances raised by the parties. However, no finding is necessary if the court affirmatively determines that resolution of a disputed factor or extraordinary circumstance is immaterial to the imposition of a just sentence.

(3) If the sentencing judge believes that the parties have overlooked a prior felony conviction or any other factor triggering a specific presumptive term, or have overlooked an applicable aggravating or mitigating factor or extraordinary circumstance, the judge shall notify the parties of the court's belief. The judge shall inform the parties of the specific facts which the judge believes establish the prior felony or presumptive sentencing factor, and the judge must allow the parties an opportunity to respond to the judge's information.

(4) The court shall resolve any factual disputes related to restitution.

(5) The court shall enter findings regarding any disputed assertion in the presentence report. Any assertion that has not been proved shall be deleted from the report; any assertion that has been proved only in part shall be modified in the report. Alternatively, if the court determines that the disputed assertion is not relevant to its sentencing decision so that resolution of the dispute is not warranted, the court shall delete the assertion from the report without making any finding. After the court has made the necessary deletions and

modifications, the court's corrected copy shall be labeled the "approved version" of the presentence report. A copy of the approved version must be delivered to the Department of Corrections within seven days after sentencing.

(g) **When Presentence Investigation Not Required.** Unless the defendant may be sentenced to a presumptive term of imprisonment under AS 12.55.125(e)(1) or (2), or the court otherwise orders, a presentence investigation by the Department of Corrections is not required if the defendant is convicted of the following offenses:

- (1) vehicle theft in the first degree in violation of AS 11.46.360;
- (2) driving while intoxicated under AS 28.35.030(n); or
- (3) refusal to submit to a chemical test under AS 28.35.032(p).

(h) **Restitution Procedures When No Presentence Investigation.**

(1) In cases where restitution may be ordered but no presentence investigation report is submitted, the prosecuting authority must file the following at least ten days before the sentencing hearing, unless otherwise ordered by the court: information and supporting documentation concerning the identity of any victims, the nature and amount of any damages incurred by the victims, a restitution amount recommendation, and the names of any co-defendants and their case numbers.

- (2) Unless otherwise ordered by the court, defendant shall file

any objections to the information submitted under subparagraph (h)(1) at least five days before the sentencing hearing, together with defendant's financial statement on a form designated by the Administrative Director.

III. Criminal Rule 32.2 is amended to read as follows:

Rule 32.2 Sentencing Hearing.

(a) **Consideration of Victim's Statement.** If a victim as defined in AS 12.55.185 prepares and submits a written statement, gives sworn testimony or makes an unsworn oral presentation under AS 12.55.023, the court shall take the content of the statement, testimony, or presentation into consideration when preparing those elements of the sentencing report required by AS 12.55.025 that relate to the effect of the offense on the victim; and when considering the need for restitution under AS 12.55.045. The court also may take the content of the statement, testimony, or presentation into consideration for any other appropriate purpose.

(b) **Defendant's Allocution.** Before imposing sentence the court shall afford the defendant an opportunity to make a statement in the defendant's own behalf and to present any information in mitigation of punishment.

(c) **The Sentence.**

(1) At the sentencing hearing, the judge shall state clearly the precise terms of the sentence, the reasons for selecting the particular sentence, and the purposes the sentence is intended to serve.

(2) If the defendant is sentenced to a term of imprisonment for a felony offense, to a term of imprisonment exceeding 90 days for a misdemeanor offense, or to a term of imprisonment for a violation of AS 04, a regulation adopted under AS 04, or an ordinance adopted in conformity with AS 04.21.010, the judge shall identify

(A) the approximate term of imprisonment the defendant must serve if the defendant is eligible for and does not forfeit good conduct deductions under AS 33.20.010; and

(B) if applicable, the approximate minimum term of imprisonment the defendant must serve before becoming eligible for release on discretionary parole.

These approximate terms of imprisonment are not part of the sentence imposed and do not form a basis for review or appeal of the sentence imposed.

(3) The court shall order that the defendant be fingerprinted at the conclusion of the sentencing hearing.

(d) **Transcript of Sentencing Proceeding.** A transcript or cassette of any sentencing proceeding at which the defendant is committed to serve a term of incarceration in excess of six months on one or more charges shall be prepared and furnished to the Department of Law, the defendant, the Department of Corrections, the State Board of Parole, if the defendant will be eligible for parole, and to the Alcohol Beverage Control Board if the defendant was convicted of a violation of AS 04, a regulation adopted under AS 04, or an ordinance adopted under AS 04.21.010.

IV. Criminal Rule 32.3 is amended to read as follows:

Rule 32.3. Judgments and Orders

(a) **Effective Dates of Orders and Judgments.** Orders and judgments become effective the date they are entered.

(1) *Oral Orders.* The date of entry of an oral order is the date the order is put on the official electronic record by the judge unless otherwise specified by the judge. At the time the judge announces an oral order, the judge also shall announce on the record whether the order shall be reduced to writing. If the oral order is reduced to writing, the effective date shall be included in the written order.

(2) *Written Orders Not Preceded by Oral Orders.* The date of entry of a written order not preceded by an oral order is the date the written order is signed unless otherwise specified in the order.

(3) *Judgments.* The date of entry of a criminal judgment is the date the judgment is put on the official electronic record by the judge unless otherwise specified by the judge. All judgments shall be reduced to writing and the effective date shall be included in the written judgment.

(b) **Commencement of Time for Appeal, Review and Reconsideration.** The time within which a notice of appeal may be filed and reconsideration or review of orders and judgments may be requested begins running on the date of notice as defined below.

(c) **Date of Notice.**

(1) *Oral Orders.*

(i) As to the parties present when an oral order is announced, the date of notice is the date the judge announces the

order on the official electronic record, unless at that time the judge announces that the order will be reduced to writing in which case the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(ii) As to parties not present at the announcement of an oral order the date of notice is the date shown in the clerk's certificate of distribution of notice of the order. If, however, at the time the judge announces the oral order the judge announces that the order will be reduced to writing, the date of notice is the date shown in the clerk's certificate of distribution on the written order.

(2) *Written Orders.* The date of notice of a written order is the date shown in the clerk's certificate of distribution on the written order.

(3) *Judgments.* All judgments must be reduced to writing. The date of notice of a judgment is the date shown in the clerk's certificate of distribution on the written judgment.

(4) *Other Service Requirements.* These notice provisions apply to the notice of orders and judgments under Rule 44(c) and do not affect the service requirements of any other rule of criminal procedure.

(d) **Clerk's Certificate of Distribution.** Every written notice of an oral order and every written order and judgment shall include a clerk's certificate of distribution showing the date copies of the notice, order or judgment were distributed, to whom they were distributed, and the name or initials of the court employee who distributed them.

V. New Criminal Rule 32.6 is added, to read as follows:

Rule 32.6. Judgment for Restitution.

(a) **Definition.** When a sentence includes a requirement that the defendant pay restitution, the judge shall either enter a separate judgment for restitution or shall include the order of restitution as a separate section of the criminal judgment. For the purpose of these rules, either of these constitutes a "judgment for restitution."

(b) **Content.** The judgment for restitution must:

(1) Identify each victim and the amount of restitution owed to each victim.

(2) State the date restitution is due or, if the court schedules installment payments, the amount and due date of each payment. If no due date is stated, the restitution amount is due immediately.

(3) State whether payment must be made through the clerk of court or the Collections Unit of the Department of Law. Payment must be made through the Collections Unit of the Department of Law unless (A) the victim elects to pursue collection without the assistance of the Collections Unit, or (B) the case is being prosecuted by a municipality.

(4) Identify by name and case number any defendants who are jointly and severally liable for the restitution owed to each victim.

(5) State whether post-judgment interest is owed on the judgment and, if so, when it begins to accrue.

(c) Entering the Judgment for Restitution

(1) *At Sentencing.* If the amount of restitution and the names of the victims are known at the time of sentencing, the court shall enter the judgment of restitution at the time of sentencing.

(2) *After Sentencing.* If the amount of restitution or the names of the victims are not known at the time of sentencing, the prosecutor shall file and serve within 90 days after sentencing a proposed judgment for restitution on a form designated by the Administrative Director. Within 30 days after receipt of the proposed judgment for restitution, the defense shall file any objection to the proposed judgment, a statement of grounds for the objection, and a financial statement on a form designated by the Administrative Director under AS 12.55.045(j). If no objection is filed, the court may enter the judgment of restitution without further proceedings.

(3) *Municipal Cases.* In addition to the requirements of (b)(1) and (2) above, a municipal prosecutor shall file an *ex parte* victim information statement on a form provided by the Administrative Director, which includes information concerning the identity and addresses of the victims. The victim information statement shall be filed within 15 days after entry of the restitution judgment under (b)(1) above or at the time the municipal prosecutor submits a proposed judgment to the court under (b)(2) above.

(d) **Execution.** Civil execution to enforce the judgment may issue if restitution is ordered to be paid by a specified date and defendant fails to make full payment by that date. If restitution is ordered to be paid in specified installments and defendant fails to make one or more installment payments, civil execution to collect the entire remaining balance may issue. The automatic stays on enforcement provided in Civil Rule 62(a) and District Court Civil Rule 24(a) do not apply to the enforcement of restitution judgments.

(e) **Transfer of State Cases to the Collections Unit of the Department of Law.** Upon issuance of a judgment for restitution in

cases prosecuted by the state, the court will transfer the judgment to the Collections Unit of the Department of Law for collection pursuant to AS 12.55.051(f). To transfer the judgment to the Collections Unit, the court will send a copy of the judgment, either in paper or electronic format, to the unit. The court will also send victim and defendant identifying information, including the name, address, birth date and social security number of each victim and defendant, to the extent the court has the information.

(f) **Priority of Payments.** Unless the court finds good cause to order a different priority, payments received from or on behalf of a defendant will be allocated as follows:

(1) If a defendant makes a voluntary payment and designates how or to what criminal or civil judgments the payment should be applied, the payment will be applied as designated by the defendant.

(2) Payments received as the result of execution on the defendant's permanent fund dividend will be applied to judgments according to the priorities stated in AS 43.23.065.

(3) If a defendant makes a voluntary payment but does not designate how the payment is to be applied or if a payment is received as a result of execution by the Collections Unit of the Department of Law or a comparable unit of a municipality, the payment will be applied using the following rules:

(A) Judgments for restitution will be paid in full before any amounts collected from the defendant will be applied to criminal or civil judgments owed to the state or a municipality.

(B) If restitution is owed to the state or a municipality, amounts collected from the defendant will be applied first to judgments for restitution owed to victims other than the state or a municipality.

(C) When restitution is ordered to be paid by a defendant to victims in the same criminal case, amounts collected from the defendant will be allocated among the victims based on the percentage of the amount of restitution owed to each victim to the total amount of restitution owed by the defendant to all of the victims; except that if a payment is less than \$100, the payment may be paid to a single victim if such payments are paid to all victims on an alternating basis.

(D) When restitution is ordered to be paid by a defendant to victims in different criminal cases, amounts collected from the defendant will be applied to the judgment that is first in time.

(4) If a payment is received as a result of execution by a victim, the payment will be applied to the judgment for restitution owed to that victim.

(g) Financial Statement.

(1) If restitution has been ordered and has not been paid, and no financial statement has been required under Rule 32.1(a)(2)(B) or Rule 32.6(b)(2), the court shall order the defendant to complete and submit such statement within 30 days of the restitution judgment. The statement shall be on a form designated by the administrative director and shall be submitted to the Collections Unit of the Department of Law in state cases or the prosecuting authority in municipal cases.

(2) If the defendant fails to submit a completed financial statement as ordered, the probation officer or prosecuting authority (including the Collections Unit of the Department of Law) may notify the

court by affidavit. Upon receipt of an affidavit under this paragraph, the court shall schedule a hearing for the defendant to show cause why the defendant should not be held in contempt for failure to comply with the order to submit the financial statement.

(3) At any time after sentencing, the probation officer or prosecuting authority (including the Collections Unit of the Department of Law) may request that the defendant be ordered to provide a financial statement pursuant to AS 12.55.045(k).

(h) **Victim Election.** If, after the judgment for restitution has been transferred to the Collections Unit of the Department of Law, the victim elects to pursue collections without the assistance of the Collections Unit, the Collections Unit shall notify the court of the victim's election. The Collections Unit shall include with the notice copies of

(1) the judgment for restitution;

(2) the signed election form received from the victim;

(3) a statement of all payments received from the defendant and applied to the restitution judgment; and

(4) any relevant victim and defendant identifying information needed by the court system to properly identify and distribute restitution payments.

(i) **Suspended Imposition of Sentence.** The judgment for restitution remains civilly enforceable after the expiration of the period of probation or the set-aside of conviction in a case where imposition of sentence is suspended.

DATED: March 5, 2002

EFFECTIVE DATE: March 5, 2002

W. Michael Faber

Chief Justice Faber

William Matthews

Justice Matthews

Robert Eastaugh

Justice Eastaugh

John Bryner

Justice Bryner

Walter Carpeneti

Justice Carpeneti

