

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1226

Amending Appellate Rules 215, 401, 402, and 403 and Criminal Rule 32.5 concerning sentence review and Appellate Rule 209 concerning appeal at public expense.

IT IS ORDERED:

1. Appellate Rule 215 is amended to read as follows:

(a) **Appellate Review of Sentence.**

(1) *Right to Appeal.* A defendant may appeal an unsuspended sentence of imprisonment that exceeds two years for a felony offense or 120 days for a misdemeanor offense on the ground that the sentence is excessive. If a sentence is imposed in accordance with a plea agreement that provides for a minimum sentence, a defendant may appeal as excessive only the part of the sentence that exceeds the minimum sentence by more than two years for a felony offense or 120 days for a misdemeanor offense. The prosecuting authority may appeal a sentence of any length on the grounds that the sentence is too lenient. An appeal under this subparagraph must be taken to the court of appeals.

(2) *Right to Seek Discretionary Review.* A defendant may seek discretionary review of an unsuspended sentence of imprisonment which is not appealable under subparagraph (a)(1) by filing a petition for review in the supreme court under Appellate Rule 402.

(b) **Notification of Right to Seek Review of Sentence.** At the time of imposition of any sentence of imprisonment, the judge shall inform the defendant

(1) of the defendant's right to appeal or petition for review of the sentence under paragraph (a);

(2) that the appellate court may reduce or increase the sentence, and that by appealing or petitioning for review of the sentence under this rule, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal or review the defendant has been twice placed in jeopardy for the same offense; and

(3) that if the defendant wants counsel and is unable to pay for the services of an attorney, the court will appoint an attorney to represent the defendant in an appeal or petition for review.

(c) **Notice of Appeal.** A notice of appeal taken only from a sentence shall be filed with the clerk of the appellate courts not later than 30 days after the date shown in the clerk's certificate of distribution on the written judgment, except as provided for in Appellate Rule 204(a)(4). The notice of appeal need only state that the sentence which is being appealed is too lenient or excessive. When filed, the notice of appeal shall be

accompanied by the items specified in Appellate Rule 204(b) [1], [2], [4], and [7].

(d) **Termination of Appeal.** Any appeal of a sentence initiated by the defendant may be terminated by the defendant filing within 30 days from the filing of the notice of appeal a notice of intent to terminate the appeal. Such a termination shall prevent any increase in the sentence or sentences imposed.

(e) **Indigent's Right to Counsel on Sentence Appeal.** An indigent defendant is entitled to the assistance of counsel in prosecuting an appeal on the ground that the sentence is excessive. Where an appeal is taken by the prosecution pursuant to AS 12.55.120(b) on the ground that the sentence is too lenient, and the defendant has not appealed, the appellate court in its discretion may appoint counsel for an indigent defendant.

(f) **Record on Appeal.**

(1) *Preparation and Contents.* Within 15 days after the filing of a notice of sentence appeal, the clerk of the trial court shall prepare sufficient copies of the record on appeal, which shall consist of the following:

[a] all charging documents;

[b] the judgment being appealed;

[c] a transcript of the entire sentencing proceeding; and

[d] all reports, documents, motions and memoranda pertaining to sentencing which were available to the sentencing court.

The clerk shall number the pages of the record consecutively. Appellate Rule 210(c) shall not apply.

(2) *Distribution.* Immediately upon preparation of the record on appeal, the clerk shall send the original to the clerk of the appellate courts, and copies to the defendant, the defendant's counsel, and the attorney for the prosecution.

(g) **Memoranda on Appeal.**

(1) *By Appellant.* Within 15 days after service of copies of the record on appeal provided for in (g) of this rule, the appellant shall file with the appellate court the original and three copies of a typewritten memorandum in support of the appeal.

(2) *By Appellee.* Within 15 days after service of a copy of appellant's memorandum, the appellee may file with the appellate court the original and three copies of a typewritten memorandum in opposition to the appeal.

(3) *Reply Memorandum.* No reply memorandum shall be filed unless ordered by the court.

(4) *Form and Contents of Memoranda.* The memoranda filed by either the appellant or the appellee need not comply with the requirements of Appellate Rule 212 unless ordered by the appellate court.

(5) *Service of Memoranda.* When filed, the original memoranda shall be accompanied by proof of service on opposing counsel.

(h) **Disposition of Appeals by Reviewing Court.** Sentence appeals will be disposed of by the appellate court on the record. Oral argument, if timely requested no later than ten days after the date on which the appellee's sentence memorandum is due, is limited to fifteen minutes per side, unless otherwise ordered by the court of appeals. The order of argument is as provided in Rule 213(b). In cases where sentence appeals are consolidated with appeals on the merits, a timely request for argument on the merits in accordance with Rule 213(a) or Rule 217(h) is deemed to include a request for argument on the sentence appeal.

(i) **Bail Pending Appeal.** A sentence appealed on the sole ground that the sentence is excessive does not confer or enlarge the right to bail pending appeal.

(j) **Consolidation of Sentence Appeals with Regular Appeals.** A party shall combine an appeal of a sentence on the ground that the sentence is excessive or too lenient, or a petition for review on those grounds, with an appeal based on other grounds. In a combined appeal, the procedure for perfecting an appeal on other grounds shall govern. All combined appeals must be taken initially to the court of appeals.

(k) **Referral of Issues Outside Jurisdiction of Court of Appeals.** In a combined appeal, upon final adjudication of all issues within the jurisdiction of the court of appeals, the court of appeals shall refer the case to the supreme court for discretionary review of any remaining sentence issues which are reviewable by the supreme court under subparagraph (a)(2) of this rule.

2. Appellate Rule 401 is amended to read as follows:

Part Four of these rules (Rules 401 through 408) governs requests for appellate review in circumstances in which there has been no final judgment within the meaning of Rule 202, or when appellate review is not otherwise available.

3. Appellate Rule 402(a) is amended to read as follows:

(a) **When Available.**

(1) An aggrieved party, including the state of Alaska, may petition the appellate court as provided in Rule 403 to review any order or decision of the trial court, not appealable under Rule 202, and not subject to a petition for hearing under Rule 302, in any action or proceeding, civil or criminal. In addition, a party may petition the supreme court as provided in Rule 403(h) to review an unsuspended sentence of imprisonment which is not appealable under Appellate Rule 215(a) (1).

(2) A petition for review shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in the action or proceeding in which it arises.

4. Appellate Rule 403 is amended to include new paragraph (h) which reads as follows:

(h) Petitions for Sentence Review.

(1) Except as provided in (h)(2), a defendant seeking relief from a sentence under Appellate Rule 215(a)(1)(B) must file a notice of intent to file a petition for sentence review no later than 10 days after the date shown in the clerk's certificate of distribution on the written judgment. If the defendant is indigent, a request for preparation of a transcript of the sentencing proceeding must accompany the notice. The petition itself must be filed no later than 45 days after the date shown in the clerk's

certificate of distribution on the written judgment or, if the court is preparing the transcript, no later than 15 days after service of the transcript on the petitioner. The following items must be filed with the petition:

(A) copies of all charging documents;

(B) a copy of the judgment being appealed;

(C) a transcript of the entire sentencing proceeding;

(D) copies of all reports, documents, motions and memoranda pertaining to sentencing which were available to the sentencing court.

(2) If the defendant is filing a combined petition and appeal under Appellate Rule 215(j), a notice of intent to file a petition is not required. Instead, the procedure for perfecting the appeal shall govern, as provided by Rule 215(j).

(3) Paragraphs (e), (h), and (i) of Appellate Rule 215 apply to petitions for sentence review. Appellate Rule 215(d) also applies, except, if the defendant is proceeding under subparagraph (h)(1) of this rule, the notice of intent to terminate must be filed within 30 days after filing of the notice of intent to file a petition for sentence review.

5. Criminal Rule 32.5 is amended to read as follows:

**Rule 32.5. Appeal From Conviction or
Sentence—Notification of Right
to Appeal.**

A person convicted of a crime after trial shall be advised by the judge or magistrate:

(a) that the person has the right to appeal from the judgment of conviction within 30 days (or 15 days in appeals from the district court made under Appellate Rule 217) from the date shown in the clerk's certificate of distribution on the judgment appealed from by filing a notice of appeal with the clerk of the appellate courts; and

(b) that if the defendant wants counsel and is unable to pay for the services of an attorney, the court will appoint an attorney to represent the defendant on the appeal.

In addition, at the time of imposition of any sentence of imprisonment, the judge or magistrate shall advise the defendant as required by Appellate Rule 215(b).

6. Appellate Rule 209(b) is amended to read as follows:

(b) **Criminal Matters.**

(1) In criminal matters the appellate court shall authorize appeals and petitions for review at public expense on behalf of defendants who are "indigent," as defined by statute, in accordance with the rules and decisions of the appellate courts of Alaska, and where such proceedings are required to be provided by state courts by decisions of the Supreme Court of the United States. Where an appeal or petition for review at public expense is authorized by the court, the costs which shall be borne at public expense include those of providing counsel and of preparing a transcript and briefs.

(2) If a defendant is allowed to proceed at public expense, the clerk of the appellate courts shall send the defendant a written notice and order, to the address provided under Appellate Rule 204(b), that

(A) advises the defendant that, if the defendant's conviction is not reversed, the defendant will be ordered to repay the prosecuting authority for the cost of appointed appellate counsel, in accordance with the schedule of costs set out in subparagraph 209(b)(6); and

(B) orders the defendant to apply for permanent fund dividends every year in which the defendant qualifies for a dividend until the cost is paid in full.

(3) A defendant authorized to proceed at public expense in the trial court is presumed to be entitled to appeal or petition for review at public expense.

(4) Counsel appointed to represent a defendant in the trial court pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal or petition for review at public expense authorized under this paragraph and shall not be permitted to withdraw except upon the grounds authorized in Administrative Rule 12. An attorney appointed by the court under Administrative Rule 12(b)(1)(B) will be permitted to withdraw upon a showing that either the public defender agency or the office of public advocacy is able to represent the defendant in the appellate proceeding. If an appeal is to be taken, trial counsel will not be permitted to withdraw until the notice of appeal and the documents required to be filed with the appeal by Rule 204 have been accepted for filing by the clerk of the appellate courts.

(5) At the conclusion of the appellate proceeding, the clerk of the appellate courts shall enter judgment against the defendant for the cost of appointed appellate counsel unless the defendant's conviction was reversed by the appellate court. The amount of the judgment shall be determined by reference to the schedule in subparagraph 209(b)(6). Before entering judgment, the clerk shall mail, to the defendant's address of record, a notice

that sets out the amount of the proposed judgment. The defendant may oppose entry of the judgment by filing a written opposition within 45 days after the date shown in the clerk's certificate of distribution on the notice. The opposition shall specifically set out the grounds for opposing entry of judgment. The prosecuting authority may oppose the amount of the judgment by filing a written opposition within the same deadline. Criminal Rule 39(c)(1)(D) and (c)(2) shall apply to judgments entered under this subparagraph.

(6) The following schedule governs the cost of appointed appellate counsel:

Type of Appellate Proceeding	Misdemeanor	Felony
Sentence Appeal or Petition for Sentence Review	\$ 250	\$ 500
Merit Appeal or Appeal from Post-Conviction Relief Proceedings	750	1,500
Combined Merit Appeal and Sentence Appeal or Petition for Sentence Review	1,000	2,000
Other Appellate Actions (Petition for Review, Petition for Hearing, etc.)	500	1,000

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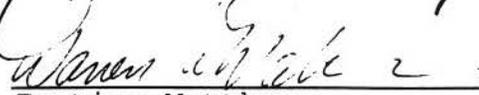
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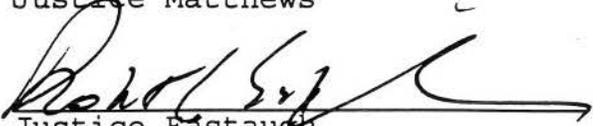
Chief Justice Compton



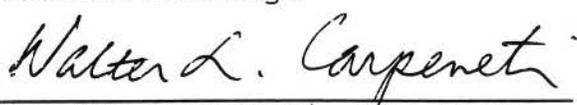
Justice Rabinowitz



Justice Matthews



Justice Eastaugh



Justice Carpeneti, Pro Tem*

*Sitting by assignment under Article IV, Section 16 of the Alaska Constitution.