

IN THE SUPREME COURT OF THE STATE OF ALASKA

ORDER NO. 1242

Amending Criminal Rules 11, 33,
and 35.1 to reflect 1995
legislative changes.

IT IS ORDERED:

1. Paragraph (c) of Criminal Rule 11 is amended to read as follows:

(c) **Pleas of Guilty or Nolo Contendere.**

The court shall not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and

* * * *

(3) informing the defendant:

(i) of the mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered, and

(ii) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, or to plead guilty; and

~~(iii)~~ (4) if the defendant is charged with a sex offense as defined in AS 12.63.100, informing the defendant in writing of the requirements of AS 12.63.010; and

(5) in cases when a plea agreement has been accepted by a court, informing the defendant:

(i) that the defendant waives the right to appeal a sentence as excessive and waives the right to seek reduction of a sentence under Criminal Rule 35 if a plea agreement between the defendant and the prosecuting attorney provides for a specific sentence or a sentence equal to or less than a specified maximum; and

(ii) that the defendant waives the right to appeal as excessive that portion of a sentence that is less than or equal to a minimum sentence specified in a plea agreement between the defendant and the prosecuting attorney and waives the right to seek reduction of a sentence under Criminal Rule 35 to a length less than the length of the minimum sentence.

2. Paragraph (h) of Criminal Rule 11 is amended to read as follows:

(1) A defendant may not withdraw a plea of guilty or nolo contendere as a matter of right. A defendant may move for withdrawal of the plea without alleging innocence of the charge to which the plea has been entered.

(2) Before sentencing, tThe trial court shall allow the a defendant to withdraw a plea of ~~guilty or nolo contendere~~ whenever the defendant, upon a timely motion ~~for withdrawal~~, proves that withdrawal is necessary to correct manifest injustice. Absent a showing that withdrawal is necessary

to correct manifest injustice, the trial court may in its discretion allow the defendant to withdraw a plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

~~(i)~~ (3) ~~A motion for withdrawal is timely and is not barred because made subsequent to judgment or sentence. After imposition of sentence, the withdrawal of a plea may be sought only under AS 12.72. A defendant requesting post-sentence plea withdrawal must prove that withdrawal is necessary to correct a manifest injustice.~~

~~(ii)~~ (4) Withdrawal is necessary to correct a manifest injustice whenever it is demonstrated that:

~~(aa)~~ (A) The defendant was denied the effective assistance of counsel guaranteed by constitution, statute or rule, or

~~(bb)~~ (B) The plea was not entered or ratified by the defendant or a person authorized to act in the defendant's behalf, or

~~(cc)~~ (C) The plea was involuntary, or was entered without knowledge of the charge or that the sentence actually imposed could be imposed, or

~~(dd)~~ (D) The defendant did not receive the charge or sentence concessions contemplated by the plea agreement, and

~~(A)~~ (i) the prosecuting attorney failed to seek or opposed the concessions promised in the plea agreement, or

~~(B)~~ (ii) after being advised that the court no longer concurred and after being called upon to affirm or withdraw the plea, the defendant did not affirm the plea.

~~(iii)~~ The defendant may move for withdrawal of the plea without alleging innocence of the charge to which the plea has been entered.

~~(2)~~ Once the plea has been accepted by the court and absent a showing that withdrawal is necessary to correct a manifest injustice, a defendant may not withdraw a plea of guilty or nolo contendere as a matter of right. Before sentence, the court in its discretion may allow the defendant to withdraw a plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea.

~~(3)~~ (5) A plea of guilty or nolo contendere which is not accepted or has been withdrawn shall not be received against the defendant in any criminal proceeding.

(a) **Grounds.** The court may grant a new trial to a defendant if required in the interest of justice.

(b) **Subsequent Proceedings.** If trial was by the court without a jury, the court may vacate the judgment if entered, take additional testimony and enter a new judgment.

(c) **Time for Motion.** A motion for a new trial based on the ground of newly discovered evidence may be made only before or within ~~two years~~ 180 days after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilt, or within such further time as the court may fix during the 5-day period.

4. Paragraph (a) of Criminal Rule 35.1 is amended to read as follows:

Rule 35.1. Post-eConviction Procedure.

(a) **Scope.** A person who has been convicted of or sentenced for a crime may institute a proceeding ~~applying~~ for post-conviction relief under ~~this rule~~ AS 12.72.010 - 12.72.040 ~~upon the ground~~ if the person claims:

(1) that the conviction or the sentence was in violation of the constitution of the

United States or the constitution or laws of
Alaska;

(2) that the court was without
jurisdiction to impose sentence;

(3) that ~~the sentence imposed exceeded~~
~~the maximum authorized by law, or is otherwise~~
~~not in accordance with the sentence authorized~~
by law a prior conviction has been set aside
and the prior conviction was used as a
statutorily required enhancement of the
sentence imposed;

(4) that there exists evidence of
material facts, not previously presented and
heard, that requires vacation of the
conviction or sentence in the interest of
justice;

(5) that the applicant's sentence has
expired, that the applicant's probation,
parole or conditional release ~~have~~ has been
unlawfully revoked, or that the ~~person~~
applicant is otherwise unlawfully held in
custody or other restraint;

(6) that the conviction or sentence is
otherwise subject to collateral attack upon
any ground or alleged error heretofore
available under any common law, statutory or
other writ, motion, petition, proceeding, or
remedy; ~~or~~

(7) that (A) there has been a significant change in law, whether substantive or procedural, applied in the process leading to the applicant's conviction or sentence, ~~when sufficient reasons exist to allow retroactive application of the changed legal standards;~~

(B) the change in law was not reasonably foreseeable by a judge or a competent attorney;

(C) it is appropriate to retroactively apply the change in law because the change in law requires observance of procedures without which the likelihood of an accurate and fair conviction is seriously diminished; and

(D) the failure to retroactively apply the change in law would result in a fundamental miscarriage of justice, which is established by demonstrating that, had the change in law been in effect at the time of the applicant's trial, a reasonable trier of fact would have a reasonable doubt as to the guilt of the applicant;

(8) that the applicant should be allowed to withdraw a plea of guilty or nolo contendere in order to correct manifest injustice as set out in Criminal Rule 11(h);
or

(9) that the applicant was not afforded effective assistance of counsel at trial or on direct appeal.

5. Paragraph (c) of Criminal Rule 35.1 is amended to read as follows:

(c) **Commencement of Proceedings - Filing - Service.** A proceeding is commenced by filing an application with the clerk ~~of the court in which the conviction occurred~~ at the court location where the underlying conviction is filed. Application forms will be furnished by the clerk of court. An application ~~may~~ must be filed ~~at any time within the time limitations set out in AS 12.72.020.~~ The clerk shall open a new file for the application, promptly bring it to the attention of the court and give a copy to the prosecuting attorney.

6. Paragraph (d) of Criminal Rule 35.1 is amended to read as follows:

(d) **Application - Contents.** The application shall (1) identify the proceedings in which the applicant was convicted, (2) state the date shown in the clerk's certificate of distribution on the judgment complained of, (3) state the sentence complained of and the date of sentencing, (4) specifically set forth the grounds upon which the application is based, and (5) clearly state the relief desired. If the application challenges a Department of Corrections or Board of Parole decision, the application

shall (1) identify the specific nature of the proceedings or challenged decision, (2) state the date of the proceedings or decision, (3) specifically set forth the facts and legal grounds upon which the application is based, and (4) clearly state the relief desired.

Facts within the personal knowledge of the applicant shall be set ~~forth~~ out separately from other allegations of facts and shall be under oath. Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached. The application shall identify all previous proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from the conviction or sentence including any previous applications for post-conviction relief. Argument, citations and discussion of authorities are unnecessary. Applications which are incomplete shall be returned to the applicant for completion.

7. Paragraph (e) of Criminal Rule 35.1 is amended to read as follows:

(e) **Indigent Applicant.** (1) If the applicant is indigent, filing fees shall be paid under the provisions of AS 09.19 and, ~~transcript and other court costs shall be borne by the state. Where the court determines that the application shall not be summarily disposed of on the pleadings and record pursuant to subdivision (f) of this rule, but that the issues raised by the application~~

~~require an evidentiary hearing,~~ counsel shall be appointed consistent with AS 18.85.100 to assist ~~indigent applicants~~ the applicant.

(2) Within 60 days of court appointment under (e)(1) of this rule, counsel shall file with the court and serve on the prosecuting attorney

(A) an amended application of a notice that counsel will proceed on the grounds alleged in the application filed by the applicant; or

(B) a certificate that counsel

(i) does not have a conflict of interest;

(ii) has completed a review of the facts and law in the underlying proceeding or action challenged in the application;

(iii) has consulted with the applicant and, if appropriate, with trial counsel; and

(iv) has determined that the application does not allege a colorable claim for relief.

8. Paragraph (f) of Criminal Rule 35.1 is amended to read as follows:

(f) Pleadings and Judgment on Pleadings.

(1) ~~Within 30 days after the filing of the application, or within such further time as the court may fix, the state shall respond by answer or by motion which may be supported by affidavits.~~ The state shall file an answer or a motion within 45 days of service of an original, amended, or supplemental application filed by counsel or by an applicant who elects to proceed without counsel, or of a notice of intent to proceed on the original application under (e)(2)(A) of this rule. The applicant shall have 30 days to file an opposition, and the state shall have 15 days to file a reply. The motion, opposition, and reply may be supported by affidavit. At any time prior to entry of judgment the court may grant leave to withdraw the application. The court may make appropriate orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading. In considering ~~the a~~ a pro se application the court shall consider substance and disregard defects of form, but a pro se applicant will be held to the same burden of proof and persuasion as an applicant proceeding with counsel. If the application is not accompanied by the record of the proceedings challenged therein, the respondent ~~shall~~ may file with its answer the record or portions thereof that are material to the questions raised in the application.

(2) ~~When a court is satisfied, on the basis of the application, the answer or~~

~~motion, and the record, that the applicant is not entitled to post conviction relief and no purpose would be served by any further proceedings, it may~~ If appointed counsel has filed a certificate under (e)(2)(B) of this rule, and it appears to the court that the applicant is not entitled to relief, the court shall indicate to the parties its intention to permit counsel to withdraw and dismiss the application and its reasons for so doing. The applicant and the prosecuting attorney shall be given an opportunity to reply to the proposed withdrawal and dismissal. In light of the reply, or on default thereof, the court may If the applicant files a response and the court finds that the application does not present a colorable claim, or if the applicant does not file a response, the court shall permit counsel to withdraw and order the application dismissed or. If the court finds that the application presents a colorable claim, the court may grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record shall not be made when a material issue of fact exists.

* * * *

9. Paragraph (g) of Criminal Rule 35.1 is amended to read as follows:

(g) **Hearing - Evidence - Order.** The application shall be heard in, and before any judge of, the court in which the conviction

~~took place underlying criminal case is filed.~~
An electronic recording of the proceeding shall be made. All rules and statutes applicable in civil proceedings, including pre-trial and discovery procedures are available to the parties except that Alaska Rule of Civil Procedure Rule 26(a)(1)-(4) does not apply to post-conviction relief proceedings. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. Unless otherwise required by statute or constitution, the applicant bears the burden of proving all factual assertions by clear and convincing evidence. The court may order the applicant brought before it for the hearing or allow the applicant to participate telephonically or by video conferencing. If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. The order made by the court is a final judgment.

10. Paragraph (h) of Criminal Rule 35.1 is repealed and paragraph (i) is relettered as (h):

~~(h) Waiver of or Failure to Assert Claims. All grounds for relief available to an~~

~~applicant under this rule must be raised in the original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.~~

~~(i)~~ (h) **Expedited Consideration.** An applicant may move for expedited consideration of the application for post-conviction relief. The motion must comply with Civil Rule 77(g).

11. Sections 1 through 10 of this order are adopted for the sole reason that the legislature has mandated the amendments.

12. The following note is added at the end of Criminal Rule 11:

Note to SCO 1242 : Criminal Rules 11(c) and (h) were amended by ch. 79 §§ 24 & 26 SLA 1995. Sections 1 and 2 of this order are adopted for the sole reason that the legislature has mandated the amendments.

13. The following note is added at the end of Criminal Rule 33:

Note to SCO 1242 : Criminal Rule 33 was amended by ch. 79 § 28 SLA 1995. Section 3 of this order is adopted for the sole reason that the legislature has mandated the amendment.

14. The following note is added at the end of Criminal Rule 35.1:

Note to SCO 1242 : Criminal Rule 35.1 was amended by ch. 79 §§ 32-39 SLA 1995. Sections 4 through 10 of this order are adopted for the sole reason that the legislature has mandated the amendments.

15. The following note, which appears at the end of Criminal Rule 11, is amended to read as follows:

Note to SCO 1204: Criminal Rule 11(c) ~~(3)(iii)~~ (4) was added by ch. 41 § 10 SLA 1994. Section 5 of this order is adopted for the sole reason that the legislature has mandated the amendments.

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Effective Date: July 15, 1996
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DATED: May 2, 1996

EFFECTIVE DATE: July 15, 1996

/s/
Chief Justice Compton

/s/
Justice Rabinowitz

/s/
Justice Matthews

/s/
Justice Eastaugh

/s/
Justice Fabe