IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA, Plaintiff, v. THOMAS JACK, JR., Defendant.	FILED IN CHAMBERS STATE OF ALASKA FIRST JUDICIAL DISTRICT AT JUNEAU By: KJK On: Feb. 15, 2017 Case No. 1JU-09-194 CR

ORDER REFERRING CASE TO THREE-JUDGE PANEL

The defendant, Thomas Jack, Jr., was found guilty by a jury of three counts of sexual abuse of a minor in the first degree, and one count of sexual abuse of a minor in the second degree.[1] He faces a composite presumptive sentencing range beginning at 40 years and one day. No statutory aggravating or mitigating factors are present.

A sentencing hearing was held on December 27, 2016, and the court announced the decision reflected in this order at a hearing on January 10, 2017. The court's reasoning was set out in detail in oral remarks made January 10, and those oral remarks are incorporated herein by reference.

The primary issue at the sentencing hearing in this case was whether to refer this case to the three-judge panel pursuant to AS 12.55.165. That statute establishes two distinct grounds for referral of a case to the three-judge panel, either of which must be proved by clear and convincing evidence. The first is whether imposition of the presumptive term would be

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[1] Jack was actually convicted of two additional counts of sexual abuse of a minor in the second degree. The Court of Appeals found that it was plain error for this court not to *sua sponte* order those two counts merged with two counts of sexual abuse of a minor in the second degree, and remanded the case for resentencing in light of the merger of those two counts. *Jack v. State*, 2014 WL 5799455 (Alaska App. 2014) (unpublished).

manifestly unjust. The second is whether it would be manifestly unjust not to consider a nonstatutory aggravating or mitigating factor.[2]

As to the first ground, the Court of Appeals has held that a finding of manifest injustice cannot be based on a conclusion that the presumptive term itself is manifestly unjust in general.[3] Before a sentencing court can properly characterize a presumptive term as "manifestly unjust," the court must articulate specific circumstances that make the defendant significantly different from a typical offender within that category or that make the defendant's conduct significantly different from a typical offense.[4]

I can identify no such circumstances here. While Jack has no prior criminal history, and there is no evidence of any prior history of unprosecuted or undetected sexual offenses, I cannot find that he does not have such a history. Furthermore the circumstances of this offense are particularly serious. Jack was a foster parent who repeatedly molested a vulnerable child placed in his care. He has expressed no remorse, nor accepted responsibility for his crimes. He has not established the existence of any extraordinary or situational factors which accounted for his crimes, or other circumstances unlikely to be repeated. He engaged in grooming behaviors, and his offenses occurred repeatedly over a period of time. Despite Jack's lack of criminal history, these facts preclude a finding that the circumstances of this offense are significantly more favorable than a typical offense.

As a result, I cannot find that the imposition of the presumptive term would be manifestly unjust. Accordingly, the first ground for referral of this case to the three judge panel does not exist.

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[2] *Kirby v. State*, 748 P.2d 757, 762 (Alaska App. 1987).
[3] *Beltz v. State*, 980 P.2d 474, 480 (Alaska App. 1999).
[4] *Id.*

The second possible ground for referral of a case is the existence of a nonstatutory mitigator. Jack argues that his prospects for rehabilitation are sufficiently favorable to establish this nonstatutory mitigator.

Prior to 2012, this nonstatutory mitigator required a defendant to do more than merely show that his prospects for rehabilitation were above average for a sexual offender.[5] The Court of Appeals held in *Kirby v State* in 1988 that a defendant must show by clear and convincing evidence that rehabilitation will actually occur.[6] In order to find this nonstatutory mitigator, the sentencing court must find, first, that it understands the problems that led the defendant to commit the offense, and second, that those problems are either readily correctable or unlikely to recur.[7] The Court of Appeals found in *Beltz v State* that a defendant's refusal to acknowledge responsibility for his crimes, and along with that declining to accept treatment, supported a finding that the defendant had not met his burden of showing an extraordinary potential for rehabilitation.[8]

Under this test, it is clear that Jack would not qualify. He has not acknowledged responsibility for his crimes. He has made no showing of the problems that led him to commit these offenses, or that those problems are readily correctable or unlikely to recur. His prospects for rehabilitation depend, even in the words of his own expert, on his willingness to accept responsibility, which is speculative at best.

However, in its decision in *Collins v. State* in 2012, the Court of Appeals substantially lowered the bar for a finding of this nonstatutory mitigator, in cases involving sexual offenses.[9] Instead of requiring a showing of "extraordinary" prospects for rehabilitation, the Court of

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[5] *Boerma v. State*, 843 P.2d 1246, 1248 (Alaska App. 1992).
[6] 748 P.2d 757, 766 (Alaska App. 1988).
[7] *Id.*
[8] 980 P.2d 474, 481 (Alaska App. 1999).
[9] 287 P.3d 791 (Alaska App. 2012).

Appeals required only a showing of "normal" or "good" prospects. If the standard set out in *Collins* applies here, Jack qualifies, because his prospects for rehabilitation, as testified to by Dr. Bruce Smith, are "normal" or "good," although certainly not extraordinary in light of his continuing denial.[10]

The Legislature overturned the decision in *Collins* in a 2013 statute. That statute purports to apply retroactively to offenses committed before its effective date, July 1, 2013.

For a defendant who, like Jack, has good but not extraordinary prospects for rehabilitation, the 2013 statute effectively doubles the minimum sentence which may be imposed. As such, I find that the 2013 statute constitutes an unconstitutional *ex post facto* law as applied to such a defendant.[11]

Given those conclusions, I believe the decision of the Court of Appeals in *Collins* compels the court to refer this case to the three-judge panel for consideration of the nonstatutory mitigating factor of Jack's prospects for rehabilitation.

I do so without any recommendation for a specific sentence.

Entered at Juneau, Alaska this 15th day of February, 2017.

Philip M. Pallenberg
Superior Court Judge

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[10] I found Dr. Smith to be credible and knowledgeable as an expert in the field of sex offender treatment and risk analysis.
[11] *Weaver v. Graham*, 450 U.S. 24 (1981).

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ORDER DENYING MOTION FOR RECONSIDERATION

The State moves on three grounds to reconsider this court's decision referring this case to the three-judge panel. The State's 10-page motion for reconsideration exceeds the five page limit provided for such motions in Criminal Rule 42(k)(2), which alone would permit the court to deny the motion. Because of the importance of these issues, though, the court will consider the motion despite the lack of a motion for leave to file an over-length motion for reconsideration. For the reasons set forth below, the court finds that the motion for reconsideration is without merit. Thus the court will deny that motion, both because the motion is over-length, and alternatively for the reasons set forth below.

The State's first argument is that this court need not follow the decision of the court in *Collins v. State*[1] because that decision was never binding legal authority. According to the State's argument, the decision in *Collins* never went into effect because the State filed a petition for hearing from that decision. The petition for hearing remained pending until the Legtislature overruled *Collins*.[2] The Supreme Court then dismissed the petition for hearing on

[1] 287 P.3d 791 (Alaska App. 2012).
[2] Ch. 43, §1, SLA 2013.

February 25, 2014. The State argues that the decision in *Collins* has no precedential effect in these circumstances.

The State cites Appellate Rules 507(b) and 512(a)(2) in support of this contention. Rule 507(b) provides that "the judgment of the appellate court takes effect and full jurisdiction over the case returns to the trial court" on the day specified in Rule 512(a) for return of the record. Rule 512(a)(2) provides that the record shall be returned on the day after a petition for hearing is denied. Under this rule, the judgment of the appellate court in *Collins* did not take effect until February 26, 2014. Since the Legislature overruled *Collins* prior to that time, the case never took effect under this view.

This interpretation, though, is not consistent either with the appropriate role of a lower court. Rules 507 and 512 are clearly intended to set out when jurisdiction over the case on appeal is returned to a trial court. Lower courts deciding other cases are bound, under the Anglo-American system of common law based on application of precedent, to follow the decisions of higher courts on an issue of law. There is no authority for the view that lower courts may ignore the decision of an appellate court until jurisdiction over the case on appeal is formally returned to a lower court.

I am not persuaded by the State's argument that this court is not bound by the decision of the Court of Appeals in *Collins*.

The State's second argument is that the court must -- in addition to finding a non-statutory mitigating factor -- find that imposition of the presumptive term would be manifestly unjust. This argument is contrary to the caselaw, which establishes two separate bases for referral of a case to the three-judge panel.[3] The first is a finding that the imposition of the presumptive term would be manifestly unjust. The second is a finding of a nonstatutory

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[3] *See, e.g., Kirby v. State,* 748 P.2d 757, 764 (Alaska App. 1987).

mitigator. If the court finds the existence of a nonstatutory mitigator, it does not need to find the first prong as well. Rather, once the court finds a nonstatutory mitigator, it evaluates the nonstatutory mitigator in the same way that it would evaluate a statutory mitigating factor, and "deny referral to the three-judge panel only when it concludes that no adjustment to the presumptive term is appropriate in light of the factor."[4] This does not require a separate finding of manifest injustice in imposing the presumptive term. Such a requirement would make the nonstatutory mitigator prong superfluous, since a manifest injustice finding would itself require referral to the three judge panel.

I thus reject the State's second argument.

The State's third argument is that application of the 2013 statute to this case would not be an *ex post facto* violation. The State argues that the 2013 amendment to AS 12.55.165 represents only a procedural change in how a defendant may obtain a referral to the three-judge panel. This is precisely the argument which the court considered and rejected at the last hearing in this case. I am not persuaded that the court's ruling is incorrect. I therefore reject the State's third argument in support of reconsideration.

For all of these reasons, the motion for reconsideration is DENIED.

Entered at Juneau, Alaska this 15th day of February, 2017.

Philip M. Pallenberg
Superior Court Judge

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[4] *Id.* at 765.