

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

2 FIRST JUDICIAL DISTRICT AT JUNEAU

3 STATE OF ALASKA,)

4)
5 Plaintiff,)

6 v.)

7 THOMAS JACK, JR.)

8 Defendant.)

Case No. 1JU-09-194 CR

9 MEMORANDUM

10 The Three-Judge Sentencing Panel ("Panel") hearing was held on January 29,
11 2018. Per the discussion during the hearing, the Panel decided to remand the case to Juneau
12 Superior Court Judge Philip Pallenberg, the trial Judge who referred the case to the Panel, for
13 sentencing based on the following analysis and findings.
14

15 Mr. Jack was charged in 2009 with having sexually abused T.T. an 11-year old
16 foster child in his care, in 2008. The case was assigned to Judge Pallenberg. Mr. Jack's first jury
17 trial resulted in a mistrial. He was convicted at the second jury trial in 2010 of three Counts of
18 Sexual Abuse of a Minor (SAM) in the 1st Degree (Counts 2,3,6) and three Counts of SAM in the
19 2nd Degree (Counts 1,4,7). And one statutory aggravating factor was found.¹ He was sentenced
20 in 2010. His attorney did not request that the case be referred to the Panel. Judge Pallenberg did
21 not *sua sponte* refer the case to the Panel.
22

23
24
25 ¹ AS 12.55.155(c)(18)(A) (Mr. Jack committed an AS 11.41 offense and the victim was "a member of the social unit made up of those living together in the same dwelling as the defendant").

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

1 Mr. Jack appealed his convictions and sentence to the Alaska Court of Appeals.
2 He also claimed on appeal that Judge Pallenberg had erred by not referring the case to the Panel
3 despite his failure to ask Judge Pallenberg to do so. The Court of Appeals in 2014 affirmed Mr.
4 Jack's convictions and found that Judge Pallenberg had not erred by not referring the case to the
5 Panel *sua sponte*. But the Court reversed Mr. Jack's sentences based on a finding that Count 4
6 should have merged with Count 3 and Count 7 with Count 6, so separate sentences should not
7 have been imposed on the merged Counts. The Court remanded the case to Judge Pallenberg for
8 resentencing.
9

10 Mr. Jack filed a request prior to the resentencing hearing that Judge Pallenberg
11 not sentence him and instead at the conclusion of the hearing refer the case to the Panel per AS
12 12.55.165(a).

13 Alaska Statute 12.55.165(a) provides that:

14 If the defendant is subject to sentencing under AS 12.55.125(c),(d),(e), or (i) and
15 the court finds by clear and convincing evidence that manifest injustice would
16 result from failure to consider relevant aggravating or mitigating factors [non-
17 statutory mitigating factors] not specifically included in AS 12.55.155 or from
18 imposition of sentence within the presumptive range, whether or not adjusted for
19 aggravating or mitigating circumstances, the court shall enter findings and
20 conclusions and cause a record of the proceedings to be transmitted to a three-
21 judge panel for sentencing under AS 12.55.175.²

19 Mr. Jack claimed that there were three grounds for a Panel referral. First, that he
20 would prove at the hearing by clear and convincing evidence that manifest injustice would result
21 from the imposition of a sentence within the presumptive sentencing³ range, whether or not
22

23
24 ² All emphasis herein is added.

25 ³ Mr. Jack has no prior felony convictions. The victim was under the age of 13. So the
presumptive sentencing range for each of the SAM 1st Degree offenses is 25-35 years per AS
12.55.125(i)(1)(A)(i). And the presumptive sentencing range for each of the SAM 2nd Degree
offenses is 5-15 years per AS 12.55.125(i)(3)(A). Alaska Statute 12.55.127(c)(2)(E) provides

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

Page 2 of 10

Alaska Court System

1 adjusted for aggravating or mitigating factors. Second, he would prove by clear and convincing
2 evidence that manifest injustice would result from failing to consider the non-statutory mitigating
3 factor recognized by the Alaska Court of Appeals in *Collins v. State*.⁴ Third, he would prove by
4 clear and convincing evidence that manifest injustice would result from failing to consider an
5 extraordinary potential for rehabilitation non-statutory mitigating factor. He did not request that
6 Judge Pallenberg find that manifest injustice would result if he was not made eligible for
7 discretionary parole at some point during his sentence.⁵

8
9 The Alaska Court of Appeals, prior to 2012, had recognized an “extraordinary” or
10 “exceptional” potential for rehabilitation non-statutory mitigating factor.⁶ So a Superior Court
11 Judge could refer a case to the Panel under AS 12.55.165(a) if the Judge found that the defendant
12 had shown by clear and convincing evidence that manifest injustice would result from failure to
13 consider that non-statutory mitigating factor.

14 The Alaska Court of Appeals in 2012 in *Collins* recognized a new non-statutory
15 mitigating factor for sexual offenses. The Court found that when the Alaska Legislature

16
17
18 that the court will sentence a defendant in Mr. Jack’s position on one of the SAM 1st Degree
19 Counts and that that the court must also impose at least “one-fourth of the presumptive term” on
20 each of the other two SAM 1st Degree Counts. Alaska Statute 12.55.127(e)(3) provides that
21 “presumptive term” means the middle of the presumptive range. The middle of the presumptive
22 range for the SAM 1st Degree offenses is 30 years. So, absent a statutory mitigating factor or
23 referral to and sentencing by the Panel, the minimum composite sentence that could be imposed
24 for the three SAM 1st Degree Counts is 40 years (25 + 7 ½ + 7 ½). And AS 12.55.127(c)(2)(f)
25 requires the imposition of a least one additional day for the remaining non-merged SAM 2nd
Degree Count (Count 1).

⁴ 287 P.2d 791 (Alaska App. 2012).

⁵ Mr. Jack is not eligible for administrative parole per AS 33.16.089 or mandatory parole per AS 33.20.010(a)(1)(3)(B). And the parties apparently agree that he is not eligible for discretionary parole per AS 33.16.090(b)(3).

⁶ *See, Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991); *Boerma v. State*, 843 P.2d 1246, 1248 (Alaska App. 1992); *Beltz v. State*, 980 P.2d 747, 481 (Alaska App. 1999);

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

1 substantially increased the sentences for sexual offenses in 2006 it did so based on legislative
2 findings that the typical sex offender has a history of unprosecuted sex offenses and has very
3 poor prospects for rehabilitation.⁷ So a Superior Court Judge should refer a case to the Panel if
4 the defendant proves by clear and convincing evidence either that the defendant does not have a
5 history of unprosecuted sex offenses or that the defendant has prospects for rehabilitation that
6 would be considered “good” or “normal” for other types of offenders.⁸

7
8 The Alaska Legislature responded to *Collins* in 2013 by declaring “that it had
9 never intended to create new grounds for referring a felony sex offender’s case to the three-judge
10 panel,”⁹ and, in effect, overturning *Collins* by enacting AS 12.55.165(c) and AS 12.55.175(f).

11 Alaska Statute 12.55.165(c) provides that:

12 A court could may not refer a case to a three-judge panel under (a) of this section
13 if the defendant is being sentenced for a sexual felony under AS 12.55.125(i) and
14 the request for the referral is based solely on the claim that the defendant, either
15 singly or in combination, has

- 16
17 (1) prospects for rehabilitation that are less than extraordinary; or
18 (2) a history free of unprosecuted, undocumented, or undetected sexual offenses.

19 Alaska Statute 12.55.175(f) provides that:

20 A defendant being sentenced for a sexual felony under AS 12.55.125(i) may not
21 establish, nor may the three-judge panel find under (b) of this section or any other
22 provision of law, that manifest injustice would result from imposition of a
23 sentence within the presumptive range based solely on the claim that the
24 defendant, either singly or in combination, has

- 25 (1) prospects for rehabilitation that are less than extraordinary; or
26 (2) a history free of unprosecuted, undocumented, or undetected sexual
27 offenses.¹⁰

28 *Manrique v. State*, 177 P.3d 1188, 1193 (Alaska App. 2008); *Silvera v. State*, 244 P.3d 1138,
29 1149 (Alaska App. 2010); *Smith v. State*, 258 P.3d 913, 917 (Alaska App. 2011).

30 ⁷ 287 P.3d at 795-96.

31 ⁸ 287 P.3d at 797.

32 ⁹ *State v. Seigle*, 394 P.3d 627, 631 (Alaska App. 2017). *See also*, Ch. 42, § 1, SLA 2013.

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

1 Mr. Jack acknowledged in his request for referral to the Panel that the Alaska
2 Legislature in 2013, in effect, repealed *Collins* but contended that the 2013 legislation would
3 violate the ex post facto clauses of the United States and Alaska Constitutions¹¹ if applied to him.

4 The resentencing hearing was held on December 22, 2016 and January 10, 2017.
5 Mr. Jack did not propose any statutory mitigating factors. Judge Pallenberg found that Mr. Jack
6 had not proven that manifest injustice would result from imposition of a sentence within the
7 presumptive range, whether or not adjusted for aggravating or mitigating factors, or that he has
8 extraordinary or exceptional potential for rehabilitation. So he declined to refer the case to the
9 Panel on those proposed grounds. He then addressed *Collins*. He found that applying the 2013
10 legislation to Mr. Jack would violate the Constitutional prohibitions on ex post facto laws,¹² so
11 *Collins* applies in this case. Focusing on the two-part *Collins* test, he found that Mr. Jack had
12 not shown by clear and convincing evidence that he does not have a history of unprosecuted sex
13 offenses but had shown by clear and convincing evidence that his prospects for rehabilitation,
14 while not exceptional, are good. So Judge Pallenberg referred this case to the Panel solely on the
15 basis of that part of the non-statutory mitigating factor recognized in *Collins*.
16
17

18
19 ¹⁰ Subsection (b) of AS 12.55.175, in pertinent part, provides that:

20 If the panel finds that manifest injustice would result from failure to consider
21 relevant aggravating or mitigating factors not specifically included in AS
22 12.55.155 or from imposition of a sentence within the presumptive sentencing
23 range, whether or not adjusted for aggravating or mitigating factors, it shall
24 sentence the defendant in accordance with this section. If the panel does not find
25 that manifest injustice would result, it shall remand the case to the sentencing
26 court, with a written statement of its findings and conclusions, for sentencing
27 under AS 12.55.125.

28 ¹¹ See, Article I, § 9 and Article I, § 10 of the United States Constitution and Article I, § 15 of
29 the Alaska Constitution.

30 ¹² Judge Pallenberg cited the Supreme Court's decision in *Weaver v. Graham*, 450 U.S. 24
31 (1981).

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

Page 5 of 10

Alaska Court System

1 Mr. Jack did not ask Judge Pallenberg to also address whether manifest injustice
2 would occur as a result of his not being eligible for discretionary parole at some point, and Judge
3 Pallenberg did not do so.

4 The State requested that the Alaska Court of Appeals review Judge Pallenberg's
5 ex post facto finding. The Court of Appeals declined to accept the case for review without
6 comment on April 19, 2017. The State then requested that the Alaska Supreme Court review the
7 finding. The Supreme Court declined review on August 28, 2017, though Justice Bolger and
8 Justice Maassen issued a dissent in which they stated their agreement with the State that that
9 there was no ex post facto violation and their view that the Court should accept review. So the
10 case was returned to the trial court and the Panel hearing was scheduled.

11
12 The parties filed pre-Panel hearing sentencing memorandums. The State, in part,
13 continued to argue that *Collins* cannot be applied to Mr. Jack. He argued to the contrary, and
14 presented arguments in support of his position that the record supports his claim that he had
15 proven the *Collins* non-statutory mitigating factor by clear and convincing evidence and that the
16 Panel should impose sentences based on the maximum reduction below the presumptive range
17 allowed by law.¹³ He also asked that the Panel find by clear and convincing evidence that
18 manifest injustice would result if he is not made eligible for discretionary parole.

19
20
21 ¹³ If the Panel found that a non-statutory mitigating factor had been proven by clear and
22 convincing evidence that factor could not result in a greater adjustment to a sentence than could
23 be made on the basis of a statutory mitigating factor. *See, Garner v. State*, 266 P.3d 1045, 1048
24 (Alaska App. 2011); *Luckart v. State*, 270 P.3d 816, 819 (Alaska App. 2012). A mitigating
25 factor for a SAM 1st Degree Count could reduce the bottom of the presumptive range to 12 ½
years per AS 12.55.155(a). It appears that the Panel would still be required to impose
consecutive terms on the other two SAM 1st Degree Counts totaling 15 years, and at least 1 day
on the unmerged SAM 2nd Degree Count, so the minimum composite jail sentence Mr. Jack
could receive on the basis of a statutory and/or non-statutory mitigating factor is 27 ½ years plus
1 day.

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

Page 6 of 10

Alaska Court System

1 The Panel at the outset of the January 29, 2016 hearing asked the parties to
2 address the ex post factor issue. The Panel was concerned that AS 12.55.175(f) is, in effect, a
3 jurisdictional provision which prevented the Panel from proceeding with this case unless the
4 Panel concurred that application of that statute to Mr. Jack would violate the Constitutional ex
5 post facto prohibitions because Judge Pallenberg had referred the case solely on the basis of the
6 *Collins* non-statutory mitigating factor that AS 12.55.175(f) was intended to eliminate. The
7 parties addressed the issue and the Panel retired to consider the matter.

8
9 The Panel found that AS 12.55.175(f) (and AS 12.55.165(c)) as applied to Mr.
10 Jack would not violate the Constitutional ex post facto clauses for basically the reasons stated in
11 Justice Bolger's and Justice Maassen's dissent. The Panel, in part, noted that the ex post facto
12 clauses are intended to prevent a legislature from making conduct a crime that was not a crime
13 when the conduct occurred and from enhancing the punishment for a crime after the crime was
14 committed, and that Mr. Jack committed the offenses in 2008, was convicted in 2010, was
15 originally sentenced in 2010, *Collins* was decided in 2012, and the Legislature in effect repealed
16 *Collins* in 2013, thereby returning the state of recognized non-statutory mitigating factors to
17 what it had been when he committed the offenses, was convicted, and was originally sentenced.¹⁴

18
19
20 ¹⁴ The Panel cited *Weaver, California Department of Corrections v. Morales*, 514 U.S. 499
21 (1995); *Amin v. State of Alaska*, 939 P.2d 413 (Alaska App. 1997); *Seigle; Ortiz v. State of*
22 *Alaska*, 173 P.3d 430 (Alaska App. 2007); and, *State v. Creekpauum*, 753 P.2d 1139 (Alaska
23 1988). The Panel notes that although the *Collins* non-statutory mitigating factor has been
24 rejected by the Alaska Legislature, the circumstances identified by the Court in *Collins* - whether
25 a defendant has a history or unprosecuted sexual offenses and the defendant's rehabilitative
potential - may still be considered in the context of a claim that manifest injustice would result
from sentencing a defendant within the presumptive range, whether or not adjusted for
aggravating and mitigating factors, and the extraordinary potential for rehabilitation non-
statutory mitigating factor, though "good" or "normal" prospects would not be sufficient for that
non-statutory mitigating factor.

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

Page 7 of 10

Alaska Court System

1 The Panel informed the parties of its findings. Mr. Jack stated the desire to have
2 the Panel proceed by allowing him to attempt to prove the exceptional or extraordinary potential
3 for rehabilitation non-statutory mitigating factor. And he requested that the Panel address his
4 discretionary parole request. The State, after some discussion, objected because Judge Pallenberg
5 had declined to refer the case to the Panel on that basis. The Panel retired to consider whether it
6 would continue with the hearing.

7 The Panel decided that, having found that it must apply AS 12.55.175(f) and that,
8 as a result, the sole basis for Judge Pallenberg's referral to the Panel was not permitted under AS
9 12.55.175(f), it could not proceed to consider Mr. Jack's case on another basis such as the claim
10 that manifest injustice would result from failure to consider the non-statutory mitigating factor of
11 exceptional or extraordinary prospects for rehabilitation, particularly when Judge Pallenberg had
12 considered and rejected the same.¹⁵

13 The Panel then considered whether it could nonetheless address Mr. Jack's claim
14 that manifest injustice would result from his not being eligible at some point for discretionary
15 parole. The discretionary parole situation is bit odd. Alaska Statute 12.55.165 is the statute that
16 addresses the grounds on which a Superior Court Judge can refer a case to the Panel. That
17 statute does not mention eligibility for discretionary parole. But the Panel clearly has the
18 authority to order that a defendant be eligible for discretionary parole, at some point and possibly
19
20
21
22

23
24
25
¹⁵ The Panel's view of AS 12.55.165-175 is that it can consider a case only the grounds on
which a case is referred by the trial court, with the possible exception of eligibility for
discretionary parole. But here the Panel was not only being asked to consider a ground on which
the case was not referred, it was being asked to consider a ground that had been considered and
expressly rejected by Judge Pallenberg.

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

1 under certain circumstances, per the express provisions of AS 12.55.175(e) and, per *Luckart v.*
2 *State*,¹⁶ under AS 12.55.175(c).

3 Given the foregoing, it is the Panel's view that a Superior Court Judge can refer a
4 case to the Panel on this basis, perhaps under the manifest injustice if sentenced within the
5 presumptive range provision in AS 12.55.165(a). And it is the Panel's view that when a case is
6 referred on another basis the Panel can consider the discretionary parole matter if it had not been
7 raised in the trial court, even if the Panel ultimately concludes that the defendant had not proven
8 the other basis for referral and the case would otherwise be remanded for sentencing.

9 The Panel did not address Mr. Jack's discretionary parole request because of the
10 Panel's view that its decision concerning the applicability of AS 12.55.175(f) in effect deprived
11 it of jurisdiction to continue. This is not simply a case in which the trial court made a referral on
12 a ground that the Panel ultimately concluded had not been proven by the defendant. Rather, it is
13 a case in which the trial court made a referral on basis that Panel believes was prohibited by
14 statute.

15 The Panel notes that it is the Panel's view that there is nothing herein that
16 prevents Judge Pallenberg on remand from referring the case back to the Panel on the eligibility
17 for discretionary parole basis, or which prevents Mr. Jack from requesting that Judge Pallenberg
18 refer and Judge Pallenberg referring the case back to the Panel on any other ground, including a
19 ground Judge Pallenberg previously had rejected, based on Judge Pallenberg's consideration at
20 that time of the evidence then in the record, including the evidence submitted after the prior
21 sentencing hearing concluded in January 2017.
22
23
24
25

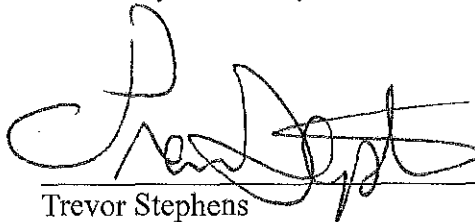
¹⁶ 314 P.3d 1226 (Alaska App. 2013).

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

1 The Panel understands that T.T. and Mr. Jack, and their families, have over the
2 past nine years been through a law enforcement investigation, charges being filed, two trials, a
3 sentencing, an appeal, a resentencing hearing that resulted in the referral to the Panel with no
4 sentence being imposed, and now the Panel remanding the case to the trial court. This situation
5 is regretful. But the Panel believes it is required under the circumstances and applicable law to
6 do as it has done.

7
8 Dated at Ketchikan, Alaska this 30th day of January 2018.

9
10 

11 Trevor Stephens
12 Superior Court Judge
13 Administrative Head
14
15
16
17
18
19
20
21
22
23
24
25

MEMORANDUM

State of Alaska v. Thomas Jack, Jr., Case No. 1JU-09-194 CR

Page 10 of 10

Alaska Court System