

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

FILED in the Trial Courts  
State of Alaska Third Judicial District

STATE OF ALASKA,

Plaintiff,

vs.

MATTHEW CAMPBELL

Defendant.

JAN 24 2013

Clerk of the Courts

By [Signature] Deputy

Case No. 3AN-11-02205 CR

**ORDER GRANTING MOTION TO REFER CASE  
TO THREE-JUDGE SENTENCING PANEL**

Defendant, Matthew Campbell (Campbell), was scheduled to be sentenced on December 21, 2012. Among other requests at sentencing, Campbell filed a Notice of Mitigating Factor and Motion to Forward Case to Three-Judge Sentencing Panel. The state opposed Campbell's requests. Following extensive hearings and argument on December 21<sup>st</sup> and 24<sup>th</sup>, 2012, the Court granted Campbell's motion but rejected his proposed mitigating factor. This written decision supplements the Court's oral findings issued on December 24, 2012.

Following trial in June 2012, Campbell was convicted of two counts of Sexual Abuse of a Minor in the Second Degree and was acquitted of two charged counts of Sexual Abuse of a Minor in the Second Degree. The charges involved alleged incidents with his stepdaughter, G.H. Campbell's convictions stem from separate incidents occurring as early as August 2008 and January 2011 when G.H. was 7 years old and 10 years old respectively.

Campbell, age 34, has no prior convictions. He has a high school education and some college training. He was employed until his arrest and received favorable letters of support from his employers. Although maintaining his innocence, Campbell wrote a letter to the Court expressing a desire to engage in whatever rehabilitative efforts the Court might impose. Campbell has strong support from friends and family in Anchorage—a number of whom spoke on his behalf at the sentencing hearing.

### **Campbell's Proposed Mitigating Factor**

Campbell faces a minimum of 5 to 15 years to serve for each conviction.<sup>1</sup> Under AS 12.55.127(c)(2)(F) at least some period of time must be imposed consecutively. Campbell must also be given 3 years of suspended time and be placed on probation for 10 years pursuant to AS 12.55.125(o). Thus, the minimum sentence the Court could impose is 8 years with 3 years suspended and 10 years' probation on each count, with all but 1 day running concurrently. If the sentence is mitigated, the Court can reduce the sentence to not less than 50% of the low end of the presumptive range of 5 years of incarceration.<sup>2</sup> Campbell has urged the Court to accept mitigating factor AS 12.55.155(d)(9), which would categorize his conduct as "among the least serious conduct included in the definition of the offense." Campbell argues that this is the case because of G.H.'s age, the absence of any skin-to-skin contact, and the absence of force

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<sup>1</sup> AS 12.55.127(i)(3)(A).



or violence. Campbell must "establish" this<sup>1</sup> mitigating factor by clear and convincing evidence. The Court rejects Campbell's argument that the "least serious" mitigator applies to his convictions. The Court finds as follows:

-G.H.'s age is not a mitigating factor. The incidents of abuse occurred when she was ages 7 and 10. That the incidents were separated in time, and occurred in the child's home by a parental figure only heightens the potential for injury to the child. Moreover, the abuse occurred at an age when G.H. was developing her sexual awareness and identity.

-While it is true that the incidents of abuse occurred over clothing, the second incident of abuse involved a vibrator. Exposing a child of 10 to the use of an adult sexual aide outweighed any mitigation that might be argued by the absence of skin-to-skin contact.

-The absence of physical force is a truism for sexual abuse with children. Physical force is typically not necessary to sexually abuse children, because adult figures, and especially parental figures, are able to coerce children into conduct as a result of their position of authority. Given that Campbell was G.H.'s stepfather, and has used verbal coercion with G.H. to keep her from reporting the first incident of abuse, the absence of physical force is not a mitigating factor.

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<sup>2</sup> AS 12.55.155(a)(2).

## Referral to the Three-Judge Sentencing Panel

Campbell has also argued that his sentencing should be referred to the three-judge sentencing panel as a result of the recent decision by the Court of Appeals in *Collins v. State*.<sup>3</sup> The state opposes Campbell's request arguing that he does not meet the criteria for referral articulated in *Collins*.

In *Collins*, the Court of Appeals recognized a new exception for referrals to the three-judge sentencing panel. Under prior case law, a defendant's case could be referred only upon a showing of "extraordinary potential for rehabilitation" or if the imposition of the presumptive sentencing term was "manifestly unjust."<sup>4</sup> But *Collins* held that a defendant convicted of a sexual felony should be referred to the panel if the defendant shows "by clear and convincing evidence" that he does not have a history of unprosecuted sex offenses *or* that he has "normal" prospects for rehabilitation.<sup>5</sup>

Both parties agree that the *Collins* decision sets a new standard for referral to the three-judge sentencing panel, but they disagree on its implications and application to this case. Campbell argues that he meets both criteria articulated by the Court of Appeals and thus must be referred under either standard. The state argues that the *Collins* decision explicitly affirms that the

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<sup>3</sup> 287 P.3d 791 (Alaska Ct. App. 2012).

<sup>4</sup> *Dancer v. State*, 715 P.2d 1174, 1177-78 (Alaska Ct. App. 1986); *Smith v. State*, 711 P.2d 561, 569 (Alaska Ct. App. 1985).

<sup>5</sup> 287 P.3d at 797.

defendant must meet the standard for referral by clear and convincing proof, and that Campbell has failed to marshal such proof.

The Court finds first that Campbell has failed to establish, by clear and convincing evidence, that he does not have a history of unprosecuted sex offenses. Campbell has no history of criminal convictions and the state has not offered any evidence of unprosecuted sexual offenses by Campbell. But it is not the state's burden to prove Campbell's offenses. Campbell himself has offered no evidence to establish that he has no unprosecuted sexual offenses. Clear and convincing evidence "is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved."<sup>6</sup> Campbell must do more than rest on the absence of the state's proof to meet his burden.

Campbell argues that the evidence he presented at the sentencing hearing establishes that he has at least "normal" prospects for rehabilitation. The Court of Appeals apparently meant "normal" to mean "good." Accepting that the phrase means average or better prospects for rehabilitation, Campbell meets this standard. Campbell is reasonably well educated, having considerable vocational and some college training. He was employed until his arrest and is fully employable given the support from his past employers. He has strong family support in the community. He has expressed a desire to cooperate with

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<sup>6</sup> *Buster v. Gale*, 866 P.2d 837, 844 (Alaska 1994).

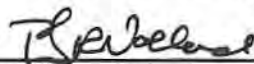



rehabilitation and is still young enough to do so. He has no criminal convictions of any type. Compared with typical felony offenders who appear before the Court (sexual or not), these are more than average qualities.

The state argues that to meet a clear and convincing standard of "normal" or "good" rehabilitation Campbell must present evidence in the form of a psycho-social assessment, polygraph testing, or sex-offender specific risk assessment like the STATIC-99.<sup>7</sup> The Court does not accept the state's reasoning. These assessments are costly and beyond the reach of the average defendant. It is also the type of evidence that would distinguish a defendant's prospects of rehabilitation as "extraordinary" and thus warrant referral to the three-judge sentencing panel under pre-*Collins* case law.

As further explained in the Court's oral ruling of December 24, 2012, the Court REJECTS Campbell's Notice of Mitigating Factor and GRANTS Campbell's Motion for Referral to Three-Judge Sentencing Panel.

IT IS SO ORDERED at Anchorage, Alaska, this 4th day of January, 2013.

  
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Philip R. Volland  
Superior Court Judge

I certify that on January <sup>4<sup>th</sup></sup>, 2013, a  
copy of the foregoing was mailed  
to: DAO J.Gruenstein, PD Z.Brown & DOC-Adult Prob  
  
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<sup>7</sup> The STATIC-99 is a male sex offender risk assessment. It is relatively simple, but requires training to administer and interpret. It does not require potential admissions by the defendant as a polygraph or psycho-social assessment might. However, in this Court's experience, is not yet routinely used for pre-sentence assessments of sex offenders in Anchorage.