

1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 THIRD JUDICIAL DISTRICT AT PALMER

3 **RECEIVED**

4 OCT - 9 2008

Area Court Administrator
Third Judicial District

5 STATE OF ALASKA,

6 Plaintiff,

7 v.

8 JAMES A. SUGAR,

9 Defendant.

Filed in the Trial Courts
State of Alaska Third Judicial District
At Palmer
OCT 14 2008
By Clerk of the Trial Courts
Deputy

10 Case No. 3PA-07-724 CR

11 **ORDER**

12 At the conclusion of the hearing October 3, 2008 the panel unanimously found
13 that imposition of the mitigated presumptive sentence (three years), would not be manifestly
14 unjust considering both the offense and defendant's criminal history. Defendant did not argue
15 the unlisted mitigator of extraordinary prospects for rehabilitation.

16 The matter is therefore remanded to the Trial Court for sentencing; and a
17 transcript of the panel members' remarks regarding their findings and conclusions will be
18 prepared.

19 ***IT IS SO ORDERED.***

20 Dated at Ketchikan, Alaska this 6th day of October, 2008.

21 

22 Michael A. Thompson
23 Superior Court Judge
24
25

ORDER

State of Alaska v. James A. Sugar, Case No. 3PA-07-724 CR

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Alaska Court System

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

STATE OF ALASKA,
Plaintiff,
vs.
JAMES SUGAR,
Defendant.

No. 3PA-07-00724 CR

VOLUME III

TRANSCRIPT OF SENTENCING
THREE-JUDGE PANEL

BEFORE THE HONORABLE
MICHAEL THOMPSON
MARK WOOD
JOHN SUDDOCK
Superior Court Judges

Palmer, Alaska
October 3, 2008
10:35 a.m.

APPEARANCES:

FOR THE PLAINTIFF: MIKE WALSH
District Attorney's Office
11921 Palmer Wasilla Highway
Suite 100
Palmer, Alaska 99645

FOR THE DEFENDANT: BETH TRIMMER
Office of Public Advocacy
1517 South Industrial Way
Suite 1
Palmer, Alaska 99645

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PROCEEDINGS

1 3PA08-1161

2 10:35:15

3 THE CLERK: Please rise. The Superior Court for the State
4 of Alaska is now in session, the Honorable Judges Michael
5 Thompson, Mark Wood, and John Suddock presiding.

6 JUDGE THOMPSON: Oh, thank you for the introduction.

7 JUDGE WOOD: Please be seated.

8 JUDGE THOMPSON: Good morning, folks. Be seated, please.

9 Well, the reason we're here, of course, is to address
10 3PA-07-724 CR. It's State of Alaska vs. Sugar. And Mr. Sugar
11 is here. I understand that he's in custody. Is it not
12 traditional for him to sit with counsel or....

13 UNIDENTIFIED VOICE: If counsel -- we usually sit in the
14 jury box, Your Honor, but if you feel -- we can put him by his
15 counsel.

16 JUDGE THOMPSON: Would you like Mr. Sugar over there with
17 you, Ms. Trimmer?

18 MS. TRIMMER: I would, Your Honor. Thank you.

19 JUDGE THOMPSON: Okay. Thanks. That way, you can
20 communicate probably a little more simply. And Mr. Walsh is
21 here on behalf of the state. I don't see other persons here
22 and I think the state's pleadings earlier suggested that it was
23 unlikely there would be further testimony from the state, or
24 evidence.

1 MR. WALSH: That is correct, Your Honor.

2 JUDGE THOMPSON: Ms. Trimmer, did you have additional
3 evidence you expected to produce today?

4 MS. TRIMMER: I do not have additional evidence, Your
5 Honor. I merely have argument and I do have just some
6 explanation of the exhibits that are already before the court.

7 JUDGE THOMPSON: Okay. Well, we'll certainly attack the
8 case in that fashion then. If you didn't catch it, this is
9 Judge Wood from Fairbanks, and Judge Suddock from Anchorage,
10 and I'm from Ketchikan. So we're from everywhere but here, I
11 guess is one way of describing it. Well, the request, of
12 course, for the case to be referred originates, as always,
13 almost always, with the defense, and certainly it did in this
14 case, so I would propose that we hear from Ms. Trimmer first,
15 then Mr. Walsh, and then Ms. Trimmer sort of closes, as we
16 would handle any sort of motion or petition or application from
17 the defense. So Ms. Trimmer.

18 MS. TRIMMER: That would be fine, Your Honor. And I would
19 address the court in more of a procedural posture of an oral
20 argument because I believe that that's where the defense is at
21 this point. And I would submit that the issue we're dealing
22 with today is whether Mr. Sugar can be sentenced fairly and
23 justly within the presumptive sentencing parameters, and I
24 suggest to you that he cannot.

25 As a threshold matter, because I know that this court,

1 having certainly seen the panel yesterday, sometimes is
2 concerned with jurisdiction of whether the three-judge panel
3 should even be sitting here, I would submit to you that as a
4 threshold matter, Judge Cutler did in fact employ the two-part
5 Hancock [sic] test, which says that she addressed the
6 presumptive sentence to reflect all of the permissible
7 mitigators. And she found two in this case. And then she made
8 findings on the record that the adjusted presumptive sentence
9 would approximate cruel and unusual punishment and that the --
10 in light of the defendant's conduct in this matter, his
11 criminal history, and that when she reduced the sentence as far
12 as she could go, which was three years, that it would be too
13 severe.

14 The question at the outset for jurisdictional purposes is
15 whether this case is extraordinary. And I would submit to you
16 that the legislative history, if we look to the commentary
17 section of the statute, suggests that a three-judge panel is
18 reserved for extraordinary cases. However, the case law in
19 this area is in slight conflict with that. Because if we look
20 to State v. Winther, which cites Lloyd, what the court said in
21 that case is that any marginal case should be referred to a
22 three-judge panel.

23 And so I would submit to you there's an implication that
24 when a case is marginal, at least for jurisdictional purposes,
25 it automatically becomes extraordinary enough for a three-judge

1 panel to hear. That being said, of course not every case gets
2 relief or the three-judge panel decides to act upon
3 substantively. And in that situation, the circumstances of the
4 case should be unusual, extraordinary. And in this case, Mr.
5 Sugar's case does provide unique circumstances and he cannot be
6 fairly sentenced, and justly sentenced, more appropriately,
7 within the presumptive sentencing range.

8 I would also, with respect to -- not to tell the court
9 what to do, but merely to lay out the law. As Judge Cutler was
10 required to conduct the two-part Heathcock test, so is this
11 court. And the second prong of the Heathcock test, the
12 question of whether a sentence of three years or more is
13 manifestly unjust and would equate to cruel and unusual, we get
14 some guidance from both the United States Supreme Court and the
15 Alaska Supreme Court as to what we do.

16 If we look to Judge Singleton's opinion in Heathcock, we
17 find that what a court is supposed to do is compare the
18 adjusted presumptive sentence to other sentences customarily
19 imposed for similar conduct, look at the defendant's specific
20 conduct in the case before it, and look at the defendant's
21 background.

22 In the record, as I indicated in my sentencing reply, the
23 court has three other cases of escape, walk-away type escape
24 from FCC before it. Those cases are Peters, Erickson, and
25 Kvasnikoff. And when we apply the three steps set forth from

1 Heathcock by Judge Singleton, we compare Mr. Sugar's adjusted
2 presumptive sentence of three years, his specific background
3 and his specific conduct, to the other sentences customarily
4 imposed for similar conduct highlights. And this is what we
5 find.

6 If you pull out Mr. Kvasnikoff's case, you will see that
7 as set forth in the affidavit by Trooper Shuey attached to the
8 felony complaint that's in the case file, Mr. Kvasnikoff was
9 serving a sentence for sexual assault I, a violent sexual
10 felony. As a background, he also has seven felony convictions,
11 five of which were violent felony offenses, and three of those
12 were violent sexual felony offenses. When he was at PCC, Mr.
13 Kvasnikoff was housed in the minimum security section, just
14 like Mr. Sugar, and he was not permitted to leave the facility,
15 just like Mr. Sugar. He did.

16 Mr. Kvasnikoff did leave PCC. He actively headed into the
17 woods. He headed towards the Glenn Highway and, if you're
18 familiar with the area, the Moose Creek area up towards Sutton,
19 and he was found hiding in the woods. He was deliberately
20 evading both the prison officials and the police. And in fact,
21 he stated he was just going to hide away in the woods. His
22 intent was to remain away from the facility, a true escape. He
23 was sentenced to three years in his escape case.

24 Next we look to Dustin Peters' case.

25 JUDGE WOOD: Was he charged with the same offense or was

1 the statute different at that time?

2 MS. TRIMMER: He was originally charged in the same case.
3 However, he was able to negotiate a plea with the state. And I
4 can get to, and I plan to get to, why that situation is
5 different in this case. The second case, Mr. Peters' case, he
6 was serving a burglary sentence at PCC, again under the same
7 situation. He was not permitted to leave. He has two felony
8 convictions, both for property-related crimes. He was found a
9 half a mile from PCC. And upon being detected by the
10 corrections officers and the police and ordered to stop, he and
11 his co-defendant, Mr. Erickson, who is our third case, began
12 running through the woods. And, in fact, neither one of them
13 stopped until the police told them they were armed.

14 Mr. Peters was sentenced to 30 days. And Mr. Erickson,
15 involved in that same case as Mr. Peterson [sic] - what's
16 important for the court to know above and beyond the facts that
17 I've just given you, is that he was also serving a sentence for
18 felony theft and he also had two felony convictions on his
19 record. Property crimes, just like Mr. Sugar's.

20 JUDGE WOOD: And they were also charged with misdemeanors;
21 right?

22 MS. TRIMMER: He negotiated to a misdemeanor.

23 JUDGE WOOD: Okay.

24 MS. TRIMMER: Yes. So at one of the end of the range, we
25 have Mr. Kvasnikoff. He's a violent felony offender who hid

1 from the DOC officers. He escaped. There was intent on his
2 part to leave the facility permanently. And he was sentenced
3 at the upper end of a range that we're looking at here, three
4 years. At the bottom of the range, we have Peters and
5 Erickson, both non-violent felony offenders who, again, with
6 intent to stay away from the facility, were sentenced at the
7 very lower end.

8 And in the middle, we have Mr. Sugar. And I say in the
9 middle for this reason. He has six felony offenses, all of
10 which are non-violent property crimes. As Judge Cutler found,
11 at least three of those are 20 years or older. The other two
12 are 10 and 15 years older, which leave us with the most recent
13 one that he was serving his sentence on. If we look to the
14 transcript and the log notes that were provided by the state
15 with respect to the trial, there is clear testimony that there
16 was no intent to remain away from the facility.

17 Mr. Sugar was on a tobacco run. Mr. Sugar was, in
18 essence, trying to bring contraband into the facility, which is
19 a misdemeanor. And when he was approached and when confronted
20 with the police and the DOC, he didn't try to run, unlike his
21 co-defendant. He didn't do anything but submit. And I submit
22 to you that he submitted because he had no intent to leave the
23 facility permanently, and that comes out in the trial
24 testimony. And both -- and Judge Cutler found that as well.

25 So when we compare his adjusted presumptive sentence of

1 three years to the other sentences for albeit somewhat similar
2 but actually more onerous escape conduct, a sentence of three
3 years or more would be disproportionate because Mr. Sugar's
4 conduct falls way below those other types of conduct and his
5 criminal history tends to fall about in between, if we look at
6 it's a non-violent and its age.

7 And I would say this to you. When we ask the specific
8 question of how is Mr. Sugar's case extraordinary, how is not
9 the typical escape offender, there are several things that
10 actually set this case apart. The first would be, as I have
11 mentioned previously, his intent. He did not have the intent
12 to permanently leave the facility. He was going on a tobacco
13 run.

14 Second is his conduct during the offense, which was to
15 immediately submit and come back, unlike his co-defendant, who
16 did try to run, and, unlike his co-defendant, who changed his
17 clothes in order to evade even being seen as someone who was
18 escaping PCC. He changed his clothes to look like a
19 presentenced individual versus a sentenced individual at the
20 facility.

21 And I would tell you that a sentence for this individual
22 in this presumptive range would be more -- for Mr. Sugar, to
23 sentence him at the presumptive range, which is where we're at
24 is three years because of the statute and Judge Cutler can go
25 to 50 percent below the presumptive range, it would be more of

1 a sentence than the sentence that he was even serving. It
2 would be a full year more than the sentence he was even serving
3 at PCC.

4 JUDGE WOOD: So was he serving a mitigated presumptive
5 sentence for his theft?

6 MS. TRIMMER: He was serving the rest of his time on his
7 theft, what.....

8 JUDGE WOOD: Oh, it was a parole.....

9 MS. TRIMMER:was on the shelf.

10 JUDGE WOOD: It was a parole violation?

11 MS. TRIMMER: It was a parole violation, two years flat,
12 is my understanding of what he was serving. He had between 35
13 and 38 days left on his sentence when this occurred.

14 JUDGE WOOD: Was this one of the ones where he had gotten
15 the maximum sentence and then he had suspended time and it was
16 revoked? Is that how it was?

17 MS. TRIMMER: He had gotten a sentence and he had
18 suspended time, is my understanding, and a parole violation
19 caused him to finish serving out that sentence.

20 JUDGE WOOD: Okay.

21 JUDGE THOMPSON: Well, two years of good time would
22 reflect a fairly substantial period of incarceration.

23 MS. TRIMMER: Yes, it would. Yes, it would. And to
24 answer your question, Judge Wood, as to really how did we get
25 here, why is Mr. Sugar charged with a felony versus what we see

1 on those other three cases, which are essentially misdemeanor
2 negotiations.....

3 JUDGE WOOD: Well, Kvasnikoff was negotiated down to a
4 class C; right?

5 MS. TRIMMER: Yes, I believe so. I would tell you that
6 this is what happened. And in normal circumstances, it may not
7 make a difference, but in this case it really does. And I know
8 this because, despite the fact that I didn't handle the
9 majority of the case before Judge Cutler, I did handle it
10 before it went to indictment, and so I do take some personal
11 responsibility here, which is why I've jumped in at this point
12 as well. And that is, when Mr. Sugar and Mr. Bourdon were
13 charged by complaint, they came before the district court judge
14 for a PTH hearing. At that time, the Rule 5 time was running
15 and was just about over. If I'm not mistaken, it maybe had
16 another day on it.

17 The state had not come to us. They had not said, let's
18 enter some negotiations about this. Let's talk about this.
19 Would you be willing to waive your Rule 5 time with the
20 understanding that we're going to negotiate? There was nothing
21 put forth on the table that way. And when I gave Mr. Sugar his
22 advice on whether or not to waive Rule 5 time, I told him no,
23 you have no incentive to waive your Rule 5 time. You're in
24 prison, they know where to find you, and it's the state's
25 burden to indict you in a timely manner.

1 It's my understanding, based on e-mail communications with
2 Mr. Walsh by Mr. Stohler and by my conversations with Mr.
3 Stohler, what that did to Mr. Sugar's case was, the DA said no
4 deal. You wouldn't waive your Rule 5 time. I'm not even
5 considering a deal in this case. And although I will not even
6 argue that the DA's Office has unfettered discretion when it
7 comes to charging an individual, what happened here was, by
8 refusing to even offer Mr. Sugar a deal, he was essentially
9 forced to go to trial, which means that he was plead as charged
10 or go to trial.

11 So he's not sitting here before you because he decided to
12 take a gamble at trial and say, well, maybe I can get off. He
13 decided that what he needed to do, based on my advice at the
14 PTH, was to assert his rights, and the DA's Office took an
15 affront to that. And so what has happened is, because of the
16 way he was charged, discretion for sentencing was essentially
17 yanked out of Judge Cutler's hand. She is completely bound by
18 the presumptive sentencing rules, and the only way that
19 discretion can be put back into this case is by the three-judge
20 panel.

21 And I would submit to you that where we are today and what
22 has presented itself with respect to his conduct, with respect
23 to his criminal history, with respect to the findings that
24 Judge Cutler made, which the state has never argued are clearly
25 erroneous, Mr. Sugar should be sentenced below the presumptive

1 range. And if we look at where he is in relation to the other
2 defendants sentenced on this type of conduct, he should be
3 sentenced at one year, six months. Thank you.

4 JUDGE THOMPSON: Thanks, Ms. Trimmer. Mr. Walsh,

5 MR. WALSH: Yes, Your Honor. Well, first and most
6 important, I take issue with the factual representations just
7 made about what happened at the preliminary hearing. At that
8 matter, the state was represented by Suzanne Powell, who,
9 unfortunately, passed away several months ago, who indicated to
10 me that counsel for defendant, who was Ms. Trimmer on that
11 occasion, refused to waive Rule 5 time. That was what was
12 communicated to me by Ms. Powell.

13 I would like the court to review the record of the
14 proceedings of April 11th to -- this is the first time that I
15 believe Ms. Trimmer has ever represented that the state would
16 not -- was not interested in a negotiation. The information
17 conveyed to me by Ms. -- in Ms. Powell's handwriting, on April
18 11th, Beth Trimmer refused to waive, counsel refused to waive.

19 So to the extent that the proceedings on April 11th may --
20 to the extent that anything was said on the record that might,
21 you know, serve to substantiate that in the eyes of the court,
22 I feel that that's crucial because the defense has chosen to
23 make this claim that the defense -- or that the state was not
24 pursuing -- interested in or pursuing a negotiated settlement.
25 We certainly were. And in aid of that, Ms. Trimmer was asked

1 to waive Rule 5 time and that was not done.
 2 And it is our -- often our position that defendants -- we
 3 certainly approach most -- in fact, almost all -- defendants
 4 with negotiated proposals for settlement. But in a case where
 5 a defendant is approached in such a way and indicates no, you
 6 know, just, I want to -- I'm not going to be agreeable to
 7 this -- and at that point in time, it did change the posture of
 8 the case. It changed -- it created a situation between the
 9 parties where the state was going to go forward and the
 10 defendant would be entitled to his day in court.
 11 And so that was -- when I obtained the case at a later
 12 point in time, being the assigned attorney in front of Judge
 13 Cutler, that was the posture the case was in and that was a
 14 result of the defense, their election early on not to
 15 negotiate, or not....
 16 JUDGE THOMPSON: I think you started this topic indicating
 17 that you didn't agree with what Ms. Trimmer said, but I think
 18 you just confirmed what she said. Whether or not it has any
 19 impact on the case eventually, I don't know. But it seems to
 20 me that your sequence of events sounds just like hers.
 21 MR. WALSH: Well, I believe....
 22 JUDGE WOOD: Just the source of it is different.
 23 MR. WALSH: Excuse me.
 24 JUDGE WOOD: No, I mean, the finger-pointing is different
 25 as to the....

1 JUDGE THOMPSON: The chronology sounds identical.
 2 JUDGE WOOD: The chronology is the same, but....
 3 JUDGE THOMPSON: Okay.
 4 JUDGE SUDDOCK: Where would the case likely have gone if
 5 Ms. Trimmer said sure, I'll waive time?
 6 MR. WALSH: Well, we would have entered into some sort of
 7 negotiations and if the parties had reached a common ground in
 8 terms of an agreement, the case might have pled out, or....
 9 JUDGE SUDDOCK: Is there a typical DA policy for this kind
 10 of case?
 11 MR. WALSH: No, there is no policy governing....
 12 JUDGE SUDDOCK: I mean, kind of sort of common law of your
 13 office -- if you're willing to deal this, we'll talk in such
 14 and such a range.
 15 MR. WALSH: Well, yes. We are more than happy to pursue
 16 negotiated resolutions. I think all of you are quite familiar
 17 with -- generally, that's the outcome in 90, 95 percent of all
 18 criminal cases.
 19 JUDGE SUDDOCK: So in this particular case, what's your
 20 range?
 21 MR. WALSH: We don't have a range with respect to a Rule
 22 11, the term, what sort of negotiation we can enter into.
 23 Or....
 24 JUDGE SUDDOCK: I know. But you've done other -- have you
 25 done other escapes from PCC or other institutions?

1 MR. WALSH: As far as myself personally negotiating an
 2 escape from PCC, I've done -- handled escape escapes under much
 3 different circumstances involving eluding from law enforcement,
 4 not a case where a subject left PCC.
 5 JUDGE SUDDOCK: Is it at least....
 6 MR. WALSH: I don't recall....
 7 JUDGE SUDDOCK:conceivable if this case had resolved
 8 on a plea, it would have resolved -- it could have resolved at
 9 the one and a half to two-year level?
 10 MR. WALSH: No.
 11 JUDGE SUDDOCK: No.
 12 MR. WALSH: Not in my opinion, based upon -- or not as the
 13 assigned prosecutor.
 14 JUDGE SUDDOCK: Uh-huh.
 15 MR. WALSH: If you would like me to give like a projection
 16 of where I think the case might have gone had we gone forward
 17 into a negotiating phase, then the defendant's six prior felony
 18 convictions would have been factored in as well as his conduct
 19 in allowing -- or in aiding the escape by a sex offender with a
 20 history a mile long, and we might have ended up possibly with a
 21 mitigated sentence, perhaps going below -- in light of --
 22 possibly a mitigated sentence. But we do have a departmental
 23 policy against mitigators without supervisor approval, so that
 24 if I had proposed -- I would have needed some supervisor
 25 approval before entering into any sort of a mitigator with the

1 defense.
 2 JUDGE THOMPSON: Well, practically speaking, the only way
 3 you can get below three here would be if you accepted a plea to
 4 a C.
 5 MR. WALSH: Oh, I don't see -- given the facts of this
 6 case, the defendant's history and his conduct, I personally
 7 can't really imagine unless, quite frankly, he could help
 8 apprehend the Medellin Cartel or something, I don't really
 9 foresee the state entering into an agreement below three years.
 10 No, Your Honor.
 11 JUDGE THOMPSON: Well, so, I mean....
 12 MR. WALSH: I think perhaps a mitigated term between three
 13 and six, perhaps. If we....
 14 JUDGE THOMPSON: I think what you're saying is, you
 15 wouldn't have accepted a C. You wouldn't have reduced this to
 16 a C felony.
 17 MR. WALSH: Well, perhaps an aggravated C, perhaps. I'm
 18 just trying to, you know, sort of go backwards here.
 19 JUDGE THOMPSON: I'm not sure I'm even happy we're having
 20 this conversation. It makes me -- I'm a little bit concerned
 21 that we're being asked to do something that we really can't do,
 22 which is re-litigate the case.
 23 MR. WALSH: Correct. And I'm a little uncomfortable
 24 trying to go backwards and project what I might have done if
 25 things had -- if the defense had been interested in April of

1 2007 in a negotiation. Then things -- perhaps things might
2 have turned out different. But the bottom line was, they were
3 not. The -- okay. Let me back up, Your Honor, and go back to
4 the -- what was left out was that the -- it was implicit -- if
5 the state comes to a defendant, it's implicit that there's a
6 quid pro quo.

7 It's not -- when -- it was not simply a matter of the
8 defense being asked to waive time and not waiving. There was
9 the understanding between the department -- my department and
10 defense agencies, and private defense counsel, that there will
11 need to be a quid pro quo to negotiate the case. That being,
12 since we're here at prelim and we have this deadline the
13 state's facing, do this and we'll look at resolving the case.
14 So I apologize for leaving out that, but that's implicit. I'm
15 sorry -- because it's just implied in the everyday, you know,
16 coming to court on a regular basis -- when you say will you
17 waive, that means do you want to negotiate the case.

18 And I did not -- the notes that I referred to in the --
19 and what was said to me by Ms. Powell was that the defense
20 wished -- elected not to waive time in order to negotiate.
21 They simply requested that the complaint be dismissed. So have
22 I addressed that, Your Honor, as far -- you had....

23 JUDGE THOMPSON: To my satis....

24 MR. WALSH: When you say that....

25 JUDGE THOMPSON: I've heard all I need to hear about that.

1 MR. WALSH: Okay.

2 JUDGE THOMPSON: If that answers your question.

3 MR. WALSH: All right. Your Honor....

4 JUDGE THOMPSON: But I can't speak for....

5 JUDGE WOOD: I have heard....

6 JUDGE THOMPSON: ...my colleagues.

7 JUDGE SUPDOCK: I'm satisfied.

8 JUDGE WOOD: Yeah, I don't need to hear anything more. We
9 understand why we're here. That's all....

10 MR. WALSH: Okay.

11 JUDGE WOOD: ...that helps me to know.

12 MR. WALSH: Your Honor, the state submits that this is
13 not, with all due respect to the Palmer court, the state
14 submits this is not an extraordinary circumstance, nor would it
15 be manifestly unjust for the defendant to receive the mitigated
16 sentence that Judge Cutler had already indicated she would be
17 likely to give him, by virtue of referring it to the
18 three-judge panel. And we submit, number one, it's -- that
19 because it's not extraordinary and there's no manifest
20 injustice that, as a preliminary matter, we challenge whether
21 this case should even be in front of the three-judge panel.

22 The defendant, a six-time convicted felon, entered into an
23 agreement or some sort of an arrangement with another inmate,
24 Eugene Bourdon, a convicted sex offender with three pages of
25 criminal history, whereby the de -- because of Mr. Bourdon's

1 poor eyesight that was -- that he testified to at the trial,
2 Mr. Sugar would act with him in escaping from the Palmer
3 Correctional Center, leaving the grounds of the Palmer
4 Correctional Center. That is what happened. And then when the
5 subjects were apprehended, Mr. Bourdon was running down the
6 highway towards Palmer, jumping over the guardrail, had to be
7 taken into custody at gunpoint.

8 What the defense is essentially saying is that this is
9 extraordinary because this defendant -- my client, you know,
10 raised his hands and surrendered, and wasn't the convicted sex
11 offender. Well, I submit to you it's not extraordinary because
12 the mere fact that it was the defendant's conduct that
13 facilitated the escape of Eugene Bourdon from the Palmer
14 Correctional Center, on top of his own criminal history, the
15 six prior felonies, that that's simply not extraordinary.

16 So he wasn't the sex offender running down the highway who
17 had to be taken into custody by law enforcement. He
18 facilitated the escape of that sex offender. And for him to
19 now come before you and say that, you know, I think that that
20 makes his claim that -- I'm not the convicted sex offender,
21 I've only got six felonies, and I wasn't running down the
22 highway towards Anchorage, having changed my uniform into a
23 misdemeanor uniform, that was the guy I helped escape -- I
24 think that that detracts substantially from the merit of his
25 saying that yes, I really do warrant a sentence of half the

1 mitigated sentence that Judge Cutler would be authorized to
2 give him.

3 Now with respect to these other cases; what led up to
4 those cases, those resolutions, those negotiated resolutions,
5 we don't know. Was the date facing a Rule 45 deadline that
6 might possibly have led to a dismissal of the case? We don't
7 know. Did one of those individuals enter into an agreement
8 with the state to turn state's evidence in exchange for
9 testimony or aid in apprehending another defendant? We don't
10 know. What were the other factors that the state law
11 enforcement or Department of Corrections were dealing with that
12 might have made that particular outcome in those cases? That's
13 sort of a negotiation appropriate. We don't know because the
14 defense has not provided any record of that.

15 The defense, if they wanted to rely on these cases, then
16 they could have substantiated that record a little bit more.
17 But what they're saying is, these folks entered into Rule 11
18 agreements. We have a bare-bones description of their conduct
19 and they got substantially less. Therefore, this defendant
20 post-trial should get the same thing or similar. And I submit
21 to you, that's not -- that's -- well, let's just apply the test
22 laid out by Ms. Trimmer.

23 What was the conduct of those other defendants? Did any
24 of those other defendants help a sex offender escape? Did Mr.
25 Kvasnikoff help a sex offender escape? Did Mr. Peters do so?

1 Did Mr. Erickson do so? I didn't see that in the probable
2 cause affidavits. So that's one factor. Using the analysis
3 laid out by Ms. Trimmer, that certainly doesn't help defendant
4 if he -- this defendant is facilitating that sort of conduct by
5 a co-defendant, that his conduct is worse than that of those
6 three individuals.

7 Criminal background. The defendant has six prior felony
8 convictions. And so he's not a sex-offender. I think that if
9 you have six prior felonies, that's pretty bad. And the mere
10 fact that you don't have the three pages of history that Mr.
11 Bourdon has and you're not a sex offender, I don't think that
12 that's -- that that really mitigates your six prior felony
13 convictions.

14 And with respect to these other cases that the defense has
15 mentioned, we don't know -- well, we do know -- there's no
16 indication that I saw in those records that those escapees were
17 aiding the escape of other individuals. So in this case, the
18 defendant's conduct was more aggravated. And the support for
19 that -- those facts regarding the defendant's assisting the
20 co-defendant's escape are in state's Exhibit number 1, page 9,
21 where the co-defendant testified about his poor eyesight.
22 Eugene Bourdon, he testified about his poor eyesight and the
23 fact that it was this defendant's involvement in the escape was
24 a result of the co-defendant's need for someone with better
25 eyesight.

1 Quite frankly, this is a case of a person with a lengthy
2 criminal history helping another person with an even worse
3 criminal history escape from jail. And the mere fact that he's
4 not as -- maybe he's not as bad as the other guy, I submit to
5 you that that does not rise to the level of an extraordinary
6 circumstance that would justify the case being here, or a
7 manifest injustice, or would render the three-to-six-year
8 mitigated range that Judge Cutler is apparently willing to
9 sentence him to, that that does not render that outcome a
10 manifest injustice. And I believe that's all I have, Your
11 Honor. Thank you.

12 JUDGE THOMPSON: Thank you, Mr. Walsh. Did either of my
13 colleagues have any questions for Mr. Walsh?

14 JUDGE SUDDOCK: I do not.

15 JUDGE WOOD: No.

16 JUDGE THOMPSON: Nor do I. Ms. Trimmer.

17 MS. TRIMMER: If I may respond just briefly, Your Honors.
18 I would also point the court to page number 9 of the log notes
19 of the state's Exhibit 1. There is nothing in the record that
20 shows, one, that Mr. Sugar knew what Mr. Bourdon's criminal
21 history was. So to imply that he knew he was helping a sex
22 offender escape is an extreme implication that has no support
23 in the record. Number one. Number two....

24 JUDGE WOOD: Excuse me. Wasn't there something, though,
25 that Mr. Sugar had known Mr. Bourdon through quite a period of

1 time? I mean, it seems to me I read something like that in
2 there.

3 MS. TRIMMER: That may be the case. But whether or not --
4 especially....

5 JUDGE WOOD: He had not....

6 MS. TRIMMER: Especially an inmate discloses that he's a
7 sex offender, which typically puts him in a position to be
8 abused in prison -- we have no idea whether he disclosed that
9 to Mr. Sugar or not.

10 JUDGE WOOD: Well, Mr. Bourdon's felonies were failure to
11 register as a sex offender; correct?

12 MS. TRIMMER: Yes. And are we saying that the record
13 supports the fact that Mr. Bourdon admitted to what he was in
14 prison for?

15 JUDGE WOOD: I don't know.

16 MS. TRIMMER: I don't....

17 JUDGE WOOD: I don't know.

18 MS. TRIMMER: I don't think it does.

19 JUDGE WOOD: Okay.

20 MS. TRIMMER: So we don't know whether or not Mr. Sugar
21 knew that. Number two....

22 JUDGE WOOD: He was just helping a fellow inmate escape
23 then?

24 MS. TRIMMER: No. I submit he wasn't helping a fellow
25 inmate escape. If you look at Mr. Bourdon -- the testimony

1 here at page 9, it specifically talks about -- yes, I did go to
2 get tobacco. The reason that I asked Mr. Sugar to come with me
3 was because I wanted him in my plans because I couldn't see.
4 We were going to come back and sell the tobacco for money.

5 JUDGE WOOD: Yeah. Did they find tobacco on either of the
6 two individuals when they picked them up?

7 MS. TRIMMER: I have no idea whether they found the
8 tobacco in the woods or not. What I do know....

9 JUDGE WOOD: No, no, no, no. I mean, when the police --
10 when they were arrested, did they have tobacco on them?

11 MS. TRIMMER: I do not know that. Which indicates only
12 that perhaps they didn't find it in the woods. But it
13 certainly indicates what Mr. Sugar -- what was in his head when
14 this occurred. It's not what the state is saying, which is --
15 I'm going to help a sex offender escape PCC. It's -- I'm going
16 with this guy and we're going to go get tobacco and bring it
17 back and sell it in prison, so we're introducing contraband.
18 So I would submit to you that that's what that shows with
19 respect to the intent.

20 And just to very briefly set forth the fact that on not
21 just one, but on two occasions, Judge Cutler invited the state
22 to please show her more about those other cases that we put
23 forward, please show her other cases where sentences were
24 different. The state has never taken the opportunity to do
25 that. So what we have is what we are able to get with respect

1 to those cases and we put them forward in order to show where a
2 typical offender has been sentenced.

3 That being said, let's just look at Mr. Bourdon, the
4 co-defendant. The exact same situation; right? As the state
5 has admitted at least three times this morning, Mr. Bourdon's
6 criminal history is excessive. You now have, based on my
7 filing, his full criminal history ahead of you -- in front of
8 you, which shows that he has three SAM III's on him. He has
9 failed to register as a sex offender three times. The state
10 themselves call him a horrendous criminal.

11 We don't have the same situation with Mr. Sugar. In fact,
12 you can say he's got six felonies on him. What he has are,
13 one, all C property crime felonies, two, at least half of which
14 are so old we can see that he hasn't been re-offending to the
15 extent that Mr. Bourdon has been re-offending.

16 JUDGE WOOD: Wait a second. He served 12 years in the
17 last 20; right? He's been on probation almost the entire time.

18 MS. TRIMMER: Yes.

19 JUDGE WOOD: Isn't that how I read his sentence, his
20 record?

21 MS. TRIMMER: You can read his sentence that way. He has
22 been revoked. I would offer.....

23 JUDGE WOOD: No, I mean, he got five years with one
24 suspended. He got a four-year flat sentence.

25 MS. TRIMMER: Yes.

1 JUDGE WOOD: You know, and then he -- I mean, he served a
2 substantial period of incarceration several times as a result
3 of his conduct. And the main reason.....

4 MS. TRIMMER: And I would agree with that.

5 JUDGE WOOD: The main reason why his sentences are so old
6 is because he's been in jail most of the time.

7 MS. TRIMMER: Maybe, maybe not. I mean, we can't
8 absolutely say that. But what we can say is, he doesn't sit
9 here as a sex offender. He doesn't sit here as a violent
10 felon. He has never been described as a horrendous criminal,
11 as the state has described Mr. Bourdon. But even so, I mean,
12 when you compare the criminal histories, it's obvious that
13 you're looking at two different things.

14 Mr. Bourdon was sentenced to three years. Mr. Bourdon's
15 conduct was extremely different. Judge Cutler made the finding
16 that Bourdon was the leader, Mr. Sugar was the follower. The
17 state has put nothing forward to show that that finding is
18 clearly erroneous. They can characterize Mr. Sugar as helping
19 a sex offender escape, but that's not what the finding is, and
20 there's nothing to overcome Judge Cutler's finding that he was
21 the follower, not the leader. That he was not the one who
22 changed his clothes, Mr. Bourdon was. That he was the one who
23 submitted because his intent was not to leave the facility
24 permanently, and Mr. Bourdon kept on running.

25 When we look at that, can this court really say that when

1 we look at Bourdon and we look at Sugar, that it would be
2 manifestly just and it would be fair to sentence them exactly
3 the same way, given the differences in their criminal histories
4 and the differences in their conduct? I submit to you that
5 it's not, even if you exclude all those other sentences we've
6 put before you. Just comparing these two co-defendants.

7 And just as an aside, one could clearly say that Mr.
8 Peters and Mr. Erickson, one of them facilitated the other one
9 escaping -- 30 days.

10 JUDGE SUDDOCK: Let me ask you, Ms. Trimmer -- in Judge
11 Cutler's order of referral to the three-judge sentencing
12 panel.....

13 MS. TRIMMER: Yes.

14 JUDGE SUDDOCK:she says, in support of its referral
15 to the three-judge panel for a sentence of less than three
16 years, the court makes the following findings. And the second
17 finding is that the gentleman was in fact on a tobacco run, a
18 short-distance tobacco run. And the third -- paragraph three
19 finding is that his mentality, given his prior head injury and
20 past conduct, indicates that he has the mentality of a
21 14-year-old that would follow a leading individual.

22 My question is, did she find those in aid of her decision
23 that the least-serious mitigator had been established by clear
24 and convincing evidence?

25 MS. TRIMMER: She -- I believe that -- from listening to

1 the record, I believe that her finding with respect to the fact
2 that it was a short-term tobacco run and not a true escape from
3 PCC in the sense that there was intent to permanently be away
4 from the facility did in fact lend to her least-serious
5 mitigator finding. I can tell you.....

6 JUDGE SUDDOCK: So you believe the record supports that
7 she found that not just as a basis to refer it to the
8 three-judge panel but as a clear and convincing fact
9 justification for the least-serious mitigator?

10 MS. TRIMMER: That particular finding, yes. I would tell
11 you, as a matter of fact, because I was at the hearing and
12 argued at the hearing for the referral, that she found by clear
13 and convincing evidence for the referral about his mentality
14 and the following nature, his nature as a follower. I don't
15 believe that she mentioned his nature as a follower
16 specifically in her least-serious finding.

17 JUDGE SUDDOCK: What about the mental status as.....

18 MS. TRIMMER: Yes.

19 JUDGE SUDDOCK:a 14-year-old?

20 MS. TRIMMER: The mental status was specifically as clear
21 and convincing for the referral.

22 JUDGE SUDDOCK: For the referral, but not necessarily for
23 the mitigator?

24 MS. TRIMMER: The least-serious.

25 JUDGE SUDDOCK: All right.

1 MS. TRIMMER: It's my -- she -- based on my listening to
 2 both of her hearings, both the one I was.....
 3 JUDGE SUDDOCK: Uh-huh.
 4 MS. TRIMMER: ...present at and the one before, she
 5 didn't bring the 14-year-old mentality in until she discussed
 6 the referral, and she had already found the least-serious
 7 mitigator.
 8 JUDGE SUDDOCK: All right.
 9 JUDGE WOOD: Ms. Trimmer, I found -- when I was looking
 10 through here, I found the information about him having the two
 11 automobile accidents that resulted in the head injuries, but I
 12 couldn't find -- and maybe I missed it, and that's why I want
 13 your help. I couldn't find any factual basis for the
 14 conclusion that he had the mentality of a 14-year-old. I
 15 found -- I mean, you know, she had the chance to go through the
 16 whole trial and could conclude that he was the follower in the
 17 case, but I didn't see the information that he had a reduced
 18 mentality because of the head injuries.
 19 MS. TRIMMER: It's my understanding that based on Judge
 20 Cutler's review of the PSRS, and his review of where he was in
 21 school and what he had done, and the things that had occurred
 22 during his youth and up until this time, as well as exactly
 23 what she heard at the trial -- and she sat through the whole
 24 trial -- and the further.....
 25 JUDGE WOOD: Of course, Mr. Sugar didn't testify at the

1 trial.
 2 MS. TRIMMER: No, Mr. Sugar didn't testify at the trial,
 3 but certainly people testified about his conduct. And in
 4 listening to that and looking at the PSR, where she found that
 5 he had had the brain injuries, she found that that was
 6 supported. Now can we support that it's actually 14? No. But
 7 I think there's certainly evidence that it's a reduced IQ and
 8 perhaps a reduced maturity level, and I think she looked very
 9 much to the reduced maturity level.
 10 JUDGE WOOD: Okay.
 11 MS. TRIMMER: Especially when she was looking -- and I say
 12 she was looking to see who was the leader here and who was the
 13 follower here, and she judged Mr. Sugar's demeanor not just as
 14 he sat there at trial, but in the other proceedings that were
 15 before her. And she's able to look at his demeanor.
 16 JUDGE WOOD: Thank you.
 17 JUDGE THOMPSON: All right. Thanks. Any questions, other
 18 questions, for counsel?
 19 JUDGE SUDDOCK: I do not.
 20 JUDGE WOOD: Actually, I do have one. You make an
 21 argument about cruel and unusual punishment, Ms. Trimmer, yet
 22 you didn't argue that at all to us. Are you just abandoning
 23 that at this point?
 24 MS. TRIMMER: I'm not abandoning that argument, Your
 25 Honor. It's my position, as I forth in the brief below, the

1 bench brief below, as well as the incorporation of that into my
 2 reply, that manifest injustice, if we look to the Heathcock
 3 decision, if we look to Singleton, Judge Singleton equated
 4 manifest injustice with cruel and unusual. And we get there
 5 slightly differently. We get there because of what he says the
 6 three things we have to look at, that I set out for this court,
 7 the defendant's conduct, the defendant's criminal history,
 8 and -- I'm not going to argue to you, though, that it's cruel
 9 and unusual under the U.S. Constitution and the U.S.
 10 constitutional cases because I think that takes us into a
 11 completely different realm when we talk about
 12 disproportionality. But we don't have those cases here in the
 13 state of Alaska yet.
 14 JUDGE WOOD: So you're saying that the manifest injustice,
 15 in this case, approaches cruel and unusual punishment?
 16 MS. TRIMMER: Especially given.....
 17 JUDGE WOOD: That's what you're saying?
 18 MS. TRIMMER: ...the fact that Mr. Sugar will be serving
 19 more time on an escape with the type of conduct that occurred
 20 than he was on his underlying case.
 21 JUDGE THOMPSON: All right. Thank you then. We'll
 22 deliberate -- should we make it 30 minutes?
 23 JUDGE SUDDOCK: Makes sense.
 24 JUDGE WOOD: Yes.
 25 JUDGE THOMPSON: We'll be back within 30 minutes, by -- if

1 counsel could reassemble at quarter to, we should be able
 2 to.....
 3 MR. WALSH: Thank you.
 4 JUDGE THOMPSON: ...let you know where we are at least,
 5 at that point.
 6 THE CLERK: Please rise. Court's in a brief recess. Off
 7 record.
 8 (Off record)
 9 THE CLERK: We're back on record in Superior Court. The
 10 three-judge panel resumes its session.
 11 JUDGE THOMPSON: Thank you. Let me announce the court's
 12 findings today and I'll turn to my colleagues for any
 13 additional comments that they might have. The three-judge
 14 panel, of course, is enabled by the statute with two routes, I
 15 guess, by which it can or should provide relief to defendants
 16 or, in some instances -- although we haven't seen cases of that
 17 sort -- to the state, should they believe that the presumptive
 18 or apparent sentences that are likely to be handed down by the
 19 trial court are either inadequate or altogether too harsh.
 20 Those two are the fairly well -- I'll say fairly well
 21 defined by case-law. The exception of extraordinary prospects
 22 for rehabilitation, that's not been urged in this case and, of
 23 course, the history here shows quite to the contrary, that Mr.
 24 Sugar's prospects for rehabilitation -- I'm not doing this
 25 gratuitously, but his prospects for rehabilitation do not

1 appear to be very good at all. But I thought we should at
2 least acknowledge that concept.

3 The other method by which this court can assume
4 jurisdiction and grant relief if justified is, of course, if
5 there would be a manifest injustice if the trial court were
6 required to follow the presumptive sentencing code with or
7 without mitigators or aggravators. And Judge Cutler's
8 findings, of course, mean that as a practical matter in this
9 case, she can sentence Mr. Sugar to as little as three years,
10 although the original target presumptive sentence would have
11 been six.

12 Had she not found mitigating factors and had been required
13 to impose a six-year sentence, I think the argument would have
14 been much stronger that to do that would have approached, if
15 not clearly constituted, a manifest injustice. But it's
16 difficult for me to hazard a guess in that direction because
17 that's not the factual situation that's before us.

18 And the panel, I believe, unanimously agreed that since
19 the trial court had authority to reduce the sentence, and in
20 fact has clearly shown her intention to do so -- given her
21 druthers, obviously, she would have reduced it even more than
22 that. But nonetheless, she does have the authority to reduce
23 the sentence to a straight three years, or 36 months.

24 We just can't find and do not find that the difference
25 between that and the 24 months, which she would otherwise

1 recommend -- in other words, a 12-month disparity or, with good
2 time, eight months -- we just can't find that the difference
3 between those two poles, if you will, constitutes manifest
4 injustice. And so we're going to have to remand the case back
5 to Judge Cutler for her handling. And at this point, as I
6 said, she's largely telegraphed her views and, unless they've
7 changed, I think we know what the end result will be.

8 Let me observe one other thing. And this was discussed
9 early, so I raised it in our discussions. You know, if we were
10 sitting here in this courtroom and it was in San Diego instead
11 of Palmer, both Mr. Sugar and Mr. Bourdon would have already
12 been serving life sentences at the time they walked away from
13 the institution because with California's harsh penalties --
14 harsher than Alaska's, which many people think are incredibly
15 harsh -- they would have been three strikes and out long ago.

16 And that played a part in my view as to what is or is not
17 a manifest injustice under a presumptive sentencing code in
18 Alaska, and often times I resort, I guess, to that analogy.
19 That doesn't mean I approve, by the way, of classifying people
20 like Mr. Sugar or Mr. Bourdon as folks who need to be locked up
21 for life. I don't. I don't agree with that and I don't think
22 it's a very good analogy in that sense at least. I think a lot
23 of mistakes are being made in the state of California, if not
24 in Alaska. But nonetheless, the difference here is not serious
25 enough to constitute what we believe our charged duty is to

1 apply and define the term manifest injustice.

2 Let me turn to Judge Wood first.

3 JUDGE WOOD: Yeah, just briefly. You know, with respect
4 to the disparity argument, the court can't control what the
5 prosecutor charges or what the jury finds, and it would be a
6 different thing if we had similar escape charges and sentences
7 to compare. In this case, we don't. We have different
8 charges. We have a jury verdict that found that it was a class
9 B felony. Judge Cutler's authority is limited because of the
10 defendant's priors, in one sense. He has at least two priors
11 that counted towards the presumptive sentence, and so --
12 because of that, he's facing a six-to-10 range.

13 She found two mitigators. We're not disturbing her
14 findings whatsoever with respect to her findings for the
15 mitigators. But she also didn't give much weight to the
16 aggravator, which was the history of more prior felony
17 convictions. And when you have somebody like Mr. Sugar who has
18 six prior felony convictions, who has served a substantial
19 period of time, who, in the best scenario, was walking away
20 from the institution in order to commit another misdemeanor, it
21 gives this court great -- it's certainly not manifestly unjust
22 to impose three years, a three-year mitigated presumptive term
23 on a class B felony.

24 JUDGE THOMPSON: Judge Suddock.

25 JUDGE SUDDOCK: I only speak to emphasize how we see our

1 job when we do this three-judge panel. We have a statutory
2 scheme before us and it is an enactment of the Alaska
3 legislature, and we're in a position to deference to that
4 statutory scheme. And it's the statutory scheme that drives
5 the result. Nothing said here implies that any of the three of
6 us would or would not impose any particular sentence were that
7 statutory scheme not to exist. I mean, how might we behave?
8 It's off the map. It's been taken off the map by the
9 legislature.

10 But nothing that's been said or done here signifies that
11 this is the sentence that any of the three of us would give had
12 we the discretion. It's just, our discretion is locked, and
13 the discretion is really committed to the Office of the
14 District Attorney. And all one can do is encourage the
15 District Attorney's Office to act sensibly in these matters, to
16 think flexibly about the full range of the values, the
17 mentality of the gentleman, the relative insignificance or
18 significance of the act, the huge expense incurred in
19 incarceration, the practicality of whether one result is going
20 to have any practical difference over another result, whether
21 something makes sense or is senseless.

22 All of those decisions are no longer entirely conferred to
23 the judiciary. They're conferred to the state. And so one
24 encourages the state to act flexibly and sensibly, but it's not
25 our fare. Presented with a statutory scheme that requires us

1 to apply standards, we're going to apply those standards, and
2 that's where it comes out. Thank you.

3 JUDGE WOOD: Thank you.

4 JUDGE THOMPSON: Anything further, Mr. Walsh?

5 MR. WALSH: No, Your Honor. Thank you very much.

6 JUDGE WOOD: Ms. Trimmer.

7 MS. TRIMMER: No, Your Honor. Thank you.

8 JUDGE THOMPSON: Thank you. We'll stand in recess.

9 Here's the papers, including a T.O.

10 THE CLERK: Off record.

11 (Court recessed)

12 11:55:15

13 END OF REQUESTED PORTION

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TRANSCRIBER'S CERTIFICATE

I, Tammie Heinrich, hereby certify that the foregoing pages numbered 221 through 257 are a true, accurate and complete transcript of proceedings in Case No. 3PA-07-00724 CR, State of Alaska vs. James Sugar, transcribed by me from a copy of the electronic sound recording to the best of my knowledge and ability.

DATE: 10/22/08

Tammie Heinrich
Tammie Heinrich, Transcriber