IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT HOMER

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 3HO-11-515 CR
	)	
JEFFERY HOLT,	)	
	)	
Defendant.	)	
	)	
	)	

ORDER GRANTING MOTION FOR REFERRAL TO THREE JUDGE PANEL

This is a sexual assault case. Troopers responded to a report of sexual assault at 3:30 a.m. on September 1, 2011, at KJ's residence in Homer. Defendant, from North Pole, told Troopers that he had known KJ for eight to ten years, and that they had been sexually intimate in the past. He was in Homer to fish and was staying with KJ. He said they were drinking and engaged in sexual contact that included penetration. He claimed a mild level of intoxication and said KJ seemed much more intoxicated than he was. Defendant scored a .020 on the Datamaster at 5:12 a.m.

Troopers described KJ as smelling strongly of alcohol and noted vomit in her hair and on the bathroom floor. KJ agreed that Defendant was in town on a fishing trip and was a guest. She said Defendant made her drinks, and she thinks he might have put something in her drink because she became very intoxicated. She said she was so intoxicated that Defendant carried her up and down stairs.

KJ said she remembered being clothed and then waking up naked while Defendant was performing oral sex on her. She claims he tried to get her to perform oral sex on him. She said she then passed out again and woke up with vaginal pain. She said Defendant ejaculated on her,

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and she believes he penetrated her digitally or with his penis. KJ scored .187 on the Datamaster at 5:51 a.m.

Mr. Inama, KJ's friend, made the call to law enforcement. He said he started receiving text messages from KJ at 12:52 a.m., and at 2:21 a.m., he received the following message: "Rape 911." He drove to KJ's home with a pistol and met Defendant. Defendant appeared to be packed and leaving, indicating that KJ was asleep. Mr. Inama was suspicious and contacted authorities.

At trial, KJ said she met Defendant and his family through the mushing community in the Fairbanks area. They reconnected through Facebook in 2009, and Defendant spent the night with her in Homer in 2010 when he was in the area. Defendant gave KJ $200 in March 2011 when she was having financial difficulties. KJ stated that the relationship with Defendant had never been romantic or sexual. She also said she thought that she had made her lack of interest in a romantic relationship clear to Defendant.

Defendant contacted KJ in August 2011 and asked if he and his brother-in-law could stay the night prior to a planned fishing trip. KJ agreed. Defendant showed up alone at 8:30 pm on August 31. He had a bottle of gin and a bottle of raspberry vodka. KJ made supper for Defendant, nursed her baby, and put him to bed. KJ said she had a vodka-based drink during this period.

She returned to the main floor and Defendant made her another drink. She said it tasted like cough syrup and affected her strongly. She said he showed her his penis, and she told him she did not want anything to do with it. She was concerned and was trying to send an email to a friend. When she was at the computer, Defendant held her face and put his penis in her mouth. KJ was startled and said, "What are you doing?" Defendant said he was just "goofing around."

KJ tried to send a text to a friend, but found she no longer had the dexterity to operate her phone. Her memory is very foggy from this point, but remembers Defendant performing various sex acts on her and trying to tell him to stop. She also remembers falling, getting sick, and being carried to the bathroom. She remembers sending a text to Mr. Inama stating, "Rape 911."

Defendant testified that he had a prior sexual encounter with KJ in 2010. He gave a detailed description of what he believed to be a consensual sexual encounter on the evening of August 31-September 1, 2011. He said that when they were engaged in sexual activity KJ was not incapacitated, and he stopped performing any act that KJ objected to.

The jury found Defendant guilty of sexual assault in the first degree based on the oral penetration at the computer. The State's theory with respect to the remaining sex acts was that Defendant incapacitated KJ with nonprescription cough medicine. KJ had complained she thought she had had been drugged to the SART nurse, however, and tests failed to show "date rape" or other incapacitating substances. The State also failed to produce evidence that would show that nonprescription cough syrup was given to KJ or could produce the symptoms complained of by KJ. The Court granted the motion for acquittal on sexual assault in the first degree on these counts, and Defendant was convicted of four counts of sexual assault in the second degree (incapacitated victim).

No aggravators were noticed or proved. Defendant argued that his conduct resulting in the sexual assault in the first degree conviction was among the least serious conduct included in the definition of the offense (AS 12.55.155(d)(9)). The State argues that a mitigated sentence is not appropriate.

The Court finds that Mr. Holt's conduct was not among the least serious conduct included in the definition of sexual assault in the first degree. Sexual assault in the first degree

includes digital penetration, "however slight."[1] Recklessly disregarding the victim's lack of consent and putting his penis in her mouth is not among the least serious conduct included in the definition of sexual assault in the first degree.

Defendant argues that the case should be sent to a three-judge sentencing panel (AS 12.55.165). The Court of Appeals has determined AS 12.55.165 requires cases to be sent to a three-judge panel in two situations.[2] The first situation is when the judge finds manifest injustice would result from failure to consider a relevant mitigating factor not listed in AS 12.55.155. The second situation occurs when the judge finds that even after mitigating the sentence using statutory mitigating factors, the presumptive sentence would be unjust.

In *Harapat*, the court held that when a three-judge panel is requested and the court finds a non-statutory mitigating factor applies, the question becomes whether it would be manifestly unjust not to make some adjustment, albeit small, to the presumptive sentence based on the non-statutory mitigating factor. If the court is inclined to adjust the sentence at all, the case should be sent to a three-judge panel.

The legislature modified the rules relating to referrals to three-judge panels following the appellate court's decision in *Collins v. State*.[3] In *Collins*, the court established a new rule for sentencing sex offenders under the 2006 amendments to the law significantly increasing presumptive sentences. The court found that the increased penalties were based upon the legislature's assumption that sex offenders commit multiple offenses before they are caught, and sex offenders are exceptionally difficult to rehabilitate.[4] The court, therefore, determined that all sex cases should be sent to a three-judge-panel if the defendant could prove by clear and

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[1] *See,* AS 11.41.410(a)(1) and AS 11.81.900(a)(59)(A).
[2] *Harapat v. State,* 174 P.3d 249 (Alaska 2007).
[3] 287 P.3d 791 (Alaska App. 2012).
[4] *Id.* 237 P.3d at 795-96.

convincing evidence that he had not committed other sex offenses, and he had at least normal rehabilitative potential.[5] Following *Collins*, the legislature then amended the law so that only sex offenders with no prior sex offenses and extraordinary rehabilitative potential can be referred to three-judge panels.[6]

Defendant is 53 and has no criminal history. He has completed college and has earned a master's degree. Defendant worked as an operator/chemist at the North Pole oil refinery for the nine-and-a-half years preceding his conviction. He raised seven children and is a dog musher who has competed in the Iditarod.

Defendant participated in a psychological examination and sex offender risk assessment with Richard F. Lazur, Psy.D. Dr. Lazur found no indication of psychopathic qualities. A violence risk appraisal placed Deendant in the lowest possible category. The sex offender appraisal administered by Dr. Lazur placed Defendant in the low risk category and determined that he was a very low risk for sexual violence. With respect to recidivism, Dr. Lazur placed Defendant in the lowest possible risk category. In the "Professional Opinion" section of his report Dr. Lazur writes:

> Not violent or aggressive, he is not impulsive, he can problem-solve, self-regulate, and has no interest in deviant sexual practices. He is not sociopathic. He holds himself accountable. He takes responsibility. Unlike the majority of sex offenders whom I either evaluated or treated in more than 25 years, he has a conscience, challenges his own views, and analyzes data to a logical outcome, even when it is not to his benefit. Seeming to have a moral compass, he holds himself to what is right. He demonstrates a history of learning from past mistakes and changing his behaviors. In my professional opinion, Mr. Holt does not pose a risk to the community. He appears amenable to treatment and although difficult now, will be able to learn and grow from this experience. An outstanding candidate for rehabilitation, his prognosis is excellent.

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[5] *Id. at* 797.
[6] AS 12.55.165(c) (effective July 1, 2013).

The Court finds by clear and convincing evidence that Defendant has extraordinary potential for rehabilitation. Defendant faces a mandatory 20 years for his conviction of sexual assault in the first degree alone. If given the discretion, this Court would impose a sentence of less than 20 years in this case. Defendant's motion to refer this matter to a three-judge sentencing panel is granted.

This order should not be interpreted as suggesting that Defendant does not deserve prison time for what he did to KJ. The Court recognizes that KJ has suffered not only from the sexual assault itself, but also suffered a tremendous loss of privacy from the investigation and trial.

The Court is confident that a three judge panel will not forget the victim.

Sentencing set for March 27, 2014 at 3:30 p.m. is vacated.

Dated at Kenai, Alaska this 26th day of March, 2014.

SEAL OF THE TRIAL COURTS OF THE STATE OF ALASKA 3JCT THIRD JUDICIAL DISTRICT

CHARLES T. HUGUELET
SUPERIOR COURT JUDGE

I certify that a copy of the foregoing was faxed to the following at their addresses of record:
DA/TEMPLE/OFFICE OF VICTIMS' RIGHTS

Date: 3/26/14 Clerk: LC