

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT UNALASKA

STATE OF ALASKA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 ISMAEL BALALLO )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Case No. 3UN-12-51CR

**ORDER ON REQUEST FOR 3 JUDGE PANEL**

The defendant was found guilty of one count of sex assault in the first degree under AS 11.41.410(a)(1) and one count of sex assault in the second degree under AS 11.41.420(a)(1) on October 1, 2012. The defendant filed a sentencing memorandum on April 22, 2013 requesting referral to a three judge panel. The state filed an opposition to this request on April 23, 2013. The mandatory minimum for a sex assault in the first degree is 20 years. The mandatory 5 year sentence for sex assault in the second degree merges with Count 1. The sentence also must include 5 years suspended time and minimum 15 years probation. The Court finds that the lowest possible sentencing is manifestly unjust and hereby GRANTS Mr. Balallo's request for a three judge panel under AS 12.55.175 for the reasons outlined below:

**Findings of Fact:**

Mr. Balallo is 46 years old. He has no reported criminal history. Mr. Balallo has family in California, and worked in Alaska at fish processing plants to send money back to them. The event occurred on March 27, 2012 inside a building used to house fish processing workers.

Mr. Balallo had a joint trial with Mr. Mayuyo. The victim and several witnesses testified at trial. The jury heard the following:

Mr. Balallo, Mr. Mayuyo, and L.V. were drinking together in another room earlier in the evening. Several people were hanging out together, and L.V. had several shots and remembered dancing. L.V. remembered leaving the room alone, and testified that next thing she remembered was Mr. Balallo, Mr. Mayuyo, and herself in her room together. Another witness testified that L.V. and Mr. Mayuyo were dancing together and walked to her room together.

Cameras are installed in the housing complex. Photograph evidence established that Mr. Mayuyo accompanied L.V. to her room at 10:39 pm. Mr. Balallo entered the room at 1:25 am. At approximately 1:30 am, Mr. Balallo and Mr. Mayuyo left. At 1:37 one of L.V.'s roommates and her boyfriend entered the room and left at 1:41 am. The roommate testified that L.V. was laughing, smiling, was not wearing any clothes, and had just exited the bathroom. At 1:56 Mr. Balallo returned, knocked on the door, and was let in. Soon after Mr. Mayuyo knocked and was let in. L.V.'s sister entered the room at 3:35 am, and Mr. Mayuyo and Mr. Balallo left at 3:36 am.

L.V. testified she was menstruating and went to the bathroom to change her sanitary pad. Mr. Balallo entered the bathroom, pushed L.V. against the wall and started kissing her and touching her. L.V. testified that he digitally assaulted her. Mr. Mayuyo walked in and told Mr. Balallo to leave, and the men exchanged a few words. L.V. thought Mr. Balallo left after that, and was in the room alone with Mr. Mayuyo. However, later in the night she realized Mr. Balallo was still in the room in another bed. She testified that Mr. Mayuyo lay in bed with her, touched and kissed her, and forced her to play with his penis.

L.V.'s sister entered the room at 3:35 am, and testified that Mr. Mayuyo was sitting on the bed with L.V., and Mr. Balallo was on the other bed. L.V. was naked and wrapped in a sheet. The men left after L.V.'s sister told them to leave. L.V. testified that she didn't remember everything about the night. L.V.'s sister testified that L.V. would tend to knock out and fall asleep after drinking. L.V. did not remember if one or either man penetrated her.

The next day L.V. made a report, and the officers obtained a search warrant for the room. There was blood on both beds and the wall of the bathroom. Mr. Balallo's shorts were found in the room, with what appeared to be blood. DNA evidence was never tested.<sup>1</sup> The victim underwent a rape exam, the results of which were presented to the jury. Mr. Balallo was found guilty of sex assault in the 1<sup>st</sup> degree and sex assault in the 2<sup>nd</sup> degree; Mr. Mayuyo was found guilty of

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<sup>1</sup> There was some testimony that evidence was sent to the crime lab, but the results were not received or entered at trial.

sex assault in the 2<sup>nd</sup> degree and acquitted in the second count of sex assault in the 2<sup>nd</sup> degree.

**Discussion of and Conclusion of Law:**

Referral to a three judge panel is provided by statute under AS 12.55.165. Referral does not necessarily mean that a defendant will receive less time than the presumptive term, but permits the three-judge panel to consider the factors and evaluate the impacts in light of the totality of the circumstances.<sup>2</sup> The panel may decide on a lesser sentence, allow for a partially suspended sentence, or eliminate a prohibition on parole.<sup>3</sup> The panel can also remand the case back to the sentencing judge if it does not believe manifest injustice will occur.<sup>4</sup>

Referral is appropriate if the defendant proves by clear and convincing evidence that he had extraordinary potential for rehabilitation such that the presumptive term is manifestly unjust.<sup>5</sup> This may be determined where a defendant proves that he does not need to be incarcerated for the full presumptive term in order to prevent future criminal activity, and that he can be adequately treated outside of prison.<sup>6</sup> To determine this, the sentencing judge must be reasonably satisfied that she knows both why the particular crime was committed and that the conditions leading up to the criminal act (and the act itself) will not recur.<sup>7</sup>

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<sup>2</sup> *Kirby v. State*, 748 P.2d 757, 766 (Alaska App. 1987).

<sup>3</sup> *Id.*

<sup>4</sup> *Lloyd v. State*, 672 P.2d 152, 155 (Alaska App. 1983).

<sup>5</sup> *Beltz v. State*, 980 P.2d 474, 481 (Alaska App. 1999).

<sup>6</sup> *Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991).

<sup>7</sup> *Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991) citing *Kirby* at 266.

Referral is generally limited to exceptional cases,<sup>8</sup> but a sentencing judge should resolve close cases in favor of referral to a three-judge panel.<sup>9</sup>

The presumptive sentence is evaluated in light of the totality of the circumstances and the *Chaney* criteria to determine if it would be manifestly unjust for the specific defendant.<sup>10</sup> The *Chaney* criteria includes rehabilitation; deterrence of the offender and others; community condemnation and affirmation of societal norms; and isolation.<sup>11</sup> Referral should only be denied if no adjustment to the presumptive term is appropriate.<sup>12</sup>

This is a close case, but the Court finds that Mr. Balallo appears to have an extraordinary potential for rehabilitation. The defendant has shown remorse and accepts responsibility for his acts. In light of the *Chaney* criteria and given the extraordinary potential for rehabilitation, the Court finds that a presumptive sentence of 20 years for sex assault in the 1<sup>st</sup> degree is manifestly unjust and should be referred to a three judge panel.

It appears that the crime in this case was situational and is unlikely to reoccur. L.V. invited Mr. Balallo and Mr. Mayuyo into her apartment. All three individuals were intoxicated. Testimony at trial established that L.V. walked around naked and got into bed in the presence of the men. The pre-sentence report found that “It seems in the present offense Mr. Balallo perceived something in his

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<sup>8</sup> *Silveria v. State*, 244 P.3d 1138, 1149 (Alaska App. 2010)

<sup>9</sup> *Lloyd v. State*, 672 P.2d 152, 155 (Alaska App. 1983).

<sup>10</sup> *Kirby v. State*, 748 P.2d 757, 765 (Alaska App. 1987).

<sup>11</sup> *See State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

<sup>12</sup> *Kirby v. State*, 748 P.2d 757, 765 (Alaska App. 1987).

intoxicated state that simply was not there and in the heat and drunkenness of the moment was overcome with lust and assaulted.”<sup>13</sup> Mr. Balallo was in a distant place from his family. The PSR writer noted that “working and spending their off time in relatively close quarters oftentimes promotes relationships that are less than ideal.”<sup>14</sup> The Court believes the crime was situational because of this environment. The Court finds that a sufficient period of incarceration less than 20 years will allow Mr. Balallo to reflect on his actions as well as obtain alcohol and sex offender assessment and treatment as required.

The Court also finds evidence of Mr. Balallo’s potential for rehabilitation in his lack of prior record, good history of employment, favorable background, and strong family ties.<sup>15</sup> Mr. Balallo moved to the United States in 2006, has no criminal history in the United States, and his family testified that he never was in trouble while living in the Philippines. He has worked at fish processing facilities for the past five years without any issues. While in the Philippines, he was considered a leader of his community and was a councilman.<sup>16</sup> He has been married for twenty-seven years, and both his wife and his children support him. His mother and siblings also wrote letters on his behalf. It is clear that he has strong and continuing family support.

Additionally, referral to a three judge panel may be appropriate even without finding extraordinary chances of rehabilitation if the presumptive term is

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<sup>13</sup> Pre-sentence report at 6.

<sup>14</sup> *Id.*

<sup>15</sup> These factors were noted in *Smith v. State*, 711 P.2d 561, 570 (Alaska App. 1985).

<sup>16</sup> The Court notes this evidence comes from the letters from his family.

manifestly unjust.<sup>17</sup> In order to determine this, the judge must articulate specific circumstances that make the defendant significantly different from a typical offender within that category or that make the defendant's conduct significantly different from a typical offense."<sup>18</sup> The Court points to the surrounding circumstances of the crime; the factors contributing to the offense are readily correctible; the absence of force or attempt to control the victim; and, the lack of testimony on sexual penetration. The defendant is not a typical offender. In addition, the victim sought out and assaulted her attackers, leading the Court to believe, (as does the PSR writer), that she has suffered minimal effects from the event. Unlike the typical offender, the Court finds that the defendant has an extraordinary potential for rehabilitation.

The State opposes the three judge panel request and argues that the lack of prior convictions did not mean the defendant wasn't a typical offender within the meaning of the statute because the legislature found that sex offenders typically have prior, undetected offenses. The State also argues that *Collins*<sup>19</sup> had no precedential value since it was on appellate review and pointed out that a bill addressing *Collins* was waiting for the Governor's signature.

The Court notes that *Collins* is on Supreme Court review, but has been essentially overturned by the passage of Senate Bill 22 signed into law by

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<sup>17</sup> AS 12.55.165(a).

<sup>18</sup> *Beltz v. State*, 980 P.2d 474, 480 (Alaska 1999).

<sup>19</sup> The Defendant's request referenced *Collins v. State*, 287 P.3d 7914, 795 (Alaska App. 20120).


Governor Parnell on June 11, 2013.<sup>20</sup> The legislation clarifies that referral cannot be based solely or in combination on the claim(s) that the defendant has prospects for rehabilitation less than extraordinary; or a history free of unprosecuted, undocumented, or undetected sexual offenses.<sup>21</sup> The bill takes effect place on July 1, 2013. However, the Court does not rely on *Collins* for this referral and finds that referral is appropriate even in light of this new bill.

**Conclusion:**

The Court notes that this is a close case, but finds that Mr. Balallo demonstrates extraordinary potential for rehabilitation such that a presumptive sentence would be manifestly unjust. The Court also finds that a presumptive sentence is manifestly unjust in light of the totality of the circumstances of the case and the *Chaney* criteria. The Court hereby GRANTS the request and refers sentencing to a three-judge panel.

So ordered this 20 day of June 2013.



  
Pat Douglass, Judge

<sup>20</sup> Senate Bill 22 : "Sec. 23. AS 12.55.175 is amended by adding a new subsection to read:

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

(1) prospects for rehabilitation that are less than extraordinary; or  
(2) a history free of unprosecuted, undocumented, or undetected sexual

offenses."

<sup>21</sup> *Id.*

I certify that on 6-20-13  
copies of this document were  
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to: KMacIolek, KBoots, JFerguson  
By JGruenstein 11 / clerk