
COMMENT

RETHINKING MANIFEST INJUSTICE: REFLECTIONS UPON THE DECISIONS OF THE THREE-JUDGE SENTENCING PANEL

BARRY JEFFREY STERN*

I. INTRODUCTION

When the Alaska Legislature adopted presumptive sentencing ten years ago,¹ it recognized that sometimes it would be manifestly unjust to require the imposition of a presumptive sentence.² It therefore established a "safety valve"³ to permit deviation from presumptive sentencing when a panel of three superior court judges agrees with the trial court that a presumptive sentence would result in manifest injustice either to the state or to a defendant.⁴

Although the legislature anticipated that some presumptive sentences would be manifestly unjust, it did not define what makes a

Copyright © 1988 by Alaska Law Review

* Professor of Law, Western New England College School of Law, Springfield, Massachusetts; J.D., University of Michigan, 1975; B.A., University of Michigan, 1971; Member, Alaska Bar Association. The author was the staff counsel for the Alaska Criminal Law Revision Subcommittee and the primary drafter of Alaska's criminal code.

1. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 219 (effective Jan. 1, 1980); see generally Stern, *Presumptive Sentencing in Alaska*, 2 ALASKA L. REV. 227 (1985), for a summary of the events leading to the adoption of presumptive sentencing and a discussion of the major features of presumptive sentencing.

2. In this comment, the term "presumptive sentence" is used to refer to the sentence imposed under the presumptive sentencing statutes after a presumptive term of imprisonment is adjusted for statutorily prescribed aggravating and mitigating factors. The term "presumptive term of imprisonment" is used to refer to the sentence required under presumptive sentencing before adjustment for aggravating and mitigating factors.

3. The "safety valve" characterization of the three-judge panel appears in *Heathcock v. State*, 670 P.2d 1155, 1166 (Alaska Ct. App. 1983) (Singleton, J., concurring and dissenting).

4. See ALASKA STAT. §§ 12.55.165-.175 (1984). Although manifest injustice to the state may result from the imposition of an inappropriately lenient presumptive sentence, all of the cases decided by the three-judge panel during the period reviewed in this comment involve trial court findings that manifest injustice would result from the imposition of an inappropriately severe presumptive sentence. See *infra* notes 22-23.

sentence unjust. Instead, the legislature simply noted two general categories of cases in which injustice might result: first, cases in which the trial court is precluded from considering relevant non-statutory aggravating or mitigating factors in modifying a presumptive term of imprisonment;⁵ and, second, cases in which a presumptive term of imprisonment, even after adjustment for relevant aggravating and mitigating factors, is manifestly unjust.⁶ Further clarification of what makes a sentence unjust has been left to the courts.

In *Lloyd v. State*,⁷ the Alaska Court of Appeals equated the manifest injustice standard with the concepts of "shocking to the conscience" and "obvious unfairness."⁸ While the court of appeals has noted that it would be inconsistent with the purposes of presumptive sentencing for trial courts routinely to find manifest injustice and to send cases to the panel,⁹ it has also stated that "where the issue of manifest injustice appears to be a close one, we would urge sentencing judges to resolve any doubt in favor of a referral" to the panel.¹⁰

In *State v. Smith*,¹¹ the Alaska Court of Appeals took a significant step in interpreting the manifest injustice standard. In that case the court held that manifest injustice can result from a trial court's inability to reduce a presumptive term of imprisonment to account for a youthful offender's "particularly favorable potential for rehabilitation."¹² Since *Smith*, the three-judge panel has increasingly relied

5. Under presumptive sentencing, a trial court may adjust a presumptive term of imprisonment only for aggravating and mitigating factors specified by the legislature. See ALASKA STAT. § 12.55.155(c), (d) (Supp. 1987). If the trial court imposes a sentence other than the presumptive term of imprisonment without having found aggravating or mitigating factors, it has imposed an illegal sentence that will be vacated on appeal. See *State v. LaPorte*, 672 P.2d 466, 467-68 (Alaska Ct. App. 1983).

6. ALASKA STAT. § 12.55.165 (1984). See generally *Smith v. State*, 711 P.2d 561, 568-70 (Alaska Ct. App. 1985).

7. 672 P.2d 152 (Alaska Ct. App. 1983).

8. *Id.* at 154.

9. *Walsh v. State*, 677 P.2d 912, 919 (Alaska Ct. App. 1984).

10. *Lloyd v. State*, 672 P.2d at 155. If a party disagrees with the trial court's finding on manifest injustice, it may appeal that determination to the court of appeals, but that court will reverse only "clearly mistaken" decisions. *Walsh*, 677 P.2d at 918.

11. 711 P.2d 561 (Alaska Ct. App. 1985).

12. *Id.* at 571-72. *Smith*, however, did not provide a workable definition of what factors establish an offender's favorable rehabilitation potential.

In *Kirby v. State*, No. 767 (Alaska Ct. App. Dec. 31, 1987), the court of appeals subsequently defined rehabilitation potential as "the converse of dangerousness." *Id.*, slip op. at 17. The *Kirby* court concluded that "a person has an unusually good potential for rehabilitation if the court is satisfied, after reviewing the totality of circumstances, that he or she can adequately be treated in the community and need not be incarcerated for the full presumptive term in order to prevent future criminal activity." *Id.* Refining its decision in *Smith*, the *Kirby* court also held that a defendant's youth, although "highly relevant," is not a prerequisite for a finding of rehabilitation potential. *Id.* at 13.

upon a defendant's rehabilitation potential in determining whether presumptive sentences are manifestly unjust.

Although the Alaska Court of Appeals has articulated general guidelines clarifying the manifest injustice standard, the trial courts and three-judge sentencing panel must apply those guidelines. If the panel disagrees with the trial court's initial finding of manifest injustice, it remands the case to the trial court for the imposition of the required presumptive sentence.¹³ When this happens, the panel accompanies its remand order with "a written statement of its findings and conclusions."¹⁴ In contrast, if the panel concurs with the trial court's finding of manifest injustice, the panel sentences the defendant without regard to the presumptive sentence.¹⁵ Moreover, when the panel imposes a sentence, it is not required to prepare a written summary or opinion in support of that sentence.¹⁶

In late 1986, the panel published the first summary of its decisions.¹⁷ The summary included a review of cases decided between July and December 1986.¹⁸ A second summary, covering cases decided between January and June 1987, was published in the fall of 1987.¹⁹ The summaries are meant "to give sentencing courts and counsel notice of

13. ALASKA STAT. § 12.55.175(b) (1984).

14. *Id.*

15. *Id.*

16. *See id.*

17. Prior to this time, the panel did not publish summaries of its decisions, nor did it keep records of its cases. *See* letter from David C. Lampen, Clerk of the Appellate Courts, to the author (Nov. 25, 1987) [hereinafter Lampen letter] (copy on file with the *Alaska Law Review*). Consequently, statistics are unavailable on the number of cases referred to the panel or the disposition of those cases during the six-and-one-half years of presumptive sentencing. (Although presumptive sentencing was adopted in 1978, it did not become effective until January 1, 1980. Act of July 17, 1978, ch. 166, 1978 Sess. Laws 219 (effective Jan. 1, 1980)):

According to the Clerk of the Appellate Courts, the current presiding judge for the panel, Judge Brian Shortell, eventually hopes to assemble complete statistics about its sentencing practices:

Judge Shortell indicates that he has been considering trying to have staff go through some of the closed cases in order to develop a data base that might be useful for the panel. He would hope to try and categorize the cases according to offense and offender, and in that way, provide some trend information on range of sentences or past rulings by the panel. At this point, however, this project has not gotten off the ground.

See Lampen letter, *supra*.

18. ALASKA SUPERIOR COURT, THREE-JUDGE SENTENCING PANEL DECISIONS, JULY-DECEMBER 1986 [hereinafter 1986 SUMMARY] (accompanying the Alaska Appellate Courts' Monthly Activity Report for December 1986).

19. ALASKA SUPERIOR COURT, THREE-JUDGE SENTENCING PANEL DECISIONS, JANUARY-JUNE 1987 [hereinafter 1987 SUMMARY] (accompanying the Alaska Appellate Courts' Monthly Activity Report for August 1987).

pertinent decisions," but the panel emphasized that they "are not intended to be more than capsule summaries."²⁰ The panel has also cautioned readers that "[f]or a more complete understanding of the decision, the specific findings and conclusions in the cases listed are the best source."²¹

The panel decided thirty-five cases during the twelve months covered by the two summaries.²² Three of those cases were on remand to the panel following court of appeals decisions finding manifest injustice.²³ A fourth case was remanded by the panel to the trial court without the necessity of a panel determination on manifest injustice.²⁴ Thus, of the thirty-five decisions summarized by the panel, thirty-one required the panel to determine whether manifest injustice was present, and it is these thirty-one cases that serve as the basis for this comment.

In twenty-four of the thirty-one cases, or seventy-seven percent of the decisions, the panel found manifest injustice and imposed

20. 1986 SUMMARY, *supra* note 18.

21. *Id.*

22. The panel decided the following cases between July and December 1986: State v. Collins, 3AN-85-4601 Cr.; State v. Dolchok, 3AN-85-5385 Cr.; State v. Hartman, 4FAS-86-362 Cr.; State v. Helton, 3KNS-83-818 Cr.; State v. King, 3AN-83-7949 Cr.; State v. Murphy, 4FA-85-3384 Cr.; State v. New, 3AN-84-4047 Cr.; State v. Nunley, 3PA-85-1847 Cr.; State v. Piazza, 3AN-85-3970 Cr.; State v. Williams, 4FA-86-282 Cr.; State v. Wilson, 3ANS-85-6449 Cr. See 1986 SUMMARY, *supra* note 18, for summaries of the panel's decisions.

The following cases were decided between January and June 1987: State v. Albert, 4FA-86-983 Cr.; State v. Bennett, 3AN-84-3584 Cr.; State v. Bond, 3AN-85-1918 Cr.; State v. Brown, 3AN-86-1716 Cr.; State v. Chilton, 3AN-86-4737 Cr.; State v. Cooper, 3AN-85-8025 Cr.; State v. Davison, 4FA-86-3371 Cr.; State v. Fry, 3AN-85-6548 Cr.; State v. George, 4FA-86-206 Cr.; State v. Green, 3KN-86-484 Cr.; State v. Hilburn, 3AN-85-601 Cr.; State v. Humphrey, 3AN-85-8027 Cr.; State v. Hutchinson, 3AN-85-8290 Cr.; State v. Kaigelak, 3BA-86-189 Cr.; State v. Kloby, 3AN-86-690 Cr.; State v. Mandregen, 3AN-85-3804 Cr.; State v. Maxwell, 4FA-86-185 Cr.; State v. Neal, 3AN-86-3413 Cr.; State v. Newman, 3AN-86-4744 Cr.; State v. Ridgeway, 3AN-86-7109 Cr.; State v. St. George, 3AN-86-6325 Cr.; State v. St. John, 3AN-84-894 Cr.; State v. Wickman, 4FA-86-2327 Cr.; State v. Winther, 4FA-86-2458 Cr. See 1987 SUMMARY, *supra* note 19, for summaries of the panel's decisions.

23. The three cases remanded by the court of appeals to the panel following court of appeals decisions finding manifest injustice were *Bennett* (1987 SUMMARY, *supra* note 19) (on remand from Bennett v. State, A-856 (Alaska Ct. App. Nov. 26, 1986)); *New* (1986 SUMMARY, *supra* note 18) (on remand from New v. State, 714 P.2d 378 (Alaska Ct. App. 1986)); *King* (1986 SUMMARY, *supra* note 18) (on remand from Smith v. State, 711 P.2d 561 (Alaska Ct. App. 1985)). The panel's decisions may be appealed to the court of appeals, which will reverse only "clearly mistaken" decisions. *Shaw v. State*, 673 P.2d 781, 786 (Alaska Ct. App. 1983). Cf. *supra* note 10 (discussing appeals from trial court decisions).

24. That case was *Wickman* (1987 SUMMARY, *supra* note 19).

sentences less severe than those required by presumptive sentencing.²⁵ The following capsule summary illustrates the types of factors that the panel is likely to consider in making such a finding of manifest injustice:

State v. James Chilton Twenty-one year old defendant with severe alcohol problem who committed impulsive armed robbery while drunk. Seven year presumptive term found manifestly unjust in view of the defendant's youth, amenability to treatment, personal history, and prospects for rehabilitation. Defendant sentenced to six years with four suspended (non-presumptive); three years' probation, [with a] condition [of] no alcohol use and completion of appropriate alcohol therapy program.²⁶

In eight cases, the panel disagreed with the trial court's determination of manifest injustice and remanded the case to the trial court for the imposition of the required presumptive sentence.²⁷ The panel's capsule summary of *State v. Hilburn* describes one such case and again highlights the factors found important by the panel in making its determination that manifest injustice was not present:

State v. Kevin Hilburn A twenty-six year old defendant facing a ten-year presumptive sentence for first degree assault (multiple rapes accomplished by threatening the victim with a firearm). Trial judge found this to be a "borderline" case justifying referral to the panel. The panel found the excellent prior record and history of the defendant did not justify a finding of manifest injustice as the crime was brutal and the victim particularly vulnerable, the defendant clearly needed a substantial jail term to protect the public, and deterrence and community condemnation goals of sentencing assumed priority under all of the circumstances of the case.²⁸

The capsule summaries prepared by the panel provide brief but valuable insights into the circumstances that now trigger presumptive sentencing's "safety valve." The summaries, therefore, are likely to be relied upon by counsel in arguing whether a case should be referred to the panel, and by trial courts in deciding whether manifest injustice is present.

25. *Albert; Brown; Chilton; Cooper; Davison; Fry; George; Green; Hutchinson; Humphrey; Kaigelak; Mandregen; Maxwell; Neal; Newman; Ridgeway; St. John; St. George* (1987 SUMMARY, *supra* note 19); *Collins; Dolchock; Nunley; Piazza; Williams; Wilson* (1986 SUMMARY, *supra* note 18).

26. *Chilton* (1987 SUMMARY, *supra* note 19) (emphasis added).

27. The panel disagreed with the trial court's finding of manifest injustice in the following cases: *Bond; Hilburn; Kloby; Mandregen; Winther* (1987 SUMMARY, *supra* note 19); *Hartman; Helton; Murphy* (1986 SUMMARY, *supra* note 18).

The total number of cases referred to in this note and note 25 *supra*, equals 32, which is one more case than the 31 decisions reviewed in this comment. The "extra case" results because one decision, *Mandregen*, involved two counts and resulted in panel findings that manifest injustice existed for one count but not for the other. See *Mandregen* (1986 SUMMARY, *supra* note 18).

28. *Hilburn* (1987 SUMMARY, *supra* note 19) (emphasis added).

The remainder of this comment discusses several aspects of the panel's approach to applying the manifest injustice standard by examining the patterns that emerge from the two published summaries. In doing so, this comment: (1) proposes that the list of mitigating factors be expanded to allow trial courts to consider a first felony offender's lack of prior criminal history in reducing a presumptive term; (2) questions whether the panel is properly applying the manifest injustice standard, particularly in its sentencing of repeat felony offenders; and (3) stresses the need for more comprehensive reporting and additional analysis of the panel's decisions.

II. DISCUSSION

A. First Felony Offenders: Rehabilitation Potential

Of the twenty-four cases in which the panel found manifest injustice,²⁹ most involved defendants who were first felony offenders.³⁰ The

29. See *supra* note 25.

30. The term "first felony offender" is used in this comment to refer to a defendant whose prior criminal history does not include a felony that can be considered for purposes of repeat felony status under presumptive sentencing. For a discussion of when an offender qualifies as a repeat felony offender, see Stern, *supra* note 1, at 239-45.

Twenty of the panel's decisions involve apparent first offenders — "apparent" because the panel's summaries, unfortunately, do not always clearly designate the prior felony status of the defendant. The 20 cases include decisions in which the defendant's status as a first felony offender is specifically mentioned or reasonably implied in the panel's summaries. The cases in this category are: *Collins* (1986 SUMMARY, *supra* note 18) (first felony offender status implicit from defendant facing seven-year sentence for assault in the first degree with a baseball bat, see ALASKA STAT. § 12.55.125(c)(2) (1984)); *Dolchok* (1986 SUMMARY, *supra* note 18) (status implicit from defendant facing eight-year sentence for sexual assault in the first degree, see ALASKA STAT. § 12.55.125(c)(1)); *Piazza* (1986 SUMMARY, *supra* note 18) (status implicit from fact that prior convictions are not mentioned in summary); *Williams* (1986 SUMMARY, *supra* note 18) (status implicit from panel's reference to defendant's "excellent prior record"); *Wilson* (1986 SUMMARY, *supra* note 18) (status as first felony offender specifically mentioned); *Albert* (1987 SUMMARY, *supra* note 19) (status implicit from defendant apparently facing a mitigated presumptive sentence for assault in the first degree with an axe, see ALASKA STAT. §§ 12.55.125(c)(2), 12.55.155(a)(2) (Supp. 1987)); *Bond* (1987 SUMMARY, *supra* note 19) (status implicit from summary's reference to defendant's "clean prior record"); *Chilton* (1987 SUMMARY, *supra* note 19) (status implicit from defendant facing seven-year sentence for armed robbery, ALASKA STAT. § 12.55.125(c)(1)); *Cooper* (1987 SUMMARY, *supra* note 19) (status as first felony offender specifically mentioned); *Green* (1987 SUMMARY, *supra* note 19) (status implicit from defendant facing eight-year sentence for sexual assault in the first degree, see ALASKA STAT. § 12.55.125(c)(1)); *George* (1987 SUMMARY, *supra* note 19) (status implicit from defendant apparently facing five-year presumptive term of imprisonment for manslaughter, see ALASKA STAT. § 12.55.125(c)(1)); *Humphrey* (1987 SUMMARY, *supra* note 19) (status noted by the panel as similar to *Smith* and *King* — the defendants in these cases were first felony

panel's most frequent justification for deviating from the presumptive sentence was the factor that established manifest injustice in *State v. Smith*:³¹ a strong potential for rehabilitation.³² One can argue, however, that *Smith* was wrongly decided by the Alaska Court of Appeals and that a prediction of rehabilitation potential, no matter how strong, should be insufficient to support a finding of manifest injustice.

In enacting presumptive sentencing, the Alaska Legislature unambiguously stated that its new sentencing scheme "reflects the 'just desserts' theory of punishment, which holds that justice requires that a sentence imposed on a defendant should be based on the crime he committed rather than on speculation as to future behavior."³³ A finding of manifest injustice based upon the defendant's rehabilitation potential appears, at first glance, to be fundamentally inconsistent with the philosophy of presumptive sentencing because it requires judges to speculate on the defendant's future behavior rather than to focus on the nature of the crime committed.

Rehabilitation potential, however, is not always an irrelevant factor under presumptive sentencing. Indeed, in its "declaration of purpose" accompanying the enactment of presumptive sentencing, the legislature directed the courts to assess the likelihood of the defendant's rehabilitation in imposing a sentence.³⁴ Relying upon that declaration of purpose, the Alaska Court of Appeals in *Juneby v. State*³⁵ held that rehabilitation potential is an appropriate factor in determining how much to adjust a presumptive term of imprisonment once a statutory prescribed mitigating or aggravating factor is established.³⁶

offenders, see *Smith*, 711 P.2d at 563); *Kaigelak* (1987 SUMMARY, *supra* note 19) (status implicit since summary refers to only one prior misdemeanor); *Mandregen* (1987 SUMMARY, *supra* note 19) (status specifically mentioned); *Neal* (1987 SUMMARY, *supra* note 19) (status implicit from defendant facing seven-year sentence for assault in the first degree, see ALASKA STAT. § 12.55.1259(c)(2)); *Newman* (1987 SUMMARY, *supra* note 19) (status implicit from defendant facing seven-year sentence for shooting victim, see ALASKA STAT. § 12.55.125(c)(2)); *Ridgeway* (1987 SUMMARY, *supra* note 19) (status specifically mentioned); *St. George* (1987 SUMMARY, *supra* note 19) (status implicit from defendant facing five-year sentence for manslaughter, see ALASKA STAT. § 12.55.125(c)(1)).

The current difficulty in determining the defendant's prior felony status could be eliminated easily if the panel included explicit designations in the summaries.

31. 711 P.2d 561 (Alaska Ct. App. 1985).

32. See, e.g., *Green* (1987 SUMMARY, *supra* note 19); *Dolchok* (1986 SUMMARY, *supra* note 18); *Nunley* (1986 SUMMARY, *supra* note 18).

33. ALASKA SENATE COMM. ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, ALASKA SENATE J. (SUPP. NO. 47) 148 (June 12, 1978) [hereinafter COMMENTARY].

34. ALASKA STAT. § 12.55.005(2) (1984).

35. 641 P.2d 823 (Alaska Ct. App. 1982), *modified*, 665 P.2d 30 (Alaska Ct. App. 1983).

36. *Id.* at 836 n.26.

Against the background of the *Juneby* decision and the legislature's determination that rehabilitation potential remains an appropriate factor under presumptive sentencing, it seems inconsistent to allow a trial court to consider rehabilitation potential in deciding how much to reduce a presumptive term of imprisonment if a statutory mitigating factor is established,³⁷ but to preclude it from reducing the sentence for rehabilitation potential if no mitigating factor is established.³⁸ Allowing deviations from presumptive sentencing through a finding of manifest injustice and sentencing by the three-judge panel is one way to insure that all first felony offenders can have rehabilitation potential taken into account at sentencing. The problem with the current approach, however, is that it is time consuming and precludes the trial courts from considering relevant information in imposing sentences.

A preferable alternative to today's burdensome practice in which a first felony offender's rehabilitation potential can sometimes be considered solely through a referral to the panel is to enact a mitigating factor codifying one of the circumstances relied upon in *Smith* to find manifest injustice. A first felony committed by an offender with no prior juvenile or adult arrests or convictions warrants a less severe sentence when compared to the same crime committed by an offender with numerous misdemeanor arrests or convictions, as the lack of prior criminal history is an objective and relevant circumstance upon which to base a finding of rehabilitation potential.³⁹ Yet, under existing law, a trial court would have to treat both offenders identically if

37. *Id.* See also *Smith*, 711 P.2d at 572 n.8.

38. It should be recalled that a trial court cannot reduce a presumptive term of imprisonment if no mitigating factors are established. See *supra* note 5. If manifest injustice would result from the imposition of the presumptive term, the panel, rather than the trial court, sentences the defendant. See *supra* note 15 and accompanying text.

39. While this conclusion reflects an element of speculation about the defendant's future conduct (*i.e.*, that because the defendant has led an otherwise lawful life, it becomes more likely that the crime is an isolated impulsive violation of the law that is unlikely to reoccur), such speculation is not necessarily inconsistent with the philosophy of presumptive sentencing. Since presumptive sentencing imposes increasingly severe sentences based on the number of the defendant's prior felony convictions, an element of speculation is also implicit in that policy determination: that a recidivist deserves a more severe sentence and is unlikely to be deterred by a lesser one. The validity of deterrence as a sentencing consideration was specifically recognized by the Alaska Legislature when it adopted presumptive sentencing. See ALASKA STAT. § 12.55.005(5) (1984).

Several sentencing systems recognize that an offender's lack of prior criminal history is a mitigating factor. See, *e.g.*, ILL. ANN. STAT. ch. 38, para. 1005-5-3.1(a)(7) (*Smith-Hurd* 1982) ("defendant has no history of prior delinquency or criminal activity or has led law-abiding life for a substantial period of time before the commission of the present crime"); N.J. STAT. ANN. § 2C:44-1(b)(7) (West Supp. 1987) (*same*); N.C.

neither case presented currently recognized aggravating or mitigating factors.⁴⁰ The lack of a prior criminal history is an important factor in sentencing first felony offenders and should be added to the current statutory list of mitigating factors.⁴¹

An expansion of the list of mitigating factors to account for a first felony offender's lack of a prior criminal history does not preclude the trial court and the panel from finding that even a presumptive term of imprisonment reduced by the statutory maximum amount⁴² for that factor remains manifestly unjust. Indeed, in the overwhelming majority of first felony offender cases in which the panel found manifest injustice, it imposed sentences substantially less severe than the lowest authorized mitigated presumptive sentence.⁴³ Most of those cases, it

GEN. STAT. § 15A-1340.4(2)(a) (1983) (defendant "has no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days' imprisonment").

40. The *aggravating* factor specified in ALASKA STAT. § 12.55.155(c)(21) (Supp. 1987) can be established in the case of a first felony offender with a long prior misdemeanor record. That factor, however, requires that the prior misdemeanors be "similar in nature to the offense for which the defendant is being sentenced . . ." *Id.* The one possible *mitigating* factor applicable to the youthful first felony offender requires the defendant's conduct to have been "substantially influenced by another person more mature than the defendant." *Id.* § 12.55.155(d)(4).

41. While one of the circumstances cited in *Smith*, 711 P.2d 561 (Alaska Ct. App. 1985), justifying a finding of rehabilitation potential, should be added to the list of mitigating factors, caution should be exercised in adding others.

It will be recalled that the primary purpose of presumptive sentencing was to eliminate unjustified disparity in Alaska's then existing sentencing practices, disparity that in some instances was correlated to the race of the defendant. *See generally* Stern, *supra* note 1, at 228-29. In concluding that the defendants in *Smith* showed high rehabilitation potential, the court of appeals in part relied upon their "good history of employment, a favorable background of scholastic and athletic achievement, strong family ties and continuing family support . . ." 711 P.2d at 570. In considering whether to add any of these circumstances to the list of mitigating factors, the legislature must confront the question of whether they would inappropriately and disproportionately apply in the sentencing of caucasian defendants. The factors of educational and vocational skills, employment record, and family and community ties are generally irrelevant as sentencing considerations under the federal guideline system. *See UNITED STATES SENTENCING COMM'N FEDERAL SENTENCING GUIDELINE MANUAL*, §§ 5H1.2, .5, .6 (1987).

42. A presumptive term of imprisonment of four years or less can be reduced by the trial court by any amount if mitigating factors are established. ALASKA STAT. § 12.55.155(a)(1) (Supp. 1987). A presumptive term of imprisonment of greater than four years can be reduced to no less than one-half the presumptive term for mitigating factors. *Id.* § 12.55.155(a)(2).

43. *See, e.g., Collins* (1986 SUMMARY, *supra* note 18) (lowest mitigated presumptive sentence was three and one-half years; panel suspended imposition of sentence for three years on condition that defendant serve one year in jail and successfully complete three years probation); *Albert* (1987 SUMMARY, *supra* note 19) (lowest mitigated presumptive sentence was three and one-half years; panel imposed non-presumptive sentence of seven years with five suspended and three years probation; the effect of a

will be recalled, relied upon the offender's strong potential for rehabilitation in finding manifest injustice.⁴⁴ Thus, even after the enactment of the proposed mitigating factor, the same cases that now result in referral to the panel because of the trial court's inability to consider rehabilitation potential in adjusting a presumptive term may continue to be referred on the basis that the presumptive sentence, even after adjusted for the lack of prior criminal history, is manifestly unjust.

The panel's sentencing patterns in first felony offender cases deserve careful analysis and scrutiny. If the Alaska Legislature agrees that the circumstances presented by those cases support the sentences imposed by the panel, it might consider broadening the discretion of trial courts to reduce a first felony offender's sentence when mitigating factors, including rehabilitation potential, are established and thereby prevent the need for referral to the panel.⁴⁵ On the other hand, if the legislature concludes that the panel has misapplied the manifest injustice standard, it might impose a cap on the maximum amount the panel can reduce a presumptive term⁴⁶ or remove the panel's jurisdiction in cases in which the trial court can mitigate a presumptive term of imprisonment. If this latter alternative is adopted, a defendant would retain the ability to seek reduction of a presumptive sentence through a sentence appeal.⁴⁷

B. Repeat Felony Offenders

In five of its summarized decisions, the panel considered cases that raised the question of whether it was manifestly unjust to impose a presumptive sentence upon repeat felony offenders.⁴⁸ In four of those five cases, the panel found manifest injustice and sentenced the

non-presumptive sentence on parole eligibility is discussed *infra* in the text accompanying notes 50-58); *Neal* (1987 SUMMARY, *supra* note 19) (lowest mitigated presumptive sentence was three and one-half years; panel suspends imposition of sentence for five years, conditioned on defendant serving one year in jail and completing a three-year probationary term).

44. See *supra* text accompanying note 32.

45. For example, the trial court might be granted the ability to reduce a first felony offender's presumptive term of imprisonment by 75% for mitigating factors. Since all presumptive terms of imprisonment for first felony offenders exceed four years, the maximum reduction now allowed for mitigating factors is 50%. See ALASKA STAT. §§ 12.55.125(c), .155(a)(2) (Supp. 1987).

46. For example, the panel could be precluded from imposing a sentence that is less than 75% of the presumptive term of imprisonment if aggravating factors are present. Under current law, there are no statutory restrictions on the panel's ability to reduce a presumptive term of imprisonment once manifest injustice is established. *State v. Price*, 730 P.2d 159 (Alaska Ct. App. 1986).

47. See ALASKA STAT. § 12.55.120 (1984).

48. Those cases were: *Brown* (1987 SUMMARY, *supra* note 19); *Davison* (1987 SUMMARY, *supra* note 19); *Fry* (1987 SUMMARY, *supra* note 19); *Kloby* (1987 SUMMARY, *supra* note 19); *Maxwell* (1987 SUMMARY, *supra* note 19). For a discussion of

defendant to less than the presumptive term of imprisonment.⁴⁹ The capsule summaries of the four cases highlight the need for more comprehensive reporting of the panel's decisions and raise the important issue of whether the panel is properly applying the manifest injustice standard in sentencing repeat felony offenders.

Consider, for example, the case of Robert Maxwell, a defendant convicted of sexual assault in the first degree upon his seven-year-old stepdaughter.⁵⁰ Maxwell had two prior felony theft convictions, and, therefore, as a third felony offender, faced a presumptive term of imprisonment of twenty-five years.⁵¹ The trial court mitigated that sentence to twelve and one-half years, found manifest injustice, and referred the case to the panel.⁵² The panel then sentenced Maxwell to a *non-presumptive* sentence of ten years with five years suspended, citing Maxwell's "very high rehabilitation potential" and the "unrelated nature of the two prior felonies," which had occurred six years earlier.⁵³ Missing from the panel's capsule summary, however, was any discussion of the circumstances of Maxwell's sexual assault. For example, the panel failed to state whether the abuse was long-term or the extent of sexual penetration, although such factors had been cited by the panel in other sexual assault cases.⁵⁴

Because Maxwell's sentence was non-presumptive, he presumably will be eligible for parole after serving one-quarter of his five-year term of imprisonment.⁵⁵ If Maxwell had been a first, rather than a third, felony offender, he would have faced a presumptive term of imprisonment of eight years,⁵⁶ which could only have been reduced to four years for mitigating factors.⁵⁷ Moreover, if Maxwell, as a first felony offender, had been sentenced to a mitigated four-year presumptive sentence, he would not have been eligible for parole.⁵⁸ Thus, the sentence

when an offender qualifies as a repeat felony offender, see Stern, *supra* note 1, at 239-45.

49. The only repeat felony offender case in which the panel did not find manifest injustice was *Kloby* (1987 SUMMARY, *supra* note 19).

50. *Maxwell* (1987 SUMMARY, *supra* note 19).

51. *Id.*; see also ALASKA STAT. § 12.55.125(i)(4) (1984).

52. The panel agreed with the trial judge that the defendant's very high rehabilitation potential and the unrelated nature of the two prior felonies made the presumptive term manifestly unjust. *Maxwell* (1987 SUMMARY, *supra* note 19).

53. *Id.*

54. See, e.g., *Fry* (1987 SUMMARY, *supra* note 19) (panel notes that assault which involved only "slight penile penetration . . . was not a part of a pattern of inappropriate sexual conduct . . . but a truly single incident . . ."); *Hutchinson* (1987 SUMMARY, *supra* note 19) (panel notes that conviction based on isolated act).

55. ALASKA STAT. §§ 33.16.090(a) (1986), 33.16.100(c) (Supp. 1987).

56. ALASKA STAT. § 12.55.125(i)(1) (1984).

57. ALASKA STAT. § 12.55.155(a)(2) (Supp. 1987).

58. ALASKA STAT. § 12.55.090(b) (1984).

that Maxwell will actually be required to serve is likely to be substantially less onerous than one served by a first felony offender convicted of the same crime who receives the lowest authorized mitigated sentence.

Even assuming that it is manifestly unjust to categorize Maxwell as a repeat felony offender because of the age and nature of his prior convictions (a conclusion that appears contrary to legislative intent),⁵⁹ the panel never explained what made Maxwell's current crime, the sexual assault of his seven-year-old stepdaughter, substantially less serious than other sexual assaults. Nor did the panel cite any justification for its conclusion that Maxwell had "very high rehabilitation potential,"⁶⁰ despite his conviction of one of the most serious felonies in the criminal code⁶¹ and his two prior felony convictions.⁶²

The panel's failure to explain more thoroughly its decision does not necessarily mean that it was wrong in imposing the sentence it did on Maxwell. The summary of that case, however, raises the more fundamental question of whether the panel's capsule summaries provide adequate guidance to the trial courts and the bar in determining the type of circumstances in which manifest injustice may exist. The panel's recent effort to document and publicize its decisions is undoubtedly a substantial improvement over its previous practice.⁶³ Nevertheless, the panel's capsule summaries are only the first step in apprising the courts, the bar, and the legislature about the work of the panel. Because the panel's decisions greatly influence manifest injustice determinations by trial courts, and are highly complex in terms of the particular circumstances raised by the cases, five-to-ten-line summaries are inadequate. The panel should, therefore, be required to

59. As enacted in 1978, a prior felony conviction could not be considered for purposes of presumptive sentencing "if a period of seven or more years has elapsed between the date of the defendant's unconditional discharge in the immediately preceding offense and commission of the present offense." ALASKA STAT. § 12.55.145(a)(1) (1980) (amended 1982). The 1978 enactment also included a mitigating factor that a prior felony conviction was of a less serious class than the instant crime. ALASKA STAT. § 12.55.155(d)(8) (repealed 1982). In 1982, the legislature increased the seven-year limitation period to ten years and eliminated the mitigating factor that a prior felony conviction was of a less serious class than the instant crime. ALASKA STAT. § 12.55.145(a)(1) (1984); Act of July 3, 1982, ch. 143, § 32, 1982 Alaska Sess. Laws 1, 26.

60. See *supra* text accompanying note 54.

61. Sexual assault in the first degree is punishable by a maximum term of imprisonment of 30 years. ALASKA STAT. § 12.55.125(i) (1984). Only the crimes of murder, kidnapping, and misconduct involving controlled substances in the first degree carry higher maximum sentences. *Id.* § 12.55.125 (a), (b).

62. See *supra* text accompanying note 51.

63. See *supra* text accompanying note 17.

publish all of its decisions in a more comprehensive memorandum or in opinion form.

Of course, cases like *Maxwell* also raise the issue of how the manifest injustice standard should be applied in sentencing repeat felony offenders. Reliance on a defendant's "high rehabilitation potential"⁶⁴ to find a sentence "fundamentally unfair" or "shocking to the conscience"⁶⁵ seems particularly inappropriate when an offender has a history of felony convictions and the presumptive sentencing system provides that prior felony convictions are one of the most important factors in determining sentence length.⁶⁶

After closely reviewing the panel's sentencing practices in repeat felony offender cases, one might conclude that the manifest injustice standard needs to be defined more precisely. Particularly with this class of offender, the Alaska Legislature might decide to impose a ceiling on the maximum reduction of a sentence that can be accomplished by the panel.⁶⁷ Additionally, the panel might be precluded from considering rehabilitation potential in finding a sentence manifestly unjust if a repeat felon's prior convictions occurred within a specified period before the current offense.

III. CONCLUSION

The tenth anniversary of the adoption of presumptive sentencing is a particularly appropriate time to reassess how well Alaska's sentencing system is working. A good starting point for that review is a thorough analysis of the decisions of the three-judge sentencing panel. The panel's decisions highlight problems with the existing statutes,

64. See *supra* text accompanying note 53.

65. See *supra* text accompanying note 8.

66. It is for this reason that this comment's proposal to enact a mitigating factor to account for rehabilitation potential is only proposed for first felony offenders. See *supra* text accompanying notes 39-41. *Maxwell* is not the only case in which the panel relied upon a finding of rehabilitation potential to find manifest injustice in sentencing a repeat felony offender. In another case, *Davison*, the panel found "strong evidence relating to" rehabilitation potential, even though the offender was 27 years old and already had two prior felony convictions. In that case, the panel sentenced Davison, who was convicted of misconduct involving weapons in the first degree, to 180 days of imprisonment, but then suspended imposition of sentence. *Davison* (1987 SUMMARY, *supra* note 19).

The court of appeals has implicitly recognized that a finding that a defendant has a strong potential for rehabilitation can occur even if the defendant has repeatedly violated the law. See *Kirby v. State*, No. 767, slip op. at 18 (Alaska Ct. App. Dec. 31, 1987) ("If a person, despite a good education, a good job, strong support in the community, and a loving family consistently commits criminal acts, a judge might well conclude that these favorable factors do not establish a good potential for rehabilitation.") (emphasis added).

67. See *supra* note 46 and accompanying text.

suggest the need for amendment, and focus attention on whether presumptive sentencing is being applied consistently with legislative intent. The panel can assist that review by publishing more complete explanations of its decisions, which would comprehensively describe the circumstances of the charged offense, the prior criminal history of the defendant, and the panel's reasons for finding a sentence manifestly unjust.

If the Alaska Legislature agrees that the circumstances that now support panel findings of manifest injustice justify departures from presumptive sentencing, it should consider broadening the discretion of the trial courts to permit consideration of those factors without the necessity of referring the case to a panel. If the legislature disagrees with aspects of the panel's application of the manifest injustice standard, it should further clarify that standard to preclude objectionable panel decisions.