IN THE COURT OF APPEALS OF THE STATE OF ALASKA

SAMUEL NICKETA, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13548 Trial Court No. 3DI-14-00512 CR MEMORANDUM OPINION No. 7068 — August 23, 2023

Appeal from the Superior Court, Third Judicial District, Dillingham, Christina L. Reigh, Judge.

Appearances: Emily Jura, Assistant Public Defender, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Donald Soderstrom, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Treg R. Taylor, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Harbison and Terrell, Judges.

Judge HARBISON.

Samuel Nicketa was convicted, following a jury trial, of one count of second-degree sexual abuse of a minor after he touched a ten-year-old girl's genitals

over her clothes while she slept.[1] Because Nicketa had previously been convicted of two sexual felony offenses, he was sentenced to a mandatory 99-year term of imprisonment.[2]

On appeal, Nicketa challenges his conviction and his sentence. First, Nicketa argues that the court erred in admitting the recording of the victim's interview at a child advocacy center under Alaska Evidence Rule 801(d)(3), and that this appreciably affected the jury's verdict. Second, Nicketa claims that the superior court erred in multiple ways when it imposed the presumptive 99-year sentence — specifically, he argues that the court erroneously denied his proposed least serious mitigator, that the court erred by failing to refer his case to the three-judge sentencing panel due to manifest injustice, and that imposition of a mandatory 99-year sentence violated his constitutional right to be free from cruel and unusual punishment. Finally, Nicketa argues that the court erred in failing to completely redact certain statements in his presentence report.

For the reasons explained in this opinion, we reject Nicketa's challenges to his conviction and sentence, and we affirm the judgment of the superior court. However, as the State concedes, the court did not properly delete certain redactions in Nicketa's presentence report. We therefore remand this case to allow the superior court to fully redact these portions of the presentence report.

Factual and procedural background

Ten-year-old J.N lived in the same household as thirty-four-year-old Samuel Nicketa, her biological uncle and adoptive brother. One night, J.N. awoke to

[1] AS 11.41.436(a)(2).

[2] *See* AS 12.55.125(i)(3)(E).

find Nicketa standing over her, touching her vagina over her clothes with his fingers. Vincent, J.N.'s other adult brother witnessed Nicketa's actions.

J.N. testified at trial that she felt Nicketa touch her vagina "[a]bout three times" over the course of the night. J.N. further testified that at least one of those times, Nicketa also "smell[ed]" her genitalia. When J.N. awoke the third time, she heard Vincent yell at Nicketa in Yupik. Likewise, Vincent testified that he saw Nicketa approach J.N. three times that night, and saw Nicketa touch J.N.'s genital area at least once. Vincent testified that the third time Nicketa approached J.N., he said something to Nicketa in Yup'ik.

A few hours later, Vincent called the troopers to report the incident. In this phone call, Vincent told the police that Nicketa was both "touching and smelling" his adoptive sister's vagina. J.N. was taken to a child advocacy center, and Trooper John Williamson conducted an interview in which J.N. disclosed the abuse. Based on these allegations, Nicketa was indicted on one count of second-degree sexual abuse of a minor.

Prior to trial, the State sought permission from the court to introduce the recording of J.N.'s interview at the child advocacy center into evidence. Nicketa objected, and the superior court held an evidentiary hearing. Both the State and Nicketa presented testimony from an expert witness: the State called Leigh Ann Bolin, the program manager for the child advocacy center in Dillingham, and Nicketa called Dr. Jason Dickinson, a psychology professor and the director of a national center for child advocacy and policy.

Both experts agreed that Trooper Williamson's interview of J.N. did not follow the protocol or recommended practices in child interviewing techniques. For example, Trooper Williamson, dressed in his full uniform, told J.N. that they each had a job to do during the interview — the trooper's job was to listen and ask questions, while J.N.'s job was to talk. Trooper Williamson also asked J.N. leading questions, such

as, "When you were sleeping, did somebody come and wake you? Did somebody come and bother you when you were sleeping last night . . . ?" The trooper also failed to elicit a full narrative from J.N. about what happened, instead summarizing the facts in his own words and asking her to correct him if he stated something wrong.

Dickinson (Nicketa's expert witness) expressed his opinion that the interview was extremely inconsistent with current interviewing guidelines and was overall, very suggestive. Bolin (the State's expert witness) did not believe that the reliability of J.N.'s disclosure of abuse was impacted by Trooper Williamson's manner of questioning. She explained that despite the trooper's failure to follow proper protocol, he was nonetheless able to build good rapport with J.N., who independently brought up Nicketa's act of touching her and repeatedly corrected the trooper when she thought that he had misstated something.

The superior court ultimately agreed with the State's expert, and admitted the recording of J.N.'s interview with Trooper Williamson under Evidence Rule 801(d)(3). The court acknowledged that the interview was "far from [the] kind of a type of interview we would like to see," but explained that there were "many, many facts" that demonstrated that the interview, taken as a whole, was not "unduly influential."

The case proceeded to trial. Both J.N. and Vincent testified at the trial, and the video recording of J.N.'s interview was played for the jury. The jury subsequently found Nicketa guilty of second-degree sexual abuse of a minor.

At sentencing, the superior court found that Nicketa had previously been convicted of two separate sexual felony offenses.[3] Under AS 12.55.125(i)(3)(E),

[3] In particular, Nicketa was convicted of one count of second-degree sexual assault and one count of second-degree sexual abuse of a minor in 2006. These charges involved two separate incidents and two different victims, but were consolidated into one case and resolved at the same time with a global plea agreement.

Nicketa was therefore subject to a presumptive 99-year sentence. Nicketa argued that the superior court should not impose the mandatory term of imprisonment because the conduct in this case was "among the least serious conduct included in the definition of the offense"[4] and imposition of such an extreme sentence violated Nicketa's constitutional right to be free from cruel and unusual punishment. Nicketa also requested, in the alternative, that his case be referred to the three-judge sentencing panel due to "the manifest injustice of the 99-year presumptive term."

The court rejected all of Nicketa's proposals, and sentenced him to 99 years in prison. The court noted that Nicketa's conduct in this case "fit squarely within the definition of the statute," that Nicketa was not significantly different than a typical offender, and that the legislature was clear in its intent to subject third sexual felony offenders to a presumptive 99-year sentence.

This appeal followed.

The superior court did not err in admitting the recording of J.N.'s child advocacy center interview under Evidence Rule 801(d)(3)

Alaska Evidence Rule 801(d)(3) authorizes the admission of a recorded statement by a child victim under sixteen years old as non-hearsay, provided that certain foundational requirements are met. These foundational requirements include: (F) "the taking of the statement as a whole was conducted in a manner that would avoid undue influence of the victim[,]" and (H) "the court has had an opportunity to view the recording and determine that it is sufficiently reliable and trustworthy and that the interests of justice are best served by admitting the recording into evidence."[5] This Court has instructed trial courts deciding whether a child's interview meets these two

[4] AS 12.55.155(d)(9).

[5] Alaska R. Evid. 801(d)(3)(F) and (H).

requirements to: (1) "affirmatively determine that the child's statement was elicited in a neutral and non-leading manner," and (2) "independently evaluate the reliability and trustworthiness of the statement if it is challenged."[6]

In the current case, the superior court acknowledged that there were various problems with the way in which Trooper Williamson questioned J.N. at the child advocacy center. However, the court found that, overall, the interview was not conducted in such a manner as to unduly influence J.N.'s disclosure.

In particular, the court pointed to the fact that the trooper was able to establish a good rapport with J.N., noting that they discussed a variety of topics and J.N. appeared comfortable with him in the video. The court also noted that when J.N. would not respond to the trooper's direct questions about the incident, he would quickly readjust and allow J.N. to control the topic of conversation. The superior court highlighted that the interview took place in a neutral setting, with only one interviewer present, and that the trooper was the first person to talk with J.N. about the incident. The court also emphasized that J.N. repeatedly corrected the trooper when he stated facts she thought were incorrect, and observed that J.N. never parroted anything the trooper was saying — instead, "she kind of stood up for herself and she was able to articulate her view of what was going on."

The superior court then went on to independently evaluate the reliability of J.N.'s statements.[7] The court again emphasized that J.N. used her own words to describe Nicketa's actions. And while the court noted that some of the trooper's questions were "somewhat suggestive," the court concluded that the questions were not "overly suggestive [such] that [they] would negate any kind of reliability or trustworthiness of this child's statement." Moreover, the record reflects that J.N. offered

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[6] *Augustine v. State*, 355 P.3d 573, 584 (Alaska App. 2015).

[7] *See id.* (explaining that Evidence Rule 801(d)(3)(H) requires trial courts to independently assess the reliability of a child's interview).

spontaneous details during her conversation with Trooper Williamson that further bolstered the reliability of her disclosure. For example, J.N. told the trooper that the last time Nicketa touched her, Vincent said something to him in Yup'ik that made Nicketa stop what he was doing.

The court ultimately determined that, for all the reasons discussed, J.N.'s statements were sufficiently reliable and trustworthy, and that the video of her interview should be admitted in the interests of justice.

Nicketa argues that the superior court conflated its analysis of subsections (F) and (H) such that the court never found the interview itself was conducted in a manner that would avoid undue influence on the child, as required by subsection (F). Rather, Nicketa claims that the court took an erroneous view that if the statements were ultimately deemed reliable and trustworthy, thus satisfying subsection (H), it would not matter if the interview itself was of such poor quality that it would violate subsection (F).

But we do not view the superior court as making such a finding. Although the evidence supporting the superior court's conclusion that both subsections (F) and (H) had been met was overlapping, the court's remarks show that, for the most part, it understood the difference between finding that the child's statements were reliable and finding that the interview itself was conducted in a manner that was not "unduly influential on th[e] child."

Nicketa also argues that the court erroneously credited the testimony from the State's expert witness, Bolin, over the testimony of Nicketa's expert, Dickinson. But this claim does not appear supported by the superior court's findings. In its analysis, the court explained that it was rejecting some of Dickinson's testimony because it conflicted with the court's view of the facts,[8] and that it ultimately agreed with Bolin's

[8] *Cf. Augustine v. State*, 469 P.3d 425, 433 (Alaska App. 2020) (instructing a trial court that credits one expert's opinion over another's to explain its reasoning).

assessment that the interview was not unduly influential. The court did not otherwise disbelieve or discredit Dickinson. Indeed, both experts largely agreed that Trooper Williamson failed to follow best practices in child interviewing.

Moreover, as the court pointed out, Dickinson did not ultimately provide an opinion about the reliability of J.N.'s statements. He emphasized that best practices were not followed in J.N.'s interview, and expressed his opinion that Trooper Williamson raised the topic in a suggestive manner and did not elicit a full narrative from J.N. Dickinson explained that the guidelines for child interviewing are "our best chance" for "trying to preserve evidence and elicit the most accurate information we can," but he also acknowledged that simply because the guidelines were not followed "doesn't necessarily mean that the child's testimony is going to be accurate or inaccurate."

In any event, even assuming *arguendo* that the superior court's determination that the interview was conducted in a neutral non-influential manner was error, we conclude that the error did not prejudice Nicketa. As we have explained, both J.N. and Vincent testified at the trial. J.N. testified that she felt Nicketa touch her genitalia "[a]bout three times" during the night and and that he smelled her genitalia at least once. Vincent corroborated this account, testifying that he saw Nicketa approach J.N. three times and touch her "around her genital area" at least once. In addition to this testimony, the jury also heard statements that Vincent made to the troopers, as well as his testimony to the grand jury. Vincent told the troopers that Nicketa was both "touching and smelling" J.N.'s vagina. Vincent also told the grand jury that he saw Nicketa touch J.N. "on her private area."

We conclude that, even if the court erred by admitting the video recording, this error did not appreciably affect the jury's verdict.[9] This is because, unlike cases where the State's evidence was largely based on out-of-court statements,[10] in this case the jury heard testimony directly from J.N. and Vincent and the video recording was cumulative of the testimony at trial.

The superior court did not err in imposing the presumptive 99-year sentence

On appeal, Nicketa does not dispute that he has two prior convictions for sexual felonies: in 2006, he was convicted of one count of second-degree sexual assault and one count of second-degree sexual abuse of a minor, based on two separate incidents. Under AS 12.55.125(i)(3)(E), Nicketa was therefore subject to a presumptive term of imprisonment of 99 years in this case. Indeed, following the jury's guilty verdict, the superior court sentenced Nicketa to 99 years in prison.

Nicketa argues, however, that the superior court erred when it imposed this presumptive sentence. First, Nicketa claims that the court erred in denying his proposed statutory mitigating factor. Second, Nicketa claims that the superior court erred in failing to find manifest injustice and refer him to the three-judge sentencing panel. And third, Nicketa argues that the presumptive 99-year sentence violated his constitutional right to be free from cruel and unusual punishment. We will address each of Nicketa's arguments in turn.

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[9] *See Love v. State*, 457 P.2d 622, 631-32 (Alaska 1969) (holding that a non-constitutional error requires reversal only if the error appreciably affected the jury's verdict).

[10] *See Augustine*, 355 P.3d at 576 (noting that the State's evidence was based "almost completely" on the children's out-of-court statements).

The superior court did not err in rejecting the least serious mitigator

First, Nicketa claims that the superior court should have found that his conduct in this case was "among the least serious conduct included in the definition of the offense."[11] Nicketa compares his case to our prior opinion in *Voyles v. State*, and argues that the brevity of the sexual contact in this case, which occurred over J.N.'s clothes and without evidence of injury or ongoing abuse, establishes that his offense was among the least serious contemplated by the statute.[12]

In *Voyles*, we found that "a single, minimal act of digital penetration" qualified as among the least serious conduct included in the definition of first-degree sexual abuse of a minor.[13] We noted that the age of the victim and the surrounding circumstances of the crime were relevant considerations — namely, that the victim was nine years old and an overnight guest in the defendant's home. But we ultimately concluded that, because there was only a single act of penetration and "the intrusion was slight and of brief duration," the conduct qualified as among the least serious contemplated by the statute.[14]

However, Nicketa's case can be readily distinguished from *Voyles*. Although Nicketa was charged with only one count of second-degree sexual abuse of a minor, the jury nonetheless heard evidence that Nicketa may have touched J.N. up to three separate times throughout the course of the night. Both J.N. and Vincent also testified that Nicketa not only touched J.N.'s genitals, but that at one point he "smelled" them.

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[11] AS 12.55.155(d)(9).

[12] *Voyles v. State*, 2017 WL 2709730 (Alaska App. June 21, 2017) (unpublished).

[13] *Id.* at *5.

[14] *Id.* at *5-6.

Nicketa argues that, like in *Voyles*, the touching was brief. But according to J.N.'s interview at the child advocacy center, she was able to discern that one of the times Nicketa touched her he used two fingers, and another time he touched her he used four fingers. This suggests that the duration of each touching was longer than a fleeting or momentary contact.

Moreover, while Nicketa was not in an official position of authority over J.N., the court noted that there was still a "dynamic of authority."[15] Even if Nicketa did not perform any official caretaking role, it is reasonable to assume that he had some degree of authority over J.N. given that he was thirty-four years old, lived with her in the same house, and was both her adoptive brother and her biological uncle.

The Alaska Supreme Court has previously explained that "[t]he legislature intended for the 'most serious' aggravating factor and the 'least serious' mitigating factor to have a limited scope."[16] Given the facts and circumstances of this case, we conclude that the superior court did not err when it declined to find that Nicketa's conduct was among the least serious.[17]

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[15] *See Thiele v. State*, 2018 WL 6132026, at *6 (Alaska App. Nov. 21, 2018) (unpublished) (acknowledging that courts may consider a defendant's position of authority over a victim in evaluating the least serious mitigator, but noting that its existence alone may not disqualify a defendant from receiving the mitigator).

[16] *State v. Parker*, 147 P.3d 690, 695 (Alaska 2006).

[17] *See Michael v. State*, 115 P.3d 517, 519 (Alaska 2005) (explaining that "[a]ny factual findings made by the [trial] court regarding the nature of the defendant's conduct are reviewed for clear error, but whether those facts establish that the conduct 'is among the least serious' under AS 12.55.155(d)(9) is a legal question").

The superior court did not err in declining to refer Nicketa's case to the three-judge sentencing panel

Nicketa next challenges the superior court's refusal to refer his case to the three-judge panel based on manifest injustice.

The three-judge panel serves as a "safety valve" for Alaska's presumptive sentencing scheme that should only be used "relatively rare[ly]."[18] The legislature intended referral to the three-judge panel "where manifest injustice would result from imposition of a presumptive sentence."[19] When the sentencing court evaluates whether a prescribed presumptive term is manifestly unjust, the court must consider "whether the defendant's conduct is significantly different from a typical offense within the definition of the defendant's crime" and "whether other circumstances make the defendant significantly different from a typical offender" of that offense.[20] This Court will only reverse the sentencing court's refusal to refer a case to the three-judge panel if the decision was clearly mistaken.[21]

Nicketa argues that under the totality of the circumstances, there is manifest injustice in his case such that the superior court should have referred his case to the panel. In support of his argument, Nicketa points to the fact that his two prior convictions were entered on the same day and that very little jail time was imposed for those offenses.

As we mentioned, Nicketa was previously convicted of one count of second-degree sexual assault and one count of second-degree sexual abuse of a minor. These charges involved two separate incidents and two different victims, but were

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[18] *Dancer v. State*, 715 P.2d 1174, 1177 n.2, 1179 (Alaska App. 1986).

[19] *Id.* at 1177.

[20] *King v. State*, 487 P.3d 242, 251 (Alaska App. 2021).

[21] *Knipe v. State*, 305 P.3d 359, 363 (Alaska App. 2013).

consolidated into one case and resolved at the same time with a global plea agreement. Pursuant to the agreement, Nicketa was sentenced to 4 years with 2 years suspended for the second-degree sexual assault conviction, and 2 years with 1 year suspended for the second-degree sexual abuse of a minor conviction, to be served consecutive, resulting in a composite sentence of 3 years to serve.

The superior court acknowledged that it was "certainly unique to have two sex convictions that came to be in the way they did in such a short period of time," and that it was "quite a leap" to sentence Nicketa to a mandatory 99-year term of imprisonment in this case. However, the court declined to find that Nicketa's circumstances were "something that's absolutely unheard of that it's so significantly different than some other offender, particularly when we're talking about child sex abuse."

The court also considered the facts underlying Nicketa's prior two sexual felony convictions. In the first of these cases, Nicketa was convicted of sexually assaulting his sixteen-year-old niece, J.A., while she was sleeping on the living room floor in July 2005. J.A. recounted that she woke up to someone "touching her on her breast and vagina under her clothing." Nicketa admitted that he touched J.A. on her breast and vagina under and over her clothing while she slept, that he was intoxicated when this occurred, and that he did "stick" his finger into her vagina.

In the second case, Nicketa was convicted of sexually abusing twelve-year-old J.M. in November 2005. J.M. fell asleep in a bedroom at Nicketa's house after watching a movie with the family. J.M. woke up and "felt a hand . . . against her breast." J.M. turned around and saw Nicketa sleeping behind her; she then decided to sleep on the couch. Nicketa later came out of the bedroom and masturbated in front of J.M. When interviewed by the troopers, Nicketa admitted to this conduct as well.

Relying on Nicketa's criminal history and the facts that were proven at trial, the superior court determined that it would not "shock[] . . . the conscience" or be

"obviously unfair" to maintain the presumptive sentencing range in this case.[22] We conclude that the superior court was not clearly mistaken in reaching this decision.

The superior court did not violate Nicketa's constitutional rights by imposing the presumptive sentence

Nicketa further argues that imposition of a 99-year presumptive sentence in his case violated his constitutional right to be free from cruel and unusual punishment.[23] Specifically, Nicketa argues that he only had one opportunity for reformation because his two prior sexual felony convictions were entered at the same time. Nicketa asserts that, under the presumptive sentencing statute, he faces a "shocking and unconscionable sentencing cliff" that is not proportionate to his offense, not necessary to accomplish any sentencing goal, and does not conform with "the otherwise incrementally graduated sentencing scheme established under Alaska law."

As Nicketa acknowledges, however, courts have previously upheld recidivist statutes, like AS 12.55.125(i)(3)(E), against claims that they are cruel and unusual.[24] The United States Supreme Court has explained that such statutes do not merely punish the conduct at issue, but also "deal[] in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law."[25]

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[22] *Dancer*, 715 P.2d at 1177 (quoting *Lloyd v. State*, 672 P.2d 152, 154 (Alaska App. 1983)).

[23] *See* U.S. Const. amend. VIII; Alaska Const. art. I, § 12.

[24] *See, e.g.*, *Ewing v. California*, 538 U.S. 11, 29 (2003); *Sikeo v. State*, 258 P.3d 906, 912 (Alaska App. 2011); *Kobuk v. State*, 2015 WL 1605158, at *4-5 (Alaska App. Apr. 8, 2015) (unpublished) (finding Alaska's 99-year presumptive term not cruel and unusual).

[25] *Ewing*, 538 U.S. at 29 (quoting *Rummel v. Estelle*, 445 U.S. 263, 276 (1980)).

Nicketa instead relies on the Alaska Supreme Court's prior opinion in *State v. Carlson* to argue that repeat offenders should only be subjected to greater sanctions if they are found to be "incorrigible."[26] In other words, a defendant should only be sentenced as a habitual offender if they have been given more than one prior opportunity to reform; thus, two or more convictions entered on the same day should only constitute one conviction for the purpose of the habitual offender statute.

But as the State points out, the Alaska Supreme Court's discussion no longer provides authoritative guidance, as it was interpreting a prior sentencing scheme. In 1978, the legislature repealed the habitual criminal statute at issue in *Carlson*.[27] Under the revised sentencing framework, all prior convictions count for presumptive sentencing purposes unless they arose from a single continuous criminal episode (or another exception applies).[28] This Court has upheld the current sentencing scheme against equal protection challenges.[29]

We have noted that the legislature is "primarily responsible for adopting sentencing policies," and to the extent the *Carlson* rule recommended one particular policy perspective, the legislature was free to — and indeed did — impose an alternative scheme. We therefore find no merit to Nicketa's constitutional challenge to the imposition of the presumptive sentence in his case.

We further note that, following his incarceration in his prior cases, Nicketa repeatedly violated his probation, eventually rejecting parole and electing to serve the

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[26] *State v. Carlson*, 560 P.2d 26, 28-29 (Alaska 1977), *superseded by statute*, AS 12.55.145.

[27] *See Tulowetzke v. State, Dep't of Pub. Safety, Div. of Motor Vehicles*, 743 P.2d 368, 371 (Alaska 1987).

[28] *See State v. Rastopsoff*, 659 P.2d 630, 637 (Alaska App. 1983); AS 12.55.145(a)(4)(C).

[29] *See Anderson v. State*, 904 P.2d 433, 436 (Alaska App. 1995).

remainder of his sentence in prison. In addition, Nicketa was convicted for failing to register as a sex offender. Therefore, even under Nicketa's logic that a defendant should only be subjected to increased punishment based on their demonstrated inability to reform, we would find his argument unavailing in this case.

The superior court failed to completely delete certain redactions from the presentence report

Finally, Nicketa claims that the superior court erred in failing to fully delete certain redactions from his presentence report. The State agrees that the superior court improperly redacted these statements in the presentence report. We have reviewed the record and we agree with the parties that, when the court merely struck through certain assertions in the presentence report with a single line, the court did not properly redact these statements.[30] Accordingly, we remand Nicketa's case to the superior court so that it may remedy these redactions.

Conclusion

For the reasons provided in this opinion, we AFFIRM the judgment of the superior court. However, we REMAND this case to the superior court for the limited purpose of allowing it to fully redact the deleted portions of Nicketa's presentence report.

[30] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess any concession of error by the State in a criminal case); *see also* Alaska R. Crim. P. 32.1(f)(5); *Packard v. State*, 2014 WL 2526118, at *5 (Alaska App. May 21, 2014) (unpublished) ("When a court determines that Alaska Criminal Rule 32.1(f)(5) requires a disputed assertion to be 'deleted' from the presentence report, the court must black out or otherwise remove the assertion, so that it is no longer a legible part of the report.").