

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT UNALASKA

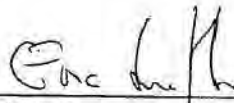
STATE OF ALASKA,)
)
 Plaintiff,)
)
 vs.)
)
 ISMAEL TANGONAN)
 BALALLO,)
 DOB: 12/27/72)
)
 Defendant.)
 _____)

CASE NO. 3UN-12-51 CR

ORDER

For the reasons set forth on the record, this case is remanded to the trial court for sentencing.

Dated at Palmer, Alaska, this 22nd day of October 2013.



ERIC SMITH
Administrative Head
Three Judge Panel

I certify that on 10-22-13
a copy of this document was sent to: DA
 CSJD Attorney(s) of Record Maciola
 Plaintiff Defendant
 Other Judge Stephen/Sudex Sudduck/Judge
At the address(es) of record: State Douglas
Pres'd Jnl State Clerk of Court
Deputy Clerk

In the Superior Court at Anchorage, Alaska

Media No: 401

Judges: E. Smith
T. Stephans
J. Suddock

Date: Tuesday, October 22, 2013

Clerk: D. Taylor

Case No: 3UN-12-00051CR

Case Title: SOA

Vs. Ismael Tangonan Balallo

Type of Proceeding: Three Judge Panel

Counsel Present:

Plaintiff: Jenna Gruenstein, Present
Defendant: Krista Maciolek, Present, w/client (in-custody)
Interpreter: Rosalia Dooley (Tagalog)
Victim: Lynda Velasquez (telephonic)

Court Orders: Minute Order –

Panel finds that under Kirby, no evidence was presented to show why the defendant did what he did and no evidence as to why this crime occurred;

Panel also didn't have any evidence as to whatever caused it is correctable or not likely to reoccur; and, in framework of Kirby that means that the exceptional potential for rehabilitation has not been proven by clear and convincing evidence

Panel finds that defendant has proven by clear and convincing evidence that the defendant is significantly different in category from other sexual assault defendants as defined by the Legislature

Panel finds that the defendant did not prove by clear and convincing evidence that a sentence of 20 to 30 years would be manifestly unjust and REMANDS the case back to Judge Douglas for sentencing

Summary of Proceedings:

9:02:36 AM On record
Court identifies case and parties
Judge Smith:
-Ms. Maciolek do we need to run this through an interpreter?

9:02:56 AM **Ms. Maciolek:**
-She won't be sworn,

9:03:04 AM **Judge Smith:**
-If at any time you need us to stop

9:03:56 AM **Ms. Dooley:**

-I will raise my hand

9:04:21 AM

Judge Smith:

-If at any time you can't hear me let us know and we stop
-Any party planning on presenting witnesses

9:04:36 AM

Ms. Maciolek:

-I don't know where to start, I rely on the pleadings and the order of referral, that laid out quite a bit of the factual background
-I will start by saying the referral to three judge panel was on both plans, extraordinary potential for rehabilitation
-Let me start again
-Both prongs of the statute
-Found that Mr. Balallo found that rehabilitation was
-Also found manifest injustice in totality of the liability
-Under manifest injustice, 20 years is obviously unfair, particularly in light of Cheney
-I don't know that I need to reiterate all my memorandum
-Several opinions on what constitutes manifest injustice

9:06:18 AM

-The Smith v. State from 1985 is important
-As far as the extraordinary potential for rehabilitation, Smith board also outlined
-Family support, positive employment history, history of community activism
-No prior record, this conduct is out of character and impulsive and a drunken night of partying with LV and Diego Mayuyo
-Positive PSR
-Environmental factor, highly situational event, distance from home, alcohol, cross-cultural miscommunication
-Remember that LV's roommate came home, back to the room, in the middle of the night and found that Ms. LV was dancing around and she was naked at the time
-This was after they left but before they came back
-That was testimony at trial
-I mention that now in cross-cultural miscommunication

9:08:13 AM

Judge Smith:

-How is it cross-cultural

9:08:18 AM

Ms. Maciolek:

-LV is American girl, California, with Hispanic background, Mr. Balallo is Filipino, English second language, he probably took LV's actions as signals of making herself available to him
-That is Dr. Bruce Smith's assessment

9:08:50 AM

Judge Smith:

-No report from Dr. Bruce Smith, how can we appropriately take notice, it is you said he said

9:09:07 AM

Ms. Maciolek:

-Dr. Smith reviewed all collateral information, he did not do diagnostic, it ineffective to go to Goose Creek to do testing
-Reason I didn't push it further, is because what he told me in consultation was written in Presentence Report and what Judge Douglas said
-Statute says

9:09:47 AM

Judge Stephans:

-It says excellent not favorable

9:09:55 AM **Ms. Maciolek:**
-I can hear my law professor saying don't get stuck by words, the intent is the same
-The Presentence Report evaluation is such the reporter took a look at the situation and made an assessment and Dr. Smith concurred with it as

9:10:20 AM **Judge Stephans:**
-Didn't the court in Smith also point out Mr. Smith was cooperative when apprehended and expressed genuine remorse at all time

9:10:34 AM **Ms. Maciolek:**
-That is my recollection
-He a soldier, he in the military, in Smith, case was considered out of character to do what he did, yes, that is correct
-Again, that is not the only factor, there are several factors
-And I maintain that if the court and the state are going to be relying on PSR when doing sentencing that they do hold some weight, again I relying on that opinion and procedural rules to establish that this was an out of character situational event in Mr. Balallo's life
-So I disagree with Ms. Gruenstein's memorandum is noticeably absent a report from a professional such as Dr. Smith
-If Presentence Report is not a neutral report why are we doing them, and trial judge should be neutral fact finder
-I also disagree that he tried to borrow money to leave town, that is pure
-Jury selection there was indications of gambling
-Point being we can speculate it for gambling purposes or something else, not just to leave town, that

9:12:32 AM **Judge Suddock:**
-True that Mr. Balallo did not testify at trial
-Ms. Gruenstein makes factual allegations due to towel bar positioning in the bath room
-I have the impression that LV has little memory
-I don't know where Ms. Gruenstein got her facts

9:13:01 AM **Ms. Maciolek:**
-She testified at the grand jury, something like that, she testified it kind of a blur and something happened in bathroom where she pushed up against the towel rack
-I don't dispute that is what she said
-All along I said I have no idea what happened in that room
-All along Diego Mayuyo and Mr. Balallo arrested and indicted at the same time
-Jury found penetration but Mr. Balallo only one convicted of penetration,
-I think it is curious, if both charged under sex assault one how that would have gone
-That's the part I do contest, don't dispute what LV said and I not questioning the jury verdict
-Only one co-defendant they found guilty of penetration, Mr. Balallo
-Mr. Balallo sentenced
-Sorry, Mr. Mayuyo sentenced, he received the mandatory minimum
-I think given the context, totality of circumstances, Chaney criteria that is appropriate for Balallo

9:14:50 AM **Judge Smith:**
-If we find rehabilitation, can't go below half

9:14:57 AM **Ms. Maciolek:**
-When I did the research on that, not found a

9:15:03 AM **Judge Smith:**
-That what statute says

9:15:08 AM **Judge Stephans:**
-2012, Lockhart says that
-If it is referred just on extraordinary potential for rehabilitation, treat it as a mitigator and can't go below half
-If the court, we find that it is sentencing within presumption range is manifestly unjust go before four

9:15:39 AM **Judge Smith:**
-Tricky, not clear you impose suspended time
-It gets very complicated and that what Lockhart all about, it on appeal now

9:15:55 AM **Ms. Maciolek:**
-It should approximate the sex assault two range, 10 year is aggravated sex assault two, rather than sex assault one
-Ms. Velasquez, LV, testified at trial, and this is part of the discovery, she did not know who penetrated her
-Her sister said when she came home in early morning and again at trial
-At trial when LV confronted Mr. Balallo, she wearing a wire, and when she walking away she said maybe it was Mayuyo who knows, what can you do
-Jury found penetration, here we are
-Time line is important, that the cameras out in the hallway establish
-As there was comings and goings from that room throughout the night
-Again I rely on my memorandum for that
-I do maintain the causal factors easily indefinable, alcohol, distance from home, cross cultural communication, dancing around naked during the night in her room, manifest injustice if the panel would reject reducing presumptive term
-Comparing what happened with Diego Mayuyo
-Reiterating time line as established by the cameras
-And potential for rehabilitation, family support and no prior history
-Is 20 years necessary to achieve sentencing goals
-Mr. Balallo's life is changed forever from this

9:18:20 AM
-I think it worth noting he not a U S citizen, he will be deported after he is released from custody
-begs the question of why he incarcerated in the US if he is going to be sent back to the Philippines
-Don't know how much the

9:18:55 AM **Judge Smith:**
-That has to do with ramifications of being deported, he has family back there so it is very different

9:19:06 AM **Ms. Maciolek:**
-Most of his family is in California
-He does indeed speak the language
-My point is should that even be considered, I don't think a published opinion on that
-Why, again, why the state of Alaska pay for incarceration for so long if that is what ends up happening, the deportation
-Rehabilitation, I already hammered that, I think Judge did a good job talking about that on rehabilitation achieved in less than 20 years and deportation that is going to ensue
-Seriousness and isolation, while no question this is serious offense, do you need 20 years to

achieve that sentencing goal of bringing that message home to community, and I maintain no you don't

-I think 20 years is beyond what needed to achieve sentencing goals

-I do think three judge panel find that manifest injustice result by failing to reduce

-Also that 20 years is manifestly unfair given the context with Diego and all three of the players for lack of a better word, their conduct on that night

-I request that you reduce it to a term that approximates the sex assault in second degree, ten years, obviously I prefer five years but I leave that to the panel

-Also restriction on discretionary parole so that Mr. Balallo has opportunity to go through parole board after one-third of time is served to see if parole board thinks it is appropriate

-It is a fiction, he not released, he subject to immigration hold and deported

-Tricky and complicated situation

9:21:55 AM -Clearly it was alcohol fueled evening, bad behavior on everybody's part, 20 years is

-I don't know the word, I don't understand why 20 years is necessary to, what 20 years will achieve given the context

9:22:24 AM

Ms. Gruenstein:

-I am trying I think the problem here is there is no evidence to support the finding that Mr. Balallo has a potential for rehabilitation

-There is no explanation, he is not young, he is not cognitively below level, didn't have his own abuse in the fact, nothing that makes him different from any other defendant other than getting up here and saying for first time offender takes away legislative ability

-For first time offender, eh gets 20 years, it is not a legal argument, it is not a basis from taking the power from legislators to set that term

-No evidence to explain what happened, I get into more on what are some serious flaws with Judge Douglas' referral and frankly flaws contradicted by her order in the other defendant

-before I do, just to set the stage, Mr. Balallo has obligation to explain to this court, why this happened, why you feel comfortable it won't happen again, why it not happen again, he done nothing

-He got part of a

-He blamed a violent rape on cultural differences which is frankly almost unbelievable

9:24:24 AM

-I ask the court to give that little or no weight

-No evidence presented to explain why this happened

-Alcohol and being away from home isn't sufficient, many people in Alaska is far away from home

-They don't also commit rapes and when they do they need to be held accountable

-He lonely,

-That is circumstances likely to manifest again, if it is just that he far enough from home and his wife and he drinks, that is more suggestive that it will occur again

-There is evidence, that he is drinking not new for him, not a one time for him

-I believe there evidence at trial this common occurrence, they drunk quite frequently

-This come out more when discussing Judge Douglas' referral, he living away from home, not unusual for him

-he been there before, he come off work for the season and go back, nothing that is new or out of the ordinary

9:25:58 AM

-He hasn't accepted responsibility, ever, nothing that has ever been before any court where he apologized or taken any acceptance, I don't know where that came from in judge Douglas' order, frankly it caught me greatly off guard, I never seen anything

-That makes it really difficult to say when we don't know why it happened or he feels sorry for what happened

-Versus getting up and saying everyone deserves blame

-Ms. Velasquez drinking in her own home, to say she bears responsibility as she was intoxicated is troubling at best

-All we have are letters from Mr. Balallo's family, no one ever talked to his family, never

questioned, just some letters

-I think that family members tend to not be the most unbiased, they see the good side but not accurate predictors of someone can be recidivist

-Family members tend to be surprised, in those letters they said it out of character which indicates they don't know that side of Mr. Balallo and don't know if it will happen again

9:27:55 AM

-I think extraordinary rehabilitation be found, something about him where he can be rehabilitated more quickly than others, nothing identified that shows what makes him more able to address these issues

-lack of responsibility if anything take him longer, but not shorter

-I am going to go over a couple of facts that I think are important for the case

-This was a sexual assault that occurred with two individuals with no prior sexual history,

-No consensual sex previously, they work acquaintances who hung out once or twice in dorm setting

-Ms. Velasquez is 20 to 30 years younger than Mr. Balallo, she was extraordinarily intoxicated to the point she not remember much

-She on her menstrual cycle at the time of this event, testimony that came in that she had been dancing around her room naked, when her female roommate came back

-My recollection was the dancing part not trial testimony, but in initial statement, I could be wrong

-That was when these two men left her room

-Ms. Velasquez clear that when she came back she had clothes on, she went to bathroom to change her pad, as she doing that, as she sitting on the toilet, he grabbed her and pinned her against the wall

-That her testimony at trial

9:30:20 AM

-A towel rack broken off but what arms sit in protruding from the wall, Ms. Velasquez testified about the pain from that and she had bruising that was consistent with that

-The borrowing of the money, from trial testimony, again I wish I had better recollection from year ago, my recollection was from the person was Mr. Balallo never asked to borrow money, that night at 3 in the morning, unusual, he woken up and I believe he was intending, I thought his testimony was he said something about wanting to leave town, I won't swear to that

-There was, MS. Ma talked some about no evidence that Ms. Velasquez penetrated her, that not true, she talked about being in the bathroom with Mr. Balallo, he clawing at her vagina and his fingers inside

-Not that the state decided to only indict one, she not identified Mr. Mayuyo identified, no basis to charge both

-There was the tail end of the Glass wire, maybe it was Mr. Mayuyo who penetrated me, it was off the cuff, her emotions were rather high at that point, she was very, very mad at the two of them

-The idea that Mr. Balallo be treated as an SA 1 defies the difference

-His action and conviction was different than SA 2, penetration, pretty violent, she had vaginal lacerations from his actions

9:33:02 AM

-It was a pretty violent penetration

-Regarding the referral order, in the co-defendant's case Judge Douglas denied his motion for referral to three judge panel

-Mr. Mayuyo provided a sex offender evaluation where a doctor had said he a low recidivist candidate, but her order in that case and some of the findings she made yesterday at odds to what in the order referring this case

-Things that transcend both defendant, I at a little loss on how to reconcile her order to referring this with her rationale for denying the other one

-In this present case, she cited the P.S.R. in this case, not sure if your Honors read the evaluation of this P.S. R. but it is bizarre

-The evaluation was almost defensive,

9:34:25 AM

Ms. Maciolek:

-I am uncomfortable talking about Mr. Mayuyo's, I wasn't there, I saw the order denying the

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referral

-To the extent the State ask the panel to rely on what the Judge said yesterday

9:34:54 AM

Judge Smith:

-Strictly speaking not pay attention to that, not part of the record in this case

9:35:03 AM

Ms. Gruenstein:

-Evaluation section for Mr. Ma is exactly the same words for Mr. Balallo, a cut and paste, that was hard for me to reconcile as these two crimes are different

-Mr. Balallo crime more violent

9:35:30 AM

Judge Suddock:

=Limit yourself to the facts in this case

-We have no basis, you not submitted the Mayuyo P.S.R.

9:35:47 AM

Judge Smith:

-The same representations about Dr. Smith, which I am sure are accurate but we don't have Dr. Smith's actual words we can consider

9:36:01 AM

Ms. Gruenstein:

-I would just ask that not a whole lot of weight be given to that P.S.R. you all have that, you seen it, the idea of saying these circumstances are surreal in a state where sadly it is not

-Again to blame sex assault on the fact someone far away from home without basis for saying that and again this case, Ms. Maciolek has read the reviews denying it, Judge Douglas

9:36:45 AM

Judge Suddock:

I mean it, stop referring to an off record, it is really inappropriate for you to argue it

9:37:00 AM

Ms. Gruenstein:

P.S.R. says this a matter of mixed signals, in the heat of the moment being overcome by lust,

-Not accurate, not something this court rely on, it is not accurate representation of the facts in this case

-This not a matter of some consensual activity crossing a line, this is a man who went into the bathroom as Ms. Velasquez was taking care of rather personal business and attacked her

-The, Ms., in the referral order Judge Douglas said the factors in this were correctable

-Again no evidence in the record to show how these factors correctable, if he released he correct any of the factors, again we don't know actually what happened, no evidence to show why this happened

9:38:22 AM

Judge Smith:

-Irrelevant he has no history of doing this at all?

9:38:28 AM

Ms. Gruenstein:

-I think that is something come up, my argument would be he in the first time category, an aggravator if he had done this before

-I don't think it is irrelevant but also the fact he never done this before we know of means he is extraordinary, I think it means he average, average first time felon sentenced to sex offense not have history,

-Just the fact that he never been caught doesn't mean he exceptional, it means he average

-Again, in the order referring this case, Judge Douglas stated that there is an absence of force in this case, at odds with trial testimony, with Mr. Balallo there was testimony of force, he pushed her against the wall, towel rack and clawed at her vagina, he had two scratches on either side of his neck, she fighting against him

9:41:00 AM

- This was a forcible assault and there was last of all, she wrote that, Ms. Velasquez suffered minimal effects, don't know if anyone had the opportunity to listen to trial testimony, it pretty clear at trial Ms. Velasquez traumatized, she written a letter talking about a year later she still has effects
- To say there has been minimal effects is accurate, Ms. Velasquez was severely impacted
- At trial she wore that trauma very clearly on her sleeve
- Again I think, I don't think rehabilitation has been proven beyond clear and reasonable
- Don't think it is manifestly unjust to sentence him to 20 years, nothing about this individual that says it should be left
- 20years is a lot of time and to say that it not applied for no basis to him to indicate he different than any other offender mis-states the way this panel should be used
- Under the Chaney criteria, seriousness of this, this was a woman who was 20 years old, away from home for the first time, living in dorm setting, she testified at trial she not made friends, this the first time she branched out, in her own room, own bathroom, when he chose to violate her space
- I think this is one of the more serious even within the realm of SA 1, don't think it sufficiently minimal to make it similar to SA 2
- Isolation is important to protect the community, without explanation as to why this happened other than alcohol and loneliness, that is troubling, Ms. Velasquez been severely impacted and harmed by this
- Deterring Mr. Balallo, there is a chance he may be deported, not a matter of protecting Alaska citizens but deterring him from any other acts
- Community condemnation
- This type of behavior in a processing plant where a lot of people in vulnerable positions
- Ms. Velasquez had to fly back to Unalaska to testify at trial, in the larger community of Alaska and narrower community of processing plant, very important to say this type of behavior, even if everyone drinking heavily, is unacceptable
- Again don't think extraordinary potential for rehabilitation

9:44:24 AM **Ms. Maciolek:**

- I would like to respond to a few things
- I disagree with Ms. Gruenstein's characterization that LV was not sure who penetrated her
- On that

9:44:47 AM **Judge Stephans:**

- Why matter

9:44:51 AM **Ms. Gruenstein:**

- Difference in SA 1 and 2

9:44:56 AM **Judge Stephans:**

- Your client convicted of SA 1, jury determined it was him

9:45:04 AM **Ms. Gruenstein:**

- No other choice but to convict him
- Reason it does matter is that the reason, I willing to speculate that Judge Douglas denied

9:45:22 AM **Judge Smith:**

- Again, if we

9:45:27 AM **Ms. Maciolek:**

- You can take judicial notice he not referred

9:45:33 AM **Judge Smith:**
-We don't know why so it is difficult

9:45:40 AM **Ms. Maciolek:**
-You heard a lot about that night
-Including Mr. Mayuyo and LV going into her room, that when they down the hallway partying at another room, the two of them, Diego Mayuyo and Ms. V went to her room, after that two men knocked on her door and an hour and a half two other men knocked on her door
-I disagree that Ms. V was shy and that this the first night she broadened
-I think she was quite popular based on the people knocking on her door throughout that particular night
-To say the P.S.R. is bizarre and not given weight begs the question of why we doing P.S.R., this is commonly used procedure and relied on, now with the new policy of open sentencing, why are we doing this, I relying on that P.S.R. and Judge Douglas' order when I chose not to proceed with Dr. Smith's evaluation
-His said almost the same thing, the causal factors were alcohol, and distance from home and that he would score low on the testing, diagnostic testing
-So you know to say that can't be relied on now begs the question has there been detrimental reliance, I ask that you do take notice of P.S.R. and that is Smith case, from 1995, this is favorable P.S.R., Mr. Mayuyo was far from home and working to send money home to his family

9:48:29 AM **Judge Stephans:**
-Conclusion was this was an attack for no reason, appears appropriate and make isolation a policy, you agree with that
-Page 7, last paragraph under e valuation section

9:48:50 AM **Ms. Maciolek:**
-Make isolation a priority in sentencing
-I don't know that the Judges are the gatekeepers in sentencing

9:49:06 AM **Judge Stephans: :**
-I come from jurisdiction we have P.S.R. for everything, the evaluation section is a recommendation
-I frankly give it very little weight, I not bound by it, often when cases gone to trial and author relying on
-I know far more about the case than the author of the P.S.R., I look at it but to me it is akin from getting recommendation from custody investigator, o.k., I have it, sometimes agree and sometimes don't, I am not bound by it
-Do I see a utility in P.S.R.?
-I have an opinion, collateral contacts, prior record, whether person in treatment before
-The evaluation is the Probation Officer looking over what they look at and making a recommendation
-I don't know they have any particular expertise I wouldn't have to do that

9:50:38 AM **Ms. Maciolek:**
-Then look at trial judge's referral order

9:50:44 AM **Judge Stephans:**
-Which parrots this almost word for word

9:50:51 AM **Ms. Maciolek:**
-She does agree it was situational event and she does agree everyone was intoxicated and she does reference that the present offense Mr. Balallo perceived something that not there in the heat

of drunkenness

-That is essentially what Dr. Smith concurred with, the reason you don't have it is I relying on P.S.R. and referral order

-if you telling me now you not give it any weight that is concern

9:51:35 AM

Judge Stephans:

-It includes findings not binding

9:51:41 AM

Judge Smith:

-You putting weight on the fact the trial Judge agreed with the Presentence Report since she did sit through the trial

9:51:59 AM

Ms. Maciolek:

-Right

-So as far as isolation goes, that is a factor, but looking at 10 years, reduce in half, that a significant period of isolation, it is also community condemnation and I disagree those two goals not already satisfied

-His life changed irrevocably, so ten years, five years is not going to amplify those effects really, I don't think that sentence, I mean stronger message than he already done

-Then you get into the seriousness of the crime and isolation, leave it at 20 years and go on down from then, even 10 years is still significant isolation

-That what three judge panel is for, that what all the case law, three judge panel is that safety value to make sure the Chaney criteria is followed vis a vis sentencing

-This is clear case of manifest injustice e

9:53:26 AM

Judge Smith:

-Ma'am, anything you like to say to the panel?

-Ms. Velasquez, anything you like to say

9:53:40 AM

Ms. Velasquez:

-Sorry, I had it on mute

-Honestly nothing to say, it is a little bit overwhelming, I don't have nothing to say

9:53:55 AM

Judge Smith:

-That is fine

-Either way is fine, same with you Mr. Balallo, if anything you want to say to the court, if not that is fine too

9:54:09 AM

Mr. Balallo:

-I apologize to Lynda, that Lynda was hurt by what happened

9:54:25 AM

Judge Smith:

-Thank you sir

-O.k., we will step out and make a decision

9:54:33 AM

Record off

11:54:40 AM

Record on

11:54:42 AM

Judge Smith:

-We are back on record, 3UN-12-51

-Panel has arrived at a determination

-First issue is whether defendant has proven by clear and convincing evidence that he has an exceptional potential for rehabilitation

-Under Kirby we need some understanding as to why the defendant did what he did and we have no evidence as to why this occurred, we also don't have any evidence as to whatever caused it is correctable or not likely to reoccur, in framework of Kirby that means that the exceptional potential for rehabilitation has not been proven by clear and convincing evidence

-Other issue is in possession of 20 to 30 presumptive term would be manifestly unjust, under Beltz two issue panel address

-First is whether there are specific circumstances that make a defendant different from particular offender within the category

-Category defined by legislature, when they increase the presumptive terms for sexual assault, essential was sexual predators, people who had history of charged or uncharged of sexual abuse or sexual assault and also exhibited, there was a framework of controlling behaviors very important to legislature decision as why they felt people who committed these offenses needed to be isolated

-Proven has proven by clear and convincing that he is significantly different as defined by the legislature

-47 years old, no history, here as a legal immigrant, elected to office in the Philippines, strong family support, gainfully employed and has been for quite a while

-worked in canneries out there for quite a while, same situational issues, this didn't happen until charged offense, no evidence in this record of any prior domestic violence or assaultive sexual behavior

-for that reason we find by clear and convincing that defendant is significantly different from the typical defender in that category as defined by legislature

-Remaining step under Beltz is to determine whether imposition of the presumptive term would be manifestly unjust, and this was an extremely difficult decision for the panel, we had extensive discussions about this

-Notwithstanding any person feelings members of the panel might have, we had to take to heart the comment in Beltz, quote, the safety value statute on the three judge panel do not authorize sentencing judges to disregard the legislature's assessment concerning the relative seriousness of the crime or the relative appropriateness of the penalty

-That is what made this particularly difficult

-As I stated, we the panel do not know why this event occurred, why this happened, we don't know whether it will reoccur, it was serious assault, it did cause important physical damage to the victim

-Of great significance to panel, evidence supports inference this offense only stopped as the other person walked into the bathroom

-Under the case law, to find manifest unjust find the presumptive term would shock the consciousness, the Chaney criteria, given the assault isolation important consideration, community consideration and general

We find that the defendant did not prove by clear and convincing evidence that 20 to 30 year sentence would shock the conscious

-Refer back to Judge Douglas for sentencing

11:57:32 AM

11:59:32 AM

Ms. Maciolek:

-Did panel consider removing

11:59:39 AM

Judge Smith:

-We don't have that authority, that our interpretation of subsection (e)
-For what it is worth that on appeal

11:59:53 AM

Judge Stephans:

-Lockhart decision states that AS, the subsection of the ability to three judge panel to lift prohibition on discretionary parole applies only on

12:00:19 PM **Judge Smith:**
-Issue is up on appeal is whether or not that language under subsection (c) we have authority
-Anything else

12:00:36 PM **Judge Stephans:**
-Just because I mentioned P.S.R., the explanation or what occurred in the P.S.R. we didn't find
persuasive and for me personally, to the extent had Dr. Smith called to testify, I not found that
very persuasive

12:01:05 PM **Judge Smith:**
-Thank counsel for arguments and briefing it was really excellent
-Any and all objections are noted for the record

12:01:18 PM **Record off**