1 **IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**

2 **THIRD JUDICIAL DISTRICT AT KENAI**

3

STATE OF ALASKA,)
)
Plaintiff,)
)
v.)
)
KEITH ROSCOE BARTMAN,)
)
Defendant.)
) **Case No. 3KN-14-947 CR**

MEMORANDUM AND ORDER

A hearing before the Three-Judge Sentencing Panel (Panel) in this case was held on November 23, 2021. The Panel at the conclusion of the hearing verbally exercised its authority: per AS 12.55.175(b) to sentence Mr. Bartman to a period of incarceration below that which the trial judge – Kenai Superior Court Judge Jennifer Wells - was authorized to impose and, per AS 12.55.175(c); and, per AS 33.16.090(b)(2), to make him eligible to apply for discretionary parole after a certain period of time provided that he has successfully completed an ordered rehabilitation program. This Memorandum is intended to incorporate, supplement and, if necessary, clarify, the Panel's decisions.[1]

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[1] As the Panel noted during the hearing; there is simply not enough time at the conclusion of a Panel hearing for the Panel to be able to list and discuss each and every point considered by the Panel; and, that Criminal Rule 32.4(e) requires the Panel to "provide a written statement of its findings and conclusions in support of any order remanding a case to the referring judge," but the Panel's practice for the past few years has been to issue such a written statement in every case, whether remanded or not, and to send a copy of the same to the Alaska Court System's Law Library, in order to provide attorneys and trial judges with information that may be useful in requesting Panel referrals and in deciding such requests, so the Panel is issuing this Memorandum and Order.

Alaska Court System

1. Case Background

Mr. Bartman was born on May 25, 1985. He and T.B. began an intimate co-habitation relationship in Anchorage in late 2013. T.B. has three minor daughters – H.B., C.B., S.S. H.B. was born on June 24, 1999 and is oldest of the three. Mr. Bartman, J.B., and her three minor daughters moved to Kenai in early 2014.

Mr. Bartman was charged herein with five counts of Sexual Abuse of a Minor (SAM) 2nd Degree in violation of AS 11.41.436(a)(5)(A).[2] Counts 1, 2, and 5 pertain to H.B., then age 14, Count 3 to C.B., and Count 4 to S.S. He pled not guilty and the case proceeded to trial in early 2019. The jury returned: guilty verdicts on Counts 1 (lesser-included offense of Attempted SAM 2nd Degree), 2 and 5; and, not guilty verdicts on Counts 3 and 4.[3]

The State alleged[4] in Count 1: that Mr. Bartman touched H.B.'s genitals over her clothing as he attempted to undo her pants, before she pushed him away and said "no;" in Count 2 that he had touched H.B.'s genitals; and, in Count 5 that he had put his mouth on H.B.'s genitals.[5]

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[2] AS 11.41.436(a)(5) at that time provided that:

> (a) An offender commits the crime of sexual abuse of a minor in the second degree if . . . (5) being 18 years of age or older, the offender engages in <u>sexual contact</u> with a person who is under 16 years of age, and (A) the victim at the time of the offense is <u>residing in the same household</u> as the offender and offender <u>has authority over the victim</u>; **or** (B) the offender occupies a <u>position of authority</u> in relation to the victim.

(All emphasis herein is added by the Panel).

[3] With respect to Counts 3 and 4, C.B. stated that while she and S.S. were in bed for the night she saw Mr. Bartman unzip his pants and attempt to remove S.S.'s blanket while S.S. was sleeping and that he attempted the same thing with her the night before but she had resisted by kicking at him and he stopped and left.

[4] ***See,*** Trial transcript at pp. 1030-32.

[5] AS 11.81.900(b)(59) at that time, in pertinent part, provided that:

The Amended Presentence Report (PSR) and H.B.'s trial testimony reflect that Mr. Bartman also had sexual contact with H.B. on several occasions during the time periods covered by Counts 1, 2, and 5 for which he was not charged.

A major dispute at trial was whether the State proved beyond a reasonable doubt that Mr. Bartman and T.B.'s three minor daughters resided in the "same household" and that he had "authority over" said children. Judge Wells provided a jury instruction for the "authority over the victim" element that was based, in part, on the statutory definition of "position of authority."[6] Judge Wells denied Mr. Bartman's related motion for judgment of acquittal.[7]

> (59) "sexual contact" means (A) the defendant's (i) knowingly touching, directly or through clothing, the victim's genitals, anus, or female breast; or (ii) knowingly causing the victim to touch, directly or through clothing, the defendant's or victim's genitals, anus, or female breast.

And at that time AS 11.81.900(b)(60), in pertinent part, provided:

> (60) "sexual penetration" (A) means genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body; each party to any of the acts described in this subparagraph is considered to be engaged in sexual penetration.

[6] AS 11.41.470(5) at that time provided:

> "position of authority" means an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor.

2. Sentencing Range/Restrictions

Mr. Bartman's prior criminal record includes a conviction in 2006 for Attempted SAM 2nd Degree.[8] The PSR reflects that he repeatedly had sexual contact over a period of five months with the 7-year old daughter of his then girlfriend while they lived together. He was sentenced to serve 2 years, with 1 year suspended, and placed on probation for 3 years. His probation conditions included a requirement that he complete a sex offender treatment program (SOTP).

Mr. Bartman was convicted in 2011 of Attempted Sexual Assault 2nd Degree[9] for conduct that occurred in 2004 but was not charged until 2010. The PSR reflects that: Mr. Bartman had been visiting a former girlfriend – Surrana Gundersen - in an apartment building; he saw J.M., a college student, in a common area; they did not know each other; he approached her; and J.B. reported that he appeared to be intoxicated, he fondled her breast over and under her clothing and put his hand down the front and back of her pants, she told him to stop and let her go, she tried to pull away, he pulled her head back by her hair and punched her in the

[7] It is not the Panel's role to review a trial judge's decisions with respect to jury instructions or a motion for judgment of acquittal. Mr. Bartman may address those matters on appeal. The Panel is noting the above because the same are pertinent to the issues that are before the Panel.

[8] 3AN-06-4491 CR.

[9] 3AN-10-14312 CR. Mr. Bartman's other criminal record consists of: 2004 Theft by Shoplifting (75 days imposed with 70 days suspended); 2007 (Attempted Failure to Register as Sex Offender 2nd Degree (AFRSO) (flat 35 days imposed)); 2007 Failure to Appear (30 days all suspended); 2009 AFRSO (90 days imposed with 80 days suspended); 2010 (AFRSO) (1 year imposed with 215 days suspended); 2011 AFRSO (flat 180 days imposed); 2012 Assault 4 (1 year imposed with 305 days suspended, alcohol screening ordered); and, 2013 (Violating Domestic Violence Protective Order (VDVPO) (flat 45 days imposed)).

stomach, and he bit and salivated on both sides of her neck.[10] He was sentenced as a first offender and received a flat jail sentence of 180 days.

Mr. Bartman is subject to a 99-year mandatory sentence on Counts 1, 2, and 5.[11] The jail sentences on the Counts must be at least partially consecutive.[12] Judge Wells could reduce his composite jail sentence by as much as one-half of the mandatory term as imposed – concurrently and consecutively.[13] He is not entitled to mandatory parole[14] or to be able to apply for discretionary parole.[15]

3. Aggravating/Mitigating Factors

Judge Wells found that the State had proven four aggravating factors: AS 12.55.155(c)(8) (Mr. Bartman's prior history includes repeated instances of assaultive behavior); AS 12.55.155(c)(18)(B) (he was convicted of a felony offense "specified in AS 11.41.410 – 11.41.458" and he "has engaged in the same or other conduct prohibited by a provision of AS 11.41.410 – 11.41.460 involving the same or another victim.");[16] AS 12.55.155(c)(18)(E) (he was convicted of a crime specified in AS 11.41.434 – 11.41.458 and he was at least 10 years older than H.B.); and, AS 12.55.155(c)(21) (his criminal history includes repeated instances of

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[10] The record also reflects that: Ms. Gundersen witnessed the incident and reported that she saw Mr. Bartman approach J.M., put his mouth on J.M.'s neck – possibly biting or licking her, and he also appeared to be tickling the front of J.B.'s body, in the stomach area; and, that Ms. Gundersen was injured as a child and as a result has some memory problems and appears to be "slow."

[11] AS 12.55.125(i)(3)(E) (for Counts 2 and 5) and AS 12.55.125(i)(4)(E) (Count 1). The Panel notes that these and the other sentencing statutory cites are based on the statutes in effect in 2014.

[12] AS 12.55.127(b),(c)(2)(F).

[13] AS 12.55.155(a)(2).

[14] AS 33.20.010(a)(3)(A).

[15] AS 33.16.090(a)(1),(b)(3).

[16] Mr. Bartman acknowledged that this aggravating factor applies.

criminal conduct – felonies or misdemeanors – "similar in nature to the offense for which [he] is being sentenced").

The State had also proposed the AS 12.55.155(c)(10) aggravating factor ("the conduct constituting the offense was among the most serious conduct included in the definition of the offense") with respect to Count 5, arguing that Mr. Bartman had actually committed the greater offense of SAM 1st degree[17] because he had engaged in "sexual penetration" (cunnilingus) with H.B. Mr. Bartman opposed the proposed aggravating factor.

Judge Wells found that the State may have proved that Mr. Bartman had probably committed the greater offense with respect to Count 5 but, given the way the case was tried,[18] had not proven the same by clear and convincing evidence.[19]

Mr. Bartman proposed one statutory mitigating factor – AS 12.55.155(d)(9) ("the conduct constituting the offense was among the least serious conduct included in the definition of the offense."). The State opposed the proposed mitigating factor.

Judge Wells found that Mr. Bartman had proven this mitigating factor by clear and convincing evidence[20] Judge Wells' related analysis initially focused on the statutory

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[17] AS 11.41.434(a)(3)(A).

[18] Judge Wells observed that the State had not charged Mr. Bartman with a "sexual penetration" offense, H.B. made statements concerning sexual penetration for the first time during her trial testimony, and was impeached with her prior related statements, and that: "[t]he bulk of the questioning . . . both on direct and cross examination, focused on Mr. Bartman's defense that he and H.B. were not part of the same social unit and he did not have a position of authority over H.B." Decision Regarding Most Serious/Least Serious Aggravator/Mitigator at p. 6.

[19] AS 12.55.155(f)(1) provided that the aggravating factors set forth at AS 12.55.155(c)(7), (8), (12), (18)(B), (19), (20), (21), and (31) must be established by clear and convincing evidence to the satisfaction of the trial judge, not a jury. AS 12.155(f)(2) provided that all other statutory aggravating factors had to be presented to a jury, unless waived by the defendant, and shown by proof beyond a reasonable doubt, unless the defendant stipulates to the existence of the aggravating factor. And AS 12.55.155(h) provided that if an aggravating factor listed in AS

definition of "position of authority" - she found that: Mr. Bartman was, in effect, H.B's "babysitter" at times; babysitters generally exercise less authority over a child than the other "positions" listed in the statutory definition of "position of authority;" he had a minimum level of actual authority over H.B.; and, he did not sexually abuse her when babysitting her. Judge Wells then found that he had only "minimally shared a household with H.B."[21] as they had not had a home of their own – staying in shelters, other people's homes, and hotels – and at the time of the offenses for which he was convicted he and T.B. were sleeping in a car outside the home in which the children were sleeping.

4. Panel Referral

Mr. Bartman requested that Judge Wells find that he had shown by clear and convincing evidence that manifest injustice will result if he is sentenced "within the presumptive range, whether or not adjusted for aggravating or mitigating factors"[22] and refer this case to the Panel on that basis. The State opposed his request.

Judge Wells granted Mr. Bartman's request.

Judge Wells began her analysis by providing the following recitation of the pertinent evidence presented at trial:

> Regarding the underlying conduct, the jury found that Mr. Bartman had had sexual contact with H.B., the then-fourteen-year old daughter of [T.B.], SAM 2 is committed when "being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and . . . the offender occupies a position of authority over the victim." The jury acquitted Mr. Bartman for conduct relating to the two youngest daughters, C.B. and S.S. The question of

12.55.155(f)(1) or (f)(2) is established as provided therein then any additional aggravating factor may be decided by the trial judge applying the clear and convincing evidence standard.

20 AS 12.55.155(f)(1) provided that mitigating factors are decided by the trial judge applying the clear and convincing evidence standard.

21 Decision Regarding Most Serious/Least Serious Aggravator/Mitigator at p. 7.

22 AS 12.55.165(a).

whether Mr. Bartman had a '<u>position of authority</u>' over H.B. was contested at trial.

The evidence indicated that [T.B.] met Mr. Bartman in either December 2013 or January 2014, and dated him until June 2014. [T.B.] had custody of her daughters and she, her children and Mr. Bartman at first lived in Anchorage hotels. In February they moved to Kenai and stayed with a variety of friends. Ultimately, in June, 2014, Ms. Valerie Campbell met the couple at a food bank and offered to let the children stay in her home. Mr. Bartman and [T.B.] slept in a vehicle. H.B. testified that she viewed Mr. Bartman as her mother's boyfriend, and someone that the children had to listen to because he was an adult. She did not view him as a father figure. [T.B.] testified that Mr. Bartman sometimes helped her with the girls, including with <u>babysitting</u>. [T.B.] testified that H.B. babysat the girls more frequently than Mr. Bartman, however.

H.B. testified that Mr. Bartman would find her when she was sleeping weekly and, although he started touching her over her clothes, he progressed to using his fingers to 'go between the folds or [her] vagina' and he 'would used his tongue to touch [her] vagina and stuff.' Her younger sisters were often in nearby beds and sometimes saw Mr. Bartman with their sister. Mr. Bartman always approached her at night, and did not touch her when he <u>babysat</u> during the day. In June, 2014, H.B. struggled with her mental health and was hospitalized. On June 21, 2014, when she told the police about Mr. Bartman's conduct, Trooper Gill noticed that H.B. had cut the words "IM FINE" inter her left wrist.

When Mr. Bartman learned that a report had been made to the police, he attempted to drown himself in the Kenai River and was saved by law enforcement. He went the Alaska Psychiatric Institute (API) for a short period, and was arrested upon release. Mr. Bartman made limited admissions, explaining that acted this way because H.B. led him on.[23] Additionally, he was trying to console her for some difficulties she had been having. Mr. Bartman was excited that H.B. found him attractive. Mr. Bartman also told law enforcement that he and [T.B.] split a fifth of vodka almost every weekend but it is unclear if alcohol use impacted Mr. Bartman's criminal conduct.[24]

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[23] The record reflects that Mr. Bartman told law enforcement that: he had placed his mouth on H.B.'s genitals while attempting to console her after her grandmother had died, after which he told her that their being together was not bad, and he had placed his hands down her pants on occasion, all of which is her fault because she had led him on, including one incident during which she had given him a provocative look and put her hand on his stomach and laid her head on his shoulder; and, he did not believe that there was anything wrong with his engaging in this sexual activity with H.B.

[24] Referral to the Three-Judge Panel at pp. 2-4. (citations omitted).

Judge Wells then: discussed her prior findings with respect to the proposed aggravating and mitigating factors; noted that Mr. Bartman faces a presumptive 99-year sentence on each of Counts 1, 2, and 5, with no mandatory or discretionary parole; and, that the mitigating factor she found could only reduce the composite sentence to 49.5 years, which would likely mean, given his age of 37, that he would spend the remainder of his life "behind bars."[25]

Judge Wells stated that the foregoing "gives the court pause"[26] and noted that: Mr. Bartman "has a somewhat limited criminal record;"[27] and, "of more importance"[28] he was sentenced as first offender for each of his two prior felony sexual offenses, and he received a flat sentence for the second conviction, with no "felony probation or rehabilitative efforts."[29] And she noted that Mr. Bartman in October 2007 "after some failures to report and to update the Sex Offender Registry . . . rejected probation and served the remainder of his time"[30] without completing a SOTP.[31]

Judge Wells then observed that Mr. Bartman contends that: the legislature, when it drastically increased the sentences for sexual felonies in 2006 had intended for the Panel to be a safety net to avoid manifestly unjust sentences; the legislature otherwise intended for courts to impose harsh sentences for sexual felonies because many such crimes are not reported,

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[25] Referral to the Three-Judge Panel at p. 5 (citations omitted).
[26] Referral to the Three-Judge Panel at p. 6.
[27] Referral to the Three-Judge Panel at p. 6.
[28] Referral to the Three-Judge Panel at p. 6.
[29] Referral to the Three-Judge Panel at p. 6. Judge Wells then addressed the facts of the two prior sexual offenses.
[30] Referral to the Three-Judge Panel at p. 7.
[31] Judge Wells also stated that it was unclear why he did not complete a SOTP.

defendants likely have unknown victims, and SOTPs are ineffective; and, subsequent research suggests that the SOTPs may be effective.[32]

Judge Wells, considering the totality of the circumstances, found that Mr. Bartman's circumstances are "atypical"[33] because: he was sentenced as a first offender on his two prior sexual offenses due to the chronology of the offenses; he received a "misdemeanor amount of jail"[34] time on the second such offense, with no court-ordered SOTP or probation; and, the legislature, in setting the presumptive sentencing ranges for a third sexual felony offender, would have assumed that the defendant had been ordered to complete a SOTP in each of the two prior cases, and a third such conviction would support the legislative assumption concerning the effectiveness of SOTPs.[35]

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[32] Mr. Bartman attached to his Sentencing Memorandum a copy of a Bitna Kim, Peter J. Benekos, and Alida V. Merlo, *Sex Offender Recidivism Revisited: Review of Recent Meta-analyses on the Effects of Sex Offender Treatment*, 17(l) Trauma, Violence & Abuse 105 (2015). The authors of this article concluded, in part, that:

> The purpose of this study was to review and synthesize meta-analyses of sex offender treatments designed to reduce recidivism. One of the most promising findings is that every meta-analysis in this review found significant recidivism reduction outcomes. Compared to the Craig eta al. (2003) study, the current review of more recent meta-analyses of sex offender treatment efficacy demonstrated a larger and more robust sex offender treatment effect in reducing recidivism.

p. 114.

[33] Referral to the Three-Judge Panel at p. 8.

[34] Referral to the Three-Judge Panel at p. 8.

[35] Judge Wells then noted the lower presumptive ranges that Mr. Bartman would be facing if one or both of his prior felony convictions were not for a sexual felony.

1 Judge Wells reviewed the sentencing considerations set forth in AS 12.55.005[36]
2 and noted that a 99-year presumptive term reflects that the legislature has given up on the
3 ***Chaney*** goal of rehabilitating persons convicted of a third sexual felony, even if a Class B or C
4 felony, which would be appropriate for a defendant who has multiple undisclosed victims and is
5 not amenable to related treatment, in which case isolation and community condemnation are the
6 ***Chaney*** goals.[37]
7 Judge Wells then found that:
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9 > Mr. Bartman is not a youthful first-time offender, but the court views ***Collins*** as
> an invitation to make the referral if there is something that makes a sex offense
10 > case atypical. Although Mr. Bartman certainly has given the court no reason to
> hope for his rehabilitative prospects, the court questions the justice of the
11 > sequence of 2 years in jail, then 186 days in jail, to 99 years in jail for his sexual
> crimes. As Mr. Bartman notes in his sentencing memorandum, it is hard to argue
12 > that the court's sentencing goals could not be met by something less than 99 years

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14 [36] AS 12.55.005 is based on the sentencing considerations identified in ***State v. Chaney***, 477
15 P.2d 441, 444 (Alaska 1970). ***See, Nell v. State***, 642 P.2d 1361, 1369 (Alaska App. 1982). The
Panel is referring to the AS 12.55.005 factors as the "***Chaney***" considerations or goals.
16 [37] Judge Wells discussed the Alaska Court of Appeals' decision in ***Collins v. State***, 287 P.3d
791, 796 (Alaska App. 2012) wherein the Court addressed the legislature's assumptions in
17 increasing the jail sentences for sexual felonies in 2006 that sex offenders have a history of
unreported or unprosecuted sexual offenses and that they are not responsive to rehabilitative
18 efforts, and held that cases could be referred to the Panel if one or both such presumptions do not
apply to the defendant, particularly if the defendant is youthful. The legislature subsequently in
19 effect at least partially overruled ***Collins*** by enacting AS 12.55.165(c) – which prohibits a trial
20 court from referring a felony sexual offense case to the Panel "based solely on the claim that the
defendant, either singly or in combination, has (1) prospects for rehabilitation that are less than
21 extraordinary; or (2) a history free of unprosecuted, undocumented, or undetected sexual
offenses" – and AS 12.55.175(f) – which prevents the Panel from finding in a felony sexual
22 offense case that imposition of a sentence within the presumptive sentencing range, whether or
not adjusted for aggravating or mitigating factors, would be manifestly unjust "based solely on
23 the claim that the defendant, either singly or in combination, has (1) (1) prospects for
rehabilitation that are less than extraordinary; or (2) a history free of unprosecuted,
24 undocumented, or undetected sexual offenses." ***See, State v. Seigle***, 394 P.3d 627, 631 (Alaska
App. 2017). But these statutory revisions do not prevent the trial court or the Panel from
25 considering these circumstances, though the same cannot be the sole basis for the trial court
referral to the Panel or the Panel's decision to accept a case and impose sentence.

in jail – or even an adjusted 49.5 years (without any parole), particularly if the court were to give weight to the goal of rehabilitation.

For these reasons, the court is referring this case to the Panel on the manifest injustice theory.[38] The Panel will schedule a hearing and notify the parties of the same in the relatively near future.[39]

5. Parties' Positions

A. Mr. Bartman

Mr. Bartman contends that: the Panel is bound by Judge Wells' aggravating and mitigating factors findings; and, manifest injustice would result if he is sentenced within the range that Judge Wells could impose based on her finding of a mitigating factor – 49.5 to 99 years - as the totality of the circumstances reflect that he is an atypical offender because: his offense was among the least serious included within the definition of the offense due to the limited evidence with respect to the "same household" and "authority over" elements of the SAM 2nd Degree offense, and if convicted of lesser included offense of SAM 3rd Degree he would be subject to a 5-year maximum sentence per the statute in effect in 2014;[40] "his fairly minimal prior record;"[41] the mitigated nature of the 2004 incident considering the facts of that

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38 The Panel presumes that Judge Wells made this finding based on the clear and convincing evidence standard, as required by AS 12.55.165(a), as she specifically cited AS 12.55.165. Referral to the Three-Judge Panel at p. 8. The Panel notes that Judge Wells indicated that a close question was presented and under such circumstances a referral to the Panel is appropriate per ***Harapat v. State***, 174 P.3d 249, 255-56 (Alaska App. 2007). Referral to the Three-Judge Panel at p. 1, n. 1.

39 Referral to the Three-Judge Panel at pp. 10-11. The Panel notes that Criminal Rule 32.4(e) requires that the Panel "either sentence the defendant or remand the case to the judge who referred the case" "[w]ithin 60 days from the date that the case is transmitted to the sentencing panel."

40 AS 11.41.438; AS 12.55.125(e)(3).

41 Three Judge Panel Sentencing Memorandum at p. 2.

case and the "lack of consent" element of the offense;[42] his youthfulness at the time of the 2004 and 2006 offenses; his lack of sex offender treatment;[43] and his "lack of education, history of being in special education and chronic homelessness."[44]

B. State

The State contends: the Panel is not bound by Judge Wells' findings with respect to the statutory aggravating and mitigating factors – in particular with respect to the "least serious" mitigating factor and "most serious" aggravating factor; Judge Wells erred in finding that the "least serious" mitigating factor applies and that the "most serious" aggravating factor does not; and, in any event, the legislature properly determines the presumptive range for felony sentences, and it would not be manifestly unjust if Mr. Bartman is sentenced within the

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[42] Mr. Bartman cites ***State v. Townsend***, 2011 WL 4107008 (Alaska Ct. App. Sept. 14, 2011), which was issued shortly after he was sentenced on the 2004 case, in which the Court of Appeals held that the "without consent" sexual assault element, as defined by AS 11.41.470(8), requires that the State prove that the defendant coerced the victim - made the victim engage in sexual conduct the victim was unwilling to engage in - and that the coercion consisted of "force" (as defined in AS 11.81.900(b)) or the threat of force other than that involved in the sexual contact or sexual penetration. He primarily bases his related factual argument on Ms. Gundersen's statements to law enforcement. He also notes that he: was incarcerated pre-trial with bail set at $25,000; subject to the pre-2006 sex offense statutes; and, he negotiated a Rule 11 agreement with the State for a 180-day flat sentence.

[43] Mr. Bartman acknowledges that he did not complete a SOTP while on probation for his first felony sexual offense conviction, but stresses that he had no such opportunity with respect to the second (which was based on conduct pre-dating his first felony sexual offense case), and he argued before the Panel that his lack of education and chronic unemployment and lack of permanent housing made it difficult for him to comply with some technical probation conditions – as evidenced by this probation records which show failures to report to his Probation Officer – and related difficulty with his sex offender registration requirements – so he decided to reject probation, serve the remaining 1 year of his sentence, and then be off probation. He also argued before the Panel that he will be substantially older when released under his proposed sentence – in the 15-30 year range – and that it has been established that older defendants in general are less likely to recidivate.

[44] Three Judge Panel Sentencing Memorandum at p. 2. Mr. Bartman noted that probation conditions addressing his substance abuse and mental health issues, as well as a SOTP, would

presumptive range as there is nothing about the offenses or Mr. Bartman as an offender that make this case atypical, and a 99-year sentence is consistent with the applicable ***Chaney*** goals.

6. Decision

A. Statutory Aggravating/Mitigating Factors

The issue of whether the Panel is bound by the trial judge's statutory mitigating and aggravating factor findings is matter of first impression for the current members of the Panel.

This matter is not specifically addressed in the Alaska statutes. The Alaska appellate courts apparently have not specifically addressed the issue.

The general rule is that the Panel is not bound by the trial court's: view of the facts; finding that a non-statutory mitigating factor applies; or, manifest injustice findings.[45]

The parties principally rely on the Alaska Court of Appeals' decision in ***Heathcock v. State***[46] - Mr. Bartman on the majority decision and the State on the dissenting opinion.

The Court in ***Heathcock*** addressed a situation in which: the trial court found that the presumptive 2-year sentence would be manifestly unjust because it was too severe; the Panel agreed that the presumptive sentence was manifestly unjust, but because it was too lenient; and, the Panel retained the case and imposed a sentence in excess of the presumptive term.[47] The Court found that the Panel was bound by the scope of the trial judge's referral – whether

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help him overcome these hurdles which would increase his chances of success in terms of improving his life and not recidivating.

[45] ***See***, ***Kirby v. State***, 748 P.2d 757, 765 (Alaska App. 1987); ***Winther v. State***, 749 P.2d 1356, 1359 (Alaska App. 1988); ***State v. Ridgeway***, 750 P.2d 362, 363 (Alaska App. 1988); ***Harapat***, 174 P.3d at 256.

[46] 670 P.2d 1155 (Alaska App. 1983).

[47] 670 P.2d at 1155-56.

1 imposition of the presumptive term would be too severe – and if the Panel disagreed the Panel

2 was required to remand the case to the trial judge for sentencing.[48]

3 The majority opinion was based on a review of AS 12.55.165 and AS 12.55.175

4 and the related commentary. The majority in this regard stated:

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> We interpret these provisions of the code and the commentary as still retaining the primary control of the sentencing process in the hands of the individual sentencing judge, with restrictions placed on him by the statutory sentencing provisions. The original sentencing judge determines whether aggravating and mitigating circumstances exist under AS 12.55.155 and the extent to which these factors will result in increasing or decreasing sentences. The original sentencing judge makes the determination that is necessary to send the case to the three-judge panel to avoid manifest injustice, either because non-statutory aggravating or mitigating circumstances exist or because the presumptive sentence, even if adjusted for aggravating or mitigating circumstances, is inappropriate. AS 12.55.165. We perceive the sentencing provisions of the revised code as setting up a system where the sentencing judge has the authority to adjust a presumptive sentence within the statutory scheme of specific statutory aggravating and mitigating facts. AS 12.55.155.
>
> Before the judge may depart from that presumptive scheme, a panel of three different judges must agree with him that such a departure is necessary. The panel then decides the degree of departure in imposing sentence. AS 12.55.175. This means that the departure from the presumptive sentencing scheme will not turn on the evaluation of one judge. Rather, a departure from the presumptive scheme under the provisions of AS 12.55.165 and AS 12.55.175 will involve the decisions of four judges. First, the original judge makes the decision to refer the

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19 [48] 670 P.2d at 1158. The Court in ***Luckart v. State***, 270 P.3d 816, 821 (Alaska App. 2012) cited ***Heathcock*** in stating ("The commentary to AS 12.55.175 strongly suggests that the jurisdiction of the three-judge panel is limited by the scope of the referral from the sentencing court."). ***See also***, ***Winfree v. State***, 683 P.2d 284, 285-86 (Alaska App.1984), citing ***Heathcock*** and stating:

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> The original sentencing judge is to first impose an appropriate sentence within the statutory provisions. It is only when these provisions lead him to a result which he believes is manifestly unjust that the three-judge panel comes into the statutory scheme. Once the original sentencing judge refers the case to the three-judge panel, the panel is to sentence the defendant only if it agrees with the original sentencing judge that application of the statutory provisions would result in a sentence that is manifestly unjust.

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> case to the three-judge panel. Then the three-judge panel, if it agrees with the evaluation of the trial judge, imposes sentence.[49]

Judge Singleton issued a concurring and dissenting opinion in which he concurred in the result – remanding the case to the trial court – and dissented from the majority's discussion of the "proper relationship between the sentencing court and the three-judge panel" because he did not deem the case an appropriate one for "entering this murky thicket."[50] He then entered the thicket and in his dissent he, in part, stated:

> It appears we are all in agreement that the three-judge panel is free to exercise its independent judgment to the extent permitted by ***Juneby*** in determining which aggravating and mitigating factors are applicable and what weight should be given the factors found in redetermining the adjusted presumptive sentence in order to determine its imposition would work manifest injustice.[51]

The majority did not address the dissent in the majority opinion.

The Panel's general view is that it is bound by the trial judge's findings that statutory aggravating and/or mitigating factors do or do not apply, and the Panel then gives the same the weight, if any, under the totality of the circumstances, that the Panel finds appropriate in deciding whether to accept the case.[52]

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[49] 670 P.3d 1157-58.
[50] 670 P.2d at 1160.
[51] 670 P.2d at 1161 (citing ***Juneby v. State***, 641 P.2d 823 (Alaska App. 1982)).
[52] The Panel notes that this view is consistent with the majority opinion in ***Heathcock*** and also with the decisions in ***Kirby, Winther***, ***Ridgeway***, and ***Harapat*** cited above as this approach gives due recognition to the trial judge's express statutory authority to find statutory aggravating and mitigating factors and limited authority to make non-final decisions with respect to non-statutory aggravating and mitigating factors and manifest injustice for Panel referral purposes and to the Panels' express statutory authority to make the ultimate decision with regards to non-statutory aggravating mitigating and aggravating factors and whether manifest injustice would result from failure to consider the same or from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating and mitigating factors (and/or from a failure to make a defendant eligible for discretionary parole).

But the Panel's general view, in any event, is not determinative here because the Panel per ***Heathcock*** is bound by the scope of Judge Wells' referral. Judge Wells found that Mr. Bartman had proven the "least serious" mitigating factor finding. She determined that she had the statutory authority to impose a jail sentence of between 49.5 and 99 years. She decided that a 49.5-year sentence would be manifestly unjust. So, the Panel must decide based on its independent assessment of the totality of the circumstances, whether it agrees with her that a 49.5-year jail sentence would be manifestly unjust based on the Panel's consideration of the totality of the circumstances. If the Panel agrees then the Panel retains the case and imposes a jail sentence below that which Judge Wells is statutorily authorized to impose (49.5 years plus 2 days) (and the Panel may also make Mr. Bartman eligible to apply for discretionary parole). If the Panel disagrees then the Panel remands the case to Judge Wells for sentencing (with or without making Mr. Bartman eligible for discretionary parole).[53]

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[53] The Panel notes that it is the Panel's view that if the Panel accepts a case based only on the finding that it would be manifestly unjust if a defendant is not made eligible for discretionary parole per AS 12.55.175(c) the Panel can order the same and remand the case to the trial judge for sentencing and that the same is particularly appropriate, if not absolutely necessary, in a ***Heathcock*** situation where the Panel does not agree with the trial judge that manifest injustice would result from failure to consider an established non-statutory mitigating factor or from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, as if the Panel imposed sentence the Panel could and likely would impose a jail sentence in excess of that which the trial judge – who is to "have primary control of the sentencing process" per ***Heathcock*** – would impose on remand. The Panel has followed this approach – ordered discretionary parole eligibility and remanded the case to the trial judge for sentencing - in at least two cases over the past few years, the most recent of which was State v. Dwight Samuel O'Connor, 3AN-11-8340 CR. The other case was State v. Joseph George Solomon, 4GA-15-10 CR.

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7. Manifest Injustice

A. Manifest Injustice – Sentenced Within the Presumptive Range

The Panel must determine whether the minimum jail term that Judge Wells could impose would be manifestly unjust based on the Panel's view of the totality of the circumstances.

The Panel recognizes that: "It is the legislature, not the judiciary, which establishes the punishment or range of punishments for a particular offense;"[54] "The presumptive term for an offense represents the legislature's assessment of the appropriate sentence for the typical offender within that category;"[55] statutory aggravating and mitigating factors "define the peripheries" of the category of typical cases and identify the "relatively narrow circumstances that tend to make a given case atypical and place it outside the relatively broad presumptive middle ground;"[56] and, the Panel's role as a "safety valve" does "not authorize sentencing judges [or the Panel] to disregard the legislature's assessment concerning the relative seriousness of the crime or the general appropriateness of the prescribed penalty . . . [so] a presumptive term cannot be 'manifestly unjust' in general. It can only be 'manifestly unjust' as applied to a particular defendant."[57]

The fairness of a sentence that Judge Wells could impose is the focal point of the Panel's analysis. The Panel must decide, based on its view of the totality of the circumstances, whether such a sentence would be "plainly unfair."[58] The Panel, in order to make such a "plainly unfair" finding must "articulate specific circumstances that make the defendant significantly

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[54] ***Beltz v. State***, 980 P.2d 474, 480 (Alaska App. 1999). ***See also***, ***Scholes v. State***, 274 P.3d 496, 503 (Alaska App. 2012); ***Dancer v. State***, 715 P.2d 1174, 1179-80 (Alaska 1986).
[55] **Id.**
[56] ***Smith v. State***, 258 P.3d 913, 920-21 (Alaska App. 2011) (quoting ***Knight v. State***, 855 P.2d 1347, 1349 (Alaska App. 1993)).
[57] ***Beltz***, 980 P.2d at 480. ***See also***, ***Moore v. State***, 262 P.3d 217, 221 (Alaska App. 2011).
[58] ***Smith v. State***, 711 P.2d 561 569 (Alaska App. 1985). ***See also***, ***Shinault v. State***, 258 P.2d 858, 850-51 (Alaska 2011).

different from a typical offender within that category **or** that make the defendant's conduct significantly different from a typical offense."[59] This involves the Panel determining:

> whether the sentence [the trial judge could impose], taking into account all of the appropriate sentencing considerations, including the defendant's background, his education, his prior criminal history, and the seriousness of his offense, would be obviously unfair in light of the need for rehabilitation, deterrence, isolation, and affirmation of community norms.[60]

The Panel will: address whether Mr. Bartman has shown that his conduct in committing the offenses for which he was convicted was significantly different from a typical such offense; then whether he has shown that he is significantly different from the typical offender in his category; and if the Panel finds that he has proven either or both, then the Panel will determine whether he has shown by clear and convincing evidence[61] that manifest injustice will result if he is sentenced within the presumptive range – the range within which Judge Wells could impose sentence – taking into consideration the totality of the circumstances, including the atypical finding(s) and the ***Chaney*** sentencing criteria.

1. Mr. Bartman - Offenses

All felony sexual offenses are, in general, serious. The Panel views the totality of Mr. Bartman's present offenses as being quite serious. He was 30 years of age when he sexually abused his live-in girlfriend's 14-year old daughter.[62] Count 2 involved mid-range "sexual

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[59] ***Beltz***, 980 P.2d at 480. ***See also***, ***Knipe v. State***, 305 P.3d 359, 363 (Alaska App. 2013); ***Smith v. State***, 258 P.3d 913, 920-21 (Alaska App. 2011); ***Moore v. State***, 262 P.3d at 221; ***Dancer v. State***, 715 P.2d 1174, 1177 (Alaska App. 1986).
[60] ***Moore***, 262 P.3d at 221 (quoting ***Totemoff v. State***, 739 P.2d 769, 775 (Alaska App. 1987)).
[61] ***See***, ***Garner v. State***, 266 P.3d 1045, 1048 (Alaska App. 2011).
[62] The record reflects that Mr. Bartman, T.B., and T.B.'s 3 daughters, including H.B., were members of the same household who had a somewhat unique living situation – they resided together in hotels and shelters and at friend's homes, and at times they were together as part of the same household but the children slept inside a friend's home while Mr. Bartman and T.B. slept in their car in the driveway of the home. Mr. Bartman had unfettered access to the home

contact" conduct. Count 1 involved a mid-range attempted SAM 2nd Degree. Count 5 was a very serious SAM 2nd Degree as the State's theory at trial was that the "sexual contact" involved in this offense was Mr. Bartman placing his mouth on H.B.'s genitals, which is by statutory definition "sexual penetration."[63] And he engaged in sexual contact with H.B. on several other occasions which were not charged.[64]

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during such circumstances as he sexually abused H.B. in the Stroh's home and he had such access into Ms. Campbell's home (she reported that at one point he entered her bedroom and asked if he could get in bed with her). And the record reflects that he had authority over H.B. Mr. Campbell testified that her impression was that the girls treated Mr. Bartman "like a substitute father" (trial transcript (TT) at p. 294) and she saw them hug each other and she considered them to be a family, and one of the girls called him dad (TT at p. 295). T.B. testified that: she and Mr. Bartman served as the girls' parents (TT at p. 314); the girls treated him as a father figure (TT at p. 315); he assigned the girls chores and she expected them to comply (TT at pp. 316, 365-66) and H.B. complied with his directions (TT at p. 367); he was in charge of H.B. (TT at pp. 359-60); and, he had authority over H.B. (TT at p. 361). H.B. testified that: the five of them were kind of a family (TT at p. 436); he assigned her chores which she was required to do (TT at p. 437); and, he had authority over where they all lived – Kenai or Anchorage (TT at pp. 512-13). The Panel notes that the Panel does not agree with Judge Well's focus, in finding the statutory mitigating factor, on Mr. Bartman's babysitting position of authority as he was not charged under the "position of authority" section of the SAM 2nd Degree statute, so the State was not required to prove that he occupied a position of authority, and the record, as noted above, reflects that he had authority over the children whether he was babysitting while T.B. was away or not. The Panel also notes that under these circumstances, his reliance on ***Simants v. State***, 329 P.3d 1033, 1037 (Alaska App. 2014) in arguing that his conduct was mitigated because he did not sexually abuse H.B. while babysitter her – while in a position of authority – is misplaced.

[63] ***See***, ***Murray v. State***, 770 P.2d 1131, 1139 (Alaska App. 1999); ***Joseph v. State***, 293 P.3d 488, 494 (Alaska App. 2012) (J. Mannheimer concurring); ***Thompson v. State***, 378 P.3d 707, 716 (Alaska App. 2017). The Panel notes that: the jury must have found beyond a reasonable doubt that Mr. Bartman engaged in this sexual conduct; and, this finding relates directly to and undermines Judge Wells' finding that the related "most serious" aggravating factor does not apply to that offense.

[64] The Panel is not able to determine, on the basis of the record, whether Mr. Bartman also attempted to sexually abuse C.B. and/or S.S. There certainly is evidence in the record that he did. He testified at trial that he did not. The jury acquitted him on those Counts. The Panel understands that the fact that he was acquitted on the related counts does not prevent the Panel from finding that he did engage in such conduct.

So, the Panel does not find that Mr. Bartman has shown that his conduct in committing the offenses for which he was convicted was significantly different from conduct typically involved in such offenses.[65]

2. Mr. Bartman - Offender

Mr. Bartman is a serious and dangerous offender. His criminal record is not extremely lengthy, but it does include convictions for assault and VDVPO, as well as four AFRSO convictions, in addition to the two prior felony sexual offenses.

Mr. Bartman was convicted of Attempted SAM 2nd Degree in the 2006 case but the record reflects he actually committed SAM 2nd Degree, and that he engaged in similar conduct with the 7-year victim – the daughter of his then girl-friend – on other occasions for which he was not charged.

Mr. Bartman was convicted of attempted Sexual Assault 2nd Degree in the 2010 case (based on 2004 conduct) but the record reflects that he actually committed Sexual Assault 2nd Degree.[66]

Mr. Bartman did poorly while on felony probation for the 2006 felony sexual offense, and rejected probation.

The totality of the circumstances surrounding the offenses he was convicted of herein, as discussed above, are quite serious. The Panel here adds that he has no remorse for his

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[65] It appears that the preponderance of the evidence standard applies to the Panel's "atypical" defendant and offense findings.
The Panel does not find that the State could not prove the "lack of consent" element as Mr. Bartman contends as the victim J.M.'s description of the incident shows that Mr. Bartman used "force" beyond that required to engage in the sexual contact and Mr. Bartman relies on Ms. Gundersen's brief description of the incident to the police, but she, by her own admission, was Mr. Bartman's friend and had a poor memory. But, in any event, Mr. Bartman was convicted of

sexual conduct with respect to H.B., he blames H.B. for the same, and he sees nothing wrong with said conduct.

Mr. Bartman also has had difficulty conforming his conduct to institutional requirements while incarcerated – per the PSR – and he has substance abuse issues – most notably alcohol, which was involved in at least the 2004 felony sexual offense and his 2012 assault - and mental health issues.

But Mr. Bartman has shown that he is an atypical offender in his category – third-time felony sexual offense offender - for at least five reasons.

First, the typical third sexual offense offender: would have committed the prior offenses for which he or she was convicted a significant period of time apart, so likely materially older when the second offense was committed; received a "felony" length sentence for each, with the second conviction being treated as a second conviction for sentencing purposes; twice been on felony probation; twice been ordered to complete SOTP; other pertinent[67] assessments and related treatment ordered, once if not twice (for many if not most such offenders) – for example related to substance abuse and mental health; and, would have been required to submit to polygraph examinations during at least one of the periods of probation, depending on the dates of the offenses and whether the offenses were committed in Alaska.

Second, Mr. Bartman was young when he committed both of his prior felony sexual offenses – 20 at the time of the 2004 offense and 22 at the time of the 2006 offense.

Attempted SAM 2nd Degree, and the offense was a serious attempted SAM 2nd Degree based on J.M.'s description, which appears to be credible.

[67] ***See, Roman v. State***, 570 P.2d 1235, 1240 (Alaska 1977); ***Sprague v. State***, 590 P.2d 410, 417-18 (Alaska 1979); ***State v. Ranstead***, 421 P.3d 15, 19-20 (Alaska 2018).

1 Third he was prosecuted first for the 2006 incident, then some 4 years later for the 2004 incident. So, he was sentenced as a first offender in both cases.

Fourth, his 1-year jail sentence for the 2006 offense was not of sufficient length for him to complete a SOTP while incarcerated. A SOTP was not immediately available to him when he began felony probation. He was on a waiting list for a SOTP when he rejected probation. He did not reject probation to avoid a SOTP. Rather, his circumstances – 8th grade education, difficulty obtaining and maintaining employment, lack of permanent housing – made it difficult for him to comply with his technical probation conditions and with his related sex offender registration requirements and he made the calculated decision – at age 23 – to reject probation and serve the suspended 1-year of jail time.

Fifth, his conviction in the 2010 case, for his 2004 conduct, resulted in a flat 180-day jail sentence. The length of the jail sentence was not of sufficient length for him to be able to complete a SOTP while incarcerated. And he had no felony probation, so no SOTP probation condition, no polygraph requirements, and no assessment for at least substance abuse treatment.

3. Manifest Injustice

a) Impact on H.B.

With regards to the impact of Mr. Bartman's criminal conduct on H.B., she has not submitted a written statement to the PSR author, the prosecuting attorney, the trial court or the Panel, and she and did not appear at the sentencing hearing before Judge Wells or at the Panel hearing, and the State advised during the Panel hearing that it is not arguing that Mr. Bartman's criminal conduct caused H.B.'s mental health problems which had resulted in an out-of-home placement for a period of time, but the Panel can nonetheless reasonably conclude based on H.B.'s age, circumstances, and her description of Mr. Bartman's criminal conduct, that

she has experienced significant resulting trauma which will likely remain with her for, at a minimum, many more years, and that is criminal conduct materially exacerbated her mental health problems to the extent that the same pre-existed his criminal conduct.[68]

b) *Chaney* Goals

Isolation is very important consideration given the foregoing. Mr. Bartman has engaged in very serious criminal conduct during his adult life, his criminal conduct did not abate as he aged, he is sexually attracted to female children, including younger children, as well as to female adults, and his conduct reflects that he lacks the ability to control his sexual urges on a regular ongoing basis as he has not been deterred by others being present when he commits felony sexual offenses.

Community condemnation is a very important consideration. The Community strongly condemns the types of sexual conduct Mr. Bartman engaged in with H.B. when committing the felony sexual offenses in this case.

There is a definite need to reaffirm in the sentences in this case the societal norms that adults – in particular adults in the same household as the victim and who have authority over the victim – do not engage in such sexual conduct with a 14-year old child.

Rehabilitation is entitled to material consideration. The Panel generally agrees with Judge Wells' assessment of Mr. Bartman's relatively poor prospects for rehabilitation. And the Panel has found that he engaged in quite serious conduct in committing the felony sexual

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[68] The Panel allowed the State to read a statement from J.M. because Mr. Bartman's arguments had opened the related door. But the Panel noted at the conclusion of the hearing that it was not relying on the statement in making its decisions.

offenses.[69] But the Panel does not find that his rehabilitation should be totally disregarded in view of the circumstances discussed above that make him an atypical offender for his category of offender, as he has not had the benefit of prior felony probation rehabilitative efforts, with no such efforts being ordered for his second felony sexual offense conviction, and none actually occurring in his first case due to his youthful, and in retrospect, bad decision to reject probation.

General deterrence is getting relatively little weight in the Panel's deliberations as it reasonably appears that the public is already at least generally well-aware that serious sentences are imposed for felony sexual offenses and that the sentences increase for repeat offenders, and, in any event, general deterrence can reasonably be addressed whether Mr. Bartman is sentenced to 99 years, 49.5 years and 2 days, or the lengthy period of incarceration he recommends, 15-30 years.

Individual deterrence would only be a consideration if Mr. Bartman is sentenced to less than the prescribed 99-year term, and, if a lesser sentence is imposed, it is an important consideration and will be addressed by a significant period of suspended jail time.

c) Determination

The Panel finds, based on the totality of the circumstances discussed above, that Mr. Bartman has shown by clear and convincing evidence that manifest injustice would occur – it would be plainly unfair – if he is sentenced to serve a jail sentence that Judge Wells is statutorily empowered to impose – 49.5 years plus 2 days – and that a sentence of 70 years with 30 years suspended on each of Counts 1, 2, and 5, with Counts 1 and 2 concurrent with Count 5 except for 1 day to serve on each of those Counts – with a probationary period of 15 years and

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[69] ***See, Kirby***, 748 P.2d at 765 (The seriousness of a defendant's crime, in and of itself, does not render the defendant's "potential for rehabilitation irrelevant.").

the probation conditions agreed to by the parties, as modified by the Panel as stated on the record during the Panel hearing, is appropriate.

The Panel notes that this sentence will result in Mr. Bartman being incarcerated from approximately age 30 until he is 70, unless he qualifies for and is granted discretionary parole per the following discussion, so when he is released he will be substantially older and be subject to felony probation conditions, including a SOTP if not completed while incarcerated, polygraph examinations, and requirements that he be assessed for mental health and substance abuse issues and that he appropriately participate in and complete any related recommended treatment programs, which may include residential substance abuse treatment. Such a sentence gives due to weight to the seriousness of his conduct, the impact on H.B., and, properly serves all of the Panel's ***Chaney*** goals.[70]

B. Manifest Injustice - Eligibility for Discretionary Parole

Mr. Bartman did not address eligibility for discretionary parole before Judge Wells or in his briefing to the Panel. The Panel mentioned the matter at the outset of the Panel hearing and he asked the court to grant him such eligibility.

The Panel considered Mr. Bartman's request for four reasons. First, the Panel has the authority to grant such a request under the appropriate circumstances per AS 33.16.090(b)(2) and AS 12.55.175(e), and per AS 12.55.175(c).[71] Second, AS 12.55.165 does not expressly provide that such eligibility is a basis for the trial judge to refer a case to the Panel.[72] Third, the

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[70] As well as the principle of parsimony, pursuant to which a "defendant's liberty should be restrained only to the minimum extent necessary to achieve the objectives of sentences." ***Pears v. State***, 698 P.2d 1198, 1205 (Alaska 1985).
[71] ***See, Luckart v. State***, 314 P.3d 1226, 1234 (Alaska App. 2013).
[72] ~~The Court of Appeals has indicated that trial judges do have such authority. ***See, Lockridge v. State***, 2016 WL 3220952 (Alaska Ct. App. June 8, 2016) (cited per ***McCoy v. State***, 80 P.3d 757,~~

Alaska Court of Appeals has held that such a request can be made for the first time during the Panel hearing.[73] Fourth, the State opposed the request but did not object to the Panel considering the request.[74]

Mr. Bartman bears the burden of proving by clear and convincing evidence based on the totality of the circumstances that manifest injustice would result if he is sentenced within or below the presumptive range and he is not made eligible for discretionary parole after serving a certain period of time, which eligibility may be conditioned on his satisfying certain conditions while incarcerated.[75]

The Panel finds that Mr. Bartman met his burden inasmuch as given all of the foregoing, including the Panel's ***Chaney*** goals,[76] the Panel finds that manifest injustice[77] would result if he is not eligible to apply for discretionary parole after serving 30 years provided that he

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762-64 (Alaska App. 2002). And the Panel has taken this approach in prior cases. But it appears that most trial judges and attorneys are not aware of the same.

73 ***See***, ***Ballalo v. State***, 2017 WL 3971822 (Alaska Ct. App. Sept. 6, 2017) (cited per ***McCoy***).

74 The Panel notes that during the first hearing in State v. Solomon the Panel determined under the circumstances of that case that the State did not have sufficient notice of and opportunity to address a discretionary parole request made by the defendant for the first time at the conclusion of a Panel hearing and remanded the matter to the trial judge to address in the first instance. The trial judge on remand referred the case to the Panel on that basis, and the Panel agreed to make the defendant eligible for discretionary parole after holding a second hearing.

75 ***See***, ***Luckart***, 314 P.3d at 1232; ***Balallo v. State***, 2021 WL 3521063 at n 7 (Alaska App. August 11, 2021) (cited per ***McCoy***).

76 If Mr. Bartman successfully completes the ordered SOTP while incarcerated then his prospects for rehabilitation will be substantially better than they appear to be at this point, the need for isolation would be materially reduced, and the minimum of 30 years to serve would be sufficient to give due weight to the seriousness of his offenses, community condemnation, and the need to reaffirm a societal norm.

77 The Alaska Court of Appeals has recognized that this is a highly subjective standard, and that the phrases it has used to describe the concept do not add much to the statutory language. ***See***, ***Smith***, 711 P.2d at 568-69. The descriptive phrases that have been used include: "obvious unfairness" (***See***, ***Lloyd v. State***, 672 P.2d 152, 154 (Alaska App. 1983); ***Smith***, 711 P.2d at 508; ***Totemoff***, 739 P.2d at 775; "shock the conscience" (***Smith***, 711 P.3d at 568); "plainly unfair"

has successfully completed a DOC approved SOTP while incarcerated and so exercises its authority per AS 33.16.090(b)(2) and AS 12.55.175(c) to order the same.[78]

8. Conclusion

Mr. Bartman has shown by clear and convincing evidence that manifest injustice would result if he is sentenced to the 49.5 years plus 2 days that Judge Wells is statutorily authorized to impose so the Panel accepted the case and imposed the sentence discussed above. A related Judgement with conditions of probation is being issued herewith.[79]

Mr. Bartman has also shown by clear and convincing evidence that manifest injustice would result if he is not eligible to apply for discretionary parole after serving 30 years if he has successfully completed a DOC approved and provided SOTP while incarcerated.

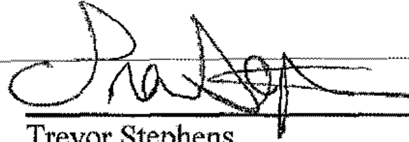
(***Smith***, 711 P.2d at 569; ***Knipe v. State***, 305 P.3d 359, 363 (Alaska App. 2013)); and, "manifestly too harsh" (***Scholes***, 274 P.3d at 500).

[78] The Panel notes that it can order that a defendant is eligible for discretionary parole, but once eligible the decision as to whether and when the defendant is actually released on discretionary parole will be determined by the Parole Board applying the considerations set forth at AS 33.16.100(a),(g), which include his rehabilitation, his risk of reoffending (isolation), and the seriousness of his crime and whether his release on discretionary parole would diminish the same (community condemnation/reaffirmation of societal norms). The Panel also notes that it did not expressly condition Mr. Bartman's eligibility on his good behavior while incarcerated as the Parole Board will consider the same per AS 33.16.100(g) in making its parole decision.

[79] The probation conditions are those agreed to by the parties during the Panel hearing – those included in the (Amended) PCR – which the Panel found appropriate per ***Roman***. The Panel has made some non-substantive stylistic changes to some of the conditions as set forth in the PSR. And the Panel, in addition to the few modifications mentioned during the Panel hearing, has also added "lawful" in Special Condition #5 in order to avoid a potential legal problem with requiring "physiological" testing. The Panel's probation condition numbers do not entirely track with those in the PSR as the Panel's Special Condition #1 is a general condition but differs from the related condition in the judgment form so the Panel stated the same separately as a Special Condition. And the Panel did not include PSR Special Condition #31 as a special condition because it is already addressed in the judgment form.

IT IS SO ORDERED.

Dated at Ketchikan, Alaska this 30th day of November 2021.



Trevor Stephens
Superior Court Judge – Administrative Head
Three-Judge Panel