



1                                   **IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**  
2                                   **THIRD JUDICIAL DISTRICT AT ANCHORAGE**

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4 **STATE OF ALASKA,**                                   )  
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**Plaintiff,**

**v.**

**DWIGHT SAMUEL O’CONNOR,**  
**Defendant.**

**Case No. 3AN-11-8340 CR**

**MEMORANDUM AND ORDER**

**1. Procedural Background**

Mr. O’Connor was convicted by a jury in 2015 of Sexual Assault 1<sup>st</sup> Degree and is subject to a presumptive sentencing range of 20-30 years.<sup>1</sup> No statutory aggravating<sup>2</sup> or mitigating factors<sup>3</sup> were proffered. Anchorage Superior Court Judge Kevin M. Saxby declined Mr. O’Connor’s request that he refer the case to the Three-Judge Sentencing Panel (Panel) on the basis of a non-statutory mitigating factor – Mr. O’Connor’s exceptional prospects for rehabilitation.<sup>4</sup> Judge Saxby imposed a sentence of 25 years with 5 years suspended, placed Mr. O’Connor on probation for 15 years and set certain general and special conditions of probation.

<sup>1</sup> See, AS 12.55.125(i)(1)(A)(ii). Mr. O’Connor was acquitted of two counts of Sexual Assault 1<sup>st</sup> Degree (Counts II, III) at a prior jury trial.

<sup>2</sup> AS 12.55.155(c).

<sup>3</sup> AS 12.55.155(d).

<sup>4</sup> Judge Saxby found that Mr. O’Connor had not established by clear and convincing evidence that he has exceptional prospects for rehabilitation because he understood, evidently per *Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991) and related Alaska caselaw, that in order to make such a finding he must understand what problems had led Mr. O’Connor to engage in the criminal conduct for which he had been convicted and that the problems were readily correctable

1 Mr. O'Connor appealed his conviction and Judge Saxby's decision to not refer his  
2 case to the Panel. The Court of Appeals affirmed his conviction and remanded the case to Judge  
3 Saxby for further consideration of Mr. O'Connor's proposed non-statutory mitigating factor.<sup>5</sup>

4 Judge Saxby on remand noted that Mr. O'Connor had shown by a preponderance  
5 of the evidence in 2015 that he has extraordinary prospects for rehabilitation, but not by clear  
6 and convincing evidence as required, and Judge Saxby found that Mr. O'Connor was able to  
7 make such a showing by clear and convincing evidence in 2021 based on his exemplary behavior  
8 while incarcerated, even though Judge Saxby still was not able to determine what problems had  
9 led Mr. O'Connor to commit the crime. So, Judge Saxby found that manifest injustice would  
10 result if this non-statutory mitigating factor was not considered, and referred the case to the Panel  
11 on that basis.  
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13 Mr. O'Connor also requests that the Panel exercise its authority to make him  
14 eligible to apply for discretionary parole.  
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18 or unlikely to recur, and he was not able to make at least the first such finding – that he  
19 understood why Mr. O'Connor had committed this offense.

20 <sup>5</sup> The Court clarified that a “totality of the circumstances test” must be applied to the issue of  
21 whether a defendant has shown by clear and convincing evidence that the defendant has  
22 exceptional prospects for rehabilitation – that the defendant “can adequately be treated in the  
23 community and need not be incarcerated for the full presumptive term in order to prevent future  
24 criminal activity” - and that the trial Judge understanding why the defendant committed the  
25 offense may be a consideration in this regard but is not a necessary requirement. *O'Connor v.*  
*State*, 444 P.3d 226, 233 (Alaska App. 2019) (quoting *Kirby v. State*, 748 P.2d 757, 766 (Alaska  
App. 1987). The Court noted that Judge Saxby had made findings concerning Mr. O'Connor's  
prospects for rehabilitation which may support a finding that this non-statutory mitigating factor  
had been proven, though the Court observed that there were also facts in the record that would  
support a contrary finding.

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**2. Parties' Positions**

Mr. O'Connor requests that the Panel sentence him to a term of 10 years of jail time to serve, and make him immediately eligible to apply for discretionary parole, on the basis of his exceptional prospects for rehabilitation claim. He does not oppose the Panel imposing at least 5 years of suspended jail time or the Panel placing him on supervised probation for 15 years subject to the probation conditions imposed by Judge Saxby in his 2015 Judgment.

The State contends that Mr. O'Connor has not shown that he has exceptional prospects for rehabilitation or that the Panel should grant him eligibility for discretionary parole, and requests that the Panel decline the case.

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**3. Panel Hearing**

The Panel hearing was held on September 30, 2021. The parties appeared.<sup>6</sup> Mr. O'Connor presented evidence.<sup>7</sup>

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<sup>6</sup> Counsel of record, Mr. O'Connor, the Panel members, and three of Mr. O'Connor's four witnesses appeared in person and participated in the hearing in compliance with applicable COVID-19 protocols.

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<sup>7</sup> Mr. O'Connor relied on the evidence already in the record and during the Panel hearing presented the expert testimony of Dr. Kristy Becker and the testimony of Lora Sinard, Valdema Sotskaya, and Kelsey O'Connor. The Panel also considered the information in the record referenced at the outset of the Panel hearing, including: the charging documents; the 2015 trial transcript; the transcripts of the June 4, 2015, November 3, 2020, and February 17, 2021 sentencing hearings; Judge Saxby's June 4, 2015 Judgment and Order of Commitment/Probation; the Pre-Sentence Report (PSR), corrected PSR, Updated PSR, and 4 PSR Addendums; Dr. Becker's January 23, 2020 report; Mr. O'Connor's worksheet; letters of support submitted by Ms. Sinard, Ms. O'Connor, Ms. Sotskaya, Lottie Michael, Danica Reindl, Christine Lamoureux, Thelma (last name illegible on the handwritten letter and provided during the Panel hearing), Fed Cosentino, Jeri and Liz Thompson, Charles Meyer, Amanda Sebwenna,

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1 **A. Panel Decision - Synopsis**

2 The Panel found with respect to Mr. O'Connor's proposed non-statutory  
3 mitigating factor that: based on the totality of the circumstances he had established by clear and  
4 convincing evidence that he has unusually favorable prospects for rehabilitation, but this  
5 mitigating factor does not warrant the Panel reducing his sentence below the applicable  
6 presumptive sentencing range given the pertinent facts and the Panel's application of the  
7 *Chaney*<sup>8</sup> sentencing criteria, so the Panel does not accept the case on this ground and the  
8 sentence imposed by Judge Saxby remains in effect.<sup>9</sup>  
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12 Earl Houser, Correctional Officer (CO) Savage; Judge Saxby's referral to the Panel; and, the  
sentencing briefing and related exhibits filed by the parties in the trial court and with the Panel.

13 <sup>8</sup> *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970). *See also*, AS 12.55.005.

14 <sup>9</sup> This decision presented a procedural situation in which the Panel found that the non-statutory  
15 mitigating factor had been established but it did not warrant a reduction in Mr. O'Connor's jail  
16 sentence below the presumptive range, but the Panel also decided to make him conditionally  
17 eligible for discretionary parole. So, the Panel did not accept the case for purposes of re-  
18 sentencing Mr. O'Connor based on the proposed non-statutory mitigating factor but did accept  
19 the case for the limited purpose of making him conditionally eligible for discretionary parole,  
20 which did not involve re-sentencing Mr. O'Connor. This caused some confusion for the Panel,  
21 and the parties, at the conclusion of the hearing as evidenced by the related discussion. The  
22 Panel expressed the view that under these circumstances Judge Saxby's Judgment would remain  
23 in effect or, if a new Judgment issued by the Panel somehow was required the Panel adopted  
24 Judge Saxby's Judgment as the Panel was not re-sentencing Mr. O'Connor and thus was not  
25 modifying the Judgment (and the Panel agreed with Judge Saxby's Judgment), and the Panel  
would issue an order addressing discretionary parole. The Panel may not have specifically stated  
it was not taking the case on the basis of the non-statutory mitigating factor but based on the  
caselaw hereafter discussed, that is what actually occurred. The Panel, on further consideration,  
believes that this is the correct procedure – the Panel in fact did not accept this case for re-  
sentencing purposes, so Judge Saxby's Judgment remains in effect, and the Panel is addressing  
discretionary parole in a separate order. This Panel had not addressed the same situation in a  
prior case. The Panel in *State v. Johnny Monigok Jack*, 3AN-15-2770 CR followed a similar  
procedure in a somewhat similar situation. The trial judge therein referred the case to the Panel  
without sentencing Mr. Jack based on findings that manifest injustice would result if Mr. Jack  
was sentenced within the presumptive range, whether or not adjusted for aggravating and  
mitigating factors, and if he was not made eligible to apply for discretionary parole. The Panel  
agreed with respect to the second but not the first finding. The Panel ordered that Mr. Jack

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1 The Panel granted Mr. O'Connor's request to be made eligible for discretionary  
2 parole, albeit only once he has served one-half of his jail sentence and conditioned on his  
3 successfully completing a sex offender treatment program (SOTP) while incarcerated, as he had  
4 established by clear and convincing evidence based on the totality of the circumstances that  
5 manifest injustice would result if was not made so conditionally eligible.

6 The Panel advised that this Memorandum and Order addressing the Panel's  
7 findings and an order providing for Mr. O'Connor's discretionary parole eligibility would be  
8 forthcoming.<sup>10</sup> This Memorandum and Order is intended to incorporate, supplement, and, if  
9 necessary, clarify the same.<sup>11</sup>

#### 11 **B. Scope of the Referral**

12 The Panel addressed the scope of the matters before the Panel pre-hearing in a  
13 September 22, 2021 Order and also at the outset of the hearing. The Panel's view is that the  
14 scope of its consideration of a case is limited to the basis of the trial judge's referral to the  
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18 would be eligible for discretionary parole and, with the parties' agreement, remanded the case to  
19 the trial judge to impose sentence.

20 <sup>10</sup> Criminal Rule 32.4(e) provides that the Panel "shall provide a written statement of its findings  
21 and conclusions in support of any order remanding a case to the referring judge." The Panel is in  
22 effect remanding the case as the Panel did not find that a sentence below the low end of the  
23 presumptive range as imposed by Judge Saxby is warranted based on the Panel's view of the  
24 facts and application of the *Chaney* sentencing criteria. The Panels' view is that the Panel can  
25 address the discretionary parole situation by means of an order rather than by issuing an entirely  
new judgment. In any event, the Panel's practice over the past few years has been to issue such a  
written statement for every case, whether remanded or not, and to send the same to the Alaska  
Court System's Law Library, in an effort to provide attorneys and trial judges with information  
that may be useful in requesting referrals to the Panel and in deciding such requests.

<sup>11</sup> The Panel notes that there is simply not enough time at the conclusion of a Panel hearing for  
the Panel to be able to fully articulate and address each and every point considered when verbally  
announcing the Panel's decision.

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1 Panel,<sup>12</sup> with the possible exception of the Panel's authority to make a defendant eligible for  
2 discretionary parole.

3 Alaska Statute 12.55.165(a) provides that:

4 If the defendant is subject to sentencing under AS 12.55.125(c),(d),(e), or (i) and  
5 the court finds by clear and convincing evidence that manifest injustice<sup>13</sup> would  
6 result from failure to consider relevant aggravating or mitigating factors [non-  
7 statutory mitigating factors] not specifically included in AS 12.55.155 or from  
8 imposition of sentence within the presumptive range, whether or not adjusted for  
9 aggravating or mitigating circumstances, the court shall enter findings and  
10 conclusions and cause a record of the proceedings to be transmitted to a three-  
11 judge panel for sentencing under AS 12.55.175.

12 Judge Saxby, per Mr. O'Connor's request, referred this case to the Panel on the  
13 basis of his finding that manifest injustice would result from a failure to consider a relevant  
14 mitigating factor not specifically included in AS 12.55.155 – Mr. O'Connor's exceptional  
15 prospects for rehabilitation. Mr. O'Connor did not contend in the trial court, and Judge Saxby  
16 did not find, that manifest injustice would result if he is sentenced within the presumptive  
17 sentencing range, whether or not adjusted for aggravating or mitigating circumstances.<sup>14</sup>

18 Mr. O'Connor mentioned eligibility for discretionary parole during the February  
19 17, 2021 hearing but it was not then a focus of the parties or Judge Saxby. Judge Saxby did not  
20 mention discretionary parole in his verbal findings at the conclusion of the hearing or in his  
21 subsequent written referral to the Panel. Mr. O'Connor nonetheless requests that the Panel make  
22 him immediately eligible to apply for discretionary parole.

23 The Panel in the September 22, 2021 Order expressed the tentative view that it  
24 would also address Mr. O'Connor's discretionary parole request during the Panel hearing

25 <sup>12</sup> *See, Luckart v. State*, 270 P.3d 816, 820 (Alaska App. 2012).

<sup>13</sup> All emphasis is added by the Panel unless otherwise noted.

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1 because: the Panel has authority to address such requests;<sup>15</sup> eligibility for discretionary parole is  
2 not a listed basis for referral in AS 12.55.165(a);<sup>16</sup> Mr. O'Connor had mentioned the matter  
3 during the February 17, 2021 hearing and Judge Saxby did not expressly decline to make a Panel  
4 referral on that basis; and, the State had fair notice of the matter.

5 The Panel's understanding after addressing these matters with the parties during  
6 the hearing is that the parties agree with the Panel's views with respect to the scope of Judge  
7 Saxby's referral and that the court could consider Mr. O'Connor's request for discretionary  
8 parole eligibility.  
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### 10 **C. Potential Sentencing Issues**

11 Mr. O'Connor committed the Sexual Assault 1<sup>st</sup> Degree in 2011. He was  
12 convicted in 2015. He was initially sentenced in 2015. SB 22 was enacted in 2013. SB 91 was  
13 enacted in 2016. SB 54 was enacted in 2017. HB 49 was enacted in 2019. SB 22, SB 91, SB  
14 54, and HB 49 made changes affecting aspects of the sentencing and parole eligibility of persons  
15 convicted of Sexual Assault in the 1<sup>st</sup> Degree. The Panel attempted in the September 22, 2021  
16 Order to identify for the parties in advance of the hearing related potential issues that could arise  
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19 <sup>14</sup> AS 12.55.165(a) provides "two discrete" grounds for referral to the Panel. *Garner v. State*,  
20 266 P.3d 1045, 1048 (Alaska App. 2011). *See also, Kirby*, 748 P.2d at 762.

21 <sup>15</sup> Explicit authority per AS 12.55.175(e), and implicit authority per AS 12.55.175(c). *See,*  
22 *Luckart v. State*, 314 P.3d 1226, 1234 (Alaska App. 2013).

23 <sup>16</sup> The Alaska Court of Appeals has indicated that the Panel may address a discretionary parole  
24 request that was not a basis for the trial Judge's referral (and the Judge had not declined to refer  
25 the case on that basis) but which was presented by the defendant during the Panel hearing. *See,*  
*Ballalo v. State*, 2017 WL 3971822 (Alaska App. September 6, 2017) (cited per *McCoy v. State*,  
80 P.3d 757, 760-62 (Alaska App. 2002)). And the Court of Appeals has indicated that a trial  
Judge may refer a case to the Panel on this basis, though it is not listed as a ground for referral in  
AS 12.55.165. *See, Lochridge v. State*, 2016 WL 3220952 (Alaska App. June 8, 2016) (cited  
per *McCoy*). The Panel independently reached a similar conclusion in *State v. Timothy Tanberg*,  
4FA-16-619 CR.

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1 if the Panel accepted the case and imposed sentence, and the Panel addressed the same with the  
2 parties at the outset of the hearing.

3 **1. Minimum Suspended Jail Sentence**

4 Alaska Statute 12.55.125(o) was in effect in 2011 (date of crime) and in 2015  
5 (date of sentencing), and provided that a court must impose at least 5 years of suspended jail time  
6 when sentencing a first-time felony offender convicted of Sexual Assault 1<sup>st</sup> Degree, such as Mr.  
7 O'Connor. SB 91 repealed AS 12.55.125(o).<sup>17</sup> SB 54 added AS 12.55.125(q) which includes a  
8 5-year minimum period of suspended jail time for persons in Mr. O'Connor's situation. HB 49  
9 made some changes to AS 12.55.125(q). These changes made by SB 54 and HB 49 apply to  
10 sentences imposed on or after the respective effective dates for conduct occurring on or after said  
11 effective dates.<sup>18</sup>

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13 The Panel's tentative view as expressed in the September 22, 2021 Order was that  
14 if the Panel accepts the case and imposes sentence then AS 12.55.125(o) applies based on the  
15 Court of Appeals' related discussion in *O'Connor* and the fact that SB 91 had vacated subsection  
16 (o) but then had, in effect, been repealed by SB 54 and neither SB 54 nor HB 49 apply to Mr.  
17 O'Connor.

18 The Panel's view as of the time of the Hearing<sup>19</sup> was that if the Panel imposes  
19 sentence then SB 91 applies as SB 91 repealed AS 12.55.125(o) and though SB 54 added a 5-

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22 <sup>17</sup> Section 179 of SB 91. The effective date of section 179 was July 1, 2015 per section 188.

23 <sup>18</sup> Per section 31(b)(4) of SB 54 and section 142(b)(9) of HB 49.

24 <sup>19</sup> The Panel observed in the September 22, 2021 Order that the Court in *O'Connor* had stated  
25 that Mr. O'Connor was subject to the 5-year minimum suspended jail time requirement (444  
P.3d at 232) and that if the Panel accepted the case and resentenced Mr. O'Connor the Panel was  
required to abide by the Court's determination. But the Panel on further review decided that the  
Court was likely simply stating what Judge Saxby was required to do at the time of the 2015  
sentencing rather than making a finding based on consideration of SB 91 and the subsequent

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1 year minimum period of suspended jail time and HB 49 addressed the same, neither applies to  
2 Mr. O'Connor due to the date of his offense, and the repeal of subsection (o) was an ameliorative  
3 modification made before Mr. O'Connor was sentenced.<sup>20</sup> The parties indicated their agreement  
4 during the Panel hearing.<sup>21</sup>

## 5 **2. Probation - Minimum Term**

6 Alaska Statute 12.55.155(o) also included a requirement that a defendant in Mr.  
7 O'Connor's position be subject to a minimum 15-year term of probation. Subsection (o), as  
8 noted above, was repealed by SB 91. SB 54 added a minimum 15-year term of probation in  
9 subsection (q), HB 49 made modifications to subsection (q), and, as noted above, neither SB 54  
10 nor HB 49 apply to Mr. O'Connor.  
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12 The Panel's tentative view as expressed in the September 22, 2021 Order was that  
13 AS 12.55.155(o) applies if the Panel imposes sentence, but the Panels' view at the time of the  
14 hearing was that SB 91 applies under such circumstances for the reasons stated above with  
15 respect to suspended jail time. The parties indicated their agreement during the Panel hearing.<sup>22</sup>  
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20 legislation that this requirement would apply if he is sentenced now, noting the lack of related  
analysis in the decision; and the Panel stated as much during the hearing.

21 <sup>20</sup> *See, State v. Stafford*, 129 P.3d 927, 930-33 (Alaska App. 2006).

22 <sup>21</sup> In any event, this matter is moot as the Panel did not accept the case based on Mr. O'Connor's  
proposed non-statutory mitigating factor and impose sentence, and under the circumstances  
23 Judge Saxby's pre-SB 91, SB 54, and HB 49 2015 Judgment remains in effect. The Panel also  
notes that Judge Saxby imposed 5-years of suspended jail time and Mr. O'Connor does not  
object to the same.

24 <sup>22</sup> In any event, this matter is also is moot for the same reasons stated above with respect to the  
prior potential issue. The Panel also notes that Judge Saxby imposed a 15-year probation term,  
25 though he had the authority to impose up to 25-years of probation, and Mr. O'Connor does not  
object to the same.

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### 3. Probation - Maximum Term

Alaska Statute 12.55.090(c)(1) in 2011 and through 2015 provided for a 25-year maximum term of probation for persons convicted of felony sex offenses. SB 91 revised AS 12.55.090(c)(1) in 2016 so that the maximum for such offenses is 15-years.<sup>23</sup> This revision applies to probation ordered on or after the effective date of the revision for offenses committed before, on, and after the effective date.<sup>24</sup> SB 54 did not make related changes. HB 49 revised AS 12.55.090(c)(1) by adding a 25-year maximum period of probation for felony sex offenses.<sup>25</sup> This revision applies to probation ordered on or after the effective date of the revision for conduct occurring on or after the effective date.<sup>26</sup>

The Panel's tentative view as stated in the September 22, 2021 Order was that the 2011-15 version of AS 12.55.090(c)(1) applies if the Panel imposes sentence for similar reasons as discussed above with respect to the other potential issues.

The Panel's view at the time of the hearing was that the SB 91 version would apply for basically the same reasons as addressed above with respect to the other potential issues. The parties indicated their agreement during the Panel hearing.<sup>27</sup>

### 4. Discretionary Parole

The Panel and the parties agree that Mr. O'Connor is not eligible for discretionary parole per AS 33.16.090 unless made eligible by the Panel under the version of AS 33.16.090(a)

22 <sup>23</sup> Section 79 of SB 91.

23 <sup>24</sup> Section 185(i) of SB 91.

24 <sup>25</sup> Section 68 of HB 49.

24 <sup>26</sup> Section 142(c)(1) of HB 49.

25 <sup>27</sup> In any event, this matter is also moot for the same reasons stated above with respect to the prior potential issues. The Panel also notes that Judge Saxby imposed a 15-year term of probation and Mr. O'Connor does not object to the same.

1 in effect from 2011-15 and under any revisions to AS 33.16.090(a) made by SB 91, SB 54, and  
2 HB 49.

### 3 **5. Mandatory Parole**

4 Alaska Statute 33.16.010 addresses mandatory parole and provides that  
5 mandatory parole is based on eligibility for statutory good time per AS 33.20.010. Alaska  
6 Statute 33.20.010 in 2011 provided that a person in Mr. O'Connor's circumstances could earn  
7 statutory good time and thus be released on mandatory parole.<sup>28</sup> The legislature in SB 22 revised  
8 AS 33.20.010 in 2013 to provide that defendants convicted of unclassified felony sex offenses,  
9 such as Sexual Assault 1<sup>st</sup> Degree, are not eligible to earn good time.<sup>29</sup> The 2013 revision  
10 applies to offenses committed on or after the effective date of the revision.<sup>30</sup>

11  
12 The Panel's tentative view as stated in the September 22, 2021 Order was the  
13 2013 revision did not apply to Mr. O'Connor, so he is eligible to earn good time and based  
14 thereon be released on mandatory parole. That was the Panel's view at the Hearing and the  
15 parties indicated their agreement with the Panel's position during the Hearing.<sup>31</sup>

### 16 **D. Non-Statutory Mitigating Factor**

17 Alaska Statute 12.55.165(a) in pertinent part provides that a trial court judge can  
18 refer a case to the Panel based on a finding that the defendant has shown by clear and convincing  
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21 <sup>28</sup> Under the 2011 version of AS 33.20.010 only a person convicted of felony sex offense who  
22 had one or more prior convictions for a felony sex offense would be ineligible for statutory good  
time.

23 <sup>29</sup> *See*, AS 33.20.010(a)(1)(3)(B).

24 <sup>30</sup> The revision was made in section 33 of SB 22, and section 46(a) thereof states the prospective  
scope of the revision.

25 <sup>31</sup> This matter also appears to be a moot because, as noted by the Panel during the hearing, Mr.  
O'Connor's eligibility is what it is, and a determination of eligibility for mandatory parole by the  
Panel is only required for truth-in-sentencing purposes per AS 12.55.025(m), and, in any event,

1 evidence that manifest injustice would result from a failure to consider a relevant mitigating  
2 factor that is not included as a statutory mitigating factor under AS 12.55.155(d). The Alaska  
3 Court of Appeals has held that trial court Judge who makes such a finding “must grant the  
4 defendant’s request for referral to the three-judge panel unless the [judge] concludes that ‘no  
5 adjustment to the presumptive [range] is appropriate in light of the factor.’”<sup>32</sup>

6 The Alaska Court of Appeals has recognized a non-statutory mitigating factor  
7 based on a defendant’s prospects for rehabilitation characterized as exceptional, extraordinary, or  
8 unusually favorable prospects for rehabilitation.<sup>33</sup>

9 The Alaska Court of Appeals has identified a number of factors that may be  
10 considered by the trial court judge in deciding to make a referral on this basis and by the Panel in  
11 reviewing such a referral, which include:

- 12 1. The defendant’s juvenile record (if any).
- 13 2. The defendant’s adult criminal record (if any).
- 14 3. The defendant’s employment history.
- 15 4. The defendant’s education and how well the defendant performed in school.
- 16 5. Whether the defendant has engaged in extra-curricular activities.
- 17 6. The existence and extent of the defendant’s family ties.
- 18 7. Whether the defendant has continuing family support.

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22 the Panel did not accept the case based on the proposed non-statutory mitigating factor and so  
23 did not impose sentence.

24 <sup>32</sup> *Daniels v. State*, 339 P.3d 1027, 1031 (Alaska App. 2014) (quoting *Kirby*, 748 P.2d at 765).  
25 *See also, Garner*, 266 P.3d at 1047.

<sup>33</sup> *See, Kirby*, 748 P.2d at 766 (unusually good prospects for rehabilitation); *O’Connor*, 444  
P.3d at 232 and *Olmstead v. State*, 477 P.3d 656, 661 (Alaska App. 2020) (extraordinary  
potential for rehabilitation); *Garner*, 266 P.3d at 1047 (exceptional prospects for rehabilitation).

The Court of Appeals evidently considers these descriptive terms to be interchangeable.

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- 1 8. Whether the defendant is youthful.  
2 9. Whether the defendant has expressed remorse for the criminal conduct.  
3 10. Whether the defendant has engaged in needed treatment.

4 11. The evaluation of the defendant in the PSR.<sup>34</sup>

5 12. Whether the Judge/Panel understands the problems that led the defendant to  
6 commit the offense.<sup>35</sup>

7 13. Whether the Judge/Panel can conclude that said problems are readily  
8 correctable or unlikely to recur.

9 14. In the sex offense context, whether the defendant has a history of  
unprosecuted sex offenses.<sup>36</sup>

10 The Defendant bears the ultimate burden of proving by clear and convincing  
11 evidence based on the totality of the circumstances that “he or she can be adequately treated in  
12 the community and need not be incarcerated for the full presumptive term in order to prevent  
13 future criminal activity.”<sup>37</sup>

14 The Panel found that a very close question was presented.

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17 <sup>34</sup> The list to this point is based primarily on *Smith v. State*, 711 P.2d 561, 570 (Alaska App. 1985) and *Daniels*, 339 P.3d at 1030-31.

18 <sup>35</sup> *See, Lepley*, 807 P.2d at 1100; *Beltz*, 980 P.2d at 481; *Smith v. State*, 258 P.3d 913, 917  
19 (Alaska App. 2011). Such a finding is not a pre-requisite to the trial court judge or the Panel  
finding this non-statutory mitigator has been established but such a finding, or the lack thereof,  
remains a consideration. *See, O'Connor*, 444 P.3d at 234.

20 <sup>36</sup> This consideration is based on *Collins v. State*, 287 P.3d 791, 796-97 (Alaska App. 2012).  
21 Under *Collins* such a finding basically constituted a non-statutory mitigating factor. The  
legislature in 2013 added AS 12.55.165(e) and AS 12.55.175(f), which apply to offenses  
22 committed before, on, and after July 1, 2013 and which in effect overruled *Collins*. But the  
Court of Appeals has recognized that this factor can still be considered as part of the totality of  
23 the circumstances with respect to whether manifest injustice would result if a defendant is  
sentenced within the presumptive range, whether or not adjusted for aggravating or mitigating  
24 factors. *See, State v. Seigle*, 394 P.3d 627, 637 (Alaska App. 2017). The Panel’s view is that  
this factor may also similarly be considered in assessing the prospects for rehabilitation of a  
defendant convicted of a felony sex offense.

25 <sup>37</sup> *Boerma v. State*, 843 P.2d 1246, 1248 (Alaska App. 1992) (quoting *Kirby*, 748 P.2d at 766).  
*See also, O'Connor*, 444 P.3d at 233.

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1 The Panel identified factors which supported Mr. O'Connor's request, including:

- 2 1. He has no juvenile record.
- 3 2. He has no material adult criminal record (a 1979 negligent driving and a 2003
- 4 taking illegal Dall Sheep = insufficiently curled horns).
- 5 3. There is no evidence in the record of his having a history of unprosecuted sex
- 6 offenses.<sup>38</sup>
- 7 4. He is a high school graduate and has some post-secondary vocational
- 8 education.
- 9 5. He has a good employment history.
- 10 6. His employer at the time of his incarceration viewed him as an outstanding
- 11 employee and presently has the same view and is willing to have him return to
- 12 his prior position when released and to provide on-site housing for him if
- 13 needed.
- 14 7. He has the support of co-workers.
- 15 8. He has strong family support – his ex-wife Ms. Sinard and daughter Ms.
- 16 O'Connor.
- 17 9. He has the strong support of many friends, including Ms. Sotskaya.<sup>39</sup>
- 18 10. He has the support of Ms. Sebwanna, for whom he functioned as a foster
- 19 parent for several months some years ago.
- 20 11. He has participated in "extra-curricular activities," including:
- 21 a) Community Service Patrol for some 20 years.
- 22 1) Weekend patrol.
- 23 2) Spoke to community groups.

24 <sup>38</sup> The State at times in this case has insinuated that Mr. O'Connor used his position as a  
community patrol volunteer to engage in similar conduct in the past, and that on this occasion he  
used his official-looking vehicle to commit the Sexual Assault 1<sup>st</sup> Degree offense. The record  
does not support either assertion.

25 <sup>39</sup> Mr. O'Connor's employment situation, housing, positive peer group, supportive friends, and  
supportive family, all involve circumstances that existed when he committed the sexual assault,  
are among the positive protective and rehabilitative factors identified by Dr. Becker.

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- 1 3) Fundraising events for local law enforcement – purchase of protective  
2 gear and Christmas presents and decorations for children.  
3 4) Public Safety Advisory Board for some 9 years.  
5) Public Safety Officer for Spenard Community Council for some 6  
years.

4 b) Plowed parking lots (i.e. Catholic Social Services).

5 c) The Willawa project.

6 d) Numerous outdoor recreational activities.

7 e) Starting a chess club while incarcerated.

8 f) Music (keyboards) while incarcerated.

9 g) Worked on cars (per Ms. Spinard's Panel hearing testimony).

10  
11 12. He did not violate the conditions of this third-party release during the  
12 approximately 3 ½ years of his pre-trial release.

13 13. STATIC-2002R – an actuarial tool designed to assist in predicting sexual and  
14 violent recidivism for sex offenders – not validated for Alaska sex offenders  
– he scored in lowest risk category.

15 14. A favorable evaluation in the Updated PSR.

16 15. His exemplary conduct while incarcerated – his valued employment, his  
17 completion of a course, his lack of infractions, his organizing the chess club –  
18 as evidenced in part by the supporting communications from CO Savage and  
19 Superintendent Houser, and the related February 17, 2021 testimony by  
20 Probation Officer Rodney Torgerson.

21 16. Dr. Becker's expert opinion<sup>40</sup> – expressed in her January 23, 2020 report and  
22 during her November 3, 2020 and Panel hearing testimony – that Mr.

23  
24  
25 <sup>40</sup> Dr. Becker is a licensed clinical psychologist with a doctorate in clinical psychology (with a  
forensic emphasis) whose work history includes employment: in a maximum security prison, as a  
parole officer supervising sex offenders, as the chief forensic psychologist at API, and in private  
practice. She has performed psychiatric evaluations for the federal government and Alaska  
courts. She has testified more than 50 times in Alaska courts as an expert in the areas of forensic  
psychology and clinical psychology. She met with Mr. O'Connor for over 3 hours at the Goose  
Creek Correctional Center on December 4, 2019 at the request of his counsel in order to evaluate  
his risk of reoffending and his potential for rehabilitation.

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1 O'Connor presents little risk of reoffending and is an unusually good  
2 candidate for consideration for rehabilitation in the community based on:

3 a) His lack of atypical sexual interests and antisocial personality traits, which  
generally are the two major risk factors for sex offenders:

4 1) The results of the Personality Assessment Inventory (PAI) reflect that  
5 his clinical profile is within normal limits.

6 2) Per the PAI he presents as a person interested in and motivated to  
7 complete treatment.<sup>41</sup>

8 3) Her clinical observations were all normal.

9 4) There is no evidence that he suffers from a psychiatric disorder.

10 5) He does not have atypical sexual interests. His sexual development  
11 was normal. He reported he had a healthy sex life with his wife at the  
time of the offense.<sup>42</sup>

12 6) He has a history of rule-following which reflects he is likely to comply  
13 with probation conditions, including treatment requirements.

14 b) The STATIC-99R – an actuarial tool which measures relative risk for  
15 sexual recidivism – he measured in the below average risk category for  
16 sexual recidivism – 1-3 persons out of 100 in this category will reoffend  
within 5 years, and after 5 years the risk is reduced by some 50%. Sex  
offenders, in general, have a relatively low rate of recidivism.

17 c) Positive dynamic factors – his pro-social/non-criminal peer group,  
18 community support, family support, stable employment.

19 d) The actual criminal conduct is taken as a given in her analysis and does  
20 not materially figure into her assessment unless it involved predatory or  
extremely violent behavior – which were not present in this case.<sup>43</sup>

21  
22 <sup>41</sup> Though Mr. O'Connor did not actually express such an interest or motivation.

23 <sup>42</sup> Mr. O'Connor did not tell Dr. Becker about his erectile dysfunction (ED). She considers this  
24 to have been an oversight – noting she did not specifically ask him a related question – rather  
25 than his understanding the potential importance of this information to her evaluation given the  
facts of the case and being untruthful or evasive, and this information does not change her  
opinions concerning his prospects for rehabilitation or his risk of reoffending, though she has not  
read P.A.B.'s trial testimony which references his ED, as ED is a physical condition and not a  
sexual deviancy.

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1 e) His evasiveness with the police and the jury do not materially affect her  
2 assessment.

3 f) His denial that he committed the offense does not materially affect her  
4 assessment because denial has not been shown to be a factor with respect  
5 to recidivism or rehabilitation.<sup>44</sup>

6 g) A person's past behavior generally is the best predictor of future behavior  
7 and he does not have a history of past bad behavior, his criminal conduct  
8 in this case is evidently an isolated incident.

9 The Panel also identified negative factors in this regard, including:

- 10 1. Mr. O'Connor's lack of remorse.<sup>45</sup>
- 11 2. His continued denial that he committed the offense.<sup>46</sup>
- 12 3. His failure to provide an explanation for why he committed the offense.<sup>47</sup>
- 13 4. His deceptiveness with the police.<sup>48</sup>
- 14 5. His deceptiveness before the jury.<sup>49</sup>

15 <sup>43</sup> Dr. Becker, as previously noted, was not provided and so did not review the victim's (P.A.B.)  
16 trial testimony.

17 <sup>44</sup> Dr. Becker relied on a 2013 meta-analysis performed by Dr. Zelig. Dr. Becker testified  
18 during the November 3, 2020 hearing that she does not know why Mr. O'Connor committed the  
19 offense and that is not relevant to what the defense asked her to consider – risk and rehabilitation  
20 – though it would be relevant with respect to the appropriate treatment he receives. She also  
21 testified that sex offender treatment (SOTP) would be necessary and that there are quality SOTP  
22 providers in the Anchorage area.

23 <sup>45</sup> Mr. O'Connor did state during one or both of his two allocutions – before Judge Saxby and  
24 the Panel – that he takes full responsibility for the events on the night in question – but the only  
25 remorse he expressed was that he had been unfaithful to his wife, which caused him to feel  
related guilt – and he has not expressed any remorse with respect to P.A.B. or any empathy or  
demonstrated any insight with regards to the physical, mental, and emotional harm he caused  
her.

<sup>46</sup> See, *Beltz*, 980 P.2d at 481;

<sup>47</sup> This situation affects the ability of the Panel to make findings with respect to whether the  
conditions which led to the commission of this offense will not recur. See, *Beltz*, 980 P.2d at  
474; *Manrique v. State*, 177 P.3d 1188, 1194 (Alaska App. 2008).

<sup>48</sup> See, *O'Connor*, 444 P.3d at 235. Mr. O'Connor during his 2015 trial testimony  
acknowledged that he had been dishonest when interviewed by the police. Transcript at pp.  
1103, 1177. And additional related trial testimony was provided by Detective Jade Baker.

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1 The Panel found that Mr. O'Connor had shown, barely, by clear and convincing  
2 evidence that he has unusually good prospects for rehabilitation,<sup>50</sup> that: "he or she can be  
3 adequately treated in the community and need not be incarcerated for the full presumptive term  
4 in order to prevent future criminal activity."<sup>51</sup>

6 **D. Sentence or Remand**

7 The Panel, having made the foregoing decision:

8 must then assess the proper sentence, applying the *Chaney* sentencing criteria and  
9 taking the mitigating factor into consideration. If the sentence the three-judge  
10 panel would impose is outside the range of sentences the sentencing judge is  
11 authorized to impose, the panel must retain jurisdiction and impose [ ] sentence . .  
12 ."<sup>52</sup>

14  
15 <sup>49</sup> Mr. O'Connor testified that he did not rape or otherwise take advantage of P.A.B. Transcript  
16 at p. 1116. He also testified that they engaged in consensual sexual activity. Transcript at pp.  
17 1077-87. His testimony is inconsistent with the jury's verdict. His testimony is also  
18 irreconcilable with P.A.B.'s trial testimony, which is hereafter discussed.

19 <sup>50</sup> It is an indication of the Panel's view of how close a question was presented that the Panel  
20 chose to express the finding in these terms, rather than a finding or "exceptional" or  
21 "extraordinary" prospects for rehabilitation, though the Panel recognizes that the Court of  
22 Appeals has used the three terms interchangeably.

23 <sup>51</sup> *Boerma*, 843 P.2d at 1248 (quoting *Kirby*, 748 P.2d at 766).

24 <sup>52</sup> *Garner*, 266 P.3d at 1048. *See also*, *State v. Silvera*, 309 P.3d 1277, 1285 (Alaska App.  
25 2013). "If the Panel, having considered a non-statutory mitigating factor, determines that a  
defendant should still receive a sentence within the presumptive range then:

the panels' conclusion is equivalent to a finding that it *not be* manifestly unjust to  
"fail to consider" the non-statutory sentencing factor. The case is therefore  
governed by the final sentence of AS 12.55.175(b), which directs the three-judge  
panel to "remand the case to the sentencing court, with a written statement of its  
findings and conclusions, for sentencing under [the normal rules of presumptive  
sentencing]."

*Garner*, 266 P.3d at 1051 (J. Mannheimer and J. Bolger concurring) (emphasis in original).

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1 The Panel considered the seriousness of Mr. O'Connor's offense, Mr. O'Connor  
2 as an offender, the impact of the crime on P.A.B., the non-statutory mitigating factor,<sup>53</sup> and the  
3 *Chaney* sentencing criteria.<sup>54</sup>

4 The Panel found that Mr. O'Connor had committed a quite serious Sexual Assault  
5 1<sup>st</sup> Degree, though his conduct was not among the most serious included within the definition of  
6 the offense.<sup>55</sup> The Panel in this regard placed substantial reliance on P.A.B.'s 2015 trial  
7 testimony.<sup>56</sup>

8 P.A.B.'s trial testimony included the following concerning the events at issue:

- 9  
10 1) She consumed approximately 7-8 mixed drinks at various bars;<sup>57</sup>

11  
12 <sup>53</sup> The Panel is to evaluate a non-statutory mitigating factor "in the same way it would evaluate a  
13 statutory mitigating factor that has been established by clear and convincing evidence." *Kirby*,  
748 P.2d at 765.

14 <sup>54</sup> *See generally*, AS 12.55.005 and *Kirby*, 748 P.2d at 760.

15 <sup>55</sup> *See*, AS 12.55.155(c)(10).

16 <sup>56</sup> The Panel is aware that Judge Saxby, per his June 4, 2015 sentencing comments, concluded  
17 that Mr. O'Connor's conduct was in the "lower range of seriousness" "in comparison to other  
18 Sexual Assaults in the 1<sup>st</sup> Degree." Transcript at p. 1359. Judge Saxby was not entirely certain  
19 what had actually transpired and noted that the jury in the first trial had listened to P.A.B.'s  
20 testimony and had acquitted Mr. O'Connor on two of the three charges, and hung on the  
21 remaining charge. But he also found that Mr. O'Connor had used violent language and engaged  
22 in violent actions, as claimed by P.A.B. and denied by Mr. O'Connor, and that "if anything rang  
23 true throughout the trial, that testimony from the victim rang true to me." Transcript at p. 1360-  
24 61. Judge Saxby during the February 17, 2021 hearing again referenced Mr. O'Connor's  
25 violence and violent language and stated that: "And I guess I'd note that that throughout the  
testimony that I've heard I've found her testimony to be far more credible than his about the  
event that night." Transcript at p. 99. Judge Saxby noted in this regard that P.A.B. had attempted  
to memorize Mr. O'Connor's license plate and promptly reported the offense once she was free  
of him. Judge Saxby then stated that: "her account of it being a very bad and in some ways  
violent encounter is more - - the more credible account." Transcript at p. 101. The Panel is not  
bound by Judge Saxby's findings (or by an expert's testimony). *Kirby*, 748 P.2d at 767. The  
Panel having considered the evidence in the record finds no material basis for not concurring  
with his findings concerning P.A.B.'s credibility. So, the Panel is placing substantial reliance on  
P.A.B.'s trial testimony in determining the seriousness of the offense. The Panel, however, does  
not agree with Judge Saxby's characterization of the seriousness of the offense.

<sup>57</sup> Transcript at pp. 163-65.

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- 1           2)     She thinks she left the bars at approximately 2:30 a.m.,<sup>58</sup>
- 2           3)     She was drunk;<sup>59</sup>
- 3           4)     She missed the bus, hitchhiked and was picked up by a taxi.<sup>60</sup>
- 4           5)     She intended to go to a trailer where her son and others lived but nobody  
5           answered her knock, so she walked to a friend's home but the lights there  
6           were off;<sup>61</sup>
- 7           6)     A white truck stopped. Mr. O'Connor was driving. He offered her a ride.  
8           62
- 9           7)     She wanted to go to friend's home (David) but when they got there Mr.  
10           O'Connor accelerated and drove past, which worried her but she had been  
11           drinking and could not think real straight;<sup>63</sup>
- 12           8)     He drove to an industrial area, unlocked a fence, and then drove to a small  
13           camper trailer, she figured they were going to have a drink and went with  
14           him into the trailer.<sup>64</sup> Nothing of a sexual nature had occurred to that  
15           point;<sup>65</sup>
- 16           9)     Once inside the next thing she remembers is that her pants were off and he  
17           was on top of her and she was trying to get him off of her;<sup>66</sup> she feared  
18           that he may kill her if she got him off of her, she thought about her  
19           children and family;<sup>67</sup> he was hurting her, and he told her that wanted to  
20           rape her ass and that he could not cum in her pussy, and that he was not  
21           done with her yet;<sup>68</sup> he pulled her hair back and put his hands around her  
22           neck, causing her to fear he would choke her, she was hollering at him to

18   <sup>58</sup> Transcript at pp. 172-73.

19   <sup>59</sup> Transcript at p. 217.

20   <sup>60</sup> Transcript at pp. 165-70. The cab driver, Megan Patrick, testified that it was evident to her  
21   that P.A.B. had been drinking and was drunk but she seemed to be on something else as she was  
22   jerky and all over the place and stumbled at one point at some stairs. Transcript at p. 940-41,  
23   945-46. Officer Corey Crane, the first officer on scene, testified that P.A.B. appeared to him to  
24   be intoxicated. Transcript at p. 369.

25   <sup>61</sup> Transcript at p. 174.

<sup>62</sup> Transcript at pp. 175-78.

<sup>63</sup> Transcript at pp. 178-79.

<sup>64</sup> Transcript at pp. 179-81.

<sup>65</sup> Transcript at pp. 185, 186, 256.

<sup>66</sup> Transcript at pp. 184-86. She denied that she had taken her pants off. Transcript at p. 187.

<sup>67</sup> Transcript at pp. 186-87.

<sup>68</sup> Transcript at p. 187.

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1 get off of her and he hollered back that he was not done with her yet, and  
2 he kept telling her could not cum in her pussy and had to fuck her in the  
3 ass, and she kept telling him to stop, and he threw her<sup>69</sup> like a rag doll; she  
4 wound up on her stomach and tried to crawl forward to get away but he  
5 was too heavy, he penetrated her vagina with his penis, it hurt and she told  
6 him to stop and he told her he was not done with her yet,<sup>70</sup> he tied to use  
7 lotion as a lubricant, he was not able to ejaculate and was having trouble  
8 maintain an erection, and was becoming mad, saying he could not cum in  
9 her pussy so he had to rape her in the ass, saying that over and over  
10 again;<sup>71</sup> she was praying, thinking about her family, and wondering if she  
11 would make it out of there alive and, he then suddenly stopped, she  
12 dressed, they did not speak, and he drove her to David's residence.<sup>72</sup>

13 The record also reflects that Mr. O'Connor that night had: gone out with his wife  
14 for pizza and then to a bar, his wife decided on the way to a second bar that she wanted to go  
15 home, so he dropped her off there; he then went by himself to the second bar;<sup>73</sup> he left the second  
16 bar at closing time;<sup>74</sup> he did not drive home and instead gave a person a ride and then drove past  
17 his work site, he picked up P.A.B. shortly before 3:00 a.m.,<sup>75</sup> and he had access to the the place  
18 he took her due to his employment.

19 The Panel concluded, in part, that Mr. O'Connor had engaged in predatory  
20 behavior, at least once he had seen P.A.B., as evidenced by his picking her up, her being

21 <sup>69</sup> Transcript at p.p. 187-88.

22 <sup>70</sup> Transcript at pp. 189-90. Karyn Warner, a Sexual Assault Nurse Examiner (SANE) who is  
23 part of a Sexual Assault Response Team (SART), testified that she performed a SART  
24 examination of P.A.B. beginning at approximately 7:00 a.m. on the day of the offense and that:  
25 at that point P.A.B.'s blood alcohol content was .063 (at 7:32 a.m.) and she tested positive for  
marijuana, but she did not appear at that point to be intoxicated, P.A.B. had apparently recent  
bruises and abrasions, including bruising on her left shoulder consistent with a fingerprint mark,  
an abrasion on her left shoulder towards the chest area, also possibly consistent with a fingerprint  
mark, bruises on her inner thigh near her genitals, abrasions on her back, and though she does not  
necessarily expect to find internal injuries she found a bruise on B.A.C.'s hymen and a laceration  
to her perineal area. Transcript at pp. 402-51, 479, 521.

<sup>71</sup> Transcript at pp. 190-91.

<sup>72</sup> Transcript at pp. 191-92.

<sup>73</sup> 2015 trial transcript at pp. 1042-44.

<sup>74</sup> Transcript at pp. 1047.

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1 intoxicated and vulnerable, his driving past her friend's house, his taking her to a remote site  
2 accessed through a locked gate, and his committing the sexual assault at that location.

3 The Panel largely addressed Mr. O'Connor as an offender in the context of  
4 addressing the proposed non-statutory mitigating factor, per the above-discussion.

5 P.A.B. did not speak at the June 4, 2015, November 3, 2020, or February 17, 2015  
6 sentencing-related hearings in the trial court. She did not appear during the Panel hearing. She  
7 did not submit a written statement to be included with any of the PSRs. But the Panel concluded  
8 based on the trial record that the sexual assault was a horrific event for her and that she likely  
9 will experience serious lasting related trauma.  
10

11 The Panel considered all of the *Chaney* sentencing criteria<sup>76</sup> and determined that  
12 community condemnation and the need to reaffirm societal norms are the most important  
13 *Chaney* considerations due to the nature and seriousness of the offense, and that considering  
14 those factors and the totality of the circumstances, the non-statutory mitigating factor did not  
15 warrant the Panel making a downward adjustment from the bottom of the presumptive 20-30  
16

17  
18 <sup>75</sup> Transcript at pp. 1143-1148.

<sup>76</sup> The Alaska Supreme Court in *Chaney* stated:

19 Under Alaska's Constitution, the principles of reformation and necessity of  
20 protecting the public constitute the touchstones of penal administration. Multiple  
21 goals are encompassed within these broad constitutional standards. Within the  
22 ambit of this constitutional phraseology are found the objectives of rehabilitation  
23 of the offender into a noncriminal member of society; isolation of the offender  
24 from society to prevent criminal conduct during the period of confinement,  
25 deterrence of the offender himself after his release from confinement or other  
penological treatment, as well as deterrence of other members of the community  
who might possess tendencies toward criminal conduct similar to that of the  
offender, and community condemnation of the individual offender, or in other  
words, reaffirmation of societal norms for the purpose of maintaining respect for  
the norms themselves.

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1 year sentencing range, noting the very close call in finding the non-statutory mitigator, that the  
2 factors supporting finding the mitigator served to justify a sentence at the bottom end but not  
3 below the presumptive range, and that his rehabilitative prospects and recidivism risk would be  
4 further addressed in the context of his eligibility for discretionary parole; and, that a sentence at  
5 bottom of the presumptive range would also serve the sentencing goal of general deterrence.

6 The Panel also found, to the extent it had to consider the remainder of Judge  
7 Saxby's Judgment under the circumstances, that: individual deterrence would be served by the 5-  
8 years of suspended jail time Judge Saxby had imposed; and, Mr. O'Connor's rehabilitation  
9 would be further addressed by means of the probation conditions Judge Saxby had imposed.

10 The Panel under such circumstances, per *Garner* and the related caselaw, did not  
11 accept this case on this basis and did not impose sentence. A remand for sentencing is not  
12 necessary as Judge Saxby has already imposed sentence.

#### 13 **E. Eligibility for Discretionary Parole**

14 The Panel considered Mr. O'Connor's request for discretionary parole eligibility  
15 under AS 12.55.175(c).<sup>77</sup> He bears the burden of proving by clear and convincing evidence  
16 based on the totality of the circumstances that manifest injustice would result if he is sentenced  
17 within or below the presumptive range and he is not made eligible for discretionary parole after  
18

19  
20  
21  
22 477 P.2d at 444 (citations omitted).

23 <sup>77</sup> Mr. O'Connor referenced AS 12.55.175(e) but he did not prove that: manifest injustice would  
24 result from the imposition of a sentence within the presumptive sentencing range; or, that a  
25 sentence below the presumptive range should be imposed because of his exceptional potential for  
rehabilitation. So, the Panel does not view the restriction imposed under AS 12.55.175(e) on its  
discretionary parole authority under AS 12.55.175(c) discussed in *Luckart* (314 P.3d at 1232-33)  
to apply, even if such a decision is materially based on Mr. O'Connor's prospects for  
rehabilitation.

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1 serving a certain period of time, which eligibility may be conditioned on his satisfying certain  
2 conditions while incarcerated.<sup>78</sup>

3 The Panel found that Mr. O'Connor had shown by clear and convincing evidence  
4 that manifest injustice<sup>79</sup> would result if he is not made eligible for discretionary parole after  
5 having served half of the jail sentence imposed by Judge Saxby provided he has successfully  
6 completed a SOTP while incarcerated. The Panel's decision is based on the following analysis.

7 Mr. O'Connor has shown that he differs from the typical person convicted of  
8 Sexual Assault 1<sup>st</sup> Degree due to his above-discussed prospects for rehabilitation. A defendant's  
9 prospects for rehabilitation are one *Chaney* sentencing criteria, though related to isolation,  
10 another *Chaney* criteria. The Panel has necessarily addressed and prioritized the *Chaney* criteria  
11 based on the totality of the present record. Dr. Becker testified that Mr. O'Connor should be  
12 required to complete SOTP, and that his doing so would provide another protective factor with  
13 respect to his risk of reoffending. His successful completion of a SOTP, whether he continues to  
14 deny his offense or not, would demonstrate significant and substantial progress towards actual  
15 rehabilitation, building on his model post-offense conduct (on pre-trial release and while  
16 rehabilitation, building on his model post-offense conduct (on pre-trial release and while  
17

18  
19  
20  
21 <sup>78</sup> See, *Luckart*, 314 P.3d at 1232; *Balallo v. State*, 2021 WL 3521063 at n 7 (Alaska App.  
August 11, 2021) (cited per *McCoy*).

22 <sup>79</sup> The Alaska Court of Appeals has recognized that this is a highly subjective standard, and that  
23 the phrases it has used to describe the concept do not add much to the statutory language. See,  
*Smith*, 711 P.3d at 568-69. The descriptive phrases that have been used include: "obvious  
24 unfairness" (See, *Lloyd v. State*, 672 P.2d 152, 154 (Alaska App. 1983); *Smith*, 711 P.2d at 508;  
*Totemoff v. State*, 739 P.2d 769, 775 (Alaska App. 1987)); "shock the conscience" (*Smith*, 711  
25 P.3d at 568); "plainly unfair" (*Smith*, 711 P.2d at 569; *Knipe v. State*, 305 P.3d 359, 363 (Alaska  
App. 2013)); and, "manifestly too harsh" (*Scholes v. State*, 274 P.3d 496, 500 (Alaska App.  
2012)).

**MEMORANDUM AND ORDER**

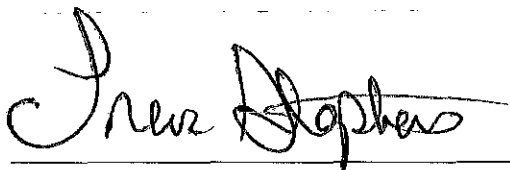
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1 incarcerated).<sup>80</sup> He will have served at least half the jail sentence imposed by Judge Saxby. And  
2 at that point, the *Chaney* calculus would change – with rehabilitation entitled to greater weight,  
3 and being addressed in his parole conditions, individual deterrence would be enhanced as he  
4 would face the additional consequence of returning to prison to serve part or all of the initially  
5 imposed jail sentence if he violated a parole condition, and community condemnation and the  
6 need reaffirm societal norms would still be very important considerations but members of the  
7 community considering the matter would also take note of his having completed SOTP, a  
8 continuation of his model post-offense conduct.<sup>81</sup>

9  
10 The Panel, as discussed above, is herewith addressing his eligibility for  
11 discretionary parole in a separate order.

12 **IT IS SO ORDERED.**

13 Dated at Ketchikan, Alaska this 7<sup>th</sup> day of October 2021.

14  
15 

16 Trevor Stephens  
17 Superior Court Judge  
Administrative Head

18  
19  
20 <sup>80</sup> *See, Luckart*, 314 P.3d at 1233. The Panel is not here referencing the type of victim-centered  
21 conduct that would support the exemplary post-offense conduct non-statutory mitigating factor.  
*See, Olmstead v. State*, 477 P.3d 656 (Alaska App. 2020).

22 <sup>81</sup> The Panel notes that it can order that a defendant is eligible for discretionary parole, but once  
23 eligible the decision as to whether and when the defendant is actually released on discretionary  
24 parole will be determined by the Parole Board applying the considerations set forth at AS  
25 33.16.100(a),(g), which considerations 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. O'Connor's eligibility on his continued good  
behavior while incarcerated but the Parole Board will consider the same per AS 33.16.100(g) in  
making its parole decision.

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