



1 **II. Sentencing**

2 **b. Presumptive Sentences**

3 Mr. Eckert has two prior felony convictions: MICS 4<sup>th</sup> Degree in 2001 and MICS  
4 4<sup>th</sup> Degree in 2015.<sup>2</sup> The MICS 4<sup>th</sup> Degree conviction merges into the MICS 2<sup>nd</sup> Degree  
5 conviction. He is subject to a presumptive sentencing range of 13-20 years on the A felony  
6 offense and 4-10 years on the C felony.<sup>3</sup> The sentences can be imposed consecutively or wholly  
7 or partially concurrently.<sup>4</sup> He is not eligible for discretionary parole on the A felony offense.<sup>5</sup>

8 **b. Aggravating Factors**

9 Judge Huguelet found at sentencing that there are three applicable statutory  
10 aggravating factors - AS 12.55.155(c)(12),(21),(31).  
11

12 **c. Statutory Mitigating Factors**

13 Mr. Eckert requested that Judge Huguelet find two statutory mitigating factors<sup>6</sup> -  
14 the conduct involved in his offenses “was among the least serious conduct included in the  
15 definition of the offense”<sup>7</sup> and that the facts surrounding the commission of the offenses and his  
16 prior offenses establish that “the harm caused by his conduct is consistently minor and  
17 inconsistent with the imposition of a substantial period of imprisonment.”<sup>8</sup> Judge Huguelet  
18

19  
20 <sup>2</sup> The 2001 conviction (3KN-01-228 CR) involved a marijuana grow operation and the 2015  
conviction (3N-14-1483) involved the possession of a small amount of heroin.

21 <sup>3</sup> The date of Mr. Eckert’s offenses (December 15, 2015) herein predates the effective date of  
22 SB 91 (July 12, 2016) with respect to the substantive offenses, though SB 91 applies to the  
presumptive sentencing ranges.

23 <sup>4</sup> AS 12.55.127(b).

<sup>5</sup> AS 33.16.090(b)(2).

24 <sup>6</sup> Mr. Eckert indicated during an earlier hearing that he intended to proffer a Post-Traumatic  
Stress Disorder (PTSD) statutory mitigating factor (AS 12.55.155(d)(20)(B)) and present related  
expert testimony, but he did not do so.

25 <sup>7</sup> AS 12.55.155(d)(9).

<sup>8</sup> AS 12.55.155(d)(12).

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1 found that Mr. Eckert had not proven either proposed statutory mitigating factor by clear and  
2 convincing evidence.

3 **d. Panel Referral**

4 Alaska Statute 12.55.165(a) provides that:

5 If the defendant is subject to sentencing under AS 12.55.155(c),(d),(e), or (i) and  
6 the court finds by clear and convincing evidence that manifest injustice would  
7 result from failure to consider relevant aggravating or mitigating factors not  
8 specifically included in AS 12.55.155 or from imposition of a sentence within the  
9 presumptive range, whether or not adjusted for aggravating or mitigating factors,  
10 the court shall enter findings and conclusions and cause a record of the  
11 proceedings to be transmitted to the three-judge panel for sentencing under AS  
12 12.55.175.

13 Mr. Eckert requested that Judge Huguelet find a non-statutory mitigating factor  
14 based on the post-offense changes to the MICS 2, Conspiracy to Commit MICS 2, and MICS 4  
15 statutes made by SB 91,<sup>9</sup> and he also contended that these circumstances would result in manifest  
16 injustice if he were sentenced within the presumptive range, whether adjusted for statutory  
17 aggravating or mitigating factors. Judge Huguelet rejected the same.<sup>10</sup>

18 Judge Huguelet learned near the end of the sentencing hearing that Mr. Eckert had  
19 received two medals while in the United States Navy: the Navy Commendation medal for his

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20 <sup>9</sup> Mr. Eckert argued that Judge Huguelet should find a non-statutory mitigating factor based on  
21 the sentencing changes made by SB 91 - if his 2014 offense had been committed after SB 91's  
22 effective date it would have been a Class A misdemeanor, not a C felony, and if it was not felony  
23 the older 2001 felony offense would not be considered for presumptive sentencing purposes, so  
24 he would be sentenced as a first-time felony offender, and also the A felony would be B felony,  
25 and the B felony a C felony. Mr. Eckert specifically noted that he was not arguing that the  
exceptional prospects for rehabilitation non-statutory mitigating factors applies, and Judge  
Huguelet and the prosecuting attorney both noted that it could not apply - apparently because the  
aggravating factor under AS 12.55.155(c)(21) had been found and per AS 12.55.165(b) a case  
cannot be referred to the Panel on the basis of exceptional potential for rehabilitation if that  
aggravating factor has been found.

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1 April 24, 1988 heroics as a rescue diver in saving six imperiled crewmembers on the USS  
2 Bonefish and rescuing twenty-eight other crew members in a life-raft, and the Navy Marine  
3 Corps medal for his bravery on October 7, 1989 by making numerous dives to aid in the retrieval  
4 of a dead airman and in saving another airman. The Navy Marine Corps medal is the highest  
5 peacetime medal awarded to a member of the Navy or the Marine Corps. Judge Huguelet had  
6 served in the Navy, had extensive other military service, was familiar with the medals and the  
7 degree of bravery displayed by those who receive them. He decided it would be manifestly  
8 unjust not to consider the same even though Mr. Eckert's heroism had occurred some thirty years  
9 earlier, so he found that an "extraordinary heroism in military service"<sup>11</sup> non-statutory mitigating  
10 factor should be recognized and applied to Mr. Eckert, and verbally referred the case to the Panel  
11 on that basis.

12  
13 Judge Huguelet issued a post-hearing written Referral to Three Judge Panel. He  
14 stated the finding that:

15 being decorated for selfless bravery twice - including receiving the nations'  
16 highest award for peacetime heroism - is a mitigating factor that should be  
17 considered when sentencing Mr. Eckert . . . [and] it would be manifestly unjust  
18 not to adjust the presumptive sentence based on this non-statutory mitigating  
19 factor.<sup>12</sup>

20 Judge Huguelet then noted that Mr. Eckert had made recent positive changes in  
21 his life and that "he appears to have reexamined his life and genuinely made an effort to change  
22 [and] [h]is courage as young man shows he has the potential and will power to succeed."<sup>13</sup>

23 <sup>10</sup> Judge Huguelet found that the Legislature intended that the substantive changes made in SB  
24 91 to operate prospectively, so adopting the proposed non-statutory mitigating factor would be  
25 contrary to the Legislature's intent.

<sup>11</sup> Transcript at p. 105.

<sup>12</sup> Referral at p. 6.

<sup>13</sup> Id.

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1 Judge Huguelet concluded by stating that he would be inclined to sentence Mr.  
2 Eckert to a composite sentence of three to five years<sup>14</sup> of time to serve with ten years suspended  
3 and place him on probation for five years, and to revoke his probation in 3KN-14-1483 CR but  
4 not impose any of the suspended jail time. Judge Huguelet did not take action in 3KN-14-1483  
5 and so the case apparently was also before the Panel for sentencing had the Panel accepted 3KN-  
6 15-1863 and imposed sentence.<sup>15</sup>

### 7 III. Panel Hearing

8 Mr. Eckert's hearing evidence focused on three things. First, the specifics of his  
9 heroic conduct and the medals he received.<sup>16</sup> Second, the PTSD he claims to have suffered as a  
10 result of his experiences in the Navy, in particular, his experiences during the conduct that  
11 resulted in the medals being awarded, and the effect of the same on his involvement with drugs.  
12 Third, the positive post-offense changes he had made.

13 The State did not dispute Mr. Eckert's heroism, that he received the medals, or the  
14 significance of the medals. The State did focus on his receiving a less than honorable discharge  
15 in 1990 for drug usage.  
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19 <sup>14</sup> The Panel could not impose this sentence because the bottom of the presumptive range is  
20 more than four years so, per AS 12.55.155(a)(2), the least amount of actual jail time the Panel  
21 could impose would have been one half of thirteen years as a non-statutory mitigating factor  
22 could not result in a greater downward adjustment than a statutory mitigating factor. *See,*  
23 *Luckart v. State*, 270 P.3d 816, 819 (Alaska App. 2012); *Garner v. State*, 266 P.3d 1045, 1048  
(Alaska App. 2011); *Beauvois v. State*, 837 P.2d 1118, 1122-23 (Alaska App. 1992); *Bossie v.*  
*State*, 835 P.2d 1257, 1258 (Alaska App. 1992); *State v. Price*, 740 P.2d 476, 482 (Alaska App.  
1987).

24 <sup>15</sup> It is not clear to the Panel why Judge Huguelet did not address 3KN-14-1483 CR during the  
25 sentencing hearing as he could then have followed through with his stated intent with respect to  
that case.

<sup>16</sup> Credible testimony was also presented that after returning to Alaska following his discharge  
from the Navy Mr. Eckert saved a child from drowning in a lake.

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1 Mr. Eckert did not present any testimony (expert or otherwise) or medical records  
2 showing that he had actually at any time been diagnosed with PTSD, and there do not appear to  
3 be any otherwise in the record.<sup>17</sup>

4 Mr. Eckert presented testimony that he had been in his sister's 3<sup>rd</sup> party custody  
5 for some four months immediately prior to the trial and during that time: he did not violate any  
6 condition of his release; he was clean and sober; he obtained his commercial driver's license  
7 (CDL); he completed an out-patient substance abuse treatment program; his socialization  
8 improved; he helped his sister and her husband with projects at their home; he was involved in  
9 charitable community activities; he made plans to attend a vocational school; and, he has a new  
10 positive outlook on a drug-free life. He also submitted documents showing the programs he had  
11 completed while incarcerated.  
12

13 Mr. Eckert's arguments focused on his heroic acts in the context of his prospects  
14 for rehabilitation and, to a lesser extent, his claimed related PTSD. He argued that: the non-  
15 statutory mitigating factor should not be limited to heroism in military service; the Panel should  
16 find that the non-statutory mitigating factor had been proven; and, the Panel should impose the  
17 sentence recommended by Judge Huguelet.  
18

19 The State argued that: the Panel should not recognize the non-statutory mitigating  
20 factor; and, if the Panel did so, the Panel should nonetheless impose sentence within the  
21 presumptive range given Mr. Eckert's criminal history, the facts of the case, his less than  
22 honorable discharge from the Navy, and the fact that his heroic conduct was some thirty years  
23 ago, and before he committed his three felony drug offenses.  
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<sup>17</sup> Mr. Eckert stated during his allocution that he had been so diagnosed.

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1 **IV. Panel's Decision**

2 The Panel's authority is limited by the basis for the trial court's referral to the  
3 Panel.<sup>18</sup> So the Panel's sole focus is the "selfless bravery" - "extraordinary heroism in military  
4 service" non-statutory mitigating factor basis for Judge Huguelet's referral.

5 The Panel general analysis was: first, determine whether to adopt the new non-  
6 statutory mitigating factor<sup>19</sup> found by Judge Huguelet; second, if adopted, determine whether Mr.  
7 Eckert had shown by clear and convincing evidence that he factor applied to him; and, third, if  
8 so, impose sentence.

9 The Panel decided not to adopt the proposed new non-statutory mitigating factor.  
10 The Panel's decision was based on the following analysis.<sup>20</sup>

- 11
- 12 a. The manifest injustice focus is not on the fairness of the presumptive term.
  - 13 b. The manifest injustice focus is on whether manifest injustice would result if  
14 the proposed non-statutory mitigating factor is not considered.
  - 15 c. That focus requires that the Panel consider the importance of the proposed  
16 factor and the potential unfairness that would result if the factor is entirely  
17 disregarded.
  - 18 d. A non-statutory mitigating factor adopted by the Panel should meet the same  
19 general criteria that control the Legislature's adoption of mitigating and  
20 aggravating factors. And be related to the Legislature's "overarching"

21 <sup>18</sup> See, *Luckart*, 270 P.3d at 821 ("The commentary to AS 12.55.175 strongly suggests that the  
22 jurisdiction of the three-judge panel is limited by the scope of the referral from the sentencing  
23 court.").

24 <sup>19</sup> The Legislature "in effect delegated to the three-judge panel the authority to create new  
25 aggravating and mitigating factors under the common law." *Dancer v. State*, 715 P.2d 1174,  
1178 (Alaska App. 1986). So the Panel is not bound by Judge Huguelet's finding that such a  
non-statutory mitigating factor should be created.

<sup>20</sup> The factors the Panel identified are primarily based on the Alaska Court of Appeals related  
discussions in *Dancer*, 715 P.2d at 1178 and *Smith v. State*, 711 P.2d 561, 569-70 (Alaska App.  
1985).

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1 [presumptive sentencing] goal of eliminating unjustified disparity in  
2 sentencing.”<sup>21</sup>

- 3 e. The general criteria include identify frequently recurring characteristics of the  
4 crime and/or the criminal that should be so considered.
- 5 f. And the Panel must evaluate the importance of the characteristics in light of  
6 the *Chaney* sentencing goals<sup>22</sup> and determine if the factor would further one  
7 or more goal.

8 The Panel decided that Mr. Eckert had not shown<sup>23</sup> that adoption of the proposed  
9 non-statutory mitigating factor of “selfless bravery” - “extraordinary heroism in military service”  
10 was appropriate or necessary<sup>24</sup> based on its evaluation of the importance of the factor in light of  
11 the *Chaney* sentencing goals for seven reasons.

12 First, the members of the Panel have the utmost respect for those that serve in this  
13 country’s military, and a person’s “selfless bravery” - “extraordinary heroism in military service”  
14 is without doubt worthy of recognition, respect, and acclaim, but such conduct is not, in and of  
15 itself, in the abstract a stand-alone basis for allowing the possibility of a sentence being imposed  
16 below the bottom of the presumptive range.

17 Second, judicial recognition of such conduct in sentencing must further a *Chaney*  
18 goal.

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20 <sup>21</sup> *Smith v. State*, 229 P.3d 221, 231 (Alaska App. 2010).

21 <sup>22</sup> *State v. Chaney*, 477 P.2d 441, 443-44 (Alaska 1970). *See also*, AS 12.55.005.

22 <sup>23</sup> It appears that Mr. Eckert had the burden of showing by clear and convincing evidence that  
23 the Panel should adopt the proposed non-statutory mitigating factor. *See, State v. Silvera*, 309  
24 P.3d 1277, 1285 (Alaska App. 2013) (“The three-judge panel then independently reviews  
25 whether the defendant has established the non-statutory mitigating factor by clear and convincing  
evidence.”). The Panel independently reviewed the proposed non-statutory mitigating factor and  
its decision would have been the same had the preponderance of evidence been applied of if Mr.  
Eckert, the proponent of the factor, did not bear the burden of proof or persuasion.

<sup>24</sup> Recognizing the Panel’s “safety valve” function. *See, Nell v. State*, 642 P.2d 1361, 1369-70  
(Alaska App. 1982).

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1 Third, Judge Huguelet in his Referral and Mr. Eckert in his evidence and  
2 argument focused on the *Chaney* goal of rehabilitation.

3 Fourth, the Panel agrees that rehabilitation is the one *Chaney* goal that this  
4 proposed mitigating factor service could serve to further as the conduct covered by the factor  
5 would in most if not all cases be relevant to a person's prospects for rehabilitation, and it does  
6 not appear that recognition of the conduct in a non-statutory mitigating factor would materially  
7 further another *Chaney* sentencing goal.

8  
9 Fifth, a trial judge would consider the conduct covered by the proposed non-  
10 statutory mitigating factor in determining what sentence to impose within the presumptive  
11 range.<sup>25</sup> Indeed, the conduct would likely be a very important consideration in this regard. But  
12 the fact that the conduct reflects favorably or very favorably on a defendant's prospects for  
13 rehabilitation does not itself warrant adoption of the conduct as a non-statutory factor as there are  
14 many things that a trial judge may consider in assessing a defendant's prospects for rehabilitation  
15 and a trial judge's reliance on a fact or circumstance does not simply elevate the same to non-  
16 statutory mitigating factor status. Put another way, such a fact or circumstance must be  
17 sufficiently extraordinary and compelling that it should be adopted as a new rehabilitation-based  
18 non-statutory mitigating factor so that a sentence could be imposed below the bottom of the  
19 presumptive range set by the Legislature based solely on the same.

20  
21 Sixth, the Panel has recognized the rehabilitation-based non-statutory mitigating  
22 factor of exceptional potential for rehabilitation. The Panel is not persuaded, at least based on  
23 the record in this case and the arguments presented, that it is necessary or appropriate to

24  
25 <sup>25</sup> *See, Lynch v. State*, 2017 WL 1968277 (Alaska App. May 10, 2017) (cited per *McCoy v. State*, 80 P.3d 757, 764 (Alaska App. 2002)).

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1 The Panel noted with regards to the PTSD related evidence and arguments, that  
2 the Legislature has created a military related PTSD statutory mitigating factor<sup>29</sup> and Mr. Eckert  
3 apparently decided that it did not apply to him as he did not propose that factor or present related  
4 expert or medical evidence.<sup>30</sup>

5 The Panel noted that if it had adopted a selfless bravery/heroism non-statutory  
6 mitigating factor it may not apply to Mr. Eckert because his acts of bravery occurred over  
7 twenty-five years before he committed the offenses at issues, he received a less than honorable  
8 discharge from the Navy relatively shortly after his brave conduct, and all of his serious criminal  
9 activity occurred after the brave conduct.  
10

11 And the Panel noted that Mr. Eckert on remand was not precluded from making  
12 new arguments before the trial court for referral to the Panel, such as an argument based on his  
13 ineligibility for discretionary parole.<sup>31</sup>  
14

15 great benefit to the community. The Panel expressed concern about how to frame such a non-  
16 statutory mitigating manner in a meaningful way. The Panel notes that its decision would be the  
17 same whether the proposed non-statutory mitigating factor is limited to military related selfless  
18 bravery and heroism or not.

19 <sup>29</sup> AS 12.55.155(d)(20)(B). The Panel was concerned that adopting the proposed non-statutory  
20 mitigating factor would, in effect, be an end run around the Legislature's intent because it is a  
21 rehabilitation based factor, Mr. Eckert apparently cannot pursue a referral to the Panel on the  
22 basis of the exceptional potential for rehabilitation non-statutory mitigating factor, at least on the  
23 A felony offense, because of a statutory aggravating factor Judge Huguelet found and which the  
24 Legislature has determined precludes such a referral, and, to the extent his claimed PTSD is a  
25 consideration under this factor, there is the specific statutory mitigating factor that he did not  
26 pursue so finding a non-statutory mitigating factor based on his claimed military-related PTSD  
27 would be inconsistent with the Legislature's intent.

28 <sup>30</sup> The Panel notes that the Legislature limited application of this statutory mitigating factor to  
29 "combat-related" PTSD (and traumatic brain injuries) and that the factor reflects that the  
30 Legislature has considered military service in the context of statutory mitigating factors and this  
31 is the only military-related statutory mitigating factor it has adopted.

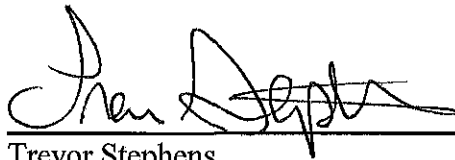
32 <sup>31</sup> The Panel in State v. Timothy Daniel Tanberg, 4FA-16-619 CR recently decided that a  
33 referral to the Panel may be made solely on the eligibility for discretionary parole basis though  
34 AS 12.55.165(a) does not specifically list that as a basis for referral as the Panel has the general  
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1 Dated at Ketchikan, Alaska this 11<sup>th</sup> day of March 2019.

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4 Trevor Stephens  
5 Superior Court Judge  
6 Three-Judge Panel  
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24 authority per AS 12.55.175(c) to grant eligibility for discretionary parole without finding that a  
25 the defendant has extraordinary potential for rehabilitation or that manifest injustice would result if  
the defendant is sentenced within the presumptive range, whether or not adjusted for aggravating  
or mitigating factors. *See, Luckart v. State*, 314 P.3d 1226, 1232 (Alaska App. 2013).

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