

1 of Sexual Abuse of a Minor in the 1st Degree (SAM 1st), 2 counts of Sexual Abuse of a Minor in
2 the 2nd Degree (SAM 2nd), and a count of Unlawful Exploitation of a Minor, alleging that he had
3 sexually abused L.K. while she resided in his home over an approximately 3-year period, when
4 she was approximately ages 8-10.

5 Mr. King pled not guilty. He moved pre-trial to suppress his statements to the
6 police. The trial court denied his motion.

7 Mr. King maintained his not guilty plea but waived his right to a jury trial, opting
8 instead for a court trial before Anchorage Superior Court Judge Jack Smith, and he agreed that
9 L.K.'s grand jury testimony and Alaska CARES child advocacy center recorded interview could
10 be presented as evidence at trial, so L.K. would not have to testify.

11 Mr. King during the trial: did not challenge the testimony of Anchorage Police
12 Department Detective Leonard Torres, the State's only witness, with respect to the SAM 1st or
13 SAM 2nd charges; did not present any evidence; and, his counsel did not make an opening
14 statement or present closing arguments.

15 Judge Smith found Mr. King guilty on 10 counts of SAM 1st Degree – Counts 4-
16 13 – and the 2 SAM 2nd Degree Counts (14,15), and acquitted him on the 4 remaining counts.

17 Mr. King faced a minimum composite sentence of 92 years, 6 months and 2 days.
18 He is not eligible to apply for discretionary parole. He is entitled to mandatory parole.²
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22 members to touch on every material point and consideration when verbally stating the Panel's
23 decision during the Panel hearing.

24 ² Mr. King is subject to a presumptive sentencing range of 25-35 years on each of the SAM 1st
25 Degree counts per AS 12.55.125(i)(1)(a)(i). He is subject to a presumptive range of 5-15 years
on each of the SAM 2nd Degree counts per AS 12.55.125(i)(3)(A). The sentencing court must
impose at least one-quarter of the presumptive term – calculated from the middle of the
presumptive – for each of Counts 5-13 (SAM 1st Degree) consecutive with each other and with
Count 4 (SAM 1st Degree) per AS 12.55.127(e)(2) and AS 12.55.127(e)(4)(A), and at least 1

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1 Mr. King, in preparation for sentencing, arranged for and underwent a sex
2 offender risk assessment and psychological evaluation by Dr. Bruce Smith, a forensic
3 psychologist. Dr. Smith issued a related report.

4 Prior to the sentencing the State did not proffer any statutory mitigating factors,
5 and Mr. King did not proffer any statutory mitigating factors. He did request that Judge Smith
6 refer the case to the 3-Judge Sentencing Panel (Panel) per AS 12.55.165(a) on the grounds that:
7 he qualifies for the non-statutory mitigating factor of extraordinary prospects for rehabilitation
8 and it would be manifestly unjust if some adjustment was not made to the presumptive term
9 based on that non-statutory mitigating factor; and, that manifest injustice would result from
10 sentence being imposed within the presumptive range, whether or not adjusted for aggravating
11 and mitigating factors. He relied primarily on Dr. Smith's report. The State opposed the case
12 being referred to the Panel.
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14 - Mr. King presented Dr. Smith's testimony during the sentencing hearing. No
15 other evidence was presented. Judge Smith determined that Mr. King had not proven either
16 proposed grounds for referral to the Panel by clear and convincing evidence, so he declined to
17 refer the case, and proceeded to sentence Mr. King, imposing the minimum possible composite
18 sentence of 92 years, 6 months, and 2 days.
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24 consecutive day for each of the 2 SAM 2nd Degree convictions per AS 12.55.127(c)(2)(F). He is
25 not eligible for discretionary parole unless made eligible by the Panel per AS 33.16.090. He is
entitled to mandatory parole (good time) due to the dates of his offenses, per AS 33.16.010 and
AS 33.20.010.

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1 Mr. King appealed. The Court of Appeals affirmed Mr. King's convictions but
2 remanded the case to the trial court for further consideration of whether the case should be
3 referred to the Panel.³

4 Judge Smith had retired. The case was reassigned to Anchorage Superior Court
5 Judge Eric Aarseth. Judge Aarseth set a sentencing hearing and briefing schedule.

6 Mr. King in his sentencing brief requested that the case be referred to the Panel on
7 the two grounds previously presented and added a third basis – the non-statutory mitigating
8 factor of exemplary post-offense conduct. The State opposed referral to the Panel on any basis.
9 The State did not propose any statutory aggravating factors and Mr. King did not propose any
10 statutory mitigating factors.⁴

11 The parties at the sentencing hearing relied on the evidence then in the record.
12 Judge Aarseth found that Mr. King had not met his burden of proof with respect to the exemplary
13 post-offense conduct non-statutory mitigating factor but he had met his burden of proof with
14 respect to the other two proposed grounds for referral, and that manifest injustice would also
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18 ³ *King v. State*, 487 P.3d 242 (Alaska 2021). The Court of Appeals: discussed the import of Dr.
19 Smith's unrefuted expert opinions; found that the trial court had not applied the proper totality of
20 the circumstances test with regards to the extraordinary potential for rehabilitation non-statutory
21 mitigating factor; and, found that it was not clear that the trial court had applied the proper
22 manifest injustice if sentenced within the presumptive range, whether or not adjusted for
23 aggravating and mitigating factors, analysis as the trial court had focused primarily on the facts
24 of the offenses and not on Mr. King and his background and other conduct, in particular his trial
25 related decisions which avoided L.K. having to testify, his remorse, and, his willingness to
participate in sex offender treatment.

⁴ The Court of Appeals had noted that there was evidence in the record which would support the
trial court finding the AS 12.55.155(c)(18)(B) statutory aggravating factor – that Mr. King had
been convicted of felony sexual offense under AS 11.41.410 -.458 and had engaged in the same
or other conduct prohibited by AS 11.41.410 - .458 with same or another victim – and that if this
aggravating factor was found to apply the case could not be referred to the Panel on the basis of
the extraordinary potential for rehabilitation non-statutory mitigating factor per AS 12.55.165(b).

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1 result if Mr. King were not eligible to apply for discretionary parole after serving one-half of the
2 composite active jail sentence.⁵ So, he did not impose sentence and referred the case to the
3 Panel.

4 The Panel hearing was held on January 4, 2022.⁶ Neither party called witnesses
5 or submitted exhibits.

6 2. Facts

7 The record, in addition to the facts outlined above in the procedural history,
8 contains the following material facts.

9 Mr. King graduated from high school. He was trained and then worked as a
10 welder. He enlisted in the Navy at age 21, served for some 7 years, and was honorably
11 discharged. He obtained an associate's degree in computer engineering. He had a part-time job
12 for a short period of time and then worked for the Federal Aviation Administration (FAA) in
13 Anchorage for some 23 years.

14 Mr. King has no material prior criminal record.

15 Mr. King has never married. At the time he began to sexually abuse L.K. he had
16 not had an intimate relationship since he was in the Navy. He lived alone.
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20 The State informed Judge Aarseth near the outset of the sentencing hearing that it was not
21 pursuing that statutory aggravating factor.

22 ⁵ Judge Aarseth's referral reflects that he referred the case to the Panel on the basis of both the
23 non-statutory extraordinary prospects for rehabilitation mitigating factor and the finding that
24 imposition of sentence within the presumptive range, whether or not adjusted for aggravating or
25 mitigating factors, would be manifestly unjust, though he evidently believed that a sentence of 46
26 years, 3 months, and 2 days, the lowest composite sentence that the Panel could impose based on
27 a finding that the non-statutory mitigating factor applies, would not be manifestly unjust if Mr.
28 King is eligible to apply for discretionary parole after serving one-half of that sentence.

29 ⁶ Mr. King filed a motion on December 30, 2021 to continue the Panel hearing to a later date
30 due to Dr. Smith's non-availability on January 4, 2022, and requested expedited consideration.

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1 Mr. King's brother has two daughters, including L.K... His brother in or about
2 2007 was not able to adequately provide for his daughters. Mr. King allowed his brother and
3 nieces to move into his home. L.K. was approximately 7 years old.

4 L.K. is on the autism spectrum, she has a sensory disorder, and has been
5 diagnosed with ADHD, and a mood disorder.

6 Mr. King began by default to assume more of a parental role than he had
7 anticipated or wanted. L.K.'s sister moved to her mother's home. L.K. moved to a bedroom on
8 the same floor as his bedroom. He became involved in her hygiene care, including bathing.
9 L.K.'s sensory disorder was such that she frequently did not wear clothes while home.

10 Mr. King began to engage in sexual activity with L.K., touching her vagina while
11 bathing her and showing her and letting her touch his erect penis. Over a period of 2-3 years he
12 engaged in sexual conduct with L.K, by his estimate, over 50 different times. His conduct
13 included: digital anal penetration (Counts 4,5); cunnilingus (Count 6); penile anal penetration
14 (Counts 7-9); penetrating L.K.'s anus with a vibrator (Count 10), penetrating L.K.'s vagina with
15 a vibrator (Count 11); fellatio (Counts 12, 13); and, sexual contact (Counts 14,15). He used
16 candy to persuade L.K. to engage in these activities.

17 Mr. King, when interviewed by Detective Torres, acknowledged that: he let L.K.
18 touch his erect penis; he played with her vagina; he showed her sexual positions; he digitally
19 penetrated her while bathing her; his penis touched her vagina while they were in bed together; he
20 masturbated in front of her; he ejaculated in her mouth; he used a vibrator in her anus and
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25 The Panel addressed this matter at the outset of the January 4, 2022 hearing. Mr. King advised
that he was withdrawing the motion to continue. The hearing then proceeded as scheduled.

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1 vagina; he wore a cock ring while engaging in sexual acts with her; and, he had become sexually
2 aroused while spanking L.K.'s sister's naked behind while other children were watching.

3 Mr. King explained to Detective Torres that: L.K. had bad hygiene, ran around
4 the house naked and he had to care for her, including bathing her; what he did would be
5 inappropriate if done to a normal child, and if inappropriate was not sexual as there was no
6 penile penetration which is "real sex;" he engaged in at least some of this conduct so she would
7 learn about sexual matters; and, she was curious about sex, she grabbed and rubbed his penis,
8 and she grinded on him.

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10 Mr. King's allocution during the 2015 sentencing hearing before Judge Smith
11 included a material amount of self-pity, but he: acknowledged that there was no excuse for his
12 behavior; expressed the hope that L.K. will recover in time, and advised that he will do what he
13 can to help her; apologized to those he may have hurt, most especially L.K.; acknowledged his
14 responsibility for any illegal conduct that occurred between he and L.K.; recognized that his
15 conduct involved a betrayal of trust and that she did not deserve what happened to her; stated
16 that he will feel guilt and remorse for the rest of his life; and, advised that he would participate in
17 whatever sex offender programs the court orders.⁷

18 L.K.'s mother provided a victim impact statement to the author of the PSR in
19 which she advised that: when L.K. came to live with her after Mr. King was charged she was a
20 broken and angry child, who frequently cried and who blamed herself for what had happened;
21 and, L.K. had been regularly receiving counseling for the past year and a half and was doing
22 much better.
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1 Dr. Smith is a well-credentialed and experienced forensic clinical psychologist.
2 He received his doctorate in psychology in 1981 and has since been a licensed psychologist
3 practicing in Alaska. He helped develop the Department of Corrections (DOC) sex offender
4 treatment program (SOTP). He has testified as an expert in the field of forensic psychology some
5 300 times.

6 Dr. Smith met with Mr. King in April 2015 for purposes of conducting a sex
7 offender risk assessment and a psychological evaluation. He conducted a clinical interview and
8 administered the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), the Personality
9 Assessment Inventory (PAI), the Multiphasic Sex Inventory (MSI II), the STATIC-2002R, and
10 the STABLE-2007 tests.

11 With regards to the psychological evaluation, Dr. Smith recognized that Mr. King:
12 had disclosed having sexual interest, thoughts and sexual fantasies involving children; had
13 minimized and rationalized his conduct and blamed L.K. during both his police interview and the
14 forensic clinical interview and testing;⁸ had endorsed a number of extreme and bizarre thoughts;⁹
15 and, had exhibited thinking and behavior which was basically the same as other child molesters.
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19 ⁷ Mr. King submitted a written statement which was included with the Pre-Sentence Report
20 (PSR), and it appears his verbal allocution consisted of his reading that written statement. The
PSR author also included with the PSR letters of support for Mr. King from family and friends.

21 ⁸ The MSI II in particular. Dr. Smith in this regard, in part, wrote:

22 However, his responses indicate a number of rationalizations to minimize the
23 seriousness of his sexual behavior. These include believing the allegations
24 against him were exaggerated, no one was hurt by what happened, he did not plan
25 it, he slipped up one time, made a mistake and does not know how the sexual
things happened. Mark noted he was stressed, mixed up, and is not perfect. He
further placed responsibility for his behavior on having problems with his family,
having been interested in the child's sexual development, attempting to teach her
about sex, having to keep her washed and clean, and not having a satisfying
sexual relationship. Finally, Mark also holds the victim responsible for his sexual

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1 Dr. Smith found that Mr. King's test results reflected that he had a number of
2 inter-related emotional and psychological problems, which contributed to his committing the
3 sexual abuse, including an Unspecified Depressive Disorder, Other Specific Paraphiliac
4 Disorder-Sexual Abuse of Children; Exhibitionist Disorder, Personality Disorder NOS with
5 paranoid and antisocial features, and, possibly, an Anxiety Disorder involving female peers. He
6 found that Mr. King is sexually attracted to adult women but feels inadequate and lacks the
7 confidence to interact socially with adult women, and he sees himself as the victim of a
8 dangerous world, which keeps him from accepting full responsibility for his actions. He opined
9 that the foregoing needed to be addressed, and could be addressed in an institutional setting, such
10 as the DOC facilities in Palmer or Juneau, or in the community by a DOC approved provider.¹⁰

12 With regards to the risk assessment, Dr. Smith determined that Mr. King presents
13 a low risk of recidivism based primarily on the results of the STATIC-2002R, an instrument used
14 to predict sexual and violent recidivism for sex offenders, which reflect that he scored in the
15 lowest risk category, with a predicted recidivism rate of 1% at 5 years following release from
16 custody, and that only 2.1% to 4.4% of all sex offenders scored lower.¹¹ Dr. Smith recognized

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19 behavior because she kept coming over to see him, asked for it by the way she
20 looked and talked, led him on all the way, and wanted and liked the sexual things
21 that happened.

22 Dr. Smith's May 18, 2015 report at p. 6.

23 ⁹ Dr. Smith noted this in discussing the results of the MMPI-II. Dr. Smith found that Mr. King's
24 paranoia and psychopathic deviance scales were elevated, and noted that person with his profile
25 tend to exhibit a pattern of chronic psychological maladjustment – they are immature, alienated,
26 tend to manipulate others for their own gratification, rationalize their difficulties, and blame
27 others rather than accept responsibility for their actions.

¹⁰ Dr. Smith identified two such providers – Dr. Roger Graves and Dr. Michelle Yep Martin.

¹¹ Dr. Smith acknowledged that this instrument had not been normed for the Alaska population,
and he applied a routine correctional sample. His report and his sentencing hearing testimony,

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1 that Mr. King scored a moderate risk of recidivism on the STABLE-2007 but placed more
2 weight on the STATIC-2002R results, and found that his overall risk of recidivism is low.¹²

3 Dr. Smith opined that Mr. King:

4 does not acknowledge a sexual deviance that led to his repeated molestation of his
5 niece. He believes that her proximity when moved next to his room and her
6 nakedness were the triggers that led to his sexualizing her. Mark has some
7 unusual thought patterns and cognitive distortions that come from his lack of
8 social experience with women and children over the course of his life. It appears
9 that the availability of a nude prepubescent/pubescent child was the primary risk
10 factor.¹³ Research supports that access to a victim is the most powerful risk factor
11 for re-offending. His risk of recidivism is most likely related to being
12 unsupervised with a female child and not having a form of external support or
13 validation of his logical distortions. Another factor is the fact that Mark was non-
14 assertive in his relationships with adults . . . and appears to have intimacy deficits
15 that need to be addressed as a component of developing a healthy approach to
16 sexuality. He has social anxiety, a long term depressive baseline to his feeling,
17 and feels he has been victimized in life. These are all treatment areas for Mark to
18 address. . .

19 Mark needs to address his sexual deviancy, suspicion and mistrust of others,
20 intimacy deficits and cognitive distortions in treatment. . .

21 He will be best served by placement in treatment while incarcerated so that he
22 may continue to take responsibility for his offending behavior, and learn
23 avoidance and thought stopping to address his sexualization of prepubescent
24 females, learn to use his self-management tools from a relapse prevention plan
25 and Good Lives plan, develop a safety net, and establish a safety plan for any
26 potential children of other people in his home environment. . .

27 The primary recommendation to emerge from this evaluation is for Mark to
28 engage a DOC approved provider while incarcerated if possible but immediately
29 upon his release to address his pattern of sexual abuse of his niece given his lack
30 of a mature adult as a sexual outlet. . . [He will also need to address his]

31 and the discussion of the STATIC-2002R in the PSR, reflect that the STATIC-2002R is used by
32 DOC and is the best available risk assessment instrument for sex offenders.

33 ¹² The STATIC-2002R generally measures static or fixed factors while the STABLE-2007
34 includes more dynamic or changing factors. Dr. Smith noted with respect to the former that
35 recognized predictors of recidivism include criminal history, non-sexual antisocial behavior
beginning in childhood and continuing into adulthood, prior contact offenses, prior violent
offenses, and drug use problems, none of which were present for Mr. King.

¹³ All emphasis is added by the Panel unless otherwise noted.

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1 underlying negative emotional states. . . Mark has an engrained pattern of
2 thinking and behaving that that fits the diagnostic criteria for a personality
3 disorder on testing. This allowed him to engage in the molest behavior with his
4 niece even though he knew it was wrong and against both his own moral code and
5 that of society. This one sided thinking process in combination with his access to
a vulnerable pubescent female led to the offending behavior event though there
does not appear to have been a deviant sexual interest pattern in children that pre-
dated the offending time frame.

6 Dr. Smith during his 2015 sentencing hearing testimony; further explained why he
7 placed primary weight on Mr. King's historical risk factors (STATIC-2002R); advised that
8 research shows that engagement in a SOTP further reduced an offender's risk of recidivism;
9 opined that Mr. King does not have a fixed ingrained pattern of deviance that must be addressed;
10 and stated,

11 The underlying factors on the other side of things, having to do with things that
12 relate to intimacy deficits and having to related to his thinking pattern and what
13 clouded his judgment, and those things are eminently treatable, either in an
14 incarcerated setting or with a community provider, once he is released.

15 3. Panel Decision

16 a. Panel Role

17 The Panel understands that: "It is the legislature, not the judiciary which
18 establishes the punishment or range of punishments for a particular offense;"¹⁴ "The presumptive
19 term for an offense represents the legislature's assessment of the appropriate sentence for a
20 typical offender within that category;"¹⁵ and, the "safety valve" Panel statutes "do not authorize
21 sentencing judges [or the Panel] to disregard the legislature's assessment concerning the relative
22 seriousness of the crime or the general appropriateness of the prescribed penalty."¹⁶ But the

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24 ¹⁴ *Beltz v. State*, 980 P.2d 474, 480 (Alaska App. 1999). *See also, Scholes v. State*, 274 P.3d
496, 503 (Alaska App. 2012).

25 ¹⁵ *Id.*

¹⁶ *Id.* *See also, Moore v. State*, 262 P.3d 217, 2021 (Alaska App. 2011).

1 Panel also recognizes that the Legislature did create the Panel as a presumptive sentencing safety
2 valve in appropriate cases and, with certain exceptions that do not apply herein,¹⁷ did not exclude
3 even unclassified felony sexual offenses – offenses which are heinous by definition – from
4 possible Panel referral.

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6 **b. Scope of the Referral**

7 The Panel advised the parties at the outset of the Panel hearing that the Panel's
8 position is that the scope of its consideration of a case is limited to the basis of the trial judge's
9 referral to the Panel,¹⁸ with the possible exception of the Panel's authority to make a defendant
10 eligible for discretionary parole.

11 So, the Panel considered the two grounds for referral per AS 12.155.165(a)¹⁹
12 found by Judge Aarseth – the non-statutory extraordinary potential for rehabilitation mitigating
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15 ¹⁷ See, AS 12.55.165(b),(c).

16 ¹⁸ See, *Luckart v. State*, 270 P.3d 816, 820 (Alaska App. 2012).

17 ¹⁹ AS 12.55.165(a) provides that:

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

22 AS 12.55.165(a) provides “two discrete” grounds for referral to the Panel. *Garner v. State*, 266
23 P.3d 1045, 1048 (Alaska App. 2011). See also, *Kirby v. State*, 748 P.2d 757, 762 (Alaska App.
24 1987). The Panel has the authority to address eligibility for discretionary parole – explicit per
25 AS 12.55.175(e) and implicit per AS 12.55.175(c). See, *Luckart v. State*, 314 P.3d 1226, 1234
(Alaska App. 2013). Eligibility for discretionary parole is not listed as a ground for trial court
referral to the Panel in AS 12.55.165(a) but the Alaska Court of Appeals has indicated that a trial
court may nonetheless refer a case to the Panel on this basis. See, *Lochridge v. State*, 2016 WL
3220952 (Alaska App. June 8, 2016) (cited per *McCoy v. State*, 80 P.3d 757, 762-64 (Alaska

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1 factor and the claim that manifest injustice would result if Mr. King is sentenced within the
2 presumptive range, whether adjusted for aggravating or mitigating factors, and whether manifest
3 injustice would result if he is not made eligible for discretionary parole after serving an
4 appropriate portion of the minimum composite jail sentence the Panel could impose based on
5 finding the non-statutory mitigating factor provided he satisfies any conditions imposed by the
6 Panel.²⁰

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8 **c. Non-Statutory Mitigating Factor**

9 The Panel first addressed the proposed non-statutory mitigating factor because the
10 existence of a mitigating factor is a material consideration with respect to other basis for referral
11 – that manifest injustice would result from imposition of a sentence within the presumptive
12 range, whether or not adjusted for aggravating or mitigating circumstances.²¹

13 The Alaska Court of Appeals has recognized a non-statutory mitigating factor
14 based on a defendant’s prospects for rehabilitation characterized as exceptional, extraordinary, or
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17 App. 2002). The Panel independently reached a similar conclusion in State v. Timothy Tanberg,
18 4FA-16-619 CR.

19 ²⁰ The Panel, given Judge Aarseth’s referral, considered both whether manifest injustice would
20 result if Mr. King is sentenced to the composite presumptive term, whether or not adjusted for
21 aggravating or mitigating factors, and whether manifest injustice would also result if he is not
22 made eligible to apply for discretionary parole after serving whatever presumptive composite
23 sentence was then being considered by the Panel.

24 ²¹ *See, Smith v. State*, 711 P.2d 561, 569 (Alaska App. 1985);

25 The proper procedure for the sentencing court in such a case is first to calculate
what the presumptive term would be after adjusting for aggravating and
mitigating factors and, second, to determine whether the adjusted term would be
manifestly unjust – or plainly unfair – when compared with a sentence the court
might deem ideally suitable in the absence of presumptive sentencing.

See also, Shinault v. State, 258 P.3d 848, 850-51 (Alaska App. 2011).

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1 unusually favorable prospects for rehabilitation.²² The Legislature has made clear that a trial
2 judge cannot refer, and the Panel cannot accept, a case on this basis if the defendant's "prospects
3 for rehabilitation are less than extraordinary."²³

4 Rehabilitation basically means that the defendant will not reoffend, though a
5 defendant is not required to prove the same to an absolute certainty.²⁴ Mr. King bears the burden
6 of proving by clear and convincing evidence based on the totality of the circumstances that he
7 can be adequately treated in the community and need not be incarcerated for the full presumptive
8 term in order to prevent future criminal activity.²⁵

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

- 13 1. The defendant's juvenile record (if any).
- 14 2. The defendant's adult criminal record (if any).
- 15 3. The defendant's employment history.
- 16 4. The defendant's education and how well the defendant performed in school.
- 17 5. Whether the defendant has engaged in extra-curricular activities.
- 18 6. The existence and extent of the defendant's family ties.
- 19 7. Whether the defendant has continuing family support.
- 20 8. Whether the defendant is youthful.
- 21 9. Whether the defendant has expressed remorse for the criminal conduct.
- 22 10. Whether the defendant has engaged in needed treatment.

23 ²² See, *Kirby*, 748 P.2d at 766 (unusually good prospects for rehabilitation); *O'Connor v. State*,
24 444 P.3d 226, 232 (Alaska App. 2019) and *Olmstead v. State*, 477 P.3d 656, 661 (Alaska App.
25 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.

²³ AS 12.55.165(c)(1) (trial court referral) and AS 12.55.175(f)(1) (acceptance by the Panel).

²⁴ See, *O'Connor*, 444 P.3d at 234-35.

²⁵ See, *O'Connor*, 444 P.3d at 233-35; *Boerma v. State*, 843 P.2d 1246, 1248 (Alaska App.
1992); *Kirby*, 748 P.2d at 766; *Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991); *Beltz*,
980 P.3d at 481; *Manrique v. State*, 177 P.3d 1188, 1193 (Alaska App. 2008); *Silvera v. State*,
244 P.3d 1138, 1149 (Alaska App. 2010); *Smith v. State*, 258 P.3d 913, 917 (Alaska App. 2011).

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- 1 11. The evaluation of the defendant in the PSR.²⁶
- 2 12. Whether the Judge/Panel understands the problems that led the defendant to
- 3 13. Whether the Judge/Panel can conclude that said problems are readily
- 4 14. In the sex offense context, whether the defendant has a history of
- 5 unprosecuted sex offenses.²⁸

6 The Panel found that there are facts that militate against the Panel finding that Mr.
7 King had met his burden of proof, including:

- 8 1. Mr. King minimized and rationalized his offenses
- 9 2. He blamed the victim.
- 10 3. His 2015 allocution was in material part consistent with Dr. Smith's
- 11 4. As Judge Aarseth found, his trial decisions were also tactical, though his
- 12 5. Dr. Smith's report did not address some things that appear to be pertinent,
- 13 6. And certain of Dr. Smith's above-stated findings

14 The Panel also found that there were a number of facts that supported the Panel
15 finding that Mr. King had met his burden of proof, including:

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18 ²⁶ The list to this point is based primarily on *Smith*, 711 at 570 and *Daniels*, 339 P.3d at 1030-31.

19 ²⁷ See, *Lepley v. State*, 807 P.2d 1095, 1100 (Alaska App. 1991); *Beltz*, 980 P.2d at 481; *Smith v. State*, 258 P.3d 913, 917 (Alaska App. 2011). Such a finding is not a pre-requisite to the trial court or the Panel finding that 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.

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21 ²⁸ This consideration is based on *Collins v. State*, 287 P.3d 791, 796-97 (Alaska App. 2012). Under *Collins* such a finding basically constituted a non-statutory mitigating factor. The legislature in 2013 added AS 12.55.165(c) and AS 12.55.175(f), which apply to offenses 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 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 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
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1. Mr. King is a first felony offender.
2. He has no material prior criminal record, as a juvenile or an adult.
3. His offenses were out of character inasmuch as there is no evidence of any prior similar conduct.
4. He was in his mid-50's when he committed the sexual abuse. The Panel understands that youthfulness is often considered a positive factor in this regard but is of the general view that what a person has or has not done in the past is a reasonable indicator of what they will or will not do in the future, and Mr. King lived for decades without engaging in such conduct.
5. He graduated from high school, was trained as a welder, and earned an associate's degree.
6. He has a very good work history.
7. He has family ties and support.²⁹
8. He has a good institutional record overall.
9. He has engaged in programs while incarcerated.³⁰
10. He has been continuously employed while incarcerated.
11. He expressed remorse and a degree of acceptance of responsibility in 2015 and, perhaps more so, during his allocation before the Panel.
12. He has expressed the desire to engage in SOTP and his willingness to do whatever programs are ordered.
13. He did take the above-noted approach to the trial – which spared L.K. from having to testify.
14. His trial approach was as “slow plea” as characterized by the Court of Appeals, as he did not actively contest the charges, leading to a largely inevitable outcome.
15. His “low risk” STATIC-2000R test result – only 2.1% - 4.4% of all sex offenders scored lower, with an anticipated recidivism rate of 1% over the first five years of release.
16. The PSR author recognized the importance of the STATIC-2000R result.
17. Dr. Smith, an expert in the area of sex offender risk assessments, recognized and discussed the importance of the STATIC-2000R result, and his expert opinion is that Mr. King is a “low risk” to reoffend, taking into consideration the STABLE-2007 test results.
18. Dr. Smith noted that statistically the risk of reoffending is further reduced if a defendant completes SOTP, which he recommends that Mr. King complete while incarcerated. Mr. King has expressed a willingness to complete a SOTP and his doing so while incarcerated if made reasonably available to him by DOC is something that would be ordered by the trial court or the Panel.

²⁹ The letters of support submitted with the PSR are somewhat problematic inasmuch as many of the writers express the view that he is innocent – despite his admissions and convictions - and there are references to sexual abuse by others in the extended family.

³⁰ The record reflects that DOC would not make SOTP available to him until he is much closer to his date of release.

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- 1 19. Dr. Smith identified Mr. King's risk factors as access to a victim, in particular
2 a nude prepubescent/pubescent female, which circumstance can readily be
3 addressed as a matter of parole and probation conditions and supervision.
4 20. Dr. Smith's psychological evaluation of Mr. King resulted in a number of
5 emotional and mental concerns, but his expert opinion is that all are eminently
6 treatable, in the community or while incarcerated.
7 21. The Panel, based on Dr. Smith's unrefuted expert opinions, does know why
8 Mr. King committed these offenses,³¹ and it is extremely unlikely that the
9 conditions that lead to his sexual abuse of L.K. will ever recur.

10 The Panel found, based on its consideration of the totality of the circumstances,
11 that Mr. King met his burden of proving by clear and convincing evidence that he has
12 extraordinary potential for rehabilitation. The Panel noted that Mr. King engaged in utterly
13 deplorable ongoing sexual conduct with his young vulnerable niece and had a number of
14 identified mental and emotional problems, but Dr Smith's unrefuted and credible expert opinions
15 were that he presents a low risk for reoffending, the risk would be further reduced if he
16 completed SOTP and safeguards were in place to eliminate his identified risk factors, and that his
17 mental and emotional problems were readily treatable in the community.

18 The Panel then considered whether it would be manifestly unjust, considering the
19 totality of the circumstances, including the *Chaney*³² sentencing criteria,³³ if some adjustment,
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21 ³¹ Such a finding is not necessarily required per *O'Connor* but this is a factor the Panel may
22 nonetheless consider.

23 ³² *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

24 ³³ The Alaska Supreme Court in *Chaney* stated:

25 Under Alaska's Constitution, the principles of reformation and necessity of
protecting the public constitute the touchstones of penal administration. Multiple
goals are encompassed within these broad constitutional standards. Within the
ambit of this constitutional phraseology are found the objectives of rehabilitation
of the offender into a noncriminal member of society; isolation of the offender
from society to prevent criminal conduct during the period of confinement,
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

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1 albeit small, is not made to the sentence allowed by the presumptive sentencing law based on this
2 non-statutory mitigating factor.

3 The Court of Appeals has described “manifest injustice” as meaning a situation:
4 involving “obvious unfairness,”³⁴ which “shocks the conscience;”³⁵ which is “plainly unfair;”³⁶
5 and which is “manifestly too harsh.”³⁷ The Court has also recognized that “manifest injustice” is
6 a subjective standard and that the descriptive phrases do not add much to the statutory term –
7 “manifest injustice.”³⁸

8
9 The Panel, recognizing that all SAM 1st Degree and SAM 2nd Degree conduct is
10 very serious, found that Mr. King’s conduct was particularly serious as: L.K. was very young;
11 they were family and household members; he was one of L.K.’s primary care providers; L.K.
12 had special needs of which he was well aware; his conduct was planned; and, his conduct was
13 ongoing, varied, occurred over a relatively lengthy period of time, and included similar conduct
14 for which he was not charged.³⁹

15 The Panel addressed Mr. King as an offender in the context of discussing the non-
16 statutory extraordinary prospects for rehabilitation mitigating factor.

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19 offender, and community condemnation of the individual offender, or in other
20 words, reaffirmation of societal norms for the purpose of maintaining respect for
the norms themselves.

21 477 P.2d at 444 (citations omitted). *See also*, AS 12.55.005.
22 ³⁴ *Lloyd*, 671 P.2d at 154; *Smith*, 711 P.2d at 568; *Totemoff v. State*, 739 P.2d 769, 775 (Alaska
23 App. 1987); *Moore v. State*, 262 P.3d at 221.
³⁵ *Smith*, 711 P.2d at 568.
³⁶ *Smith*, 711 P.2d at 569; *Knipe v. State*, 305 P.3d 359, 363 (Alaska App. 2013).
24 ³⁷ *Scholes*, 274 P.3d at 500.
³⁸ *Smith*, 711 P.2d at 568-69.
25 ³⁹ The State, as noted above, did not pursue the AS 12.55.155(c)(18)(B) aggravating factor, and
the Panel is not finding the aggravator as such, but the Panel is making this finding in the context

1 The Panel addressed the extremely negative impact Mr. King's conduct has had
2 and likely will have on L.K., relying on both the nature of the conduct and L.K.'s mother's
3 victim impact statement, finding that L.K. was subjected to horrific circumstances which will
4 likely result in at least some degree of life-long trauma.

5 The Panel discussed the *Chaney* sentencing criteria, prioritizing: the strong
6 overwhelming community condemnation of Mr. King's conduct and the need to reaffirm the
7 societal norms that an adult, an uncle in particular, does not engage in such conduct with a child,
8 in particular a niece with special needs who is in his care; isolation, at least until he has
9 successfully completed a SOTP; and, his rehabilitation, to be addressed through related orders
10 and probation conditions; and also considering individual deterrence, to be addressed primarily
11 through suspended jail time, and general deterrence.

12 The Panel found, given all of the foregoing, that manifest injustice would result if
13 some adjustment was not made to the composite presumptive sentence based on the
14 extraordinary potential for rehabilitation non-statutory mitigating factor. So, the Panel accepted
15 the case on this ground.

16 The Panel, in sentencing a defendant based on a non-statutory mitigating factor,
17 employs basically the same analysis as a trial court, weighing the non-statutory mitigating factor
18 in the same manner as a statutory mitigating factor would be weighed.⁴⁰ A non-statutory
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23 of ascertaining the seriousness of Mr. King's conduct based on the evidence in the record,
24 including his own admissions.

25 ⁴⁰ See, *Garner*, 266 P.3d at 1048; *Harapat*, 174 P.3d at 253-54; *Kirby*, 748 P.2d at 762-65;
Bossie v. State, 835 P.2d 1257, 1259 (Alaska App. 1992); *Daniels*, 339 P.3d at 1030; *Lowe v. State*,
866 P.2d 1320, 1322 (Alaska App. 1994); *Smith*, 711 P.2d at 569-70.

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1 mitigating factor cannot result in a greater adjustment to the presumptive term than a statutory
2 mitigating factor,⁴¹ which would be one-half of the composite presumptive term in this case.⁴²

3 The Panel determined, based on the foregoing, that a composite sentence of 46
4 years, 3 months, and 2 days – one half of the minimum presumptive composite term - would
5 serve the Panel’s *Chaney* goals and otherwise be appropriate under the circumstances.

6 **d. Manifest Injustice**

7 Mr. King bears the burden of proving by clear and convincing evidence that
8 manifest injustice would result from imposition of a composite sentence of 46 years, 3 months,
9 and 2 days. In order to satisfy that burden he must show that there are: “articulable specific
10 circumstances that make [him] significantly different than the typical offender within that
11 category or that make [his] conduct significantly different from a typical [such] offense.”⁴³

12 This analysis also involves the Panel determining:

13
14 whether the sentence, taking into account all of the appropriate sentencing
15 considerations, including the defendant’s background, his education, his
16 character, his prior criminal history, and the seriousness of his offense, would be
17 obviously unfair in light of the need for rehabilitation, deterrence, isolation, and
18 affirmation of societal norms.⁴⁴

19 With regards to eligibility for discretionary parole under the Panel’s AS
20 12.55.175(c) authority, Mr. King bears the burden of proving by clear and convincing evidence
21 that manifest injustice would result if he is sentenced within or below the presumptive range and

22 ⁴¹ See, *Garner*, 266 P.3d at 1048; *Luckart*, 270 P.3d at 819; *State v. Price*, 740 P.2d 475, 482
23 (Alaska App. 1987); *Bossie*, 835 P.2d at 1258; *Beauvois v. State*, 837 P.2d 1118, 1122 (Alaska
24 App. 1992).

⁴² AS 12.55.155(a).

⁴³ *Beltz*, 980 P.2d at 480. See also, *Knipe*, 305 P.3d at 363; *Smith*, 258 P.3d at 920-21; *Moore*
25 262 P.3d at 221; *Dancer v. State*, 715 P.2d 1174, 1177 (Alaska App. 1986).

⁴⁴ *Moore*, 262 P.3d at 221 (quoting *Totemoff*, 739 P.2d at 775).

1 is not made eligible for discretionary parole after a certain period of time, which eligibility may
2 be conditioned on his satisfying certain conditions while incarcerated.⁴⁵

3 The Panel found that Mr. King did not show that manifest injustice would result
4 from imposition of a composite sentence of 46 years, 3 months, and 2 days but he did she show
5 that manifest injustice would result if he is not made eligible to apply for discretionary parole
6 after serving one-half of that composite term provided that while incarcerated he had
7 successfully completed a DOC approved SOTP and appropriately participated in mental health
8 treatment/therapy if made reasonably available to him by DOC.

9
10 The Panel in particular found that: Mr. King had not shown that his conduct was
11 materially different from the conduct involved in typical SAM 1st Degree and SAM 2nd Degree
12 offenses; he did show that he is significantly different than the typical SAM 1st Degree and SAM
13 2nd Degree offender for the reasons discussed above with respect to the Panel's extraordinary
14 potential for rehabilitation findings, but those findings were taken into full account in that
15 context and do not warrant further reduction in the composite sentence⁴⁶ given the Panel's
16 assessment of the seriousness of his offenses, the impact of the same on L.K., and the Panel's
17 *Chaney* goals; and, in view of his age⁴⁷ and the finding that he need not be incarcerated for the
18 full adjusted presumptive term in order to prevent his recidivating if he complies with the
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22 ⁴⁵ See, *Luckhart*, 314 P.3d at 1232.

23 ⁴⁶ The Panel notes that if the Panel were statutorily precluded from finding the extraordinary
24 potential for rehabilitation non-statutory mitigating factor then the Panel would basically reach
25 the same result with respect to the appropriate composite sentence by means of the manifest
injustice if sentenced within the presumptive range, whether or not adjusted for aggravating or
mitigating factors, basis for referral.

⁴⁷ Mr. King was born on January 22, 1955. It reasonably appears that he will be less likely or
able to reoffend at the age at which he could possibly be released on discretionary parole.

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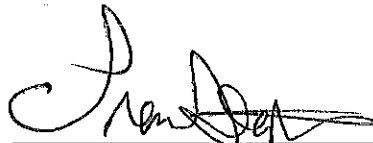
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1 discretionary parole conditions imposed by the Panel, manifest injustice would result if he is not
2 eligible to apply for discretionary parole after serving one-half of the active jail time imposed.⁴⁸

3 The Panel has issued a Judgement, including orders and general and special
4 conditions of probation, which is based on the Panel's findings as set forth herein. Mr. King, per
5 the Court of Appeal's Opinion, has 30 days from the date of the distribution of this
6 Memorandum and Order to inform the Court if he intends to appeal the Panel's decision.

7 **IT IS SO ORDERED.**

8 Dated at Ketchikan, Alaska this 10th day of January 2022.

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12 Trevor Stephens
13 Superior Court Judge
14 Administrative Head

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21 ⁴⁸ Put another way, under the totality of the circumstances, service of sentence of approximately
22 23 years and 1 ½ months would satisfy the Panel's *Chaney* goals and otherwise be appropriate if
23 he has successfully completed a SOTP and appropriately participated in mental health counseling
24 or therapy if made reasonable available to him by DOC. The Panel did not require successful
25 completion of such counseling or therapy as it reasonably appears that the same may necessarily
be ongoing in some form for a considerable period of time, if not the remainder of Mr. King's
life, and Dr. Smith did not recommend that this treatment be completed while incarcerated, as he
did for the SOTP. The Panel notes that its findings presume Mr. King's continued good behavior
while incarcerated.