1	IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2	THIRD JUDICIAL DISTRICT AT UNALASKA
3	STATE OF ALASKA,
4	Plaintiff,
5	v.)
6	ISMAEL T. BALALLO,
7	Defendant.
8	Case No. 3UN-12-51 CR
9	<u>MEMORANDUM</u>
10	The Three-Judge Sentencing Panel ("Panel") hearing in this case was held or
11	February 1, 2019 following a remand from the Alaska Court of Appeals. Per the discussion
12	during the hearing, the Panel declined to order that Mr. Balallo be made eligible for discretionary
13	parole. This Memorandum is provided per Alaska Criminal Rule 32.4(e).
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1.7	¹ Balallo v. State, 2017 WL 3971822 (September 6, 2017). The Panel previously considered this case and decided that: Mr. Balallo had shown that he was different than other sex offenders.
18	but he nonetheless had not shown by clear and convincing evidence that manifest injustice would result from imposition of a sentence within the applicable presumptive range, whether or no
19	adjusted for aggravating and mitigating factors; he had not shown that the extraordinary potentia for rehabilitation non-statutory mitigating factor applied to him, noting that the Panel still did no
20	know why he had committed the offense; and, given those findings, the Panel could not order that he be eligible for discretionary parole under AS 12.55.155(c)(e), thought by the Panel to be
22	the only source of its ability to grant such relief. Mr. Balallo appealed the Panel's manifes injustice and discretionary parole decisions, but not the non-statutory mitigating decision, as wel
23	as other aspects of his case arising in the trial court. The Court of Appeals affirmed the tria
24	court, and reversed the Panel with respect to the discretionary parole decision in light of its decision in <i>Lukcart v. State</i> , 314 P.3d 1226, 1232-38 (Alaska App. 2013) that the Panel also has
25	the authority under AS 12.55.175(c) to grant eligibility for discretionary parole. The Cour remanded the case to the Panel. The Court noted in the remand order that Mr. Balallo could
ري	address his claim that the Panel had erred with regards to the manifest injustice analysis wher back before the Panel.

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Mr. Balallo presented one issue to the Panel - whether the Panel should exercise its authority under AS 12.55.175(c) to order that Mr. Balallo at some point during his 20-year prison sentence for Sexual Assault 1st Degree be eligible to apply for discretionary parole, with or without related conditions.

Mr. Balallo requested that the Panel order that he be eligible for discretionary parole after having served one-third or one-half of the 20 year sentence, and that the Panel not impose a pre-condition that he have completed sex offender treatment (SOTP) while incarcerated as he has no control over whether the Department of Corrections (DOC) will make SOTP available to him prior to an eligibility to apply for discretionary parole date.

Mr. Balallo bears the burden of proving by clear and convincing evidence that manifest injustice would result if he is sentenced within the presumptive range and is not made eligible to apply for discretionary parole after serving a certain period of time, which may be conditioned on his satisfying certain conditions while incarcerated.²

The Panel's view is that Mr. Balallo, in order to meet his burden of proof, must prove that there are exceptional circumstances that, when considered in light of the facts of the case and the applicable *Chaney*³ considerations, warrant the Panel taking the requested action with respect to discretionary parole eligibility.⁴

² See, Luckart, 314 P.3d at 1232. This is the standard used by the trial court in Luckart and the Court, after noting as much, did not state or otherwise indicate that the standard was not appropriate.

³ State v. Chaney, 477 P.2d 441, 443-44 (Alaska 1970).

⁴ The Panel notes that in a recent Fairbanks case, <u>State of Alaska v. Timothy D. Tanberg</u>, 4FA-16-619 CR the Panel found that the defendant had met this burden based on findings that the defendant differed from the typical sex offender, based on related expert testimony, and that related appropriate and effective treatment specific to the defendant's problem which contributed to his committing the offense was available, again based on expert testimony. The Panel

Mr. Balallo relies on the Panel's prior finding that he is different from the typical sex offender, and the facts that: he had no prior criminal record; he is a Philippine citizen but was in the country legally when he committed the offense; he was employed and has a good employment history; he has a supporting family; and, while in custody he has not had any write-ups, has participated in all rehabilitative classes and programs made available to him, and has been employed in the facility's laundry.

The Panel found that those circumstances are the types of circumstances that could, in conjunction with other circumstances, support a finding by clear and convincing evidence that manifest injustice would result if the defendant is sentenced to the presumptive term and not made eligible for discretionary parole, but were not themselves⁵ sufficient for the Panel to make that finding in this case in light of the seriousness of Mr. Balallo's offense, the impact on the victim, and the pertinent *Chaney* considerations.⁶

imposed related pre-conditions to his actually being able to apply for discretionary parole when he had served the prescribed portion of his sentence (10 years).

- The Panel also noted that the prior finding that he is different than the typical sex offender was made in the context of the discussion of that issue in *Collins v. State*, 287 P.3d 791 (Alaska App. 2012). The legislature reacted to *Collins* by enacting AS 12.55.165(c) and AS 12.55.175(f), thereby, in effect, overturning *Collins*. *See, State v. Seigle*, 394 P.3d 627, 631-32 (Alaska App. 2017). The Panel nonetheless may still consider the factors identified in *Collins*. *See, Seigle*, 287 P.3d at 634-39. And the Panel has done so herein.
- This case is in a unique procedural posture as the Panel itself typically imposes sentence when accepting a case, even if the only basis is eligibility for discretionary parole, but here the trial court has imposed sentence. The Panel's view of the *Chaney* goals is that community condemnation, reaffirmation of societal norms, isolation (noting the finding that the Panel still does not know Mr. Balallo committed this offense), and general deterrence are important considerations and warrant a sentence within the presumptive sentencing range, and he has not shown that his being eligible for discretionary parole as requested would adequately serve those goals.

MEMORANDUM

So Mr. Balallo's request that the Panel order that he be eligible for discretionary parole after serving one-third or one-half of his sentence, with or without related pre-conditions, is denied. IT IS SO ORDERED. Dated at Ketchikan this 4th day of February 2019. Trevor Stephens Superior Court Judge Three-Judge Panel