IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS

STATE OF ALASKA,	)
	)
Plaintiff,	)
	)
v.	)
	)
TIMOTHY DANIEL TANBERG,	)
	)
Defendant.	)
	)

Case No. 4FA-16-00619CR

DECISION AND ORDER GRANTING MOTION FOR THREE JUDGE SENTENCING PANEL

I. INTRODUCTION

The defendant, Timothy Tanberg, filed a Motion for Three Judge Sentencing Panel, asking this court to refer his case to the Panel pursuant to AS 12.55.175 for imposition of the minimum 20-year presumptive sentence for first-degree sexual assault[1] and to make him eligible for discretionary parole after he serves half that sentence. Because the court finds that any sentence within the presumptive range would be manifestly unjust without eligibility for discretionary parole and because this court finds that Tanberg's potential for rehabilitation is exceptional and failure to consider this non-statutory mitigating factor in deciding his eligibility for discretionary parole would be

[1] AS 12.55.125(i)(1)(A)(ii).

manifestly unjust, the motion is granted and this case is referred to the Three Judge Sentencing panel for sentencing.

II. STATEMENT OF FACTS

A grand jury indicted the defendant, Timothy Tanberg, on one of first-degree sexual assault.[2] A petit jury convicted Tanberg of that single count.

The testimony at trial indicated that Tanberg and the complaining witness, M.P., met while he was in the military. Later they moved in together. They had daily sex together as part of a 3.5 year relationship. The sex involved role-playing and tying each other up. Sometimes, Tanberg testified, M.P. would say "no" and push him away as part of their pretend play before sex.

The M.P. became pregnant and the couple had a baby girl. After the birth of the child the sexual relationship stopped for a while. The parties continued to live together in a non-sexual relationship with their daughter.

Over time things changed and, at M.P. urging, the sexual relationship was rekindled. On August 4, 2015, M.P. asked Tanberg to perform oral sex on her, which he did. Tanberg then tried to have vaginal sex, but M.P. said she did not want to have sex. Despite not wanting to, and after some protesting,

[2] In violation of AS 11.41.410(a)(1).

M.P. acquiesced to having vaginal intercourse with Tanberg. She said it was because of his anger and her being frightened. She regretted having sex. She testified that she did so without consent. After the incident, M.P. remained in Tanberg's apartment until a second incident a week later.

The second incident formed the basis of Tanberg's conviction. According to M.P., on August 11, 2015, the baby got sick and was throwing up. After cleaning the stomach contents off her sick baby in the shower, M.P. handed the baby to Tanberg for him to dry the baby off. Tanberg left the bathroom with the baby. M.P. got in the shower.

Shortly thereafter, Tanberg returned to the bathroom without the baby. He began masturbating outside the shower curtain. Then he opened the curtain. He was clothed but his erect penis stuck out of his open fly. He touched M.P.'s breasts and vagina. He made her masturbate him. From outside the shower, he tried to put his penis in her vagina. M.P. backed away. She repeatedly said "no" and pushed him away. Tanberg grabbed M.P. She said "no" again. He pinned her arms to her side and forced his penis into her vagina.

Later that day, M.P. reported the incident to a friend. The friend called the police. M.P. went to the Fairbanks Memorial Hospital, where a forensic nurse examined her. The nurse

testified that M.P. had a small vaginal tear and some bleeding. The nurse could not determine from the tear if the sex in the shower was consensual.

The State Troopers obtained a warrant to listen to phone conversations and read text messages exchanged between M.P. and Tanberg. M.P. tried to get Tanberg to admit to rape in text messages and conversations. A State Trooper interviewed Tanberg, also seeking to get him to admit to rape. Tanberg told M.P. that he was sorry for everything that he had ever done to her and that he had become one of the people he hated most. After becoming suspicious that he was under investigation, Tanberg stated that he woke up and smoked marijuana, that he was not thinking straight, that it was not something he trying to get away with, and that he deserved to be punished.[3]

Tanberg testified at trial and denied any recollection of any intercourse at all during the encounter in the bathroom. At trial, Tanberg testified that because he had been high on marijuana, he could not remember the incident. After his conviction, in preparation for sentencing, Tanberg took a polygraph test. During the test he denied having sex that morning and the examiner found those denials to be most likely truthful.

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[3] PSR at 4.

The jury was apparently convinced that Tanberg did have sexual intercourse with M.P. that morning without her consent and with reckless indifference to the lack of consent. And so this case proceeds to sentencing.

Tanberg filed a Motion for Three Judge Sentencing Panel. At a hearing on the motion, Tanberg put on expert testimony from a a specialist in sex offender psychology. The court also considered the Presentence Report and heard from the report writer.

The Presentence Report and Sex Offender Risk Assessment[4] indicate that Tanberg grew up in Sacramento, California. When Tanberg was ten months old, Child Protective Services removed him and his sister from their parents' home and placed them with their grandmother. His parents were drug addicts. He sometimes visited his father, but never visited his mother. An aunt and her three children lived with Tanberg in his grandmother's house. Tanberg describes two of the cousins he lived with as brothers. Tanberg has two older brothers. They remained with their mother, but Tanberg saw them on holidays.

Tanberg's grandmother died when he was only eight. After her death, he lived with an aunt until he graduated high school.

[4] Presentence Report, Jan. 30, 2018; Sex Offender Risk Assessment.

He is close to his sister. Tanberg maintains ties with his sister, cousins, and aunts.[5]

During first-grade, Tanberg struggled in school and he was once suspended for fighting. He was diagnosed with attention deficit disorder. Tanberg attended ADD management classes, which improved his behavior. Academic help improved his academic performance.

During high school, Tanberg smoked marijuana and had his first sexual relationship. Tanberg graduated from high school in 2007.

After high school, Tanberg joined the army. He served in Iraq, where he spent a year in a combat zone. In combat, he suffered a concussion from an explosion. During his eight years of service, he mainly worked with computers. He was honorably discharged in 2015.[6] Tanberg suffered from PTSD, but treatment helped to relieve him of his symptoms.[7]

In the military, Tanberg was married for five years. He divorced his wife after she was unfaithful to him. The marriage gave Tanberg a seven year old son and a six year old daughter. The children live with their mother, with whom Tanberg "co-

[5] Sex Offender Risk Assessment at 3.
[6] Sex Offender Risk Assessment at 2.
[7] Sex Offender Risk Assessment at 4.

parents" and remains on good terms.[8] The military moved Tanberg and his family to Fairbanks, but after his divorce his former wife moved with the children to Ohio.[9] After his discharge from the military, Tanberg stayed in Fairbanks and took up smoking marijuana.

Tanberg has no prior juvenile or adult convictions. Ten years ago, Tanberg, on social media, told a woman, who had been bullying someone he was dating, that he was going to kill her. Tanberg was charged with threatening with intent to terrorize.[10] The police dropped the charge. The police, Tanberg reported, found the threat empty, since he lived in a different state from its recipient.[11]

No statutory aggravators or mitigators are present in this case.

In support of Tanberg's Motion for Three Judge Sentencing Panel, Maureen Fried, LCSW, a specialist in adult sex offenders, stated that Tanberg's psychology differs from that of a typical sex offender. The typical sex offender, Fried testified, enjoys inflicting pain and suffering on others and has no regard for their rights. Tanberg does not display such deviance or

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[8] Sex Offender Risk Assessment at 3.
[9] Sex Offender Risk Assessment at 3-4.
[10] PSR at 7.
[11] *Id.*; Sex Offender Risk Assessment at 1.

criminality. Fried concluded that Tanberg would not benefit from sex offender treatment in prison, since he lacks the traits that treatment is designed to extinguish.[12] Tanberg's chance of coming before the court again for a sex crime, she opined, is low. The typical sex offender's chance of coming before the court repeatedly for sex offenses, she testified, is high.

Tanberg suffers from borderline personality disorder, a mental illness seldom found in sex offenders. Those suffering from borderline struggle to regulate their emotions, exercise poor judgment in relationships, and act impulsively. Fried testified that Tanberg, like other borderlines but unlike most sex offenders, could benefit from dialectical behavioral therapy, a form of cognitive behavioral therapy unavailable in prison.

During her four hours with Tanberg, Fried administered two sex offender risk assessments, tests that use interview questions to predict sexual and violent recidivism in sex offenders. On one of these tests, the STATIC 2002-R,[13] Tanberg scored a 2 on a scale between -2 and 13 points, representing a

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[12] Sex Offender Risk Assessment at 8-9.

[13] The STATIC 2002-R uses risk factors drawn from five classes: age, persistence of sexual offending, deviant sexual interest, relationship to victims, and general criminality. Sex Offender Risk Assessment at 6.

low risk of re-offense.[14] His 2 points resulted from his relatively youthful age of 29.[15] He received scores of 0 for persistence of sexual offending, deviant sexual interests, relationship to victim, and general criminality.[16]

On the other assessment,[17] the STABLE-2007, Tanberg scored 5 out of 26 possible points, representing a moderate risk of re-offense. His five points derived from his score of 1 on intimacy defects, his score of 3 on general self-regulation, and his score of 1 on sexual self-regulation, since he reported having 30 past sexual partners, including prostitutes. By contrast, he scored a 0 on significant social influences predicting recidivism, since he gets along with his siblings and ex-wife; a 0 on concern for others, since he has concern for others; and a 0 on cooperating with supervision, since he does cooperate with supervision and has had no write ups in jail.[18]

In preparation for sentencing, Fried and Tanberg's attorney, arranged for David Raskin, Ph.D. (psychology), to take

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[14] Sex Offender Risk Assessment at 7. The court has some difficulty understanding this score. Tanberg scored a total of 2 out of 3 points on the age risk factor, since he is 29. But he scored a 0 out of 3 points on the four other risk factors. Thus, his overall score on the assessment appears to be 0 on a scale of -2 to 13. His score would be 2 on a scale of 0 to 15.
[15] *Id.* The younger a sex offender, the more likely he is to reoffend.
[16] *Id.*
[17] The STABLE-2007 assessment.
[18] *Id.*

Tanberg's polygraph.[19] Under examination, Tanberg denied putting his penis in M.P.'s genitals, denied using physical force to put his penis in her vagina, and denied grabbing her and forcing his penis into her vagina. In Raskin's opinion, Tanberg's denials were truthful. The confidence in these conclusions exceeded 90%.[20]

Tanberg still denies that he is legally guilty of sexual assault. He acknowledges that his relationship with M.P. was dysfunctional, that he failed to regulate his emotions, and that he communicated ineffectively.

III. DISCUSSION

A defendant sentenced within or below the presumptive range for a sexual felony, under AS 12.55.125(i)(1) or (2), must serve the sentence imposed, less any good time accrued, before being eligible for discretionary parole.[21] An exception applies when defendants have "been allowed by the three-judge sentencing panel under AS 12.55.175 to be considered for discretionary parole release."[22] The Panel has the authority to grant enhanced

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[19] Forensic Assessment.
[20] *Id.*
[21] AS 33.16.090(b)(2).
[22] *Id.*

parole eligibility to defendants who are subject to presumptive sentencing.[23]

A sentencing court is authorized to refer a presumptive sentencing case to the three-judge panel, pursuant to AS 12.55.165(a), when "the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors…."[24] This statute contemplates a finding of manifest injustice in two distinct situations.[25] In the first, manifest injustice would result from failure to consider aggravating or mitigating factors not specifically included in AS 12.55.155.[26] In the second, manifest injustice would result from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors.[27]

A sentence is manifestly unjust when it "shocks the conscience"[28] or is "plainly unfair."[29] In determining if a presumptive term would be manifestly unjust the court applies

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[23] *Luckart v. State*, 314 P.3d 1226, 1232 (Alaska App. 2013); *Kirby v. State*, 748 P.2d 757, 765 (Alaska App. 1987).
[24] AS 12.55.165(a); *Smith v. State*, 711 P.2d 561, 568-69 (Alaska App. 1985).
[25] *Smith*, 711 P.2d at 569.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 568.
[29] *Id.* at 568, 570.

any aggravating or mitigating factors to the term and decides if the adjusted term would be manifestly unjust compared with a sentence the court might deem ideally suitable in the absence of presumptive sentencing.[30] The question is whether the lowest allowed sentence would still be clearly mistaken under the *Chaney* sentencing criteria, now codified under AS 12.55.005.[31] To find a presumptive term manifestly unjust, a court must be able to articulate specific circumstances that make the defendant significantly different from a typical offender within that category or make the defendant's conduct significantly different from a typical offense.[32]

When deciding whether manifest injustice would result from failure to consider a non-statutory mitigating factor in imposing the defendant's sentence, the court must evaluate the importance of the non-statutory factor in light of the traditional sentencing goals of rehabilitation, general and specific deterrence, protection of the public, and community condemnation or reaffirmation of societal norms.[33]

A defendant claiming the non-statutory mitigator of extraordinary potential for rehabilitation must prove by clear

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[30] *Id.* at 569.
[31] *Shinault v. State*, 258 P.3d 848, 851 (Alaska App. 2011).
[32] *Beltz*, 890 P.2d at 480.
[33] *Smith*, 711 P.2d at 569.

and convincing evidence that he will be rehabilitated.[34] He must prove that he can adequately be treated in the community and need not be incarcerated for the presumptive term to prevent future criminal activity.[35] A sentencing court should only predict successful treatment and non-recidivism when it is reasonably satisfied that it knows why a particular crime was committed and that the conditions leading to the criminal act will not recur - either because the factors that led the defendant to commit the crime are readily correctible or because the defendant's criminal conduct resulted from unusual environmental stresses unlikely to recur.[36]

In assessing a defendant's rehabilitative potential, the court may consider the following:[37]

1. The defendant's prior criminal record (adult and juvenile)
2. The defendant's employment history
3. Whether the defendant did well in school
4. Whether the defendant is or was engaged in extracurricular activities
5. Whether the defendant has strong family ties

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[34] *Boerma v. State*, 843 P.2d 1246, 1248 (Alaska App. 1992).
[35] *Beltz*, 890 P.2d at 481.
[36] *Boerma*, 843 P.2d at 1248.
[37] *Smith*, 711 P.2d at 570; *Daniels v. State*, 339 P.3d 1027, 1030-31 (Alaska App. 2014).

6. Whether the defendant has continuing family support

7. Whether the defendant has received a favorable PSR evaluation

8. Whether the defendant has expressed remorse

9. Whether the defendant is youthful, and

10. Whether the defendant has engaged in substance abuse (if an issue)

The court may also consider a defendant's continued denial of the offense, not taking responsibility for his or her criminal conduct, or not explaining the conduct.[38]

A. Imposing the Minimum Presumptive Term without Eligibility for Discretionary Parole is Manifestly Unjust.

The court finds, by clear and convincing evidence, that referral to the Panel is justified because imposing a 20-year sentence on Tanberg without eligibility for discretionary parole is manifestly unjust, whether or not any non-statutory mitigators apply.

As a first felony offender, Tanberg faces a presumptive sentence of 20 to 30 years.[39] No aggravators or statutory mitigators apply to Tanberg's case. Thus, for a sexual felony imposed within or below this presumptive range, Tanberg would

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[38] *See Beltz*, 890 P.2d at 481.
[39] 12.55.125(i)(1)(A)(ii).

normally have to serve the sentence imposed, less any good time accrued, before being eligible for discretionary parole.[40]

Tanberg, however, is significantly different from the typical first-degree assault offender. As the as STATIC 2002-R sex offender risk assessment administered to him indicated, he is unlikely to persist in sexual offending and he lacks deviance and general criminality. Typical first-degree assault offenders show these traits. Tanberg is also significantly different from the typical first-degree sexual assault offender because he has borderline personality disorder, which, as Fried testified, is uncommon in sex offenders.

The second sex offender risk assessment administered to Tanberg, the STABLE-2007, represented him as having a moderate risk of re-offense. This risk derived mainly from his poor ability to self-regulate. To a lesser extent, it stemmed from his intimacy deficits and inability to regulate his sexual impulses. The court does not find these deficits make Tanberg a typical first-degree sexual assault offender, since he, unlike the typical offender, has no significant social influences predicting recidivism, shows no lack of concern for others, and cooperates with supervision.

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[40] *See* AS 33.16.090(b)(2).

Tanberg's conduct was also significantly different than that involved in the typical first-degree sexual assault. The typical first-degree sexual assault is, as Fried testified, motivated by the desire to inflict pain on others. Tanberg, by contrast, acted because of the poor impulse control and communication skills associated with his borderline personality disorder and because of the significant, unusual, hyper-sexual relationship between the couple which included, as matter of roleplaying, restraints, saying "no," and pretending to resist sexual advances before consensual sex.

In applying the *Chaney* sentencing criteria, the court observes, first, that isolation is only an incidental goal of this sentencing. Tanberg need not be incarcerated for 20 years to protect the public. Tanberg's assault happened in a particular dysfunctional relationship, which is a circumstance unlikely to repeat itself. The public will be adequately protected if Tanberg is released on discretionary parole after he serves 10 years of a 20-year sentence.

Second, a sentence of more than 10 years will impair Tanberg's rehabilitation. There are no in-prison treatment programs of the kind Tanberg requires. Dialectical behavioral therapy, which would rehabilitate him by treating his borderline personality disorder, is available only in the community. The

sooner Tanberg gets to in-community dialectical behavioral therapy, the sooner the rehabilitation sentencing goal will be advanced.

Third, specific deterrence is not a factor requiring significant weight in this case. Tanberg's is unlikely to reoffend. This offense occurred because of a constellation of circumstances came together. Those circumstances include the complicated sexual relationship between the parties, the break-up and rekindling of that sexual relationship, and Tanbergs misreading and mishandling of those complexities. This offense is highly situational and not rooted in a criminal personality trait. And even if specific deterrence were a controlling sentencing goal in this case, a decade in prison is sufficient to deter Tanberg.

Fourth, general deterrence is an important goal of this sentencing. An ideal sentence must communicate that non-consensual sex with a former intimate partner is harmful, criminal, and a violation of the dignity of the person. A sentence that requires a minimum of 10-years active imprisonment before consideration of discretionary parole, is enough general deterrence.

Fifth, the community strongly condemns all sex crimes, including first-degree sexual assault involving a former

intimate partner. In these circumstances, however, sentencing Tanberg to 20 years in prison with eligibility for discretionary parole after 10 years served is adequate to achieve reaffirmation of the societal norm against first-degree sexual assault.

The court concludes it would be manifestly unjust to sentence Tanberg for 20 years without eligibility for discretionary parole. It is highly likely that Tanberg could be safely released into the community in 10 years.[41] The parole board would be in a better position to make this determination in the future. The sentenced imposed at this time should not prevent that determination in the future. Accordingly, this court will refer Tanberg to the Panel for imposition of the presumptive minimum sentence and to consider Tanberg's eligibility for discretionary parole after he served half the sentence.

B. Tanberg has Exceptional Potential for Rehabilitation and it Would be Manifestly Unjust Not to Consider This in Deciding His Eligibility for Discretionary Parole

Based on the expert testimony in support of the motion and the evidence at trial, this court finds by clear and convincing

[41] Indeed, it is likely that Tanberg could be safely released today. The need to advance other sentencing goals such as deterrence, and reaffirmation of norms support the active term of imprisonment of 10 years more so than a need to protect the public.

evidence that Tanberg has exceptional potential for rehabilitation.

First, the court is reasonably satisfied it knows why Tanberg committed this crime. He and M.P. had a consensual sexual relationship. The relationship included restraints and resisting sexual advances while saying "no." This offense occurred during the breakup and rekindling of the relationship, a complicated time for both Tanberg and M.P. This complicated sexual relationship and complicated breakup and rekindling was beyond Tanberg's ability to manage given his cognitive limitations: he has a borderline personality disorder; he suffered a traumatic childhood with removal from his mother and father followed by the death of his caregiver grandmother; and he suffered PTSD associated with closed head trauma while serving in a war zone in Iraq. When Tanberg put his penis in M.P.'s vagina and she said "no," he acted on expectations created by his relationship with M.P. and he acted without the ability to recognize the genuine refusal and engage in genuine communication with M.P.

Second, the court is reasonably satisfied that the conditions leading to Tanberg's criminal act will not likely recur. It is also unlikely that he will engage in similar conduct with another sexual partner given the consequences of

his conduct in this case and the risk he would take if he did. Because he is no longer in this complicated sexual relationship and no longer living with M.P., and because he has a demonstrated ability to learn and succeed, Tanberg is unlikely to reoffend. It is unlikely that all the circumstances that aligned to lead to this offense would align again, and if they did, it is likely that Tanberg would be able to better communicate with his sexual partner and better navigate the circumstances, especially with continued therapy.

Third, the court would not order sex offender treatment for Tanberg because it would not be responsive to his needs and not affect his chance of reoffending. He lacks the traits sex offender treatment seeks to eliminate. He has borderline personality disorder, but this must be treated outside prison. The court would order dialectical behavioral therapy for treatment of the borderline personality disorder, or the nearest equivalent, for Tanberg while incarcerated if available.

Fourth, Tanberg has no juvenile or adult criminal record. His teenage threat on social media does not change this.

Fifth, Tanberg's eight years of military service shows he has had and is capable of a stable employment history.

Sixth, Tanberg completed high school despite a difficult childhood. The court does not know what his grades were, but his academic performance and behavior improved after supervision.

Seventh, Tanberg has family ties to his children, ex-wife, cousins, and sister. These ties are genuine and motivating.

These findings confirm Tanberg's potential for rehabilitation.

The court acknowledges that Tanberg continues to deny being guilty of the offense. This does not change the court's conclusion that he has extraordinary prospects of rehabilitation. His denial of legal guilt creates no increased risk of recidivism. The polygraph examination suggests that he is not denying the offense to escape punishment for a crime he knows he committed or to deceive the public into thinking he is innocent. There was sufficient evidence at trial to support conviction; there was also evidence from which Tanberg could reasonably argue reasonable doubt. The jury voted for conviction.

The court finds, by clear and convincing evidence, that failure to consider Tanberg's extraordinary potential for rehabilitation in determining his eligibility for discretionary parole would be manifestly unjust.

First, in the circumstances of this case and this offender, Tanberg's extraordinary potential for rehabilitation, as a sentencing goal, deserves more weight than the sentencing goals of specific and general deterrence, protection of the public, community condemnation, and reaffirmation of societal norms. Those goals are satisfied by the presumptive sentence and are not frustrated by eligibility for parole after 10 years.

Second, because Tanberg has proved no statutory mitigator applies to his case, he must receive a presumptive term of 20-years flat without eligibility for discretionary parole unless the Three Judge Panel authorizes his eligibility for discretionary parole.

Given Tanberg's exceptional potential for rehabilitation, the court refers his case to the Three Judge Panel to consider his eligibility for discretionary parole.

IV. CONCLUSION

The court grants the Motion for Three Judge Sentencing Panel because sentencing Tanberg within the presumptive range without making him eligible for discretionary parole after he serves half that sentence would be manifestly unjust and because Tanberg has exceptional potential for rehabilitation and it would be manifestly unjust to fail to consider that factor in

deciding whether to impose the minimum presumptive term without making him eligible for discretionary parole.

V. ORDER

Accordingly,

IT IS HEREBY ORDERED that the Motion for Three Judge Sentencing Panel is granted. This case is referred to the Three Judge Panel for sentencing to consider granting Tanberg eligibility for discretionary parole. The Panel will schedule a hearing and notify the parties of the time and place of that hearing.

DATED at Fairbanks, Alaska, this 20th day of June, 2018.

Michael A. MacDonald
Superior Court Judge

I certify that on 6/20/18 copies of this form were ~~sent to:~~ hand delivered in open court to DA PD

CLERK:

cc: Judge Stephens