





1  
2 Mr. Solomon's executive functioning – his ability to exercise proper judgment,  
3 impulse control, self-regulation, develop insight, engage in abstract thinking, learn from his  
4 mistakes, connect conduct and consequences, and judge interpersonal cues – is permanently  
5 limited to a material degree by at least his FASD.<sup>2</sup>

6 Mr. Solomon suffers from Major Depressive Disorder, with a history of  
7 depression dating back to young adulthood. He also experiences Complicated Bereavement due  
8 to his family relationship circumstances and the deaths of important people in his life.  
9

10 Mr. Solomon has no prior juvenile or adult criminal convictions. He was charged  
11 in 2008 with Disorderly Conduct and Furnishing Alcohol to a Minor but the State dismissed the  
12 case.

13 **b. Mr. Solomon's Offenses**

14 E.H., age 64 went to her friend Joyce George's home in Nulato to visit the  
15 evening of May 5, 2014. They became intoxicated and fell asleep on separate couches. E.H.  
16 was fully clothed. Mr. Solomon entered the home during the early morning of May 6. He  
17 brought a condom. He carried the incapacitated E.H. to a bedroom. He penetrated her vagina  
18 and anus with his penis. She awoke while he was penetrating her vagina with his penis. She tried  
19 to fight him off but was unsuccessful due to the significant difference in their sizes. She tried to  
20  
21

22 <sup>1</sup> The Panel will refer to the condition as FASD for ease of reference.

23 <sup>2</sup> The record does not reflect that he was formally diagnosed as suffering from a Traumatic  
24 Brain Injury (TBI) as a result of the fall, or of the impact, if any, on his executive functioning if  
25 so diagnosed. And there is no evidence in the record of any testing specific to the effect, if any,  
of his huffing several years ago on his brain and executive functioning abilities. Ms. Fried  
testified, before Judge Seekins and the Panel, that Mr. Solomon's mental deficits were certainly  
caused by the FASD and TBI and huffing may also have been contributors but it is not possible

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1 call for help but he put his hand over her mouth. He said he was cuming, rolled her over and  
2 penetrated her anus with his penis. She cried out for Ms. George. He began to hit her on the  
3 back. E.H.s cry awoke Ms. George, who came into the bedroom. She saw Mr. Solomon  
4 kneeling and penetrating E.H. from behind with his hand on E.H.'s mouth. She said something  
5 to Mr. Solomon, he got up, put on his pants, told E.H. "here is your payment," threw a bottle of  
6 alcohol toward Ms. George, and ran from the residence. E.H. told Ms. George that she had been  
7 raped and was in pain.

### 8 **c. Investigation**

9  
10 Law enforcement was contacted. E.H. was subjected to a forensic exam by a  
11 Sexual Assault Nurse Examiner (SANE). E.H. was still very intoxicated (.168 BAC). The  
12 SANE nurse observed genital injuries and bruising on E.H.'s back, shoulder, arms, and legs.  
13 The nurse took anal and vaginal swabs.

14 An Alaska State Trooper interviewed Mr. Solomon in Nulato on May 6, 2014.  
15 Mr. Solomon stated that: a friend (Victor Alexie, Jr.) had dropped him off at home at 1:30 a.m.<sup>3</sup>;  
16 he remained at home the rest of the night; he had not gone to Ms. George's residence; he had not  
17 had a prior sexual relationship with E.H.; the allegations against him were "bullshit"; and, his  
18 DNA would not be found at the alleged crime scene. He consented to providing a DNA sample.

19 The vaginal and anal swabs were forwarded to the State Crime Lab. The swabs  
20 were examined. Sperm was detected in each. DNA testing was performed. The results reflect  
21 that Mr. Solomon could not be excluded as the source of the sperm.  
22

23  
24 to differentiate the possible effects of each as each would basically have the same effect if a  
25 material factor with respect to the state of his brain and executive functioning abilities.

<sup>3</sup> Mr. Alexie told the Troopers that Mr. Solomon had been with him the evening of May 5 but he had taken him home at approximately midnight.

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1 Mr. Solomon was charged on February 9, 2015 with two counts of Sexual Assault  
2 in the 2<sup>nd</sup> Degree. An arrest warrant was issued. Troopers arrested him in Nulato on February  
3 15, 2015. They informed him of his *Miranda* rights. He agreed to speak with the Troopers. He  
4 said he did not have anything further to say about why his DNA was found on E.H. and that he  
5 did not remember engaging in vaginal or anal intercourse with E.H., though he knew it had  
6 happened.

7  
8 The Grand Jury returned a four-count Indictment on March 5, 2015, charging Mr.  
9 Solomon with two counts of Sexual 1<sup>st</sup> Degree<sup>4</sup> and two counts of Sexual Assault 2<sup>nd</sup> Degree.<sup>5</sup>  
10 The State alleged that Mr. Solomon engaged in penile vaginal and anal penetration with E.H.  
11 while she was incapacitated and then without her consent.

#### 12 **d. Trial**

13 This case was assigned to Fairbanks Superior Court Judge Ben Seekins. Mr.  
14 Solomon's family retained counsel to represent him. Mr. Solomon pled not guilty. A  
15 competency examination was performed and he was determined to be competent to stand trial.<sup>6</sup>

16 The case proceeded to trial. E.H. and Ms. George testified. Their testimony was  
17 consistent with the above. The State also presented evidence of the forensic SANE examination  
18 and DNA testing.

19 Mr. Solomon chose to testify. He testified that Ms. George had asked him to  
20 come to her home with alcohol; he arrived at approximately 3:00 a.m. with a bottle of Seagram's  
21 whiskey; E.H. was also there; Ms. George mixed drinks for the three of them; E.H. was  
22

23  
24 <sup>4</sup> AS 11.41.410(a)(1). ("An offender . . . engages in sexual penetration with another person  
without consent of that person.")

25 <sup>5</sup> AS 11.41.420(a)(3) ("An offender . . . engages in sexual contact with a person who the  
offender knows is . . . mentally incapacitated.")

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1 intoxicated; E.H. shocked him by asking him out of the blue to have sex with her in exchange for  
2 the entire the bottle of whiskey; he agreed; he was not an active participant in the sexual  
3 encounter, he just laid there with her astride him; he did ejaculate in her; he did not hit her or  
4 place his hand over her mouth; he could not have kneeled behind her because of his bad hip; and,  
5 when they were done they dressed and he left.

6 The jury found Mr. Solomon guilty on all four Counts.<sup>7</sup>

7  
8 **e. Sentencing**

9 The State did not propose any statutory aggravating factors. Mr. Solomon, now  
10 represented by new counsel, did not propose any statutory mitigating factors.

11 Mr. Solomon requested that Judge Seekins defer sentencing and refer the case to  
12 the Panel per AS 12.55.165(a) on two grounds: the extraordinary prospects for rehabilitation  
13 non-statutory mitigating factor; and, that manifest injustice would result if he were sentenced  
14 within the presumptive range, whether or not adjusted for aggravating and mitigating factors.  
15 His arguments were factually based on his brain injury and related executive functioning  
16 limitations, and the effect of the same on his conduct in committing the offenses for which he  
17 was convicted. The State argued against referral to the Panel.

18 Related hearings were held on May 9, 2018, May 29, 2018, August 15, 2018, and  
19 August 24, 2018.<sup>8</sup>

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22 <sup>6</sup> It appears that culpability issues were not raised.

23 <sup>7</sup> The Panel notes that its factual determinations were made in light of the Jury's verdicts, which  
24 reflect that the jury found R.H. and Ms. George credible and that Mr. Solomon's testimony was  
25 not credible. And that the Panel is not bound by the trial court's evaluation of the facts. *See,*  
*Winther v. State*, 749 P.2d 1356, 1359 (Alaska App. 1988).

<sup>8</sup> Mr. Solomon presented the expert testimony of Moreen Fried, a licensed clinical social worker  
with extensive experience in the areas of mental health diagnoses, sex offender evaluations, and  
sex offender treatment. She had conducted a Sex Offender Risk Assessment of Mr. Solomon at

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1 Judge Seekins issued his Decision on September 27, 2018.

2 Judge Seekins therein discussed the offenses. He outlined the differing accounts  
3 of the same presented at trial by E.H. and Ms. George on the one hand and Mr. Solomon on the  
4 other. He noted that: E.H. is a self-professed alcoholic who was still extremely intoxicated  
5 during the SANE examination several hours after the incident; and, the SANE nurse testified it is  
6 possible E.H.s injuries could have been caused by consensual sex.

7  
8 Judge Seekins discussed the findings in Mr. Solomon's 1996 Psycho-Educational  
9 Evaluation and Ms. Fried's findings concerning his FASD and the impact of the same on his  
10 executive functioning. He noted that Ms. Fried had also mentioned a TBI and that a TBI could  
11 lead to deficits similar to those caused by FASD. He discussed her STABLE 2007 and STATIC-  
12 R assessments. And he noted that Ms. Fried testified that Mr. Solomon's huffing may also have  
13 contributed to his brain injury.

14 Judge Seekins noted that: Mr. Solomon has no prior criminal record; he denies the  
15 sexual assault allegations; he asserts that his bad hip and rheumatoid arthritis rendered him  
16 incapable of forcing himself on E.H.; and, he continues to adamantly contend that the sexual  
17 activity between he and E.H. was consensual, instigated by E.H., and was part of a their  
18 agreement to exchange sex for alcohol.

19  
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21  
22 the Fairbanks Correctional Center on June 6, 2017 and prepared a related written report on June  
23 7, 2017, which report is in the record. Her report reflects, in part, that she administered the  
24 STATIC 2002-R and STABLE 2007 risk of recidivism tests and Mr. Solomon score on the  
25 former placed in him in the "low to moderate" risk category and his score on the latter placed  
him in the "moderate risk" category. She testified during the Panel hearing that the STABLE  
2007 rating is likely more reliable as it takes his executive functioning deficits into account, at  
least to some degree.

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1 Judge Seekins noted that Ms. Fried had testified that Mr. Solomon is a situational  
2 offender and that such offenders are generally treatable, but Mr. Solomon's amenability to  
3 treatment is limited by his executive functioning impairments.

4 Judge Seekins found that: the Sexual Assault 2<sup>nd</sup> Degree counts would merge into  
5 the Sexual Assault 1<sup>st</sup> Degree counts for sentencing purposes; the presumptive range on each  
6 Sexual Assault 1<sup>st</sup> Degree count is 20-30 years; and, per AS 12.55.127(c)(2)(E), there must be at  
7 least 6.25 years of consecutive jail time imposed, so the presumptive range is 26.25 – 36.25  
8 years. Mr. Solomon and the State agree with these findings.

9 Judge Seekins observed that AS 12.55.165(a) provides two grounds for referral to  
10 the Panel: a finding that a non-statutory mitigating factor had been proven; and/or a finding that  
11 manifest injustice would result if the defendant is sentenced within the applicable presumptive  
12 range, whether or not adjusted for aggravating and mitigating factors.

13 Judge Seekins first addressed Mr. Solomon's non-statutory mitigating factor  
14 argument. He noted that there are two statutory mitigating factors that together address  
15 executive functioning impairment cause by a TBI, huffing, and FASD - AS 12.55.155(d)(18)<sup>9</sup>  
16

17  
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19  
20 <sup>9</sup> “[T]he defendant committed the offense while suffering from a mental disease or defect as  
21 defined in AS 12.47.130 that was insufficient to constitute a complete defense but that  
22 significantly affected the defendant's conduct.” AS 12.47.130(5) defines “mental disease or  
23 defect” as:

24 a disorder of thought or mood that substantially impairs judgment, behavior,  
25 capacity to recognize reality, or ability to cope with the ordinary demands of life;  
‘mental disease or defect’ also includes intellectual and developmental disabilities  
that result in significantly below average general intellectual functioning that  
impairs a person's ability to adapt to or cope with the ordinary demands of life.

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1 and AS 12.55.155(d)(20)(A)<sup>10</sup> – which the legislature has expressly limited to non- AS 11.41  
2 offenses, so neither applied in this case. And he noted that under Alaska case law he could not  
3 treat such excluded circumstances as the basis for finding a non-statutory mitigating factor.<sup>11</sup>

4 Judge Seekins then addressed Mr. Solomon’s manifest injustice argument. He  
5 recognized that Mr. Solomon must show that there are specific circumstances that significantly  
6 differentiate him from the typical sex offender, or that his conduct was significantly different  
7 from that involved in the typical sexual assault.<sup>12</sup>

8  
9 Judge Seekins noted that in this context he could consider the above-discussed  
10 excluded circumstances – Mr. Solomon’s brain injury and related executive functioning  
11 impairments – as part of a totality of the circumstances analysis. He then considered: Mr.  
12 Solomon’s executive functioning impairments; his low intellectual functioning; the serious of  
13 Mr. Solomon’s offense; his lack of prior criminal record; that the case involved an isolated  
14 alcohol-related occurrence with a victim with whom Mr. Solomon claimed to have had a prior  
15 sexual relationship; and, the individual deterrent, general deterrent, rehabilitation, and isolation  
16 *Chaney*<sup>13</sup> sentencing goals.

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21 <sup>10</sup> “[T]he defendant committed the offense while suffering from a condition diagnosed as a fetal  
22 alcohol spectrum disorder, the . . . disorder substantially impaired the defendant’s judgment,  
behavior, capacity to recognize reality . . . and the . . . disorder affected the defendant’s conduct.”

23 <sup>11</sup> Judge Seekins cited *State v. Seigle*, 394 P.3d 627 (Alaska App. 2017). The Court in that case  
24 stated: “And we held that, after the legislature has expressly rejected a particular circumstance  
for inclusion as a statutory mitigating factor, a sentencing court can no longer treat this same  
circumstance as a non-statutory mitigator.” 394 P.3d at 626 (citing *Totemoff v. State*, 739 P.2d  
769, 776 (Alaska App. 1987)).

25 <sup>12</sup> Decision at p. 11, citing *Beltz v. State*, 980 P.2d 474, 480 (Alaska App. 1999).

<sup>13</sup> *State v. Chaney*, 477 P.2d 441, 443-44 (Alaska 1970).

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1 Judge Seekins did not specifically discuss whether Mr. Solomon's conduct was  
2 significantly different than that involved in the typical sexual assault. He did seek to distinguish  
3 the circumstances of Mr. Solomon's sexual assault from those involved in another case involving  
4 an offender with mental limitations in which the trial court had declined to refer the case to the  
5 Panel, and the Court of Appeals had affirmed.<sup>14</sup>

6 Judge Seekins primary focus was on whether there were specific circumstances  
7 that differentiated Mr. Solomon from the typical sex offender.<sup>15</sup> With regards to the referenced  
8 *Chaney* goals, Judge Seekins found that: Mr. Solomon would not be deterred by imposition of a  
9 presumptive sentence due to his executive functioning limitations; it would be unfair to impose a  
10 presumptive sentence to deter others because Mr. Solomon is different than a typical offender  
11 due to his executive functioning impairments; and, though he does not have extraordinary  
12 potential for rehabilitation, Ms. Fried's report and risk assessments reflect that he does not pose a  
13 significant risk to the public.

14 Judge Seekins concluded that, given all of the above, Mr. Solomon is significantly  
15 different than the typical sex offender and that it would be manifestly unjust to impose the  
16 presumptive sentence, whether or not adjusted for aggravating and mitigating factors.  
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20  
21 <sup>14</sup> *See, Knipe v. State*, 305 P.3d 359, 361 (Alaska App. 2013). The defendant in *Knipe* was a  
22 first time felony offender with borderline intellectual functioning living with his uncle's family  
23 who sexually abused his 3-year old cousin by digitally penetrating her vagina. The defendant had  
24 been sexually abused as a child, had no prior criminal record, and had consumed alcohol prior to  
25 committing the offense. The trial judge denied his request to refer the case to the Panel because  
a sentence within the 25-35 year sentencing range, whether adjusted for aggravating or  
mitigating factors, would not be manifestly unjust. The trial judge focused on the seriousness of  
the offense, the injury to the victim, and a lack of a sex offender assessment. The Court of  
Appeals found that the trial judge's decision was not clearly mistaken.

<sup>15</sup> It may be that Judge Seekins' discussion of *Knipe* was meant to be considered in this context.

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1 **f. Panel's Executive Functioning Findings**

2 Mr. Solomon has not shown that he suffered a TBI or, if he did, the effect of the  
3 same on his executive functioning. He has not shown that his huffing years ago caused material  
4 brain damage or the extent of any impact of his huffing on his executive functioning.

5 Mr. Solomon, as noted above, has shown that he suffers from FASD, and that as a  
6 result he has material executive functioning deficits. The full extent of his present executive  
7 functioning deficits is not known.<sup>16</sup>

8  
9 Mr. Solomon does have executive functioning, including some ability to plan,  
10 focus, and attempt to achieve a goal. This, in part, is evidenced by: the manner in which he  
11 committed the sexual assaults, including attempting to quiet R.H to avoid detection.; his lying to  
12 the Troopers during the first interview in effort to persuade the Troopers that he did not commit a  
13 crime and, once he was aware of the DNA test results, trying to minimize his conduct during the  
14 second Trooper interview by claiming he did not remember, apparently due to his alcohol  
15 consumption; and, his then testifying at trial that he had engaged in consensual sexual  
16 penetration with E.H. and providing a full exculpatory explanation of the attendant  
17 circumstances, which testimony the jury clearly found not to be credible.

18  
19 Mr. Solomon's executive functioning limitations are such that: he likely will not  
20 materially benefit from, or be able to effectively participate in, traditional substance abuse or sex  
21 offender treatment programming; he will likely have difficulty successfully completing a term of  
22 traditional supervised probation; and, he is likely to recidivate (commit new crimes, possibly but  
23 not necessarily including sex offenses) if he is not in a structured consistently supervised setting.

24  
25 <sup>16</sup> Ms. Fried was not qualified as an expert in this area. No recent neuropsychological testing  
results are in the record, and there is no related testimony a qualified expert.

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1 Mr. Solomon's recidivism risk would likely substantially decrease if when  
2 released from custody: any benefits to which he is entitled, such as SSI, Medicaid, Division of  
3 Vocational Rehabilitation, are in place; a guardianship has been established; he lives in a group  
4 home type facility such as that operated by FRA in Fairbanks; his daily routines are structured  
5 for him; he is the subject of ongoing supervision – by a person or ankle monitoring or some  
6 combination of the two; and, any other identified necessary programs and therapy have been  
7 arranged and he participates in the same.

8  
9 Additional facts may be stated in the Discussion section.

### 10 **III. DISCUSSION**

#### 11 **a. Acceptance Precluded**

12 The Panel's view is that its jurisdiction is limited to the basis of the referral from  
13 the trial judge.<sup>17</sup>

14 Judge Seekins' referral, as just noted, was based solely on his finding per AS  
15 12.55.165(a), that Mr. Solomon had shown by clear and convincing evidence that manifest  
16 injustice would result if Mr. Solomon was sentenced within the 26.25 – 36.25 year presumptive  
17 range, whether or not adjusted for aggravating and mitigating factors. Judge Seekins did not find  
18 that: a non-statutory mitigating factor had been proven; or, that manifest injustice would result if  
19 Mr. Solomon at some point during his incarceration is not made eligible to apply for  
20 discretionary parole.

21  
22 The first step in the Panel's analysis is to calculate the applicable presumptive  
23 term.<sup>18</sup> Judge Seekins found that the applicable presumptive range for the two offenses for  
24  
25

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1 which Mr. Solomon will be sentenced is 26.25 – 36.25 years. The parties agree with his merger  
2 finding and his sentence calculation.

3           The second step is for the Panel to determine whether the presumptive term, as  
4 adjusted if there are any aggravating or mitigating factors, would be manifestly unjust when  
5 compared to the sentence the court Panel might deem ideally suitable in the absence of  
6 presumptive sentencing. To make such a finding the Panel must be able to articulate specific  
7 circumstances that make Mr. Solomon different from the typical offender within the category or  
8 that make his conduct significantly different from a typical such offense.<sup>19</sup>

9  
10           Mr. Solomon apparently is not arguing that his conduct was significantly different  
11 from that involved in a typical such offense. To the extent he is making that argument, he has  
12 not shown the same as the record reflects that: he went into another person’s home in the middle  
13 of the night; carried a clothed incapacitated victim to a bedroom, at least partially undressed her,  
14 engaged in penile vaginal and anal penetration, and then forcibly engaged in such penetration  
15 with the victim after she awoke and attempted to verbally and physically resist, causing the  
16 victim to suffer internal genital injuries and external bodily injuries; and, he only stopped  
17 because he was interrupted by the owner of the home.

18           Mr. Solomon is arguing that he is different from the typical offender. His  
19 argument is factually based on his executive functioning impairments. So his argument falls  
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21  
22 <sup>17</sup> *See, Luckart v. State*, 270 P.3d 816, 821 (Alaska App. 2012) (“The commentary to AS  
23 12.55.175 strongly suggests that the jurisdiction of the three-judge panel is limited by the scope  
of the referral from the sentencing court.”).

24 <sup>18</sup> *See, Smith v. State*, 711 P.2d 561, 569 (Alaska App. 1985); *Shinault v. State*, 258 P.3d 848,  
850-51 (Alaska App. 2011).

25 <sup>19</sup> *See, Beltz*, 980 P.2d at 480; *Knipe*, 305 P.3d at 363; *Smith v. State*, 258 P.3d 913, 920-21  
(Alaska App. 2011); *Moore v. State*, 262 P.3d 217, 221 (Alaska App. 2011); *Dancer v. State*,  
715 P.2d 1174, 1177 (Alaska App. 1986).

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1 squarely within the scope of the above-discussed inapplicable statutory mitigating factor(s) (AS  
2 12.55.155(d)(20(A) with respect to his FASD, and, if he had shown he has a TBI that was a  
3 material factor in his conduct in this case and/or that his huffing contributed to his brain damage  
4 and was such a factor, AS 12.55.155(d)(18)).

5 The Panel cannot base the requested manifest injustice finding “solely” on the  
6 basis of a mitigating factor that the legislature has considered and rejected.<sup>20</sup> But the Panel is  
7 required to consider the totality of the circumstances and can consider Mr. Solomon’s executive  
8 functioning impairments in that broader context. So the Panel must determine whether there are  
9 other material circumstances and consider the same.  
10

11 It appears that Mr. Solomon is basing his entire different from the typical offender  
12 in the category argument on his executive functioning impairments with the possible exception  
13 of his lack of prior record. The Panel notes in this regard that his *Chaney*-related discussion is  
14 based on said impairments,<sup>21</sup> as is his discussion of the facts and circumstances and seriousness  
15 of his offenses.<sup>22</sup> To the extent he is not, the only other non-executive functioning impairment  
16 circumstances referenced is his lack of prior criminal record.  
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18  
19 <sup>20</sup> *See, Totemoff*, 739 P.2d at 773-77; *Duncan v. State*, 782 P.2d 301, 302-04 (Alaska App.  
1989); *Moore*, 262 P.3d at 221; *Seigle*, 394 P.3d at 635-37.

20 <sup>21</sup> The same is true of Judge Seekins’ related discussion in his Decision and Mr. Solomon  
21 presented basically the same *Chaney* analysis before the Panel.

22 <sup>22</sup> Mr. Solomon contends that he was invited into the home and, because of his executive  
23 functioning impairments he misunderstood the situation once there - thinking that E.H. wanted to  
24 have sex with him in exchange for the alcohol he brought, and that is what resulted in the sexual  
25 assault. Judge Seekins did not specifically set forth findings as to what actually happened during  
the incident. He did note Mr. Solomon’s version of events and placed substantial reliance on  
Ms. Fried’s report and testimony, which were premised on her conclusion that Mr. Solomon  
committed the offenses in a manner consistent with Mr. Solomon’s above version of events and  
that he actually continues to believe that the sexual activity was the result of a mutually agreed  
upon exchange of sex for alcohol. So Mr. Solomon is attempting to minimize the seriousness of  
his offenses by minimizing his culpability based on his executive functioning impairments, and

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1 character, prior criminal record, the seriousness of the offense, and the *Chaney* sentencing  
2 goals.<sup>24</sup>

3 The Panel does not find that it has been shown by clear and convincing evidence  
4 that manifest injustice would result - that it would be plainly<sup>25</sup> or obviously unfair<sup>26</sup> or would  
5 shock the conscious<sup>27</sup> or would be manifestly too harsh<sup>28</sup> - if Mr. Solomon is sentenced within  
6 the applicable presumptive range, whether or not adjusted for aggravating or mitigating factors,  
7 for six reasons.

8 First, Mr. Solomon's offenses were very serious as described above.<sup>29</sup>

9 Second, related to the first, E.H. was subjected to a surprise brutal sexual assault  
10 that caused her internal and external physical injuries, which traumatized her, and which  
11 continues to traumatize her.

12 Third, as noted above, there is a material culpability component of Mr. Solomon's  
13 executive functioning-related argument – the notion that he is not really responsible or entirely  
14 responsible for his conduct because his executive functioning impairments caused him to  
15 misperceive E.H.'s social cues and the overall situation in general. The Panel has found that he  
16 does have FASD and that as a result he does have material executive functioning impairments.  
17  
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19  
20 <sup>24</sup> *See, Totemoff*, 739 P.2d at 733-37; *Moore*, 262 P.3d at 221.

21 <sup>25</sup> *See, Smith*, 711 p.3d at 569; *Knipe*, 305 P.3d at 363.

22 <sup>26</sup> *Lloyd v. State*, 672 P.2d 152, 154 (Alaska App. 1983); *Smith*, 711 P.2d at 154; *Totemoff*, 739  
P.2d at 775.

23 <sup>27</sup> *Smith*, 711 P.2d at 568.

24 <sup>28</sup> *Scholes v. State*, 274 P.3d 496, 500 (Alaska App. 2012). The Alaska Court of Appeals has  
observed that these descriptive phrases add little to the term used in the statute – “manifest  
injustice.” *Smith*, 711 P.2d at 568-69.

25 <sup>29</sup> With regards to Mr. Solomon's reliance on Judge Seekins' *Knipe* comparison, there likely are  
aspects of Mr. Solomon's offenses that are more serious and less serious than those present in  
*Knipe*, but it does not matter which was more serious as Mr. Solomon's offenses were

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1 But, as also previously noted, his argument is based on viewing the evidence in the light most  
2 favorable to him and in a manner that is not consistent with the jury's verdicts, and his executive  
3 functioning was sufficient for him take the steps necessary to commit the offenses and try to  
4 avoid detection and then try to avoid the consequences of his conduct by first denying any  
5 involvement, then minimizing his conduct once the DNA results were known, and finally  
6 choosing to testify at trial and presenting a somewhat detailed exculpatory explanation for his  
7 conduct during his testimony.

8  
9 Fourth, Mr. Solomon's *Chaney* discussion focuses primarily on his rehabilitation.  
10 He acknowledges that rehabilitation cannot be achieved in the traditional sense because his  
11 executive functioning impairments will not improve and must instead be "out-sourced." So he  
12 argues that he will receive no cognitive benefit from extended incarceration or traditional  
13 rehabilitative programs, and that he and the community would be better served if he is released  
14 early (after serving 13 years) into a supervised structured living situation.

15 The Panel agrees that traditional notions of rehabilitation may not apply to Mr.  
16 Solomon. But the Panel does not find this argument persuasive because it presumes too many  
17 things that presently are not reasonably certain – that a program such as FRA will be available  
18 when he is released early, that a guardianship will be in place, that the other services will be  
19 available, and that he will agree to participate in these types of programs.

20  
21 Fifth, the Panel does not agree that general deterrence is not a *Chaney* goal  
22 worthy of material consideration. A sentence within the presumptive range could reasonably be

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24  
25 sufficiently serious that manifest injustice would not result if he is sentenced within the  
presumptive range.

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1 expected to have a general deterrent effect, at least in Nulato and nearby communities as the  
2 sentence Mr. Solomon receives will likely be widely known in those areas.

3 Sixth, community condemnation, reaffirmation of societal norms, and isolation  
4 are important *Chaney* considerations, and each supports imposition of a sentence within the  
5 presumptive range.

6 The community strongly condemns sexual assault because this offense more than  
7 any other in the criminal code involves such an immediate physical intimate invasion of the  
8 victim's personhood, causing trauma that often lasts a lifetime. The Panel recognizes that Mr.  
9 Solomon has substantial support from family, friends, and many other members of the Nulato  
10 community. But those people take issue with the verdict and if they believed that Mr. Solomon  
11 had engaged in the conduct for which he was convicted, or that some other person had engaged  
12 in such conduct, they likely would also express condemnation of the same.

14 There is a need to reaffirm the societal norm that a person cannot: walk into  
15 another's home uninvited; sexually assault an incapacitated victim; and then continue the sexual  
16 assault after she becomes conscious and attempts to verbally and physically resist.

17 There is a need to isolate Mr. Solomon. His executive functioning impairments  
18 are such that traditional sex offender treatment and substance abuse treatment will likely be of  
19 little if any material benefit, and it is likely that he will recidivate, whether by committing a new  
20 sexual offense or another type of offense unless he is the type of supervised structured life  
21 situation – 24 hours a day 7 days a week – that Ms. Fried testified would be appropriate and  
22 necessary, and it is not reasonably certain at this point that such a situation will be available to  
23

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25  
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1 him when released or that he would agree to participate in the same, particularly as it would  
2 almost certainly mean he will live in Fairbanks or Anchorage, and not Nulato.<sup>30</sup>

3 **c. Discretionary Parole**

4 The Panel is not addressing Mr. Solomon's request that the Panel make him  
5 eligible to apply for discretionary parole per AS 12.55.175(c)<sup>31</sup> because the Panel is concerned  
6 that this issue has not been sufficiently raised, briefed, or presented for the Panel to decide it  
7 now.

8  
9 The Panel's general authority to grant eligibility for discretionary parole to a  
10 defendant convicted of Sexual Assault 1<sup>st</sup> Degree was discussed by the parties and Judge Seekins  
11 in the trial court. But he did not refer this case to the Panel on that basis and he did not discuss  
12 the matter in his Decision. It may be that he did not do so because AS 12.55.165(a) does not  
13 expressly list it as a basis for trial court referral to the Panel, even though AS 12.55.175(e) and  
14 AS 12.55.175(c), as interpreted in *Luckart II*, provide the Panel with the authority to grant  
15 eligibility for discretionary parole.

16 The State, apparently in reliance on the scope of the referral stated in Judge  
17 Seekins' Decision, did not address the matter in its brief filed with the Panel. Mr. Solomon did  
18 mention it in his concurrently filed Panel brief, but only in the final sentence. And his counsel  
19 only briefly mentioned the matter near the conclusion of his arguments before the Panel.  
20

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22  
23 <sup>30</sup> The Panel agrees with Judge Seekins that Mr. Solomon may not be individually deterred by a  
24 sentence in the presumptive range or by the suspended portion of a jail sentence. But that does  
25 not mean that manifest injustice would result if he were sentenced within the presumptive range,  
whether or not adjusted for aggravating and mitigating factors. If anything it supports the  
Panel's isolation concerns.

<sup>31</sup> *See, Luckart v. State*, 314 P.3d 1226, 1232-38 (Alaska App. 2013) (*Luckart II*).

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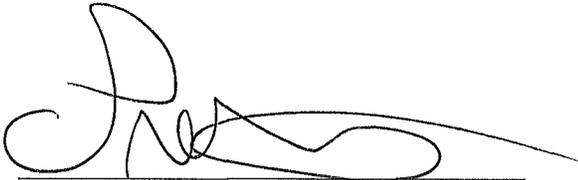
1 First, Judge Seekins only referred the case to the Panel on the basis of his finding  
2 that manifest injustice would result if Mr. Solomon were sentenced within the presumptive  
3 range, whether or not adjusted for aggravating and mitigating factors.

4 Second, the Panel finds, based on its consideration of the totality of the  
5 circumstances, that the only material manifest injustice grounds advanced are those that come  
6 squarely within the scope of statutory mitigating factors that the legislature has decided do not  
7 apply to Sexual Assault offenses, and the Panel cannot base the requested manifest injustice  
8 finding solely on such grounds.  
9

10 Third, in any event, considering those grounds and the totality of the  
11 circumstances, Mr. Solomon has not met his burden of proof.

12 Fourth, the Panel is not addressing the discretionary parole eligibility matter  
13 mentioned by Mr. Solomon, but he may present that matter to Judge Seekins, who in turn may  
14 refer it to the Panel if Mr. Solomon satisfies the applicable burden of proof.

15 Dated at Ketchikan, Alaska this 4<sup>th</sup> day of February 2019.

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Trevor Stephens  
Superior Court Judge  
Administrative Head

25 known if and when he applied for discretionary parole, and likely would be very important points  
raised in his application.

**MEMORANDUM**

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