IN THE COURT OF APPEALS FOR THE STATE OF ALASKA

JAMES STONEKING, Appellant, v. STATE OF ALASKA, Appellee.	)	Court of Appeals No. A-13993

Trial Court Case No. 4FA-20-02209CI

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
THE HONORABLE JUDGE PATRICIA HAINES PRESIDING

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF ALASKA

Filed in the Court of Appeals
for the State of Alaska on
this __ of April, 2023.

Meredith Montomery, Clerk
of the Appellate Courts

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AUTHORITIES PRINCIPALLY RELIED ON

Alaska Constitution, Article I, § 12

Criminal Administration. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

Alaska Constitution, Article III, § 21

Executive Clemency. Subject to procedure prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures. This power shall not extend to impeachment. A parole system shall be provided by law.

AS 12.55.115

Fixing eligibility for discretionary parole at sentencing. The court may, as part of a sentence of imprisonment, further restrict the eligibility of a prisoner for discretionary parole for a term greater than that required under AS 33.16.090 and 33.16.100.

AS 33.16.100(a)

Granting of discretionary parole. (a) The board may authorize the release of a prisoner who is otherwise eligible under AS 12.55.115 and AS 33.16.090(a)(1) on discretionary parole if it determines a reasonable probability exists that

(1) the prisoner will live and remain at liberty without violating any laws or conditions imposed by the board;
(2) the prisoner's rehabilitation and reintegration into society will be furthered by release on parole;
(3) the prisoner will not pose a threat of harm to the public if released on parole; and
(4) release of the prisoner on parole would not diminish the seriousness of the crime.

INTERESTS OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF ALASKA

The American Civil Liberties Union of Alaska (ACLUAK) is an Alaska non-profit corporation dedicated to advancing civil liberties in Alaska. Prison reform is one of its priority projects. In 2021, the ACLUAK launched its Prison Project, with dedicated resources and staff who work actively in the courts, with the legislature, and with the public to decrease incarceration where incarceration has not been shown to promote public safety, and to support reforms within the criminal justice system to guarantee fair treatment of those incarcerated, increase opportunities for rehabilitation, and enhance the likelihood of successful re-entry to the community for individuals released from incarceration.

The ACLUAK is an affiliate of the American Civil Liberties Union, the preeminent national civil liberties organization, which has an historic interest in protecting prisoners' rights. The ACLU's National Prison Project is dedicated to ensuring that the nation's detention facilities comply with the constitution, domestic law, and human rights principles.

The Alaska Supreme Court recognized the ACLUAK's interest in and expertise concerning prisoners' rights when it invited the ACLUAK to submit an amicus brief in consolidated cases involving prisoner disciplinary appeals.[1]

The ACLUAK seeks to participate as an amicus in this case because it has experience with many incarcerated individuals that illustrates that a key issue raised by the

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[1] *See Huber v. State,* No. S-16190; *DeRemer v. State*, No. S-16194; *Walker v. State*, No. S-16202, Order of May 9, 2017 in consolidated appeals.

appellant James Stoneking – the way in which the Parole Board denies parole because the Board believes that release would diminish the seriousness of the crime – is not unique to him but reflects a systemic issue that affect many individuals in Alaska's prisons.

STATEMENT OF FACTS

Introduction

The ACLUAK, through extensive communications with many incarcerated individuals, regularly hears accounts of how the Parole Board responds to applications for discretionary parole. Unlike Stoneking and his counsel, the ACLUAK is well-positioned to see and report on patterns.

In the sections that follow, the ACLUAK provides, first, some statistical background and public statements from the Alaska Parole Board regarding the Board's treatment of applications for discretionary parole. This information, presented to the public by the Parole Board, is appropriate for this court's consideration.[2]

Second, the ACLUAK presents information on decisions by the Parole Board in a handful of specific other cases that appear, in material ways, similar to Stoneking's case. The Parole Board's decisions are public documents.[3] To provide context for these

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[2] *See generally State v. Erickson*, 574 P.2d 1, 4-6 (Alaska 1978) (addressing the appropriateness of appellate court considering "legislative facts" that were not presented to the superior court); *id.* at 5 ("legislative facts come into play when the court is faced with the task of deciding . . . statutory interpretation"); *see also Sundberg v. State*, 667 P.2d 1268, 1271 (Alaska App. 1983) (where criminal defendant wanted to establish for the court a pattern of excessive force arrests, the State suggested that one way to do this would be through a "Brandeis Brief" submitted to the appellate court).

[3] *See* AS 33.16.170(d).

decisions, the ACLUAK also provides transcripts of some of the parole hearings that preceded these decisions and some of the written information presented to the Board in advance of the hearing – typically the applicant's parole progress report – which the Board is expected to consider in making its parole decisions.[4] These reports are shared with this court with the consent of the parole applicants; because they are not public documents,[5] they are submitted in a confidential appendix. This court may take judicial notice of decisions made by a government agency and of the materials submitted to them that provide context for the decisions.[6]

The ACLUAK, of course, is not asking this court to make findings or conclusions about any of these cases. The point is simply to show patterns in the kinds of statements Parole Board members make at parole hearings and in the way the Parole Board considers applications for discretionary parole. The ACLUAK believes that this broader picture may be of value to this court when it decides the issues presented by Stoneking.

Statistics and statements from the Parole Board concerning the grant of discretionary parole

The Parole Board does not lightly grant discretionary parole to anyone. In 2021 and 2022, the Parole Board *denied* 70 or 75% of all applications for discretionary parole.[7] The

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4 *See* AS 33.16.110(a), .130(b).

5 *See* AS 33.16.170(a).

6 *See Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047, 1051 n.3 (9th Cir. 2005) ("Materials from a proceeding in another tribunal are appropriate for judicial notice." (quoting *Biggs v. Terhune*, 334 F.3d 910, 915 n.3 (9th Cir. 2003)).

7 *See* https://doc.alaska.gov/Parole/documents/quick-facts-2021.pdf; https://doc.alaska.gov/Parole/documents/Quick%20Facts%202022.pdf (also available at

Board granted discretionary parole in just 18% of the cases (37 people) in 2021, and in 25% of the cases (46 cases) in 2022.[8] Even a "grant" of parole does not necessarily mean that the inmate will be released from custody in the near future. Some "grants" are for a parole date as much as 8 years in the future.[9]

In some cases, the Parole Board neither grants nor denies the parole application outright. Instead, the Parole Board continues the case, generally telling the inmate when he may apply again.[10] This is commonly called a "set-off." Five of the cases described below involve 10-year set-offs.[11] In a public hearing in October 2020, the then-chair of the Parole Board, Edie Grunwald, stated that a 10-year set-off is "automatically" what's given

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Appx. 1-2).

[8] *See* Appx. 1-2. The grant rate has plunged since 2017. Between 2011 and 2017, for example, between 52 and 66% of parole applications were granted each year. *See* https:// alaskapublic.org/2021/06/03/the-number-of-alaskans-released-on-discretionary-parole-fell-sharply-in-2020/ (including graphs and charts based on data supplied by the Parole Board).

[9] For example, based on communications from parole applicants, the ACLUAK is aware that Timothy St. Clair was granted parole in 2021, effective 8 years and 12 days after the parole hearing. Michael Dunkin was granted parole in 2020, effective 5 years and 2 days after the parole hearing. Jace Frankson was granted parole in 2019, effective 5 years after the parole hearing. Sabubu Hodari was granted parole in 2019, effective 6 years and 5 months after the parole hearing. Geoffrey Mathis was granted parole in 2020, effective in 7 years and 3 months.

[10] *See generally* AS 33.16.100(h) (authorizing continuations). The Parole Board continued 7% of cases that came before it in 2021 and 5% in 2022. [Appx. 1-2]

[11] *See infra* at 9, 13, 15, 18, 22; *see also, e.g., McDonald v. State, Dep't of Corrs.*, 519 P.3d 345, 347 (Alaska 2022) (Board gave a 10-year set-off based on its belief that release at the time of the hearing would diminish the seriousness of the offense); *Walker v. State*, 2020 WL 7774938, at *1 (Alaska App. Dec. 30, 2020) (unpublished) (also involving a 10-year set-off).

in a murder case when a parole application is not denied but is continued.[12] When the Board continues an application, sometimes it suggests additional programs the inmate should complete to improve his likelihood of being granted parole in the future, and sometimes it does not, particularly where the inmate has successfully completed all of the rehabilitative programming available within the prison.[13] As illustrated below, even when the inmate complies with the Board's recommendations, there is no guarantee that the inmate will be granted parole when he renews his application after the set-off period. Instead, despite the inmate's compliance with the Board's recommendations, the Parole Board sometimes denies parole[14] or continues the hearing for another 10 years.[15]

The Board asserts that it considers all the information available to it, and all four of the statutory criteria.[16] However, in many instances, as illustrated below, when the Board declines to grant parole, the most important factor – and sometimes the only factor – is whether the offender (who must have served at least the amount of time required by the legislature and the court) has served "enough time." Often the Board concludes that the time served is not enough time and, that despite the offender's having met the first three criteria, parole is denied because "early release" would diminish the seriousness of the

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12 *See* https://doc.alaska.gov/Parole/audio/Parole%20Board%20Admin%20Meeting%202020.mp3, at approx. 37:23-37:56; *see also* Appx. 10 (informal transcript of this meeting).

13 *See, e.g.*, Appx. 103, 106-07, 111, 119, 134-35, 175, 180, 183.

14 *See, e.g.*, Appx. 185-86.

15 *See, e.g.*, Appx. 106-07, 134-35.

16 *See* https://doc.alaska.gov/Parole/audio/Public%20Admin%20Meeting%2010.20.2022.mp3, at approx. 4:23-11:30 (hereinafter "2022 Parole Administrative Meeting").

offense.[17]

The Board also asserts publicly that it places importance on the recommendation of an inmate's institutional parole officer ("IPO"), presumably because the IPO is expected to know the inmate well.[18] The examples below show that in fact the Parole Board regularly declines to grant parole even when the IPO strongly supports it.

Sample cases where the Parole Board has declined to grant parole based largely on its belief that release would diminish the seriousness of the offense[19]

Odie Walters

Odie Walters was convicted of six felony charges, including murder, burglary, and assault, all arising out of a single incident in June 1989 when he assaulted his ex-wife and shot and killed her current romantic partner.[20] He was sentenced to a composite term of 81 years to serve, plus an additional 10 years suspended; the judge provided that he would not be parole eligible until he had served 30 years. [Appx. 100-01][21] This meant that Walters became parole eligible in 2019, the year he turned 71. [*Id.*]

The Parole Progress Report prepared by Walters's IPO reflects that Walters had

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17 *See generally infra* at 6-27.

18 *See* 2022 Parole Administrative Meeting at approx. 8:21.

19 The ACLUAK thanks the individuals whose cases are profiled below for their consent to share documents from their cases and to describe their cases for this court.

20 *See Walters v. State*, 1992 WL 12153689, at *1-*2 (Alaska App. Dec. 30, 1992) (unpublished).

21 *See* AS 12.55.115 ("The court may, as part of a sentence of imprisonment, further restrict the eligibility of a prisoner for discretionary parole for a term greater than that required under AS 33.16.090 and 33.16.100.").

only two disciplinary actions during his 30 years of incarceration in this case – one in 2002 and one in 2009.[22] [Appx. 194] Walters served most of his sentence at Spring Creek Correctional Center, where he was regularly employed, including as a skilled furniture maker; many people highly regarded his work. [Appx. 194, 197, 206, 207, 210, 213-20] By 2019, he had fulfilled all the requirements of his Offender Management Plan.[23] [Appx. 194] His programming included successful completion of courses in anger management, victim impact, and re-entry. [Appx. 195, 197, 209, 211, 212] He had a support system from his family in the community, and a realistic plan for finding work in Alaska, then relocating out-of-state where he could care for his aging mother. [Appx. 195, 198] His IPO supported his parole release, stating that, after 30 years in custody, with an excellent behavior record and completion of rehabilitative programs, Walters posed a low risk to the public. [Appx. 195] Unsurprisingly, victim family members opposed his release. [Appx. 203-05][24]

At Walters's parole hearing in February 2019, the majority of the Board members' statements to Walters focused on his crime. [Appx. 222-24 (Tr. 5-11)] Walters did not defend or justify his behavior in any way. He explained that, in 1989, he had an attitude

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22 Neither of Walters's write-ups involved a "major infraction" under DOC policy. *See* Dept. of Corrections Policies and Procedures § 809.02.

23 *See* AS 33.30.011(a)(8) (requiring DOC personnel to prepare for each inmate a case plan, often referred to as an Offender Management Plan or OMP).

24 "Victim," as a term in the Alaska criminal code, refers both to the person against whom an offense has been perpetrated and, when the victim is deceased, to other family members. *See* AS 12.55.185(19). For clarity's sake, this brief typically refers to the "victim's family" when referring to surviving family members of the deceased, without intending to diminish their status as victims in their own right.

of wanting to control his wife, and, when he was hurt or distressed, he did not have the ability to walk away – but he said he'd been working on that for the past 30 years, and he knew that now he could walk away from a conflict. [Appx. 223-24 (Tr. 8-11)]

Board Member Possenti started her interview of Walters by saying "part of . . . what we have to decide is how much is enough time . . . for what happened." [Appx. 224 (Tr. 10)] She acknowledged to Walters that he had done well in prison, but she stressed that the Board also has to consider "if paroling you this early . . . would diminish the seriousness of the offense, . . . what kind of impact it would have on the victims." [Appx. 224 (Tr. 11)] She noted that the victims that the Board had heard from did not support his release. [*Id.*]

The Parole Board denied Walters's application for release. [Appx. 102, 224 (Tr. 13)] By way of explanation, the Board's spokesperson stated:

> You know, the seriousness of the offense is just too great to consider parole this early, and the impact that it would have on the victims, you know, would negatively impact them. And, you know, we just can't . . . justify a release this early.
>
> We would encourage you to keep doing what you're doing. You know, if there's any other, you know, counseling or anything that, you know, would help if you've, you know, talk to anybody about the crime itself and – to, I guess, kind of work on some of that, some of the emotional stuff that goes with that. We would encourage you to do that.
> [Appx. 224 (Tr. 13)]

The Board's more formal denial letter repeated the theme about why the Board opposed "early" release: "The Board feels that releasing you this early would diminish the seriousness of that offense and have a negative impact on the victim's remaining family." [Appx. 103] The Board also wrote that it believed that Walters was continuing to blame at least part of the crime on his ex-wife, though its basis for that belief is not stated. [*Id.*]

The Board's view (apparently based on a 15-minute hearing) was contrary to the opinion of Walters's IPO who interacted with him regularly and observed how he took full responsibility for his criminal behavior. [Appx. 195] The Board allowed Walters to re-apply in 10 years, when he will be 81 years old. [Appx. 102]

Donald Seek

Donald Seek was convicted in 1995 of murder in the first degree and tampering with evidence.[25] He received a sentence of 66 years, with no judicial restriction on his parole eligibility,[26] meaning he became parole eligible after serving 22 years.[27]

Seek had a parole hearing in October 2016, as he neared the 22-year mark. His IPO recommended that he be granted parole, conditioned on his obtaining a substance abuse assessment and complying with treatment recommendations, and that he reside for six months when first released in approved sober living transitional housing. [Appx. 229] Seek's parole package showed his good conduct in prison (with no disciplinary action since 2007), steady employment, active participation in substantial rehabilitative programming, completion of his OMP, and a plan to continue participation in Alcoholics Anonymous if released. [Appx. 227-28, 230-33]

The Board denied Seek's initial parole request, but allowed him to re-apply in 5 years, if he completed additional substance abuse treatment. [Appx. 105-06] The denial letter stressed the severity of the crime and the victim's family's opposition to his release.

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25 *See Seek v. State*, 1998 WL 80112, at *1 (Alaska App. Feb. 25, 1998) (unpublished).

26 *See id.* at *10.

27 *See* former AS 33.16.100(d) (1993).

[Appx. 106] The Board observed that Seek was still 23 years from his mandatory release date. [*Id.*] The letter also noted concerns by the Board that Seek "did not appear to be able to articulate why you committed this crime." [*Id.*] However inarticulate Seek seemed to the Board in person, his parole application discussed how years of incarceration had helped him understand the effects of his substance abuse and his thinking errors at the time of the crime. [Appx. 232]

Seek moved for reconsideration, and the Board ruled that he could re-apply before 2021 if he submitted proof of completing the RSAT (Residential Substance Abuse Treatment) program. [Appx. 235] Seek submitted proof that he successfully completed the RSAT program in October 2017. [*Id.*]

The Board scheduled Seek for a renewed parole hearing in December 2019. His parole letter update for that hearing included support from his IPO for granting parole, with a condition that he reside at a Community Re-entry Center for the first six months. [Appx. 236] Seek's parole plan identified his family as a support network in the community, offered a realistic plan for obtaining employment, and maintaining a sober lifestyle. [Appx. 238] The victim's family continued to oppose his release on parole. [Appx. 244-46 (Tr. 21-26)]

At the hearing, Seek was asked to describe what he had learned in the RSAT program. Seek expressed his appreciation for having been directed to complete that program. He said he had learned a lot about his core beliefs and boundaries and how his alcoholism had corrupted them; he had also learned about the triggers that could bring back a craving for alcohol and how to mitigate those feelings and prevent a relapse. [Appx. 241

(Tr. 7)] Seek had become a strong supporter of AA and wanted to continue to participate and to help others deal with their alcoholism. [Appx. 241 (Tr. 8)]

Board Member Meyer spoke to Seek about how he'd been able to "carve[] out a bit of a life" for himself in prison, and to have social interactions with staff and other prisoners, but the person he killed could not do that. [Appx. 241 (Tr. 8)] Meyer explained, "[T]hat's one of the things we take into consideration." [Appx. 241 (Tr. 9)][28] Another thing the Board considers, Meyer said, is "how much time is enough time for someone to serve for the crime you committed." [*Id.*]

Board Chair Edie Grunwald asked Seek to define "victims" and "morals" and asked him how he though the victims in this case feel. [Appx. 241-42 (Tr. 9-10)] Seek recognized that the victims are upset and angry and opposed to his release on parole. He knew his crime had affected everyone in the community of Old Harbor. [Appx. 242-43 (Tr. 10-11, 14)]

Board Member Wilson echoed the theme of having to decide whether Seek had served enough time. [Appx. 243 (Tr. 15)] He told Seek that his repeated requests for parole "add[] up to someone that might not understand the severity of their crime." [Appx. 243 (Tr. 16)] Seek stated that he had believed he was ready for parole in 2016, but he was better prepared now, having completed even more treatment. [Appx. 243 (Tr. 15)]

Board Member Larson focused most of his questions to Seek on details of the crime. [Appx. 243-44 (Tr. 17-20)] Seek answered that he should have known then how to avoid

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[28] Board Member Meyer made very similar comments at other parole hearings. *See* Appx. 223 (Tr. 6), 280, 327 (Tr. 14), 337 (Tr. 10-11).

a dispute by negotiating or walking away, rather than getting a gun; he explained that, at the time, he felt his life was in danger and he was acting in self-defense, but he knew now that he responded in the wrong way and should have acted to defuse the situation. [Appx. 244 (Tr. 19-20)]

Although Seek unquestionably had done all that the Parole Board had required him to do at the previous hearing, the Board again denied Seek's application. The Board's spokesperson explained the Board's reasoning:

> The basis of our decision in part lies in going back to how much time is enough time, and that's a difficult question to answer. But right now we don't feel that is enough time.
>
> The other part of it is, in your statements, you continue to revert to the talk of self-defense and those sorts of things, and we don't get the feeling that you really have come to terms with precisely what it was that you've done and the effect that it's had on the victims in this case.
>
> So in the interim, we would encourage you to seek out a victim impact class as well as criminal thinking errors class, because those two things are of utmost concern to us.
> [Appx. 246 (Tr. 27-28)]

The Board's formal denial letter stated:

> The Board continues to recognize that you have performed well while in custody. You have had little disciplinary action during your entire incarceration period, have maintained steady employment, and completed several rehabilitative programs. . . . However, as with your initial appearance for discretionary parole, the Board must continue to weigh your current actions against those committed the night you took the life of [T.C.]
> [Appx. 107]

The letter also explained that the Board believed that Seek still asserted he acted out of self-defense and that he did not recognize the seriousness and illegality of his action. [*Id.*] (It is unclear what evidence the Board relied on for this assertion.) The Board concluded:

> After much consideration as to the above noted concerns, the Board feels that releasing you at this time would truly diminish the seriousness of the offense. [*Id.*]

The Board repeated the encouragement that Seek participate in a victim impact course and a program to address cognitive thinking errors. [*Id.*] The Board allowed Seek to apply again in 2026, 10 years from the 2016 hearing. [Appx. 107, 246 (Tr. 27)]

Robert Hernandez

Robert Hernandez was convicted of 29 felony charges for burglary and theft, all arising out of eight home break-ins on one day in 2008, plus an additional burglary in 2007.[29] He received a composite sentence of 35 years to serve.[30] After serving approximately 13 years – 37% of his sentence – he was eligible for discretionary parole, and he presented his application to the Parole Board in August 2021. Hernandez was 62 years old at that time. [Appx. 248]

Hernandez's parole package documented that Hernandez had completed his OMP, and had completed the in-prison Residential Substance Abuse Treatment program, the 48-week offender program, and a lengthy series of other courses on anger management, alternatives to violence, relapse prevention, re-entry, and victim impact. [Appx. 248-49, 252-53] He had taken on leadership roles in mentoring others in the substance abuse prevention program. [Appx. 252] He had a good institutional behavior record, a history

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[29] *See Hernandez v. State*, 2012 WL 3240106, at *1 (Alaska App. Aug. 8, 2012) (unpublished). The offense dates provided above come from CourtView (*State v. Hernandez*, 3AN-07-10231CR). If the CourtView dates are accurate, this suggests that the court's opinion may have mistakenly treated the May 2007 burglary as if had occurred in May 2008.

[30] *See Hernandez*, 2012 WL 3240106, at *1.

of steady employment and volunteer work in prison, and a realistic release plan. [Appx. 251-54]

Hernandez's IPO supported his release. She recognized his long criminal history and his past failures on supervision, but, from her work with him, she observed that he "has finally made the conscious choice and proven efforts to change." [Appx. 254] She was impressed by the "copious amount of programming" he had completed and his goal to become a certified Peer Support Specialist, so he could help others with the addictions that had troubled him. She concluded that he "has every reason to succeed if released on discretionary parole." [*Id.*]

Others who had worked closely with him in prison also attested to the positive changes he had made, and they supported his release. [Appx. 259-62]

The Parole Board denied his application. [Appx. 109][31] The denial letter stressed Hernandez's criminal history, including both the crimes for which he was then incarcerated and his earlier offenses. [Appx. 110-11] (These together, obviously, are what resulted in his 35-year sentence, an abnormally long sentence for property offenses.) It described his victims' opposition to his release. [Appx. 110] Based on his history, the Board expressed a lack of confidence that he would be able to live in the community without violating the conditions of his release. [Appx. 111] The Board commended Hernandez's progress in recent years, but stated that "it does not yet mitigate the immensity of your repeated criminal acts." [*Id.*] The Board concluded that release at that time "would only serve to

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[31] Hernandez does not have a copy of the CD or a transcript of his parole hearing.

diminish the seriousness of your crimes." [*Id.*]

The Board acknowledged that it did not know what additional rehabilitative programs would be available within the next 10 years, but it encouraged him to continue participating in any that would address "criminal thinking errors" and assist in his re-entry to the community. [Appx. 111] The Board gave no apparent weight to the recommendation from Hernandez's institutional probation officer or the others within the prison who knew Hernandez well and who supported his release. The Board permitted Hernandez to re-apply in 10 years [Appx. 110], at which point he will have served over 65% of his sentence and be just months shy of his mandatory release date.

Hernandez moved for reconsideration. [Appx. 263-64] His IPO continued to support him. She wrote: "My recommendation to grant discretionary parole still stands. He has made a very visible change over the last decade. He is a good candidate for discretionary parole, and I believe the Parole Board should reconsider this 10 year denial." [Appx. 264]

The Board denied reconsideration and adhered to its refusal to grant discretionary parole. [Appx. 112-13]

Michael Stephens

Michael Stephens was convicted in 1982, based on a guilty plea, of first-degree murder.[32] He was 23 years old at the time of the crime. The crime involved a violent attack on another young man, with whom Stephens had engaged in consensual sex. [Appx. 115]

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[32] *See Stephens v. State*, 1983 WL 807895, at *1 (Alaska App. Oct. 5, 1983) (unpublished).

Stephens identified himself as gay while growing up, which was a constant source of tension in his family. At the sentencing hearing, a psychologist testified that he diagnosed Stephens with masochism and homosexuality, which was then regarded as a pathological condition. [*Id.*] The sentencing judge imposed a maximum sentence of 99 years, but set no restriction on his parole eligibility. [*Id.*] Under the applicable law, Stephens was eligible for release on discretionary parole after serving 33 years.[33]

Stephens applied for discretionary parole in 2015, after he had been incarcerated for 33 years. His parole application reflected that he had had only three disciplinary actions in all those years, the most recent in 2004. [*Id.*] He had completed 66 classes and other rehabilitative programs and had served in leadership roles helping other inmates with their progress toward rehabilitation, including facilitating anger management and relapse prevention courses and being a leader in the Residential Substance Abuse Treatment program. [Appx. 115-16]

At the Parole Board hearing, in response to questions from Board members, Stephens explained how he now understood that he attacked his victim out of anger against himself over his sexuality and his fear that he could lose his family again[34] because of their displeasure with his sexuality. [Appx. 117] He was clear that these feelings came from within himself; he was not blaming the victim in any way. [*Id.*] He described how the programs he had participated in in prison had helped and changed him, so he was no longer

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[33] *See* former AS 33.15.080, .180(b) (1980).

[34] As a teen, he had been sent away to undergo forced heterosexual conversion therapy. [Appx. 115]

ashamed or afraid because of his sexuality. [Appx. 117-18] He had learned to be open and not to keep secrets, to communicate with others, to seek help when needed, and to surround himself with positive role models. [Appx. 116, 118-19]

The Parole Board denied his application for release, stressing the seriousness of his crime and its belief that Stephens did not yet have adequate insight into why he committed the crime or what would help him not to commit another assault. [Appx. 119] The Board recommended that he participate in DOC's 48-week offender program and allowed him to re-apply in five years. [*Id.*]

Stephens filed a post-conviction relief application, contending that the Parole Board's decision denying his parole was not supported by evidence or adequate explanation.[35] Judge MacDonald agreed with Stephens and directed the Parole Board to provide Stephens with a new parole hearing. [Appx. 114-33] This decision was issued in 2020, not long before Stephens was eligible to apply again under the Parole Board's 2015 decision. Thus, no additional hearing was scheduled as a result of the superior court's ruling. [Appx. 133, 271-72]

Stephens's 2020 application documented that he had completed the 48-week program as required by the Parole Board. [Appx. 146] The renewed application also included a recent, very favorable psychological examination, a certificate of completion of a baker's apprenticeship program, a letter of support from his work supervisor, a certificate of completion of two conflict resolution programs, and another recommendation for release

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35 *See Stephens v. State*, 4FA-17-01507CI.

from his IPO. [Appx. 146-50]

At the hearing, Stephens discussed his belief that the mental health counseling he had received over many years would enable him to "be a good person" in the community. [Appx. 274-75, 279-80] He answered questions from Parole Board Chair Edie Grunwald that conveyed his understanding of all the people hurt by his crime. [Appx. 275-78] Board Member Meyer contrasted how Stephens had been able to live a life, even in prison, while his victim could not. [Appx. 280-81] He asked, rhetorically, how the Board should determine whether Stephens had served "enough time":

> [Y]ou were sentenced to 99 years – a lifetime – because you took that life. You haven't spent your whole life in prison. You've had . . . the opportunity to do something when you were young. You ended his opportunity on that day to ever do anything . . . . But that's the point of a 99-year sentence. You serve your lifetime. . . . [I]t's not taken from you. You actually have the opportunity to be useful. . . . The most difficult thing for this Board to do is like you were saying, you have a lot of support – is trying to decide how much time is enough time. How much time is enough to honor that dead young boy.
> [Appx. 281]

At the end of the hearing, the Board again denied parole, saying simply that the denial was "based on the extreme seriousness of [the] crime." [Appx. 292-93] The Board's follow-up written letter, elaborating on the bases for denial, also emphasized the severity of the offense, as well as Stephens's problems as a juvenile and young adult before the offense. [Appx. 134] The Board wrote that it was not confident that Stephens's release would assure community safety and that it "would only serve to diminish the seriousness of your offense." [Appx. 134-35] This time, the Board gave Stephens a 10-year set-off. [Appx. 135]

Stephens re-opened his post-conviction relief case and appealed this second denial of parole release to the superior court. [Appx. 136] After receiving additional briefing from both sides, Judge MacDonald granted summary judgment to Stephens. [Appx. 136-66] Judge MacDonald found again that the Parole Board's reasons for denying parole were not supported by the record. [Appx. 156-60] He noted particularly that the Board did not explain how it determined that releasing Stephens would diminish the severity of the crime. By 2020, Stephens had served 38 years in prison, the equivalent of 54 years with earned good time credit. [Appx. 158] Just as Judge MacDonald had written in his first decision in this case, he again concluded that the Parole Board offered no basis for finding that release after serving a sentence of the length Stephens had then served would diminish the seriousness of the crime. [Appx. 158, 165] Because the court lacked authority to order Stephens released on parole, Judge MacDonald remanded the case to the Parole Board (again) for renewed consideration. [Appx. 159, 163-66] The court found no basis for the recent 10-year set-off, particularly in light of the prior 5-year continuance, so it enjoined the Parole Board from giving Stephens more than a 5-year set-off if it again denied parole. [Appx. 160-63]

The Parole Board met in August 2022 and again denied discretionary parole, giving Stephens a 5-year set-off from that date. [Appx. 167-69] The denial letter listed many positive findings about Stephens but concluded yet again that release would diminish the seriousness of the offense. [*Id.*]

Jonathan Norton

Jonathan Norton was arrested in 1989 and charged with murdering a man whose car

he wanted to steal.[36] Norton was then just 16 years old. He was a troubled youth with a history of juvenile offenses. [Appx. 179] The superior court granted the State's motion to waive juvenile jurisdiction, this court affirmed that decision,[37] and in 1995 Norton pled guilty to a charge of first degree murder. [Appx. 170] He received a sentence of 99 years with 10 years suspended. [Appx. 171]

Norton had a rocky adjustment to life in prison; he was a very young adult trying to be tough to survive. [Appx. 295-99, 309, 325 (Tr. 7-8)] In approximately 1999, he was transferred to a prison in Arizona, where he spent several years in a drug treatment module, and participated for a decade in a program called Concerned Offenders for Youth Awareness, through which inmates mentored juvenile delinquents and other youth; he also became involved with training rescued dogs. [Appx. 300, 309] For Norton, these experiences were transformational. [Appx. 301] His disciplinary record improved dramatically; between 2000 and 2011 he had only two disciplinary incidents. [Appx. 298] In 2012, Norton was moved to a less structured environment, where initially he could not cope. He had a bad year in which he relapsed into old patterns of challenging authority, but soon he found the self-control he needed, and he had no further disciplinary write-ups after 2012. [Appx. 299, 300, 325 (Tr. 8-9)]

Norton was eligible to apply for discretionary parole in 2019, after serving one-third of his 89-year sentence. His parole application documented a long history of steady employment within prison – this from a man who had never held a job before being

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36 *See State v. J.R.N.*, 861 P.2d 578, 579 (Alaska 1993); *see also* Appx. 178-79.

37 *See J.R.N. v. State*, 884 P.2d 175, 177 (Alaska App. 1994).

incarcerated at age 16. [Appx. 300] Further, his application showed that he had successfully completed a broad range of rehabilitative programs after 2012, including courses in anger management, criminal thinking errors, moral reasoning, criminal relapse prevention, and substance abuse prevention. [Appx. 300, 303-04] He continued to participate actively in volunteer programs that contributed to the community. [Appx. 300-01] He assumed leadership roles among inmates at Wildwood Correctional Center. [Appx. 301, 309]

Norton developed a detailed and realistic release plan, which included plans for housing, employment, volunteer work, and community support. [Appx. 301, 310-11]

His parole application was strongly supported by corrections personnel, including his institutional probation officer, Wildwood's superintendent, and other corrections staff who had worked with him. [Appx. 301-02, 313-21] The professionals who knew him well recognized his deep remorse for his criminal actions as a youth and his full acceptance of responsibility for his own misconduct. [*Id.*] His IPO specifically opined that, since Norton had served almost 30 years in prison, committed so much to his own reformation, and worked so hard to contribute to society, his release would not diminish the severity of the offense. [Appx. 302] The victim's family and other community members strongly opposed his release. [Appx. 324-25 (Tr. 5-6), 328-29 (Tr. 18-22)] One opponent was Ben Grunwald, husband of Edie Grunwald, later appointed as Parole Board chair. [Appx. 322] The Grunwalds are the parents of a teen who was murdered by other teens in 2016.[38]

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[38] *See* https://www.adn.com/alaska-news/crime-courts/2022/08/08/I-killed-my-friend-Palmer-resident-sentenced-to-serve-99-years-for-2016-murder-of-mat-su-teen/.

At the hearing in February 2019, Norton spoke candidly about how "my actions when I was younger that caused us all to be here today have been significant, traumatizing, and truly regrettable." [Appx. 325 (Tr. 7)] He recognized that it had taken him "a long time to understand what I did" and to realize that he'd had a "terrible and completely wrong thought process" about how to act in order to be accepted. [*Id.*] Once he came to that understanding, he committed himself to a different path. [Appx. 325 (Tr. 7-8)]

Parole Board members asked him few questions. (The transcript of his interview reflects more time devoted to Board members' comments than to Norton's responses. [Appx. 325-28 (Tr. 6-18)]) Two Board members talked about their central task being to decide how much time is enough. Board Member Possenti said, "[C]ertainly, you know, the big question sitting on the table is how much time is enough time for a life being taken." [Appx. 326 (Tr. 10)] Board Member Meyer stated, "You took a life of a human being in cold blooded murder . . . . So what do you think is enough time for that?" [Appx. 326 (Tr. 13)]

At the conclusion of the hearing, the Parole Board denied Norton's application for release, saying he could reapply in 10 years. [Appx. 175, 329 (Tr. 22-23)] In oral comments, the Board's spokesperson explained:

> Some of the factors involved with that are, while we recognize that your efforts in recent past have been remarkable, very good, but they're short.
>
> When we look at someone that appears before us for the kind of crime that was committed, we're looking for a little bit longer term than that. And so we encourage you to continue to make use of your life like you seem to have here. It may not be on the outside, but it's a – nevertheless, it's productive what we read.
> [Appx. 329 (Tr. 22-23)]

The Board's denial letter stressed the Board's view that releasing him would diminish the seriousness of the offense. [Appx. 175] The letter also noted Norton's early history of misconduct while incarcerated (which it mistakenly characterized as a 20-year history). [*Id.*; *see also* Appx. 326 (Tr. 12-13)] The Board commended Norton for his "recent efforts," but found they were outweighed by the seriousness of his offense and the Board's concern for public safety. [Appx. 175]

Norton moved for reconsideration. [Appx. 330-31] The Board declined to reconsider. It acknowledged his "much-improved institutional conduct," but reiterated its view that "the severity of your offense has outweighed your efforts at following the institutional rules." [Appx. 177]

Norton appealed the Parole Board's denial to the superior court in a post-conviction relief application.[39] As a result of a superior court order, the Board issued a new letter in October 2022 to provide additional explanation of the bases for the Board's decision. [Appx. 178-80] The new letter contains a detailed description of the crime that resulted in Norton's incarceration, and a description of his juvenile misconduct before that offense. [Appx. 178-79] It details his history of disciplinary actions since being incarcerated, continuing to refer to it as a 22-year history of defiance of institutional rules, instead of a 10-year history, followed by 10 years of good behavior, followed by a one-year relapse, and then another decade of no infractions at all. [Appx. 179; *see* Appx. 295-99] The Board acknowledged that Norton's recent history demonstrated that he had learned self-control,

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[39] *See Norton v. State*, 3AN-19-10870CI.

completed all the recommended rehabilitative programming, and presented a viable release plan, and that release would further his rehabilitation and reintegration into the community. However, the Board reiterated its determination that Norton's release would diminish the severity of the offense; this outweighed all the favorable factors. [Appx. 179-80]

Apirat Suwannasaeng

Apirat Suwannasaeng pled guilty to a 1995 murder. He was 18 years old at the time of the crime. He had gone looking for a person he believed had wronged him; when he found what he thought was that person's car, he shot the person inside – who turned out to be a stranger. [Appx. 186, 336 (Tr. 9)] He received a sentence of 70 years with 20 years suspended. [Appx. 181-82]

After serving the mandatory minimum of 20 years, which was 40% of his prison term, he was eligible to apply for discretionary parole in 2015. The Parole Board denied his application and allowed him to re-apply in five years; it directed him in the interim to obtain a substance abuse evaluation and to follow treatment recommendations and also to complete the 48-week offender program. [Appx. 183]

By 2018, Suvannasaeng had met the preconditions, and he applied for an earlier hearing. [Appx. 184] The Parole Board denied this request and required him to wait until 2020 to reapply. The denial letter stated: "[I]t is still early in your sentence to advance your hearing date. At the time of your first parole hearing in April of 2015 there was strong victim presence and clear opposition to any type of release consideration. We support the victim's position and will continue to monitor your progress in preparation for your next hearing in 2020." [*Id.*]

Suwannasaeng's renewed parole application in 2020 showed that he had completed his Offender Management Plan, had had no disciplinary write-ups in the past five years, had been employed steadily, and had participated in additional treatment and vocational training. [Appx. 332-33] He had support from his family and a plan to live with his parents and to find work and further vocational training if he was released and his request for an interstate transfer of parole was approved; he had alternative plans for release if he were required to remain in Alaska. [Appx. 333] His IPO supported his release on discretionary parole. He wrote:

> This Officer believes that while the severity of the offense committed can't be completely diminished, but due to the period of time incarcerated, his current age and his willingness to immerse himself in rehabilitative programs that his risk to the public is greatly reduced and that given the opportunity to reenter the community he may very well be successful and productive. [*Id.*]

The parole packet reflected that the victim's family opposed his release [Appx. 332], and family members made similar statements at the parole hearing. [Appx. 337-38 (Tr. 13-17)]

At the hearing, Suwannasaeng discussed what he had learned from the additional programming the Board had required. He said he'd learned to make better choices, not to react with his emotions, how to manage his anger, and how to put other people first. [Appx. 335 (Tr. 5)] When asked how he felt about what he had done, he said he thinks about the crime every day; he is remorseful and understands how he affected the victim's family. [Appx. 336 (Tr. 6-7)] He said he had done everything he could to not be the 18-year-old who came into prison and to be a better person. [Appx. 336 (Tr. 7)] Board Member Possenti acknowledged that Suwannasaeng had done well in prison, then stated, "but then we also have to consider how much time is enough time [if] someone's life has been taken."

[*Id.*] Board Member Meyer returned to one of his recurrent themes, noting that Suwannasaeng had had a chance to "carve[] out a life for yourself. . . . [Y]ou're living a life," whereas the person he killed did not have that chance. [Appx. 337 (Tr. 10)] Meyer continued, "[W]hen we look at the case like this where you killed a person, . . . what is enough time? Well, some would say there's never enough time. Why should you ever be free? . . . . [Y]ou killed a man. . . . Why should you ever be set loose to live a normal life?" [Appx. 337 (Tr. 10)] He said that the Board needed to "honor[] the life that could have been of the person that you killed." [*Id.*]

At the end of the hearing, notwithstanding that Suwannasaeng had fulfilled the requirements set at his previous hearing, the Board denied Suwannasaeng's parole application and required him to serve the rest of his sentence. [Appx. 185, 339 (Tr. 18)] The chair of the Parole Board stated that the crime was heinous and deserving of strong community condemnation, so the Board "just can't justify an early release at this time." [Appx. 339 (Tr. 18)]

The Board's written denial acknowledged the "significant amount of rehabilitative programming" he had completed, that Suwannasaeng had completed his Offender Management Plan, and that he had maintained clear conduct since his prior hearing. [Appx. 186] To explain the denial, the letter states:

> However, the Board could not reconcile that [i.e., the previously listed positive factors] with the senseless murder that you perpetrated against a total stranger who happened to be driving the same type of vehicle as a person you were seeking retaliation against. The victim[']s family will never be whole again and must live with the loss of their loved one for the rest of their lives; while you still get a life to live, even if it is in prison. The Board felt that to

> release you early would severely diminish the seriousness of your crime and therefore could not justify a release to discretionary parole.
> [Appx. 186]

Suwannasaeng filed a post-conviction relief action, seeking review of the Parole Board's decision to deny his parole.[40] In January 2022, in response to a superior court decision in another individual's post-conviction relief case, the Parole Board issued a supplemental letter in Suwannasaeng's case "to provide more clarity as to the basis for their denial" of his 2020 parole application. [Appx. 188] This letter notes various concerns the Board had and the factors it considered, but stated that the Board had not found that there was a probability that Suwannasaeng would pose a risk to the public or that he could not live at liberty without violating laws and parole conditions. [Appx. 189] The Board stated that it found that release could further Suwannasaeng's rehabilitation. [*Id.*] The single factor justifying the Board's denial of Suwannasaeng's parole request was its belief that his release would diminish the severity of the offense. The Board stressed the heinousness of the offense and the lasting impact of the victim and his family. It concluded, "One of the hardest decisions to determine is how much time is enough time and because your actions leading up to your offense and at the time of your offense were so callous [the Board] concluded that releasing you early would only serve to diminish the seriousness of your crime." [*Id.*]

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40 *See Suwannasaeng v. State*, 3AN-20-06875CI.

ARGUMENTS

THE PAROLE BOARD ABUSES ITS DISCRETION SYSTEMICALLY IN THE EMPHASIS IT PUTS ON ITS BELIEF THAT GRANTING PAROLE WOULD DIMINISH THE SERIOUSNESS OF THE OFFENSE.

A. THE ALASKA CONSTITUTION AND SENTENCING STATUTES INTEND A SYSTEM WHERE, AS A RULE, INDIVIDUALS WHO ARE ELIGIBLE FOR DISCRETIONARY PAROLE WILL BE RELEASED WHEN THEY DEMONSTRATE THEY CAN LIVE AS LAW-ABIDING MEMBERS OF THE COMMUNITY.

1. Introduction

Since Statehood, the Constitution has required that criminal administration in this state shall be based on the principle of reformation, as well as the goal of protecting the public.[41] And the Alaska Constitution requires the legislature to establish a parole system.[42] In requiring both a parole system and that criminal administration recognize the principle of reformation, the Constitution enshrines the understanding of the drafters and the electorate who adopted the document that even a person who deserves and receives a long sentence for committing a horrible crime may be rehabilitated, and such an individual may be released from prison after serving the amount of time established by the legislature and judge as necessary to serve the goals of sentencing. The Parole Board exists principally to evaluate the likelihood that an applicant who is eligible for discretionary parole could live at large without posing a threat to the community. Under neither the Constitution nor

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[41] *See* Alaska Constitution, art. I, § 12 (as originally adopted). A 1994 amendment maintained those two goals and added other goals to serve, including community condemnation of the offender and the rights of crime victims. *See* Alaska Constitution, art. I, § 12 (as amended effective Dec. 30, 1994 (*see* Legislative Resolve No. 58 (1994) (proposing constitutional amendment)).

[42] *See* Alaska Constitution, art. III, § 21 ("A parole system shall be provided by law.").

the sentencing and parole statutes is the Parole Board authorized to arrogate to itself the right to decide that the seriousness of the crime would be diminished if an eligible prisoner were granted "early release" – i.e., release *after* the individual has served more than the minimum time necessary to be eligible for discretionary parole.

Inherent in the establishment of a parole system, as this court previously has recognized, is the purpose "to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed."[43]

2. Overview of the statutes and regulations governing discretionary parole

As directed by the Constitution, the state legislature adopted a parole system.[44] The first parole statute set no minimum time that a sentenced prisoner needed to serve before being eligible for release on parole.[45] It allowed a sentencing judge to designate the minimum time a prisoner must serve before being eligible for parole; that time could not be more than one-third of the maximum sentence.[46] The original parole statute contained no explicit criteria for the parole board to consider, but it generally directed the Parole

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43 *Covington v. State*, 938 P.2d 1085, 1089 (Alaska App. 1997), quoting *State v. Stores*, 816 P.2d 206, 208-09 (Alaska App. 1991), which in turn quoted *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

44 *See* SLA 1960, ch. 81.

45 *See id.* § 7 ("A state prisoner, other than a juvenile delinquent, wherever confined and serving a definite term or terms of over 180 days, whose record shows that he has observed the rules of the institution in which he is confined may, in the discretion of the board, be released on parole.") (codified as former AS 33.15.180 (1960)).

46 *See id.* § 12 (codified as former AS 33.15.230(a)(1) (1960)).

Board to focus on whether the individual could live at liberty without violating the laws.[47] In other words, the Parole Board's task was to determine whether someone who had not conformed to society's rules had been reformed by his incarceration and could be expected to function as a law-abiding citizen.

In 1964 and 1974, the legislature amended the parole statutes to set certain minimum terms a prisoner must serve before being eligible for parole.[48] The task of the Parole Board was not changed.

During the first two decades after Statehood, sentencing statutes generally gave judges broad discretion, so that sentences imposed on similar offenders for similar offenses could differ widely, depending largely on the attitudes of the sentencing judge.[49] Further, over time, the different sentencing provisions for different crimes became illogical, with longer sentences sometimes being authorized for less serious offenses.[50] Even if a sentence was, although legal, clearly too lenient to express community condemnation for a serious

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47 *See id.* § 3 ("If it appears to the board from such review [of materials about the prisoner] that a prisoner eligible for parole will, in reasonable probability, live and remain at liberty without violating the laws, or without violating the conditions imposed by the board, and if the board further determines that his release on parole is not incompatible with the welfare of society, the board may, in its discretion, authorize the release of the prisoner on parole.") (codified as former AS 33.15.080 (1960)).

48 *See* SLA 1964, ch. 43, § 34; SLA 1974, ch. 110, § 1 (amending former AS 33.15.180 and .080 (1960), respectively).

49 *See generally Dancer v. State*, 715 P.2d 1174, 1176 & n.1 (Alaska App. 1986) (noting studies that had shown that the personality of the sentencing judge was a paramount factor in determining the length of sentence imposed).

50 *See* Alaska Criminal Code Revision, Part 6, commentary at 3-4 (Tentative Draft 1978).

crime,[51] constitutionally the appeals courts could not require that the sentence be increased.[52] The Parole Board also, could not increase a sentence, but, in exercising its discretion to grant or deny parole, it had an important role in evening out some of the discrepancy.

In the late 1970s, the legislature undertook a comprehensive review of the laws defining crimes and applicable sentences.[53] A central purpose of the revisions to the sentencing statues, which took effect in 1980,[54] was to reduce unwarranted variation in sentences.[55] As part of the new presumptive sentencing scheme, the legislature created categories of convicted defendants who would not be eligible for discretionary parole.[56] Most defendants who were not serving presumptive sentences remained eligible for parole

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51 *See, e.g., State v. Chaney*, 477 P.2d 441, 444-47 (Alaska 1970) (disapproving sentence imposed for sexual assault because it was too lenient to effectuate the goal of community condemnation); *State v. Hooper*, 750 P.2d 840, 842-43 (Alaska App. 1988) (disapproving sentence for a drug offense because it was substantially more lenient than sentences imposed in comparable cases); *State v. Brinkley*, 681 P.2d 351, 355-58 (Alaska App. 1984) (disapproving sentence for a sexual assault because it was very short compared to sentences imposed in similar cases).

52 *See Sonnier v. State*, 483 P.2d 1003, 1005 (Alaska 1971) ("once a sentence has been meaningfully imposed, it may not, at a later time, be increased"); *see also* AS 12.55.120(b) (enacted in 1969) (authorizing the State to appeal a sentence as too lenient and providing that the appellate court may disapprove a sentence as too lenient but may not increase the sentence).

53 *See* SLA 1976, ch. 114 (establishing Alaska Code Revision Commission and Criminal Law Revision Subcommission).

54 *See* SLA 1978, ch. 166, § 25.

55 *See id.*, § 12 (adding AS 12.55.005); *see generally* Alaska Criminal Code Revision, Part 6, commentary at 7-9 (Tentative Draft 1978); *Dancer*, 715 P.2d at 1182; *Nell v. State*, 642 P.2d 1361, 1370 (Alaska App. 1982).

56 *See* SLA 1978, ch. 166, § 15 (codified as former AS 33.15.180 (1980)).

after serving one-third of their sentence or any mandatory minimum, whichever was longer.[57] The new law did not alter a sentencing judge's authority to restrict parole eligibility beyond the statutory minimum – or to deny parole entirely – if warranted by the facts of an individual case.

Although the criminal code revision process initially was intended to encompass comprehensive revisions to the parole statutes to accompany the new criminal statutes and sentencing provisions,[58] that step was delayed. The legislature adopted a modest change in 1981, amending former AS 33.15.060 (which was generally a predecessor to AS 33.16.100(a)) to direct that, when the Parole Board evaluates whether to grant discretionary parole, it should consider "whether there was unjustified disparity in the sentence imposed on a prisoner in relation to other sentences imposed under similar circumstances."[59]

A more complete revision of the parole statutes was enacted and took effect in 1985.[60] Those new laws were designed to eliminate some of the confusion that had been generated by the adoption of presumptive sentencing and to modernize the procedures that govern granting and revoking discretionary parole.[61]

As part of the 1985 package, the legislature adopted AS 33.16.100(a), which establishes criteria for the Board to consider when evaluating an application for

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57 *See* SLA 1978, ch. 166, §§ 14-16 (amending former AS 33.15.080 and .180).

58 *See* Alaska Criminal Code Revision, Part 6, commentary at 11-13 & Appendix II (Tentative Draft 1978).

59 *See* SLA 1981, ch. 32, § 2.

60 *See* SLA 1985, ch. 88 (codified in relevant part as AS 12.55.115 and 33.16 (1985)).

61 *See* Governor's Transmittal Letter, available at 1985 House Journal 183-84.

discretionary parole.[62] Those criteria, which are central to the issues raised by Stoneking and the ACLUAK as amicus, remain unchanged since that time.

Little legislative history explains the legislature's intent with respect to these criteria. In particular, there is no indication that the legislature wanted to change the criteria the Parole Board had been using. The bill as initially drafted described the criteria for granting release (to be stated in the proposed new AS 33.16.100(a)), as follows:

> The board may authorize the release of a prisoner on discretionary parole if it determines that
>
> (1) the prisoner eligible for discretionary parole will, with reasonable probability, live and remain at liberty without violating any laws and without violating any conditions imposed by the board; and
>
> (2) the release of the prisoner on discretionary parole is compatible with the welfare of society and would not diminish the seriousness of the crime.[63]

The first substantive hearing on this bill was a joint hearing of the House Judiciary Committee and the House Health, Education, and Social Services Committee on February 21, 1985. Minutes of the hearing reflect that a representative of the Parole Board gave a brief history of parole in Alaska, and then Patrick Conheady, the Assistant Attorney General who played a significant role in drafting the bill that became law, began a section-by-section overview of the bill.[64] At the next hearing, on February 25, Conheady picked

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62 *See* SLA 1985, ch. 88, § 2.

63 *See* HB 141 (introduced Jan. 28, 1985) (copy at Appx. 16-31).

64 *See* Joint Meeting of House Health, Education, and Social Services Committee and House Judiciary Committee on HB 141, February 21, 1985, Minutes at 3-8 (copy at Appx. 34-39). The minutes are not detailed; the only sentence regarding the section that became AS 33.16.100(a) states, "Mr. Conheady discusses Section 110 in determining a prisoner's suitability for parole." [Appx. 37] A recording of this hearing is not available.

up where he had left off, starting with a discussion of proposed AS 33.16.170.[65]

Two witnesses addressed the joint committee hearing on February 25: Charlie Parr, who was both a former representative and a past member of the Parole Board, and Alonzo Patterson, Jr., the then-current chair of the Parole Board.[66] Both men discussed the Board's role in reducing unwarranted disparities in sentences. Parr noted studies that showed that Alaska Native and Black defendants received longer sentences than Whites; he said that decisions by the Parole Board can take account of and reduce unwarranted disparities.[67] Patterson noted geographic differences in sentencing.[68] One of the witnesses mentioned guidelines the Board had developed, establishing the Board's view of the customary amount of time an offender should serve for various categories of crime.[69] This was obviously a way the Board addressed some of the discrepancies in sentences for otherwise similar crimes and similar offenders. The witness testified that the Board "will stick fairly closely to these numerical guidelines."[70]

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65 *See* Joint Hearing of House Health, Education, and Social Services Committee and House Judiciary Committee on HB 141, February 25, 1985, Tape 31 at approx. 2:13-27:30. (Links to all still-available audio files may be obtained from the Legislative Library).

66 *See id.* at approx. 27:57-34:47 (opening statement by Patterson), 34:54-43:12 (opening statement by Parr).

67 *See id.* at approx. 40:01-40:40.

68 *See id.* at approx. 1:19:04-1:20:26.

69 *See id.* at approx. 1:17:49-1:18:15. *See also Frank v. State*, 97 P.3d 86, 88 (Alaska App. 2004) (referring to Parole Board guidelines on the number of months an offender in a particular category should serve); *see generally* former 22 AAC 20.142 (Reg. 117; Reg. 169 (numerical guidelines)); Reg. 215 (repealing former 22 AAC 20.142 (effective Aug. 28, 2015)).

70 *See* Tape 31 at approx. 1:18:08-1:18:15.

Following this hearing, Conheady revised the initial draft of the bill. For the section that eventually became AS 33.16.100(a), Conheady replaced the language he had initially proposed with the four sections that the legislature later voted to adopt to define the criteria for the Board to consider. Conheady explained in a letter that he intended the language that became AS 33.16.100(a)(1)-(4) "to correspond to criteria used by courts at sentencing under State v. Chaney, 477 P.2d 441 (Alaska 1970), with particular emphasis on the rehabilitative goals of the board."[71]

The revised language was discussed at a House Judiciary Committee on March 20, when Conheady repeated that the purpose of the language was to reflect the principles of *Chaney*.[72] The House held one further committee hearing on this bill, on March 30, 1985, but apparently none of the discussion focused on the meaning or intention of any of the four criteria.[73] The only subsequent modification made by the legislature before the bill passed was to add into the opening phrase that the Board may grant discretionary parole if it determines that "a reasonable probability exists that" each of the criteria is met.[74] The

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[71] Letter from Patrick Conheady to Rep. Max Gruenberg (March 5, 1985), House Health, Education and Social Services Committee Bill File for HB 141 (copy at Appx. 40-41). *See also* Hearing of House Health, Education, and Social Services Committee on HB 141, March 6, 1985, Minutes at 6, referring to Tape 41, side 1, No. 557 (Conheady mentioned the changes to that section that he proposed) (Minutes not reprinted in the appendix may be obtained from the Legislative Library.); HB 141 (offered March 13, 1985) (incorporating Conheady's changes) (copy at Appx. 42-59).

[72] *See* Hearing of House Judiciary Committee on HB 141, March 20, 1985, Tape 51 at approx. 1:07:57-1:08:20.

[73] *See* Hearing of House Judiciary Committee on HB 141, March 30, 1985, Tape 61 (The available recording is of poor quality in places.)

[74] *See* SLA 1985, ch. 88, § 2.

House Judiciary Committee relied on a Sectional Analysis; tracking Conheady's statements, the Sectional Analysis states that the tests proposed for AS 33.16.100(a)(1)-(4) follow the *Chaney* criteria that judges use in sentencing.[75]

Since 1985, the legislature has not changed the four criteria the Parole Board should consider when evaluating whether to grant an application for release on discretionary parole. The legislature periodically has modified the categories of prisoners eligible for discretionary parole, including increasing the time some must serve before becoming parole eligible and making defendants convicted of certain crimes categorically ineligible for discretionary parole.[76] Constitutionally, new restrictions on parole apply prospectively only. However, the fact that the legislature can – and sometimes does – decide that the goal of community condemnation requires tougher eligibility requirements for release and that some categories of defendants may never be released on discretionary parole is significant. These types of legislative decisions support concluding that, when the legislature has chosen *not* to adopt such a rule, it does not intend that the Parole Board could substitute its own view that it would diminish the severity of the crime to grant parole to an eligible inmate who received a near-maximum sentence, served decades in prison, and worked hard to meet the criteria in AS 33.16.100(a)(1)-(3).

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[75] *See* Sectional Analysis for HB 141 at 3, House Judiciary Committee Bill File for HB 141 (copy at Appx. 63).

[76] *See, e.g.*, AS 33.16.090(a)(1)(A), (C)-(E), (b)(1)(A)-(B), (b)(7).

3. Read in the context of the entire sentencing and parole scheme, AS 33.16.100(a)(4) is not intended to allow the Parole Board the right to deny parole simply because the Board believes that granting parole would diminish the seriousness of the offense.

As shown in Stoneking's brief and the cases of the individuals described above, the Parole Board seems to believe it has full authority to deny release on discretionary parole because the Board believes the individual has not yet served enough time. Board members commonly state that they need to decide "how much is enough time" for the crime that was committed. [*E.g.*, Appx. 127 (quoting Parole Board Chair Henderson), 189, 224 (Tr. 10-11), 241 (Tr. 9), 246 (Tr. 27), 281, 326 (Tr. 10, 13), 336 (Tr. 7), 337 (Tr. 10)]

With its heavy reliance on AS 33.16.100(a)(4) as a basis for denying parole, even when the other criteria of AS 33.16.100(a) are satisfied, the Board is essentially resentencing individuals. In practical effect, the Board's decisions set an often substantially longer mandatory minimum that must be served before the inmate is treated as eligible for release on parole or impose a restriction on parole eligibility substantially beyond what the legislature and the sentencing judge determined is appropriate for that type of crime and for that offender. In making these decisions, the Parole Board assumes a power beyond what the legislature intended.

The legislative history supports the view that the legislature included AS 33.16.100(a)(4) as a way to recognize the Parole Board's longstanding role in reducing unjustified disparity in sentences. Witnesses before the legislature explained that the Parole Board understood that sentences sometimes varied by geography and by race, and that the Parole Board had adopted guidelines on times to serve in order to ensure that

similar defendants who committed similar crimes served approximately the same amount of time.[77] On the heels of sentencing reform that emphasized decreasing unwarranted discrepancies in sentencing, it made sense for the legislature to authorize the Parole Board to consider the *Chaney* criteria and on that basis defer parole release when a particular defendant received an atypically lenient sentence as compared to other similarly situated defendants. An appellate court can disapprove a sentence that is too lenient to serve the goal of community condemnation, but it may not increase the sentence.[78] The Parole Board also may not increase a sentence, but under (a)(4) has discretion to even out some of the discrepancies in the time similar defendants convicted of similarly serious crimes must serve in prison.

On the other hand, the legislative history does not suggest that the legislature intended to allow the Parole Board to override the determinations by the legislature and the sentencing judge when they have both decided, for example, that it does not disserve the goal of community condemnation to release a defendant convicted of murder who received a near-maximum sentence after that defendant has served a third of his sentence, amounting to decades in prison, if that individual demonstrates his rehabilitation and his ability to live at large without violating society's rules.

When the legislature adopts a sentencing range and establishes the minimum number of years or percentage of a sentence of imprisonment that must be served before

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77 *See supra* at 34.

78 *See supra* at 31 & n.52.

that individual may be released on parole, the legislature exercises its authority to determine the types of sentence that serve the constitutional and statutory goals of sentencing. Thus, for example, when the legislature determines that first degree murder is a particularly egregious offense that warrants a sentence of 30 to 99 years – but makes the defendant parole eligible after serving the mandatory minimum or one-third of the total, whichever is longer, unless a greater restriction is imposed by the sentencing judge – this declares the legislature's view that, even a worst offender, sentenced to the maximum term, may be released after 33 years without disserving the goal of community condemnation, provided the offender can demonstrate at that time that his release will not pose a risk to public safety.

In evaluating Michael Stephens's case, Judge MacDonald could not be certain from the Parole Board's first denial of how much weight the Board had put on a belief that release would diminish the seriousness of the crime. However, if that was a basis for the Board's denial, as Judge MacDonald inferred from comments that it was, Judge MacDonald concluded that "there is not substantial evidence to support this conclusion." [Appx. 127] He explained his analysis:

> [O]n its face, releasing Stephens on parole would not seem to diminish the seriousness of the offense. Stephens has served a sentence deep into the presumptive range.[79] Under the current Alaska sentencing statutes, the lower

[79] Judge MacDonald seems to misuse the term "presumptive" when discussing sentencing for a first-degree murder; more accurately, he refers to the legal sentencing range, since first-degree murder has no presumptive sentencing range. Thirty years is currently the mandatory minimum sentence for most first-degree murder convictions; when Stephens committed his crime – and through 2016 – the mandatory minimum was 20 years. Since 1980, the maximum term has been 99 years. *See* AS 12.55.125(a); former AS 12.55.125(a) (1980), amended by SLA 2016, ch. 36, § 86.

> end of the presumptive sentencing range for a first conviction of first degree murder is 30 years and the high end is 99 years. At the time he was before the parole board, Stephens had served 32 years in prison. With good-time credit, Stephens' time served at the time of the parole hearing equated to a sentence of 48 years. As of the issuance of this decision and order, he has served 36 years. With good-time credit, Stephens' time served now equates to a sentence of more than 54 years.
>
> Stephens has now served the time equal to 24 years more than the current presumptive minimum term. Releasing a prisoner after service of a sentence so deeply within the presumptive range can be presumed not to diminish the seriousness of the crime.
> [Appx. 128]

Besides adopting minimum terms an offender must serve before becoming eligible for parole, the legislature also has authorized sentencing judges to restrict parole eligibility beyond the statutory minimum, when justified by the facts of an individual case.[80] Based on its review of thousands of cases appealed over the decades, this court must know that such judicially-imposed restrictions are not very common. For the most part – especially when imposing a long sentence on a youthful offender – judges seem to recognize that realistically they cannot predict whether an offender will be a good or bad candidate for discretionary parole after serving more than 30 years in prison.[81] Judges therefore often entrust to the Parole Board the responsibility for evaluating the individual's progress toward rehabilitation after decades in prison and for determining whether the individual

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[80] *See* AS 12.55.115; *see also State v. Korkow*, 314 P.3d 560, 565 (Alaska 2013) (legislature has authorized sentencing judges to restrict parole eligibility when appropriate on an individual basis under any of the criteria in AS 12.55.005).

[81] *See Korkow*, 314 P.3d at 565 ("a sentencing judge may consider whether the Parole Board will at a later date be better able to assess the defendant's prospects for successful parole").

has substantially reformed and has developed a release plan that makes it likely he will live as a law-abiding citizen in the community. The Parole Board will have access to much new information after 30 years, including reports on the individual's participation in rehabilitative programs, his ability to conform to rules within prison, and whether he has a release plan that provides a supportive, pro-social structure to enhance his chances of succeeding in the community.

However, when a judge deliberately chooses not to restrict parole eligibility, it does not follow that the judge intends to have the Parole Board re-evaluate the facts the judge already has weighed and that have not changed in the intervening decades, such as how the seriousness of the crime and the need for community condemnation determine the minimum sentence the defendant must serve, even if all the other goals of sentencing are satisfied. A sentencing judge does not abdicate to the Parole Board the responsibility to decide how much time is "enough" so that release on discretionary parole will not diminish the seriousness of the crime. If a judge does not restrict parole beyond the statutory minimum, a judge essentially declares that he or she believes that parole release after serving the statutory minimum would serve the *Chaney* criteria, if the individual has been rehabilitated by that time and has a reasonable parole plan. If the judge does not believe that, the judge should restrict parole eligibility. A judge's decision not to restrict parole is *not* an invitation to the Parole Board to resentence the individual and to say that, for that kind of a crime, the minimum time to serve established by the legislature and the judge is not enough.

Given the authority of the legislature and the judiciary to determine appropriate

sentences that serve the constitutional and statutory goals of sentencing, AS 33.16.100(a)(4) cannot reasonably be read to give the Parole Board unfettered discretion to resentence individuals to longer mandatory minimum terms because the Board believes that serving the statutory minimum time before becoming parole eligible is not enough time to serve. Judges may not impose sentences fashioned out of disagreement with the legislature's determination about when a defendant may become parole eligible. As this court explained in *Thomas v. State*,[82] a judge may not impose a very long sentence just to ensure that the defendant will not be paroled "too soon," simply because the judge disapproves of the legislature's policy that will authorize release on parole if the individual has been rehabilitated and can be released without a threat to society.[83] Similarly, the Parole Board should not be permitted effectively to resentence individuals because Parole Board members disagree with the decisions of the legislature and the judge about the minimum time necessary to serve the goal of community condemnation of an offense. Yet that is what the Parole Board does routinely when it finds that an individual who has served more than the minimum time required by the legislature and the judge and who meets the criteria in AS 33.16.100(a)(1)-(3) still has not served "enough" time and therefore may not be paroled.

This court should find that the Board errs when it denies parole because the Board believes that release would diminish the seriousness of the offense, when this rationale is

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82 413 P.3d 1207 (Alaska App. 2018).

83 *See id.* at 1211-13.

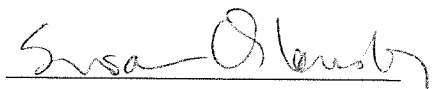
applied to someone who received a harsh sentence within the legal range, not an arguably too-lenient sentence, and who has been incarcerated for more than the minimum number of years required by the legislature and the sentencing judge. This is not to say that the Board *must* grant parole to anyone who has served the statutory minimum amount of time. The Board has ample discretion to evaluate the other three criteria in AS 33.16.100(a) and to deny parole if it has a factual basis for concluding that the other goals, including rehabilitating the defendant and protecting the public, will not be served if the individual is released.

CONCLUSION

This court should use this case as a vehicle for discussing the meaning and proper use of AS 33.16.100(a)(4). Clear guidance from this court is important, particularly since superior court judges have little ability to override a Parole Board's decision to deny parole in an individual case. This court should declare that, when the Parole Board considers the case of a defendant who received a sentence deep within the legal range and who has served more than the amount of time required by the legislature and the sentencing judge to become eligible for parole, the Parole Board may not deny the application for discretionary parole based on its belief that the minimum amount of time required by statute to become eligible for parole is not enough time, such that release at that time would diminish the seriousness of the offense.

Respectfully submitted, this 14 day of April 2023.

REEVES AMODIO LLC



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