

ALASKA'S LENGTHY SENTENCES ARE NOT THE ANSWER TO SEX OFFENSES

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ABSTRACT

Individuals convicted of sex offenses in Alaska are serving extremely long sentences in prison. The Alaska legislature restricted the ability of those convicted of sex offenses to have their cases referred to three-judge panels for sentencing outside the presumptive sentencing range set by the legislature. The Alaska Supreme Court then held that different forms of sexual penetration are distinct and separate offenses, meaning that the associated charges cannot be merged and the sentences must run consecutively. Thus, Alaska has embraced lengthy sentences for sex offenses. Unfortunately, this punitive practice is doing little to protect Alaskan communities or rehabilitate the people who commit sex offenses. In fact, the Alaska legislature's decision to limit judicial discretion and, in turn, harshen sentences is rooted in unfounded and inaccurate assumptions about those who commit sex offenses. This Note proposes that Alaska's courts should more easily be able to refer sex offense cases to three-judge panels for sentencing outside of Alaska's presumptive sentence ranges, that rehabilitation should replace over-punishment, and that prosecutors should not be able to stack offenses where redundant. Through these solutions, Alaska can protect its communities, help better rehabilitate those who commit sex offenses, and save taxpayer dollars through a more efficient and just criminal justice system.

I. INTRODUCTION

At the Lemon Creek Correctional Center treatment program for

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people convicted of sex offenses, incarcerated people are given the opportunity to write letters to their victims.¹ Although these letters are never sent, one individual in the program explained that the exercise helped him empathize with his victim and consider “how [he] affected that person’s life.”² Program participants are also asked to write a narrative of the time leading up to their crime and provide an account of what actually happened.³ The clinical counselor in charge of the program in 2015 explained that this exercise was intended to be self-revealing, putting participants in a position where they must confront what they did without denying or minimizing the harm they caused.⁴

This program is aimed at helping people convicted of sex offenses truly change, for the safety of Alaskan communities is at stake when formerly incarcerated people return home.⁵ The Lemon Creek Correctional Center treatment program is one of the five in-custody treatment programs in Alaska for people convicted of sex offenses.⁶ But this program only has capacity for twenty-four participants, even though over 700 individuals were in prison for sex offenses on average in 2017.⁷ In fact, to participate in any of the five in-custody treatment programs, individuals must apply and are then placed on a waitlist, which is organized according to their risk level and the amount of time remaining on their sentence.⁸ Importantly, the existence of these waitlists suggests that people who are convicted of sex offenses want treatment. But it is up to the State of Alaska to provide people convicted of sex offenses with the treatment they need, rather than simply locking them away without treatment for decades.

In 2006, in response to both a perception and a reality of high rates of sexual assault in the state,⁹ the Alaska legislature dramatically increased the sentencing ranges for people convicted of sex offenses.¹⁰

1. Lisa Phu, *Inside a Juneau Prison’s Sex Offender Treatment Program*, ALASKA PUB. RADIO (July 9, 2015), <https://www.alaskapublic.org/2015/07/09/inside-a-juneau-prisons-sex-offender-treatment-program/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. DEP’T OF CORRS., DEP’T OF EDUC. & EARLY DEV. & DEP’T OF LAB. & WORKFORCE DEV., ALASKA REHABILITATION AND REENTRY 8 (Jan. 30, 2020).

7. ALASKA CRIM. JUST. COMM’N, SEX OFFENSES: A REPORT TO THE ALASKA LEGISLATURE 62, 26 (2019), <http://www.ajc.state.ak.us/acjc/docs/ar/2019/ACJCSexOffensesReport.pdf>.

8. *Id.*

9. *Sentencing for Sexual Offenses: Hearing on H.B. 353 Before the Alaska H. Judiciary Standing Comm.*, ALASKA H. JUDICIARY STANDING COMM. MINUTES, 24th Leg. (Feb. 8, 2006) [hereinafter *Hearing on H.B. 353*] (statement of Rep. Mark Neuman at 1:59:59 PM).

10. S.B. 218, 24th Alaska State Legis., 2d Reg. Sess., 2006 Alaska Sess. Laws

Unfortunately, neither these policies nor caselaw has effectively addressed the sexual assault crisis in Alaska. According to a 2019 report, “sexual violence continues to be as serious a problem today as it was when [the 2006 sex offense sentencing reform act] was passed.”¹¹ Today, Alaska has the highest number of reported rapes per capita of any state in the country.¹² The current policies are not working. Thus, this Note seeks to diagnose the core issues with sentencing for people convicted of sex offenses in Alaska’s criminal justice system and offer a new approach.

This Note begins in Part II by describing the background of sex offense sentencing in Alaska. The Alaska legislature has harshened sentences for people convicted of sex offenses twice in the last sixteen years and, as a result, there are now more people convicted of sex offenses serving lengthy sentences in prison.¹³ Part III explores the problems with sex offense sentencing in Alaska today, including the legislature’s decisions to lengthen presumptive sentencing ranges based on unfounded assumptions that people who commit sex offenses are especially difficult to rehabilitate and bound to re-offend, and to restrict the extent to which judges can sentence outside the established sentencing ranges through Alaska’s three-judge panel system.¹⁴ Additionally, the Alaska Supreme Court embraced sentence-stacking by holding that separate acts of penetration warrant separate convictions, handing significant power to prosecutors.¹⁵ Altogether, this has resulted in people convicted of sex offenses in Alaska serving unnecessarily long sentences for the purported purposes of community safety.¹⁶ Next, Part IV proposes

ch. 14; ALASKA JUD. COUNCIL, ALASKA FELONY SENTENCING PATTERNS: 2012–2013, at 17 (2016), [http://www.ajc.state.ak.us/publications/docs/research/AKFelonSenPatterns2012-2013\(June%202016\).pdf](http://www.ajc.state.ak.us/publications/docs/research/AKFelonSenPatterns2012-2013(June%202016).pdf).

11. ALASKA CRIM. JUST. COMM’N, *supra* note 7, at 58.

12. *Forcible Rape Rate per 100,000 Inhabitants in the United States in 2020*, by State, STATISTA, <https://www.statista.com/statistics/232563/forcible-rape-rate-in-the-us-by-state/> [hereinafter *Forcible Rape Rate 2020*] (last visited Jan. 29, 2022).

13. ALASKA JUD. COUNCIL, *supra* note 10, at 10; Barbara Dunham, *Alaska Sex Offense Law: What Has Changed*, 36(1) ALASKA JUST. F. 2, 2–3 (2019), <https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/alaska-justice-forum/36/1fall2019/ajf.361c.sex-offenses.cshhtml>; ALASKA CRIM. JUST. COMM’N, *supra* note 7, at 59.

14. *Collins v. State*, 287 P.3d 791, 797 (Alaska Ct. App. 2012) (citing ALASKA S. J., 24th Leg., 2d Sess. 2207 (Feb. 16, 2006)), *superseded by statute*, Crimes; Victims; Child Abuse and Neglect, §§ 1, 20, 21, 2013 Alaska Sess. Laws ch. 43, 2–3, 11–12; *Hearing on H.B. 353*, *supra* note 9 (statement of Rep. Mark Neuman at 1:59:59 PM); Letter from Michael C. Geraghty, Att’y Gen., to Sean Parnell, Alaska Governor (Apr. 25, 2013) (on file with Alaska state government) (discussing omnibus bill relating to sex trafficking, other crimes, and criminal procedures).

15. *State v. Thompson*, 435 P.3d 947, 961 (Alaska 2019); *King v. State*, 487 P.3d 242, 252–55 (Alaska Ct. App. 2021) (Mannheimer, J., concurring).

16. *See* ALASKA CRIM. JUST. COMM’N, *supra* note 7, at 59 (reporting the disproportionate increase in sentencing for sex offenses).

solutions to Alaska's current over-punishment of sex offenses. It argues that courts should be more easily able to refer sex offense cases to three-judge panels for sentencing outside of Alaska's presumptive sentence ranges, that rehabilitation should replace over-punishment, and that prosecutors should not be able to stack offenses where redundant. Finally, Part V addresses potential concerns that the public and policymakers may have with these offered solutions by arguing that these solutions would likely better protect Alaskan communities than the status quo.

II. BACKGROUND

A. Harshening of Sex Offense Sentences Over Time

In Alaska, felonies, including sex offenses, are sentenced under the state's presumptive sentencing scheme.¹⁷ This scheme dictates a presumptive range of incarceration for an individual based on "the typical offender who committed the [relevant] typical offense."¹⁸ The legislature implemented this scheme to reduce disparities in sentencing while still allowing some judicial discretion in sentencing.¹⁹ In 2006, the legislature separated sex felonies from non-sex felonies and imposed longer presumptive sentencing ranges for sex felonies.²⁰

Most sentences in sex offense cases are determined during plea agreements because "only about 12 percent of felony sex offense cases [in Alaska] go to trial."²¹ In plea agreements, the parties can determine a specific sentence or provide a sentence range to the judge, who will determine the defendant's sentence.²² Legislation passed in 2019 requires a prosecutor to confer with the victim in sex offense cases at the plea agreement stage.²³ Prosecutors must ask victims if they agree with the proposed plea agreements and formally document the victims' opinions.²⁴ Further contributing to the increase in sentences for sex offenses in Alaska, there is no credit given for time spent on electronic monitoring or time spent in treatment prior to sentencing,²⁵ revealing the punitive, rather than rehabilitative, purpose of the sentencing scheme.

17. Dunham, *supra* note 13, at 2.

18. ALASKA JUD. COUNCIL, *supra* note 10, at 10.

19. Teresa White Carns, *Alaska Felony Sentencing Patterns: Selected Findings*, 33(2-3) ALASKA JUST. F. 6, 6 (2016).

20. ALASKA JUD. COUNCIL, *supra* note 10, at 10.

21. Dunham, *supra* note 13, at 2-3 (citing ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 23).

22. *Id.* at 3.

23. *Id.*

24. *Id.*

25. *Id.*

Additionally, presumptive sentencing ranges consider a defendant's criminal history, requiring longer sentencing ranges for those with prior criminal convictions.²⁶

The Alaska legislature replaced presumptive sentencing terms with presumptive sentencing ranges for felony offenses in 2005.²⁷ It did this in response to the United States Supreme Court's holding in *Blakely v. Washington*.²⁸ In that case, the Court held that the Sixth Amendment requires a jury, rather than the sentencing judge, to determine whether a sentence can be increased due to aggravating circumstances.²⁹ The Alaska Governor at the time supported the legislature's change because the Supreme Court's decision in *Blakely* "created a potential attack on the constitutionality of state law, gave rise to inconsistent trial court rulings and generated numerous appeals."³⁰

After the law was enacted in 2006, presumptive sentence ranges doubled for people charged with sex felonies in Alaska.³¹ For certain categories of sex felonies, the presumptive range increased even more.³² For example, sexual assault in the first degree increased from a sentence of eight years to a range of twenty to thirty years.³³ For people with one prior non-sexual assault felony conviction, sentences for sexual assault in the first degree increased from fifteen years to a range of thirty to forty years.³⁴ In fact, the statute requires that anyone with two prior sex felony convictions receive a ninety-nine year sentence, regardless of whether the person has been convicted of first, second, or third degree sexual assault.³⁵

Even though the same ninety-nine-year sentence is required for offenders with any two prior sex felony convictions, there can be a stark difference between the degrees of those prior convictions. For example, first-degree sexual assault might involve non-consensual sexual penetration while sexual assault in the second degree entails non-consensual sexual contact.³⁶ Third-degree sexual assault, in contrast, is described as sexual contact with a person who lacks mental capacity.³⁷

26. *Id.* at 2.

27. Press Release, Office of the Governor, Murkowski Signs Bill Fixing Criminal Sentencing Statutes (Mar. 22, 2005); ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 56.

28. 542 U.S. 296 (2004); *see* Press Release, Office of the Governor, *supra* note 27; ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 56.

29. *Blakely*, 542 U.S. at 313–14.

30. Press Release, Office of the Governor, *supra* note 27.

31. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 56.

32. *Id.*

33. *Id.* at 53, 56.

34. *Id.*

35. *Id.* at 53.

36. ALASKA STAT. §§ 11.41.410(a)(1), 11.41.420(a)(1) (2021).

37. *Id.* § 11.41.425(a)(1)(A).

Despite these distinctions, the ninety-nine-year sentence—the highest sentence possible in Alaska because the state has neither a life sentence nor the death penalty—applies in each case where the defendant has two prior sex felony convictions.³⁸

Alaska policymakers were explicit about their intent to get tough on sex crimes. Alaska State Representative Mark Neuman, a sponsor of House Bill 353 that increased presumptive sentence ranges for sex offenses, explained that, by doubling presumptive sentences, the legislature could “send[] a clear message of zero tolerance.”³⁹ Representative Neuman justified the need to “toughen the laws” by stating that “Alaska has the highest per capita rate of reported rapes, and that rate is nearly 71 percent greater than that of the next highest state.”⁴⁰ Additionally, Representative Neuman highlighted that Alaska had 4,300 registered sex offenders.⁴¹ Alaska State Senator Con Bunde, a sponsor of Senate Bill 218, explained that the bill was a response to the high rates of sexual abuse in Alaska and the current law’s failure to address the issue.⁴²

In response to two high profile sex abuse cases,⁴³ the Alaska legislature passed further sentencing reforms in 2019, which included reforms for sex offense sentences.⁴⁴ For example, the legislature increased the minimum sentence from zero to two years and the maximum sentence from two to twelve years for sexual abuse of a minor in the third degree where there is a six-year age difference between the victim and the defendant.⁴⁵ Additionally, although low-level felony convictions from over ten years prior typically do not impact a presumptive sentence range, the legislature removed this ten-year limitation for sex offenses.⁴⁶ As a result, in sex offense cases, no matter how long ago an individual

38. THE SENT’G PROJECT, VIRTUAL LIFE SENTENCES 1 (2019), <https://www.sentencingproject.org/publications/virtual-life-sentences/>; *State and Federal Info: Alaska*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/alaska> (last visited Dec. 17, 2021).

39. *Hearing on H.B. 353*, *supra* note 9 (statement of Rep. Mark Neuman at 1:59:59 PM).

40. *Id.*

41. *Id.*

42. ALASKA CRIM. JUST. COMM’N, *supra* note 7, at 57.

43. Rebecca Palsha, *Lawmakers Hope to Strengthen Sentences for Sex Crimes in Alaska*, ALASKA’S NEWS SOURCE (Feb. 18, 2019, 7:59 PM), <https://www.alaskasnewsresource.com/content/news/Lawmakers-look-at-strengthening-sex-crime-sentences-506017061.html>.

44. Anchorage Police Dep’t, *New Crime Reform Laws Start Today; Here’s What You Need to Know*, ANCHORAGE PRESS (July 9, 2019), https://www.anchoragepress.com/bulletin/new-crime-reform-laws-start-today-here-s-what-you-need-to-know/article_c4fff704-a27f-11e9-a897-370acfb60012.html.

45. *Id.*

46. Letter from Kevin G. Clarkson, Att’y Gen., to Michael J. Dunleavy, Alaska Governor (June 26, 2019) (on file with Alaska state government).

committed a low-level felony, the sentencing court will factor this prior low-level conviction into the individual's presumptive sentence range.⁴⁷ The Chief of the Anchorage Police Department praised the 2019 sentencing reforms, asserting: "This will help improve law enforcement's ability to keep Alaskans safe in Anchorage, and across the state."⁴⁸

Given the high rate of sex abuse in the state at the time,⁴⁹ the Alaska legislature's efforts might seem understandable. Unfortunately, these efforts have failed to address the problem. A 2020 study showed that Alaska still has the highest rate of forcible rapes of any state, with 154.8 rapes for every 100,000 inhabitants.⁵⁰ Rather than reduce sex abuse rates, the Alaska legislature simply lengthened sentences.

B. Sex Offense Sentences Have Lengthened in Alaska Since 2006

The number of people incarcerated for sex offenses has increased since the Alaska legislature reformed sentencing for sex offenses. In 2006, there were a total of 501 people incarcerated for sex offenses by the Alaska Department of Corrections.⁵¹ But, just eleven years later in 2017, this number increased to a staggering 764.⁵²

Not only were more people convicted of sex offenses, convicted individuals were also serving longer sentences as a result of the 2006 reforms. Between 2005 and 2014, the time people convicted of sex offenses spent in prison rose by eighty-four percent.⁵³ In contrast, during the same time period, prison time only increased by seventeen percent for people convicted of violent, non-sex offenses.⁵⁴ This disparity was reflected in sentencing as well. In 2012 and 2013, most people incarcerated for sex offenses received sentences within or above the incarceration time prescribed by Alaska's presumptive sentencing range.⁵⁵ At the same time, fifty-one percent of people incarcerated for non-sex felonies received sentences under the prescribed presumptive sentence range.⁵⁶ Strikingly, unlike other felonies like drug and property crimes, 100% of people

47. *Id.*

48. Anchorage Police Dep't, *supra* note 44.

49. The 2001 rate of rape in Alaska was higher than any other state. ANDRÉ B. ROSAY & ROBERT H. LANGWORTHY, DESCRIPTIVE ANALYSIS OF SEXUAL ASSAULTS IN ANCHORAGE, ALASKA 2 (2003).

50. *Forcible Rape Rate 2020*, *supra* note 12.

51. ALASKA DEP'T OF CORR.: DIV. OF ADMIN. SERVS., 2006 OFFENDER PROFILE 53, <https://doc.alaska.gov/admin/docs/profile2006final.pdf>.

52. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 26.

53. *Id.* at 59.

54. *Id.*

55. ALASKA JUD. COUNCIL, *supra* note 10, at 58.

56. *Id.* at 3.

sentenced for sex felonies in that timeframe served time in prison.⁵⁷

Alaska's harsh sex offense sentencing aligns with sex offense sentences imposed by other states, because states tend to impose longer sentences for people convicted of sex offenses. Nationally, people sentenced for sex offenses in 2018 served sixty-two percent of their total sentences on average, the highest percentage of time-served among all types of crimes.⁵⁸ The Bureau of Justice found that the average sex offense sentence across forty-four states was 12.2 years in 2016.⁵⁹

There is no reason to think that Alaska's increase in sex offense sentence lengths correlates with some national condition other than Alaska's change in policy. Unlike Alaska, the national average for punishment of sex offenses has not seen such a sharp increase in the last ten years. Similar to the 2016 average sentence of 12.2 years, the average sentence for rape across all states in 2009 was 13.17 years.⁶⁰ Federal sentences for sex offenses are slightly longer than state sentences but have not seen a significant increase in recent years.⁶¹ In 2018, people convicted of rape were sentenced to 14.84 years in federal prison.⁶² Although the federal system does not rely on presumptive sentencing ranges, Congress has instituted mandatory minimums for many sex offenses, especially those involving minors.⁶³

III. PROBLEMS WITH ALASKA'S SENTENCING OF PEOPLE CONVICTED OF SEX OFFENSES

In Alaska today, sex offense sentences are dictated by presumptive sentencing ranges and sometimes, like in the case of sexual abuse of a minor in the first degree, mandatory consecutive sentences.⁶⁴ Due to the legislative assumptions that it is particularly difficult or potentially

57. *Id.* at 50.

58. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 26.; DANIELLE KAEBLE, TIME SERVED IN STATE PRISON, 2016, at 1, 4 (2018), <https://bjs.ojp.gov/content/pub/pdf/tssp16.pdf>.

59. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 26 (citing KAEBLE, *supra* note 58, at 4). Alaska was not one of the forty-four states included in the analysis. See KAEBLE, *supra* note 58, at 2.

60. Thomas P. Bonczar et al., *National Corrections Reporting Program: Sentence Length of State Prisoners, by Offense, Admission Type, Sex, and Race*, BUREAU OF JUST. STAT., <https://bjs.ojp.gov/library/publications/national-corrections-reporting-program-sentence-length-state-prisoners-offense> (last visited Dec. 14, 2021).

61. U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES FOR SEX OFFENSES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 30 (2019).

62. U.S. SENT'G COMM'N, QUICK FACTS: SEXUAL ABUSE OFFENDERS 1 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Sexual_Abuse_FY18.pdf.

63. U.S. SENT'G COMM'N, *supra* note 61, at 8.

64. ALASKA STAT. § 12.55.127(c)(2)(E) (2021).

impossible to rehabilitate people who have committed sex offenses and they are likely to re-offend, the legislators determined that people convicted of sex offenses are better served spending time in prison rather than getting treated and returning to their communities, resulting in lengthy presumptive sentencing ranges for sex offenses.⁶⁵ Moreover, mandatory consecutive sentences only further lengthen sentences. However, the legislators' assumption does not seem to align with reality. Only 1.9% of people convicted of sex offenses who were released in 2008 returned to prison for a new sex offense within three years of their release.⁶⁶

Alaska has seen a dramatic increase in sentence lengths for sex offenders in recent years.⁶⁷ This is not simply due to the legislature's decision to increase the presumptive sentencing ranges for sex offenses in 2006.⁶⁸ There are two other problems with Alaska's sentencing of sex offenses that have led to a sharp increase in sentence lengths. First, in response to an Alaska court's decision in *Collins v. State*,⁶⁹ the Alaska legislature passed legislation restricting courts' ability to refer defendants in sex offense cases to three-judge panels for re-sentencing outside of the presumptive sentencing range.⁷⁰ Second, an Alaska court's decision in *State v. Thompson* defined separate acts of penetration as distinct offenses and, in turn, handed prosecutors the powerful tool to stack sex offense sentences.⁷¹ This Part explores these problems with the law surrounding sex offense sentencing in Alaska as it stands today.

A. Presumptive Sentencing Ranges for Sex Offenses Are Lengthy Today

Alaska courts are required to sentence sex offense crimes within the presumptive sentencing range as established by the legislature in 2006

65. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 57.

66. *Id.* at 48.

67. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 59.

68. See Crimes; Victims; Child Abuse and Neglect, 2013 Alaska Sess. Laws ch. 43, § 1 (stating that the 2006 sex offenses sentencing reforms were not intended to permit access to a three-judge panel for re-sentencing in the manner suggested by the majority in *Collins v. State*); *State v. Thompson*, 435 P.3d 947, 961 (Alaska 2019) (holding that separate acts of penetration are distinct offenses and must receive separate sentences that cannot merge).

69. 287 P.3d 791 (Alaska Ct. App. 2012), *superseded by statute*, Crimes; Victims; Child Abuse and Neglect, §§ 1, 22, 23, 2013 Alaska Sess. Laws ch. 43, 2-3, 11-12.

70. Crimes; Victims; Child Abuse and Neglect, 2013 Alaska Sess. Laws ch. 43, §§ 1, 20, 21.

71. *King*, 487 P.3d at 247 (citing *State v. Thompson*, 435 P.3d 947, 961 (Alaska 2019)).

and later amended in 2019.⁷² The presumptive sentencing range for sexual offenses depends on the victim's age, the use of a weapon, and whether the individual sentenced has a history of criminal convictions.⁷³ The presumptive sentencing ranges for statutory rape, which is the offense of illegal penetration involving a minor where consent is immaterial, are demonstrative.⁷⁴

Taking into account the previously described factors, the presumptive sentencing range for sexual abuse of a minor in the second degree spans from five to ninety-nine years.⁷⁵ To put this into perspective, the federal sentencing scheme mandates a thirty-year minimum sentence for aggravated sexual abuse involving children.⁷⁶ Federal sentences for sexual abuse of a minor in the third degree are capped at five years and sentences for sexual abuse of a minor in the fourth degree are capped at one year.⁷⁷

The 2006 Alaska legislature established harsh sentences for sex offenses based on the assumption that people who commit sex offenses are repeat offenders and therefore very difficult, if not impossible, to rehabilitate.⁷⁸ State senators discussed the underreporting of sex offenses during legislative hearings.⁷⁹ They conjectured that people convicted of sex offenses have likely already victimized many other people before they are caught, suggesting that a hefty punishment is justified.⁸⁰

Alaska legislators also relied on testimony from the Alaska Department of Law (DOL) and the Alaska Department of Corrections (DOC).⁸¹ A representative for the DOL expressed the DOL's support for

72. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 56; Anchorage Police Dep't, *supra* note 44.

73. RAPE, ABUSE & INCEST NAT'L NETWORK, SEX CRIMES: DEFINITIONS AND PENALTIES: ALASKA 10 (2020), <https://apps.rainn.org/policy/policy-crime-definitions-export.cfm?state=Alaska&group=3>.

74. *See id.* (listing prison sentences depending on felony class).

75. *Id.* Sexual abuse of a minor in the second degree includes when "[t]he offender is 18 years old or older and engages in sexual contact with a victim under 18 years old, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian." *Id.* at 9.

76. U.S. SENT'G COMM'N, *supra* note 61, at 9.

77. RAPE, ABUSE & INCEST NAT'L NETWORK, *supra* note 73, at 10.

78. *Collins v. State*, 287 P.3d 791, 797 (Alaska Ct. App. 2012) (citing ALASKA S. J., 24th Leg., 2d Sess. 2207 (Feb. 16, 2006)), *superseded by statute*, Crimes; Victims; Child Abuse and Neglect, §§ 1, 22, 23, 2013 Alaska Sess. Laws ch. 43, 2-3, 11-12; *Hearing on H.B. 353*, *supra* note 9 (statement of Rep. Mark Neuman at 1:59:59 PM).

79. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 57.

80. *Id.*

81. *Hearing on H.B. 353*, *supra* note 9 (statement of Susan A. Parkes, Deputy Attorney General, Criminal Division, Office of the Attorney General, Department of Law, at 2:29:32 PM and statement of Portia Parker, Deputy Commissioner, Office of the Commissioner—Juneau, Department of Corrections, at 2:39:39 PM).

the legislation by simply stating that “rehabilitation [for people convicted of sex offenses] doesn’t work.”⁸² Similarly, a DOC representative stated that the DOC endorsed the legislation, describing post-release treatment of people incarcerated due to sex offenses as “very, very difficult to do.”⁸³

Notably, despite the breadth of acts encompassed by the term “sex offense,” the legislature seemed to apply its assumptions to people convicted of *any* sex offense.⁸⁴ With these assumptions about people who commit sex offenses in mind, the legislature implemented the sentencing reforms that drastically increased the presumptive sentencing ranges for sex offenses.⁸⁵ These lengthy presumptive sentencing ranges remain the law in Alaska today.⁸⁶

B. The Legislature Constrained Judicial Discretion Around Sex Offense Sentencing

In response to an Alaska Court of Appeals decision holding that a court could sentence outside the presumptive range if a defendant did not meet the legislature’s assumptions about people convicted of sex offenses, the legislature restricted the courts’ ability to make such discretionary decisions. In that case, *Collins v. State*, the court held that the legislature based the 2006 sex offense sentencing reforms on the belief that people convicted of sex offenses are “*atypically* dangerous” defendants with an “*atypically poor* prospect for rehabilitation.”⁸⁷ In establishing the new presumptive sentencing ranges for sex offenses, the legislature assumed that people who commit sex offenses have likely done so before and are “particularly resistant to rehabilitative efforts.”⁸⁸ On this basis, the legislature justified increasing the presumptive sentencing ranges for sex offenses.⁸⁹

In *Collins*, the court also asked the parties and amicus curiae to

82. *Id.* (statement of Susan A. Parkes, Deputy Attorney General, Criminal Division, Office of the Attorney General, Department of Law, at 2:29:32 PM).

83. *Id.* (statement of Portia Parker, Deputy Commissioner, Office of the Commissioner – Juneau, Department of Corrections, at 2:39:39 PM).

84. *See id.* (neither the legislators nor the DOL and DOC representatives distinguished between different types of sex offenses when discussing the traits and tendencies of people convicted of sex offenses).

85. *See* ALASKA JUD. COUNCIL, *supra* note 10, at 17 (stating that in some cases the presumptive sentencing range lengths more than doubled).

86. RAPE, ABUSE & INCEST NAT’L NETWORK, *supra* note 73, at 1.

87. 287 P.3d 791, 797 (Alaska Ct. App. 2012), *superseded by statute*, Crimes; Victims; Child Abuse and Neglect, §§ 1, 22, 23, 2013 Alaska Sess. Laws ch. 43, 2-3, 11-12.

88. *Id.* (citing ALASKA S. J., 24th Leg., 2d Sess. 2207 (Feb. 16, 2006)).

89. *Id.*; *Hearing on H.B. 353*, *supra* note 9 (statement of Rep. Mark Neuman at 1:59:59 PM).

provide supplemental briefing on the issue of “whether sentencing judges should take account of these legislative assumptions in deciding whether referral to the three-judge panel is warranted in a particular sex offense prosecution.”⁹⁰ After reviewing the submissions, the court held that there are some instances in which referral to a three-judge panel is appropriate.⁹¹ In particular, the court explained that if defendants can show that the legislative assumptions do not apply to them—for example, “young defendants with no significant criminal record”—they should receive referrals to three-judge panels.⁹² Defendants simply need to either prove that they lack a “history of unprosecuted offense[s]” or that they have a normal chance of rehabilitation.⁹³ The court reasoned that the legislature based the presumptive sentencing ranges on an assumption that neither of those things are true for defendants in sex offense cases.⁹⁴ Thus, if defendants can prove otherwise, they should have the opportunity for a three-judge panel to consider whether imposing a sentence within the presumptive sentencing range would be “manifestly unjust.”⁹⁵

For example, the defendant in *Collins* committed a sex offense at the age of twenty.⁹⁶ The defendant did not commit any offenses as a juvenile,⁹⁷ but in adulthood the defendant had committed relatively minor crimes: fourth-degree theft and providing false information to police officers.⁹⁸ He paid a fifty-dollar fine and served ninety days in prison for the two crimes.⁹⁹ When presented with a first-degree sexual assault conviction in this case, the defendant received a twenty-five year sentence with five years suspended.¹⁰⁰ This was his first serious crime, yet the defendant would enter prison at age twenty and would not be a free man until age forty, losing all of his early adulthood to prison time.

After finding that Collins did not fit the profile of a sex-offense defendant as understood by the legislature, the court held that the case should be remanded and referred to a three-judge panel for potential re-sentencing outside the presumptive range.¹⁰¹ While still acknowledging

90. *Collins*, 287 P.3d at 795, *superseded by statute*, Crimes; Victims; Child Abuse and Neglect, §§ 1, 22, 23, 2013 Alaska Sess. Laws ch. 43, 2–3, 11–12.

91. *Id.* at 796 (citing ALASKA S. J., 24th Leg., 2d Sess. 2212 (Feb. 16, 2006)).

92. *Id.*

93. *Id.* at 797.

94. *Id.* (citing ALASKA S. J., 24th Leg., 2d Sess. 2207 (Feb. 16, 2006)).

95. *Id.*

96. *Id.* at 794.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 792.

101. *Id.* at 797.

the seriousness of a first-degree assault conviction, the court found that “young defendants with no significant criminal record,” like Collins, should have an opportunity to argue for a sentence outside the presumptive sentencing range in front of a three-judge panel.¹⁰²

The Alaska legislature, however, disagreed with the *Collins* court’s interpretation of sex offense sentencing legislation and passed a bill explicitly overturning the *Collins* court’s decision.¹⁰³ The legislature declared that it never intended to “create new or additional means for a defendant convicted of a sexual felony . . . to obtain referral to a three-judge panel.”¹⁰⁴ Instead, it acknowledged that the factors identified by the *Collins* court, the defendant’s history and likelihood of rehabilitation, were relevant but not sufficient for obtaining referral to a three-judge panel.¹⁰⁵ Thus, the three-judge panel statute now dictates that a person sentenced for a sex offense cannot obtain a three-judge panel referral “based solely on the claim that the defendant, either singly or in combination has (1) prospects for rehabilitation that are less than extraordinary; or (2) a history free of unprosecuted, undocumented, or undetected sexual offenses.”¹⁰⁶ Put simply, a court needs to find additional factors, beyond what the court found in *Collins*, in order to justify a three-judge panel referral.¹⁰⁷ In turn, the legislature hamstrung courts from helping defendants with the potential to rehabilitate.

At the time of the bill’s passage, the executive branch sided with the legislative branch. The Alaska Attorney General released a statement declaring that “*Collins* used a mistaken interpretation of legislative intent regarding standards for referring sex offenders to a three-judge sentencing panel.”¹⁰⁸ The enacted law limited courts’ ability to treat individual defendants differently.

Yet, as demonstrated in *Collins*, there are certainly some circumstances where the defendants, particularly if they are young and had not previously committed many crimes, may be capable of rehabilitation and unlikely to reoffend. In these situations, the courts should be able stray from the presumptive sentencing range in order to promote fairness.

102. *Id.* at 796–97.

103. Crimes; Victims; Child Abuse and Neglect, 2013 Alaska Sess. Laws ch. 43, §§ 1, 20, 21.

104. *Id.*

105. ALASKA STAT. §12.55.175(f) (2021).

106. *Id.*

107. *Id.*

108. Re: HCS CSSB 22(FIN)—omnibus bill relating to sex trafficking, other crimes, and criminal procedures, Op. Alaska Att’y Gen. (2013).

C. Prosecutors' Power to Stack Offenses Threatens Due Process

Moreover, prosecutors and judges can stack sex offense sentences, allowing them to impose several sentences that run consecutively.¹⁰⁹ In *State v. Thompson*, Thompson, a man in his forties, sexually abused a girl, J.C., over the course of three years.¹¹⁰ During that time, the sexual abuse involved different types of penetration.¹¹¹ The Supreme Court of Alaska ultimately held that each type of penetration could constitute a distinct conviction,¹¹² a holding that would dramatically increase the overall length of Thompson's sentence.

A jury convicted Thompson of thirteen counts of first-degree sexual abuse and four counts of second-degree sexual abuse.¹¹³ The trial court treated the different types of penetration, even when they occurred in the same "sexual episode," as separate convictions, which carried distinct sentences.¹¹⁴ The court of appeals reversed, finding that many of the separate convictions needed to merge and remanding the case to the superior court for re-sentencing.¹¹⁵

On appeal, the Supreme Court of Alaska reversed and found that the separate penetration convictions need not merge.¹¹⁶ The court held that "a separate and distinct act of penetration occurs each time the penetrated orifice or the penetrating object or body part changes."¹¹⁷ Thus, because they can decide which charges to bring, prosecutors may stack the charges to impose lengthy sentences on those convicted of sex offenses.¹¹⁸ And Alaska law mandates "consecutive sentencing for each individual conviction."¹¹⁹ Taken together, this is particularly impactful in instances where the sexual abuse is ongoing, like in *Thompson*, and has therefore likely involved different types of penetration.¹²⁰

Prosecutors gained significant power over sex offense sentencing when the Alaska Supreme Court held that each act of penetration should count as an individual sex offense and that the correlating sentences,

109. *King v. State*, 487 P.3d 242, 253 (Alaska Ct. App. 2021) (Mannheimer, J., concurring) (citing *State v. Thompson*, 435 P.3d 947, 961 (Alaska 2019)).

110. *Thompson*, 435 P.3d at 950-51.

111. *Id.*

112. *Id.* at 950.

113. *Id.* at 952.

114. *Thompson v. State*, 378 P.3d 707, 716-17 (Alaska Ct. App. 2016) (*aff'd in part, rev'd in part, remanded* 435 P.3d 947 (2019)).

115. *Id.* at 718.

116. *Thompson*, 435 P.3d at 961.

117. *Id.*

118. *King v. State*, 487 P.3d 242, 253 (Alaska Ct. App. 2021) (Mannheimer, J., concurring).

119. *Id.*

120. *See Thompson*, 435 P.3d at 951.

when presented to the court, must be consecutively stacked.¹²¹ An Alaska Court of Appeals decision two years later highlighted such prosecutorial power. In that case, *King v. State*, the court applied the Alaska Supreme Court's holding from *Thompson* and affirmed the lower court's imposition of separate, consecutive sentences for each individual sex offense conviction.¹²² The jury found the defendant guilty of ten counts of sexual abuse of a minor in the first degree and two counts of sexual abuse of a minor in the second degree.¹²³ The trial court then sentenced the defendant accordingly, imposing a sentence of over ninety years.¹²⁴ On appeal, the defendant filed a motion contending that some of his illegal acts were "the same offense for double jeopardy purposes and therefore should merge."¹²⁵ Based on the evidentiary findings of the trial court, the appellate court rejected the defendant's double jeopardy argument and ruled that the defendant's various sentences, adding up to, over ninety-two years should not merge.¹²⁶

A concurring judge on the court of appeals, Judge Mannheimer, raised due process concerns with the court's ruling.¹²⁷ Judge Mannheimer wrote, "I believe that [the defendant's] case illustrates a significant problem in our state's sentencing law."¹²⁸ He explained that Alaska law allows prosecutors "absolute control over whether to charge" defendants with sexual offenses.¹²⁹ Prosecutors can pick and choose multiple charges related to the same incident, knowing that the sentencing court will have to stack the sentences so long as the offenses involved different forms of penetration. Moreover, Alaska law mandates that the sentences be imposed consecutively, handing prosecutors even more power over the length of sex offense sentences.¹³⁰

For instance, in *King v. State*, the court had to impose a sentence of over ninety years, "regardless of how the sentencing judge viewed King's actions, King's background, and King's prospects for rehabilitation."¹³¹ The court *had* to impose this sentence because of the charges brought by the prosecutor. Notably, a forensic psychologist testified at trial that the defendant had a low chance of re-offending and had "positive prospects

121. *Id.* at 961.

122. *King*, 487 P.3d at 247.

123. *Id.* at 245-46.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 252 (Mannheimer, J., concurring).

128. *Id.* (Mannheimer, J., concurring).

129. *Id.* at 253 (Mannheimer, J., concurring).

130. *Id.* (Mannheimer, J., concurring).

131. *Id.* (Mannheimer, J., concurring).

for rehabilitation.”¹³² Regardless, a person like King convicted of sexual abuse of a minor in the first degree essentially receives a life sentence because of the worrisome structure of Alaska’s parole statutes and the lack of eligibility for good time credit that Judge Mannheimer highlighted.¹³³ This places the decision of whether defendants should spend the rest of their lives in prison in the prosecutor’s hands, not the judge’s or the jury’s.¹³⁴ Thus, Alaska’s sex offense sentencing scheme gives disproportionate power to the prosecutor.

While there is no doubt that sexual abuse of a minor is a deplorable crime that harms the most innocent, Alaska’s sex offense sentencing scheme results in the imposition of unhelpful, excessive, unduly harsh sentences. As Judge Mannheimer argued, the state’s system of punishment exceeds what is necessary to achieve the legislature’s stated goals of sentencing,¹³⁵ including the elimination of disproportionate sentences.¹³⁶

Entrusting prosecutors with the ability to impose lengthy sentences, however, threatens these goals. Indeed, the individual presumptive sentence ranges are harsh enough that prosecutors need not resort to stacking offenses to impose what amount to life sentences. As a result of such harsh sentencing practices, in situations where a plea bargain is not reached and the state successfully brings all charges, defendants receive composite sentences that are “manifestly unjust.”¹³⁷ This is even true in situations, like in *King v. State*, where the defendant demonstrates remorse and shows promise of rehabilitation.¹³⁸

Thus, the legislature’s harsher presumptive sentencing ranges and constraints on judicial discretion, the Alaska Supreme Court’s decision in *Thompson v. State*, and prosecutors’ ability to stack sentences result in a sentencing scheme that gives prosecutors significant control over the sentence lengths and imposes exceedingly lengthy sentences on those convicted of sex offenses.

IV. PROPOSED SOLUTIONS

This Part proposes three solutions to Alaska’s current sex offense sentencing regime. It first recommends that the legislature should afford courts more judicial discretion in referring sex offense cases to three-judge

132. *Id.* at 248.

133. *Id.* at 254 (Mannheimer, J., concurring).

134. *Id.* (Mannheimer, J., concurring).

135. *Id.* (Mannheimer, J., concurring).

136. Carns, *supra* note 19, at 6.

137. *King*, 487 P.3d at 254 (Mannheimer, J., concurring).

138. *Id.* (Mannheimer, J., concurring).

panels for re-sentencing. Second, it proposes that there should be more opportunities for rehabilitation, rather than harsh punishment, for people convicted of sex offenses. Finally, this Part calls for the elimination of redundant stacked sentences to better ensure proportional punishment.

A. Courts Should Have More Power to Refer Sex Offense Cases to Three-Judge Panels

Since the legislature's assumptions that people convicted of sex offenses are difficult to rehabilitate, likely to re-offend, or likely have already offended do not apply in all sex offense cases, judges should have more discretion to refer cases to three-judge panels that can impose sentences below the presumptive sentence ranges when these assumptions do not apply to a particular defendant. The Alaska legislature increased presumptive sentencing ranges for people convicted of sex offenses based on the assumptions that it is much harder for people to undergo successful rehabilitation after committing sex offenses and people convicted of sex offenses have likely previously committed unprosecuted sex offenses.¹³⁹ As the *Collins* court suggested in its interpretation of the legislature's findings,¹⁴⁰ courts should be able to refer defendants to three-judge panels when the legislature's assumptions do not apply. More specifically, courts should have the discretion to refer defendants to three-judge panels based *solely* on the fact that the defendant either has a high likelihood of successful rehabilitation or no history of unprosecuted sex offenses.

While the legislature has the authority to set presumptive sentencing ranges, judges should be entrusted with the ability to employ judicial discretion and stray from the statutory ranges through referral to three-judge panels when solely the *Collins* court factors apply.¹⁴¹ At the very least, the legislature's assumptions are not valid in all cases,¹⁴² and judges, looking at all the facts of a specific case, are best equipped to determine when it is appropriate to impose a shorter sentence. Indeed, contrary to the legislature's assumptions, the vast majority of people convicted of sex

139. *Collins v. State*, 287 P.3d 791, 797 (Alaska Ct. App. 2012), *superseded by statute*, Crimes; Victims; Child Abuse and Neglect, 2013 Alaska Sess. Laws ch. 43, §§ 1, 20, 21; *Hearing on H.B. 353*, *supra* note 9 (statement of Rep. Mark Neuman 1:59:59 PM).

140. *Collins*, 287 P.3d at 797.

141. *See infra* Section III.B.

142. *See* BRAD A. MYRSTOL ET AL., ALASKA SEX OFFENDER: RECIDIVISM AND CASE PROCESSING STUDY: FINAL REPORT 23 (2016), <https://scholarworks.alaska.edu/bitstream/handle/11122/7342/1408.02.aksorcps-final.pdf> (stating that people convicted of sex offenses do not recidivate at a higher rate than other returning citizens).

offenses do not recidivate.¹⁴³ In Alaska, while judges cannot sentence below the presumptive sentencing range, they can typically refer non-sex offense cases to three-judge panels¹⁴⁴ and should be able to do so for more sex offense cases, including when defendants meet the characteristics identified by the *Collins* court. When sex offense defendants have a high likelihood of successful rehabilitation or no history of unprosecuted sex offenses, sentencing judges should have the power to utilize a “necessary safety valve to prevent unfairness” by referring a case to a three-judge panel.¹⁴⁵

Additionally, both the decisions and the practices of federal courts indicate that the federal system supports judicial discretion over sentencing decisions. Alaska replaced sentencing terms with the presumptive sentencing range scheme in response to a Supreme Court decision that struck down the Alaska sentencing terms scheme in 2004.¹⁴⁶ When it did so, the Alaska legislature intended to give judges more discretion.¹⁴⁷ The Alaska State Senate released a Letter of Intent expressing its “desire ‘to give judges the authority to impose an appropriate sentence.’”¹⁴⁸

In the instance of sex offense sentencing, judges should be granted discretion because a 2016 Alaska Justice Statistical Analysis Center (AJSAC) study showed that the legislature’s assumptions about people convicted of sex offenses are not always true.¹⁴⁹ While 55.4% of people released from prison after serving sex offense sentences were rearrested for *some* offense, only 7.1% of released people were rearrested for *sex* offenses during the seven-year period after release.¹⁵⁰ When researchers updated their study to include the eight-year period after release, they found that fewer than ten percent of individuals “were reconvicted of a felony sex offense.”¹⁵¹ In fact, upon release, people convicted of sex offenses were more likely to be rearrested for offenses against public administration, offenses involving non-sexual physical harm, offenses against property, and motor vehicle offenses than for registerable sex

143. JANICE IWAMA & STAN ORCHOWSKY, IMPROVING STATE CRIMINAL HISTORY RECORDS: RECIDIVISM OF SEX OFFENDERS RELEASED IN 2001, at 17 (2009), https://www.jrsa.org/pubs/reports/sex_offender_final.pdf.

144. *Collins*, 287 P.3d at 795-96, *superseded by statute*, Crimes; Victims; Child Abuse and Neglect, §§ 1, 22, 23, 2013 Alaska Sess. Laws ch. 43, 2-3, 11-12.

145. *Id.* at 796.

146. Teresa W. Carns, *Alaska’s Responses to the Blakely Case*, 24 ALASKA L. REV. 1, 1-2 (2007).

147. *Id.* at 15.

148. *Id.*

149. MYRSTOL ET AL., *supra* note 142, at 23.

150. *Id.*

151. ALASKA CRIM. JUST. COMM’N, *supra* note 7, at 45-46.

offenses.¹⁵² Moreover, while those in the study were more likely to be *arrested* for new, registerable sex offenses than offenses against public order, they were more likely to actually be *convicted* of offenses against public order than registerable sex offenses.¹⁵³ Thus, while people who commit sex offenses are sometimes rearrested, it is not accurate to assume that they are typically rearrested for sex crimes.

In fact, returning citizens convicted of sex offenses actually recidivate at a lower rate than returning citizens convicted of other criminal offenses.¹⁵⁴ A recidivism rate for all crimes of 55.4% among people convicted of sex offenses in the AJSAC study might seem high, but Alaska's overall recidivism rate across all crimes was about 66% in 2016.¹⁵⁵ The AJSAC study summarized its findings by stating that "not only were Alaska sex offenders less likely to be rearrested (for any offense) than individuals convicted of other crimes, sex offenders were especially unlikely to be rearrested for sex crimes after they were released from prison back into the community."¹⁵⁶

Studies conducted in other states and nationwide have similarly found relatively low rates of recidivism among people released from prison after serving sentences for sex offenses.¹⁵⁷ Rates for same-crime recidivism are consistently between 3.5% and 4%.¹⁵⁸ This was the case even before the Alaska legislature lengthened sentences for sex offenses in 2006, revealing the flawed nature of the premise that people who commit sex offenses are more likely to recidivate.¹⁵⁹ Indeed, a 2001 study showed that, in Alaska, only 3.4% of people released after serving time for sex offenses were rearrested for sex offenses.¹⁶⁰ In passing the 2006 sex offense sentencing reforms, the legislature not only ignored this fact, but it also premised its policy on the falsehood that the exact opposite was true.

Still, the legislature continues to permit courts to consider the *Collins* court's factors when determining if a referral to a three-judge panel is appropriate.¹⁶¹ Although courts cannot rely solely on the *Collins* court's

152. MYRSTOL ET AL., *supra* note 142, at 14.

153. *Id.*

154. *Id.* at 23.

155. Brad A. Myrstol & Pamela Cravez, *Crime Rates and Alaska Criminal Justice Reform*, ALASKA JUST. F., Oct. 18, 2017, at 1.

156. MYRSTOL ET AL., *supra* note 142, at 23.

157. Radley Balko, *Opinion: The Big Lie About Sex Offenders*, WASH. POST (Mar. 9, 2017), <https://www.washingtonpost.com/news/the-watch/wp/2017/03/09/the-big-lie-about-sex-offenders/>.

158. *Id.*

159. IWAMA & ORCHOWSKY, *supra* note 143, at 17.

160. *Id.*

161. ALASKA STAT. §12.55.175(f) (2021).

factors to justify a referral, the legislature permits courts to take into account a defendant's history of unprosecuted sex offenses and a defendant's likelihood of rehabilitation.¹⁶² Particularly in light of the fact that the legislature's assumptions do not apply to all defendants,¹⁶³ it is critical that courts continue to include the *Collins* court's factors in three-judge panel analyses. Most importantly, the legislature should reverse its 2019 legislation overturning the *Collins* decision. Until then, courts should not shy away from integrating the *Collins* court's framework into three-judge panel referral determinations.

B. Harsh Punishments for People Convicted of Sex Offenses Should be Replaced with Rehabilitation

Alaska should require people convicted of sex offenses to partake in a rehabilitative process instead of subjecting them to overly harsh prison sentences. Over-punishment does more harm than good.¹⁶⁴

In fact, over-punishment may ultimately serve as a barrier to justice, especially in situations where victims know their abuser and are deterred from reporting. As one proponent for acquaintance rape punishment reform wrote, "[t]o the extent that concerns about overpunishment lead a single victim to not report, a prosecutor not to charge, and a juror not to convict, the sentence for a rape conviction must be reformed."¹⁶⁵ While the intent behind lengthy sentences might have been to hold people accountable and give victims justice, harsh sentences might actually deter those involved from inflicting punishment on those responsible.

Even if over-punishment does not discourage reporting, charging, and convicting, rehabilitation is still preferable to long sentences because rehabilitation treatment can prevent future harm. For example, a study of Alaska's cognitive behavioral treatment program for people serving time for sex offenses between 2011 and 2014 showed that, of those who completed treatment, only three percent were convicted of a new sex offense.¹⁶⁶ Only twenty-two percent were reconvicted of any new criminal

162. *Id.*

163. MYRSTOL ET AL., *supra* note 142, at 23.

164. See Alison Siegler, *End Mandatory Minimums*, THE BRENNAN CTR. (Oct. 18, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums> ("Long sentences . . . make it more difficult for people to reintegrate into society . . . [and] make[] us less safe by diverting resources from other critical public safety needs. In contrast, studies show that shorter sentences [do not] diminish public safety . . .").

165. Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 AM. CRIM. L. REV. 259, 269 (2018).

166. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 71.

offense.¹⁶⁷ In a state with one of the highest recidivism rates in the nation,¹⁶⁸ effective treatment programs like this are worth highlighting and building upon. Why send someone like the defendant in *King v. State*, with significant prospects for rehabilitation, to prison for decades when effective treatment is a more potent tool for realizing those prospects?¹⁶⁹

At the moment, in-patient rehabilitation treatment opportunities in Alaska have waitlists, and most people incarcerated for sex offenses do not receive treatment until the end of their sentences.¹⁷⁰ If people have to wait to receive treatment, they might miss out on the benefits of early treatment that may allow for more effective rehabilitation.¹⁷¹ Although there has not been significant research on the effect of earlier treatment, researchers suggest that there might be some benefits, including increased motivation and a better recall of what triggered the behavior.¹⁷² In some cases, a significant amount of time spent in rehabilitation might be necessary to obtain these benefits, which may not be possible if rehabilitation starts too late.¹⁷³

Moreover, rehabilitation saves taxpayer dollars. In 2016, researchers attached a monetary value to reduced rates of recidivism accomplished by each program, including the eliminated cost of more victimization.¹⁷⁴ They found that every dollar spent on prison outpatient treatment for people incarcerated for sex offenses resulted in \$2.38 in benefits.¹⁷⁵ The same researchers looked at community treatment for returning citizens and found \$4.43 in benefits for every dollar spent in 2015 and \$6.33 in benefits for every dollar spent in 2017.¹⁷⁶ Finally, in developing a prioritized list of concerns for survivors in Alaska, even victim advocates are not focused on lengthening sentences for sex offenses.¹⁷⁷

167. *Id.*

168. See THE PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 10-11 (2011) (including a chart that shows that between 2004 and 2007 Alaska had an overall recidivism rate of 50.4%, the sixth highest rate in the U.S. among reporting states).

169. *King v. State*, 487 P.3d 242, 254 (Alaska Ct. App. 2021) (Mannheimer, J., concurring) (“Psychological testing showed that, with proper treatment and supervision, King was unlikely to re-offend.”).

170. ALASKA CRIM. JUST. COMM’N, *supra* note 7, at 64.

171. Andrew Day et al., *The Intensity and Timing of Sex Offender Treatment*, 31 SEXUAL ABUSE 397, 403 (2017).

172. *Id.*

173. *Id.*

174. ALASKA CRIM. JUST. COMM’N, *supra* note 7, at 64

175. *Id.*

176. *Id.* at 66.

177. See *id.* at 61 (listing issues and concerns identified by victim advocates in Alaska, which do not include increasing sentence lengths for sex offenses).

C. Sentence Stacking Should be Eliminated Where Redundant

Sentencing courts in Alaska should not be permitted to consecutively stack sex offense convictions just because each conviction involved a different form of penetration. The sentence imposed on each individual defendant should fall within the presumptive sentencing range for the relevant sex offense. As previously discussed, Alaska sex offense sentences are already lengthy enough that they do not need to be stacked to punish effectively. Alaska's criminal justice system should aim to rehabilitate each defendant, rather than splice up facts to count as many offenses as possible. Prosecutorial power that leads to sentence-stacking should be curtailed, ensuring that sentencing courts in Alaska cannot then consecutively stack and, in turn, over-punish.¹⁷⁸

Beyond Judge Mannheimer's due process concerns¹⁷⁹ and the defendant's double jeopardy argument in *King v. State*,¹⁸⁰ this proposal to eliminate sentence-stacking is rooted in the fact that long sentences are harmful and ineffective. Although Alaska does not officially allow the death penalty or life sentences, the long sentences that result from stacked sentences are effectively life sentences.¹⁸¹ People sentenced to Alaska's maximum ninety-nine years will likely never live freely.¹⁸² These lengthy sentences can also dramatically shorten people's lifespans.¹⁸³

Considering the harm experienced by survivors of sex offenses, perhaps it seems like a just punishment for people convicted of sex offenses to endure severe hardship. Given what we understand about the impact of lengthy sentences, however, imposing this harm is illogical. There is no societal payoff for the harm caused by imposing long sentences. First, people typically age out of criminal behavior, meaning that people pose less of a threat to public safety once they are in their

178. See *King v. State*, 487 P.3d 242, 253 (Alaska Ct. App. 2021) (Mannheimer, J., concurring) (stating that "prosecutors are able to exercise substantial control over a defendant's sentence" because of their ability to stack offenses).

179. *Id.* at 252 (Mannheimer, J., concurring).

180. *Id.* at 247.

181. *Id.* at 254 (Mannheimer, J., concurring).

182. Michelle Theriault Boots, *Alaska Sees the Most Dramatic Increases in Life Expectancy in the Nation, New Study Says*, ANCHORAGE DAILY NEWS, <https://www.adn.com/alaska-news/health/2017/05/09/alaska-sees-the-most-dramatic-increases-in-life-expectancy-in-the-nation-new-study-says/> (May 9, 2017).

183. Emily Widra, *Incarceration Shortens Life Expectancy*, PRISON POL'Y INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ ("[F]or each year lived behind bars, a person can expect to lose two years off their life expectancy.").

thirties or forties.¹⁸⁴ This is true regardless of race or class.¹⁸⁵ If sentencing courts punish in order to incapacitate wrongdoers, then lengthy sentences do not satisfy courts' stated goal because "each successive year of incarceration is likely to produce diminishing returns for public safety."¹⁸⁶ Keeping people locked up well into their seventies or eighties is therefore not necessary.

Second, studies show that the *certainty* of punishment, not its severity, deters people from committing crime.¹⁸⁷ People might be deterred from committing a crime because they fear punishment itself, not because they know they will face a long sentence.¹⁸⁸ As a result, some suggest that "[e]ffective policing that leads to swift and certain (but not necessarily severe) sanctions is a better deterrent than the threat of imprisonment."¹⁸⁹ Research reveals that people who commit crimes are less deterred by long sentences because they are generally both less educated and less invested in their futures than people who do not commit crimes.¹⁹⁰ Thus, if lengthy sentences fail to effectively deter people from committing crimes, then lengthy sentences do not necessarily prevent crime.¹⁹¹ Instead, Alaska could make it easier to prosecute sex offenses in order to increase the certainty of punishment by reducing the state's currently high burden of proof.

Finally, imprisonment is expensive.¹⁹² Longer sentences mean a larger inmate population that costs a significant amount of public funds.¹⁹³ Lengthy sentences mean that limited public resources go toward funding incarceration, rather than "policing, drug treatment, preschool programs, or other interventions that might produce crime-reducing benefits."¹⁹⁴ Thus, long sentences fail to reduce crime, prevent people from committing crimes, or improve public safety.

Alaska courts should not stack sentences for different forms of

184. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UNIV. MO. KAN. CITY L. REV. 113, 122 (2018).

185. *Id.*

186. *Id.*

187. *Id.* at 123 (emphasis added).

188. *Id.*

189. U.S. DEP'T OF JUST., NAT'L INST. OF JUST., *FIVE THINGS ABOUT DETERRENCE 2* (May 2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>.

190. Bryan Lufkin, *The Myth Behind Long Prison Sentences*, BBC (May 15, 2018), <https://www.bbc.com/future/article/20180514-do-long-prison-sentences-deter-crime>.

191. Mauer, *supra* note 184, at 124.

192. *Id.*

193. Lufkin, *supra* note 190 (estimating that, if the U.S. shortened sentences and, in turn, reduced its prison population by forty percent, the country could save \$200 billion over ten years).

194. Mauer, *supra* note 184, at 124.

penetration to create lengthy sentences. Stacked sentences serve as yet another tool for increasing sentence lengths, harming both people who are incarcerated and the general public. Additionally, stacked sentences give prosecutors too much power¹⁹⁵ and impose unduly severe punishment on people convicted of sex offenses. Thus, courts should instead treat one instance of sexual assault as one sex offense, and defendants convicted of sex offenses should receive sentences that fall within the presumptive sentencing range for a single sex offense.

V. ADDRESSING CONCERNS WITH THESE PROPOSED POLICY SOLUTIONS

A. Longer Sentences Do Not Keep Communities Safe

The Alaska legislature is right to be concerned about an uptick in sexual abuse and assault. Compared with the rest of the country, Alaska has higher rates of sex offense victimization.¹⁹⁶ A 2020 study showed that Alaska has the highest rate of forcible rapes, with 154.8 rapes for every 100,000 inhabitants.¹⁹⁷ This is more than double the rate of the state with the second-highest rape rate and more than ten times the rate of the state with the lowest rape rate.¹⁹⁸ Roughly one-third of Alaskan women are survivors of sexual violence.¹⁹⁹

Furthermore, there is no way to adequately quantify the harm that survivors of sexual assault must endure. Some compound the harm by using alcohol to cope with the trauma of sexual assault.²⁰⁰ Many must endure the trauma while knowing that their assailant will never be charged with a crime.²⁰¹ Moreover, this issue highlights Alaska's racial inequities, as sexual assault disproportionately impacts Alaska Native

195. King v. State, 487 P.3d 242, 253 (Alaska Ct. App. 2021) (Mannheimer, J., concurring) (stating that "prosecutors are able to exercise substantial control over a defendant's sentence" as a result of their ability to stack offenses).

196. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 12.

197. *Forcible Rape Rate 2020*, *supra* note 12.

198. *Id.* Arkansas had the second highest rate, 73.5 forcible rapes per 100,000 inhabitants, and New Jersey had the lowest rate, 14.4 forcible rapes per 100,000 inhabitants. *Id.*

199. Adriana Gallardo et al., *Unheard*, PROPUBLICA (June 1, 2020), <https://features.propublica.org/alaska-sexual-assault/unheard-survivor-stories/>.

200. Emily Hofstaedter, *Change the Law to Make Prosecution for Rape More Possible in Nome and Across Alaska, Experts Say*, ALASKA PUB. MEDIA (Feb. 10, 2021), <https://www.alaskapublic.org/2021/02/10/law-change-needed-to-bring-more-rape-prosecutions-in-nome-and-across-the-state-some-experts-say/>.

201. *See id.* (stating that only thirty-eight percent of adult sexual assaults in Alaska are criminally charged).

women.²⁰²

For so many reasons, the Alaska legislature is right to take action against sexual assault. As one Alaska journalist put it, “[o]ur disgust and hostility against rapists and sexual abusers of children is justified and helps stop these crimes.”²⁰³ However, the legislature’s actions creating harsher penalties for those committing sexual offenses are not actually keeping Alaskan communities safe.²⁰⁴

There is no proof that locking people away for long periods of time keeps Alaskans safer from sexual abuse. In fact, a 2019 report revealed that “sexual violence continues to be as serious a problem today as it was when [sex offense sentencing reform in 2006] was passed.”²⁰⁵ Although the 2003 rate of rape in Alaska was 2.5 times higher than the national average, the rate of rape in Alaska increased to 2.8 times higher than the national average by 2017.²⁰⁶ Thus, if the goal of the legislation was to reduce sexual violence in Alaska, it failed.

Instead of implementing severe sentences, Alaska could tackle its sexual assault problem by making it easier to prosecute sex offenses. One way to do so is by lowering the burden necessary to prove that consent was not present. Alaska law requires the state to prove lack of consent, which can be a challenging task because Alaska defines consent in such a way that requires the prosecution “to prove [the victim] feared physical harm.”²⁰⁷ Some experts, advocates, and survivors have criticized the high burden of proof required in Alaska sexual assault cases.²⁰⁸

Moving in the right direction, the Alaska legislature recently passed a bill to require active consent, establishing that “lack of consent through words or conduct means there is no consent.”²⁰⁹ The bill now awaits the governor’s signature, but, if enacted, it would lower the state’s burden of proof.²¹⁰ Legislative reforms like this might be better suited to address the problem of sexual assault in Alaska than lengthy sentences. For example,

202. *Id.*

203. Charles Wohlforth, *Going Home: Even Sex Offenders Should Get a Chance to Rejoin Society*, ANCHORAGE DAILY NEWS (Aug. 16, 2017), <https://www.adn.com/opinions/2017/08/16/going-home-even-sex-offenders-should-get-a-chance-to-rejoin-society/>.

204. Hofstaedter, *supra* note 200.

205. ALASKA CRIM. JUST. COMM’N, *supra* note 7, at 58.

206. *Id.*

207. *Id.*

208. Hofstaedter, *supra* note 200.

209. Lisa Phu, *Alaska Legislature Modernizes 40-Year-Old Definition of Consent in Sexual Assault Cases*, ANCHORAGE DAILY NEWS (May 20, 2022), <https://www.adn.com/politics/alaska-legislature/2022/05/20/alaska-legislature-modernizes-40-year-old-definition-of-consent-in-sexual-assault-cases/> (discussing the passage of H.B. 5, 32d Leg., 2d Sess. (Alaska 2022)).

210. *Id.*

New Jersey—the state with the lowest forcible rape rate in 2020—emphasizes consent, defining sexual assault as sexual penetration “using coercion or without the victim’s affirmative and freely-given permission.”²¹¹

Most importantly, communities are better off when people convicted of sex offenses are rehabilitated and allowed to return home. People who commit sex offenses and are deemed “high-risk” become no more likely than the average person to commit a new sex offense after undergoing Alaska’s long-term cognitive behavioral therapy.²¹²

In addition to rehabilitation, returning citizens should be given the support they “need to establish stability in their homes, jobs and families” in order to lead law-abiding lives.²¹³ Laws that make it impossible for people convicted of sex offenses to return to their communities—even after they have completed their terms of imprisonment—can nullify the purpose of imprisonment and benefits of rehabilitation. These laws sometimes force returning citizens “to move from environments in which they have support networks into other communities in which they have no support, putting residents in their new communities at risk.”²¹⁴ Without their support networks and with the stigma that comes with the sex offense registry and other sex offense-related collateral consequences, people convicted of sex offenses are not set up to succeed and become more likely to reoffend.²¹⁵ This poses a danger to Alaskans. If money is spent on isolating people who commit sex offenses, instead of providing support and rehabilitation, Alaskan communities will be less safe.²¹⁶

Focusing on rehabilitation, rather than simply locking away people who commit sex offenses, will allow Alaska to balance its goals of keeping its communities safe while still giving those who commit wrongs a second chance.²¹⁷ Alaska’s top priority should be keeping the public safe,²¹⁸ but Alaska should also prioritize allowing formerly incarcerated citizens to

211. *Forcible Rape Rate 2020*, *supra* note 12; N.J. STAT. ANN. § 2C:14-2(c)(1) (West 2012).

212. Wohlforth, *supra* note 203.

213. Debora Jones, *Why Sex Offender Laws Do More Harm Than Good*, ACLU N.J., <https://www.aclu-nj.org/theissues/criminaljustice/whysexoffenderlawsdomoreharmthangood>

214. *Id.*

215. *Id.*

216. *Id.*

217. See generally Astrid Birgden & Heather Cucolo, *The Treatment of Sex Offenders: Evidence, Ethics, and Human Rights*, 23 *SEXUAL ABUSE* 295, 307 (2011) (stating that popular deterrence-based sex offense sentencing laws that do not emphasize rehabilitation run contrary to human rights, yet it is unclear “whether such laws actually protect the community”).

218. Wohlforth, *supra* note 203.

return home.²¹⁹ Emphasizing rehabilitation makes *both* of these goals attainable.²²⁰

B. The Courts Should Serve As Checks On the Legislature's Unfounded Policies

Some Alaskans might have concerns with a policy that gives judges the power to sentence outside of presumptive sentencing ranges. After all, while Alaska state legislators are elected through a democratic process, Alaska state judges are appointed and then face uncontested yes-no elections.²²¹ It is possible that Alaskans are more comfortable with democratically elected legislators serving as a check on judges, rather than the other way around.²²² But these concerns about a democratic policy-making process must be balanced against the reality that policymakers are too often guided by politics, not facts.²²³

Judges need to serve as a check against legislators because political influences impact policymaking, particularly when it comes to sex offenses and enhanced sentencing. A 2015 study showed that the public supports punitive measures, especially against people who commit sex offenses, resulting in policymakers embracing tough sex crime laws.²²⁴ In fact, a study of policymakers across the nation revealed that elected officials' ideas and perceptions about sex crimes are often not based in science.²²⁵ Additionally, heeding public opinion,²²⁶ legislators tend to ignore the evidence that long sentences do not work and rest policy "on nothing more than the notion that a longer sentence will cure everything."²²⁷ Legislators fail to consider empirical evidence, instead

219. *Id.*

220. *Id.*

221. *Judicial Selection in Alaska*, BALLOTPEDIA, https://ballotpedia.org/Judicial_selection_in_Alaska (last visited Jan. 29, 2022).

222. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1349 (2006) ("[D]emocratic ideals are bound to stand in an uneasy relation to any practice that says elected legislatures are to operate only on the sufferance of unelected judges.").

223. See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1881 (2008) (modern courts consider "impermissible motivations" on the part of legislators in their statutory analyses).

224. Lonnie Burton, *Study: Public Misperceptions About Sex Offenders Skew Policy-Making*, PRISON LEGAL NEWS (Apr. 13, 2017), <https://www.prisonlegalnews.org/news/2017/apr/13/study-public-misperceptions-about-sex-offenders-skew-policy-making/>.

225. Michelle Meloy et al., *The Sponsors of Sex Offender Bills Speak Up: Policy Makers' Perceptions of Sex Offenders, Sex Crimes, and Sex Offender Legislation*, 40 CRIM. JUST. & BEHAV. 438, 449 (2013).

226. Burton, *supra* note 224.

227. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF

focusing on deterrence and incapacitation while ignoring the negative impacts of long sentences.²²⁸

Judges can serve as a corrective measure against irrationally long sentences. In most states, however, they are often limited in their discretion to do so by mandatory sentences or sentence ranges.²²⁹ To serve as a model for the nation in creating effective judicial oversight, Alaska could opt to go against this trend.

Sex offense sentencing policy in Alaska serves as a stark example of judges need to serve as a safeguard against unfounded legislative policy. In 2006, Alaska legislators based the implementation of lengthy sex offense presumptive sentencing ranges on the flawed assumptions that people who commit sex offenses are likely to recidivate and difficult to rehabilitate.²³⁰ Legislators failed to recognize their faulty assumptions and likely believed they were taking the politically safe route.²³¹ It is in situations like this where judges need to be able to step in and use their discretion to counteract unfounded policy.

Although both judges and legislators face elections and the associated political pressures, judges are more familiar with a defendant's individual situation than legislators, who act prospectively.²³² This allows judges to calibrate the punishment to a person's circumstances in a way that legislators never can.²³³ Thus, a panel of three judges in Alaska should be able to use their discretion and show mercy in all cases where the legislature's assumptions about defendants do not apply to a specific defendant. Judges should more easily be allowed to use their discretion and analyze the specific facts of a defendant's situation in order to mitigate the risks associated with politically motivated policymakers.

MASS INCARCERATION 50 (2019).

228. *Id.* at 49.

229. *Id.* at 54.

230. *See Collins v. State*, 287 P.3d 791, 797 (Alaska Ct. App. 2012) (explaining that legislators based the presumptive sentencing ranges "on the assumption that defendants being sentenced for sex offenses have likely committed many other sex offenses before they were caught"), *superseded by statute*, Crimes; Victims; Child Abuse and Neglect, §§ 1, 22, 23, 2013 Alaska Sess. Laws ch. 43, 2-3, 11-12; *Hearing on H.B. 353*, *supra* note 9 (statement of Rep. Mark Neuman at 1:59:59 PM) (stating that people who commit sex offenses are difficult to rehabilitate).

231. *See Inimani M. Chettiar & Udi Ofer, The 'Tough on Crime' Wave Is Finally Cresting*, THE BRENNAN CTR. (Jan. 16, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/tough-crime-wave-finally-cresting> ("For decades, politicians competed to see who could push the most draconian criminal justice policies.").

232. Siegler, *supra* note 164 (explaining that the judge is neutral, but the prosecutor is an adversary in the case).

233. *Id.*

VI. CONCLUSION

For the last fifteen years, Alaska has been struggling with how to solve its very real sexual assault problem. The Alaska state legislature implemented longer presumptive sentencing ranges for sex offenses,²³⁴ and the courts embraced stacking sex offense sentences.²³⁵ As a result, sentences for sex offense crimes lengthened dramatically.

This tactic has not worked.²³⁶ Alaska remains the state with the highest rate of rape in the country.²³⁷ Sexual violence continues to impact the lives of so many Alaskans.²³⁸ It is time to re-evaluate the state's sex offense sentencing policy.

Alaska needs to confront the failures of its current sex offense sentencing regime and take action. This Note has proposed three solutions to Alaska's current over-punishment of people convicted of sex offenses. First, Alaska state judges should have more power to refer defendants in sex offense cases to three-judge panels that can impose sentences outside of the legislature's presumptive sentencing ranges in certain situations. Second, instead of imposing harsh, unduly long sentences, Alaska should invest in rehabilitating people convicted of sex offenses. Third, courts should not stack offenses that involve different forms of penetration. It is time for Alaska to reverse course on sex offense sentencing policy, and these proposed solutions offer a much-needed alternative approach that would proportionately punish people for committing sex offenses and help keep communities safe.

234. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 56.

235. *State v. Thompson*, 435 P.3d 947, 961 (Alaska 2019).

236. ALASKA CRIM. JUST. COMM'N, *supra* note 7, at 58 ("Sexual violence continues to be as serious a problem today as it was when [the 2006 sex offense sentencing reform act] was passed.").

237. *Forcible Rape Rate 2020*, *supra* note 12.

238. *Gallardo et al.*, *supra* note 199.