

## THE ANATOMY OF AN UNJUST AND TRAGIC VERDICT IN JUNEAU, PART IV

By David Ignell<sup>4</sup>

### An Upcoming Election

The subject of sexual assault has become a dominant theme in some Alaska elections and judicial appointments the past decade. In 2018, Juneau attorney Ms. Julie Willoughby had a judicial appointment taken away when the governor found out about a legal brief she had written while representing a client charged with sexual assault. In 2016, Juneau Representative Ms. Cathy Munoz lost a four-term seat in the House after being falsely characterized in the press as a supporter of sex offenders. Gov. Sean Parnell made “Choose Respect” perhaps the most dominant theme in Alaska for a year going into the 2010 gubernatorial election.

Juneau Superior Court Judge Philip Pallenberg has aspired to sit on the Alaska Supreme Court since at least 2012. To get there, he first had to be retained by Juneau voters as a Superior Court judge in the Nov. 2010 election. It was his first retention vote since becoming a judge in 2007. The most critical factor would be getting a recommendation on the ballot from the Alaska Judicial Council (AJC), the same group he would need to go through to get to the Supreme Court.

The AJC began their review process of Mr. Pallenberg late in 2009 and concluded at the end of June 2010. This period is also when Mr. Pallenberg made most of his damaging rulings against Mr. Jack.

A handful of Juneau GALs and CASAs had considerable influence in the AJC’s grading of Mr. Pallenberg. This group of “social service professionals” work closely together. The alleged victim’s GAL had started the Juneau CASA program and considered the CASAs to be “volunteer GALs.”

### Inviting the GAL to Participate

Mr. Pallenberg appeared to cater heavily to the alleged victim’s GAL during Mr. Jack’s trials. On January 7, 2010, he issued a four-page order discussing seating arrangements and directed it be sent to the GAL. Mr. Pallenberg invited her to a hearing on January 21 and suggested he would change his order if she felt differently.

On the morning of February 1, the first day of trial, the GAL surprised Mr. Jack’s attorney by trying to prevent the girls’ CASA from being called as a witness. The CASA had been interviewed by the AST late in October and had said Mr. Jack gave the girls a “safe and secure” environment.

The CASA kept a journal that Mr. Jack’s attorney was trying to get; it could contain valuable information that would run counter to the timeline the State was trying to push. Mr. Jack’s investigator had met with CASA on January 28. In a follow-up phone call regarding the journal, he found out the GAL was upset with the CASA for speaking with Mr. Jack’s investigator.

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Later in the afternoon of February 1, the GAL was involved in legal maneuvering that would give the alleged victim special treatment as a witness. Mr. Jack's attorney was deeply concerned it was witness bolstering and could undermine the effectiveness of the CASA if he was called as a witness.

Mr. Pallenberg ended proceedings on February 1 by ruling the GAL would need to make a factual showing in order to obtain that special treatment. However, just before calling in the jury on February 2, Mr. Pallenberg told the parties he had changed his mind overnight. The GAL would not have to make the showing after all. Mr. Jack's attorney objected but Mr. Pallenberg ignored her.

On February 2, Mr. Jack's attorney put on the record that the CASA's computer had crashed and the journal for the critical dates was no longer available. Mr. Jack's attorney decided not force the CASA to testify because of the pressure being put on him by the GAL, the loss of the desired journal, and the ruling by Mr. Pallenberg that allowed witness bolstering. The jury did not hear the CASA's important testimony about the "safe and secure environment" the Jack's provided to the girls.

#### Forcing an Unfair Trial

Mr. Pallenberg's most highly prejudicial ruling in favor of the GAL was yet to come. When Mr. Jack's family couldn't come up with \$60,000, his attorney filed a motion to withdraw from his case. By then, the second trial date of June 28 was just two months away.

The task of finding a new attorney was handed to the Office of Public Advocacy (OPA) in Anchorage. The OPA located a new attorney interested in the case. On May 6, he appeared before Mr. Pallenberg and requested the trial date be continued to September to give him time to adequately prepare. The transcripts from the first trial hadn't even been prepared yet.

The alleged victim's GAL argued against the extension. She told Mr. Pallenberg the needs of victims in Hoonah weren't being taken into account and the situation in Hoonah was intolerable. Mr. Pallenberg ruled in her favor again. He did not allow the extension of time and the prospective attorney declined to take on Mr. Jack's case.

Mr. Pallenberg decided he would try to force the original attorney to work for OPA at a substantially reduced rate unless OPA could find another attorney to start trial on June 28. The OPA had a big problem with that, the judge had no legal authority to impose an attorney on them. The original attorney also had a big problem with being forced to work at the significantly reduced OPA rates and the dangerous precedent that Mr. Pallenberg would set for future cases.

As June 28 approached without an attorney for Mr. Jack, Mr. Pallenberg appeared to become increasingly agitated. On May 10, the Deputy Director of the OPA filed an affidavit saying that another attorney couldn't be located. Mr. Pallenberg took the unusual measure of demanding that the Director fly down from Anchorage to appear in front of him.

The OPA finally came up with an attorney from Wasilla willing to represent Mr. Jack and on June 1 he filed a Notice of Appearance. A week later, the Wasilla attorney asked for an extension of the trial date. He had just received 1100 pages of transcripts from the first trial and there was no way he could be ready to try a case of such great magnitude in three weeks. He had to fly down for hearings on the extension request in Juneau on June 14<sup>th</sup> and 15<sup>th</sup>.

### A Very Unhappy Judge

During these hearings Mr. Pallenberg repeatedly expressed how upset he was, saying, “I am a little bit more than disturbed by this situation”, “feel like a bait and switch”, “I am extremely displeased about where we are right now”, “not sure whose fault it is, but I am really unhappy about this, and “here we are with the rug pulled out from us.” Mr. Pallenberg was even upset the OPA had challenged his legal authority to appoint a lawyer for them.

During his tirade, Mr. Pallenberg acknowledged that Mr. Jack was not going to get a fair trial if he couldn’t force the OPA’s hand to retain the original attorney. Mr. Pallenberg said this about his May 6 order trying to force the OPA and the original attorney together, “I recognized that it was not long before that trial. There are a lot of documents and information involving this case. At that time I found it surprising to find a lawyer for a case of this magnitude.”

Mr. Pallenberg then told the Wasilla attorney, “You made your bed and you need to sleep in it. I can’t force this case to trial to punish a lawyer when I don’t have confidence it would be a fair trial. I do not have sympathy for a lawyer for not investigating how complex the case was. I can’t force this case to trial in less than 2 weeks and know it will be a fair trial.”

Mr. Pallenberg postponed the trial just two weeks. The extension was grossly inadequate. All the defense attorneys had told Mr. Pallenberg that 4 months was necessary to get prepared for a major felony trial with a possible 50-year sentence. Mr. Pallenberg, who 11 years previously had testified about juries making mistakes, was about to force a Juneau jury into a huge mistake.

### The Appearance of Impropriety

Other than perhaps for putting pressure on the CASA, nothing in the preceding paragraphs should suggest that the GAL did anything improper. She was simply advocating for her client, the alleged victim, at the express invitation of Mr. Pallenberg.

There is no evidence in the documents that the GAL knew about the extensive exonerating evidence that the OCS, the AST, and the DA all knew about. The GAL was employed by OPA, a separate state agency. If she and her CASAs gave Mr. Pallenberg excellent ratings because of the way he handled Mr. Jack’s case, they were certainly entitled to do so.

The critical issue at stake is Canon 2 of the Alaska Code of Judicial Conduct. It says a judge shall avoid the *appearance* of impropriety in all the judge’s actions. Mr. Pallenberg didn’t do this when he went out of his way to invite the GAL to get involved in the trial and then took her side on important, even critical issues that significantly prejudiced Mr. Jack. A violation of Canon 2 doesn’t even require a finding that Mr. Pallenberg acted with the intent to get a higher AJC rating. The focus is solely on the appearance.

### Mr. Pallenberg Gets Excellent Ratings

At the end of June, Mr. Pallenberg received the coveted approval rating from the AJC. The AJC’s deliberations aren’t a public record but the high ratings he received from the Juneau GALs and CASAs likely were a crucial factor. The important category of peace and probation officers rated him a 3.4 out of 5. Acceptable, but not good.

In the equally important category of social service professionals (SSP), three social workers gave Mr. Pallenberg an overall score of 3.3. Again, acceptable but not good.

His SSP score was boosted significantly by 6 Juneau CASAs and a single Juneau GAL. The CASAs rated him a near perfect 4.8 and the GAL rated him a perfect 5.0. These high ratings boosted Mr. Pallenberg's overall rating by the SSPs from 3.3 to 4.3. The appearance of impropriety became even greater.

#### Denials that Don't Negate Guilt

Back on January 28, 2010, Mr. Pallenberg had made another astonishing ruling. Mr. Jack's attorney had requested a dismissal of all charges against Mr. Jack because of the DA's failure to present substantial exonerating evidence to the grand juries, as required by law. The request was sound and should have been granted by Mr. Pallenberg. However, on January 7 he had invited the alleged victim's GAL to participate in the case. Did Mr. Pallenberg fear that dismissing the case could derail his judicial career?

As discussed in Part III, the social worker had made a big deal to the grand juries about the lack of an "adamant denial", when only subtle hints were dropped. In line with this theme, the DA didn't tell the jurors about another secretly recorded interview by the AST, initiated an hour before the lead investigator arrested Mr. Jack. In that interview the AST lead investigator had been more direct and Mr. Jack responded with at least a dozen denials. A minute before the Trooper placed him under arrest, Mr. Jack said in exasperation, "how many ways I can say no."

Mr. Pallenberg knew about these unequivocal denials. He knew about Mr. Jack's many statements to the social worker that he did not *knowingly* or *intentionally* do anything improper. He knew that Mr. Jack consistently said throughout the secretly taped records that the only time he might have improperly touched the girl was on the rare occasions the entire family had fallen asleep in the master bedroom watching TV.

Mr. Pallenberg knew that Mr. Jack couldn't "adamantly deny" any improper touching during those occasions because he was of course, asleep! Mr. Pallenberg knew about the testimony of the alleged victim's sister that contradicted key components of her sister's allegations. He knew about other exonerating evidence that wasn't presented to the grand jury.

Yet Mr. Pallenberg denied the motion to dismiss all the charges. Those charges specifically required Mr. Jack to *knowingly* touch the alleged victim. In his order, dated January 28 and one week after the hearing he invited the GAL to attend, Mr. Pallenberg wrote, "there is nothing in [the secretly taped recordings] that would have tended, in and of itself, to negate the defendant's guilt". It's inconceivable that an unbiased judge could view the contents of the secret recordings in such a light.

#### Enabling Illegal Conduct

It's unlawful for the DA to withhold important exonerating evidence from the grand jury. If that happens, judges are required to throw out the indictment. It's the only way to prevent DA's from abusing their power. Mr. Pallenberg knew there was a substantial amount of exonerating evidence that the DA had withheld from the grand jury. By denying the request to dismiss all charges, Mr. Pallenberg enabled the DA's illegal conduct that cost an innocent man his freedom the last 10 years.

The old joke about grand juries indicting a ham sandwich isn't so funny when it comes to innocent people like Mr. Jack. The DA's completely bogus indictment cost Mr. Jack and his family their collective

lifetime savings to pay for attorney fees. When their money was exhausted, Mr. Jack was forced into a situation where he had unprepared counsel for his second trial. That first grand jury indictment doomed an innocent man.

#### Reburying the Smoking Gun

Four days after denying Mr. Jack's request to dismiss all the charges, the DA dropped a bombshell on Mr. Pallenberg and Mr. Jack's attorney. On the evening of February 1, after the jury had been selected, the DA handed over a copy of the teacher's letter to Mr. Jack's attorney. It was the most advantageous time for the DA to do this, but the worst time for Mr. Pallenberg. The DA placed the burden of dealing with the letter, the proverbial "smoking gun", directly on the shoulders of the judge.

Mr. Pallenberg was trapped. Four days earlier he had denied the motion to dismiss all charges for the DA's failure to present exonerating evidence to the grand juries. Had he known earlier about the teacher's letter, Mr. Pallenberg would have garnered sufficient political cover to dismiss the charges against Mr. Jack in an important election year. Instead, the DA disclosed the letter at the last possible moment and put the judge in a very tenuous position.

On the morning of February 2, Mr. Jack's attorney wanted to read the teacher's letter into the record where it would have been preserved for the appellate court to see if Mr. Jack was convicted. With the letter in the record, the appellate court would have no choice but to overturn the conviction and hand Mr. Pallenberg an embarrassing loss. Mr. Pallenberg did not allow that to happen. He denied another important request from Mr. Jack's attorney. The "smoking gun" that contained fax headers showing it had been received by the OCS and the DA prior to the grand jury hearing never came into play.

#### Prejudicial Rulings Throughout

During the first trial, Mr. Pallenberg continued to make several more prejudicial rulings against Mr. Jack. For the sake of brevity those rulings won't be discussed in this story except to briefly summarize three instances.

1) Mr. Pallenberg consistently prevented Mr. Jack's attorney from introducing evidence that would indicate that the girl's pregnancy fears were attributable to boys from her school. 2) Mr. Pallenberg allowed the juror to hear highly prejudicial and inadmissible double and triple hearsay that Mr. Jack had made a "suicide gesture." 3) At the end of the trial and over the strenuous objection of Mr. Jack's attorney, Mr. Pallenberg allowed the DAO to amend its charges a second time to fit the girl's most recent testimony which had changed yet again.

(Part V will address how the reaction to an epidemic, and unrecognized cultural differences may have contributed to Mr. Jack's wrongful conviction)