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IN THE SUPREME COURT OF THE STATE OF ALASKA

STACEY ALLEN GRAHAM,

Petitioner,

v.

STATE OF ALASKA,

Respondent.

Supreme Court No. S-17411

Court of Appeals No. A-A-12222
Trial Case No. 3AN-13-08758CR

CERTIFICATE OF SERVICE

VRA AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Arial 12.5 point.

Parker Minert certifies that: I am a Paralegal employed by the Alaska Public Defender Agency, 900 West 5th Avenue, Suite 200, Anchorage, Alaska 99501. On **March 13, 2020**, I **delivered** a copy of the **Brief of Respondent** to:

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Parker Minert
Paralegal

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APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
HONORABLE KEVIN M. SAXBY, JUDGE

BRIEF OF RESPONDENT

ALASKA PUBLIC DEFENDER AGENCY

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STATUTES

Alaska Statute 11.41.110(a)(2) provides:

Murder in the second degree.

(a) A person commits the crime of murder in the second degree if

. . .

(2) the person knowingly engages in conduct that results in the death of another person under circumstances manifesting an extreme indifference to the value of human life;

. . . .

Alaska Statute 11.81.900(a)(3) provides:

Definitions.

(a) For purposes of this title, unless the context requires otherwise,

. . .

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

. . . .

Alaska Statute 12.61.900(3) provides:

Definitions.

. . .

(3) "victim" has the meaning given in AS 12.55.185;

. . . .

Alaska Statute 12.55.185(19) provides:

Definitions.

. . .

(19) "victim" means

(A) a person against whom an offense has been perpetrated;

(B) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is a minor, incompetent, or incapacitated:

(i) an individual living in a spousal relationship with the person specified in (A) of this paragraph; or

(ii) a parent, adult child, guardian, or custodian of the person;

(C) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is dead:

(i) a person living in a spousal relationship with the deceased before the deceased died;

(ii) an adult child, parent, brother, sister, grandparent, or grandchild of the deceased; or

(iii) any other interested person, as may be designated by a person having authority in law to do so.

Alaska Statute 12.61.010 provides:

Rights of crime victims.

(a) Victims of crimes have the following rights:

(1) the right to be present during any proceeding in

(A) the prosecution and sentencing of a defendant if the defendant has the right to be present, including being present during testimony even if the victim is likely to be called as a witness;

(B) the adjudication of a minor as provided under AS 47.12.110;

(2) the right to be notified by the appropriate law enforcement agency or the prosecuting attorney of any request for a continuance that may substantially delay the prosecution and of the date of trial, sentencing, including a proceeding before a three-judge panel under AS 12.55.175, an appeal, and any hearing in which the defendant's release from custody is considered;

(3) the right to be notified that a sentencing hearing or a court proceeding to which the victim has been subpoenaed will not occur as scheduled;

(4) the right to receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts and to be provided with information as to the protection available;

(5) the right to be notified of the procedure to be followed to apply for and receive any compensation under AS 18.67;

(6) at the request of the prosecution or a law enforcement agency, the right to cooperate with the criminal justice process without loss of pay and other employee benefits except as authorized by AS 12.61.017 and without interference in any form by the employer of the victim of crime;

(7) the right to obtain access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having medical assistance administered; however, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(8) the right to make a written or oral statement for use in preparation of the presentence report of a felony defendant;

(9) the right to appear personally at the defendant's sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(10) the right to be informed by the prosecuting attorney, at any time after the defendant's conviction, about the complete record of the defendant's convictions;

(11) the right to notice under AS 12.47.095 concerning the status of the defendant found not guilty by reason of insanity;

(12) the right to notice under AS 33.16.087 of a hearing concerning special medical parole of the defendant;

(13) the right to notice under AS 33.16.120 of a hearing to consider or review discretionary parole of the defendant;

(14) the right to notice under AS 33.30.013 of the release or escape of the defendant; and

(15) the right to be notified orally and in writing of and receive information about the office of victims' rights from the law enforcement officer initially investigating the crime and from the prosecuting attorney assigned to the offense; at a minimum, the information provided must include the address, telephone number, and Internet address of the office of victims' rights; this paragraph

(A) applies only to victims of felonies and to victims of class A misdemeanors if the class A misdemeanor is a crime involving domestic violence or a crime against a person under AS 11.41; if the victim is an unemancipated minor, the law enforcement officer and the prosecuting attorney shall also provide the notice required by this paragraph to the parent or guardian of the minor;

(B) is satisfied if, at the time of initial contact with the crime victim, the investigating officer and prosecuting attorney each give each crime victim a brochure or other written material prepared by the office of victims rights and provided to law enforcement agencies for that purpose.

(b) Law enforcement agencies, prosecutors, corrections agencies, social services agencies, and the courts shall make every reasonable effort to ensure that victims of crimes have the rights set out in (a) of this section. However, a failure to ensure these rights does not give rise to a separate cause of action against law enforcement agencies, other agencies of the state, or a political subdivision of the state.

Alaska Statute 12.55.023 provides:

Participation by victim in sentencing.

(a) If a victim requests, the prosecuting attorney shall provide the victim, before the sentencing hearing, with a copy of the following portions of the presentence report:

(1) the summary of the offense prepared by the Department of Corrections;

(2) the defendant's version of the offense;

(3) all statements and summaries of statements of the victim;

(4) the sentence recommendation of the Department of Corrections; and

(5) letters of support submitted to the court for consideration.

(b) A victim may submit to the sentencing court a written statement that the victim believes is relevant to the sentencing decision and may give sworn testimony or make an unsworn oral presentation to the court at the sentencing hearing. If there are numerous victims, the court may reasonably limit the number of victims who may give sworn testimony or make an unsworn oral presentation during the hearing. When requested by the victim of a felony or a class A misdemeanor, if the class A misdemeanor is a crime involving domestic violence or a crime against a person under AS 11.41, when the victim does not submit a statement, give testimony, or make an oral presentation, the victims advocate may submit a written statement or make an unsworn oral presentation at the sentencing hearing on behalf of the victim.

Alaska Statute 12.61.015 provides:

Duties of prosecuting attorney.
(a) If a victim of a felony, a sex offense as defined in AS 12.63.100, or a crime involving domestic violence requests, the prosecuting attorney shall make a reasonable effort to

(1) confer with the person against whom the offense has been perpetrated about that person's testimony before the defendant's trial;

(2) in a manner reasonably calculated to give prompt actual notice, notify the victim

(A) of the defendant's conviction and the crimes of which the defendant was convicted;

(B) of the victim's right in a case that is a felony to make a written or oral statement for use in preparation of the defendant's presentence report, and of the victim's right

to appear personally at the defendant's sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(C) of the address and telephone number of the office that will prepare the presentence report; and

(D) of the time and place of the sentencing proceeding;

(3) notify the victim in writing of the final disposition of the case within 30 days after final disposition of the case;

(4) confer with the victim or the victim's legal guardian concerning a proposed plea agreement before entering into the plea agreement to ask the victim or the victim's legal guardian whether the victim is in agreement with the proposed plea agreement; the prosecuting attorney shall record whether the victim or the victim's legal guardian is in agreement with the proposed plea agreement;

(5) inform the victim of a pending motion that may substantially delay the prosecution and inform the court of the victim's position on the motion; in this paragraph, a "substantial delay" is

(A) for a misdemeanor, a delay of one month or longer;

(B) for a felony, a delay of two months or longer; and

(C) for an appeal, a delay of six months or longer.

(b) The notice given under (a)(2) of this section must inform the victim that the statement, sworn testimony, or unsworn oral presentation of the victim may contain any relevant information including

(1) an explanation of the nature and extent of physical, psychological, or emotional harm or trauma suffered by the victim;

(2) an explanation of the extent of economic loss or property damage suffered by the victim;

(3) an opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage; and

(4) the recommendation of the victim for an appropriate sentence.

(c) The state and the prosecuting attorney may not be held liable in damages for any failure to comply with the requirements of this section.

(d) The court may reschedule a hearing to consider a plea agreement as needed to allow additional time to comply with the victim notification requirements under (a)(2) and (4) of this section.

(e) Nothing in this section requires a victim or a victim's legal guardian to provide a response to a prosecuting attorney regarding a plea agreement or requires the prosecuting attorney to be bound by the victim's or legal guardian's response regarding the plea agreement.

(f) The prosecuting attorney shall notify a victim of a sex offense as defined in AS 12.63.100 or crime involving domestic violence as defined in AS 18.66.990 if, before trial, the offender of the victim is discharged from a treatment program for noncompliance.

CONSTITUTIONAL PROVISIONS

ALASKA CONSTITUTION
Article I, Section 24 provides:

Rights of Crime Victims

Crime victims, as defined by law, shall have the following rights as provided by law: the right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court; the right to confer with the prosecution; the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process; the right to timely disposition of the case following the arrest of the accused; the right to obtain information about and be allowed to be present at all criminal or juvenile proceedings where the accused has the right to be present; the right to be allowed to be heard, upon request, at sentencing, before or after conviction or juvenile adjudication, and at any proceeding where the accused's release from custody is considered; the right to restitution from the accused; and the right to be informed, upon request, of the accused's escape or release from custody before or after conviction or juvenile adjudication

ISSUE PRESENTED FOR REVIEW

Did the court of appeals correctly apply this court's precedent when it determined the sentencing court committed legal errors in sentencing Stacey Graham that required a remand for resentencing before a different judge?

STANDARD OF REVIEW

Whether a trial court complied with applicable law in imposing sentence is a question of law, which this court reviews de novo.

ARGUMENT

Graham's Case Was Properly Remanded for Resentencing.

Alaska has one of the broadest sentencing ranges nationwide for a person who kills while driving drunk – 1 to 99 years.[1] The breadth of Alaska's range reflects the three offenses for which a driver may be convicted if he causes a death while intoxicated: criminally negligent homicide,[2] manslaughter,[3] and second-degree murder.[4] These offenses exist on a spectrum of recklessness, with the penalty increasing with the degree of reckless behavior. It is often difficult to precisely differentiate reckless behavior within this spectrum, presenting an inherent risk of unjustified sentencing disparity among similarly situated defendants.

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[1] MOTHERS AGAINST DRUNK DRIVING, PENALTIES FOR DRUNK DRIVING VEHICULAR HOMICIDE, at 1 (rev. July 2018) (providing approximate sentences possible in traffic crash deaths caused by a drunk driver). Only North Dakota appears to have a comparable sentencing range. *Id.* (stating that North Dakota has sentencing range of zero to life imprisonment).

[2] AS 11.41.130.

[3] AS 11.41.120(a)(1).

[4] AS 11.41.110(a)(2).

The risk presented by Alaska's statutory scheme requires careful scrutiny by trial and appellate courts to ensure the broad penalty range applicable to DUI homicides is not unjustly or unfairly applied in a given case. Below, the court of appeals held that the sentencing court misunderstood the applicable law and structured Stacey Graham's sentencing to allow improper emotional pressure on the court's decision making. These errors compounded the inherent risk Graham faced at sentencing for reckless homicide, and the court of appeals correctly determined they required a remand for resentencing before a new judge.

A. Alaska's reckless homicide statutes reflect a spectrum of conduct that lacks exact boundaries, which creates a risk of unjustified sentencing disparity.

Under the Alaska Statutes, a person acts recklessly if he "is aware of and consciously disregards a substantial and unjustifiable risk that . . . [a] circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[5] Reckless conduct presents a "high degree of risk."[6]

As Professor LaFave explains, reckless conduct "may serve as the basis for manslaughter liability, but it will not do for murder."[7] For murder, "the required danger may be designated a 'very high degree of risk' to distinguish it from those

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5 AS 11.81.900(a)(3).

6 *See* WAYNE R. LAFAVE et. al, 2 SUBSTANTIVE CRIMINAL LAW § 14.4(a) (updated Oct. 2019) [hereinafter LAFAVE].

7 *Id.* (internal footnote omitted).

lesser degrees of risk which will suffice for other crimes."[8] This "very high degree of risk" renders an actor's culpability equivalent to a person who acts purposefully or knowingly.[9] This distinction between a "high degree of risk" and a "very high degree of risk" is a "matter[] of degree, and there is no exact boundary line between each category; they shade gradually like a spectrum from one group to another."[10]

Using the language of the Model Penal Code,[11] Alaska's reckless homicide statutes reflect this distinction between high risk circumstances justifying a manslaughter conviction and very high risk circumstances justifying a murder conviction.[12] Under Alaska law, "[f]or reckless homicide to be classified as murder instead of manslaughter, the factfinder must find that 'the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life.' "[13]

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[8] *Id.*

[9] *Jeffries v. State*, 169 P.3d 913, 916 (citing Model Penal Code § 210.2 cmt. 4 (1980) (revised commentary on the Model Penal Code as adopted in 1962)).

[10] LAFAVE, *supra* note 6.

[11] *Jeffries*, 169 P.3d at 916 (explaining that extreme indifference murder under AS 11.41.110(a)(2) "is adapted from the Model Penal Code, which was adopted 'in large measure' by the Alaska Legislature in 1978") (quoting *Neitzel v. State*, 655 P.2d 325, 332 (Alaska App. 1982)).

[12] *See Jeffries*, 169 P.3d at 917 ("Jeffries contends that the only way to ensure a clear distinction between manslaughter and extreme-indifference murder is to reserve murder for cases in which the objective risk of death or serious physical injury posed by the defendant's actions is 'very high.' This is a correct statement of the law[.]").

[13] *Id.* (quoting *Neitzel v. State*, 655 P.2d 325, 335 (Alaska App. 1982)). The question whether a person displayed extreme indifference requires consideration of "(1) the social utility of the actor's conduct; (2) the magnitude of the risk his conduct creates including both the nature of the foreseeable harm and the likelihood that the

The factfinder's determination of this question has significant consequences at sentencing: Manslaughter is a class A felony without a mandatory minimum sentence and a maximum sentence of 20 years, and the presumptive range for a first felony offender (at the time Graham committed his offense) was 7 to 11 years.[14] Absent mitigating factors, a defendant convicted of two counts of manslaughter would face a minimum active term of imprisonment of 14 years.[15]

Second-degree murder, by contrast, is an unclassified felony that, at the time of Graham's offense, required a mandatory minimum sentence of 10 years and carried a maximum sentence of 99 years.[16] A defendant convicted of two counts of second-degree murder would face a minimum active term of imprisonment of 20 years.[17]

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conduct will result in that harm; (3) the actor's knowledge of the risk; and (4) any precautions the actor takes to minimize the risk." *Id.* (quoting *Neitzel*, 655 P.2d at 336-37).

[14] Former AS 12.55.125(c)(2)(A) (2013). The presumptive range for a first felony offender decreased to 5 to 9 years in 2016, *see* SLA 2016, ch. 36 § 88, but the legislature returned the range to the pre-2016 level in 2019. *See* 4SSLA 2019, ch. 4 § 70.

[15] AS 12.55.125(c)(2)(C)(i) (providing that court must impose either presumptive term or active term of imprisonment, whichever is less, consecutively for each count of manslaughter). This defendant would be eligible for discretionary parole after serving approximately 6.5 years. Former AS 33.16.090(b)(7)(C) (2013).

[16] Former AS 12.55.125(b) (2013). The mandatory minimum for second-degree murder increased from 10 years to 15 years in 2016. *See* SLA 2016 ch. 36 § 87.

[17] AS 12.55.127(c)(2)(B). This defendant would not be eligible for discretionary parole until serving at least 20 years. Former AS 33.16.090(b)(7)(A) (2013).

As this court has recognized, "the question whether an actor's conduct demonstrates extreme indifference to the value of human life is primarily one for the factfinder; only rarely will evidence favorable to the defendant as to a single factor in the *Neitzel* analysis prevent the case from going to a jury."[18] But this court has also recognized that a charge of murder is only rarely appropriate in a motor vehicle homicide.[19] And "unlike appellate judges and lawyers, trial jurors see only the one case in front of them."[20] Because lay factfinders lack "fixed points of comparison,"[21] there is a risk of inconsistent application of the reckless homicide statutes, which can result in potentially unjustified sentencing disparity among similarly situated defendants.

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[18] *Jeffries*, 169 P.3d at 917; *see also id.* (" 'Whether recklessness is so extreme that it demonstrates indifference [as to purposeful or knowing homicide] is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.' ") (quoting *Neitzel*, 655 P.2d at 336 (quoting Model Penal Code § 210.2, at 21-23 (1980)).

[19] *Id.* at 923 ("We agree with the admonition in *Pears* [*v. State*, 672 P.2d 903, 906 n.1 (Alaska App. 1983)] that a charge of second-degree murder should only rarely be appropriate in a motor vehicle homicide.") (internal quotation marks omitted).

[20] *Prince v. State*, 2011 WL 6934045, *14 (Alaska App. Dec. 28, 2011) (unpublished) (Mannheimer, J., concurring).

[21] *Id.* (Mannheimer, J., concurring).

B. This court's precedent recognizes the risk presented to the goal of fair and just sentencing when sentencing defendants for DUI reckless homicides.

1. This court has repeatedly characterized deaths resulting from drunk driving as "vehicular" or "motor vehicle" homicides.

Both before and after the adoption of the revised criminal code, this court has characterized deaths resulting from drunk driving as "vehicular" or "motor vehicle" homicides. Such descriptions began as early as 1976,[22] and this court has applied it to convictions for manslaughter and second-degree murder alike.[23]

Notwithstanding the lack of a statutory crime labeled "vehicular homicide," this court's characterization reflects distinguishing characteristics of the crime, as compared to other reckless homicides, including the fact that many Alaskans engage in the underlying conduct despite the grave consequences that can result. Indeed,

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[22] *See Layland v. State*, 549 P.2d 1182, 1184 (Alaska 1976) (considering sentence appeal from manslaughter conviction where intoxicated individual killed one person and seriously injured two others and noting that "[w]hile vehicular homicide does not require a criminal intent, the fact that a loss of life is involved compels us to consider it among the most serious of offenses"); *see also Rosendahl v. State*, 591 P.2d 538, 539 (Alaska 1979) (citing *Layland* in considering sentence appeal from conviction for negligent homicide resulting from act of intoxicated driving); *Bishop v. State*, 573 P.2d 856, 858 (Alaska 1978) (citing *Layland* in considering sentence appeal from manslaughter conviction resulting from act of intoxicated driving); *Sandvik v. State*, 564 P.2d 20, 25-26 (Alaska 1977) (citing *Layland* and further stating that "[a]though the sentence received by Sandvik is longer than an[y] imposed for vehicular manslaughter which has previously been appealed to this court," sentence was not clearly mistaken).

[23] *See, e.g., Jeffries v. State*, 169 P.3d 913, 923 (Alaska 2007) (citing with approval, *Pears v. State* (*Pears I*), 672 P.2d 903, 906 n.1 (Alaska App. 1983), which court characterized as "motor vehicle homicide"); *Pears v. State* (*Pears II*), 698 P.2d 1198, 1201-03 (Alaska 1985) (discussing legislative intent in revising criminal code with respect to "reckless vehicular homicide" in sentence appeal from second-degree murder conviction); *Layland*, 549 P.2d at 1184 (applying characterization in manslaughter case).

this court has recognized the "unique nature" of a reckless homicide committed by an intoxicated driver:

> Recent statistics indicate that thousands of innocent people are killed or seriously injured nationwide each year by automobile drivers who take to the road in spite of the fact that they are highly intoxicated. Unlike many crimes, the victim has no way of protecting himself. While vehicular homicide does not require a criminal intent, the fact that a loss of life is involved compels us to consider it among the most serious offenses. The unique nature of the offense mandates that the trial court, in fashioning a sentence, place heavy emphasis on societal condemnation of the conduct and the need to protect society.[24]

2. This court has held that trial courts should compare DUI reckless homicide to other DUI reckless homicides, regardless of the level of offense for which the defendant was convicted.

The first person to be convicted of murder for a vehicular homicide in Alaska was Richard Pears.[25] "While driving while intoxicated, Richard Pears caused an automobile accident in which two people died and one was injured."[26] Convicted of two counts of second-degree murder and one count of second-degree assault, Pears appealed his composite sentence of 20 years to the Alaska Court of Appeals.[27]

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[24] *Layland*, 549 P.2d at 1184.

[25] *Pears I*, 672 P.2d at 911. ("Pears is the first person in this state to be convicted of murder for a motor vehicle homicide.").

[26] *Id.* at 905.

[27] *Id.*

The court of appeals applied the recently adopted *Page* benchmark[28] to Pears and concluded his 20-year sentence was not clearly mistaken.[29]

This court granted Pears's petition for hearing, and it concluded his 20-year sentence was excessive.[30] The *Pears* court stated that, when evaluating the propriety of a sentence, it had "frequently compared sentences imposed in prior cases involving similar offenses to that imposed in the case under review," which enabled the court to determine whether sentencing disparities among similarly situated defendants are "so irrational as to be 'unjustifiable.' "[31] In Pears's case, this court observed that "the question exists whether we should compare Pears's sentence with prior manslaughter sentences involving drunken drivers or with second degree murder

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[28] *See Page v. State*, 657 P.2d 850, 855 (Alaska App. 1983) ("Twenty years is therefore a proper benchmark to measure sentences for [second-degree murder]. Any sentence substantially exceeding that amount would appear at least provisionally suspect. It would appear appropriate, therefore, in light of AS 12.55.125(b) and experience in sentencing second-degree murders, both before and after enacting the revised code, that one convicted of that offense should receive a sentence of from twenty to thirty years.").

[29] *Pears I*, 672 P.2d at 911-12 ("If Pears' sentence is looked at as a sentence for murder, we do not believe that we can find that it was clearly mistaken. . . . Thus Pears' twenty-year sentence does not appear to be out of line with other sentences which have been imposed for murder. We conclude that although Pears' sentence is severe and certainly appears to be significantly greater than any sentence which has formerly been imposed in a case involving a motor vehicle homicide, the sentence is not clearly mistaken.") (citing *Page*, 657 P.2d at 855).

[30] *Pears II*, 698 P.2d at 1200.

[31] *Id.* at 1202 (quoting *Burleson v. State*, 543 P.2d 1195, 1202 (Alaska 1975)).

sentences" and concluded that manslaughter sentences were the appropriate comparison for four reasons.[32]

First, this court noted that Pears's conduct was "generally similar to that of other drunken drivers who have recklessly caused others to die."[33] Although he had no prior convictions for driving while intoxicated or reckless driving,[34] Pears repeatedly drove recklessly while intoxicated on the day the fatal crash occurred after being repeatedly told by a passenger that his driving scared her and after being warned by police officers not to drive because he was too intoxicated.[35]

Second, this court observed that Pears's conduct was "not comparable to that reviewed in sentence appeals under the new second degree murder statute."[36] This court noted that there were "few published decisions involving sentencing appeals under AS 11.41.110(a)(2)," citing three second-degree murder appeals involving conduct distinct from vehicular homicide.[37] One involved an "extreme indifference" second-degree murder conviction for shooting the victim;[38] the second

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32 *Id.* at 1202-1203.

33 *Id.* at 1202.

34 *Id.* at 1200.

35 *Pears I*, 672 P.2d at 909. The court of appeals described Pears's conduct in great detail. *See id.* at 909-10.

36 *Pears II*, 698 P.2d at 1202.

37 *Id.* at 1202 n.9.

38 *Id.* (citing *Minchow v. State*, 670 P.2d 719 (Alaska App. 1993), and explaining that "defendant had a history of nonfelony assaults;" "returned and shot the victim" after a fight, and was sentenced to 30 years); *see also Minchow*, 670 P.2d at 719.

was *Page*, where the defendant stabbed the victim;[39] and the third involved a defendant convicted of felony murder.[40]

Third, the *Pears* court noted that the legislature's adoption of the "extreme indifference" theory of second-degree murder "was not in response to public outcry for increased penalties for vehicular homicide."[41] This court found "no legislative intent to specifically upgrade the penalties given for reckless vehicular homicide by the 1978 enactment of the revised code."[42]

This court also noted that, in enacting the new second-degree murder statute, the legislature also lowered the mandatory minimum sentence from 15 to 5 years.[43] Given this reduction, this court stated, it was not clear whether the *Page* benchmark would remain a "typical" sentence under the current statute: "Both the lowering of the minimum term from fifteen to five years and the inclusion of reckless homicide as second degree murder may alter the 'typical' sentence."[44]

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[39] *Pears II*, 698 P.2d at 1202 n.9. (citing *Page v. State*, 657 P.2d 850 (Alaska App. 1983), and explaining that defendant was originally charged with first-degree murder for "stabbing, tying up victim, leaving victim to die" and sentenced to 99 years). The *Page* opinion does not state under what theory he was convicted, but the conviction was a lesser included offense of first-degree murder. *Page*, 657 P.2d at 851.

[40] *Pears II*, 698 P.2d at 1202 n.9 (citing *Faulkenberry v. State*, 649 P.2d 951 (Alaska App, 1982), and explaining that defendant had "longstanding compulsion to set fires," was convicted of first degree arson and second degree homicide, and sentenced to 60 years); *see also Faulkenberry*, 649 P.2d at 952.

[41] *Pears II*, 698 P.2d at 1202.

[42] *Id.* at 1203.

[43] *Id.* at 1202-03.

[44] *Id.* at 1203.

The *Pears* court then compared the 20-year composite sentence in that case with prior manslaughter sentences.[45] The court determined that, while Pears's conduct was comparable to that of those defendants, "his record of prior offenses is better than all of them" but "his sentence is substantially greater than any imposed."[46] It concluded, "This disparity is, in our view, unjustifiable."[47]

3. This court has recognized a sentencing court may be unduly or improperly influenced by unnecessarily detailed, emotional, and not particularly relevant information about a crime victim.

In *Sandvik v. State*,[48] the defendant, who was convicted of manslaughter for striking a 15-year-old bicyclist while he was driving under the influence of alcohol, challenged the inclusion of detailed information about the victim in his presentence report; the report "included information about the deceased, her school activities,

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[45] *Id.* at 1203 & n.13 (considering "most severe sentence" imposed in *Sandvik v. State*, 564 P.2d 20 (Alaska 1977); "lengthy" sentences imposed in *Rosendahl v. State*, 591 P.2d 538 (Alaska 1979); *Layland v. State*, 549 P.2d 1182 (Alaska 1976); and *Gullard v. State*, 497 P.2d 93 (Alaska 1972); "substantial" sentences imposed in *Clemans v. State*, 680 P.2d 1179 (Alaska App. 1984); *Godwin v. State*, 554 P.2d 453 (Alaska 1976); and *Bishop v. State*, 573 P.2d 856 (Alaska 1978); and "most lenient" sentences imposed in *State v. Lamebull*, 653 P.2d 1060 (Alaska App. 1982); *State v. Lupro*, 630 P.2d 18 (Alaska App. 1981); and *Pena v. State*, 664 P.2d 169 (Alaska App. 1983)).

[46] *Id.* at 1203. This court continued, "It cannot be explained by the increase in maximum sentences available that accompanied the 1978 redefinition of second degree murder, because none of the sentences in the above cases imposed an unsuspended term of the twenty year maximum then available." *Id.* at 1204.

[47] *Id.* This court's caution in *State v. Wentz*, 805 P.2d 962, 966 n.5 (Alaska 1991), against extending the holding or dicta of *Pears* beyond that case related to the specific sentence recommended by a majority of the *Pears* court, not the court's broader discussion of second-degree murder sentencing.

[48] 564 P.2d 20 (Alaska 1977).

exemplary character, plans for the future and the reaction of her parents to her tragic death."[49]

This court acknowledged that a sentencing court needed "basic information pertaining to the victim or victims of the crime" in order to "accomplish the full panoply" of sentencing goals.[50] But it also concluded that portions of the victim information contained in Sandvik's presentence report were "unnecessarily detailed, emotional, and not particularly relevant."[51]

The sentencing court, however, expressly disclaimed reliance on this information in imposing sentence.[52] This court determined that Sandvik's sentencing proceeding was not "rendered defective" by the inclusion of the improper information, concluding that "the sentencing court was not unduly or improperly influenced by the material complained of."[53]

C. The court of appeals applied this court's precedent in vacating Graham's sentence and remanding for resentencing.

Consistent with this precedent, the court of appeals identified four legal errors in the trial court's analysis of Graham's case,[54] and it concluded that Graham's

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49 *Id.* at 21.

50 *Id.* at 23.

51 *Id.* at 24.

52 *Id.*

53 *Id.*

54 *Graham v. State*, 440 P.3d 309, 319 (Alaska App. 2019).

resentencing should be conducted by a different judge.[55] These rulings were not erroneous, and this court should affirm the court of appeals' opinion.

1. The court of appeals preserved Graham's right to an individualized sentencing determination without reference to an inapplicable benchmark.

a. The court of appeals correctly set out the governing framework for consideration of Graham's sentence.

In advance of sentencing, the state filed a sentencing memorandum that characterized Graham's crime as DUI homicide, compared his crime to other vehicular homicides, both murders and manslaughters, and compared his crime to cases in which only one person was killed. [Exc. 26] In its sentencing comments to the court, the state highlighted the harm caused by drunk driving, characterized the proceeding as a sentencing "for the more serious offense of murder or manslaughter, in connection with drunk driving," spoke of "DUI fatalities," and compared Graham's conduct to other DUI homicide cases. [Tr. 61, 67-73] And in imposing sentence, the court, without objection by the state, characterized Graham's offense as "vehicular homicide" and compared his crime to other DUI vehicular homicides, including homicides in which only one person was killed. [Tr. 110-11]

This characterization of Graham's offense as vehicular homicide, which the court of appeals repeated in its opinion, reflects this court's long-standing recognition of vehicular homicide as a unique subset of reckless homicide.[56] The state, however, argues on appeal that this comparison gives "the misleading

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55 *Id.* at 328.

56 *See supra* Part B.1.

impression that Graham's sentence was extraordinarily severe and unprecedented in its length" and that it allowed the court to wrongly compare Graham's sentence to sentences imposed for manslaughter.[57] [Pet. Br. 9-11]

Graham's sentence was unprecedented.[58] And the court of appeals did not rely on the comparisons to manslaughter sentences to hold that the sentencing court was clearly mistaken. Rather, it noted those prior sentences provide background for reviewing the sentencing court's legal analysis.[59]

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[57] The state also suggests that "relatively recent cases addressing manslaughters involving drunken driving" suggest Graham's sentence was "not especially severe." [Pet. Br. 11] But in doing so, the state omits any information regarding the defendant's background, an important consideration in imposing sentence. Tickett, who was 19 years old at the time of his offense, "had prior contact with the juvenile court, as well as convictions for consuming alcohol as a minor and violating the conditions of his release" and, while the instant charges were pending, "committed another, unrelated felony." *Tickett v. State*, 334 P.3d 708, 713 (Alaska App. 2014). Bottcher, who tried to bribe a witness, had no prior DUI convictions but had a 40-year history of alcoholism and admitted to routinely driving while intoxicated. *Bottcher v. State*, 2009 WL 226010, *1 (Alaska App. Jan. 28, 2009) (unpublished). And Tice "had multiple criminal convictions," including two prior felonies, various probation violations, and convictions for driving while intoxicated. *Tice v. State*, 199 P.3d 1175, 1177 (Alaska App. 2008).

[58] Indeed, the sentencing court itself recognized the extraordinary nature of the sentence it was imposing. The court stated, "I intend to render a sentence that, I believe, will be the highest sentence rendered in Alaska history for conduct of this type." [Tr. 117] The court added, "I think it will be the highest sentence in a case where you're talking about a first conviction with no prior criminal record and the – where the vehicle wasn't deliberately being used as a weapon to – in an attempt to harm others." [Tr. 117-18]

[59] *See Graham*, 440 P.3d at 313-14.

b. Because the *Page* benchmark was based on the typical sentence imposed for intentional assaults, it historically has not been applied in cases involving unintentionally assaultive conduct.

Sentencing benchmarks provide a starting point for a trial court's individualized imposition of sentence.[60] By their very nature, the guidance a benchmark provides depends on how closely the conduct of the defendant being sentenced approximates the historical conduct that provided the basis for the benchmark.[61] Even when the defendant's conduct closely hews to the conduct through which the benchmark was identified, courts must be careful to not apply the benchmarks inflexibly so as to undermine the individualized sentencing process.[62]

The state recognizes the peril of a court relying too heavily on benchmarks [Pet. Br. 12], but it nevertheless argues that the sentencing court properly looked to the *Page* benchmark in imposing Graham's sentence. [Pet. Br. 15-20] But the *Page* benchmark only represents the historical benchmark for second-

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[60] *State v. Hodari*, 996 P.2d 1230, 1237 (Alaska 2000) ("Benchmarks are not to be used as inflexible rules but rather as historically-based starting points for analysis in individual cases.").

[61] *See id.*; *cf. State v. Wentz*, 805 P.2d 962, 966 (Alaska 1991) ("Whether a particular offense is sufficiently serious to justify placing it in the upper rather than lower end of the sentencing range, however, cannot be determined with mathematical certainty. Such questions are not easily resolved by resort to 'bright line' rules or pronouncements concerning the 'correct' sentence to be applied under varying factual circumstances.").

[62] *Hodari*, 996 P.3d at 1235 (approving court of appeals' statement that "the proper use of benchmarks was as 'starting points' in the appellate review of sentences, not as 'hard and fast limits,' nor as rigid rules which 'can only be deviated from when certain specific, limited exceptions are established' ") (quoting *Williams v. State*, 809 P.29 931, 933 (Alaska App. 1991)).

degree murder sentences that resulted from intentionally assaultive conduct.[63] And as this has court recognized, a DUI reckless homicide is "not comparable" to the homicides that provided the basis for the *Page* benchmark.[64]

The *Pears*'s distinction between intentionally assaultive and unintentionally assaultive conduct has governed sentencing of second-degree murder for the past 35 years. The court of appeals applied this distinction, explaining that it has historically determined whether the *Page* benchmark is an appropriate reference in a given second-degree murder case.[65]

Instead of applying this distinction, the sentencing court believed that, under *Felber v. State*,[66] the *Page* benchmark was "the starting point for [its] analysis" [Tr. 111], and the state argues that the sentencing court was correct. [Pet. Br. 16-17] Felber was convicted of DUI extreme-indifference murder after using his vehicle

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[63] *See Pears II*, 698 P.2d 1198, 1202-03 (Alaska 1985). This court noted that the benchmark was developed from cases prosecuted before the inclusion of reckless homicide within the offense of second-degree murder. *Id.* at 1203 & n.12.

[64] *Id.* at 1202.

[65] In doing so, the court cited to prior cases, *Gustafson v. State*, 854 P.2d 751 (Alaska App. 1993), and *Philips v. State*, 70 P.3d 1128 (Alaska App. 2003), that also applied the distinction. *See Graham,* 440 P.3d at 320. [Pet. Br. 15-16] *Gustafson* and *Phillips* interpret the court's decision in *State v. Krieger*, 731 P.2d 592 (Alaska App. 1987), which relied on this court's precedent to distinguish between intentional and unintentional homicides. *See Krieger*, 731 P.2d at 595-96 (citing *Pears v. State*, 698 P.2d 1198, 1205 n.5 (Alaska 1985)). In *Gustafson*, the court of appeals clarified that *Krieger*'s discussion of "unintentional homicides" meant "criminal homicides that do not result from intentional assaults," as all theories of second-degree murder involve unintentional killings. *Gustafson*, 854 P.2d at 766. And *Phillips* discussed *Gustafson* and *Krieger*, noting that "*Page* continues to be the benchmark sentencing range for second-degree murders arising from intentional assaults." *Phillips*, 70 P.3d at 1144.

[66] 243 P.3d 1007 (Alaska 2010).

as a weapon; the court of appeals upheld Felber's sentence, stating that "that the circumstances of Felber's case would support a sentence substantially more severe than the *Page* benchmark range."[67] But as the court of appeals explained in *Graham*, it was Felber's intentional conduct that distinguished his conduct from unintentional assaults and warranted reference to the *Page* benchmark.[68] That reference thus applied the distinction between unintentional and intentional assaults first recognized in *Pears*: "*Felber* did not represent a change from these principles. Rather, our decision in *Felber* was an application of these principles."[69]

This distinction between intentional and unintentional assaultive conduct does not "demote[] the seriousness" of extreme-indifference murders. [Pet. Br. 17-18] Rather, applying *Page* to unintentionally assaultive conduct artificially increases a sentencing court's starting point. This is contrary to both this court's admonition against rigid application of formulaic benchmarks[70] and the legislature's intent in adding reckless conduct to the second-degree murder statute.

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67 *Id.* at 1013. Among other things, Felber, when "seemingly trapped" by police, intentionally rammed multiple police and civilian vehicles in order to escape, and continued to apply force to the gas pedal after running a red light and striking a vehicle in the intersection. *Id.* at 1008-09. Felber received a sentence of 25 years for his second-degree murder conviction. *Id.* at 1013.

68 *Graham*, 440 P.3d at 320.

69 *Graham*, 440 P.3d at 320. In the context of unintentionally assaultive second-degree murders, the court of appeals has "held that the *Chaney* sentencing criteria can be satisfied by a sentence below the *Page* benchmark – even when the consequences of the defendant's drunk driving are severe." *Graham*, 440 P.3d at 320 (citing *Puzewicz v. State*, 856 P.2d 1178 (Alaska App. 1993) (upholding "sentence of 13 years to serve for a double second-degree murder stemming from a drunk-driving accident")). The state does not address this aspect of *Graham*.

70 *See supra* notes 62-64 and accompanying text; *see also* Pet. Br. 12.

In *Pears*, this court found that the addition of reckless homicide to the second-degree murder statute did not reflect a legislative intent "to specifically upgrade the penalties given for reckless vehicular homicide."[71] [Pet. Br. 17-18] In the 35 years since that finding, the legislature has twice amended AS 12.55.125(b), which sets for the sentencing range for second-degree murder.[72] But those amendments do not reflect a concern with sentencing range applicable to reckless vehicular homicides.[73]

It is true that, by including both categories of conduct within AS 11.41.110, the legislature has equated the seriousness of extremely reckless homicides with homicides that result from intentionally assaultive conduct. [Pet. Br. 17-18] But this does not mean the legislature intended the *Page* benchmark to apply to reckless homicides under the second-degree murder statute. Indeed, it could not have – the legislature enacted AS 11.41.110(a)(2) five years before the *Page* benchmark was identified.[74] Rather, the more appropriate inference from this

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[71] *Pears II,* 698 P.2d 1198, 1202-03 (Alaska 1985).

[72] *See* SLA 1999, ch. 65, § 1 (increasing mandatory minimum from 5 years to 10 years); SLA 2016, ch. 36 § 87 (increasing mandatory minimum from 10 years to 15 years).

[73] The legislative history underlying these changes does not reflect a specific legislative concern with vehicular homicides. *See generally* Senate Bill (SB) 91, Twenty-Ninth Legislature – Second Session; SB 10, Twenty-First Legislature – First Session; *see also Joseph v. State*, 293 P.3d 488, 492 (Alaska App. 2012) (citing *Shea v. Dep't of Admin., Div. of Retirement and Benefits*, 267 P.3d 624, 633 n.33 (Alaska 2011) ("However, the legislature is presumed aware of pertinent court decisions when it amends a statute.").

[74] *Compare* SLA 1978 ch. 166, § 3 *with Page v. State*, 657 P.2d 850 (Alaska App. 1983).

equivalency is that the *Page* benchmark does not actually represent the "historical starting point" for imposing sentence under all theories of AS 11.41.110.[75]

A benchmark's usefulness necessarily depends on it being representative of the typical sentence imposed for a given offense. As this court recognized in *Pears*, "[v]irtually all the sentences reviewed by the court of appeals in establishing [the *Page*] benchmark were imposed prior to the January 1, 1980 effective date of the current statute," and the prior statute did not criminalize reckless behavior as second-degree murder.[76] For this reason, to the extent the court of appeals erred in its *Page* analysis in *Graham*, it did so by affirming the continued validity of *Page* to intentionally assaultive conduct – not, as the state suggests, by failing to apply *Page* to unintentionally assaultive conduct.[77]

Finally, the fact that the *Page* benchmark does not apply to Graham is consistent with *Jeffries*. [Pet. 18-19] *Jeffries* challenged the sufficiency of the evidence to support a second-degree murder conviction for a DUI reckless homicide;[78] it did not address Jeffries's sentence. Even if *Jeffries* recognizes "that

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[75] *Pears II*, 698 P.2d at 1203 (observing that "the inclusion of reckless homicide as second degree murder may alter the 'typical sentence' of twenty to twenty-five years imposed for second degree murder imposed under the prior statute").

[76] *Id.* at 1201-02, 1203 n.12

[77] The state contends that *Walsh v. State*, 677 P.2d 912 (Alaska App. 1984), provides an appropriate analysis for determining the seriousness of a second-degree murder charge. [Pet. Br. 18] But the state argues that the *Page* benchmark applies to Graham's case, and it does not explain how a *Walsh* analysis fits with *Page*. [Pet. Br. 18] Nor does it explain how adopting a standard applicable to only one theory of second-degree murder would ensure that all theories of murder are treated as equally serious. [Pet. Br. 17]

[78] *Jeffries v. State*, 169 P.3d 913, 914 (Alaska 2007).

an extreme indifference homicide can be equally as serious and worthy of societal condemnation as a murder arising from intentionally assaultive conduct" [Pet. Br. 19], the sentence Jeffries received – 13 years to serve for convictions for second-degree murder, driving while intoxicated, and driving with a suspended license[79] – confirms that the *Page* benchmark does not reflect the "typical sentence" imposed for second-degree murder under AS 11.41.110.

2. The court of appeals recognized the sentencing court improperly aggravated Graham's sentence because of conduct common in DUI homicides.

At sentencing, the state proposed several aggravating factors. [Exc. 19-23] One of the state's proposed aggravating factors was (c)(6): "the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices,"[80] and the sentencing court concluded this factor applied in Graham's case.[81] The court of appeals, however, noted that the risk Graham's conduct

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[79] *See* At. Br. 10, *Jeffries v. State*, Case Nos. A-8167, A-8177 (Jan. 10, 2003). Although the state noticed a cross-appeal challenging the sentence imposed on Jeffries as too lenient, it abandoned that appeal. *See* Notice re: Cross-Appeal, *State v. Jeffries*, Case No. A-8177 (April 18, 2003); Order, *State v. Jeffries*, Case No. A-8177 (April 22, 2003).

[80] AS 12.55.155(c)(6). The state also proposed aggravating factor (c)(4) (that the defendant employed a dangerous instrument in furtherance of the offense) and (c)(10) (that the conduct constituting the offense was among the most serious conduct included in the definition of the offense). [Exc. 20] The court found the (c)(4) aggravator applied "in virtually all 2nd degree murder cases" such that it was "not really a distinguishing factor in this case." [Tr. 108] And it found that Graham's conduct was "exactly the type of conduct that the Court of Appeals was talking about as falling within that mainstream of 2nd degree murder cases" such that the (c)(10) aggravator did not apply. [Tr. 109]

[81] The sentencing court stated:

presented did "not distinguish [his] case from the typical drunk-driving homicide."[82] It stated that, "[i]n the absence of evidence that Graham's drunk driving created an *atypical* risk of harm compared to the actions of other drunk drivers, the judge should have given this factor no weight."[83]

Having been convicted of two unclassified felonies, Graham was not subject to presumptive sentencing. As such, the state's proposed aggravating factor applied only by analogy, available to the parties and court as "points of reference" regarding "how a particular defendant's crime should be viewed in comparison to a typical murder."[84] That is, a court analyzing a proposed aggravating factor in a murder case does not simply assess the nature of the defendant's conduct and then make the legal determination whether that conduct falls within the statutory aggravating factor, the analysis that applies in the context of presumptive sentencing.[85] Rather, the court must also determine whether the existence of that factor differentiates the case from the typical murder case.

Here, the sentencing court acknowledged the standard it should apply in evaluating the state's proposed aggravators [Tr. 107], but it analyzed the proposed

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> [T]here were several losses of control or near collisions reported by witnesses before the collision. Some of these witnesses had passengers with them, there were a number of people on the roadway that were endangered, and I think that's essentially conceded.
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> [Tr. 108]

82 *Graham v. State*, 440 P.3d 309, 321 (Alaska App. 2019).

83 *Id.* (emphasis in original).

84 *Allen v. State*, 56 P.3d 683, 684 (Alaska App. 2002).

85 *Michael v. State*, 115 P.3d 517, 519 (Alaska 2005).

(c)(6) aggravator as in presumptive sentencing cases – it considered the circumstances of Graham's conduct, made factual findings regarding the danger it presented, and decided that those factual findings supported the conclusion that Graham's conduct presented an imminent risk to three or more people. [Tr. 108] It did not determine whether the risk presented by Graham was greater than that typically presented by a person who acts with extreme indifference.

The state argues that the sentencing court properly relied on this factor because "Graham's driving and intoxication did not create just the hypothetical risks to other drivers, passengers, bicyclists, and pedestrians that is inherent in all drunk driving" but instead presented "real and substantial" risks. [Pet. Br. 22-23] But the state's argument relies on factual findings the sentencing court did not make. The court did not find Graham's conduct approached " 'intentional gravely dangerous driving conduct.' " [Pet. Br. 22] In support of the aggravator, the court only found that Graham "lost control" several times or had several "near collisions." [Tr. 108] The court also did not make findings about how Graham's blood alcohol content affected the risk presented by his driving. [Pet. Br. 23] Indeed, the trial court did not even mention Graham's intoxication level when it found the (c)(6) aggravator to apply.

Even if the state is correct that the facts of this case could justify application of the (c)(6) aggravating factor, the sentencing court's findings were, as the court of appeals observed, insufficient to support its application to Graham's sentence. A person who is convicted of second-degree murder under AS 11.41.110(a)(2) has engaged in conduct "in which the objective risk of death or serious

physical injury posed by the defendant's actions is 'very high.' "[86] And such conduct routinely places many people at risk.[87] Absent specific findings regarding how Graham's conduct was atypical, it was improper for the (c)(6) aggravating factor to be given any weight at Graham's sentencing.

3. The court of appeals ensured that Graham would be sentenced consistent with this court's longstanding understanding of community condemnation.

The court of appeals explained that, in imposing Graham's sentence, the sentencing court misapplied the "community condemnation/reaffirmation of societal norms" sentencing factor.[88] Given this court's precedent regarding community condemnation, the court of appeals was correct that the sentencing court misunderstood this sentencing goal when sentencing Graham.

In *State v. Chaney*,[89] this court identified the goal of "community condemnation, or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves" as an appropriate sentencing consideration.[90] That goal, however, does not authorize a court to consider societal anger or indignation at a particular defendant or with respect to a given case when imposing sentence, nor does it allow a court to use the goal of community condemnation to increase the severity of a defendant's sentence based on the victim's status, characteristics, or

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86 *Jeffries v. State*, 169 P.3d 913, 917 (Alaska 2007).

87 *See id.* (describing fact patterns of cases in which intoxicated defendants were convicted of second-degree murder).

88 *Graham v. State*, 440 P.3d 309, 321-24 (Alaska App. 2019).

89 477 P.2d 441 (Alaska 1970).

90 *Id.* at 447.

future potential. Instead, community condemnation allows a court to consider the degree of harm to the victim from the defendant's actions, which ensures the defendant's sentence meets societal notions of just punishment.[91]

This court's explanation of the community condemnation sentencing goal distinguishes the analysis of harm to a victim in a vehicular homicide from the analysis of harm to a victim in a case seeking civil damages from a vehicular homicide. In a civil case, where the remedy is financial, the degree of harm suffered by a victim is necessarily predicated on that victim's identity – her age, current and future earning potential, and the collateral pain and suffering her family experienced. These victim-specific characteristics are considered to quantify the financial harm caused by the defendant's acts.

In a criminal case, however, the degree of harm to a victim in a vehicular homicide does not vary based on the victim's individual characteristics. Rather, the harm in every vehicular homicide is the most serious harm recognized by the criminal justice system: the loss of a life. In the criminal justice system, that harm is the same even though vehicular homicides cause varying levels of collateral harm and public reaction. Some vehicular homicides kill victims with scores of friends and family who voice the trauma the death has caused, and others kill victims with few, if any, loved ones able to articulate what the victim's death means to them. And some vehicular

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[91] *See Leuch v. State*, 633 P.2d 1006, 1012-13 (Alaska 1981); *Kelly v. State*, 622 P.2d 432, 433-36 (Alaska 1981). This goal allows a court to impose a substantial term of imprisonment even when the goals of isolation, rehabilitation, and deterrence do not require such a sentence. *See Leuch*, 633 P.2d at 1013.

homicides generate public outrage, while others go unnoticed. But a sentencing court considering the *Chaney* factor of community condemnation cannot consider collateral harm and public reaction in determining whether a given sentence ensures societal notions of just punishment are met. That is, a strong response to a vehicular homicide does not correlate to the degree of harm to the victim.[92]

For this reason, the state is incorrect to suggest that "[a] community's outrage at a particularly disturbing crime is integrally related to the seriousness of that crime." [Pet. Br. 28] Criminal justice standards explain that "[s]entencing determinations should be free from the pressures of community animus toward offenders."[93] Indeed, permitting a court to vary a sentence based on the collateral harm or public reaction to a particular crime risks disparate sentencing of defendants who are similarly situated with respect to other sentencing goals and who cause equal harm to the victims of their crimes.[94]

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92 *Kelly*, 622 P.2d at 435 (explaining "that the goal of community condemnation is distinct from retribution").

93 AM. BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE – SENTENCING, § 18-6.4(b), at 227, 230 (3d. ed. 1994) (providing that "sentencing court should not select a sanction of total confinement because of community hostility to the offender" and explaining that "[s]ome notorious or highly publicized offenses may excite public outrage, which in turn may interfere with the sentencing courts' ability to determine sentences in a calm and reflective way").

94 *See, e.g.*, Edward L. Glaeser & Bruce Sacerdote, *Sentencing in Homicide Cases and the Role of Vengeance*, 32 J. LEGAL STUD. 363 (June 2003) (stating that data from Bureau of Justice Statistics demonstrates that "victim race, age and criminal record still determine sentence length even when the victim was killed in a vehicular homicide;" "[d]rivers who kill black victims get substantially shorter sentences," and "[d]rivers who kill women get substantially longer sentences"). Moreover, such variance creates a risk of arbitrary punishment, which violates the

As the court of appeals explained, the sentencing court misunderstood this.[95] The sentencing court's analysis demonstrates that it considered the goal of community condemnation under that term's lay definition, not as the legal concept this court's precedent requires. The court repeatedly referred to the outrage in the community, its intent to "be a voice" for that outrage, and the increased condemnation of Graham's actions due to identity of his victims.[96] [Tr. 116-17]

The state suggests that "[r]ead in context," the sentencing court properly applied community condemnation and determined that Graham's "two second-degree murders were so serious as to require a substantial sentence," notwithstanding Graham's remorse, positive prospects for rehabilitation, and lack of future risk to the public. [Pet. Br. 29] But the court's findings on community condemnation reveal a fundamental misunderstanding of the sentencing goal. "Improper application of the

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constitutional prohibitions on cruel and unusual punishment. *See* UNITED STATES CONST. amend. VIII; XIV; ALASKA CONST. art. I, § 12.

[95] *Graham v. State*, 440 P.3d 309, 323-24 (Alaska App. 2019). The sentencing court also misunderstood "reaffirmation of societal norms" to be a distinct goal from community condemnation. After it concluded its analysis of community condemnation, the court stated that "societal norms are also a consideration that I'm required to take into account." [Tr. 117] It then explained that "one of those norms is the principle that our penal system exists for the purpose of reforming criminal behavior, when that's possible to do." [Tr. 117] But reformation is a sentencing goal apart from reaffirmation of societal norms, and this court has explained that reaffirmation of societal norms is another description for community condemnation. *Leuch v. State*, 633 P.2d 1006, 1012-13 (Alaska 1981).

[96] The state suggests that it was the prosecutor, not the sentencing court, that misapplied the goal of community condemnation. [Pet. Br. 28-29 & n.4] And while the court of appeals did discuss the prosecutor's improper sentencing arguments, *id.* at 323-24, it also explicitly discussed the sentencing court's comments. *Id.* Those comments suggest the court adopted, at least in part, the state's misdirected arguments.

Chaney criteria" requires a remand for resentencing[97] regardless whether the sentence imposed is clearly mistaken.[98]

4. The court of appeals applied this court's caution regarding the deterrent effect provided by a marginal increase in sentence.

The sentencing court stated that it believed imposing the most severe sentence ever imposed in Alaska for a defendant similarly situated to Graham served the goal of general deterrence: "[T]his is the type of situation where some people or their loved ones, their friends, are likely to weight the costs and benefits of calling a cab rather than driving as they realize lengthy prison terms are the other side of the balance when you're deciding if you're going to walk out the door." [Tr. 116] Relying on this court's decision in *Pears*, the court of appeals explained that the sentencing court misapplied the goal of general deterrence in considering Graham's sentence.[99]

In *Pears*, this court cited commentary by the American Bar Association (ABA) when it observed that "[t]he easy assumption that the benefits of deterrence will continue to increase with the severity of a sentence is not necessarily true."[100] The

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97 *Kelly*, 622 P.2d at 438.

98 The state mistakenly suggests the court of appeals' opinion represents a determination that the sentencing judge "abuse[d] his broad discretion in determining that general deterrence and community condemnation were the most important sentencing goals in Graham's case." [Pet. Br. 30] But the court of appeals concluded the sentencing court made legal errors in analyzing these sentencing goals. On remand and under a proper analysis, a sentencing court is free to conclude that general deterrence and community condemnation remain the most important sentencing goals in Graham's case. *See also infra* Part C.5.d.

99 *Graham*, 440 P.3d at 324-327.

100 *Pears II*, 698 P.2d 1198, 1205 (Alaska 1985) (citing ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures § 18-2.5 commentary at 18.120 (Approved Draft 1978)).

state argues that the cited ABA commentary concerned individual deterrence, not general deterrence. [Pet. Br. 29-30] But the commentary quoted by this court explicitly speaks of general, not individual, deterrence, and the surrounding commentary confirms the emphasis is on general deterrence.[101]

The state observes that the ABA's most recent sentencing standards continue to recognize deterrence as an appropriate sentencing consideration. [Pet. Br. 30] But the *Graham* court did not suggest or hold that deterrence was an inappropriate sentencing consideration; it concluded the sentencing court made legal errors in analyzing deterrence as it applied to Graham.[102]

Graham's plea agreement provided for a minimum sentence – 26 years to serve – that would have been more severe than any sentence previously imposed for a similarly situated defendant. The sentencing court did not explain how the

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[101] *See* ABA STANDARDS ON CRIMINAL JUSTICE, SENTENCING ALTERNATIVES & PROCEDURES, § 18-2.5, at 37-38 (Approved Draft 1978). For instance, the commentary observes that "[b]oth deterrence and incapacitation are legitimate goals of sentencing, which can, however, easily lead to the justification of extreme deprivations of liberty." *Id.* at 37. It then explains that the deterrence it is speaking to is general deterrence: "For example, a severe exemplary sentence of twenty to thirty years for a crime that is reaching epidemic proportions in a given community might be imposed in the belief that it would have a significant preventative effect on potential offenders." *Id.* And later, the commentary discusses the risk to the goal of fair sentencing posed by improper reliance on general deterrence. *Id.* at 43-44 (cautioning that use of confinement for general deterrence "raises troubling issues about the possible use of the defendant as an expedient scapegoat for deterrent purposes based possibly on little more than the notoriety or public attention the case has received" and noting that serious consideration due to goal of sentencing equality "would be infringed if material disparities in confinement could be justified only on the grounds that a defendant is 'particularly suited to provide' deterrence through the imposition of a severe exemplary sentence").

[102] *Graham*, 440 P.3d at 324-27.

marginal increase in severity between the plea agreement's minimum sentence and the sentence imposed served general deterrence. The sentencing court's reliance on the speculative marginal benefit of increasing the sentence beyond that historically imposed for similar conduct risked unjustified sentencing disparity.[103]

Indeed, the current ABA sentencing standards provide that a sentence "should be no more severe than necessary to achieve the societal purposes for which they are authorized."[104] And the commentary explains that application of this principle "depends to a great extent on the presence or absence of data on how well the sentencing system is serving intended objectives."[105]

The sentencing court cited no data to support its belief that the sentence it was imposing would have any deterrent effect,[106] and the state appears to suggest that the court's recognition that its sentence would not get the hoped-for effect, but might get a lesser hoped-for effect, rendered the sentence appropriate. [Pet. Br. 30] The court of appeals pointed out that Alaska's data regarding drunk driving, generally,

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[103] *Id.* at 326-27 ("But the question here is whether sentencing judges can realistically hope to put a stop to drunk-driving homicides by imposing an additional 10 or 12 years on top of the sentencing range that already applies to this crime under this Court's prior decisions. If not, then the added years in Graham's case simply create an unjustified disparity in sentencing.").

[104] AM. BAR ASS'N STANDARDS ON CRIMINAL JUSTICE, SENTENCING, § 18-2.4, at 28 (3d. ed. 1994).

[105] *Id.*, cmt. at 30. The commentary continues, "In these and other inquires about necessary levels of severity, however, our present empirical knowledge is often incomplete and can even appear paradoxical." *Id.*

[106] The court stated: "I think I agree that we never get the deterrent effect we hope to get but any deterrent effect is an improvement over the situation and I think we're likely to get some." [Tr. 116]

and DUI homicides, specifically, suggests that sentence length has little deterrent effect,[107] and the question for a reviewing court is whether a sentence serves the goals of sentencing, not whether the court intended the sentence do so.

5. The court of appeals remanded Graham's case for resentencing before a new judge because the sentencing court received unnecessarily detailed, highly emotional, and not particularly relevant information that improperly affected its decision.

Graham was sentenced before "a packed courtroom" with "people in the hallway." [Tr. 81] The sentencing court granted five applications for media coverage, permitting, among the applicants, four requests for television coverage, two for still camera coverage, and one each for mobile, audio, and video coverage. [R. 86-90]

Graham's presentence report contained 20 victim impact letters from the girls' friends and family. [Exc. 222-64, 279-80, 287-88, 302] Through these letters, the sentencing court saw pictures of McPheters and Durr, including collages created by their friends [Exc. 224-25]; it was presented with the items McPheters had on her person when she was killed, which, as her mother wrote, "tells about the kind of person she was" [Exc. 224, 226]; it had a timeline of McPheters's life from birth, detailing her

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[107] The state argues that "the court of appeals cherry-picked statistics that are not part of this record, that were compiled for other purposes, and that may not support is conclusion that longer sentences are ineffective for deterring drunk driving deaths." [Pet. Br. 30] The court of appeals did not conclude that longer sentences were ineffective in deterring conduct; it challenged the court's finding that a marginally longer sentence, well in excess of any historically imposed, are an effective deterrent. This distinction is important – the court of appeals did not preclude the court on remand from relying on actual evidence regarding the deterrent effects; it only precluded speculation. Moreover, the court's recitation of statistics was a direct response to the sentencing court's reliance on the information provided by Chief Mew. Given the emphasis on drunk driving statistics below, the court of appeals properly reviewed objective public information.

accomplishments and community recognition after death [Exc. 228-39]; and it reviewed an autobiography and resume written by McPheters, stating that her "goal in life is to make someone happy every day." [Exc. 241-43] The court also learned about Durr's transformation from a shy girl to "a flower ready to bloom" in elementary school [Exc. 250]; and it read about how Durr was immune to peer pressure "and wanted to help others by volunteering and being a true friend." [Exc. 288]

At the start of sentencing, the sentencing court granted, over Graham's objection, the state's request to admit victim impact testimony from two police officers and a representative of the Office of Victims' Rights (OVR) and to admit two memorial videos. [Tr. 11-16] Two police officers presented their victim impact statements, and then the state screened the two memorial videos.

McPheters's video was 17:55 minutes long and titled, "Brooke's Tribute." It contained a roughly chronological photographic history of McPheters's life, totaling approximately 214 pictures. It touched on McPheters's infancy and toddler years, followed her on vacation with her family, and watched her grow into a young woman. The audio began with a voicemail message McPheters left her mother shortly before her death, transitioned to music, and closed with the sounds of crashing ocean waves and birds chirping. The penultimate image was word art reading, "I must be a mermaid. I have no fear of depths and A great fear of shallow living." The video closed with a title car reading, "Forever Missed Never Forgot." [Exc. 182-83]

Durr's video was 13:55 minutes long and titled, "Jordyn Durr." It contained approximately 165 pictures, some of which were shown multiple times. The video depicted Durr's life from infancy, showing her as a young child holding her

brothers as infants and together with her brothers under a title card reading "Brotherly Love." Pictures of Durr as a baby and a toddler began midway through the video with the title, "Daddy's Rock and Roll Baby Jordyn." Like McPheters's video, the montage was accompanied by music throughout. [Exc. 182-83]

McPheters's mother and father and Durr's mother then presented their victim impact statements. [Tr. 37-45] A representative from the OVR then spoke "on behalf of" McPheters's brother "and some extended family members of the Durrs and McPheters."[108] [Tr. 45-47] At the conclusion of the state's evidence, the court recessed for 10 minutes. [Tr. 47] Upon returning, the court heard from Graham's stepmother and father and from Graham himself. [Tr. 52-61] The court imposed its sentence immediately after hearing the parties' sentencing arguments. [Tr. 61-128]

a. The sentencing court improperly relied on the victim impact statements presented by two police officers.

As the court of appeals held, the sentencing court allowed two police officials to present statements under "the mistaken rationale that these statements qualified as 'victim impact' statements under AS 12.55.023(b)."[109] The officers did not

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[108] The OVR lawyer spoke briefly regarding the effect of the crime on McPheters's brother [Tr. 45], but the majority of her statement urged the court to make an example of Graham, telling the court that "the families, the community ask you to hold [Graham] to the highest account and responsibility you can, to change what's happening in this community." [Tr. 46-47] She added, "Do not let these girls die in vain. Do not let any other victims who come in the path of a drunk driver be hurt or killed without there be a clear message from this Court that's an extension of the community that we will not tolerate it." [Tr. 47]

[109] *Graham v. State*, 440 P.3d 309, 328 (Alaska App. 2019).

qualify as statutory victims,[110] and the information they presented was not relevant to the court's sentencing decision.

Sergeant John MacKinnon was the officer tasked with notifying the two families of the girls' deaths. He told the court that "[t]he process of notifying the families has been the single-most difficult act [he had] ever had to do in [his] life." [Tr. 20] MacKinnon characterized Graham was living a "bankrupt life" and as "an outcast from society." [Tr. 32]

Chief Mark Mew told the court that he could not "add a single word" to the information the court had received about the impact of this tragedy. [Tr. 33] He instead focused his comments on other citizens who had been killed by drunk driving that year and explained that the police "need the help of the courts" to curb drunk driving. [Tr. 35] He explained that Graham's sentencing provided such an opportunity, noting that "the circumstances of this particular tragedy, the age and innocence of the girls, what they were doing, and when they were doing it, have galvanized the city." [Tr. 35]

The state does not directly challenge the determination by the court of appeals that these statements were improper, and the court was correct that the information the statements contained in the improperly admitted statements was not particularly relevant to the sentencing court's decision.[111]

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110 *See* AS 12.61.900(3); AS 12.55.185(19).

111 *Graham*, 440 P.3d at 328.

b. As presented, the two memorial videos were improper under *Sandvik*.

1. There is no affirmative right to screen a memorial video at sentencing.

The Alaska Constitution affords crime victims "the right to be heard, upon request, at sentencing,"[112] and the Alaska statutes provide that the right to be heard includes "the right to present a written statement, sworn testimony, or an unsworn oral presentation."[113] The state alternately argues that the right to present an unsworn oral statement "does not preclude the use of video images, photographs, music, or the

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[112] ALASKA CONST. art. I, § 24. This right extends to certain family members of a murder victim. AS 12.55.185(19)(c).

[113] AS 12.61.010(a)(8); *see also* AS 12.55.023(b) (providing victim right to submit written statement and to "give sworn testimony or make an unsworn oral presentation to the court at the sentencing hearing"). The written statement, sworn testimony, or unsworn oral presentation

> may contain any relevant information including
>
> (1) an explanation of the nature and extent of physical, psychological, or emotional harm or trauma suffered by the victim;
>
> (2) an explanation of the extent of economic loss or property damage suffered by the victim;
>
> (3) an opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage; and
>
> (4) the recommendation of the victim for an appropriate sentence.

AS 12.61.015(b).

The statutory right to submit a written statement, to give sworn testimony, or to make an unsworn oral presentation predated the enactment of the victims' rights amendment to the state constitution. *Compare* SLA 1991, ch. 57 §§ 6, 10 *with* Legislative Resolve (LR) 58, Eighteenth Legislature, at § 2. The purpose of the amendment, however, was to imbue the preexisting statutory rights with constitutional stature equivalent to a defendant's rights. *See* Statement in Support, Ballot Measure 2, State of Alaska Official Election Pamphlet, at B-22 (Nov. 8, 1994).

presentation of a memorial video" and "include[s] the presentation of a memorial video." [Pet. Br. 35, 38] Graham agrees with the first premise, and but he disagrees with the second; the legislative history does not suggest any intent to create an affirmative right that could only be constrained upon a showing of manifest injustice.[114]

Alaska has defined a victim's right to be heard as including the right to submit a written statement, provide sworn testimony, or make an oral presentation. The plain language does not include video memorials, and the bill's sponsor did not envision the right to make an oral presentation to include the right to screen a video.[115] Legislative counsel,[116] the Department of Law,[117] the Alaska Network on Domestic

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[114] *See State v. Leon*, 132 P.3d 462, 465-67 (Idaho App. 2006) (construing constitutional and statutory provisions granting crime victim right to be heard "unless manifest injustice would result" to be broader than right to present sworn written or verbal statement and refusing "to define or limit this right in such a way as to preclude the use of video images or photographs to inform the court of the victim's personal characteristics to illustrate the emotional impact of a murder on the victim's family" except where video is "so prejudicial or inflammatory in its design or content that its consideration . . . would result in manifest injustice").

[115] *See* Sponsor Statement, Representative Dave Donley, Bill File for House Bill (HB) 100, House Health, Education, and Social Services Committee, Seventeenth Legislature (explaining bill was intended to increase victim participation "by allowing victims to make oral presentations to the court (current law only allows victims to submit written remarks to the judge which is a hardship for those victims who do not feel comfortable communicating in writing"); *see also* Statement of Rep. Dave Donley, Minutes for House Health, Education, and Social Services Committee, Seventeenth Legislature (March 25, 1991).

[116] *See* Sectional Analysis of CSHB 100, Memorandum from John B. Gaugine to Rep. Dave Donley, Bill File for HB 100, House Health, Education, and Social Services Committee, Seventeenth Legislature (March 20, 1991) (describing sections 6 through 9 as giving "a victim of a crime the right . . . to give sworn testimony or *to make an unsworn statement*") (emphasis added).

[117] *See* Letter from Margot O. Knuth, Assistant Attorney General, to Rep. Dave Donley, Bill File for HB 100, House Health, Education, and Social Services Committee, Seventeenth Legislature (Feb. 26, 1991) (describing sections 5 through

Violence and Sexual Assault,[118] and the Department of Health and Social Services[119] all understood the right to make an oral presentation to mean the right to make an unsworn statement.

At the only hearing on the bill, a member of the bill sponsor's staff responded to questions concerning the intent in enacting the provisions relating to sworn and unsworn testimony.[120] She explained that the purpose was to allow victims who do not feel comfortable expressing themselves in writing to speak in court "a lot

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8 as amending "existing laws (AS 12.55.023, AS 12.55.088) to *allow a victim to make an oral statement*, as well as or instead of a written statement to the court") (emphasis added).

[118] *See* HB 100 Victim's Rights, Position Paper, Alaska Network on Domestic Violence and Sexual Assault, Bill File for HB 100, House Health, Education, and Social Services Committee, Seventeenth Legislature (detailing ANDVSA's belief "that providing an opportunity for oral presentation is important to victims who may not have writing skills or who may be dealing with English as a second language" and that victims should be able to "make their statements in the manner most comfortable and least threatening to them").

[119] *See* Position Paper, House Bill No. 100, Dep't of Health & Soc. Servs., Bill File for HB 100, House Health, Education, and Social Services Committee, Seventeenth Legislature (noting that bill would increase victims' rights "to provide written victim impact statements, sworn testimony, and *unsworn statements* for adult offender sentencing and post conviction hearings and juvenile disposition proceedings" and acknowledging advocates' argument "that without giving the victim an opportunity *to speak* in court the victim remains limited to a role of an observer at an adult criminal sentencing") (emphasis added).

[120] *See* Testimony of Arthur Snowden, Administrative Director, Alaska Court System, House Judiciary Committee, at 0:22:26 (April 3, 1991) (questioning, in light of trial court's preexisting discretion to swear in a witness, legislature's intent in enacting the "sworn testimony or unsworn oral presentation" language); Statement of Rep. Terry Martin, House Judiciary Committee, at 0:24:54 (April 3, 1991) (questioning emphasis on sworn and unsworn testimony throughout bill).

easier and faster" without "the formality of being sworn."[121] The legislative history regarding the scope of the right to be heard, then, may fairly be read to permit a court to allow the presentation of a video, but it cannot be read to require a court to do so.

2. The videos were unduly prejudicial.

Victim impact evidence "is of two distinct but related types: victim *character* evidence and victim *impact* evidence."[122] The presentation of victim character evidence – that is, evidence concerning the victim's background – is

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[121] Statement of Laurie Otto, Staff to Rep. Dave Donley, House Judiciary Committee, at 0:25:30 – 0:26:25 (April 3, 1991).

The state suggests that the legislature's focus on oral statements, as opposed to "the use of video, audio, or even of PowerPoint slide shows," was a product of its time and that the legislature's use of "oral presentation" in lieu of "oral statement" evinces a recognition "that audio-visual aids of some kind might be used." [Pet. Br. 36-37] But the digital technology available to the general public today had precursors – the film slide show and home movies – that were available in 1991, and nothing in the history suggests the legislature intended "unsworn oral presentation" to include these precursors to modern video memorials. *See* Slide shows, en.wikipedia.org/wiki/Slide_show (explaining first slide shows were presented in 1600s and that, with advent of widespread use of slide projectors in 1950s, slide shows became common way to present family photographs); *see also* Home movies, en.wikipedia.org/wiki/Home_movies (detailing introduction of 8mm film in 1932, reduced costs of Super 8 film, introduced in 1965, and Beta and VHS, introduced in 1975 and 1976, respectively, which had "effect of greatly increasing the hours of footage in most family video libraries"); Camcorder, en.wikipedia.org/wiki/Camcorder (detailing introduction in 1983 and increased use to cover personal events and rise in popularity in mid- to late 1980s").

[122] *Salazar v. State*, 90 S.W.3d 330, 335 (Tex. Crim. App. 2002). Victim character evidence "is designed to give the jury a quick glimpse of the life that the petitioner chose to extinguish, to remind the jury that the person whose life was taken was a unique human being," while victim impact evidence is designed to remind the jury that murder has foreseeable consequences to the community and the victim's survivors – family members and friends who also suffer harm from murderous conduct." *Id.* (internal footnotes and quotation marks omitted).

controlled in Alaska by this court's decision in *Sandvik*,[123] which recognized that, while a sentencing court should have "at least the basic statistical information pertaining to the victim," "unnecessarily detailed, emotional, and not particularly relevant" descriptions are not appropriate.[124]

A number of courts have applied a variation of the *Sandvik* rule to victim memorial videos in capital proceedings. Relying on federal precedent permitting states to allow the admission of evidence providing a "quick glimpse of a victim's life" in capital sentencing proceedings,[125] these courts have both allowed[126] and disallowed[127] the admission of such videos. Commentators have also addressed the

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123 564 P.2d 20 (Alaska 1977); *see also* Part B.3.

124 *Sandvik*, 564 P.2d at 24; *see also Clemans v. State*, 680 P.2d 1179, 1187-88 (Alaska App. 1984) ("Detailed and emotional information concerning the background of a homicide victim is largely irrelevant to the sentencing process" because "the value of a human life does not increase or decrease according to a person's station in life or his achievements.").

125 *See Payne v. Tennessee*, 501 U.S. 808, 822-27 (1991) (overturning existing precedent barring introduction of evidence about victim and impact of murder on victim's family to prevent inequities inherent when capital defendant submits mitigation evidence and state is precluded from "offering a quick glimpse of the life which the defendant chose to extinguish") (internal quotation marks omitted).

126 *See, e.g.*, *Hicks v. State*, 940 S.W.2d 855, 856-57 (Ark. 1997) (upholding admission of nearly 14-minute video containing 160 photographs spanning life of victim, including pictures of victim's sons, that was narrated by victim's brother where trial court viewed and redacted video before presentation to jury); *People v. Kelly*, 171 P.3d 548, 568-72 (Cal. 2007) (upholding admission of 20-minute montage of still photographs and video clips of victim's life from infancy until shortly before her death, where irrelevant background music, which "only added an emotional element to the videotape," was not prejudicial); *see also Lopez v. State*, 181 A.3d 810, 824 (Md. 2018) (affirming, in noncapital sentencing, admission of six-minute video containing approximately 115 photographs and including two songs along with the sound of church bells as proper victim impact evidence).

127 *See, e.g.*, *United States v. Sampson*, 335 F.Supp.2d 166, 191 (D.Mass. 2004) (excluding 27-minute memorial video containing over 200 still photographs of

admissibility of such videos, considering factors relevant to admissibility,[128] the impact of such videos on emotion,[129] and proposing standards governing admissibility of memorial videos.[130] Under *Sandvik*, however, the propriety of a given video must be evaluated on a case-by-case basis.[131]

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victim set to contemporary music because probative value was outweighed by danger of unfair prejudice and because video created danger of provoking undue sympathy and verdict based on passion instead of reason); *Salazar v. State*, 90 S.W.3d 330, 335-39 (Tex. Crim. App. 2002) (finding error in admission of 17-minute video consisting of 140 still photographs arranged in chronological montage where probative value was low but sheer volume and undue emphasis on victim's childhood rendered video very prejudicial and stating that background music greatly amplified prejudicial effect of error in admitting video itself); *cf. State v. Hess,* 23 A.3d 373, 381, 393-94 (N.J. 2011) (holding trial counsel provided ineffective assistance of counsel for failing to object to professionally produced 17-mintue video containing montage of approximately 60 photographs from murder victim's life from childhood to adulthood and four separate home video clips, accompanied by poems displayed over some photos and videos and by musical medley).

[128] *See, e.g.*, Christine M. Kennedy, Note, *Victim Impact Videos: The New-Wave of Evidence in Capital Sentencing Hearings*, 26 QUINNIPIAC L. REV. 1069, 1087-94 (2008) (detailing features affecting courts' decisions regarding admissibility, including length, type of photographs, availability of other victim impact evidence, and presence of musical soundtrack).

[129] *Id.* at 1098-1103 (discussing how video format and presence of music affect emotion); Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979, 984-97 (March 2010).

[130] Austin, *supra* note 129, at 1013-16 (recommending videos be short; content be probative of issues pertinent to sentencing in particular case; presentation be only by individuals closely connected to victim; music be allowed only when it has factual basis; admissibility be determined before presentation; and jurors be told relationship between prosecution videos and defense mitigation evidence).

[131] *Sandvik v. State*, 564 P.2d 20, 24 (Alaska 1977); *see also Salazar*, 90 S.W.3d at 336 (acknowledging lack of "bright and easy line" for determining admissibility of victim character or victim impact evidence and observing that lack of such rule "requires heightened supervision and careful selection of such evidence to maximize probative value and minimize the risk of unfair prejudice").

This case-specific analysis must recognize that "[t]he punishment phase of a criminal trial is not a memorial service for the victim."[132] What is appropriate in terms of length, content, and accompaniment for a memorial service can be – and was here – too emotional and inflammatory for a criminal sentencing. The combined length – nearly 32 minutes – and the combined number of photographs displayed – over 350 – during the two videos resulted in "an extended emotional appeal" that was inappropriate under *Sandvik*.[133] The sheer volume of evidence was prejudicial, especially considered in light of the other victim impact evidence before the court.[134] The other evidence before the sentencing court was sufficient to understand the impact of the victims' deaths on their families and to demonstrate each victim's "unique combination of character traits and life experiences."[135] [Pet. Br. 38-40]

The videos provided much more than a "glimpse" of the girls' lives.[136] They presented a comprehensive life history of each girl – an "infant-growing-into-

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132 *Salazar*, 90 S.W.3d at 335-36.

133 *Sandvik*, 564 P.2d at 24; *see also United States v. Sampson*, 335 F.Supp.2d 166, 192-93 (D.Mass. 2004) (denying admission of 30-minute memorial video, which, "given its length and the number of photographs displayed, would have constituted an extended emotional appeal to the jury and would have provided much more than a 'quick glimpse' of the victim's life").

134 *See supra* pages 30-32.

135 *See, e.g., State v. Leon*, 132 P.3d 462, 467 (Idaho App. 2006) (noting, in affirming admission, that memorial video "was only four-and-one-half minutes in length, and therefore offered only a 'quick glimpse of the life the petitioner chose to extinguish' "); *Salazar*, 90 S.W.3d at 336 (stating that courts must guard against potential prejudice of "sheer volume" and reversing admission of 17-minute video consisting of approximately 140 still photographs).

136 One commentator has recommended that memorial videos be no longer than three to five minutes: "A little bit of video goes a long way." Austin, *supra* note

youth" montage, which has "*de minimus*" probative value but "enormous" prejudicial effect.[137] As *Graham* court noted, "it is unclear how the content of these videos was relevant to the judge's evaluation of the proper sentence in Graham's case."[138]

In arguing the sentencing court properly relied on the two videos, the state relies on the California Supreme Court's acceptance of similar videos at sentencing. [Pet. Br. 41-43] But the state overlooks that court's warning:

> Courts must exercise great caution in permitting the prosecution to present victim-impact evidence in the form of lengthy videotaped or filmed tribute to the victim. Particularly if the presentation lasts beyond a few moments, or emphasizes the childhood of an adult victim, or is accompanied by stirring music, the medium itself may assist in creating an emotional impact upon the jury that goes beyond what the jury might experience by viewing still photographs of the victim or listening to the victim's bereaved parents.[139]

129, at 1014; *see also Salazar*, 90 S.W.3d at 336 ("A 'glimpse' into a victim's life and background is not an invitation to an instant replay.").

137 *Salazar*, 90 S.W.3d at 337.

138 *Graham v. State*, 440 P.3d 309, 327 (Alaska App. 2019).

139 *People v. Prince*, 156 P.3d 1015, 1093 (Cal. 2007). The California cases the state cites concern videos dissimilar to those here. *See id.* (explaining that video at issue was television that "did not constitute an emotional memorial tribute": "There was no music, emotional or otherwise" and it "did not . . . display the victim in her home or with her family, nor were there images of the victim as an infant or a young child."); *People v. Garcia*, 258 P.3d 751, 761 (Cal. 2011) (describing video admitted at sentencing phase as lasting 11 minutes and 45 seconds and consisting of victim's widow narrating videotaped and still images presented on screen depicting their joy as couple and loss widow experienced after victim's death and explaining that only music came at end when soft background music played for 80 seconds and accompanied one picture of victim as child sleeping with puppy); *People v. Vines*, 251 P.3d 943, 986 (Cal. 2011) (describing five-minute videotape as depicting victim singing, dancing, and rapping with family members and before crowd in high school auditorium and observing that video was "without added music, narration or visual techniques, or staged or contrived elements," video was "not a tribute or eulogy," and there was "nothing particularly dramatic or emotional about the performances"); *People v. Bramit*, 210 P.3d 1171, 1187 (Cal. 2009) (describing video as lasting less

The state specifically rejects California's concern about videos accompanied by music, claiming that the California court is "mistaken" in concluding that "the use of background music does not ordinarily add any additional information to the presentation." [Pet. 42] California, however, is not the only state to recognize the lack of probative value and the unquantifiable prejudice of enhancing presentations with the inclusion of music.[140]

For over 100 years, experiments have regularly demonstrated that "individuals are emotionally moved by music, that it is a reliable way to induce moods, and that it elicits activity in regions of the brain known to mediate emotions."[141] Yet, "[e]motions associated with music may not have any obvious behavioral consequence, can be fleeting, and hard to categorize, and can vary substantially between individuals

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than three minutes and consisting of fewer than 20 still photographs, all but one of which were "of very poor quality" and which were "unenhanced by any soundtrack or commentary" and noting that photographs included in videotape had already been admitted as still photographs during victim's brother's testimony); *People v. Zamudio*, 181 P.3d 105, 135-37 (Cal. 2008) (affirming admission of 14-minute montage consisting of 118 photographs of murdered victim couple where trial court excluded audio portion of videotape, which consisted of music and narration, and instead permitted family member to objectively describe each photograph from witness stand).

[140] *See, e.g.*, *State v. Schierman*, 438 P.3d 1063, 1119-1123 (Wash. 2018) (approving admission of video without sound after trial court found accompanying music was "inappropriate attempt[] to influence jury's decision"); *State v. Hess*, 23 A.3d 373, 394 (N.J. 2011); *United States v. Sampson*, 335 F.Supp.2d 166, 192-93 (D.Mass. 2004); *Salazar v. State*, 2001 WL 43489011, *4 (Tex. App. Oct. 4, 2011), *rev'd by* 90 S.W.3d 330 (Tex. Crim. App. 2002).

[141] P.N. Johnson-Laird & Keith Oatley, *Emotions, Music, and Literature*, HANDBOOK OF EMOTIONS 102, 104 (Michael Lewis et. al eds. 2008) (emphasis omitted). In fact, "Plato claimed in *The Republic* that melodies in different modes aroused different emotions, and argued that this was such a strong influence on moral development that society should ban certain forms of music." Aniruddh D. Patel, MUSIC, LANGUAGE, AND THE BRAIN 315 (2008).

listening to the same music."[142] Put simply, music "manipulates rather than informs."[143]

By presenting the montage set to music, the memorial videos appealed to the emotions of the trial court but in a manner that is not quantifiable and, therefore, not reviewable.[144] Even those courts that have approved the admission of memorial videos have recognized that the addition of music is irrelevant and serves only to add "an emotional element to the videotape."[145]

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[142] Patel, *supra* note 141, at 315; *see also* Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 ARIZ. L. REV. 1003, 1044 (Winter 2014) ("As Bennett Capers argues, music can tell a story without language – a story that is communicated outside of conscious awareness, and that cannot be rebutted or even transcribed. Thus it has all the hallmarks of emotional influence law should avoid. It conveys no information relevant to the legal issue, yet it asserts a strong effect on the deliberative process. Most problematic, this influence bypasses consciousness and thus is insulated from evaluation and counterargument. In common parlance, it manipulates rather than informs.") (internal footnote omitted).

[143] Bandes & Salerno, *supra* note 142, at 1044.

[144] *See* Bennett Capers, *Crime Music*, 7 OHIO ST. J. CRIM. L. 749, 759 (Spring 2010) ("Listening to music causes a series of triggers in the brain, activating first the auditory cortex, then frontal regions, and finally a network of regions – the mesolimbic system – involved in arousal, pleasure, and the transmission of opiods and the production of dopamine, which in turn activate the nucleus accumbens. In a way, music mimics some of the features of language, conveying the same emotions that vocal communication does, but in a non-referential and non-specific way.") (internal footnote omitted); Kennedy, *supra* note 130, at 1101-03 (observing that "[m]usic heightens the emotional influence of the visuals generally and introduces more factors that ought to be irrelevant to the sentencing decision" and recognizing that use of victim impact videos "challenges" ability of courts in capital sentencing proceedings to evaluate whether jurors' sentencing decisions "are being influenced by emotional or otherwise irrelevant factors that outweigh the probative value and unduly prejudice the defendant").

[145] *See, e.g.*, *People v. Kelly*, 171 P.3d 548, 571-72 (Cal. 2007) ("The Enya background music seems unrelated to the images it accompanied and may have only added an emotional element to the videotape."). The state suggests that this court

And even if the state is correct that the use of music can demonstrate the "unique humanity of the victim"[146] and can allow certain individuals or groups "an aural means of expression that would otherwise not be available," that does not justify the admission of the musical memorial videos here. [Pet. Br. 42] The sentencing court had a thorough understanding of the girls' "unique humanity" and the "devastating effect" their deaths had through the other victim impact evidence presented, and there is no indication that the girls' families – both of which gave poignant testimony at the sentencing, in addition to providing documentary materials – needed music for "expression that would otherwise not be available." Considered

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should "expect a judge to be able to mentally prepare themselves for encountering the emotional stimulus, recognize and understand any emotional response to the presentation, and account appropriately for it in formulating the sentence to be imposed." [Pet. Br. 48-49] And it argues that a court can do this in "the context of hearing music in the courtroom during a sentencing proceeding." [Pet. Br. 48]

But "judges are given no direction as to how to engage in emotional regulation beyond simply shutting off their emotions – which seems like a tall order even for the most determined judge." Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1488 (Dec. 2011). Moreover, this court cannot reasonably expect a sentencing court to understand the many ways in which various emotions can affect decisionmaking, *see* Bandes & Salerno, *supra* note 142, at 1045-48 (detailing studies demonstrating how certain emotions affect information processing), or, with respect to the emotion engendered by music, understand what scientists who study emotion and cognition have not. *See supra* notes 141-145 & accompanying text.

[146] *See Payne v. Tennessee*, 501 U.S. 808, 866 (1991) (Stevens, J., dissenting) ("The fact that each of us is unique is a proposition so obvious that it surely requires no evidentiary support. What is not obvious, however, is the way in which the character or reputation in one case may differ from that of other possible victims. Evidence offered to prove such differences can only be intended to identify some victims as more worthy of protection than others. Such proof risks decisions based on the same invidious motives as a prosecutor's decision to seek the death penalty if a victim is white but to accept a plea bargain if the victim is black.").

in the context of the videos themselves and all the other victim impact evidence presented at the sentencing, the music added to the girls' video memorials added an unreviewable emotional effect, which presented a significant, unquantifiable risk that the court's sentencing decision was improperly swayed by those emotions.

Emotion is an accepted part of sentencing, and the court of appeals did not suggest otherwise. [Pet. Br. 40-41] But the appropriateness of particular emotions depends on "the context in which they appear."[147] One commentator has noted that victim impact statements, generally, "evoke not merely sympathy, pity, and compassion for the victim, but also a complex set of emotions directed toward the defendant, including hatred, fear, racial animus, vindictiveness, undifferentiated vengeance, and the desire to purge collective anger."[148] Because not all these emotions may be considered by a court in imposing sentence,[149] the court of appeals was correct in its observation that a court must not let emotion "improperly influence the judge's sentencing decision."[150]

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147 Susan Bandes, *Empathy, Narrative, and Victim Impact* Statements, 63 U. CHI. L. REV. 361, 372 (Spring 1996); *see also* Bandes & Salerno, *supra* note 142, at 1007 ("Emotions do not always lead to prejudice, but they can lead to prejudice in more complex and subtle ways than previously recognized, impacting not only the decision maker's reaction to evidence but also the decision-making process itself.").

148 Bandes, *supra* note 147, at 395 (internal footnote omitted).

149 AS 12.55.005.

150 *Graham*, 440 P.3d at 328; *see also* Bandes, *supra* note 149, at 18-19 (discussing research on the effect of victim impact statements on jurors, including fact that statements evoke sympathy and anger in jurors, with some evidence suggesting that anger translates to punitiveness). The fact that a judge, and not a jury, imposed Graham's sentence does not mitigate the risk unduly emotional evidence can present at sentencing. [Pet. Br. 43] *See infra* Part C.5.c.

c. The assignment of a new judge was necessary to ensure a fair sentencing proceeding.

In *Sandvik*, this court held that the trial judge, which expressly disclaimed reliance on the improper material he passively encountered in a presentence report, was not "unduly or improperly influenced by the material complained of."[151] Here, the sentencing judge affirmatively considered the improper victim impact testimony and memorial videos over Graham's objection, stating that he was allowing victim impact statements from two police officers because "[t]wo of the victims can't speak" and that he saw no "public policy basis for limiting" the video presentations. [Tr. 12, 16]

Neither the victim impact testimony nor the memorial videos the judge considered, however, was "of possible assistance to the trial judge in carrying out his weighty responsibilities concerning imposition of sentence."[152] [Pet. Br. 48] And the prejudice such evidence can engender is unlike other improper evidence.[153]

The state argues that the sentencing judge was uniquely situated to recognize the risk of undue prejudice the improper evidence presented and to compartmentalize any undue prejudice so as not affect its decision. [Pet. Br. 43, 47-49] The state asserts that this court should not "presume a sentencing judge will become prejudiced against a defendant from viewing photographs of a murder victim when she was alive, listening to musical selections while viewing these photographs,

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151 *Sandvik v. State*, 564 P.2d 20, 24 (Alaska 1977).

152 *Egelak v. State*, 438 P.2d 719, 715 (Alaska 1977). The sentencing court in *Egelak* viewed crime scene photographs shortly before imposing sentence. *Id.* at 713-15.

153 *See supra* Part C.5.b.

or listening to oral presentations by police officials who discussed matters not relevant to sentencing." [Pet. Br. 48]

The sentencing judge's comments, however, present the appearance that he was prejudiced by the improper evidence. The judge agreed with the "community and people" who were saying "this just has to stop," and he stated he would "be a voice" for those people. [Tr. 116] He found that community condemnation was "especially high for drunk driving now" but that it was "even higher here, where two innocent, young girls were essentially smashed to death." [Tr. 117] The judge stated that it "would be hard to think of a situation that would unite people more in their condemnation of the behavior that led to their deaths and that demands a substantial sentence." [Tr. 117] The judge then repeatedly stated his intent to impose "the highest sentence rendered in Alaska history for conduct of this type."[154] [Tr. 117-18]

The sentencing court's comments reflected the improper evidence before it. For instance, Chief Mew pointed how "the circumstances of this particular tragedy, the age and innocence of the girls, what they were doing, and when they were doing it, have galvanized the city." [Tr. 15] And Mew asked the court to impose a "sentence severe enough to scare the 11 worst drunks in Anchorage into not

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[154] The content of the judge's sentencing comments undercuts the state's reliance on the fact that the court did not impose the maximum sentence available to it. [Pet. Br. 49] The minimum sentence available to the court under the plea agreement, 26 years to serve, would have satisfied the court's intent to impose "the highest sentence" ever imposed in Alaska for conduct similar to Graham's. *See Graham*, 440 P.3d at 313-14.

driving." [Tr. 35] The lawyer from the Office of Victim Rights asked the court "[t]o have the community condemnation within your sentence to say this cannot happen again" and to give "a clear message" that the community "will not tolerate" DUI homicides. [Tr. 47]

As Justice Boochever recognized in his dissent in *Sandvik*, "Regardless of the ability of the trial judge to overcome the subconscious as well as the conscious reaction to such material, a sentencing procedure must maintain an appearance of impartiality as well as actually being impartial."[155] Given the nature of the evidence presented at Graham's sentencing and the influence that evidence engendered, the court of appeals was correct in concluding that the sentencing court's impartiality might reasonably be questioned on remand.[156]

d. The court of appeals placed few restrictions on the new sentencing court's discretion on remand.

The court of appeals determined that the sentencing court's decision to allow the presentation of two long memorial videos accompanied by music, as well as permitting improper victim impact statements, violated the sentencing court's "duty to structure the proceedings so . . . that judge could render a reasoned sentencing

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155 *Sandvik*, 564 P.2d at 28 (Boochever, J., dissenting).

156 *Graham*, 440 P.3d at 329 (citing Alaska Canon Judicial Conduct 3(E)(1)). For the same reason, the state's reliance on *Grace L. v. State, Dep't of Health & Soc. Servs., Office of Children's Servs.*, 329 P.3d 980 (Alaska 2014), is unavailing. [Pet. Br. 47] There, this court upheld a trial court's consideration of a parent's request to substitute counsel, where the trial court explicitly stated that it would not rely on the representation hearing evidence in issuing its rulings in the case, and the parent did not "show in any way" that the trial court's consideration of the requests to substitute counsel affected its ultimate decision in the case. *Id.* at 989.

decision that comported with the law and did not rest on retribution."[157] As such, the court of appeals directed that, pursuant to the judicial canons, Graham's resentencing should be conducted by a different judge.[158]

In doing so, however, the court of appeals put few restrictions on the resentencing. The court held that the two police officers and a representative from the Office of Victims' Rights did not qualify as victims qualified to give a statement under AS 12.55.023(b).[159] But it did not state that a sentence above a certain length would be clearly mistaken. It did not order that Graham be sentenced to a specific term. And while the court stated that a sentencing court "should not carelessly subject themselves to lengthy presentations whose primary purpose and effect is to engender emotions that will improperly influence the judge's sentencing decision," it did not prohibit the presentation of any video presentation by the victims' families.[160] Given the circumstances of Graham's original sentencing and the discretion the new sentencing judge would have on remand, the court of appeals did not err in remanding Graham's case to a new judge for resentencing.

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157 *Graham*, 440 P.3d at 328.

158 *Id.* (citing Alaska Judicial Canon 3(E)(1)).

159 *Graham*, 440 P.3d at 328.

160 *Id.*

CONCLUSION

Stacey Graham respectfully requests this court affirm the decision of the court of appeals.

SIGNED on March 12, 2020, at Anchorage, Alaska.

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