IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,

Petitioner,

vs.

STACEY GRAHAM,

Respondent.

Supreme Court No. S-17411

Court of Appeals No. A-12222
Trial Court No. 3AN-13-8758CR

ON PETITION FOR HEARING FROM THE COURT OF APPEALS

AMENDED OPENING BRIEF OF PETITIONER

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CLERK, APPELLATE COURTS

_____
Deputy Clerk

VRA 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 or witness to any crime 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.

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Alaska Statutes 11.41.100(a)(1) and (b) provide:

> **Murder in the first degree.**
>
> (a) A person commits the crime of murder in the first degree if
>
> (1) with intent to cause the death of another person, the person
>
> (A) causes the death of any person; or
>
> (B) compels or induces any person to commit suicide through duress or deception;
>
> . . .
>
> (b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Alaska Statute 11.41.110 provides:

> **Murder in the second degree.**
>
> (a) A person commits the crime of murder in the second degree if
>
> (1) with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another person, the person causes the death of any person;
>
> (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;
>
> (3) under circumstances not amounting to murder in the first degree under AS 11.41.100(a)(3), while acting either alone or with one or more persons, the person commits or attempts to commit arson in the first degree, kidnapping, sexual assault in the first degree, sexual assault in the second degree, sexual abuse of a minor in the first degree, sexual abuse of a minor in the second degree, burglary in the first degree, escape in the first or second degree, robbery in any degree, or misconduct involving a controlled substance under AS 11.71.010(a), 11.71.030(a)(1), (2), or (4) - (8), or 11.71.040(a)(1) or (2) and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person other than one of the participants;
>
> (4) acting with a criminal street gang, the person commits or attempts to commit a crime that is a felony and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person other than one of the participants; or

(5) the person with criminal negligence causes the death of a child under the age of 16, and the person has been previously convicted of a crime involving a child under the age of 16 that was

(A) a felony violation of AS 11.41;

(B) in violation of a law or ordinance in another jurisdiction with elements similar to a felony under AS 11.41; or

(C) an attempt, a solicitation, or a conspiracy to commit a crime listed in (A) or (B) of this paragraph.

(b) Murder in the second degree is an unclassified felony and is punishable as provided in AS 12.55.

Alaska Statutes 11.41.120(a)(1) and (b) provide:

Manslaughter.

(a) A person commits the crime of manslaughter if the person

(1) intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree;

. . .

(b) Manslaughter is a class A felony.

Alaska Statute 11.41.130 provides:

Criminally negligent homicide.

(a) A person commits the crime of criminally negligent homicide if, with criminal negligence, the person causes the death of another person.

(b) Criminally negligent homicide is a class B felony.

Alaska Statute 12.55.005 provides:

Declaration of purpose.

The purpose of this chapter is to provide the means for determining the appropriate sentence to be imposed upon conviction of an offense. The legislature finds that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute as provided in this chapter. In imposing sentence, the court shall consider

(1) the seriousness of the defendant's present offense in relation to other offenses;

(2) the prior criminal history of the defendant and the likelihood of rehabilitation;

(3) the need to confine the defendant to prevent further harm to the public;

(4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;

(5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct;

(6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms; and

(7) the restoration of the victim and the community.

Alaska Statute 12.55.022 provides:

Victim impact statement.

As part of the presentence report prepared on each felony offender, the probation officer shall prepare a victim impact statement reporting the following information:

(1) the financial, emotional, and medical effects of the offense on the victim;

(2) the need of the victim for restitution; and

(3) any other information required by the court.

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 Statutes 12.55.125(a), (b), (c)(2), and (d)(1) provide:

Sentences of imprisonment for felonies.

(a) A defendant convicted of murder in the first degree or murder of an unborn child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment of at least 30 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, firefighter, or correctional employee who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110;

(3) the defendant subjected the murder victim to substantial physical torture;

(4) the defendant is convicted of the murder of and personally caused the death of a person, other than a participant, during a robbery; or

(5) the defendant is a peace officer who used the officer's authority as a peace officer to facilitate the murder.

(b) A defendant convicted of attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit murder in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years. A defendant convicted of murder in the second degree or murder of an unborn child under AS 11.41.150(a)(2) - (4) shall be sentenced to a definite term of imprisonment of at least 15 years but not more than 99 years. A defendant convicted of murder in the second degree shall be sentenced to a definite term of imprisonment of at least 20 years but not

more than 99 years when the defendant is convicted of the murder of a child under 16 years of age and the court finds by clear and convincing evidence that the defendant (1) was a natural parent, a stepparent, an adoptive parent, a legal guardian, or a person occupying a position of authority in relation to the child; or (2) caused the death of the child by committing a crime against a person under AS 11.41.200 - 11.41.530. In this subsection, "legal guardian" and "position of authority" have the meanings given in AS 11.41.470.

(c) Except as provided in (i) of this section, a defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

. . .

(2) if the offense is a first felony conviction and the defendant

(A) possessed a firearm, used a dangerous instrument, or caused serious physical injury or death during the commission of the offense, five to nine years; or

(B) knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, firefighter, correctional employee, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven to 11 years;

. . .

(d) Except as provided in (i) of this section, a defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to a definite term within the following presumptive ranges, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, zero to two years; a defendant sentenced under this paragraph may, if the court finds it appropriate, be granted a suspended imposition of sentence under AS 12.55.085;

Alaska Statute 12.55.125(b) (2013) provided:

Sentences of imprisonment for felonies.

. . .

(b) A defendant convicted of attempted murder in the first degree, solicitation to commit murder in the first degree, conspiracy to commit

murder in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years. A defendant convicted of murder in the second degree or murder of an unborn child under AS 11.41.150 (a)(2) - (4) shall be sentenced to a definite term of imprisonment of at least 10 years but not more than 99 years. A defendant convicted of murder in the second degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years when the defendant is convicted of the murder of a child under 16 years of age and the court finds by clear and convincing evidence that the defendant (1) was a natural parent, a stepparent, an adoptive parent, a legal guardian, or a person occupying a position of authority in relation to the child; or (2) caused the death of the child by committing a crime against a person under AS 11.41.200 - 11.41.530. In this subsection, "legal guardian" and "position of authority" have the meanings given in AS 11.41.470.

Alaska Statute 12.55.127(c)(2)(B) provides:

Consecutive and concurrent terms of imprisonment.

. . .

(c) If the defendant is being sentenced for

. . .

(2) two or more crimes under AS 11.41, a consecutive term of imprisonment shall be imposed for at least

. . .

(B) the mandatory minimum term for each additional crime that is an unclassified felony governed by AS 12.55.125(b);

Alaska Statute 12.55.155(c)(6) provides:

Factors in aggravation and mitigation.

. . .

(c) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range set out in AS 12.55.125:

. . .

(6) the defendant’s conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

Alaska Statute 22.05.010(d) provides:

> **Jurisdiction.**
>
> . . .
>
> (d) The supreme court may in its discretion review a final decision of the court of appeals on application of a party under AS 22.07.030. The supreme court may in its discretion review a final decision of the superior court on an appeal of a civil case commenced in the district court. In this subsection, "final decision" means a decision or order, other than a dismissal by consent of all parties, that closes a matter in the court of appeals or the superior court, as applicable.

Alaska Statute 22.20.020 provides:

> **Disqualification of judicial officer for cause.**
>
> (a) A judicial officer may not act in a matter in which
>
> (1) the judicial officer is a party;
>
> (2) the judicial officer is related to a party or a party's attorney by consanguinity or affinity within the third degree;
>
> (3) the judicial officer is a material witness;
>
> (4) the judicial officer or the spouse of the judicial officer, individually or as a fiduciary, or a child of the judicial officer has a direct financial interest in the matter;
>
> (5) a party, except the state or a municipality of the state, has retained or been professionally counseled by the judicial officer as its attorney within two years preceding the assignment of the judicial officer to the matter;
>
> (6) the judicial officer has represented a person as attorney for the person against a party, except the state or a municipality of the state, in a matter within two years preceding the assignment of the judicial officer to the matter;
>
> (7) an attorney for a party has represented the judicial officer or a person against the judicial officer, either in the judicial officer's public or private capacity, in a matter within two years preceding the filing of the action;
>
> (8) the law firm with which the judicial officer was associated in the practice of law within the two years preceding the filing of the action has been retained or has professionally counseled either party with respect to the matter;
>
> (9) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.
>
> (b) A judicial officer shall disclose, on the record, a reason for disqualification specified in (a) of this section at the commencement of a

matter in which the judicial officer participates. The disqualifications specified in (a)(2), (a)(5), (a)(6), (a)(7), and (a)(8) of this section may be waived by the parties and are waived unless a party raises an objection.

(c) If a judicial officer is disqualified on the officer's own motion or consents to disqualification, the presiding judge of the district shall immediately transfer the action to another judge of that district to which the objections of the parties do not apply or are least applicable and if there is no such judge, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purpose by the presiding judge of the next higher level of courts or, if none, by the other members of the supreme court. The hearing may be ex parte and without notice to the parties or judge.

Alaska Statute 22.35.030(a)(1) provides:

Records concerning criminal cases resulting in acquittal or dismissal.

The Alaska Court System may not publish a court record of a criminal case on a publicly available website if 60 days have elapsed from the date of acquittal or dismissal and

(1) the defendant was acquitted of all charges filed in the case;

Alaska Rule of Criminal Procedure 32.2 provides:

Sentencing Hearing.

(a) **Consideration of Victim's Statement.** If a victim as defined in AS 12.55.185 prepares and submits a written statement, gives sworn testimony or makes an unsworn oral presentation under AS 12.55.023, the court shall take the content of the statement, testimony, or presentation into consideration when preparing those elements of the sentencing report required by AS 12.55.025 that relate to the effect of the offense on the victim, and when considering the need for restitution under AS 12.55.045. The court shall also take the content of the victim's impact statement in the presentence report into consideration in preparing the sentencing report required under AS 12.55.025. The court also may take the content of the statement, testimony, the victim's impact statement, or presentation into consideration for any other appropriate purpose.

(b) **Defendant's Allocution.** Before imposing sentence the court shall afford the defendant an opportunity to make a statement in the defendant's own behalf and to present any information in mitigation of punishment.

(c) **The Sentence.**

(1) At the sentencing hearing, the judge shall state clearly the precise terms of the sentence, the reasons for selecting the particular sentence, and the purposes the sentence is intended to serve.

(2) If the defendant is sentenced to a term of imprisonment for a felony offense, to a term of imprisonment exceeding 90 days for a misdemeanor offense, or to a term of imprisonment for a violation of AS 04, a regulation adopted under AS 04, or an ordinance adopted in conformity with AS 04.21.010, the judge shall identify

(A) the approximate term of imprisonment the defendant must serve if the defendant is eligible for and does not forfeit good conduct deductions under AS 33.20.010; and

(B) if applicable, the approximate minimum term of imprisonment the defendant must serve before becoming eligible for release on discretionary parole.

These approximate terms of imprisonment are not part of the sentence imposed and do not form a basis for review or appeal of the sentence imposed.

(3) The court shall order that the defendant be fingerprinted at the conclusion of the sentencing hearing.

(d) **Transcript of Sentencing Proceeding.** A transcript or electronic recording of any sentencing proceeding at which the defendant is committed to serve a term of incarceration in excess of six months on one or more charges shall be prepared and furnished to the Department of Law, the defendant, the Department of Corrections, the State Board of Parole, if the defendant will be eligible for parole, and to the Alcohol Beverage Control Board if the defendant was convicted of a violation of AS 04, a regulation adopted under AS 04, or an ordinance adopted under AS 04.21.010.

Alaska Code of Judicial Conduct, Canon 3(E)(1) provides:

A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

. . .

E. **Disqualification.**

(1) Unless all grounds for disqualification are waived as permitted by Section 3F, a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during their

association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household:

(i) has an economic interest in the subject matter in controversy, or

(ii) is employed by or is a partner in a party to the proceeding or a law firm involved in the proceeding, or

(iii) has any other, more than de minimis interest that could be substantially affected by the proceeding, or

(iv) is likely to be a material witness in the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding or is known by the judge to be an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) For purposes of this Section, when a party is a governmental entity, a person is "employed by" the party when the person is employed by the agency, commission, department or (if the department is broken into divisions) division, or other unit of government directly involved in the matter to be litigated.

STATEMENT OF JURISDICTION

On February 22, 2019, the court of appeals issued a decision, reversing and remanding for resentencing Graham's sentence of 32 years for killing two teenage girls; the court of appeals also directed that a new judge be assigned to preside over Graham's resentencing. *Graham v. State,* 440 P.3d 309 (Alaska App. 2019).

The state filed a petition for hearing pursuant to Appellate Rule 302 and AS 22.05.010(d). This court granted the state's petition and ordered full briefing.

STATEMENT OF ISSUES PRESENTED

After his guilty plea, Graham was convicted of two counts of second-degree murder for killing two teenage girls after he lost control of his vehicle and struck them. He received a composite term of 32 years of active confinement. The court of appeals reversed, remanded for resentencing, and directed that a new judge be assigned to preside over Graham's resentencing.

1. Did the court of appeals err in comparing Graham's second-degree murders to cases where the defendant had been convicted of manslaughter or criminally negligent homicide, rather than to other second-degree murder cases?

2. Did the court of appeals err in comparing Graham's sentence to cases where the defendant's conduct resulted in only one death?

3. Did the court of appeals err in concluding that second-degree murder involving reckless indifference to the value of human life is inherently less serious than and thus deserving a lesser sentence than second-degree murder involving intentionally assaultive conduct? Did the court of appeals err in concluding that the benchmark of 20 to 30 years of active confinement for second-degree murder does not apply to second-degree murders involving reckless indifference to the value of human life?

4. Did the court of appeals err in concluding that the fact that Graham's conduct endangered three or more individuals should not have been considered in assessing the seriousness of Graham's offense?

5. Did the court of appeals err by reevaluating the relative weight of the *Chaney* sentencing objectives?

6. Did the court of appeals err by concluding that the trial court improperly based its sentence on retribution?

7. Did the court of appeals err in disqualifying Judge Kevin Saxby from presiding over any resentencing proceeding?

a. Was the court of appeals correct that Judge Saxby should have precluded the families of the deceased teenage girls from showing video presentations, accompanied by music, about the lives of the two girls at the sentencing hearing?

b. Did the judge's remarks at the conclusion of the sentencing hearing reflect actual bias or the appearance of bias against Graham?

c. Assuming that the judge should not have allowed the families to play the videos and should not have allowed the police chief and another officer from speaking at the sentencing hearing, did the judge's exposure to this material result in actual bias or the appearance of bias on the part of the judge?

STATEMENT OF THE CASE

Statement of facts

In August 2013, Stacey Graham attended a company golf tournament and barbeque. [Exc. 17, 201-03] Around 6:00 a.m. Graham began drinking and drove to the house of his friend and co-worker Matt Leinhart (which was located off the Old Seward Highway near O'Malley Road) because he was planning to ride to the event with Leinhart. [Exc. 201-03]

Graham brought a fifth of vodka and some orange juice to the tournament. [Exc. 17] The company also provided alcoholic drinks at no cost to the participants. [Exc. 17, 203] After the tournament and barbeque, Graham and Leinhart purchased another fifth of vodka and then returned to Leinhart's house. [Exc. 17, 202, 204] While at Leinhart's house, Graham had at least one more vodka drink. [Exc. 17, 204]

Graham last spoke to his fiancée, Brittany Hegedus, around 2:30 p.m., at which time he promised to be home by 4:00 p.m. [Exc. 201-02] Graham did not, however, go home at the agreed-upon time. Sometime later, while Leinhart was taking a shower, Graham left. [Exc. 17] Graham claimed that he had misjudged his level of intoxication and erroneously thought he was able to drive. [Exc. 204]

Shortly before 6:45 p.m., Shawna Popovici was driving east on Dimond Boulevard near the Old Seward Highway when in her rear view mirror she saw Graham's truck "barreling down" Dimond Boulevard with his tires squealing. [Exc. 17, 200] Graham's truck passed Popovici's car, and looked like it was going to crash into a silver car. [Exc. 17, 200] The truck abruptly moved into the right lane, and as it did so, it slid sideways due to water on the road. [Exc. 18, 200] The truck's tires regained traction, but the truck then shot off to the right, jumped the curb, and headed toward the sidewalk. [Exc. 18, 200]

Graham's truck collided with Jordyn Durr and Brooke McPheters, two fifteen-year-old girls who were walking along the sidewalk on their way home after having gone shopping for school. [Exc. 18, 200] The girls flew through the air; the truck went airborne, struck a large sign and came to rest on its side. [Exc. 200]

Popovici was not the only witness. Jean Baquiran, who was driving west on Abbott Road, noticed Graham's truck speeding in the opposite direction, hit water, and start to hydroplane. [Exc. 200] Baquiran also saw Graham's truck go onto the sidewalk and hit Durr and McPheters. [Exc. 200] Bradley Green, who was driving, and his wife, Julie Green, saw Graham's truck speed by, "gunning it," as Green was turning east onto Dimond from the Old Seward Highway. [Exc. 17, 200-01] The Greens then saw Graham swerve to avoid a vehicle that was pulling out of a parking lot on the south side of the road, causing Graham's truck to fish-tail. [Exc. 18, 200-01] Graham's truck stopped for a red light, and when the light turned green and the vehicle in front of Graham's truck did not immediately move, Graham honked at the vehicle, then he sped by and repeatedly switched lanes to pass other vehicles, cutting them off and causing him to again fish-tail. [Exc. 18, 201] According to Bradley Green, Graham was driving "really recklessly," like a "jerk." [Exc. 201] Julie thought that Graham was going to "lose it" because the truck was fish-tailing and out of control. [Exc. 201] Calvin Monroe, who also was driving east on Dimond and Abbott, saw Graham's truck cut in front of his car and then, after passing a second vehicle and traveling at high speed, cut off a SUV. [Exc. 201] Monroe noted that Graham's truck was spinning its tires and drifting. [Exc. 201] Monroe thought that Graham was driving recklessly and had "road rage." [Exc. 201] He turned to his son and remarked, "That guy's a drunk driver." [Exc. 201] Estimates of Graham's speed ranged from 40 to 65 miles per hour. [Exc. 18, 200-01] But all of the witnesses agreed that Graham was driving too fast for the road conditions. [Exc. 18, 200-01]

The Anchorage Police Dispatch received a report of the crash at about 6:45 p.m. [Exc. 199] The victims, Jordyn Durr and Brooke McPheters, both died at the scene from blunt force injuries to the head and thorax. [Exc. 199, 202-03] Durr attended Service High School, where she participated in the Navy Junior ROTC program and earned a letter on the Service High School rifle squad. [Exc. 16-17] McPheters attended South Anchorage High School, where she participated in the Air Force Junior ROTC program; she also volunteered at both a local program that provides meals for students living in poverty and the Anchorage Museum. [Exc. 16-17] Graham was trapped inside his truck and had to be extricated by Anchorage Fire Department personnel. [Exc. 199] Graham was transported to Alaska Native Medical Center with several serious injuries. [Exc. 199] A blood test taken approximately three hours after the crash showed that Graham's blood alcohol content was 0.180 grams per 100 milliliters, more than two times the legal limit. [Exc. 18, 199] Graham's blood also contained 60 nanograms of carboxy-THC per milliliter of blood and 2.5 nanograms of THC per milliliter of blood; carboxy-THC and THC are both metabolites of marijuana. [Exc. 18, 199]

Course of proceedings

A grand jury indicted Graham on two counts of second-degree murder under AS 11.41.110(a)(2) and two counts of manslaughter under AS 11.41.120(a)(1). [Exc. 1-3] The prosecutor added the charge of driving under the influence, *see* AS 28.35.030(a)(1). [Exc. 4-5]

The parties entered into a plea agreement, under which Graham pleaded guilty to both counts of second-degree murder and in exchange the state dismissed the remaining charges. [Exc. 6, 10] In addition, the parties agreed to a sentencing range of 13 years to 20 years on each count, to be served consecutively. [Exc. 6, 10-15] Graham thus faced a composite sentence of 26 to 40 years of active confinement. During the sentencing proceeding, as part of their victim impact statements, the families of each of the girls played

video tributes, accompanied by music, depicting the lives of the girls.[1] [Exc. 183] In addition, two law enforcement officers, Anchorage Police Chief Mark Mew and Sergeant John McKinnon, and an attorney from the Office of Victims' Rights spoke. [Exc. 107-16, 125-27] Chief Mew focused his remarks on the profound and pervasive impact of drunk-driving deaths on the community and he asked the court to help efforts to prevent drunk-driving deaths by imposing a sentence severe enough to scare people into not driving drunk. [Exc. 113-16] Sergeant McKinnon was the on-duty patrol sergeant who responded to the scene and who notified the families of the girls' deaths. Sergeant McKinnon described the scene, described how the families reacted to the news of their daughters' deaths, told the judge of his anger and disgust when learning that Graham had been drunk and would recover from his injuries and of his positive emotion when learning that Graham had accepted responsibility for his conduct. [Exc. 107-12] The sentencing court imposed a term of 20 years with 4 years suspended on each count, so that Graham received a composite term of 32 years to serve, just below the middle of the agreed-upon sentencing range. [Exc. 8-9, 173-79]

After sentencing, Graham sought to disqualify Superior Court Judge Kevin Saxby, who had presided over his sentencing, on the sole ground that the judge had expressed bias in favor of the victims during his sentencing remarks. [Exc. 180] The state filed a written opposition. [Exc. 184-92] Judge Saxby denied the motion. [Exc. 193-94] In so doing, Judge Saxby clarified that the comment about wishing he could do more for "the families that have lost so much," on which Graham based his claim of bias, referred not just to the families of the victims but also to Graham's family, who also had suffered greatly as a result of Graham's crimes. [Exc. 193] Judge Saxby noted that he intended this remark to explain why he was rejecting the position advocated by both the prosecutor and the victims and why he was not imposing the maximum period of incarceration. [Exc. 193-94]

[1] Those video presentations will be discussed later in this brief.

Judge Saxby also explained that the statement reflected the judge's view about the inadequacy of the legal system to redress the loss of family members. [Exc. 193] The chief judge of the court of appeals assigned Superior Court Judge Michael Wolverton to review Judge Saxby's decision. [Exc. 195] Although the record does not include either a written or oral order from Judge Wolverton, it appears that there was no procedural irregularity.[2]

The court of appeals did not explicitly find Graham's sentence excessive. But it vacated his sentence, remanded the case for resentencing, and directed the superior court to appoint a different judge to preside over Graham's resentencing because it found that Judge Saxby had made several legal errors in imposing Graham's sentence. *Graham v. State*, 440 P.3d 309 (Alaska App. 2019).

The state filed a petition for hearing, which this court granted and ordered full briefing.

[2] According to Courtview, Judge Wolverton did not ignore the order assigning him to review Judge Saxby's decision. Instead, Courtview indicates that Judge Wolverton denied the request for recusal seven days after the chief judge assigned that task to him, and five days after Graham filed his notice of appeal. That order is not part of the record on appeal because it was not issued until after the notice of appeal was filed.

ARGUMENT

I. THE COURT OF APPEALS INAPTLY COMPARED GRAHAM'S OFFENSES WITH MANSLAUGHTERS AND CRIMINALLY NEGLIGENT HOMICIDES

A. Standard of review

Whether it is appropriate to compare an offender's crimes with crimes of a lesser classification and consider the offenders similarly situated is a legal question on which this court exercises its independent judgement. *See Booth v. State*, 251 P.3d 369, 372-73 (Alaska App. 2011) (appellate courts will apply independent judgment or *de novo* standard of review when asked to ascertain the law or the legal test that applies to a given situation).

B. Graham was sentenced for two second-degree murders, not the non-existent crime of "vehicular homicide"

The court of appeals repeatedly called Graham's offenses "vehicular homicide[s]" or drunk-driving homicide[s]," placed Graham's crimes in the same category as manslaughters or criminally negligent homicides involving drunk driving, and called Graham "similarly situated" to offenders convicted of manslaughter and criminally negligent homicide. *Graham*, 440 P.3d at 312-14, 318-20, 326-27. But in Alaska there is no crime of vehicular homicide; nor is there a separate species of homicide for conduct involving drunk driving. Instead, homicides involving drunk driving are charged – based on the offender's actual conduct, culpable mental state, and surrounding circumstances – like any other homicide offense.

A person who has been driving drunk is charged with criminally negligent homicide when there is evidence that with criminal negligence the person causes the death of another person. *See* AS 11.41.130(a)(1). A person is charged with manslaughter when there is evidence that the person intentionally, knowingly, or recklessly caused the death of another person under circumstances not amounting to murder. *See* AS 11.41.120(a)(1). In contrast, a person is charged with second-degree murder when there is evidence that the person knowingly engaged in conduct that resulted in the death of another under

circumstances manifesting an extreme indifference to the value of human life or there is evidence that the person, acting with intent to cause serious physical injury to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to another, the person causes the death of any person. *See* AS 11.41.110(a)(1); AS 11.41.110(a)(2). And in cases where there is evidence of an intent to kill, a person may be charged with first-degree murder. *See* AS 11.41.100(a)(1).

As the legislature intended, these crimes are of different severities and carry different sentencing ranges. First-degree murder is an unclassified felony and carries a minimum term of 30 years and a maximum term of 99 years. *See* AS 11.41.100(b); AS 12.55.125(a). Second-degree murder also is an unclassified felony and at the time of Graham's sentencing was subject to a minimum term of 10 years and a maximum term of 99 years. *See* AS 11.41.110(b); former AS 12.55.125(b).[3] Manslaughter is a Class A felony, and for a first-felony-offender, is subject to a presumptive range of 5 to 9 years and a maximum term of 20 years. *See* AS 11.41.120(b); AS 12.55.125(c)(2). Criminally negligent homicide is a Class B felony, and for a first-felony-offender, is subject to a presumptive range of 0 to 2 years and a maximum term of 10 years. *See* AS 11.41.130(b); AS 12.55.125(d)(1).

For this reason, grouping Graham's second-degree murders with, and comparing his sentence to those given for, manslaughters and criminally negligent homicides is inapt and gives the misleading impression that Graham's sentence was extraordinarily severe and unprecedented in its length. *Graham*, 440 P.3d at 313-14 (comparing Graham's sentence to *Tice v. State*, 199 P.3d 1175 (Alaska App. 2008) (25 years for manslaughter and first-degree assault), *Powell v. State*, 88 P.3d 532 (Alaska App. 2004) (26 years for two counts of first-degree assault, one count of reckless endangerment, and one count of

[3] Second-degree murder currently carries a minimum term of 15 years. *See* AS 12.55.125(b).

DUI), and *Pusich v. State*, 907 P.2d 29 (Alaska App. 1995) (18 years to serve for manslaughter and first-degree assault)). Given that Graham committed more serious offenses that resulted in the deaths of two innocent pedestrians, his composite sentence of 32 years cannot be reasonably compared to the sentences imposed in these cases. Moreover, of these cases, only *Tice* and *Powell* address sentences imposed during the time where the minimum sentence for second-degree murder was ten years, rather than the five years it had been prior to September 20, 1999. *See* § 1, ch. 65 SLA 1999 (changing the mandatory minimum sentence for second-degree murder from five years to ten years). Such cases are of very limited, if any, utility in evaluating whether a sentence imposed for a wholly separate class of offense, under a law with a greater mandatory minimum sentence is extraordinarily severe or excessive.

More importantly, relatively recent cases addressing manslaughters involving drunken driving suggest that the sentence Judge Saxby imposed in this case was not especially severe. *See Tickett v. State*, 334 P.3d 708, 713-14 (Alaska App. 2014) (composite sentence of 19 years with 4 years suspended for manslaughter, first-degree assault, and driving under the influence); *Bottcher v. State*, 262 P.3d 224, 225-27 (Alaska App. 2011) (composite sentence of 23 years with three years suspended, *i.e.*, 20 years of active confinement, for manslaughter, third-degree fear assault, and failure to render assistance); *Tice*, 199 P.3d at 1177-79 (composite sentence of 25 years for manslaughter and first-degree assault). Given that Graham committed more serious offenses, and that his offenses resulted in the deaths of two innocent pedestrians, his composite sentence of 32 years to serve does not seem extraordinarily severe.

This comparative-weight error infected the entire analysis by the court of appeals. *See Graham*, 440 P.3d at 324 (calling Graham's sentence "extraordinarily severe"), 326-27 (calling Graham's sentence unprecedented and referring back to its earlier discussion of lengthy sentences for "vehicular homicide," remarking that a composite

sentence of 15 to 20 years, which is at the bottom of the current statutory range for a single count of second-degree murder is "substantial," and referring to Graham's sentence as a decade longer than that imposed for "similarly situated" defendants).

In grouping Graham's offenses this way, the court of appeals overlooked this court's sentencing decisions. In *State v. Wentz*, 805 P.2d 962, 965 (Alaska 1991), this court stated that the range of reasonable sentences for an offense "should be determined not by imposition of an artificial ceiling which limits a large class of offenses to the lower end of the sentencing spectrum, but, rather, by an examination of the particular facts of the individual case in light of the total range of sentences authorized by the legislature for the particular offense." This court also explained that whether an offense is sufficiently serious to place it in the upper rather than the lower end of the sentencing range "cannot be determined with mathematical certainty" or by "resort to 'bright line' rules about the 'correct' sentence in certain factual circumstances. *Id.* at 966. *See also Burleson v. State*, 543 P.2d 1195, 1202 (Alaska 1975) (explaining that sentencing is an "individualized process" that requires looking at the facts and circumstances of each case). As in *Wentz*, the practical effect of the court of appeals's grouping will have the effect of reducing the range of acceptable sentences expressly authorized by the legislature for second-degree murder to the range imposed for manslaughter. In *State v. Hodari* this court again rejected "formulaic benchmarks" or bright line rules that prescribe what must be done in certain future cases in the absence of a developed record. 996 P.2d 1230, 1235-36 (Alaska 2000), This court cautioned in *Hodari* that courts err if they pay little or no deference to the statutory range of permissible sentences. *Id.* at 1236. By focusing on its prior cases addressing manslaughter and criminally negligent homicide, the court of appeals overlooked the significant differences between the statutory range of permissible sentences for second-degree murder, manslaughter, and criminally negligent homicide.

It is true that at times, Judge Saxby referred to Graham's crimes as vehicular homicides. [*See* Exc. 163, 165] To the extent that Judge Saxby characterized Graham's sentence as one that is extremely long for a vehicular homicide, Judge Saxby was prey to the same analytical error as the court of appeals. [*See* Exc. 172-73 (calling Graham's sentence the "highest rendered in Alaska history for conduct of this type)]

In one respect, however, it was proper to recognize Graham's offenses were drunk-driving homicides. In *Pusich v. State*, the court of appeals identified several factors to consider in sentencing an offender for a homicide involving drunk driving. 907 P.2d 29, 38 (Alaska App. 1995). Those factors are: (1) the degree of a defendant's recklessness; (2) the magnitude of the consequences of the defendant's conduct; (3) the age of the defendant; (4) the defendant's record of past offenses; and (5) the defendant's record of alcohol abuse. *Id.* These factors, like the sentencing objectives listed in AS 12.55.005, may be applied to homicides involving drunk driving. And in fact Judge Saxby did specifically consider these factors in fashioning Graham's sentence. [*See* Exc. 151, 164, 168] But consideration of these factors does not mean that the legislature's classification of homicides or its prescribed sentencing ranges for homicides should be ignored or rendered meaningless.

II. THE COURT OF APPEALS ERRED IN COMPARING GRAHAM'S SENTENCE TO THOSE IMPOSED IN CASES WHERE ONLY ONE DEATH RESULTED

A. Standard of review

Whether it is appropriate to compare Graham's sentence with sentences for offenses that resulted in only one death and to consider these offenders similarly situated is a legal question on which this court exercises its independent judgement. *See Booth*, 251 P.3d at 372-73 (appellate courts will apply independent judgment or *de novo* standard of review when asked to ascertain the law or the legal test that applies to a given situation).

B. Because Graham killed two people, his sentence cannot be meaningfully compared to cases involving only one death

The court of appeals in discussing Graham's sentence compared it to those imposed in cases where at most one death resulted from the defendant's conduct. *See Graham*, 440 P.3d at 313-14 (comparing Graham's sentence to *Tice*, 199 P.3d at 1178-79 (25 years to serve for manslaughter and first-degree assault); *Phillips v. State*, No. A-11269, 2014 WL 6608927, *6 (Alaska App. Nov. 14, 2014) (unpublished) (20 years to serve for second-degree murder and first-degree assault); *Powell*, 88 P.3d at 539 (26 years to serve for two counts of first-degree assault)). In so doing, the court of appeals failed to acknowledge that Graham's conduct resulted in two deaths and instead focused on the poor criminal histories of the defendants in these cases, implicitly suggesting that Graham was deserving of a lesser or similar sentence due to his lack of criminal history. *Id.* For the very same reasons discussed above, this type of comparison infected the entire analysis of the court of appeals – it improperly viewed Graham's composite sentence as extraordinarily severe.

Under both the terms of the plea agreement and AS 12.55.127(c)(2)(B), the trial court was required to impose consecutive terms for each count of second-degree murder. [Exc. 6-7, 10-15] But the requirement of consecutive terms was not a basis for discounting the amount of time imposed for each count. This court has recognized that composite sentences for crimes harming multiple victims can and should be more severe than for a single crime involving a single victim. *See State v. Dunlop*, 721 P.2d 604, 609 (Alaska 1986) (when several deaths occur in the course of a single incident, the offense has been committed several times and there are as many punishable offenses as there are victims). It is true that some of the cases relied on by the court of appeals involved multiple victims, but the additional victims were injured, not killed. The cases thus are not comparable; the legislature has determined that death is a more severe consequence that when resulting from similar conduct under similar circumstances will warrant a different charge and a less

severe sentence. For this reason, Graham's composite sentence should not be compared to sentences for offenders who killed only one person. And it cannot reasonably be said that the sentence imposed for each death should be reduced so Graham's composite sentence does not reflect disparity from sentences imposed for a single death.

III. SECOND-DEGREE MURDER INVOLVING RECKLESS INDIFFERENCE IS NOT INHERENTLY LESS SERIOUS THAN SECOND-DEGREE MURDER INVOLVING INTENTIONALLY ASSAULTIVE CONDUCT

A. Standard of review

Whether second-degree murders involving reckless indifference to the value of human life are inherently less serious than second-degree murders involving intentional assaultive conduct is a legal question on which this court exercises its independent judgement. *See Booth*, 251 P.3d at 372-73 (appellate courts will apply independent judgment or *de novo* standard of review when asked to ascertain the law or the legal test that applies to a given situation).

B. Any benchmark range for second-degree murders should apply to all forms of second-degree murder

The court of appeals erred in holding that its benchmark of 20 to 30 years for second-degree murder applies only to second-degree murders involving intentionally assaultive conduct. *Graham*, 440 P.3d at 318-21. *See Page v. State*, 657 P.2d 850, 855 (Alaska App. 1983) (establishing a benchmark range of 20 to 30 years to serve for second-degree murder). This conclusion is flawed for two reasons.

First, the court of appeals based its conclusion in part on *Gustafson v. State*, 854 P.2d 751 (Alaska App. 1993). *See Graham*, 440 P.3d at 320. But in *Gustafson*, the court never reached the issue. Instead, in *Gustafson* the court of appeals stated both that an upper boundary of 10 years of imprisonment for all unintentional homicides would be at odds with the *Page* benchmark and that even *if* it required lenient treatment of some second-degree murders, this rule of leniency would apply only to second-degree murders that are

not the result of intentional assaults. *Gustafson*, 854 P.2d at 766. Contrary to its current reading, the court of appeals did not hold in *Gustafson* that it was requiring lenient treatment of some second-degree murders.

The court of appeals also relied on *Phillips v. State*, 70 P.3d 1128, 1144-45 (Alaska App. 2003), in support of its conclusion. *Graham*, 440 P.3d at 320. But *Phillips* misstates the holding in *Gustafson*, construing it to mean that typically second-degree murders stemming from conduct that is not intentionally assaultive are among the least serious and it does so in addressing a different question – whether second-degree murders arising from intentional assaults are among the most serious second-degree murders. *Phillips*, 70 P.3d at 1144-45. It does not follow, even assuming second-degree murders arising from intentionally assaultive conduct are among the most serious of second-degree murders, that second-degree murders that do not fall within this category are necessarily among the least serious or are atypical of the conduct constituting second-degree murder. *Accord, Parker v. State,* 147 P.3d 690, 695 (Alaska 2006) ("the fact that something is not most serious . . . does not make it least serious."). Thus neither *Gustafson* nor *Phillips* provides sound support for the proposition that second-degree murders that do not arise from intentionally assaultive conduct are necessarily or even typically less serious than other second-degree murders.

For these reasons, the court of appeals should not have faulted Judge Saxby for concluding that *Felber v. State*, 243 P.3d 1007 (Alaska App. 2010), reflects that the *Page* benchmark, of 20 to 30 years to serve for a single count of second-degree murder, applied to Graham's case. *See Graham*, 440 P.3d at 319-21. In *Felber*, the court of appeals affirmed a composite sentence of 66 years to serve for an offender who had used his vehicle as a weapon and was convicted of, among other offenses, second-degree murder and four counts of first-degree assault. For his second-degree murder count, Felber received 25 years to serve, a term in the middle of the *Page* sentencing benchmark range for first felony

offenders. *Id.* at 1013. The court of appeals observed that, because he was a third felony offender and his conduct was "far from typical within the range encompassed by the second-degree murder statute," the circumstances of Felber's case "would support a sentence substantially more severe than the *Page* benchmark range." *Id.* Given this language in *Felber*, Judge Saxby was not mistaken in concluding that a sentence for second-degree murder, involving drunken driving and conduct falling within the range of typical conduct for a second-degree murder, will not be clearly mistaken if it falls within the *Page* benchmark and that the *Page* benchmark is the starting point of the sentencing analysis. Graham is not entitled to a mitigated sentence or one at the bottom of the applicable sentencing range merely because his second-degree murders resulted from his extremely reckless use of a motor vehicle, as opposed to using it as a weapon.

More importantly, by holding that the *Page* benchmark does not apply to second-degree murders under subsection (a)(2), the court of appeals demoted the seriousness of second-degree murders charged under subsection (a)(2) of AS 11.41.110 below that of second-degree murders charged under subsection (a)(1) of the statute. This demotion of all offenses charged under a particular subsection is inconsistent with legislative intent and with the proposition that when a statute defines alternative means of committing an offense, those means are presumed to be of equal seriousness (and that an evaluation of an individual offense depends on the facts and circumstances of that offense and the offender's history). *See*, *e.g.*, *Jackson v. State*, 890 P.2d 587, 597 (Alaska App. 1995) (reckless conduct is not per se less serious than knowing or intentional conduct); *Lepley v. State*, 807 P.2d 1095, 1097 (Alaska App. 1991) (fellatio not a less serious form of sexual penetration than vaginal or anal penetration); *Simpson v. State*, 796 P.2d 840, 843 (Alaska App. 1990) (sexual penetration with a 14-year-old in defendant's foster care not less serious conduct than sexual penetration with a younger child since the legislature included both types of conduct within the same offense); *State v. Jackson*, 776 P.2d 320, 328 (Alaska App. 1989)

("It is well established that all of the categories of conduct classified within a single statutory provision must, in the abstract, be presumed equally serious; differences in seriousness between similarly classified offenses must thus be evaluated on a case-by-case basis."); *Walsh v. State*, 677 P.2d 912, 916-17 (Alaska App. 1984) (reckless conduct constituting manslaughter not necessarily less serious than manslaughters involving intentional or knowing mental state mitigated by extreme provocation); *Juneby v. State*, 641 P.2d 832, 841 (Alaska App. 1982) (the grouping of different means of committing an offense within the same statute with identical classifications and sentencing range indicates all means constitute the same offense and all subsections are to be viewed as involving equally serious conduct), modified on other grounds, 665 P.2d 30 (Alaska App. 1983).

The reasoning in *Walsh* is especially applicable to Graham's case since it also addressed whether conduct involving an intentional mental state is inherently more serious than a type of reckless conduct, reckless conduct that reflects a manifest indifference to the value of human life, and also involves drunk driving. *Walsh*, 677 P.2d at 917-18. In *Walsh*, the court explained that an analysis of whether an offense will constitute reckless manslaughter or reckless murder depends on whether the recklessness manifests an extreme indifference to human life, which may depend on the social utility of the defendant's conduct, any precautions taken by the defendant, and the foreseeability that death might result. *Id.* at 918-19. The court also explained in *Walsh* that this analysis is appropriate in determining the seriousness of a drunk-driving manslaughter. *Id.* at 919. It follows that a similar analysis is appropriate in determining the seriousness of a second-degree murder involving drunk driving, rather than presuming that a second-degree murder involving drunk driving ordinarily is less serious than a second-degree murder involving intentionally assaultive conduct.

The court of appeals's approach in *Graham* also is inconsistent with this court's decision in *Jeffries v. State*, 169 P.3d 913 (Alaska 2007), and with the legislative history

of AS 11.41.110. In *Jeffries*, this court looked to the commentaries to the Model Penal Code in discussing the scope of the conduct that falls within AS 11.41.110. This court pointed out that the commentaries suggest that extreme-indifference murder is intended to allow actors to be convicted of murder if their actions, while not purposeful or knowing with regard to the resulting death, demonstrate "equivalent indifference to the value of human life." *Id.* at 916. This court also pointed out in *Jeffries* that the commentaries recognize that this kind of reckless homicide "cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly." *Id*. at 916-17. Thus, while this discussion in *Jeffries* is found in the context of a claim challenging the sufficiency of the evidence to support a second-degree murder conviction, its teaching – that an extreme indifference homicide can be equally as serious and worthy of societal condemnation as a murder arising from intentionally assaultive conduct (that did not involve an intent to kill) – applies with equal force in assessing the seriousness of various types of second-degree murder. It also implicitly endorses the approach taken by the court of appeals in *Walsh*.

Furthermore, the commentary to AS 11.41.110 explains that the conduct described in subsection (a)(2) "describes conduct that is very similar to the 'substantially certain' clause in subsection (a)(1)" of the statute. Senate Journal Supp. No. 47 at 9-10 (June 12, 1978). In other words, the alternative theories of second-degree murder describe conduct, circumstances, and culpable mental states, which do not differ substantially in moral culpability, and which amount to the same crime with the same applicable sentencing range. Thus, to the extent that the 20 to 30 year benchmark applies to any second-degree murder case, it also would apply to Graham's case and would provide a starting point for the sentencing judge's analysis.

Given that Judge Saxby found correctly that Graham's conduct fell within the mainstream of seriousness for second-degree murder, the judge did not make a legal error by using the 20 to 30 year benchmark as the starting point of his analysis. [Exc. 163-64,

166] *See Hodari*, 996 P.2d at 1235 (endorsing the view that benchmarks are starting points for an individualized analysis in each case but do not necessarily represent the typical sentence for a given offense). The fact that a sentence below the *Page* benchmark can be appropriate in cases where the offender did not intentionally assault the victim does not mean that such a sentence always is appropriate when the offender did not intentionally assault the victim or that the starting point of the sentencing analysis is different. Moreover, just as an "affirmance of a sentence on appeal means only that . . . the sentence is not excessive" and does not set a ceiling on sentences in similar cases or mean that the court would not have affirmed a greater sentence, the fact that the appellant's sentence was higher than any other reviewed sentence for that crime does not necessarily mean that the sentence was excessive or should be reconsidered. *Olson v. State*, 264 P.3d 600, 606 (Alaska App. 2011) (quoting *Hurn v. State*, 872 P.2d 189, 199-200 (Alaska App. 1994)); *Pusich*, 907 P.2d at 34-35 (expressly recognizing the fact that the appellant's sentence was higher than any other reviewed sentence for a vehicular homicide does not necessarily mean that the sentence was excessive).

IV. JUDGE SAXBY DID NOT ERR IN FINDING GRAHAM'S OFFENSES WERE AGGRAVATED BECAUSE HIS CONDUCT ENDANGERED THREE OR MORE PEOPLE

A. Standards of review

"The existence or non-existence of an aggravating or mitigating factor is a mixed question of law and fact." *Michael v. State*, 115 P.3d 517, 519 (Alaska 2005). Determining whether an aggravating factor applies requires a two-step process: the court must first assess the nature of the defendant's conduct, a factual finding, and then determine whether that conduct falls within the statutory standard, a legal determination. *Id. See also State v. Tofelogo*, 444 P.3d 151, 154 (Alaska 2019). "Any factual findings made by the court regarding the nature of the defendant's conduct are reviewed for clear error, but whether those facts establish that the conduct" falls within the factor's scope "is a legal question."

Michael, 115 P.3d at 519; *Tofelogo*, 444 P.3d at 154. In interpreting the scope of an aggravating factor, the appellate court applies its independent judgment, interpreting the statute "according to reason, practicality, and common sense, considering the meaning of the statute's language, its legislative history, and its purpose." *Tofelogo*, 444 P.3d at 154 (quoting *Parson v. State*, *Dep't of Revenue, Alaska Hous. Fin. Corp.*, 189 P.3d 1032, 1036 (Alaska 2008)). If a factor is found to properly apply, the amount of weight to give it lies within the sentencing judge's discretion and is reviewed under the "clearly mistaken" standard. *Tofelogo*, 444 P.3d at 154-55.

B. The finding that Graham's conduct endangered three or more people was amply supported and given appropriate weight

In sentencing Graham, Judge Saxby remarked that Graham's use of alcohol on the day of the offenses was "not just excessive" but fell "well into the range that constituted an abuse." [Exc. 160-61] Judge Saxby characterized Graham's driving as "aggressive," "extremely reckless," and as verging on "road rage," remarking that this behavior was more reckless than merely running a red light. [Exc. 161, 164-65] This conclusion was based on the evidence in the record that Graham was speeding in poor driving conditions, had fishtailed several times, was tailgating and honking at other vehicles, and passing vehicles in a dangerous manner. [Exc. 161] Judge Saxby found that Graham's conduct created a risk of imminent physical injury to three or more people, noting that before Graham's vehicle struck Durr and McPheters, Graham lost control of his vehicle several times, had several near collisions, and there were passengers in some of the vehicles Graham nearly missed. [Exc. 163] *See* AS 12.55.155(c)(6), stating that a felony offense is aggravated if "the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices." Statutory aggravating factors, such as this one, however, do not directly apply to unclassified felonies such as second-degree murder, but they do provide "points of reference" or some guidance in determining whether a particular offense

is aggravated than the norm. *See Blalock v. State*, ___ P.3d ___, 2019 WL 4725166, *10 (Alaska App. 2019); *Allen v. State*, 56 P.3d 683, 685 (Alaska App. 2002).

As the court of appeals recognized, the judge's factual finding that Graham's conduct endangered the lives of three or more people was undisputed. *See Graham*, 440 P.3d at 321. Graham's own attorney acknowledged that Graham's conduct endangered multiple lives. [Exc. 151, 154] But counsel argued that this fact did not make Graham's case "transcend into a category that's different from the average drunk-driving offense" and that Graham's degree of recklessness was no more aggravated than the typical drunk-driving homicide case and thus this factor should not be accorded any weight. [Exc. 151-52] The court of appeals erred in adopting this argument and concluding that it is true of all drunken driving homicides that the offender's conduct creates a risk of imminent physical injury to three or more people and thus should not be applied in homicide cases involving drunk driving. *Id.*

In reaching this conclusion, the court of appeals overlooked the fact that 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. The risks created by Graham's intoxication and driving were real and substantial.

Several witnesses reported that Graham had engaged in aggressive driving; he was weaving in and out of traffic, cutting off other vehicles, tailgating, speeding, honking his horn at other drivers, and nearly collided with other vehicles before his vehicle struck and killed the two girls. This type of driving can properly be characterized as extremely egregious, or "intentional gravely dangerous driving conduct" that might have justified charges of extreme-indifference second-degree murder under AS 11.41.110(a)(2) even against a sober driver. [Exc. 17-18, 200-01] *See Jeffries*, 169 P.3d at 918 (describing "inherently reckless or intentional gravely dangerous driving conduct," including swerving in and out of traffic or driving at high speed, that might justify extreme-indifference murder

charges even against a sober driver, and noting that prior cases have not required "overtly egregious driving conduct" to support a conviction for second-degree murder). In addition, although Graham's blood alcohol content was not as high as Jeffries's was, Graham, like Jeffries, had been drinking all day, and three hours after the collision he still had a blood alcohol content of .18 percent. [Exc. 18, 199] This made it far more likely for him to cause a collision than a driver with only a .08 percent blood alcohol content. *See Jeffries*, 169 P.3d at 922 (noting that while a driver with a .08 percent blood alcohol content is three times more likely to cause a collision than a sober driver, a driver with a .15 percent blood alcohol content, less than Graham's blood alcohol content, is twelve times more likely to cause a collision than a sober person). Graham's conduct, involving both particularly egregious driving behavior and extreme intoxication, provided ample justification for Judge Saxby's determination that the aggravating factor applied in assessing the seriousness of Graham's conduct relative to other second-degree murders. *See* AS 12.55.155(c)(6). Moreover, Judge Saxby was cognizant of the concept that when an aggravating factor would apply in virtually all cases of a certain type, it is inapplicable. It was for this reason that the judge rejected the proposed aggravating factor that the offense involved the use of a dangerous instrument. [Exc. 163] Given this record, the court of appeal should not have faulted Judge Saxby for finding the aggravator applicable to Graham's sentencing.

V. THE COURT OF APPEALS ERRED WHEN IT REEVALUATED THE WEIGHTS TO BE ACCORDED TO THE SENTENCING GOALS

A. Standard of review

Because a sentencing judge has broad discretion in determining the priority and relative weights of the sentencing goals set forth in AS 12.55.005, codifying the goals articulated in *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970), appellate review of the priority and relative weights given to the various sentencing factors is for abuse of

discretion. *See State v. Wentz*, 805 P.2d 962, 964 (Alaska 1991) (citing *Nukapigak v. State*, 663 P.2d 943, 945 (Alaska 1983)); *LaLonde v. State*, 614 P.2d 808, 811 (Alaska 1980); *Asitonia v. State*, 508 P.2d 1023, 1026 (Alaska 1973); *Gray v. State*, 267 P3d 667, 674 (Alaska App. 2011); *Evan v. State*, 899 P.2d 926, 931 (Alaska App. 1995).

B. Judge Saxby's findings and prioritization of the sentencing goals

Before imposing sentence, Judge Saxby made several factual findings with respect to Graham's offenses. First the judge found that on that day Graham's consumption of alcohol was "not just excessive, but" constituted "abuse," observing that more than three hours after the crash, Graham's blood alcohol level was more than two times over the legal limit. [Exc. 160-61, 169] The judge also found that Graham engaged in "aggressive driving" and "extremely reckless driving behavior," noting that one witness thought Graham was exhibiting road rage and that the two girls he killed "had absolutely no chance to avoid" Graham. [Exc. 160, 168, 170] The judge found that Graham's conduct created a risk of imminent physical injury to three or more people, noting that there had been several near collisions before Graham's vehicle struck the two girls. [Exc. 163, 170] The judge found that Graham had used a dangerous instrument, as was true in virtually all second-degree murder cases, and thus was not a factor distinguishing Graham's case from other second-degree murders. [Exc. 163]

Judge Saxby recognized the magnitude of the consequences of Graham's conduct was high, noting that two girls, who were walking home on the sidewalk, died from massive blunt-force trauma and that two other girls (Graham's) essentially lost their father for their youth and young adulthood, leaving three families "bereft." [Exc. 161-62, 168, 170]

Judge Saxby concluded that Graham's offense did not represent most serious conduct because it did not involve the intentional use of a motor vehicle to injure another person. [Exc. 163-64] The judge also found that Graham's offense did not constitute least

serious conduct because it involved extreme recklessness, but rather fell within the mainstream of second-degree murders and was conduct that ordinarily would call for a sentence within the 20- to 30-year range. [Exc. 164] The sentencing judge accordingly found that for each count, the 20- to 30-year range was the starting point of the analysis. [Exc. 166] The judge recognized that there were no reported cases approving a sentence in excess of 20 years for a vehicular second-degree murder where the defendant did not deliberately use his or her vehicle as a weapon. [Exc. 167, 172-73]

Judge Saxby found that Graham was not a youthful offender, thus his age, 31 at the time of sentencing, was a neutral factor. [Exc. 168-69] Graham's criminal history, consisting of only a single speeding ticket, weighed in favor of a lesser sentence, as did his good potential for rehabilitation; thus the judge considered rehabilitation an "important sentencing goal." [Exc. 169-70, 172] In addition to concerns about Graham's abuse of alcohol on that day, Judge Saxby also had concerns about Graham's prior use of and experimentation with other illegal substances. [Exc. 169] The judge found that so long as a substance abuse evaluation and whatever treatment was recommended were completed successfully, the need to confine Graham to protect the public would be satisfied. [Exc. 170] The judge found that "any substantial sentence" he would impose would be sufficient to deter Graham for the rest of his life from drinking and driving, and that the prosecution itself had probably already deterred Graham from engaging that conduct. [Exc. 170-71]

Judge Saxby found that this type of crime, however, was one where the imposition of a substantial sentence would further the goal of general deterrence. [Exc. 171] The judge recognized that community condemnation and reaffirmation of societal norms were highly significant factors in drunk driving cases, especially one where two innocent, young girls were "essentially smashed to death"; accordingly, those factors demanded the imposition of a substantial sentence. [Exc. 171-73] The judge thus gave priority to general deterrence and community condemnation and he elected to impose a

very significant sentence, but one that was not at the high end of the statutory range, was not at the high end of the benchmark sentencing range and was not the maximum allowable under the plea agreement. Instead, the judge imposed a sentence of 16 years to serve on each count for a total of 32 years of active confinement, a sentence that was just below the middle of the range agreed to under the plea agreement. [Exc. 196-97]

C. Judge Saxby did not abuse his discretion in prioritizing and according weight to each of the sentencing factors

As noted above, AS 12.55.005 codifies the sentencing goals originally identified in *State v. Chaney* that a judge should consider in fashioning an appropriate sentence for an offender. 477 P.2d at 444 (identifying the objectives of sentencing under the Alaska Constitution). This statute provides in pertinent part:

> In imposing sentence, the court shall consider
>
> (1) the seriousness of the defendant's present offense in relation to other offenses;
>
> (2) the prior criminal history of the defendant and the likelihood of rehabilitation;
>
> (3) the need to confine the defendant to prevent further harm to the public;
>
> (4) the circumstances of the offense and the extent to which the offenses harmed the victim or endangered the public safety or order;
>
> (5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct;
>
> (6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as reaffirmation of societal norms; and
>
> (7) the restoration of the victim and the community.

Id.

The court of appeals faulted Judge Saxby for justifying Graham's sentence based on the goals of general deterrence and community condemnation. *Graham*, 440 P.3d at

321-27. But the court of appeals overlooked that these were not the only sentencing objectives that the judge considered and that there were several reasons underlying the sentencing decision, instead analyzing the question as if each factor alone were the only basis for the judge's decision. *Id.* [*See* Exc. 168-73] Given the holistic nature of sentencing – a process that takes into account the characteristics of the offender, the nature and circumstances of the criminal conduct, and the impact of the criminal conduct on the victims and the community – viewing each sentencing objective in isolation risks mischaracterization of the sentencing judge's analysis and can lead to the mistaken conclusion that the sentence was unjustified. In addition, for the reasons previously discussed, it is erroneous to characterize Graham's sentence as "extraordinarily severe," given that he was convicted of two serious counts of second-degree murder. This is particularly so where the term he received for each count, 16 years, falls below the *Page* sentencing benchmark, and given that Graham's composite sentence of 32 years is just slightly above the *Page* benchmark and just below the middle of the sentencing range called for by Graham's plea agreement.

More specifically, the court of appeals erred in concluding that Judge Saxby improperly applied the concept of community condemnation, equating it with retribution. *Graham*, 440 P.3d at 322-24. The court of appeals recognized that community condemnation of the offender and reaffirmation of societal norms express equivalent concepts. *Id.* at 322. It then recognized that these goals can justify the imposition of a substantial sentence, even when a defendant might have a favorable background, is remorseful, and has good prospects for rehabilitation, in order to reflect community beliefs that certain norms are inviolable and will be upheld by the courts. *Id.* at 322 (citing *Newsom v. State*, 533 P.2d 904, 911-12 (Alaska 1975); *Cleary v. State*, 584 P.2d 952, 955-56 (Alaska 1976); *Benefield v. State*, 559 P.2d 91, 98-99 (Alaska 1977); *State v. Wortham*, 537 P.2d 1117, 1121 (Alaska 1975); *State v. Lancaster*, 550 P.2d 1257, 1260 (Alaska

1976)). The court also recognized that this principle applies in vehicular homicide cases. *Id.*

The court of appeals also explained, however, that the concepts of community condemnation and reaffirmation of societal norms are distinct from retribution, the concept of making defendants pay for their crimes, a concept that is based on vengeance. *Id.* at 323 (citing and discussing *Kelly v. State*, 622 P.2d 432, 434 (Alaska 1981); *Leuch v. State*, 633 P.2d 1006, 1012-13 (Alaska 1981)). The court of appeals further explained that a sentencing judge is not permitted to rely on the goal of community condemnation to give voice to the community's outrage at a particular defendant or at an especially disturbing crime. *Id.* at 323. The state does not take issue with these statements. But it also must be recognized that these concepts are not as distinct as the court of appeals suggests, and that it can be at times difficult to discern the difference, especially when that distinction turns on the sentencing judge's intent, rather than the facts and circumstances of the offenses. A community's outrage at a particularly disturbing crime is integrally related to the seriousness of that crime, a factor that a sentencing judge can and should take into account when imposing a sentence. *See* AS 12.55.005(1) (which lists this factor as one the must be considered by the sentencing judge).

In reaching the conclusion that Judge Saxby improperly applied the concept of community condemnation in ways that are not permitted, the court of appeals relied heavily on the prosecutor's sentencing argument.[4] *Graham*, 440 P.3d at 323-24. The court of appeals overlooked, however, that the prosecutor acknowledged that Graham "is not a monster," is a "hard worker," is a "loving father," and a "good friend." [Exc. 129] The prosecutor also acknowledged that Graham has "high prospects for rehabilitation," has a

[4] The state recognizes that the prosecutor made some incorrect arguments. [*See* Exc. 132-33, 135-36; Tr. 72 (opining that prior sentencing cases were wrongly decided, telling the judge that the community was angry and outraged by Graham's conduct, and asking the judge on these bases to impose the maximum sentence under the plea agreement)]

"low likelihood of ever re-offending," has taken "full responsibility" for his conduct, and has repeatedly apologized for his conduct and the harm it caused. [Exc. 129-32] The court of appeals also overlooked that Judge Saxby listened to defense counsel's sentencing argument, which included argument on the distinction between community condemnation and retribution, the need not to be swayed by emotions, and which urged the judge to impose a sentence at the lower end of the agreed upon sentencing range. [Exc. 136-58]

Most importantly, there is no reason to assume that the judge adopted the prosecutor's erroneous argument, particularly since the judge did not impose the sentence urged by the prosecutor, but one substantially less severe and just below the middle of the agreed upon range. If anything, the fact that the judge rejected the prosecutor's sentencing proposal suggests the opposite – that the judge also rejected the prosecutor's erroneous argument. Read in context, Judge Saxby's remarks reflect his belief that, even though Graham was genuinely remorseful, had good prospects for rehabilitation, and was likely not to pose a danger in the future to the public, his two second-degree murders were so serious as to require a substantial sentence. [*See* Exc. 159-73] This basis for imposing a substantial sentence is entirely proper. In fact, the judge expressly recognized his obligation to render the lowest possible sentence within the agreed upon range that would meet all the sentencing goals. [Exc. 173] This recognition reflects that Judge Saxby was not improperly motivated by retribution, but rather by community condemnation and reaffirmation of societal norms in the objective sense endorsed by this court in *Kelly* and *Leuch*.

The court of appeals also erred in concluding that the sentence imposed by Judge Saxby was not justified by the sentencing objective of general deterrence. *Graham*, 440 P.3d at 324-27. The court of appeals's conclusion appears to be based largely on its skepticism that a severe sentence is effective in deterring other offenders. *Id.* Although this court in *Pears v. State* also expressed skepticism about the benefits of deterrence from harsh sentences, it is worth noting that the authority this court cited for its skepticism – the

American Bar Association's (ABA) Standards for Criminal Justice, "Sentencing Alternatives and Procedures" (Approved Draft 1979), § 18-2.5, commentary at page 18.120 – was commentary on the deterrence of individual offenders, rather than on general deterrence, and was intended to explain why the benefits of increased sentences might not always be worth the costs. 698 P.2d 1198, 1205 (Alaska 1985). Moreover, the current ABA Standards continue to include general deterrence as one of the five sentencing objectives that should always be considered. *See* the American Bar Association's Standards for Criminal Justice, "Sentencing Alternatives and Procedures" (1994 3d ed.), § 18-2.1. It also should be noted that Judge Saxby was aware that a severe sentence might not always produce all of the hoped-for-benefits. [Exc. 157-59] And, for the same reasons discussed above, there is no reason to believe that Judge Saxby adopted Chief Mew's view of the deterrent benefits of a severe sentence given that the judge did not impose even close to the most severe sentence possible under the plea agreement.

Furthermore, 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 its conclusion that longer sentences are ineffective for deterring drunk driving deaths. *Graham*, 440 P.3d at 325-26. Finally, the court of appeals was under the belief that Graham's sentence for two second-degree murders was "extraordinarily severe" and was a decade more than any other similarly situated offender has ever received. *Id.* at 324, 326-27. But for the reasons discussed above, neither of those statements is accurate. This court should conclude that Judge Saxby did not improperly base Graham's sentence on general deterrence and did not abuse his broad discretion in determining that general deterrence and community condemnation were the most important sentencing goals in Graham's case.

VI. THE COURT OF APPEALS ERRED IN DISQUALIFYING JUDGE SAXBY FROM PRESIDING OVER ANY RESENTENCING

A. The decision of the court of appeals

The court of appeals did not disqualify Judge Saxby for the reason asserted by Graham in the trial court – the judge's remarks reflected a partiality to the victims. [*See* R. 61-70] Instead, relying on Alaska Judicial Canon 3(E)(1), the court of appeals disqualified Judge Saxby because he was exposed to lengthy emotional presentations that possibly could have improperly influenced him and his sentencing remarks supposedly suggested the possibility that one of the rationales for the sentence imposed was retribution. *Graham*, 440 P.3d at 327-29.

B. Standards of review

A judge's decision that the judge is capable of being fair is reviewed under the abuse of discretion standard. *Amidon v. State*, 604 P.2d 575, 577 (Alaska 1979); *Phillips v. State*, 271 P.3d 457, 459, 464 (Alaska App. 2012). On the separate issue of whether reasonable people would question the judge's ability to be fair, *i.e.*, the appearance of bias, the standard of review is *de novo* because a "reasonable appearance of bias" is assessed under an objective standard and is a question of law. [5] *Phillips*, 271 P.3d at 459, 467-68.

Whether Judge Saxby considered materials presented at sentencing that were unduly prejudicial is reviewed under the abuse of discretion standard. *See State v. Walls*, 601 P.2d 1050 (Alaska 1979). To the extent that this underlying question turns on statutory construction or the construction of constitutional provisions, this court reviews the issue *de novo*. *Friends of Willow Lake, Inc. v. State, Dept. of Transp. & Public Facilities, Div. of*

[5] Because the court of appeals required Judge Saxby's recusal for a reason different than that argued in the trial court — a reason that was argued by Graham in his opening brief in a single sentence and footnote — technically the question is one of plain error. [*See Graham v. State*, No. A-12222, At. Br. at 32 & n. 84] Because the state did not assert plain error in the court of appeals and because the question is largely one of law, it makes little practical difference.

Aviation and Airports, 280 P.3d 542, 546 (Alaska 2012); *Smart v. State, Dept. of Health & Social Services*, 237 P.3d 1010, 1014 (Alaska 2010).

C. The presentation of memorial videos for each of the victims was proper

The first inkling that the families of the victims intended to present memorial videos reflecting the lives of the two girls was in the presentence report. The writer noted that both the Durr and McPheter families were planning to create slideshows with music and photographs of the girls that they wished to play at Graham's sentencing in order to "better put to light who they truly were." [Exc. 206]

Graham filed a memorandum, arguing that the sentencing judge needed to "regulate" the presentation of victim impact materials to minimize their emotional impact and that neither Alaska Criminal Rule 32.2 nor AS 12.55.022-.023 authorizes a victim to make an oral presentation that includes photographs or other audio-visual aids. [Exc. 35-37]

Through the Office of Victims' Rights (OVR), the Durr and McPheter families filed a written response, arguing that the families of the victims should not be barred from presenting photographs or video images of the victims. [Exc. 38-41] The OVR asserted that the constitutional right of the victims to be treated with dignity, fairness, and respect encompasses the right to present photographic and video images of the homicide victims. [Exc. 38-39] The OVR also asserted that the presentations would be relevant to the sentencing objectives to be considered, especially the objectives of community condemnation, the seriousness of the offense, the extent of harm to the victims, and the restoration of the victims and the community. [Exc. 39-40] The OVR explained that recognition of who the victims were in life and who was lost would be "a small step" towards restoration "for both the victim families and the community." [Exc. 40] The OVR

also pointed out that the proposed victims' presentations would require only a small amount of time compared to the many hours the court had already expended on the case. [Exc. 40]

At the beginning of the sentencing hearing, Judge Saxby addressed whether technology or photographs could be used during presentation of the victim impact statements. [Exc. 101-02] Defense counsel stressed that his objection to a slide show with music was not based on public policy but rather on his contention that the statutes did not permit these types of presentations. [Exc. 103] Given the commonplace use of photographs and PowerPoint presentations in court proceedings, and given that the victims have a constitutional right to be present and to be heard, Judge Saxby ruled to allow the showing of photographs or videos during the victim statements, but warned that given the time constraints of the hearing, he might have to limit the victim presentations so that he could complete the sentencing as scheduled. [Exc. 102-03] The two videos were played just before members of the Durr and McPheters families spoke. [Exc. 116-17, 182-83]

The video entitled "Jordyn Durr" was approximately 13:55 minutes in length. [Exc. 183] The video portrayed Jordyn as a girl who was loved by her family and who was growing into a young woman. [Exc. 183] The video included approximately 165 photographs, several of which were displayed more than once. [Exc. 183] They depicted Jordyn throughout her life, from the time she was an infant, as a toddler, as a child with her family at home and on vacation, and as a teen. [Exc. 183] The video was accompanied by music reflecting the family's love for Jordyn and the loss they experienced, including, "I Dreamed a Dream" by Anne Hathaway, "Just the Way You Are" by Bruno Mars, "For Whom the Bell Tolls" by Metallica, and "You'll Be in My Heart" by Phil Collins. [Exc. 121-24, 183, 215-16, 222-23, 250-52, 259]

The video entitled "Brooke's Tribute" was approximately 17:55 minutes in length. [Exc. 183] The video showed events of significance in Brooke's life from the time she was an infant and toddler, continuing as she grew into a young woman, and included

shots from family vacations and school trips. [Exc. 183] The video included approximately 214 photographs. [*See* Exc. 117-21, 183, 215-16, 224-47, 253-58, 262-63] The audio accompanying the photographs started with a recording of a voicemail message that Brooke had left for her mother shortly before Brooke's death. [Exc. 183] Then music was played, including "Cups (Pitch Perfect's 'When I'm Gone')" by Anna Kendrick, "Sweet Child O' Mine" by Guns N' Roses, "See You Again" by Carrie Underwood, and "When I get Where I'm Going" by Brad Paisley, featuring Dolly Parton. [Exc. 183] The audio ended with the sounds of waves crashing and birds chirping. [Exc. 183] The music selections, like the music selections for Jordyn's video, reflect the family's love for Brooke and the great loss her death brought them. [*See* Exc. 117-21, 215-16, 224-47, 253-58, 264]

The court of appeals was mistaken to conclude that Judge Saxby should have excluded the two video presentations. Under the Alaska Constitution, a crime victim has the right to be treated with dignity, respect, and fairness during all phases of the criminal justice process. *See* art. I, § 24 of the Alaska Constitution. A crime victim also has the constitutional right to be heard, upon request, at sentencing. *Id.* These constitutional rights are given effect by both statute and court rule. Alaska Statute 12.55.022 requires the presentence report to include a victim impact statement. Alaska Statute 12.55.023(b) affords a crime victim the right to submit a written statement that the victim believes is relevant to the sentencing decision. This statute also affords a victim the right to give either sworn testimony or "an unsworn oral presentation" at the sentencing hearing. Criminal Rule 32.2(a) provides that if a victim submits a written statement, gives sworn testimony, or gives "an unsworn oral presentation," the court shall take the contents into consideration in preparing the victim impact portion of the sentencing report as well as for "any other appropriate purpose."

Because these statutes and rule give effect to a victim's constitutional rights to be treated with dignity, fairness and respect, and to be heard, the term "unsworn oral

presentation" in AS 12.55.023 and Criminal Rule 32.2(a) should be broadly construed. *See Northern Alaska Environmental Center v. State*, *Dept. of Natureal Resources*, 2 P.3d 629, 635 (Alaska 2000) (given the broad constitutional mandate to protect the public interest in dispositions of state land, term "interests in land" was construed to include interests such as licenses). Allowing the use of audio or visual aids furthers the goal of increasing participation by crime victims and of making it easier and more comfortable for crime victims to participate in the criminal justice process. This is especially true for victims who are not capable of or comfortable with fully expressing themselves with words, either in writing or orally. Construing the term "oral presentation" to include the use of audio or visual aids thus assures crime victims that their participation will be meaningful and gives full effect to a victim's constitutional rights to be "heard" and to be treated with dignity and respect. And because a crime victim can attach a video or PowerPoint presentation to a written statement, affording a crime victim to the right to include the audio or visual material in their oral presentation at the sentencing hearing furthers the legislative intent to increase victim participation in sentencing without exposing the judge to information that would otherwise be unavailable. Alaska's constitutional victims' right to be "heard" and statutory right to make an "oral presentation" thus does not preclude the use of video images, photographs, music, or the presentation of a memorial video.

Nothing in the legislative history of a victim's statutory right to provide a written statement and either sworn testimony or an unsworn oral presentation suggests that the legislature intended to exclude the use of audio or visual aids in making an unsworn oral presentation. Rather, the legislative history confirms that the legislature's purpose was to increase participation by crime victims and to make it more comfortable for crime victims to participate in the sentencing process. *See* Sponsor Statement, Dave Donley, Bill File for House Bill (HB) 100, House Health, Education, and Social services Committee, 17th Alaska Legislature (noting that the bill was intended to increase crime victims' right of

participation "by allowing victims to make oral presentations to the court" (former law only allowed victims to submit written remarks to the judge which was a hardship for victims who do not feel comfortable communicating in writing)); Statement of Rep. Dave Donley, Minutes of House Health, Education, and Social Services Committee, 17th Alaska Legislature (March 25, 1991) (same). At a hearing where this bill was discussed, Laurie Otto, then a member of sponsor Rep. Donley's staff, explained the purpose of the provisions allowing a victim to make an oral presentation:

> The purpose of allowing the oral testimony to begin with is peoples can provide unsworn written testimony right now, but there's a lot of people in the state that just don't feel – comfortable and capable of expressing themselves in writing, and it's a lot easier for them to come into court and just make an oral statement. And certainly if any party insists on the testimony being sworn, it's going to be sworn, but if no one insists on it, it's a lot easier and faster for the victim to just stand up and say their piece rather than going through the formality of being sworn. So it's just to provide the option, just like we provide unsworn written comments right now. We don't require people to get notarized statements and submit them to the court; we let them just provide a letter.

House Judiciary Committee, at 0:25:30 – 0:26:25 (April 3, 1991) (statement of Laurie Otto), *available at* http://www.akleg.gov/ftr/archives/1991/HJUD/33-HJUD-910403.mp3 (last visited on October 28, 2019).

It is not surprising, nor determinative, that in 1991, when HB 100 was passed, the legislature did not envision the use of video, audio, or even of PowerPoint slide shows, in an oral presentation. PowerPoint was not officially launched until 1990, just a year before the legislation was passed.[6] And the earliest record of a memorial or tribute video containing a photographic montage that the state could find was in 1988, just three years before the legislation was passed. *See* Jeff Strickler, MEMORIAL VIDEOS GIVE LASTING FAREWELL, Star Tribune, (June 6, 2011), *available at* http://startribune.com/memorial-

[6] *See* Wikipedia, Microsoft PowerPoint, *available at* https://en.wikipedia.org/wiki/Microsoft_PowerPoint (last visited on October 28, 2019).

videos-give-lastingfarewell/123142533/ (last visited on October 28, 2019). Memorial videos, especially ones that are set to music, did not become commonplace until several years later. *Id.* As Judge Saxby pointed out, the use of videos and PowerPoint has in recent decades become commonplace in courtrooms. [Exc. 102] The fact that the legislature did not know what media technology would become commonplace in the coming years does not mean that the use of advanced technology as a part of an oral presentation by a victim at sentencing is prohibited. Indeed, the legislature's use of the broader term "oral presentation," rather than the more narrow term "oral statement" strongly suggests that the legislature recognized that audio-visual aids of some kind might be used. And given the purpose of the legislation is to increase the participation of victims at sentencing and to implement victims' constitutional rights, the term "oral presentation" should be construed to include the use of audio or visual aids, including memorial videos that are set to music or other types of soundtrack.

In *Leon v. State* the Idaho Court of Appeals rejected a challenge to the introduction of a DVD about the murder victim's life played during the direct examination of the victim's mother during sentencing. 132 P.3d 462 (Idaho App. 2006). The DVD at issue in *Leon* was four-and-one half minutes long and contained both video and photographic images of the victim alone, with her children, and with other family members. *Id.* at 464. The video images were accompanied by contemporaneous audio recordings and the still images were arranged in a montage and set to music. *Id.* In rejecting the defendant's argument that the DVD was inadmissible because it was not a "statement," the Idaho court relied on a victim's right under the Idaho Constitution to be "heard" at sentencing. *Id.* at 465-67. Article I, section 22(6) of the Idaho Constitution uses language similar to that used in the Alaska Constitution; it states that a victim of crime has the right "[t]o be heard, upon request, at all criminal justice proceedings considering a plea of guilty, sentencing, incarceration or release of the defendant, unless manifest injustice would result." The

constitutional right is codified using similar language in I.C. § 19-5306(1)(e). *See Leon*, 132 P.3d at 464. Finding the term "to be heard" to be ambiguous, the Idaho court concluded that, since prior to the adoption of this constitutional provision victims already had the right to give a sworn statement at sentencing, the constitutional provision "must describe a broader right" that is not limited to verbal or written statements under oath. *Id.* at 465-66. The court also concluded that "a broad view of a victim's right to be heard conforms with the discretion traditionally afforded a trial court to consider a wide range of information at sentencing" and to make a broad inquiry from a variety of sources and kinds of information as to the harm caused by the defendant's conduct. *Id.* at 466. It accordingly saw "no reason to define or limit [the right to be heard] in such a way as to preclude the use of video images and photographs to inform the court of the victim's personal characteristics and to illustrate the emotional impact of a murder on the victim's family." *Id.* at 466-67. This court should likewise construe Alaska's constitutional victim's right to be "heard" and statutory right to make an "oral presentation" not to preclude the use of video images and photographs and to include the presentation of a memorial video.

A sentencing court has broad discretion to consider all relevant evidence and information concerning the offense and the offender. *Clemans v. State*, 680 P.2d 1179, 1188 (Alaska App, 1984). The video presentations in Graham's case contained information of legitimate probative value to the sentencing objectives. Information about a homicide victim that shows the impact of the victim's death on their family and community is relevant to demonstrate the harm caused by the defendant's crime, and thus the severity of the crime, as well as to show community condemnation for the defendant's criminal conduct. *See* AS 12.55.005 (sentencing considerations include the seriousness of the defendant's offense, the circumstances of the offense and the extent to which the offense harmed the victim, and the effect of the sentence as a reflection of community condemnation of the criminal conduct). Moreover, to understand the impact of the death

on the family of the deceased, it may often be necessary to have information about the character of the homicide victim. *See Payne v. Tennessee*, 501 U.S. 808, 819 (1991) ("the assessment of harm caused by the defendant" has traditionally been an important concern in sentencing and the sentencing court has always been free to consider a wide range of relevant information); *Clemans*, 680 P.2d at 1188 ("To disregard the practical consequences that a homicide might have on members of a victim's family would be wholly unrealistic" and would ignore "a sound and realistic measure of the seriousness of the harm occasioned by the particular offense."). Although the Court in *Payne* was not addressing the presentation of a video set to music, the Court's statements that the sentencing authority has always been free to consider a wide range of relevant material, to "conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come," about the harm caused by a crime reflect that its holding is equally applicable to video presentations like the ones given at Graham's sentencing. 501 U.S. at 819, 821, 825.

But detailed and emotional information about the background and character of a homicide victim, can be irrelevant if introduced to show that the value of a human life increases or decreases according to a person's station in life or achievements, because the life of each human being is considered equally worthy of protection. *See Payne*, 501 U.S. at 822-23; *Sandvik v. State*, 564 P.2d 20, 23-24 (Alaska 1977) (portion of presentence report strongly suggesting in an emotional manner that victim was a particularly worthy person and that therefore defendant was particularly worthy of punishment was irrelevant and improper); *Clemans*, 680 P.2d at 1187-88 (explaining the significance of the distinction between background information concerning a victim, which is not relevant, and information concerning the impact of a victim's death on immediate relatives, which is relevant). The purpose of victim impact evidence is not to encourage comparative judgments about the character of the victims or to suggest that the murder of a victim who

was a great asset to the community justifies a greater sentence than the murder of someone perceived to be less worthy. Instead, the purpose of victim impact material is to show "each victim's uniqueness as an individual human being" regardless of the person's character and achievements. *Payne*, 501 U.S. at 823. Even when the victim is an unemployed, mentally disabled individual, who may not have been in the view of many a "significant contributor" to society, the victim was a murdered human being whose loss affected their family, as well as the community as a whole. *Id.* at 823-24. Stated differently, a victim's uniqueness does not turn on having unique qualities but rather a recognition that each individual is a unique representation of humanity and has a unique combination of character traits and life experiences.

Of course, even victim impact presentations that serve "entirely legitimate purposes" can be "so unduly prejudicial" that they render the proceeding fundamentally unfair and should be excluded. *Payne*, 501 U.S. at 825, 831. What is to be avoided is exploitation of the emotional impact of such evidence to inflame the sentencing judge or to convert a sentencing hearing into an emotional exercise in vindictiveness. *Clemans*, 680 P.2d at 1188. But this limitation does not mean that evidence that "quite poignantly" points out some of the harm done by the offense is necessarily unduly prejudicial. *See Payne*, 501 U.S. at 826 (noting approvingly that the disputed testimony "quite poignantly" illustrated some of the harm caused by Payne's murders). The reality overlooked by the court of appeals here is that victim impact evidence's probative value may be, to some extent, tied to its potential to evoke emotion because the evidence shows the magnitude of the loss and the depth of the family's grief. This does not render it unfairly prejudicial.

In any event, it is probably not possible, or even desirable to exclude all emotional content from information about the harm caused by a murder because emotions are inherent to the decision making process and because excluding them would depersonalize the victim just as the murderer did. *See Payne*, 501 U.S. at 832 (excluding

all emotions would depersonalize the victim) (O'Connor, White, and Kennedy, JJ., concurring); Terry Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 Cal. L. Rev. 629, 640-42 (2011) (discussing the cultural script of dispassion in our judicial system and the fact that this script has not and cannot eliminate emotion from judicial decisions). In addition, excluding all emotion from the decision-making process would deprive judicial decisions of some of their moral force and recognition of the real consequences of judicial decision-making. *See Old Chief v. United States*, 519 U.S. 172, 187-88 (1997) (evidence may be relevant "not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings"); Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 Minn. L. Rev. 1997, 2007, 2011, 2028, 2051 (2010); Maroney, 99 Cal. L. Rev. at 647. Furthermore, emotions may be based on an individual's underlying belief structure, may embody complex thought about that individual's beliefs, may provide a distinct and significant supplemental means for apprehending the world, and can be analyzed like other thoughts. *See* Abrams & Keren, 94 Minn. L. Rev. at 2004, 2028-29, 2032-33, 2040, 2043-44, 2065; Maroney, 99 Cal. L. Rev. at 632, 642-51. In short, emotion and cognition are intertwined. Emotions thus can and should play a role in rational decision making and are often present, even if unrecognized and unaccepted, in the law. *See* Abrams & Keren, 94 Minn. L. Rev. at 2004, 2009; Maroney, 99 Cal. L. Rev. at 630, 634-36, 657-65, 668-71, 681-82. A reasoned judgment that is accompanied by emotion is not one that is improper or prejudicial. "Rather, emotion – some emotion, emotion both ways, emotion not alone but in combination with the law, logic, and reason – helps judges get it right." Denny Chin, *Sentencing: A Role for Empathy*, 160 U. Pa. L. Rev. 1561, 1580-81 (2012).

In *People v. Kelly* the California Supreme Court, relying in part on *Payne*, upheld the admission of a 20-minute victim-impact video featuring film footage and photographs and accompanied by soft background music by Enya, during the sentencing of a defendant

who murdered a 19-year-old. 171 P.3d 548, 567-72 (Cal. 2007). The court dismissed the notion that videos are inherently prejudicial and found that the video of the victim in *Kelly* was not unduly prejudicial but relevant to the penalty determination. *Id.* at 570-71. The court recognized, however, that problems could arise from the length of a video or the use of "stirring music," and that courts should monitor the jurors' reactions to ensure that the proceedings did not become overly emotional. *Id.* at 569-70. The court also expressed concern that background music could be "problematic" because it may "enhance the emotion of the factual presentation" without adding any relevant facts. *Id.* at 571-72.

The California court was mistaken, however, about its conclusion that, as opposed to the use of music to show the victim was an accomplished musician, the use of background music does not ordinarily add any additional information to the presentation. As mentioned above, the musical selections made by the victim's family members, just as the selection of descriptive language and the selection of photographs portraying the victim, can demonstrate the unique humanity of the victim, *i.e.* the victim's place in the world, the nature of the family's relationship with the victim, and the importance of that relationship in ways that words alone may not be able to do. A video and accompanying music may thus communicate critical information about the victim and the devastating effect his or her death had for family, friends, and the community. And for some individuals and cultural groups who are not comfortable with speaking in public or who have very little practice expressing their innermost thoughts in public, the selection of background music allows for an aural means of expression that would otherwise not be available.

Since *Kelly*, the California Supreme Court, using a case-by-case approach, has had repeatedly upheld the use of video tributes for a homicide victim. *See e.g., People v. Garcia*, 258 P.3d 751, 752-54 (Cal. 2011) (citing *People v. Prince*, 156 P.3d 1015, 1091-93 (Cal. 2007); *People v. Bramit*, 210 P.3d 1171 (Cal. 2009); *People v. Zamudio*, 181 P.3d 105, 135-37 (Cal. 2008)); *People v. Vines*, 251 P.3d 943, 985-86 (Cal. 2011).

A review of the video presentations here shows that Judge Saxby did not abuse his discretion in allowing them at the sentencing proceeding. The combined length of the two videos was about 30 minutes. [Exc. 101] The content of the videos was exactly what one would expect – photographs of the victims at various stages of life with family members and friends, and music selected by their families to reflect their feelings about each girl. A review of the videos demonstrates that they did not suggest directly or indirectly any desire for vengeance or retribution. Nor did either video in any way suggest that the character or achievements of the girls warranted imposition of a particularly harsh sentence, but rather the videos showed the uniqueness of each girl and the profound loss each family experienced as a result of the girls' deaths, matters that can be properly considered by the sentencing judge.

Moreover, some of the concerns that have been expressed about the use of videos, especially ones that are accompanied by background music, at sentencing are less substantial in Alaska, where a single judge, not a collective group of untrained jurors, act as the sentencing authority in all cases, including murder cases, and where there is no death penalty, as is the case in California. As will be discussed below, this court has long recognized that our trial judges are more knowledgeable and experienced than the average juror in a homicide prosecution and ordinarily can avoid becoming unduly prejudiced by the exposure to adverse information about the offense or its impacts.

D. The judge's remarks did not suggest that the sentence was based on retribution or that the judge was improperly influenced by the presentations

The Alaska Court of Appeals in the past has looked to the judge's sentencing remarks in assessing whether the sentencing judge was unduly swayed by the emotional nature of the evidence, whether the sentencing judge misconstrued the evidence, and whether the sentencing judge misapplied the evidence. *See Clemans*, 680 P.2d at 1188-89 (judge did not increase sentence based on the impermissible view that the victims were

particularly worthy people, but rather the sentence was "the result of a careful effort to apply the appropriate sentencing criteria to the totality of the record").

Judge Saxby's sentencing remarks reflect that he carefully analyzed each of the sentencing factors. [Exc. 160-73] In assessing the severity of Graham's offenses, Judge Saxby emphasized the nature of Graham's conduct. [Exc. 160-61, 163-69] In assessing the harm caused by Graham's offenses, Judge Saxby was factual, did not use emotionally laden language, and did not reflect any animus against Graham. [Exc. 161-62, 170] Further, in assessing the extent of the harm that resulted, Judge Saxby recognized, not only the harm that Graham's crimes caused to the Durr and McPheters families, but also the harm that it had caused to his own family and that no matter what sentence the judge imposed, Graham would not be present for much of his children's childhoods. [Exc. 161-62] In fact, in his order ruling on the motion for recusal, Judge Saxby reiterated this point – that he had compassion and sympathy for all of the families, including Graham's family. [Exc. 193] Finally, Judge Saxby also recognized that he was obliged by law to impose a sentence that was no more harsh than necessary to achieve the sentencing goals. [Exc. 173] Judge Saxby did not misconstrue or misapply the information presented at sentencing. Nor did he increase Graham's sentence based on the impermissible view that Jordyn Durr and Brooke McPheters were particularly worthy people whose deaths called for enhanced punishment or the impermissible view that the sentence was necessary to achieve retribution. *Clemans*, 680 P.2d at 1188. Rather, the record shows that the sentence imposed by Judge Saxby, like the sentence imposed by the judge in *Clemans*, was "the result of a careful effort to apply the appropriate sentencing criteria to the totality of the record." *Id.* at 1188-89.

E. Judge Saxby's exposure to the video presentations, the remarks of the police officials, and the remarks of the Victims' Rights Attorney does not warrant disqualifying him from presiding over any resentencing

In *Donlun v. State,* this court addressed the disqualification of the original sentencing judge at the defendant's second resentencing. 550 P.2d 369 (Alaska 1976). At

Donlun's first resentencing, the judge "placed substantial emphasis" on the fact that Donlun had not been regularly employed since his arrest, and then inferred from that fact that Donlun must have committed other crimes for which he had not been caught. *Id.* at 371. The judge described Donlun as a "leech on society," who was probably living off it illegally. *Id*. Given the intemperate remarks and unwarranted inference made by the sentencing judge besmirching Donlun's character, this court, without further explanation, held that the sentencing judge should not preside over Donlun's second resentencing. *Id.* at 371-72. In contrast, Judge Saxby made no intemperate remarks, nor did he make any unwarranted inferences sullying Graham's character. *Donlun* thus does not provide any basis for disqualifying Judge Saxby.

In the seminal case of *Amidon v. State* this court addressed the authority for and standards governing disqualification of a judge. 604 P.2d 575 (Alaska 1979). This court recognized that the right to an impartial tribunal is embodied in AS 22.20.020, which provides in pertinent part that "A judicial officer may not act as such in a court of which he is a member in an action in which . . . the judicial officer feels that, for any reason, he cannot give a fair and impartial decision." *Amidon*, 604 P.2d at 577 (quoting former AS 22.20.020(a)(6)).[7] This court said that, since the initial determination lies within the discretion of the judge, the judge's decision should be accorded substantial weight. *Amidon*, 604 P.2d at 577. This court recognized, however, that when there has been a showing of actual bias in the decision rendered, the refusal of a judge to disqualify themselves might be found to be patently unreasonable and subject to reversal. *Id.*

To prove a claim of actual bias under the standard for actual bias announced in *Amidon*, a claimant must show that the judge formed an opinion from extrajudicial sources that resulted in an opinion other than on the merits. *Williams v. Williams*, 252 P.3d 998, 1010 (Alaska 2011). To sustain this burden, it is not enough to show that the judge made

[7] This provision, in gender neutral language, is now found in AS 22.20.020(a)(9).

decisions or rulings unfavorable to the claimant, especially when those decisions are supported by the available evidence and did not affect the ultimate decision in the case. *Id.*; *Grace L. v. State, Dept. of Health & Social Services*, 329 P.3d 980, 989 (Alaska 2014); *Luker v. Sykes*, 357 P.3d 1191, 1199 (Alaska 2015); *Kinnan v. Sitka Counseling*, 349 P.3d 153, 160 (Alaska 2015). *See also Crawford v. State*, 337 P.3d 4, 33 (Alaska App. 2014) (noting that judges are generally not required to remove themselves from a case simply because they have made remarks critical of an attorney or litigant or because the judge has made ruling adverse to a party).

This court stated in *Amidon* that, "the appearance of partiality might be sufficient grounds" for it to reverse "in an appropriate case," cautioning that "[w]here only the appearance of partiality is involved," it would require "a greater showing for reversal." 604 P.2d at 577. This court recognized that former Canon 3(C)(1) of the Alaska Code of Judicial Conduct requires a judge to give weight to the appearance of impartiality and should err on the side of disqualification where the judge's impartiality "might reasonably be questioned." *Id.* at 578.

Alaska courts have since construed AS 22.20.020 to incorporate a requirement identical to the one in the Judicial Code of Conduct: a judge should disqualify himself or herself if the judge's impartiality might reasonably be questioned. *See Pride v. Harris*, 882 P.2d 381, 385 (Alaska 1994); *Crawford v. State*, 337 P.3d 4, 33 (Alaska App. 2014); *Phillips*, 271 P.3d at 464-67; *State v. Dussault*, 245 P.3d 436, 439 (Alaska App. 2011); *Perotti v. State*, 806 P.2d 325, 327 (Alaska App. 1991). Alaska courts also have said that the test for the appearance of partiality is suggested by the commentary to Canon 2A of the Alaska Judicial Code of Conduct: "The test for the appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." *See*

Crawford, 337 P.3d at 33; *Keller v. State*, 84 P.3d 1010, 1012 (Alaska 2004); *Dussault*, 245 P.3d at 442.

In *Amidon*, this court, however, also recognized that "a judge has as great an obligation not to disqualify himself [or herself] when there is no occasion to do so, as he [or she] has to do so in the presence of valid reasons." 604 P.2d at 577. In *Feightinger v. State*, 779 P.2d 344, 348 (Alaska App. 1989), the court of appeals discussed a judge's obligation to deny disqualification when there is no reason to do so:

> Judges will frequently be assigned cases involving unpleasant issues and difficult problems. Often litigants and their attorneys will be particularly vexatious. In many cases, publicity adverse to the judge is virtually certain no matter what decision he or she reaches. In such cases, judges insufficiently attuned to their responsibilities might readily welcome a baseless request for recusal as an escape from a difficult case. To surrender to such a temptation would justly expose the judiciary to public contempt based on legitimate public concern about judicial integrity and courage. While we agree that judges must avoid the appearance of bias, it is equally important to avoid the appearance of shirking responsibility.

Id. The court of appeals has since explained that the duty to sit is the converse of the judge's duty of recusal when there is a valid reason for disqualification. *Phillips*, 271 P.3d at 468-69.

In affirming the denial of recusal, based on a claim of appearance of partiality from hearing information about a party's mental health in other proceedings, after noting the duty not to order disqualification when there is no reason to do so, this court stated:

> Trial judges are often called upon to compartmentalize their decisions – to review evidence that is later declared to be inadmissible or to rule on similar legal issues at different stages of a contested case. Generally, these decisions do not create an appearance of impropriety unless the judge hears something or does something so prejudicial that further participation would be unfair to the parties.

Grace L., 329 P.3d at 988-89 (citing *Lacher v. Lacher*, 993 P.2d 413, 420-21 (Alaska 1999); *R.J.M. v. State, Dep't of Health & Soc. Servs.*, 946 P.2d 855, 869-70 (Alaska 1997);

Cook v. State, 36 P.3d 710, 728-29 (Alaska App. 2001); *State v. City of Anchorage*, 513 P.2d 1104, 1112 (Alaska 1973)). Moreover, this court has long recognized in other contexts that "[o]ur trial judges, as a group, are more knowledgeable and experienced than is the ordinary juror in regard to homicide prosecutions." *Egelak v. State*, 438 P.2d 712, 715 (Alaska 1968). *See also Sandvik v. State*, 564 P.2d 20, 24 & n.8 (Alaska 1977). This view of our judiciary led this court to conclude in *Egelak* that it could not presume that trial or sentencing judges would permit themselves to be unduly prejudiced against a defendant from having viewed autopsy photographs. 438 P.2d at 715. And, since the record did not reflect that the sentencing judge in *Egelak* had become prejudiced after viewing the photographs, this court affirmed the defendant's sentence. *Id.*

In *Jerry B. v. Sally B.*, 377 P.2d 916, 922-25 (Alaska 2016), this court again addressed a claim that the judge's exposure to potentially prejudicial information about a litigant in a criminal case created an appearance of bias that required the judge's recusal. In rejecting this claim, this court acknowledged that when presiding over a separate but related proceeding, a judge may be exposed to evidence that is irrelevant or inadmissible in the other proceeding. *Id.* at 925. But this court also recognized that it has repeatedly held a judge has no obligation to order disqualification merely because the judge presided over a related proceeding or case and favorably quoted its language in *Grace L*. *Id.*

This court's discussions in *Grace L.* and *Egelak* about our judiciary's training, experience, and ability to compartmentalize apply with equal force to Graham's case. 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 those photographs, or listening to oral presentations by police officials who discussed matters not relevant to the sentencing. Given a judge's training and the context of hearing music in the courtroom during a sentencing proceeding, one can 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.

As in *Egelak*, the record contains no evidence that Judge Saxby was prejudiced by having viewed and heard the videos about the two murder victims. Prior to sentencing, Judge Saxby had received a great deal of information about the case including (1) a lengthy presentence report with attached statements from the family and friends of both victims and attached statements from the family and friends of Graham, (2) a very lengthy sentencing memorandum from Graham, (3) a sentencing memorandum from the state, (4) a memorandum from Graham regarding the use of the memorial videos, and (5) a response from the OVR on the use of the memorial videos. [Exc. 16-100, 196-301] At the sentencing hearing, the judge indicated that he had read all of the materials that had been filed with the court. [Exc. 104-06, 128, 132-36, 159-73] Given the abundance of materials and factors that the judge had already reviewed and considered, it is almost certain that before the sentencing hearing the judge, like any prepared judge would, had a very good idea of what sentence he would impose and the reasons for its imposition.

For the reasons discussed above, neither of the video presentations nor the statements from the two police officials, even if inadmissible, was so prejudicial that Judge Saxby's continued participation would be unfair to the parties. As discussed above, the judge's sentencing remarks reflect that he carefully analyzed each of the sentencing factors, did not use emotionally laden language, and did not exhibit any hostility or animus toward Graham. [Exc. 160-73] Furthermore, the judge did not impose the maximum term available under the plea agreement, as urged by the victims' rights attorney and police officials, but rather a term just below the middle of the available range. [Exc. 6, 8-15, 173-79] It therefore appears that these presentations did not improperly influence or prejudice the judge. Rather, allowing the presentations and expressing a willingness to listen to what everyone, including Graham's parents, had to say, reflected the judge's respect for all in the

courtroom. It also reflected the judge's awareness that disallowing the presentations or interrupting them in a packed courtroom in a case that had generated substantial publicity had the potential to create an unnecessary distraction.

Given this record, there is no basis to conclude that Judge Saxby displayed any actual bias or the appearance of bias in this case. Accordingly, there is no reason to disqualify Judge Saxby from presiding over any further proceedings.

CONCLUSION

For the reasons discussed above, this court should reverse the decision of the court of appeals and affirm the composite sentence of 32 years to serve that was imposed by Judge Saxby for the two second-degree murders Graham committed. Alternatively, if this court determines that a remand is needed for any reason, it should conclude that the remand proceedings should be presided over by Judge Saxby.

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