In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **SANDI DAWN NIEVES,** **Defendant and Appellant.**	**CAPITAL CASE** Case No. S092410

Los Angeles County Superior Court Case No.
PA030589-01
The Honorable L. Jeffrey Wiatt, Judge

SUPPLEMENTAL RESPONDENT'S BRIEF

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STATUTES

CONSTITUTIONAL PROVISIONS

I. THE TRIAL COURT WAS NOT BIASED AND DID NOT COMMIT MISCONDUCT

Appellant cites to numerous recent United States Supreme Court, California Supreme Court, and California Court of Appeal cases to further support her claim that the trial judge in her case, Judge Wiatt, committed misconduct, was biased, and was prejudiced against her and her counsel. (Supp. AOB 6-19.) As discussed below, none of the cases cited by appellant assists her.

A. The United States Supreme Court cases, *Rippo* and *Williams*, do not support appellant's claims

Relying on *Rippo v. Baker* (2017) ___ U.S. ___ [137 S.Ct. 905] (per curiam) and *Williams v. Pennsylvania* (2016) ___ U.S. ___ [136 S.Ct. 1899], appellant contends that reversal for judicial bias or misconduct "is not limited to actual bias, but also when the risk of bias cannot be tolerated under the federal Due Process Clause." (Supp. AOB 8-9; see Supp. AOB 6-10.) First, appellant is incorrect that this is the standard of review for claims of judicial bias or misconduct. Rather, this is the standard of review for judicial disqualification or recusal. The standard of review for claims of judicial bias or misconduct remains as described in respondent's brief. (See RB 123.) On appeal, a reviewing court "'must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial.'" (*People v. McWhorter* (2009) 47 Cal.4th 318, 373; see also *People v. Armstrong* (2019) 6 Cal.5th 735, 799-800; *People v. Buenrostro* (2018) 6 Cal.5th 367, 406; *People v. Gomez* (2018) 6 Cal.5th 243, 293; *Schmidt v. Superior*

Court (2020) 44 Cal.App.5th 570, 589.) As thoroughly discussed in respondent's brief, Judge Wiatt was not biased and did not engage in judicial misconduct, let alone any misconduct or bias that deprived appellant of a fair trial. (See RB 72-155.)

Second, with the understanding that *Rippo* and *Williams* addressed the legal standard for judicial disqualification or recusal, appellant is correct these cases had not been decided when the briefing was completed in this case. However, she is not correct that these cases provide a new expanded standard that was not in effect prior to the briefing being completed. The standard upon which appellant now relies was announced by the United States Supreme Court in 2009 in *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868, and followed by this Court in 2010 in *People v. Freeman* (2010) 47 Cal.4th 993, which was prior to the filing of respondent's brief in 2011 and appellant's reply brief in 2012. "[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist 'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'" (*Freeman*, *supra*, at p. 996, quoting *Caperton*, *supra*, at p. 877.)

Appellant contends that "the federal Constitution required Judge Wiatt to recuse himself at the point that he became embroiled with defense counsel and counsel moved for mistrial." (Supp. AOB 10, citing AOB 76, 85-87.) Not so. "Only the most

'extreme facts' would justify judicial disqualification based on the due process clause." (*Freeman*, *supra*, 47 Cal.4th at p. 996, quoting *Caperton*, *supra*, 556 U.S. at pp. 886-887.) Appellant's case does not include the type of "extreme facts" that would warrant recusal or disqualification. "This case does not implicate any of the concerns–pecuniary interest, enmeshment in contempt proceedings, or the amount and timing of campaign contributions–which were the factual bases for the United States Supreme Court's decisions in which it found that due process required judicial disqualification. . . . [S]uch a violation in this sphere is extraordinary; the clause operates as a 'fail-safe' and only in the context of extreme facts." (*Freeman*, *supra*, at p. 1006.) For example, the cases upon which appellant relies, *Rippo* and *Williams*, contain such "extreme facts."

In *Rippo*, a Nevada jury convicted the defendant of first degree murder and sentenced him to death. (*Rippo*, *supra*, 137 S.Ct. at p. 906.) The defendant learned during the trial that the judge was a target of a federal bribery probe, and he presumed the District Attorney's Office, which was prosecuting him, was involved in that investigation. The defendant moved to disqualify the judge, who declined to recuse himself. The judge was later indicted on federal charges. The Nevada Supreme Court affirmed the judgment on direct appeal, concluding that the defendant had not provided evidence that state authorities were involved in the federal investigation. (*Ibid.*)

The defendant raised his bias claim in an application for postconviction relief and included documents from the judge's

criminal trial, which demonstrated the District Attorney's Office was involved in the investigation of the judge. (*Rippo*, *supra*, 137 S.Ct. at p. 906.) The application was denied and the Nevada Supreme Court affirmed the denial, finding that the defendant's allegation did not show the judge was "actually biased in this case." (*Id.* at pp. 906-907.)

The United States Supreme Court vacated the judgment, concluding that the Nevada Supreme Court applied the "wrong legal standard." The Court explained, "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge 'has no actual bias.' [Citation.] Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.' [Citations]." (*Rippo*, *supra*, 137 S.Ct. at p. 907.)

In *Williams*, the defendant was convicted of first degree murder in 1984. (*Williams*, *supra*, 136 S.Ct. at p. 1903.) During trial, Ronald Castille, the then-District Attorney of Philadelphia, approved the trial prosecutor's request to seek the death penalty against the defendant. (*Ibid.*) The jury ultimately sentenced the defendant to death. (*Id.* at p. 1904.)

In 2012, the defendant sought post-conviction relief in the trial court based on newly discovered evidence. (*Williams*, *supra*, 136 S.Ct. at p. 1904.) After an evidentiary hearing, the trial court stayed the defendant's execution. The State requested that the Pennsylvania Supreme Court vacate the stay of execution. At this time, Castille was serving as the Pennsylvania Supreme Court's chief justice. The defendant filed a motion requesting

that Chief Justice Castille recuse himself or, if he declined, refer the recusal motion to the full court for decision. Chief Justice Castille denied the motion for recusal and the request to refer the motion to the full court for decision, without explanation. (*Ibid.*) The Pennsylvania Supreme Court ultimately vacated the trial court's stay order and reimposed the death sentence. (*Id.* at pp. 1904-1905.) Chief Justice Castille joined the majority opinion written by another justice and drafted a concurrence. Two weeks later, Chief Justice Castille retired from the bench. (*Id.* at p. 1905.)

The United States Supreme Court held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." (*Williams, supra*, 136 S.Ct. at p. 1905.) The Court explained that "[d]ue process guarantees 'an absence of actual bias' on the part of a judge." (*Ibid.*) When reviewing a claim of bias, "[t]he Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, 'the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.'" (*Ibid.*) The Court concluded that Chief Justice Castille's authorization to seek the death penalty against the defendant amounted to "significant, personal involvement in a critical trial decision," and his failure to recuse himself from the defendant's case "presented an unconstitutional risk of bias" in violation of the due process clause. (*Id.* at p. 1907.)

Appellant's case does not present "extreme facts," like the ones in *Rippo* and *Williams*, that require judicial disqualification or recusal on due process grounds. Further, Judge Wiatt did not become "'embroiled in a running, bitter controversy" with defense counsel or become "so enmeshed in matters involving [a litigant] as to make it appropriate for another judge to sit." (Supp. AOB 9.) As expounded upon in respondent's brief, the vast majority of Judge Wiatt's actions, comments, and remarks were in response to defense counsel's improper conduct, questions, arguments, and inability to follow the trial court's rulings. Additionally, Judge Wiatt was not biased against appellant or her attorney; rather, he was exercising his authority and duty to control the proceedings to ensure a fair trial for both parties. (See RB 72-155.) Recusal or judicial disqualification was not required.

B. None of the recent California Court of Appeal cases relied upon by appellant support her claims

Appellant cites to three recent California Court of Appeal cases to support her argument that Judge Wiatt committed reversible judicial misconduct. (Supp. AOB 10-14.) But these three cases are entirely distinguishable from this case and are of no assistance to appellant.

First, appellant cites to *People v. Force* (2019) 39 Cal.App.5th 506, a case that he acknowledges involved prosecutorial misconduct, not judicial misconduct. (Supp. AOB 11-12.) In that case, the defendant, a sexually violent predator (SVP), petitioned the trial court to be placed in a conditional release program. (*Force, supra*, at p. 509.) At his prior SVP trial,

while under oath, the defendant denied committing two prior instances of sexual misconduct. Later, after being committed as an SVP for treatment, the defendant admitted that he committed the acts. (*Id.* at p. 511.) The day before the bench trial on the petition commenced, defense counsel informed the court that the defendant wanted to testify and that the defendant would admit the two prior instances of sexual misconduct, but was concerned the prosecution would charge the defendant with perjury. (*Id.* at pp. 511-512.) Defense counsel told the court that the prosecutor "had already indicated to her that he 'would charge' appellant with perjury if he testified inconsistently with his prior testimony denying those incidents." (*Id.* at p. 512.) The court suggested that the prosecutor grant the defendant immunity, which the prosecutor declined to do. (*Id.* at pp. 512-514.) The defendant decided not to testify at his trial after being informed by his counsel what the prosecutor told her in regards to perjury. (*Id.* at p. 514.) Following a bench trial, the trial court denied the defendant's petition for conditional release. (*Id.* at p. 511.)

The California Court of Appeal held that the prosecutor impermissibly infringed on the defendant's constitutional right to testify on his own behalf and engaged in an activity that was "wholly unnecessary to the proper performance of his duties and of such a character as 'to transform [a defense witness] from a willing witness to one who would refuse to testify," and that the error was not harmless. (*Force*, *supra*, 39 Cal.App.5th at pp. 517-519, citations omitted.)

In the instant case, the trial court informed defense counsel, after listening to Dr. Lorie Humphrey's testimony at an Evidence Code section 402 hearing regarding discovery violations and whether Dr. Humphrey intentionally used the wrong norms to skew appellant's test results in her favor, that while it would not preclude Dr. Humphrey from resuming her testimony in front of the jury, she could be liable for prosecution for perjury. (39RT 5506-5511, 5523, 5569, 5573.) Defense counsel responded that he did not believe Dr. Humphrey committed perjury, but otherwise did not object. (39RT 5573.) The trial court then stated, "Maybe someone wants to advise her of her right to have an attorney present. I am not going to do that, because I don't want to interfere with the defense and dissuade a witness, and that's one of the reasons I asked her to step outside." (39RT 5574.) *Force* concerned a prosecutor infringing on a defendant's right to testify in his or her own defense, a situation entirely different than the one here in which the trial court properly suggested, outside the witness's presence, that the witness might need legal assistance due to possible perjured testimony. (See RB 133-135.) *Force* is of no assistance to appellant.

Next, appellant cites to *People v. Tatum* (2016) 4 Cal.App.5th 1125, to support her claim that the trial court undermined the credibility of defense witnesses, Dr. Humphrey, Dr. Philip Ney, and Dr. Gordon Plotkin "by questioning their integrity, commenting on their testimony, and validating, assisting, and sometimes suggesting positions taken by the

prosecution and its experts." (Supp. AOB 12-13.) *Tatum* is distinguishable.

In that case, the defendant was convicted of first degree murder and attempted murder. (*Tatum*, *supra*, 4 Cal.App.5th at p. 1128.) On the first day of voir dire, the trial court told the first group of prospective jurors that they would judge the credibility of witnesses and that a witness could not be prejudged before he or she testified. The court then remarked, "And I always use this example–and I'm sorry if somebody here is a plumber, but I've had horrible experiences with plumbers . . . . So if I hear somebody is coming in, and I hear he's a plumber, I'm thinking, 'God, he's not going to be telling the truth.' So obviously I have already prejudged that person, and I wouldn't be able to be fair." (*Ibid.*) Six of the empaneled jurors heard this comment. (*Id.* at p. 1131.) Defense counsel moved for a mistrial based on the court's comment because the defendant's alibi witness was a plumber. (*Id.* at pp. 1128-1129.) The trial court denied the motion for a mistrial asserting that the comment was a personal example. The defendant's alibi witness, a plumber, testified. (*Id.* at p. 1129.) In closing argument, the prosecutor argued the alibi witness was lying. (*Id.* at pp. 1129-1130.)

The California Court of Appeal held that the trial court "usurped the jury's function to determine the credibility of the witnesses" with its comment about plumbers and abused its discretion when it failed to declare a mistrial. (*Tatum*, *supra*, 4 Cal.App.5th at pp. 1130-1131.) The court reasoned that six members of the jury heard the trial court itself would not believe

a plumber who testified, that defendant's alibi witness, a plumber, was his main defense, and that the witness's credibility was a central issue in the trial. (*Id.* at p. 1131.)

Here, nothing as egregious occurred with appellant's witnesses. Unlike in *Tatum*, the vast majority of the challenged comments regarding defense witnesses were made outside of the presence of the jury, and even if some comments were in the presence of the jury, none of them "usurped the jury's function to determine the credibility of the witnesses." (See RB 133-141; *Tatum*, *supra*, 4 Cal.App.5th at p. 1130.) The remarks as to Dr. Humphrey were made after the jury had been excused (38RT 5319, 5489-5490) or during an Evidence Code section 402 hearing outside the jury's presence (39RT 5503-5504, 5507-5511, 5523, 5530).

The remark that Judge Wiatt would issue a warrant for Dr. Ney's arrest if he did not return to the court to complete his testimony was made outside the presence of the jury and Dr. Ney. (42RT 6212-6213.) Appellant's claim that Judge Wiatt implied Dr. Ney was lying during cross-examination when he told the prosecutor to ask a "direct question, and if it's inconsistent then you can impeach him with the transcript" (42RT 6096) has been forfeited for failure to object. Even if the claim were not forfeited, the court's remark was directed at how the prosecutor was questioning the witness and was not a comment on Dr. Ney's credibility as a witness.

As to Dr. Plotkin, Judge Wiatt's termination of defense counsel's examination was an effort to control the proceedings

after defense counsel insisted on not following the court's rulings. Judge Wiatt's subsequent questioning of Dr. Plotkin did not undermine or disparage his credibility. (52RT 7899, 8008-8009; 53RT 8104-8106.) Although Judge Wiatt did admonish Dr. Plotkin not to argue with the court while in front of the jury, this comment was made outside the presence of the jury. (53RT 8119.) Thus, Judge Wiatt did not usurp the jury's function to determine the credibility of witnesses, and *Tatum* is of no assistance to appellant.

Lastly, appellant relies on a civil case, *Victaulic v. American Home Assurance Co.* (2018) 20 Cal.App.5th 948, to support her position. (Supp. AOB 13-14.) That case, like the others, is distinguishable. In that product liability case, the trial court questioned a defense witness during cross-examination in front of the jury. (*Id.* at pp. 963-968, 974.) Also in front of the jury, the court accused the witness of signing a verification under penalty of perjury knowing its contents were false. (*Id.* at pp. 967-968.) Outside the presence of the jury and the witness, the court remarked that counsel and the court had a conversation regarding the witness's admission that she perjured herself in her verification. The parties and the court determined that the witness be permitted to obtain counsel and assert her Fifth Amendment right when she returned to the stand. The defense moved for a mistrial based on the court's interactions with the witness in front of the jury and argued that the court usurped the jury's function to determine the credibility of witnesses by indicating that it did not believe the witness's testimony. (*Id.* at

p. 969.) The trial court denied the motion. (*Id.* at p. 970.) Later, as ordered by the trial court, the witness resumed the stand, and in the jury's presence, asserted a blanket privilege not to testify. (*Id.* at p. 971.)

The Court of Appeal found that the trial court was hostile to the witness and that the court indicated to the jury that it did not believe the witness's testimony. (*Victaulic*, *supra*, 20 Cal.App.5th at pp. 974-975.) The Court of Appeal also found that the trial court mocked the witness and acted as an advocate for the plaintiff when it questioned the witness. (*Id.* at pp. 975-976.) The Court of Appeal additionally held that the court erred when it made the witness invoke the privilege not to testify in front of the jury. (*Id.* at p. 981.)

Here, contrary to appellant's position, none of the actions taken by Judge Wiatt in this case rose to the level of misconduct seen in *Victaulic*. Again, most of the comments and remarks appellant challenges were made outside the presence of the jury and/or not followed with an objection. Judge Wiatt was exercising his duty to control the proceedings and limit the introduction of evidence to relevant material matters when he questioned witnesses, terminated defense counsel's questioning, and did not allow a witness to answer an improper question. (Pen. Code, § 1044; see RB 125-154.)[1] Additionally, Judge Wiatt never made any witness invoke the Fifth Amendment right not to

[1] All further statutory references are to the Penal Code unless otherwise designated.

testify in front of the jury. Thus, *Victaulic* is distinguishable and is of no assistance to appellant.

In a footnote, appellant asserts "there have been several new developments with regard to factual internet research by judges during a trial, which occurred in this case." (Supp. AOB 14, fn. 3.) To support her assertion, she cites to a 2018 American Bar Association (ABA) Journal article on a Formal Opinion issued by the ABA Standing Committee on Ethics and Professional Responsibility. (Supp. AOB 14, fn. 3.) This article merely provides a summary of an original ABA Formal Opinion and carries no legal binding authority whatsoever. As discussed in respondent's brief, Judge Wiatt's internet research as to two defense expert witnesses did not constitute misconduct under the circumstances. (RB 144.)

C. This Court's recent cases rejecting claims of judicial misconduct support respondent's position

Appellant claims that this Court's recent cases rejecting claims of judicial misconduct in capital cases "are all different from this one." (Supp. AOB 15; see Supp. AOB 15-19.) Respondent disagrees.

In *Armstrong*, *supra*, 6 Cal.5th 735, the defendant argued that he was deprived of a fair trial because the trial court was biased against him. (*Id.* at p. 798.) This Court found his allegation was "largely derivative" and if "not derivative . . . largely forfeited" because the defendant never claimed that his constitutional rights were violated because of judicial bias. (*Id.* at p. 799.) This Court also concluded the challenged statements

were justified and did not suggest "'any judicial misconduct or bias, let alone misconduct or bias that was so prejudicial that it deprived defendant of a fair, as opposed to a perfect, trial.'" (*Id.* at pp. 799-800, citation omitted.)

Like in *Armstrong*, appellant's allegations of misconduct and bias are largely forfeited for failure to object. (See RB 123-124, 142.) In any event, as discussed at length in respondent's brief, Judge Wiatt's statements and comments were justified and did not suggest any prejudicial misconduct or bias that deprived appellant of a fair trial. (See RB 125-154.)

In *Gomez, supra*, 6 Cal.5th 243, the defendant argued the trial court demonstrated improper judicial bias in violation of his constitutional rights when it admitted evidence of the defendant's brief refusal to attend trial and instructed the jury it could infer consciousness of guilt from it. (*Id.* at pp. 283-286, 292.) This Court rejected the defendant's argument and found that the trial court did not "officiously and unnecessarily usurp the duties of the prosecutor" by allowing the evidence because the prosecutor introduced the evidence, not the court. (*Id.* at p. 293.) This Court also concluded that the trial court did not admit the evidence and instruct the jury on consciousness of guilt with the intent to harm or disadvantage the defendant. "Rather, the trial court appears to have acted pursuant to its duty to control the trial proceedings (§ 1044) and under the erroneous but honest belief that a defendant's refusal to attend trial was relevant evidence as to a defendant's consciousness of guilt." (*Ibid.*)

Here, like in *Gomez*, the trial court did not act with the intent or desire to harm or disadvantage appellant. Rather, Judge Wiatt's actions and remarks were a direct response to defense counsel's improper conduct, which consistently pushed the boundaries of the trial court's rulings. (See RB 125-141.) As in *Gomez*, Judge Wiatt was exercising his authority under section 1044 to control the trial to ensure a fair trial for all parties. (See RB 142-154.)

In *People v. Woodruff* (2018) 5 Cal.5th 697, the defendant claimed the trial court engaged in a pattern of misconduct that demonstrated the trial judge allied with the prosecution and discredited the defense. He cited 12 instances of alleged misconduct and argued that "cumulatively" they demonstrated to the jury that the defense case was without merit. (*Id.* at p. 768.) This Court first recognized that appellant's challenge to 11 of the purported instances of misconduct had been forfeited for failure to object (*id.* at p. 769), that two of the alleged instances occurred outside the presence of the jury and thus could not have been prejudicial (*id.* at p. 770), and that in any event, the court's comments "did not rise to the level of 'an unconstitutional display of judicial bias,' but instead amounted to correct rulings occasionally accompanied by impatience at defense counsel's argumentative examination of witnesses and improper remarks" (*id.* at p. 768; see *id.* at pp. 770-772). This Court noted that the trial court has "'the duty and the discretion to control the conduct of the trial'" and has the discretion "'to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate

questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.'" (*Id.* at p. 768.) The standard is "'whether the judge's behavior was so prejudicial that it denied [defendant] a fair, as opposed to a perfect, trial.'" (*Ibid.*)

Specifically, this Court found the court's comments to defense counsel that it would not "hesitate to dress you down or embarrass you in front of the jury," that counsel could "[b]e as zealous and vigorous and as aggressive as you want, but do it professionally," and that "[if] I think you're being unprofessional or acting inappropriately, I'll call you on it," in response to defense counsel's complaint that the court was not being fair and was interfering with the defendant's right to a fair trial with its comments, were "an accurate explanation of its duty 'to control the conduct of the trial' and of its discretion to 'rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions of otherwise engages in improper or delaying behavior.'" (*Woodruff, supra*, 5 Cal.5th at p. 770.) This Court noted in particular, that "instances of friction as the one described above 'are virtually inevitable in a long trial.'" (*Ibid.*)

This Court also found the trial court's comments to defense counsel during direct and cross examinations were an exercise of the court's discretion to rebuke defense counsel. (*Woodruff, supra*, 5 Cal.5th at pp. 771-772.) Although the comments "exhibited some impatience with counsel's argumentative comments and questions," they did not demonstrate prejudicial misconduct or bias. (*Id.* at p. 772.)

Here, like in *Woodruff*, the majority of the challenged comments were made outside the presence of the jury. In any event, these comments, and the ones made in front of the jury, were in direct response to defense counsel's inappropriate questions, defense counsel's and the defense witnesses' inability to follow the court's rules and instructions, and improper behavior. Like in *Woodruff*, the court here was controlling the conduct of the trial to ensure fairness and exercising its discretion to rebuke an attorney for improper conduct. (See RB 125-148.)

In *People v. Peoples* (2016) 62 Cal.4th 718, the defendant claimed that the trial judge should have been disqualified from his case for engaging in three ex parte conversations prior to the guilt phase of his trial. (*Id.* at pp. 785-787.) Reviewing the defendant's claim as one concerning his state and federal constitutional rights to due process, this Court noted, "[t]o establish a federal due process violation, 'there must exist the probability of actual bias on the part of the judge.'" (*Id.* at p. 787.) This Court found the trial judge's ex parte communications did not "demonstrate a substantial probability of actual bias." (*Ibid.*) Appellant contends this Court applied the incorrect standard of review under the United States Constitution by requiring a substantial probability of actual bias. (Supp. AOB 17, fn. 5.) Not so. This Court was fully aware of the proper standard of review. This Court subsequently stated, "[W]hile a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias

sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist 'the probability of actual bias on the part of the judge or decisionmaker [that] is too high to be constitutionally tolerable.'" [Citations.] The high court has emphasized that only the most 'extreme facts' justify judicial disqualification based on the due process clause." (*Id.* at p. 788.) Thus, this Court was fully aware of the proper standard of review for judicial disqualification and recusal.

In *Peoples*, the defendant additionally contended the trial judge was biased and engaged in numerous instances of judicial misconduct. (*Peoples*, *supra*, 62 Cal.4th at pp. 787-788.) One of his allegations was that the trial judge spoke to defense counsel in an abusive fashion when he used vulgar and disrespectful language. (*Id.* at pp. 788-789.) This Court agreed the trial judge spoke discourteously and disrespectfully to defense counsel throughout the trial and violated canon 3B(4) of the California Code of Judicial Ethics,[2] but found his misconduct "was limited to hearings outside the presence of the jury and thus did not result in a probability of actual bias." (*Id.* at p. 789.) Further, the defendant did not offer any evidence that the trial judge's remarks influenced the jury or affected the trial and did not offer

[2] Canon 3B(4) of the California Code of Judicial Ethics states, "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers and of all staff and court personnel under the judge's direction and control."

any examples of prejudicial behavior that occurred in front of the jury. (*Id.* at p. 790.)

Again, here, many of the comments appellant challenges were made outside the presence of the jury like in *Peoples*. Further, appellant cannot show any remarks made in front of the jury influenced the jury or affected the trial in a prejudicial manner. (See RB 126-154.)

In *People v. Banks* (2014) 59 Cal.4th 1113, this Court rejected the defendant's claim that the trial court's remarks in the aggregate demonstrated judicial bias and denied him a fair trial. (*Id.* at pp. 1171-1178.) First, the defendant argued that the trial court's remarks about defendant's repeated absences, refusals to come to court, and his mental health status demonstrated judicial bias. This Court found that the trial court was frustrated with the defendant's repeated absences, and that although the court expressed skepticism as to the defendant's mental health excuses for his absences, that skepticism did not demonstrate bias toward the defendant. (*Id.* at pp. 1172-1175.) This Court also found the defendant did not show the court's comments impacted the jury in any way. (*Id.* at pp. 1175-1176.)

Next, the defendant argued the trial court's interruption of defense counsel's opening statement, in which it reminded counsel that the opening statement was not argument, demonstrated judicial bias. (*Banks*, *supra*, 59 Cal.4th at p. 1176.) This Court found the interruption was not of the type of "discourteous or disparaging" remark that constitutes judicial misconduct. (*Ibid.*) Lastly, the defendant claimed the trial court

committed misconduct when it sustained an objection by the prosecution during the cross-examination of the prosecution's DNA expert and instructed defense counsel not ask questions that misstated the evidence or assumed facts not in evidence. (*Id.* at pp. 1176-1177.) Defense counsel did not object to the court's comments. (*Id.* at p. 1177.) This Court found that any claim of judicial misconduct was forfeited and that, in any event, the remark, either in isolation or in combination with the court's comments about the defendant's mental health, did not demonstrate the court was pervasively biased against the defendant. (*Id.* at pp. 1177-1178.)

Here, like in *Banks*, Judge Wiatt's actions, remarks, and comments, in isolation or in the aggregate, do not demonstrate that he was pervasively biased against appellant. Moreover, appellant cannot show that any of Judge Wiatt's comments negatively impacted the jury in any way. (See RB 126-154.)

In *People v. Maciel* (2013) 57 Cal.4th 482, this Court found that the defendant forfeited his eight claims of judicial misconduct for failure to object and that the claims were meritless because the defendant failed to show any judicial misconduct or bias, "let alone misconduct or bias that was 'so prejudicial that it deprived defendant of 'a fair, as opposed to a perfect, trial.'" (*Id.* at p. 533.) In particular, this Court found that the trial court's remark, "Don't make a speaking objection. Just make an objection, gentlemen, when you make one, if you do. State a legal ground rather than argue in front of the jury," did not disparage defense counsel. Rather, the court was merely

explaining to both counsel that it did not want them to make speaking objections. (*Id.* at pp. 533-534.) This Court also found that the remainder of the challenged comments did not amount to disparagement of counsel. (*Id.* at pp. 534-538.)

Like in *Maciel*, Judge Wiatt's admonishments about not making speaking objections were directions to both counsel (14RT 1283), and nothing Judge Wiatt said reminding defense counsel of that instruction amounted to disparagement of counsel. (See RB 126-132.)

Lastly, in *People v. Houston* (2012) 54 Cal.4th 1186, the defendant claimed that the trial court was biased against mental health professionals and psychology generally, violating his right to a fair trial. (*Id.* at p. 1219.) In response to a question by defense counsel, defendant's psychologist, Dr. Rubinstein, testified, "[a] brain is a brain is a brain." (*Ibid.*) The court remarked, "Is that Gertrude Rubinstein? I'm sorry. Go ahead with your answer, Doctor," in an apparent play on Gertrude Stein's famous line of poetry, "[r]ose is a rose is a rose is a rose." (*Ibid.*) Shortly thereafter, defense counsel asked the psychologist how she would respond to criticisms of psychiatry and psychology, and the prosecutor objected to the question as leading. (*Ibid.*) The trial court overruled the objection, remarking that the question was understandable and "[i]t's really all the psychology stuff is mumbo jumbo stuff." (*Id.* at pp. 1219-1220.) The defendant did not object to either of the trial court's comments, and this Court found that the defendant had forfeited his claim. (*Id.* at p. 1220.) Even if not forfeited, this Court found

the court's reference to "Gertrude Rubinstein" did not convey to the jury the message that the court did not believe Dr. Rubinstein's testimony or denigrate her. This Court also found the court's use of the phrase "mumbo jumbo" did not mean the court thought psychiatry and psychology were "mumbo jumbo"; instead, the court was restating defense counsel's question. (*Ibid.*)

Here, like in *Houston*, many of appellant's challenges have been forfeited on appeal for failure to object. Also like in *Houston*, the comments made by Judge Wiatt to defense witnesses did not convey to the jury that he did not believe the witnesses' testimony or denigrate the witnesses. (See RB 125-148.)

None of the cases cited to in appellant's supplemental brief assists in strengthening her claim that Judge Wiatt was biased, committed misconduct, and was prejudiced against her and her counsel. Appellant's claim must be rejected.

II. APPELLANT WAS NOT PREJUDICED BY THE TRIAL COURT'S ORDER THAT SHE SUBMIT TO A PSYCHOLOGICAL AND NEUROLOGICAL EXAMINATION

Appellant contends that *People v. Krebs* (2019) 8 Cal.5th 265, recently decided by this Court, does not undermine her claim that she was prejudiced by the trial court's order that she submit to psychological and neurological examinations by the prosecution. (Supp. AOB 20-21.) To the contrary, this Court's decision in *Krebs* supports respondent's position that appellant was not prejudiced by the trial court's order. (See RB 201.)

In *Krebs*, the defendant was convicted of two counts of first degree murder and various other crimes and was sentenced to death. (*Krebs, supra*, 8 Cal.5th at p. 273.) The trial court ordered the defendant to be examined by the prosecution psychiatrist, Dr. Park Dietz. (*Id.* at pp. 286, 346.) The defendant refused to be examined, and Dr. Dietz testified as much during the penalty phase. (*Id.* at pp. 286, 346.) The prosecution noted the defendant's refusal to be examined in closing argument, "stating, 'the defendant will spend days talking to Dr. Berlin [the defense psychiatrist] . . . but when the Court orders the defendant to talk to Dr. Dietz . . . the defendant refused. Where's the fairness in that? Who's looking for the truth?'" (*Id.* at p. 346.)

This Court found the trial court committed *Verdin*[3] error when it ordered the defendant to be examined by Dr. Dietz, but concluded the error was not prejudicial. (*Krebs, supra*, 8 Cal.5th at p. 346.) Finding the case similar to *People v. Wallace* (2008) 44 Cal.4th 1032, 1087-1088, this Court found that three factors weighed against a finding of prejudice: (1) Dr. Dietz did not rely on the defendant's refusal to submit to a court-ordered examination to criticize the defense expert's conclusions; (2) the defendant's crimes were particularly brutal, a factor which weighed "'heavily in aggravation;'" and (3) the defense explained to the jury that the defendant refused to be examined by Dr. Dietz because Dr. Dietz would have examined him with an already-formed opinion. (*Id.* at pp. 346-347.)

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[3] *Verdin v. Superior Court* (2008) 43 Cal.4th 1096.

This Court also noted the case differed from *Wallace* because in *Wallace*, the jury heard from an additional prosecution expert that the defense expert testimony was "'questionable,'" and the prosecutor did not remark on the defendant's refusal to submit to an examination. (*Krebs, supra*, 8 Cal.5th at p. 347.) Nonetheless, this Court found the differences did not compel a different conclusion because in *Krebs*, the jury heard testimony from both the defendant and the defendant's expert supporting Dr. Dietz's testimony that the defendant did not suffer from volitional impairment. (*Ibid.*)

This Court also found the prosecutor's comment during closing argument was "brief" and did not provide a basis to support the defendant's claim on appeal that the prosecution's treatment of defense experts was "venomous." (*Krebs, supra*, 8 Cal.5th at p. 347.) This Court concluded that "[u]nder the totality of the circumstances, 'it is not reasonably probable that [in the absence of the *Verdin* error] the jury would have returned a penalty verdict of life without parole . . . rather than death.' [Citation.]" (*Ibid.*)

Appellant argues that *Krebs* is distinguishable from her case and does not undermine her claim of prejudice. (Supp. AOB 20-21.) Respondent disagrees. The trial court appointed Drs. Barry Hirsch, Robert Brook, Edwin Amos, and Robert Sadoff to conduct interviews of appellant. (10RCT 2337; 11RCT 2530-2531, 2557, 18RCT 4471.) Appellant refused to submit to an examination unless Dr. Kaser-Boyd, a defense expert, was present. (29RT

3782-3783, 3908-3909.) The prosecution objected, and appellant was not examined. (29RT 3910.)

Dr. Brook testified that he was not able to interview appellant and, over objection by defense counsel, testified that he was told appellant refused to be evaluated by him. (38RT 5376.) Dr. Amos testified that appellant had refused to be examined by him. (48RT 7273.) Dr. Sadoff testified that he was told he would not be able to examine appellant, but he did not testify appellant had refused to be examined. (47RT 7067.)

Here, like in *Krebs*, Dr. Brook did not rely on appellant's refusal to participate in the examination when he criticized the defense expert's methodology and conclusions. (See 38RT 5377.) Additionally, the testimony of Drs. Sadoff, Amos, and Brook disagreeing with appellant's experts did not rely on her refusal to participate in the examination. (38RT 5376; 47RT 7067; 48RT 7273.) Further, like in *Krebs*, the evidence of appellant's premeditation and culpability in the heinous and brutal murders of her four children was overwhelming, while the evidence of her alleged cognitive impairments was weak. (See RB 201.) Additionally, in closing argument, the prosecutor noted for the jury that Drs. Brook, Amos, and Sadoff had requested to examine appellant, but that she had refused. (56RT 8767, 8771, 8783.) These remarks were mere statements of fact and were less pointed than the prosecutor's remark found harmless in *Krebs*.

The trial record in this case further shows that, during cross-examination, defense counsel asked Dr. Brook whether it would make a difference if he knew that appellant had agreed to

an examination on the condition that someone else be present in the room during the examination. The prosecutor objected. The trial court then instructed the jury, "when the defendant submits their mental state as an issue in the case, the defendant must submit to an examination by the prosecution experts without condition. That was not forthcoming in this case." (38RT 5485.)

During closing argument, the prosecutor reminded the jury about that instruction and argued that the jury could consider appellant's refusal when determining the weight and credibility of defense experts' opinions, validity of the defenses, and the validity of the information appellant provided to the defense experts. (56RT 8805-8806.) The prosecutor also remarked that appellant's refusal to be examined could be considered "as an attempt to suppress or conceal evidence against her." (56RT 8806.) No objection by defense counsel was lodged. (56RT 8806.)

Although there was no issue of the trial court instructing the jury on the defendant's refusal to submit to an examination or remarks on that instruction by the prosecution raised in *Krebs*, the trial court's instructions here and the prosecutor's subsequent remarks are not sufficient to compel a different conclusion than the one reached in *Krebs*.

The jury was instructed that to find appellant guilty of murder, the prosecution had to prove beyond a reasonable doubt that appellant had the requisite mental state. (20RCT 5102-5104.) The jury was not instructed that appellant's refusal to submit to an examination meant she had the required intent or that her refusal meant she was guilty. Rather, the jury was

instructed that the examination needed to take place without any conditions and that such an examination did not occur. (38RT 5485.) Additionally, the jury was instructed that it was not to be influenced by bias or prejudice against appellant. (64RT 10071.) Moreover, the jury was admonished that the arguments of counsel were not evidence. (64RT 10071.) Jurors are presumed to understand and follow the trial court's instructions. (*People v. Thompson* (2010) 49 Cal.4th 79, 138; *People v. Yeoman* (2003) 31 Cal.4th 93, 138-139.) Arguments of counsel "carry less weight with a jury than do instructions from the court." (*Boyde v. California* (1990) 494 U.S. 370, 384; see *People v. Mendoza* (2007) 42 Cal.App.4th 686, 704.) Thus, the jury herein understood that the prosecutor's statements constituted argument and were not binding instructions that it was required to follow. Finally, as stated *ante*, the evidence of appellant's guilt was staggering and the aggravating factors weighing in favor of a sentence of death were numerous.

Thus, like in *Krebs*, under the totality of the circumstances present here, it is not reasonably likely the jury would have found appellant not guilty or returned a verdict of life without parole had the jury not heard evidence that appellant refused to submit to an examination by a prosecution expert, the trial court's instruction, or the prosecutor's remarks during closing argument. (See *Krebs*, *supra*, 8 Cal.5th at p. 347; see also RB 194-201.)

III. THE VICTIM IMPACT EVIDENCE WAS PROPERLY ADMITTED

To support her claim that the victim impact evidence admitted during the penalty phase was unnecessary, excessive, irrelevant, cumulative, and inflammatory, appellant cites to the United States Supreme Court case of *Bosse v. Oklahoma* (2016) ___ U.S. ___ [137 S.Ct. 1] and five recent California Supreme Court cases. (Supp. AOB 22-29.) None of these cases assists appellant in strengthening her position.

In *Bosse*, the defendant was convicted of three counts of first degree murder. (*Bosse, supra*, 137 S.Ct. at p. 2.) During the penalty phase, over the defendant's objection, the State of Oklahoma asked three of the victims' relatives to recommend a sentence to the jury. All three relatives recommended death. The jury subsequently recommended that the defendant be sentenced to death. (*Ibid.*) On appeal, the defendant argued the testimony recommending death violated the Eighth Amendment under *Booth v. Maryland* (1987) 482 U.S. 496. The Oklahoma Court of Criminal Appeals affirmed the sentence, finding that no error occurred. (*Bosse, supra*, at p. 2.) The United States Supreme Court reversed, holding the Oklahoma Court of Criminal Appeals erred in concluding that *Payne v. Tennessee* (1991) 501 U.S. 808, "implicitly overruled" *Booth* in its entirety, specifically the portion of *Booth* that holds "the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment." (*Bosse, supra*, at pp. 2-3.) The Supreme Court held the state court "remains bound by *Booth*'s

prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence unless this Court reconsiders that ban." (*Id.* at p. 2.)

Appellant argues that the penalty phase of her trial was "replete" with the type of victim impact testimony prohibited by *Bosse* and that the testimony was thus impermissible under the Eighth Amendment. She cites to the same portions of the testimony provided by Minerva Serna, Fernando Nieves, David Folden, and Charlotte Nieves that she did in her opening brief. (Supp. AOB 22-25.) But *Bosse* simply reiterated the standard from *Payne*, the same standard cited and relied on by respondent in the respondent's brief, and the one binding on this Court. (See RB 320-323, 335-342.) "The federal Constitution bars victim impact evidence only if it is 'so unduly prejudicial' as to render the trial 'fundamentally unfair.'" (*Payne*, *supra*, 501 U.S. at p. 825.) *Bosse* does not alter the conclusion that the victim impact testimony by the four witnesses here was permissible and that the vast majority of appellant's challenges to specific testimony were forfeited for failure to object. (See RB 310-323, 335-342.) Indeed, the United States Supreme Court noted in *Bosse* that the challenged questions and responses were offered over the defendant's objection, implying than an objection was required to reach the merits of the claim. (*Bosse*, *supra*, 137 S.Ct. at p. 2.) Further, *Bosse* focused on the witnesses' testimony recommending death. Here, the four witnesses were never asked what sentence they wanted imposed nor did they testify they

wanted appellant sentenced to death. *Bosse* does not change the ultimate conclusion that the victim impact testimony here was permissible because it was not unduly prejudicial.

Next, appellant contends that "[n]one of the opinions of this Court issued since the filing of the Reply Brief consider [victim impact] evidence comparable to this case," specifically, the 13-minute video, the description of the girls' funeral, and the poster boards. (Supp. AOB 26.) To the contrary, the five opinions of this Court that appellant cites involve evidence similar or analogous to the evidence presented here.

In *People v. Mendez* (2019) 7 Cal.5th 680, the defendant murdered Michael Faria and Jessica Salazar and was sentenced to death. (*Id.* at p. 684.) At the penalty phase of the trial, six witnesses offered victim impact testimony, three for Faria and three for Salazar. (*Id.* at p. 709.) Faria's father testified about his son and that his son "died a 'tragic, sickening, evil, disgusting death.'" (*Id.* at pp. 709-710.) Faria's sister testified that her brother protected her. She described childhood photographs of her brother and other siblings, and the photos were shown to the jury. (*Id.* at p. 710.) Salazar's mother described her son's personality and testified that she saw her son at the hospital after he had been shot. She also testified that she fell into a five-month period of drug abuse after her son's death. Two of Salazar's cousins testified about the impact of her death. (*Ibid.*) Salazar's mother read a poem Salazar had written as a fifth grader and "narrated the occasions on which 'about eight' childhood photos of Salazar were taken." (*Id.* at p. 711.) A video

of Salazar's sixth grade graduation and a photo of Salazar's gravestone were shown to the jury. (*Ibid.*)

This Court held the victim impact evidence was "powerful" but not "improper under our precedents." (*Mendez*, *supra*, 7 Cal.5th at pp. 711-712.) This Court found it was "obvious that a parent would describe the murder of a child as a 'tragic, sickening, evil, disgusting death[.]'" (*Id.* at p. 713.) This Court also found that admitting 13 photos of Salazar and fewer of Faria was not excessive and specifically noted the photo of the gravesite was admissible. (*Id.* at p. 712, fn. 3.) This Court further found the home video of Salazar's sixth grade graduation and the poem were admissible. (*Id.* at pp. 713-714.) This Court reasoned, "so long as victim impact evidence does not invite the jury to respond in a purely irrational way, it is admissible." (*Id.* at p. 712.)

Here, appellant overlooks that there were four victims, survived by two fathers, one brother, two half-sisters, and a stepmother. One 13-minute video compilation of the four victims was admitted along with a total of eight photo collages, one collage for each victim, three collages containing photographs of the victims with other family members individually titled, "Memories," "Family Memories," and "Fun Times Together," and one collage showing Jaqlene's and Kristl's bedroom at their father's apartment, entitled "In Remembrance." (60RT 9331, 9376-9378; 61RT 9444-9445.)

In the collage entitled "Nikolet Nieves," there were seven photos of Nikolet. In the collage entitled "Rashel Nieves," there were six photos of Rashel. In the collage entitled "Kristl Folden,"

there were six photos of Kristl. In the collage entitled "Jaqlene Folden," there were six photos of Jaqlene. (60RT 9334-9335, 9337, 9378; Peo. Exhs. 100, 101, 104, 105.) The collage "Memories" contained six photos, the collage "Family Memories" contained 13 photos, the collage "Fun Times Together" contained nine photos, and the collage "In Remembrance" contained five photos. (60RT 9331, 9376-9378; Peo. Exhs. 98, 99, 103, 106.) In *Mendez*, this Court found that the admission of 13 photos for one victim was not excessive. (*Mendez*, *supra*, 7 Cal.5th at p. 712.) Thus, the photos admitted here for four victims cannot be considered excessive.

Additionally, the video was 13 minutes long, did not have any music in the background, was not narrated, and showed the four victims doing ordinary activities. The video in *Mendez* showed Salazar graduating from sixth grade. (*Mendez*, *supra*, 7 Cal.5th at p. 713.) The video here was not excessive or inflammatory.

Appellant contends the prosecution allowed a "witness to give his opinions as to penalty." (Supp. AOB 27.) Although not clear exactly what testimony appellant is challenging herein, she may be referring to when Folden testified, "[t]his time it stops." (60RT 9371; see Supp. AOB 24; AOB 464.) This brief comment did not explicitly or implicitly indicate that Folden wanted appellant to be sentenced to death. The comment was ambiguous, and it is pure speculation to assume the jury understood it to mean Folden desired the death penalty.

In *People v. Bell* (2019) 7 Cal.5th 70, the victim had been married less than two months before he was murdered by the defendant. (*Id.* at p. 127.) The court admitted a redacted videotape of the victim's wedding during the penalty phase of the trial over the defendant's objection. The four-minute video showed the victim eating cake, throwing the bride's garter, and dancing to music. (*Ibid.*) While this Court noted that caution should be exercised in permitting victim impact evidence in the form a "lengthy videotaped or filmed tribute to the victim . . . '[t]here is no bright-line rule pertaining to the admissibility of videotape recordings of the victim at capital sentencing hearings.'" (*Id.* at pp. 127-128.) This Court held the video was properly admitted as victim impact evidence as it resembled other videotape evidence that was held admissible in *People v. Dykes* (2009) 46 Cal.4th 731, 783-785 (eight-minute video of the victim and family visiting Disneyland), *People v. Brady* (2010) 50 Cal.4th 547, 579 (four-minute video of victim celebrating Christmas with family), and *People v. Vines* (2011) 51 Cal.4th 830, 888 (five-minute video that showed the victim singing and dancing with family members and in a high school performance). (*Id.* at pp. 127-128.) The video quality resembled a "home movie," it was of a real event in the victim's life, there was no "'narration, background music, or visual techniques designed to generate emotion,'" nor did it "'convey outrage or call for vengeance or sympathy.' [Citation.]" (*Id.* at p. 128.)

Here, like in *Bell*, the video was of "home movie" quality, i.e., it was not a professional production, there was no narration,

background music, or techniques used to garner an emotional response. Further, the video depicted the victims engaging in ordinary activities less likely to garner an emotional response than a wedding video. Additionally, in *Bell*, the defendant murdered one victim. The video evidence for the one victim was four minutes long. Here, as described *ante*, appellant murdered four victims and the video was 13 minutes long for all four victims.

Appellant argues this Court found the video in *Bell* admissible because the trial court reviewed the video, required the prosecutor to cut portions, and gave the jury a special instruction on how to consider victim impact evidence. (Supp. AOB 27-28.) Preliminarily, as detailed *ante*, those were not the only reasons why this Court found the video admissible. (See *Bell*, *supra*, 7 Cal.5th at pp. 127-129.) Regardless, as discussed in respondent's brief, here the prosecution edited the video from 35 minutes to 13 minutes (60RT 9262-9263) and the trial court's review was adequate. (See RB 327- 331.)

In *People v. Westerfield* (2019) 6 Cal.5th 632, the defendant was convicted of murdering a seven-year-old girl. (*Id.* at p. 639.) At the penalty phase of the trial, two of the victim's elementary school teachers testified as victim impact witnesses. (*Id.* at p. 652.) The teachers testified as to the victim's character and the effect of her murder on themselves and the victim's classmates. (*Id.* at pp. 652, 728.) This Court held the teachers' testimony did not invite a purely irrational response from the jury or render the defendant's trial fundamentally unfair. (*Id.* at p. 729.) This

Court reasoned that the harm caused by criminal conduct is not limited to immediate family members and that the defendant's murder of a seven-year-old girl caused emotional harm to her teachers and classmates. (*Ibid.*) Thus, the victim impact testimony as to that harm was properly admitted. (*Id.* at pp. 728-729.)

Westerfield simply reiterates the standard that victim impact evidence is admissible in the penalty phase of a capital case as long as it does not invite a "purely irrational response from the jury," or is "so unduly prejudicial as to render the trial 'fundamentally unfair.'" (*Westerfield*, *supra*, 6 Cal.5th at p. 729, citing *Payne*, *supra*, 501 U.S. at pp. 808, 825.) Here, only immediate family members testified as to the impact the deaths of their daughters and granddaughters had on them. Nothing in their respective testimonies invited a "purely irrational response from the jury" or rendered the trial "fundamentally unfair." *Westfield* supports the admission of the victim impact testimony in this case.

In *People v. Spencer* (2018) 5 Cal.5th 642, the defendant was convicted of first degree murder with robbery and burglary special circumstances. (*Id.* at p. 648.) At the penalty phase of the trial, four members of the victim's family provided victim impact statements, and three other witnesses testified about how the victim's wife reacted when she received the news of his death. (*Id.* at pp. 653-654, 676.) Photographs of the victim were also admitted. (*Ibid.*) Except for the photographs, the defendant did

not object to the introduction of the victim impact evidence. (*Id.* at p. 677.)

This Court held that because the defendant failed to object, any claim on appeal that the testimony was erroneously admitted was forfeited. (*Spencer*, *supra*, 5 Cal.5th at p. 677.) On the merits, this Court held that "[t]he number of witnesses that testified in this case, the content of their testimonies, and the decision to admit four of the victim's photographs are all within the limits of what we found proper in prior cases." (*Ibid.*) The family members testified about their relationships with the victim, how they learned about his death, and how his death affected their lives. (*Ibid.*) This Court found that four statements from the victim's family and testimony from three people about the victim's wife's reaction upon learning of her husband's death was not excessive, and the discussion of the impact of the victim's death on their own lives and on the lives of other family members was not improper. (*Id.* at p. 678.) This Court also found the testimony about events in the victim's life that occurred far before the victim's death was not improper. (*Id.* at pp. 678-679.) As to the four photographs of the victim, this Court found that they did not create unfair prejudice, citing to *People v. Garcia* (2011) 52 Cal.4th 706 as support. In *Garcia*, this Court found that no error occurred when the jury was shown an "11-minute 45-second videotape consisting of a photo montage of the victim." (*Spencer*, *supra*, at p. 679; *Garcia*, *supra*, at pp. 720-721, 752-754.)

Here, like in *Spencer*, appellant failed to object to the vast majority of the victim impact testimony she challenges. (See 60RT 9302-9303, 9305, 9308, 9311, 9319, 9323, 9338, 9344, 9371, 9374, 9378, 9403, 9413.) Thus, like in *Spencer*, appellant's claims on appeal have been forfeited. In any event, only four witnesses, all family members, testified as to how the death of the four young girls impacted their lives, and the testimony was not unduly prejudicial. If victim impact testimony from seven witnesses was found proper in *Spencer*, then surely the testimony from the victims' fathers, grandmother, and stepmother was proper here. Additionally, this Court's approval of the 11-minute and 45-second videotape montage in *Garcia* supports the admission of the 13-minute video in this case.

Finally, in *People v. Montes* (2014) 58 Cal.4th 809, a 10-minute videotape comprised of 115 photographs of the victim was shown to the jury during the penalty phase of the trial. (*Id.* at p. 826.) The video was accompanied by "light instrumental music" and concluded with "an image of a snow-covered road and a photograph of [the victim's] memorial bench at the cemetery, which his high school football team had donated." (*Ibid.*) This Court found that the accompanying music did not add materially to the emotional effect of the video and that the video was properly admitted as victim impact evidence. (*Id.* at pp. 883-884.) As appellant acknowledges (Supp. AOB 29), this Court subsequently held in *People v. Sandoval* (2015) 62 Cal.4th 394, that background music in victim impact presentations is never permitted, unless the music is relevant to the jury's penalty

phase decision, because it provides no relevant information and is potentially prejudicial. (*Id.* at p. 442.)

Here, the video was only three minutes longer than the one found permissible in *Montes* and it contained no background music or narration. Thus, the video here was properly admitted as victim impact evidence.

In sum, the victim impact evidence here was properly admitted. (See RB 310-345.)

IV. THE REASONABLE DOUBT STANDARD DOES NOT APPLY TO PENALTY-PHASE AGGRAVATING FACTORS AND THERE IS NO REQUIREMENT OF JUROR UNANIMITY AS TO THOSE FACTORS

Appellant contends that *Hurst v. Florida* (2016) 577 U.S. ___ [136 S.Ct. 616], *Ring v. Arizona* (2002) 536 U.S. 584, 589, and *Apprendi v. New Jersey* (2000) 530 U.S. 466, 494, require that a jury find unanimously and beyond a reasonable doubt each fact that increases a sentence from life in prison to a sentence of death, i.e., all penalty-phase aggravating circumstances. (Supp. AOB 29-30.) This Court has repeatedly rejected this claim, and appellant provides no compelling reasons for this Court to revisit its holdings.

In *Hurst*, the United States Supreme Court found that Florida's capital sentencing scheme violated *Ring* because the judge, rather than the jury, made the ultimate factual determinations necessary to impose the death penalty. (*Hurst, supra*, 136 S.Ct. at pp. 621-622.) Under Florida's capital sentencing scheme at that time, the maximum sentence a capital defendant could receive on the basis of a murder conviction alone

was life imprisonment. A Florida trial court, however, had the authority to impose a death sentence if the jury rendered an "advisory sentence" of death and the court found sufficient aggravating circumstances existed. The Supreme Court held this sentencing scheme violated *Ring* because the jury made an advisory verdict while the judge made the ultimate factual determinations necessary to sentence a defendant to death. (*Ibid.*) Thus, *Hurst* reiterated that juries, not judges, must "find each fact necessary to impose a sentence of death." (*Id.* at p. 619.)

As this Court has recognized, "California's sentencing scheme is materially different from that in Florida." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1235, fn. 16; accord, *People v. Becerrada* (2009) 2 Cal.5th 1009, 1038.) Unlike *Hurst*, there was no penalty-phase judicial factfinding in this case. Appellant's death sentence is based on the jury's findings, and the jury's verdict here was not merely "advisory" as in *Hurst* (21RCT 5403-5420). (See *Hurst*, *supra*, 136 S.Ct. at p. 622; *Rangel*, *supra*, at p. 1235, fn. 16.)

Nothing in *Hurst* requires California to implement any standard of proof as to any penalty determination by a jury or to require unanimity as to the aggravation factors. (*Rangel*, *supra*, 62 Cal.4th at p. 1235.) Moreover, as appellant acknowledges (Supp. AOB 30), this Court has repeatedly rejected his claim. In *People v. Salazar* (2016) 63 Cal.4th 214, this Court found:

> "Neither the federal nor the state Constitution requires that the penalty phase jury make *unanimous* findings concerning the particular aggravating

> circumstances, [or] find all aggravating factors *beyond a reasonable doubt* . . . . The United States Supreme Court's recent decisions interpreting the Sixth Amendment's jury-trial guarantee [citations] do not alter these conclusions. [Citations.]"

(*Id.* at p. 255, quoting *People v. Linton* (2013) 56 Cal.4th 1146, 1215, original italics; see also *People v. Danks* (2004) 32 Cal.4th 269, 316 ["trial court did not err in failing to require the jury to make unanimous separate findings of the truth of specific aggravating evidence" and "[n]othing in *Ring* . . . or *Apprendi* affects our conclusions in this regard"]; *People v. Crew* (2003) 31 Cal.4th 822, 860; *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, 275.)

In *People v. Simon* (2016) 1 Cal.5th 98, a case decided after *Hurst*, this Court held:

> Nor is the death penalty unconstitutional "for failing to require proof beyond a reasonable doubt that aggravating factors exist, outweigh the mitigating factors, and render death the appropriate punishment." [Citation.] This conclusion is not altered by the United States Supreme Court's decisions in *Apprendi* [] and *Ring* []. [Citation.]

(*Id.* at p. 149; accord *People v. Garcia* (2011) 52 Cal.4th 706, 764 ["There is no constitutional requirement to instruct [] on any burden of persuasion regarding the penalty determination"].)

And more recently, in *Rangel*, this Court held:

> The death penalty statute does not lack safeguards to avoid arbitrary and capricious sentencing, deprive defendant of the right to a jury trial, or constitute cruel and unusual punishment on the ground that it does not require either unanimity as to the truth of aggravating circumstances or findings beyond a reasonable doubt

> that an aggravating circumstance (other than Pen. Code, § 190.3, factor (b) or factor (c) evidence) has been proved, that the aggravating factors outweighed the mitigating factors, or that death is the appropriate sentence. [Citations.] Nothing in *Hurst v. Florida* (2016) 577 U.S. ___ [193 L.Ed.2d 504, 136 S.Ct. 616],[fn. omitted] *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, or *Apprendi v. New Jersey* (2000) 530 U.S. 466, affects our conclusions in this regard. [Citation.]

(*Rangel*, *supra*, 62 Cal.4th at p. 1235.)

Nor have the United States Supreme Court's decisions in *Alleyne v. United States* (2013) 570 U.S. 99, 107, *Ring*, *supra*, 536 U.S. 584, and *Apprendi*, *supra*, 530 U.S. 466, changed this Court's analysis on this issue (see Supp. AOB 30). (See, e.g., *People v. Elliot* (2005) 37 Cal.4th 453, 487; *People v. Ward* (2005) 36 Cal.4th 186, 221-222; *People v. Stitely* (2005) 35 Cal.4th 514, 573; *People v. Morrison* (2004) 34 Cal.4th 698, 730-731; *Danks*, *supra*, 32 Cal.4th at p. 316 ["Nor should the jury have been instructed that the reasonable doubt standard governed its penalty determination" and "[n]othing in *Ring* . . . or *Apprendi* . . . mandates a different conclusion."]; *Prieto*, *supra*, 30 Cal.4th at pp. 263, 275.) Accordingly, nothing in *Hurst*, or the other cases cited by appellant, impose the reasonable doubt standard on aggravating circumstances at the penalty phase or requires juror unanimity as to those circumstances. Appellant's claim must be rejected.

CONCLUSION

For the foregoing reasons, and those previously discussed in the respondent's brief, respondent respectfully requests that this Court affirm the judgment and the sentence of death.

Dated: May 15, 2020

Respectfully submitted,

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JAMES WILLIAM BILDERBACK II
Senior Assistant Attorney General
JAIME L. FUSTER
Deputy Attorney General

KRISTEN J. INBERG
Deputy Attorney General
Attorneys for Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL RESPONDENTS BRIEF** uses a 13-point Century School Book font and contains 10,572 words.

Dated: May 15, 2020

XAVIER BECERRA
Attorney General of California

KRISTEN J. INBERG
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF ELECTRONIC SERVICE & SERVICE BY U.S. MAIL

Case Name: **The People v. Nieves** No.: S092410

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On **May 15, 2020,** I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

John A. Clarke
Clerk of the Court
Los Angeles County Superior Court
Stanley Mosk Courthouse
111 N. Hill Street
Los Angeles, CA 90012
To be delivered to Hon. Ronald S. Coen, Judge

On **May 15, 2020**, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by transmitting a true copy via electronic mail to:

Amitai Schwartz, Esq
Attorney for Appellant
Served Via TrueFiling

SF-CAP
California Appellate Project
Served Via Email: filing@capsf.org

Beth Silverman Deputy District Attorney **Served Via Email: bsilverman@da.lacounty.gov**

I declare under penalty of perjury under the laws of the State of California, the foregoing is true and correct and that this declaration was executed on **May 15, 2020**, at Los Angeles, California.

S. Hubbard
Declarant

/s/ S. Hubbard
Signature

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. NIEVES (SANDI DAWN)**
Case Number: **S092410**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **kristen.inberg@doj.ca.gov**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
SUPPLEMENTAL BRIEF	S092410_SRB_People v. Nieves

Service Recipients:

Person Served	Email Address	Type	Date / Time
Amitai Schwartz Attorney at Law 55187	amitai@schwartzlaw.com	e-Serve	5/15/2020 11:02:02 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

5/15/2020
Date

/s/Shoshana Hubbard
Signature

Inberg, Kristen (311744)
Last Name, First Name (PNum)

CA Attorney General's Office - Los Angeles
Law Firm