**DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff and Respondent,<br><br>v.<br><br>CARY ANTHONY STAYNER,<br>Defendant and Appellant. | **CAPITAL CASE**<br><br>No. S112146<br><br>Santa Clara County<br>Superior Court<br>No. 210694 |

On Automatic Appeal From a Judgment of Death
of the Superior Court of the State of California
for the County of Santa Clara

The Honorable Thomas C. Hastings, Judge Presiding

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# APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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By appointment of the California
Supreme Court

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**APPELLANT'S SUPPLEMENTAL OPENING BRIEF**

## I. INTRODUCTION

All phases of this trial were permeated with the judge's bias and animosity toward the defense and favoritism for the prosecution resulting in a denial of the appellant's constitutional rights. (See, e.g., AOB Claims XXII and XXX 518-534.)

In 2021, after briefing in this case was completed, in *People v. Nieves* (2021) 11 Cal.5th 404, 498, this Court reaffirmed the critical importance of trying a capital defendant before an impartial judge and stressed the pernicious impact a judge's demeaning behavior could have on the defense's presentation of mitigation evidence.

Here, the trial court engaged in the type of pervasive misconduct condemned in *Nieves* and improperly aligned itself with the prosecution. The judge scolded defense counsel dozens of times, while simultaneously rejecting defense arguments by

making incorrect legal rulings, or by claiming the record said something other than what it actually said. Throughout trial, the court demeaned the defense case in front of the jury with snide comments and rulings that the defense's proposed evidence was unnecessary, irrelevant or cumulative. This supplemental brief addresses how the trial judge's numerous instances of antipathy toward Mr. Stayner[1] and his partiality for the prosecution fall within the sphere of conduct condemned by the *Nieves* decision and require reversal of the convictions and sentence.

## II. APPLICABLE LAW

The due process clause of the Fourteenth Amendment requires that a defendant be tried by an unbiased judge. (See, e.g., *In re Murchison* (1955) 349 U.S. 133, 136 and *Webb v. Texas* (1972) 409 U.S. 95, 98.) "A criminal defendant has due process rights under both the state and federal Constitutions to be tried by an impartial judge." (*Nieves*, *supra*, 11 Cal.5th at p. 498.) This principle has been in place for decades. (*Bracy v. Gramley* (1997) 520 U.S. 899, 904-905; see also *Johnson v. Mississippi* (1971) 403 U.S. 212, 216; *Cooper v. Superior Court* (1961) 55 Cal.2d 291, 301 ["The judge's function as presiding officer is preeminently to act impartially"]; *People v. Mahoney* (1927) 201 Cal. 618, 626 ["Every

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[1] Several of these instances are set out in numerous sections of appellant's opening brief. These will be referenced here rather than set out in detail but must be considered to demonstrate the full scope of the judicial misconduct and its prejudicial impact on the jury.

defendant under such a charge is entitled to a fair trial on the facts, and not a trial on the temper or whimsies of the judge who sits in his case. Whatever the degree of guilt of appellant here, those who know the circumstances surrounding his conviction are likely to feel that the verdict resulted from the conduct of the judge and not from the evidence"].)

In addition to the due process right to be tried by a fair and impartial judge, California Penal Code section 1044 constrains trial judges as well. If the judge's behavior is biased and abusive, relief is warranted under this requirement. This is particularly true when the defendant is facing the ultimate penalty of death. (*People v. Sturm* (2006) 37 Cal.4th 1218.) In *Sturm*, this Court held that the judge's conduct was prejudicial under either the *Chapman* or *Watson* standard in reversing the death penalty. (*Chapman v. California* (1967) 386 U.S. 18, 24 and *People v. Watson* (1956) 46 Cal.2d 818, 836.)

A trial judge must always remain fair and impartial. (*Kennedy v. Los Angeles Police Department* (9th Cir. 1989) 901 F.2d 702, 709.) He "'must be ever mindful of the sensitive role [the court] plays in a jury trial and avoid even the appearance of advocacy or partiality.'" (*Ibid.*, quoting *United States v. Harris* (9th Cir. 1974) 501 F.2d 1, 10.) A trial judge commits misconduct if he persistently makes discourteous remarks so as to discredit the defense or create the impression it is allying itself with the prosecution. (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206-1209; *People v. Carpenter* (1997) 15 Cal.4th 312, 353; *People v. Fudge* (1994) 7 Cal.4th 1075, 1107; *People v. Clark* (1992) 3

Cal.4th 41, 143.) "The judge's function as presiding officer is preeminently to act impartially." (*Cooper v. Superior Court, supra,* 55 Cal.2d at p. 301.) "A trial judge must strive for total neutrality and complete circumspection in the eyes and minds of the jury." (*Bursten v. United States* (5th Cir. 1968) 395 F.2d 976, 983.)

While defense counsel here acted properly throughout the trial, this Court has noted even had trial counsel acted outside their ethical bounds, that provides no excuse for the judge's demeaning and abusive behavior. "[O]ur cases have never suggested that a trial court is relieved of its obligation to remain temperate and impartial when confronted with a lawyer's provocative or improper behavior." (*Nieves, supra,* 11 Cal.5th at p. 482.)

"[J]urors watch courts closely, and place great reliance on what a trial judge says and does. They are quick to perceive a leaning of the court. Every remark dropped by the judge, every act done by him during the progress of the trial is the subject of comment and conclusion by the jurors, and invariably they will arrive at a conclusion based thereon as to what the court thinks about the case. . . . However impatient a trial judge may be with a defense, he should be careful not to indicate such impatience by remarks or comments made during the course of a trial which will prejudice a defendant." (*People v. Zamora* (1944) 66 Cal.App.2d 166, 210-211.) "We have cautioned that '[t]rial judges "should be exceedingly discreet in what they say and do in the presence of a jury"'" (*Sturm, supra*, 37 Cal.4th at p. 1237) and

their comments "'must be accurate, temperate, nonargumentative, and scrupulously fair'" (*id.* at p. 1232). "'Although the trial court has both the duty and the discretion to control the conduct of the trial [citation], the court 'commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution' [citation]. Nevertheless '[i]t is well within [a trial court's] 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.'" (*People v. Woodruff* (2018) 5 Cal.5th 697, 768.)" (*Nieves*, *supra*, 11 Cal.5th at p. 477.)

In *Nieves,* this Court found the trial judge's behavior was so egregious that the death sentence had to be reversed: "The trial court directed stern remarks and periodic sarcasm toward defense counsel that impugned counsel's competence and 'inevitably conveyed to the jury the message that the trial court thought that defense counsel was wasting the court's – and the jury's – time by asking inappropriate questions.'" (*Nieves, supra,* 11 Cal.5th at p. 483.) "It is completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty, or ethics of the attorneys in a trial. This principle holds true in instances involving a trial judge's negative reaction to particular questions asked by defense counsel, regardless of whether the judge's ruling on the prosecutor's objection was correct; even if an evidentiary ruling is correct, that

would not justify reprimanding defense counsel before the jury." (*Id*. at pp. 483-484, cleaned up, citations omitted.)

Citing *People v. Sturm, supra*, 37 Cal.4th at p. 1238, this Court concluded in *Nieves* that "the conduct by the trial judge reflect[ed] 'a pattern of disparaging defense counsel and defense witnesses in the presence of the jury, and convey[ing] the impression that he favored the prosecution,' and it therefore constitute[d] misconduct. (*Sturm, supra*, 37 Cal.4th at p. 1238.)" (*Nieves, supra*, 11 Cal.5th at pp. 477-478.)

In *Nieves,* "the trial judge not only reprimanded counsel for posing improper questions, but, by referencing proceedings outside the jury's presence in which the court had ruled against the defense, implied that counsel deliberately attempted to skirt the court's rulings. When the trial judge chastised counsel for speaking objections and other extraneous comments, he highlighted the repeated warnings and admonitions counsel had violated, again conveying to the jury that counsel was flouting court rules to inject impermissible matters into the trial. By voicing concerns about counsel's discovery compliance and blaming counsel's lawful disclosures for a delay in the proceedings, the trial judge contributed to the impression that he doubted counsel's honesty and found his conduct improper." (*Nieves, supra,* 11 Cal.5th at p. 484.)

"On a few occasions, the trial court directly accused counsel of trying to place inaccurate or inadmissible evidence before the jury, telling counsel, 'That is improper, and you know it,' referring to another of counsel's representations as 'false and

misleading,' and remarking that counsel did not want to provide the jury with an accurate version of evidence." (*Nieves, supra,* 11 Cal.5th at p. 484.)

This case also implicates concerns this Court identified in *Nieves*: repeated references to rulings that had gone against the defense and insinuations that the defense was dishonestly trying to "back door" evidence that had been excluded. These comments served not just to impugn defense counsel but also to impugn the integrity of their case.

The opinion in *Nieves* also brings an important new perspective to appellant's judicial bias claims because although this Court has said that a trial court's rulings alone cannot establish judicial bias, see, e.g., *People v. Navarro* (2021) 12 Cal.5th 285, 332, it relied on erroneous and damaging judicial rulings in *Nieves* and *Sturm* to buttress other evidence of prejudicial judicial bias.

In *Sturm*, the court noted the frequency with which the trial court sua sponte objected to defense counsel's questions or interfered with defense questioning (*Sturm, supra,* 37 Cal.4th at p. 1235) and particularly pointed out that the judge had ruled against the defense much more frequently than he had ruled against the prosecution. (*Sturm, supra,* 37 Cal.4th at p. 1244 ["the trial judge was not evenhanded; rather, he interjected himself more vociferously and on many more occasions during the defense case in mitigation than he did during the prosecution's case in aggravation"].) There, the combination of the adverse rulings and repeated derogatory comments toward defense

counsel, their case and their witnesses, led this Court to find prejudicial judicial bias against Mr. Sturm and his defense team. (*Sturm, supra,* 37 Cal.4th at p. 1244.)

In *Nieves*, the court pointed to the fact that the trial judge repeatedly sustained objections to defense counsel's opening statement at the penalty phase (*Nieves, supra,* 11 Cal.5th at p. 504), noting that the rulings combined with disrespectful comments to "increase[] the potential for prejudice flowing from the judge's comments." The Court also pointed to a number of incorrect penalty phase rulings as evidence of bias:

> The trial judge erroneously sustained objections to questions that sought to bolster the testimony of a chaplain attesting to defendant's remorse for the crimes; the judge also repeatedly and erroneously sustained objections to questions about defendant's nonviolence and the value she brought to the lives of others. The "very act" of sustaining those objections "tended to mislead the jury" (*People v. Hill* (1992) 3 Cal.4th 959, 1009 [13 Cal.Rptr.2d 475, 839 P.2d 984])—by minimizing defendant's mitigating evidence and communicating that defendant's valued attributes were "not worth considering" (*Sturm, supra*, 37 Cal.4th at p. 1239). The trial judge's hostility and impatience with the defense were further evident in the judge's erroneous exclusion of whole categories of mitigating evidence—Dr. Boone's testimony regarding defendant's neuropsychological test results and cognitive impairment and PET scan results portraying brain injury consistent with defendant's childhood traumas and neuropsychological testing.

(*Nieves, supra*, 11 Cal.5th at p. 505.)

Another erroneous ruling relating to penalty phase instructions provided additional fodder for a judicial bias finding

even though the incorrect ruling, standing alone, did not constitute reversible error. The *Nieves* court said,

> The trial court also improperly instructed the jury to consider the 'weight and significance' of defendant's failure to provide timely discovery concerning eight of 12 penalty phase witnesses -- an error we earlier found harmless when viewed in isolation. Because the trial court repeatedly chastised defense counsel and expressed doubts about the defense, however, the erroneous instruction and improper aggravating factor were apt to contribute to the perception that defendant was manipulative and that her mitigating evidence was not to be trusted. (*Sturm*, *supra*, 37 Cal.4th at p. 1243.)

(*Nieves, supra*, 11 Cal.5th at p. 505.)

Finally, this Court noted that the *Nieves* judge improperly gave the jury a penalty phase instruction "that gratuitously implied that defense counsel was improperly characterizing the case in mitigation. As with the judge's remarks during counsel's opening statement, the timing of these interventions increased their prejudicial effect." (*Nieves, supra,* 11 Cal.5th at p. 505.)

The lesson from *Nieves* and *Sturm* is that while adverse rulings alone cannot establish judicial bias, adverse rulings combined with intemperate behavior in front of the jury can establish reversible bias.

As in *Sturm* and *Nieves*, the trial here was rife from start to finish with instances of judicial actions barred under these legal and constitutional principles.

## III. SPECIFIC INSTANCES OF JUDICIAL BIAS AND MISCONDUCT

The trial court's bias against Mr. Stayner and defense counsel began in pre-trial motions and continued throughout all of the ensuing proceedings, including the penalty phase. The misconduct was pervasive and can be divided into the following four categories, albeit with extensive overlap among them: 1) misconduct discrediting and minimizing the defense mitigation case; 2) comments demeaning defense counsel and exhibiting the court's bias against them; 3) misconduct demonstrating the court's bias in favor of the prosecution and against the defense; and 4) judicial bias as exhibited by the trial court's legal errors and misstatements of the record when denying defense arguments.

### A. Misconduct Discrediting and Minimizing the Defense Mitigation Case

In *Nieves*, this Court reversed the death penalty because the judge's behavior diminished the impact of the mitigation case, saying:

> It is not difficult to imagine the horror a jury might feel in response to defendant's actions. Nonetheless, a juror could regard the stunning enormity of the crime, and the fact that defendant intended to take her own life, as a sign of significant mental instability. Absent the trial judge's persistent, disparaging remarks, a juror might have viewed these circumstances with greater sympathy and concluded the crime was a tragedy lacking the moral culpability to warrant death. A juror might also have given greater weight to defendant's remorse and evidence she had been a loving mother to conclude that life in prison, confronted each day with what she

> had done to her children, was a fitting punishment. Although we cannot be certain the jury would have reached a different verdict in the absence of the judge's commentary, we are unable to say the penalty "verdict was "'surely unattributable'" to the trial court's [misconduct]."

(*Nieves, supra,* 11 Cal.5th at p. 506.)

In view of the fact that the jury here was instructed to consider mitigating evidence introduced at all phases of the trial, the instances of misconduct affecting the mitigation case are not limited to the conduct of the penalty phase alone.[2]

Dr. Jose Silva was called as a defense witness first in the guilt phase. When the prosecutor objected on Evidence Code section 352 grounds to the defense's direct examination of Dr. Silva, the court scolded defense counsel in front of the jury:

> Prosecutor: We are covering one aspect of Asperger's, and what I see in this outline, we have got about 40 other areas to go here in terms of diagnostic issues. So at some point in time, we are going to have to seriously think under 352.
>
> The Court: I agree. I indicated previously *we have to tighten this up somewhat. Otherwise, we are going to spend an undue amount of judicial time and economy on explaining diagnoses. He certainly can give us his opinion, but I think we have to tighten it up*.

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[2] The curtailment of the defense evidence case was raised as substantive claims in Appellant's Opening Brief, but the trial court's demeaning and intemperate behavior in ruling on the claims support the judicial bias claim as well. See, e.g., Claims XIV (improper exclusion of defense evidence at the sanity phase) and XXII (improper exclusion of defense evidence at the penalty phase).

(48 RT 5830-5831, italics added.) But autism and related diagnoses were relevant to the mens rea defense and then could be considered by the jury in the penalty phase.

During counsel's opening penalty phase statement the court made the following scathing comment:

> Well, we will until we get to the point in time where there are repetitive instances of not complying with the order of the court, and then, of course, the court has an alternative to impose. That is to just stop the opening statement and start the evidence. So you may continue.

(75 RT 9537-9538.)

The court then sustained four objections during the penalty opening with reprimands (75 RT 9531, 9533, 9534, 9537-9538), and scolded counsel that it would give her only five more minutes to finish. "I think what I'm going to do is set a time frame. Five more minutes for opening statement. Then we will start with the evidence." (75 RT 9544.) Shortly thereafter, the trial court terminated defense counsel's opening statement.

The trial court prohibited mitigation character testimony, stating in the jury's presence, "But as to her opinion now, the jury's already found him guilty of these offense[s], so her opinion as to whether he would or would not do something is irrelevant." (80 RT 10396.) The court's relevance ruling was wrong. "Even where mitigating evidence does not 'relate specifically to [the defendant's] culpability for the crime he committed,' it may still be relevant as mitigation if the jury could draw favorable inferences regarding the defendant's character and those inferences 'might serve "as a basis for a sentence less than

death.'" *Lockett*, *Eddings*, and *Skipper* 'emphasized the severity of imposing a death sentence and [made clear] that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor."'" (*Rhoades v. Davis* (2019) 914 F.3d 357, 365.)

When defense counsel queried whether this ruling covered a witness's opinion about Mr. Stayner's character, the trial court commented, "I didn't say that, counsel. My comments speak for themselves. My comments speak for themselves. You've heard them; they're on the record. Ask your next questions." (80 RT 10396.)

When defense counsel asked a female friend of Mr. Stayner whether she found him attractive and flirted with him, in preparing to elicit testimony about whether he had been aggressive toward her, the trial court improperly commented on the evidence, "Well, apparently if somebody is being aggressive, it's the witness as opposed to the defendant the way you are framing the question. So on that basis, the objection is sustained." (80 RT 10508.) The trial court continued to comment on the testimony, "I think it's clear. She painted a picture. I think the jury is gleaning from her testimony what the picture was." (80 RT 10508.) When defense counsel stated, "Your honor, I think it's unfair to characterize this witness as aggressive," the trial court responded, "I'm sorry you think it's unfair, Ms. Morrissey. That's unfortunate for you." (80 RT 10508.)

While there had been evidence that Mr. Stayner had continually engaged in pulling his head hair throughout his life

and the court sustained objections that similar testimony was cumulative, when the defense counsel asked a defense witness whether he also pulled the hair from other parts of his body, the trial court commented, "That's a new one. I haven't heard that before." (80 RT 10510.)

During defense counsel's attempt to introduce testimony about the conditions in which Mr. Stayner was housed while awaiting trial[3], the trial court told defense counsel with the jury present that "the jail has nothing to do with the character and background of the defendant. It's irrelevant. Every jail is different; every prison is different. Conditions have nothing [to] do with the defendant's background or his character. It's irrelevant." (81 RT 10604.) When defense counsel then attempted to explain the relevancy, "well, this goes to the conditions under which he is housed and the issue of adjustment under –" the Court cut him off and lectured him. (81 RT 10604.) After the court's lecture, Mr. Burt stated, "I need to make an offer of proof as to why it is relevant." At side bar, Burt explained that he had briefed the issue and that there was case law that indicated "if the defendant is going to have prison adjustment experts, that the prison adjustment expert can testify about the conditions under which the prisoner is housed as a basis for the expert's opinion as to why he or she should adjust as opposed to prison adjustment -- prison conditions in the abstract." The court responded that the jail conditions were "irrelevant to this

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[3] The substance of the issue excluding this proper mitigation evidence is addressed in the AOB at Claim XXIII.

defendant's character or background." The witness from the jail could testify about whether the defendant had problems, which might bear on future dangerousness. (81 RT 10605.) Burt explained once again that the evidence wasn't being offered as to character, but for future adjustment under *Skipper v. South Carolina*. (81 RT 10606.)[4] "Well the objection is sustained to the condition of the jail. In the court's judgment it is irrelevant."

When Ms. Morrissey attempted to ask about a new topic, the court sustained another relevancy objection from the prosecution, repeating, "Miss Morrissey, again, my ruling I thought was fairly clear as to what you could do with Mrs. Sartell as far as a witness, but we not going to relive and repeat the family dynamics, what was happening in the family. We've heard it from so many different sources. It's not going to serve any meaningful purpose." (83 RT 10888.)[5]

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[4] *Skipper v. South Carolina* (1986) 476 U.S. 1, 4–5 (quoting *Lockett v. Ohio* (1978) 438 U.S. 586, 604) (holding that the exclusion of evidence regarding petitioner's good behavior in prison while awaiting trial deprived him of his right to place before the sentence relevant evidence in mitigation of punishment).

[5] The substance of this claim is addressed in the AOB Claim XXII. Defense counsel made a lengthy offer of proof detailing the expected testimony from Mr. Stayner's sister, Cindy Sartell, demonstrating that her testimony was not cumulative. See AOB, pp. 470-471.

The instances of the court finding defense mitigation evidence irrelevant and/or cumulative[6] in front of the jury are too numerous to recount fully verbatim as the trial court ruled against the defense over one hundred times during a few days of the defense penalty phase case. However, a few examples demonstrate the trial court's persistent limitation of Mr. Stayner's mitigation case. (See 77 RT 9860-9861 [shutting down inquiry about Mr. Stayner waiving his *Miranda* rights so he could accept responsibility]; 77 RT 9863 [evidence that Mr. Stayner discussed his OCD with police, before getting access to a lawyer or a mental health professional]; 80 RT 10333-34 [refusing to admit quite a bit of family social history unless the defense could show that Mr. Stayner was a direct and immediate witness to the specific instances related to his family history and calling evidence cumulative in front of the jury]; 80 RT 10336-10337[7]

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6 Instances of court finding defense mitigation evidence cumulative in front of the jury include the following: 79 RT 10204; 80 RT 10333, 10362, 10369, 10371, 10467, 10480, 10483, 10510, 10516, 10517; 81 RT 10533, 10534, 10535, 10538, 10539, 10568, 10584, 10594; 83 RT 10879-10880, 10885, 10886, 10887, 10895; and 84 RT 11053.

7 Extended comments claiming defense evidence was cumulative and irrelevant: "Mr. Williamson: I'm going to object unless they start connecting it to the defendant. The Court: Well, I'm inclined to agree. and I thought my comment previously was to that effect. You certainly can offer any evidence that you feel the jury should hear about the defendant, his background, his character, et cetera. but all of this extraneous information, in the court's judgment, is not relevant. Ms. Morrissey: Your honor, the offer of proof would be that we introduced a lot of evidence in this trial about the family and about the family history. The Court: So, there's no reason to repeat it, so it's just cumulative."

[preventing Mr. Stayner's aunt from discussing family dysfunction, which experts had relied on to form opinions, based on relevance not on hearsay]; 80 RT 10342-10343[8] [preventing Mr. Stayner's aunt from testifying about how she and Mr. Stayner's mom were raised as irrelevant][9]; 80 RT 10390, 10391 [excluding evidence Mr. Stayner's mom was molested by her father, court states in front of jury that evidence is irrelevant]; 80 RT 10387 [court claiming that what happened within the family was irrelevant unless it was observed by Mr. Stayner, including fact that his grandfather molested his aunt, but not in front of

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[8] Comments in front of the jury about proper mitigation being irrelevant: The Court: Well, again, I indicated I would give you leeway with respect to factor (k) and character, background, and record, interfamilial relationship, how he was raised, conduct of siblings and the family with respect to him and the parents and all of that. But to now talk about how this witness was raised with her sister Kay in their family home at a time when the defendant wasn't even born, in the court's view, is not relevant. It's going too far. it's stretching it to the point where it's not relevant, so the objection is sustained. (80 RT 10342.)

[9] Experts in death penalty mitigation focus on the importance of developing the defendant's multi-generational social history, to inform mental health experts and the jurors of the life trajectory that led the defendant to be charged with a capital offense: " "Most capital defense practitioners now recognize that it is disastrous to wait until the eve of trial to consult a mental health expert, but many over-compensate for this risk by consulting experts too early. It is essential for counsel ... to develop an independently corroborated multi -generational social history that will highlight the complexity of the client's life and identify multiple risk factors and mitigation themes." (See Russell Stetler, *Mental Disabilities and Mitigation*, The Champion 49, 50 (Apr. 1999) (citations omitted), cited in Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist As A Necessity and A Matter of Right* (2003) 16 Cap. Def. J. 43, 72.

jury].) While numbers alone are not fully dispositive, it would appear that more than 90% of the relevance objections were made by the prosecution and at least 75% of them were sustained.

The court's constant characterization of the defense case as irrelevant undermined defense counsel's credibility and irreparably damaged Mr. Stayner's defense.

At another point, the court continued to demean the defense mitigation case by saying the trial had been taking too long and suggesting that the defense evidence was unnecessarily repetitive.

"We have a very serious time issue in this case. We are now almost one week beyond our outside schedule. The evidence will be completed in this trial in the penalty phase by tomorrow, Friday. I've indicated that on several occasions. Consequently, the Court is going to sustain objections to the family dynamics because we've heard it numerous times." (83 RT 10884.)

When the prosecutor objected to a family member testifying about the history of molestation in the family, the court repeated its prior comments both about the relevance of this devastating mitigation but also about the time constraints:

> Well, this is my position with respect to this testimony, and we've heard it a number of times through different sources: I was under the impression when this witness was called that she was being called as a witness on behalf of the defendant to testify as to her feelings about the defendant. And if it does involve a character trait, her expression to the jury as to what the jury should do because of some character trait that she has for the defendant, such as love or whatever. We're not going to replay the entire family scenario through this witness or any

> other witness because we've already heard it on numerous occasions, through numerous witnesses. So, I'm going to start sustaining objections to all of this information about what was happening in the family, what was happening when steven was abducted, what was happening after he returned. It doesn't serve any useful purpose under 352. This is -- this is, in the court's view, repetitive testimony which doesn't serve any purpose.

(83 RT 10883.)

In penalty phase closing argument, the court not only sustained the prosecution's objections, but made critical commentary in front of the jury:

> Mr. Williamson: Your honor, this is improper argument. We are here to decide life or death; other types of murders are simply irrelevant.
>
> The Court: Yes. I'm not going to instruct on any of that, aside from the two penalties in this case: life in prison, or death. So the other sentences on that pyramid are irrelevant. I'm not going to instruct on it.
>
> Ms. Morrissey: I understand, your honor. So we will just concentrate –
>
> The Court: Just turn that off.

(85 RT 11227.)

When defense counsel pointed out that some jurors had expressed concerns during voir dire that LWOP was too expensive[10] and commented on the cost of the death penalty, the prosecutor objected, "This is *absolutely improper*." The court then

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[10] See, e.g., 29 RT 2754-2755, 34 RT 3516-351, 37 RT 4020-4021 [prospective jurors expressing concerns about the cost of LWOP].

added: "*It is improper argument*, and, counsel, *it's obvious it's improper*, and you know it's improper. So don't do that, please. (85 RT 11231-11232, italics added.)

Similarly, when defense counsel tried to explain that Mr. Stayner would remain in federal custody for the rest of his life and stated that when considering a sentence of life without parole in state custody, that state prison "is no Club Med," the prosecutor objected, "This is improper comment too. Issues of confinement have nothing to do with the proffered sentencing." The court chastised, "The conditions of confinement were expressed (sic) by the court ruled inadmissible, and to argue the distinction between federal and state court is not proper. The objection is sustained." (85RT 11242-11243.)

When defense counsel tried to explain that the Armstrong family was satisfied with the life sentence in the federal case in order to rebut the prosecution argument that the Joie Armstrong murder required that Mr. Stayner be executed, the prosecution objected (85RT 11243), and the court commented: "That's not arguing the evidence. There is no evidence of that. You are arguing facts not in evidence. Stick with the evidence. Go ahead." (85 RT 11243.)

The court also shut down and demeaned defense counsel when she tried to impress upon jurors their individual responsibility for any death sentence they might impose by explaining how firing squads had worked. The court said, "That's not proper. That's not proper argument again when you talk about the method, mode of execution, how a sentence is carried

out. (83 RT 11308.) (See *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329 [jurors may not be led to believe that responsibility for the death sentence lies anywhere but on them].)

Similarly, the court shut down and demeaned defense counsel when she referenced the manner of execution not as a reason for rejecting the death penalty but simply as a descriptor of what the state wants to do to Mr. Stayner – strap him to a gurney and kill him – which she argued was inconsistent with Mr. Stayner's cooperation with law enforcement. The court commented: "That's not proper comment. The method or how somebody is put to death by any particular state or governmental entity is not relevant. It's not proper comment." (86 RT 11303.)

Up until the very end of penalty arguments, the court belittled counsel and demeaned the mitigation case, ensuring that jurors would enter the penalty deliberations with an unfairly diminished view of Mr. Stayner's case for life.

### B. Comments Demeaning Defense Counsel and Exhibiting the Court's Bias Against Them

In addition to the trial court specific denouncements of the substance of the defense evidence, it displayed animus toward and demeaned defense counsel, which undermined counsels' credibility and Mr. Stayner's defense. The court's disparaging comments began in pre-trial motions outside the presence of the jury and continued throughout the trial, often with the jurors present.

When considering a pre-trial motion to continue the trial based on a critical defense witness's unavailability, the trial court

chastised defense counsel before making its incorrect legal analysis: "I don't really like lawyers to characterize what I said. I said what I said." (6 RT 391.)

Outside the presence of the jury, the judge mocked defense counsel's argument that the constitution required her expert be given confidential access to Mr. Stayner in the jail:

> Counsel: Okay your honor, I think there are concerns that would require confidentiality, are Mr. Stayner's right to consult with an attorney, to consult with experts chosen by his attorney, his right to prepare a defense in a capital case, the sixth, eighth amendment.
>
> The Court: Does it say that in the constitution?
>
> Counsel: No, it doesn't say that in the constitution.
>
> The Court: Does it say somewhere in the constitution where someone is charged with a capital offense the lawyer can select an expert of his or her choosing, and that expert has an absolute right to go into a jail, whether it's a federal or state penal institution, and have a private visit with the inmate when the institution says: "No, we have security concerns; we don't want this to happen; we want the interview to take place of the phone between the glass window, which is the type of interview that most inmates have"? . . . . So, if the constitution says that somewhere, I'll listen to what you have to say. But when you tell me it's in the constitution, it doesn't mean much to me.
>
> Ms. Morrissey: You honor, we have to cite the constitution in order to adequately represent Mr. Stayner and protect the record. I'm sorry it doesn't say that in the constitution. The constitution doesn't say lots of things.

> The Court: I am sorry, too, it has to come up in the constitution. I'm sure the constitution doesn't talk about lawyers selecting experts and then blaming the constitution compels the expert has a right to go into a jail in a private interview, talk with the defendant, irrespective of what the penal institution or the correctional office might have to say. . . .
>
> Ms. Morrissey: I wish I could just give up on it, but I can't your honor. I have an obligation. The Court: I wish you would, too. But I know you won't give up on it.

(82 RT 10702-03.)[11]

When defense counsel requested a three-week continuance because the primary defense guilt phase expert, Dr. George Woods, was unavailable due to family medical emergencies, including his father's anticipated imminent death, (46 RT 5548-50), rather than showing any understanding for terrible bind caused by Dr. Woods' family tragedies, the court incorrectly stated that the defense had represented "Dr. Woods would never be a trial witness," and questioned whether Woods should be part of the guilt phase case. (46RT 5560-63.)[12]

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11 But see *Ake v. Oklahoma* (1985) 470 U.S. 68, 84 [due process clause of the Fourteenth Amendment requires the state to give capitally charged defendant access to a mental health expert to address both sanity and future dangerousness]. And even if the trial court was correct in its ruling, the disparagement of defense counsel, who was properly raising a constitutionally protected right, was unwarranted.

12 But as discussed in more detail below, the judge was incorrect about the state of the record. Dr. Woods had been identified as a potential witness as early as February, 2002 (see 12 CT 2657), but in open court on May 22, 2002, the trial court

In another instance when the court denied a defense motion to continue based on the unavailability of a different defense witness, the court criticized the defense for using the court-appointed competency expert Dr. Silva as a guilt phase defense witness and accused defense counsel of misleading the court in their representation about the witnesses. (46 RT 5567-5568.)

Then, after denying the continuance, in mid-trial in front of the jury, the trial court disparaged defense counsel regarding Dr. Woods when the prosecutor objected to questions to Dr. McInnes about Dr. Woods' report: "[Prosecutor Williamson:] I'm going to object, this being irrelevant, and move to strike, unless Woods is going to testify." When defense counsel opposed the objection, "[a]s Mr. Williamson knows, Dr. Woods can't testify," the trial court berated counsel in front of the jury: "What's the point of making a comment like that, Miss Morrissey? If you have a question, Miss Morrissey, ask a question of the witness. If you finish asking questions, you can sit down. But don't make comments in front of the jury." (66 RT 8639.)

During the cross-examination of Agent Rinek, defense counsel sought to introduce portions of Mr. Stayner's interview, but the court sustained objections to that. When defense counsel

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pressed defense counsel about providing discovery and a list of guilt phase witnesses to the prosecution: "Use the court time, and I want you to specifically state for the record and disclose to the People your trial experts." (15RT 1201.) In response, Ms. Morrissey stated that Dr. Woods and six other experts would be their only witnesses at the guilt phase. (15RT 1201, 1204.)

stated that "In view of the court's ruling, that's all the videos that I can play," to explain why she was moving the video equipment and that the witness could return to the stand, the court quickly scolded her for editorializing:

> The Court: You just editorialized.
>
> Ms. Morrissey: well –
>
> The Court: You have no further questions, you have no further questions.
>
> Ms. Morrissey: I don't.
>
> The Court: But you just editorialized.
>
> Ms. Morrissey: Okay. I will try not to, your honor.
>
> The Court: Thank you. Now I lost track. Did you complete the cross-examination?

(43 RT 5115.)[13]

During direct examination of Dr. McInnes during the sanity phase, defense counsel sought to introduce a demonstrative exhibit of the D.S.M.-IV's criteria for schizotypal features to help the jury follow Dr. McInnes' testimony. (64 RT 8323-8325.) The prosecutor objected, stating "it's just a detail out of the D.S.M." (64 RT 8325.) Defense counsel explained its purposes to "help[] the jury understand. It's visual. It's - - this is the hard stuff, right?" (*Ibid.*) In front of the jury, the court mocked defense counsel: "Well, is that a legal response?" (*Ibid.*) This forced defense counsel to justify her response: "No, I could probably come up with a better response than that, but I think

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[13] The substance of the exclusion of the videotaped statements is addressed in the AOB at pp. 340-342.

this is a chart or diagram that is commonly used to illustrate an expert's testimony. And I suppose if Dr. McInnes wanted to write this out herself, she could probably do it as part of her testimony just to help the jury understand. But since it was already printed for us, we'd thought we'd use this." (64 RT 8325.) The court then chastised defense counsel again before the jury:

> Well, how many times have we come to this juncture in the road where we talked about hearsay and what's admissible on direct and what's admissible on cross and detailed hearsay versus just a reference to the D.S.M.? But on this particular score, in the exercise of my discretion, if this will expedite this particular portion of the testimony, I will allow you to use the diagram for illustrative purposes only. It does not mean it's going into evidence.

(64 RT 8325.)[14]

In another instance, the court patronized counsel in response to a prosecution objection:

> Ms. Morrisey: Did you ask Mr. Stayner whether or not he had a camera in February of 1999?
>
> Mr. Canzoneri: Beyond the scope, your honor.
>
> The Court: You are referring to?

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[14] Not only were the court's comments demeaning, they were legally incorrect: "[D]emonstrative evidence [is] offered to help a jury understand expert testimony or other substantive evidence ...." (*People v. Duenas* (2012) 55 Cal.4th 1, 20.) Demonstrative evidence is "not offered as substantive evidence, but as a tool to aid the jury in understanding the substantive evidence." (*Id.* at p. 25.) To be admissible, demonstrative evidence must be a reasonable representation of that which it is alleged to portray and must assist the jurors in their determination of the facts of the case. (*People v. Rivera* (2011) 201 Cal.App.4th 353, 363.)

Ms. Morrissey: I'm referring to the transcript of the tape that was played to the jury.

The Court: In exhibit 90?

Ms. Morrissey: Yes, played for the jury.

The Court: Well, we have heard it. It speaks for itself. So to cross-examine and ask a witness do you recall whether or not this hundred-and-some-odd pages contained a certain word, or did Mr. Stayner say this, or did you say that, is not going to get us very far. It speaks for itself. It's been played. The jury heard it. If you have a reference you want to reference, you can maybe do that. But just to ask him within these hundred-and-some-odd pages did he say that - do you have a recollection of him saying that at all?

The witness: I'd have to refer to the transcript, your honor.

Ms. Morrissey: Okay.

The Court: There is the answer. That's what I was getting at.

(43 RT 5172.)

At numerous times in front of the jury, the court suggested that counsel was trying to get testimony in through a back door when the court had closed the front door, implying that counsel was deceitful and untrustworthy. (See 43 RT 5170 ["Same ruling. That's kind of the back-door deal than the front door."]; 43 RT 5198 ["That, again, is kind of a back door versus the front door. Sustained."]; 36 RT 3881 ["I will say this, because it was framed in such a way where you are using the back door when the front door was kind of closed."]; 64 RT 8276 ["Well, you came through the back door. I closed the front door. Sustained."].)

When defense counsel was cross-examining the prosecution's arson expert, after the court sustained a prosecution objection, the court admonished defense counsel Burt in front of the jury:

> I have discretion to curtail the scope of the cross-examination if you persist in asking questions which are repetitive and irrelevant. You can cross-examine at length about what he did in this case, what his examination consisted of, what factors he has relied upon to render an opinion the fire was intentionally started, what factors he relied upon to render the opinion as to the time the fire was started. You can cross-examine him all day on that, but not on these other matters, which are totally irrelevant.

(42 RT 4948.)

As required by case law, Mr. Burt requested to make an offer of proof at sidebar. (See *People v. Allen* (2008) 44 Cal.4th 843, 872, fn. 19 ["To preserve a contention that evidence should have been admitted, a party's offer of proof must make clear the substance of the proffered testimony"]; *People v. Mataele* (2022) 13 Cal.5th 372, 423.)

The court responded: "No. I think my position is clear as to the scope of the examination, and sidebar couldn't serve any purpose. You can examine and cross-examine in length on the opinion he gave in court today, the reasons for the same, et cetera. But the rest of it is all irrelevant." (42 RT 4949.)

After sustaining the prosecution's objection to another similar question, the court stated, "I am going to curtail the examination if this continues." (42 RT 4948-4949.) When Mr. Burt continued to ask questions about Huff's publications related

to arsonists' state of mind, the prosecutor, equating himself with the court, interjected:

> Mr. Williamson: I am going to object to any further examination. I think *we have been pretty lenient here*.
>
> Mr. Burt: That's outrageous, that statement. The court has not allowed any cross-examination of this witness, and I ask the court to instruct counsel not to give his opinions about what the court – whether the court is being lenient or not.
>
> The Court: Can I instruct counsels, every counsel, that we are not going to put up with what's just happened. We are not going to get personal. We are not going to react the way you reacted. It's not proper, it's not professional, and it's below your dignity. Now, I am going to rule when there is an objection. I don't want colloquy back and forth. I don't want comment on what the court has done or not done. If there is an objection, I will rule on it.

(42 RT 4954, italics added.)

Although the court reprimanded both counsel for getting personal, it did not correct the prosecution's conflation of the court with itself or make any attempt to distance itself from the prosecution.

In the AOB, Mr. Stayner raised claims related to judicial bias during defense counsel's cross-examination of prosecution expert Dr. Alan Waxman, AOB 525-527, but the impact of that biased conduct is even more relevant in light of the *Nieves* court's focus on bias that undermines a defendant's mitigation case. Waxman, who was offered to impeach defense expert Dr. Joseph Wu's testimony that PET scans showed Mr. Stayner had brain damage, testified at the guilt trial, but both experts' testimony was directly relevant to brain damage mitigation. The trial judge

repeatedly scolded Burt during his cross of Waxman and made incorrect legal rulings on the propriety of the cross-examination essentially helped the prosecution denigrate Dr. Wu's brain scan evidence – so in that regard, the behavior diminished the mitigation case.

In addition to the specific judicial comments noted in the AOB, the court made the following comments in response to objections to counsel's cross examination of Waxman.

> The Court: the way you frame it, it is [argumentative]. He knows what this book is. He's never read it. So references to what's in it are something he's never read. So, obviously, it didn't go to his opinion.

(56 RT 7204-7205.)

> Q. (by Mr. Burt) you are looking at that right now as we speak, right, doctor?
>
> A. Yes, I am.
>
> Q. Does the information in there surprise you?
>
> Mr. Williamson: I'm going to object. This is improper to cross-examine a witness on something he hasn't read and considered in considering his opinion.
>
> The Court: Well, that's what I just said, and you asked the next question. If he has read this and it was a basis for a portion or part of his opinion, it's certainly proper cross-examination. But if it's something he's aware of and has never read, it's irrelevant. He's never read it.

(56 RT 7205.)

> Q. You said he didn't give you the article on S.P.M. you just said that, right?
>
> A. I didn't –

Mr. Williamson: That misstates what he said.

The witness: S.P.M. is a thing that you get off the internet. It's a program, very sophisticated analytic program. You can download it from the internet. And the documentation is very clear. What I've asked from doctor Wu is a similar set of documents to understand his method. He says, "I've written it somewhere. I don't know where it is." that's not a way to conduct business. You must provide the manual –

Mr. Burt: May that be stricken, your honor? It's nonresponsive.

The Court: It's his opinion. He just gave you his opinion.

Mr. Burt: I didn't ask for his opinion.

The Court: That's what he's here for. He's given an opinion.

Mr. Burt: Could I have the last answer read back, please?

The Court: No, you can't. Ask your next question.

(56 RT 7210-7211.)

Waxman: At the time I did that comparison, I didn't find a big difference in those particular normal databases versus Mr. Stayner. It's as simple as that. You don't have to be a rocket scientist to understand that.

Q. (by Mr. Burt) You made that point. Are you ready now to answer the question I asked you?

Mr. Williamson: I object.

The witness: I thought I answered it.

The Court: That question is not proper. Ask your next question.

> Mr. Burt: I move to strike his comment about rocket scientists. It's nonresponsive. It's argumentative. It's advocacy.
>
> The Court: Your request is denied. Ask your next question.
>
> Q. (by Mr. Burt) Now, doctor, let me ask the question again, if I can –
>
> The Court: Don't ask it again. He just answered it. Ask another question. He just answered your question. There is no reason to repeat a question. It's cumulative.
>
> Mr. Burt: Thank you, your honor.

(56 RT 7233.)

In ruling on the defense motion for a mistrial based on the court's derogatory comments during the cross-examination of Dr. Waxman, including saying, "No, I can tell you what's wasting time" in the presence of the jury (57 RT 7360), the court continued berating defense counsel outside the presence of the jury:

> The Court: With all due respect, I'm not going to respond, except to say it's totally lacking of merit. My comments speak for themselves. There is a complete record of the court proceedings. Every word I've said is a part of the record. At some point in time it might very well be reviewed by a reviewing court. It speaks for itself. My personal belief as to your cross-examination is not relevant. I'm not going to state it for the record. Everybody in this courtroom I think has an opinion about lawyers and proceedings and how people conduct direct examination, cross-examination, and so on. I can say that you were becoming a little combative with the witness. I think that caused the witness to say on one occasion he didn't want to incur your ire because of the manner in which you were cross-examining him. That was

> said in the presence of the jury by the witness based upon what I perceive to be, I assume, your combative conduct. But as far as my comments, they speak for themselves. They are on the record. Your motion is totally frivolous. It lacks merit. The motion is denied.

(57 RT 7429-7430.)

In a discussion outside the presence of the jury regarding the admissibility of portions of Mr. Stayner's interview with Agent Rinek, the judge sustained the prosecution's objection and attacked defense counsel: "Here is what you have to listen to. Because you don't know what I apparently read or have done. But you have to listen to what I am doing now. What I am doing now, I am ruling you can do this in your case. The objection is sustained." (44 RT 5207.)

In closing argument, while preparing to read the instruction to which she was referring, Ms. Morrissey stated, "This is the instruction you are going to be given, I believe. So, to the extent that I was not stating the law in a manner that Mr. Williamson agreed with --." (60 RT 7864-7865.) The prosecutor objected to the comment as improper, and in front of the jury, the court admonished defense counsel, "Well, just a moment, just a moment. You see, when you reduce it to personal comments, this is what happens, and you just did this. So, don't reduce the arguments to personal comments about other counsel. You can reference his argument, but don't make those type of side comments. Go ahead." (60 RT 7865.)

During the sanity phase, the abuse continued. The jury's critical task at the sanity phase was to determine whether Mr. Stayner's impairments made it so that at the time of the crimes,

he could not know or understand the nature and quality of his actions or distinguish right from wrong. (64 RT 8174.) When defense counsel attempted to discuss the meaning of these undefined concepts using a dictionary definition, the court sustained two prosecution objections reprimanded her in front of the jury. (70 RT 9314-9315.) After she resumed her closing, the court sua sponte interrupted her a third time to deliver a scolding, again for the jury to hear: "Just a moment. We talked about front door, back door and side door, and you, apparently, are reading a definition from the dictionary. Am I correct?" (70 RT 9315.) When defense counsel asked to approach, the court denied her request and again admonished her, "just argue to the jury what you believe the meaning of the words are, if you feel that's pertinent to your argument. But again, don't read definitions of words other than my instructions." (70 RT 9316.)

After briefly discussing the difference between knowing and understanding, the prosecution objected to counsel's signal that she intended to read from a case discussing the applicable insanity test. (70 RT 9316-9317.) Again, the trial court admonished counsel before the jury, "I don't think it's appropriate in argument to recite principles of law from prior cases unless I'm going to instruct the jury on that." Unsatisfied with the printed case defense counsel provided in support of her intended course of action, the court apologized to the jury because defense counsel was wasting their time:

> Well, I can't glean from this was you want to do and what you claim this case stands for unless you tell me at side-bar. And I apologize for this, ladies and

> gentlemen, because this is taking valuable time away from the jury, but I have to have a record on all of these objections, and so on. And I can't glean from what you just gave me what this case stands for with respect to what you want to do. So come to side-bar please.

(70 RT 9318.) Upon returning from side bar, the court again apologized to the jury and informed them that the prosecutor's objection was sustained.

The abuse continued throughout the penalty phase as well. After sustaining objections to additional proposed penalty phase evidence as cumulative, the trial court, again in front of the jury, castigated defense counsel: "And Mrs. Morrissey, if you want to continue along that line, contrary to the court's ruling, which I thought was fairly clear, we will stop the examination of the witness. . . . But you cannot continually ask questions which are violative of the court order, which I thought was fairly clear, go ahead." (83 RT 10887.)

During closing penalty phase argument, when defense counsel stated that the jury was going to have to choose between two severe penalties: death by lethal injection or life in prison without parole (85 RT 11230), the court interjected: "That's improper argument, counsel. I venture to say you are aware of that because it's so obvious. The manner of execution is nothing for the purview of the jury, and it's an improper comment. And I'm going to strike it. Disregard it." (85 RT 11230.)

### C. Misconduct Demonstrating the Court's Bias in Favor of the Prosecution and Against the Defense

Demonstrating its animosity towards the defense, the court often admonished defense counsel for imaginary "misconduct" while ignoring the prosecutor's actual misbehavior. As this Court explained in *Nieves*, intemperate behavior toward the defense can constitute evidence of improper bias when the trial court saves its venom for only one party: "This was not a case in which the trial court also expressed sarcasm, impatience, and annoyance toward the prosecution, which might have 'indicat[ed] its comments were a matter of personal style, not the result of a belief that any of the attorneys was incompetent or that the defense case lacked merit.' [Citations.] Instead, the trial court spared the prosecution such treatment while 'repeatedly and improperly disparaging defense counsel, which conveyed to the jury the message that the court was allied with the prosecution.' (*Sturm*, *supra*, 37 Cal.4th at p. 1240, 39 Cal.Rptr.3d 799, 129 P.3d 10.)" (*Nieves, supra,* 11 Cal.5th at p. 483.)

For example, prior to calling Agent Rinek, the prosecutor stated in front of the jury (and without being admonished), "[a]t this particular time we are getting ready to put on a part of a statement. Counsels filed a motion on this today. We need to take that up very briefly so we can get on with our next witness." (42 RT 5016.) The court stated it had not yet had time to read the motion and defense counsel then requested the topic be addressed out of the jury's presence. (*Ibid*.) Rather than excusing the jury

to discuss the matter further, the court continued in front of the jury:

> The Court: It is [usually appropriate to address such issues without the jury]. But usually these matters are taken up pretrial by way of in limine motions.
>
> Ms. Morrissey: That's correct, but we got the subject of the motion at about 5:15 yesterday.
>
> The Court: The subject matter of the motion was 5:15 yesterday?
>
> Ms. Morrissey: At 5:15 yesterday. I think we should be commended getting the motion in. Actually, Mr. Burt should be commended.
>
> Mr. Williamson: Are you going to testify?
>
> The Court: Well, the point I'm trying to make, and we have our jury seated here, and we have only so much court time during the day. And we usually have a lot of these matters resolved before the trial starts so that when we start the trial, these issues had been resolved. I thought they had been. Now, if something comes up at 5:15 last night that wasn't thought of previously, certainly you have a right to be heard and I'll listen to what you have to say. But give me a realistic opinion as to the time frame involved so we can let our jury know.
>
> Mr. Williamson: I think 30 minutes will do it.
>
> The Court: Thirty minutes. I haven't read the motion. Is there going to be a response?
>
> Mr. Williamson: We just got it today. I looked at it over lunch. I'll make an oral response. We are ready to go, I think, and I think we can resolve the motion and put on more evidence for this jury.
>
> The Court: Let me just ask for purposes of the balance of the testimony today after we take this up out of the presence of the jury.

> Then, of course, at that point in time the court staff has to take a break, as you know, especially on behalf of the court reporter. Who is the next witness?
>
> Mr. Williamson: It is Special Agent Jeff Rinek. You saw him testify at the preliminary hearing. It concerns --
>
> Ms. Morrissey: Your honor, I'm going to object to this recitation of the number of times Agent Rinek has been in this court. It's not necessary. We have a jury here.
>
> Mr. Williamson: I'm trying to explain who he is to the judge, counsel. It has to do with the audiotape confession. That's what he's going to talk about.
>
> The Court: All right. The next witness is a witness that has to deal with that. Okay.

(42 RT 5016-5018.)

During Rinek's testimony, the court repeatedly sustained prosecution objections, not just with its ruling, but punctuated with critical commentary. For example, the court admonished counsel with increasing severity that Agent Rinek's motivation while interrogating Mr. Stayner was irrelevant: "His motivation is not relevant. He can testify as to what was said. Why something was said is not relevant." (43 RT 5129.) When defense counsel sought to ask Agent Rinek about whether he told Mr. Stayner he had contacts that would enable him to get counseling for Mr. Stayner after he said he had offered to get him counseling, the court granted the prosecution's asked and answered and relevance objections, reprimanding: "Previously, you asked him whether or not he had offered to get counseling for Mr. Stayner, and he answered, 'Yes.' So it's been covered. . . .

He's already testified he indicated that he had offered to get counseling for Mr. Stayner. We have that on the record. We have all heard it. The objection is sustained. It's redundant, It's cumulative." (43 RT 5129.)

During Agent Rinek's testimony, the prosecutor played three portions of Mr. Stayner's interrogation (Exhibit 90, 2d SCT Vol 1., pp. 109-210) that included extensive confessions to the charged murders. When defense counsel tried to cross-examine Rinek about the confessions, the prosecutor objected on the ground that it had not questioned Rinek about the confessions. Even though the jury had just heard the confessions through this particular witness's testimony, which established the foundation for admitting the recording, the court again lectured defense counsel: "But the point is, there is an objection because this was not referenced on direct examination. And I inquired when the tape was actually marked and when it was going to be played whether or not the videotape depicted the activity of the defendant at the two scenes in question where this property was recovered, and the answer was 'yes.' And that's what I thought it was. Now it's going beyond that with a further interview." (43 RT 5158.)

The trial court then sustained a series of prosecution relevancy objections when defense counsel attempted to examine Agent Rinek about his reasons for asking Mr. Stayner about a number of third-party suspects while questioning him about the Sund-Pelosso murders. (43 RT 5159-5162.) When Ms. Morrissey asserted that the jury was "entitled to know something about the

context in which [the confessions] arose," the court again scolded counsel, saying "they are not entitled to know *and you know they are not entitled to know* what somebody's state of mind is as to why somebody might have said something." (43 RT 5162-5163, italics added.)

Similarly, the trial court allowed the prosecution to portray Mr. Stayner as emotionless and lighthearted about the murders – at the guilt phase – but not did not permit the defense to rebut that narrative with videos showing how distraught he was. (45 RT 5479-5483, 5487.) The trial court ruled that FBI Agent Keith Hittmeier's testimony about Mr. Stayner's emotional display was irrelevant to Mr. Stayner's emotional state at the time of the killings, and sustained the prosecution's relevance objection. (45 RT 5486-5487.)[15]

The court again reprimanded Morrissey in front of the jury when she asked for a stipulation, "There's no – there's no stipulation. And it's not proper to make an offer of a stipulation in the presence of the jury. If you have one, that's fine. You can recite it, but don't make the offer in the presence of the jury. Now, there is an objection that it's not relevant [and cumulative]. . . . And I'm inclined to agree that it is cumulative, and it's not relevant. We've had extensive testimony about the family, the makeup, the family tree, the et cetera, et cetera. So, there comes a point where it simply is cumulative testimony as opposed to new testimony." (80 RT 10369.)

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15 The error in the exclusion of this defense evidence is addressed in AOB at pp. 336-339.

When Ms. Morrissey attempted to explain that Mr. Williamson had previously asked for a stipulation in front of the jury, the court interrupted her: "I don't care what Mr. Williamson did. There is no stipulation, and there's no offer of a stipulation to be made in the presence of the jury. What might have happened, it didn't come to my attention, and I didn't rule on it; it's irrelevant. There is no stipulation, and I'm making an order not to make an offer of stipulation before the jury." (80 RT 10369-10370.)

By contrast, when the prosecution, also in front of the jury, asked the defense to stipulate to the reporter's transcript of Mr. Stayner's interrogation before that stipulation was a done deal (defense had concerns about accuracy), the court permitted it and did not castigate the prosecutor. (42 RT 5040-5041.)

The court's bias for the prosecution and against the defense was evident in the way it allowed the prosecution to engage in the behavior that it prohibited for the defense. For example, when Burt asked Dr. Silva during the penalty phase on direct, "Did you also come to an opinion as to whether he knew the nature and quality of his act?" the trial court sustained the prosecutor's objection to the question as irrelevant, despite Burt's explanation that the evidence was relevant to explain this expert's opinion on how other factors may be present, even though the expert opined that Mr. Stayner was legally sane. (81 RT 10693.) However, when the prosecutor asked a similar question on cross-examination about whether Mr. Stayner knew

that killing the victims was wrong and that society viewed it as wrong, the following colloquy occurred:

> Mr. Burt: I'm going to object; excuse me. I'm going to object to these questions. They're getting into sanity, and the court prevented me from getting –
>
> Mr. Williamson: Goes to his appreciation of the criminality of his act.

(82 RT 10740.)

> The Court: I am not sure what you're talking about where the court prevented anything.
>
> Mr. Burt: I asked Dr. Silva--
>
> The Court (interrupting the answer to its question): Mr. Burt, I rule when an objection is made. We don't revisit past rulings. If you want to revisit a past ruling and bring up something where you claimed that you were precluded from doing something, do it at the sidebar and not in the presence of the jury. It's not appropriate.

(82 RT 10741.)

The record shows that the trial court persistently treated the parties unequally, a fact that could not have been lost on the jury.

### D. Judicial Bias as Exhibited by the Trial Court's Legal Errors and Misstatements of the Record when Denying Defense Arguments

The opening brief set forth numerous trial court substantive legal errors, which this Court should consider as evidence supporting the judicial bias claim as it did in *Nieves*. (*Nieves, supra*, 11 Cal.5th at pp. 504-505.) Even though part of the opinion eschewed reliance on incorrect legal rulings as part of the bias analysis (*id.* at p. 485), the Court's ultimate finding that

the bias was prejudicial at the penalty phase specifically cited incorrect legal rulings. (See section II., *ante*, citing *Nieves, supra,* 11 Cal.5th at p. 505.) While some of the erroneous rulings in Mr. Stayner's case are highlighted here, the AOB sets forth all of the trial court's erroneous legal rulings.

The trial court refused to let the defense impeach prosecution expert Dr. Park Dietz with the fact that he had agreed the defendant in another case, which involved extensive planning, was unable to appreciate the wrongness of his behavior and was insane. (See 51 CT 13829-13832.) As noted in the AOB claim XVIII, an expert's conclusions and work in other cases is a proper subject for cross-examination. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 635 & *People v. Price* (1991) 1 Cal.4th 324, 457-458; see also *People v. DeHoyos* (2013) 57 Cal.4th 79, 123 ["An expert's testimony in prior cases involving similar issues is a legitimate subject of cross-examination when it is relevant to the bias of the witness].) In this case, the trial court ignored the case law and the constitutional principles, focusing instead solely on the alleged difference between the Hawaii and California definition of insanity. (57 RT 8901.)

As set forth in the AOB Claim XXII, the trial court refused to admit the significant family social history unless the defense could show that Mr. Stayner was a direct and immediate witness to the specific instances related to his family history. (See, e.g., 79 RT 10191 [sustaining an objection to Ms. Jones testifying how all of the children in the Mr. Stayner family were reacting to Steven's abduction]; 79 RT 10189 10190, 10861-10863 [excluding

evidence about Mr. Stayner's father, including that he was an exhibitionist and molested Mr. Stayner's sister]; 79 RT 10220-10221 [excluding testimony that uncle's drug abuse adversely affected other members of the family as well as Mr. Stayner]; 79 RT 10225 [excluding alleged hearsay that a family member was in prison for molest]; 79 RT 10231 [excluding testimony that Mr. Stayner's uncle molested another cousin, Larry Higgins]; 83 RT 10882-10883, 10916-10920 [excluding testimony from family members about their own dysfunction]; 80 RT 10333-10334; 10336-10337 [preventing Nancy Thompson (Mr. Stayner's aunt) from discussing family dysfunction, which experts had relied on to form opinions, based on relevance not on hearsay]; 80 RT 10342-10343 [preventing Mr. Stayner's aunt from testifying about how she and Mr. Stayner's mom were raised as irrelevant]; 80 RT 10383; 10384-10385; 10390; 10391 [excluding evidence Mr. Stayner's mom was molested by her father]; 80 RT 10387 [court claiming that what happened within the family was irrelevant unless it was observed by Mr. Stayner, including fact that his grandfather molested his aunt].)

Requiring the defense to demonstrate that the defendant actually witnessed familial dysfunction encompassed by a social history investigation flies in the face of the well-established United States Supreme Court law. (See, e.g., *Rompilla v. Beard* (2005) 545 U.S. 374, 391-392 [noting the importance of investigating and presenting parental dysfunction that may have occurred prenatally]; *Eddings v. Oklahoma* (1982) 455 U.S. 104,

115 [turbulent family history is relevant mitigation]; and *Skipper v. South Carolina, supra*, 476 U.S. at p. 4.)

As raised in the AOB Claim VII, the trial court refused to hold a hearing on juror misconduct allegations, i.e., that three jurors failed to disclose that they were molestation victims, by finding that there was no possibility that the alleged misconduct could have been prejudicial. In *In re Manriquez* (2018) 5 Cal.5th 785, 798, this Court held that a juror's failure to disclose raises a rebuttable presumption of prejudice, but because the court never held a hearing, it could not have reasonably found the presumption rebutted. Here, the trial court refused to hold a hearing "because the court finds that based upon the totality of the facts in this case, that there is no possibility that a hearing would reveal any type of prejudicial misconduct." (88 RT 11394.)

Similarly, the court assumed there could be no prejudice – without the benefit of an evidentiary hearing – when it considered the allegation that one of the jurors was improperly harassed by coworkers and bullied into convicting and imposing the death penalty. The court concluded "the fact that a juror was approached at work by co-employees and resisted those persons, and even resisted to the point where he took steps not to go into work, is not jury misconduct. If in fact, however, that had been brought to the attention of the court, the court might have taken steps to stop that by way of the co-employees. But the person was conscientious enough to actually call in sick on those occasions when co-employees did in fact pester him." (88 RT 11392.) The court further explained that "if in fact it were to be perceived that

such conduct by the jurors in question was misconduct," the resulting presumption of prejudice could be overcome by consideration of "the totality of the evidence in the case, the strength of the case." (88 RT 11393.)

But the trial court's assessment that uninvited external influences cannot constitute juror misconduct was wrong. (See *Mattox v. United States* (1892) 146 U.S. 140 and *Remmer v. United States* (1954) 347 U.S. 227, 229 ["The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant."].)

When ruling on the motion to continue the jury trial in July, the judge was adamant that Dr. Woods had not been listed as a guilt phase witness and based his denial on that fact, implying that defense counsel was using Dr. Woods' family emergency as a ruse for seeking the continuance. Defense counsel represented that "Dr. Woods was our primary guilt phase expert in the case." (46 RT 5550.) This was not disputed by the prosecution. Yet, the trial court stated, "It was not once mentioned any time that they were required for the guilt phase of the trial, not once. And not once was it ever mentioned that Dr. Woods was ever going to be a witness. In fact, it was mentioned just to the contrary, that Dr. Woods would never be a trial witness. He was the witness who was apparently retained to prepare all of the information -- to conduct and oversee the tests that were going to be administered, and all of that information

would be presented to the trial expert. And the trial expert was identified as Dr. McInnes." (46 RT 5559-5560.)

The judge continued, "In view of the fact that Dr. Woods was not a critical witness, he was not represented to be a trial witness; in view of the fact you have Dr. McInnes, who has been retained since December of last year who you represented was going to be the trial witness . . . if you feel that you need a guilt phase witness, you have Dr. McInnes. She apparently has -- knows the case. She apparently is your trial expert. It wasn't Dr. Woods." (46 RT 5561.)

But barely two months before this hearing, the judge required that the defense provide the prosecution with a list of experts and their reports for the guilt phase. (15 RT 1201.) At that hearing, defense counsel listed Dr. Woods as the first expert at the guilt phase and informed the court that his report had already been provided to the prosecution. (15 RT 1204.) It is telling that the prosecutor never once in the July hearing disputed defense counsel's representations to the court regarding Dr. Woods use as a guilt phase witness.

Yet, the judge, focused only on his mistaken belief that Dr. Woods was never identified as a guilt phase expert witness, denied the motion to continue stating that "You have your trial expert. [Dr. McInnes] has been identified as such. No good cause has been shown or this motion. The motion is ordered denied." (46 RT 5563.)

Similarly, in rejecting defense counsel's arguments regarding limitations on her opening statement at the penalty

phase, the judge misstated his ruling made only moments before. Defense counsel asked to make a record of all the additional things she wanted to say but the court shut her down, claiming it did no such thing:

> Ms. Morrissey: Your honor, while we are waiting for the jury, I'd like to mark and put in evidence the outline I had of the opening statement so the court would know what I wasn't allowed to say.
>
> The Court: You stopped your opening statement. I didn't stop you.
>
> Ms. Morrissey: No, I was given a five-minute limit.
>
> The Court: And you stopped. You didn't indicate to me you needed more time. The request is denied.

(75 RT 9547.) The judge had stated, "Five more minutes for opening statement. Then we will start with the evidence." (75 RT 9544.)

Finally, Mr. Stayner has noted elsewhere in this brief that in ruling against his lawyers, the trial court misstated the factual record, as it did when it claimed it never forced defense counsel to end her opening statement early. One additional incident of misstating the facts deserves explication here, particularly because it informs both this Court's consideration of the judicial bias claim and its consideration of the juror misconduct claims.

During voir dire, as Mr. Stayner pointed out in his AOB, a prospective juror – who ended up becoming seated juror #12 – called the clerk to say that she had talked about the case with her husband, who was a law enforcement officer, and that he was very concerned about her sitting on the case because of his job

and because of the juror's health. (33 RT 3319, 3328, cited at AOB 178-182.) Defense counsel asked that she be excused for cause because she violated the admonition not to discuss the case with anyone, and the court denied that challenge. (33 RT 3339-3342.)

In denying the challenge, the trial court went far beyond issuing an incorrect ruling in response to defense counsel's cause challenge and misstated the facts in a way that minimized the juror's misconduct. Specifically, when the trial court ruled on the motion, it said:

> I -- I suspect what happened with her happened to a number of our panel. They didn't call or tell us it happened. She did because I feel she's very conscientious. And I can say from her answers she, in my judgment, at least appears to be very candid, very forthright, and she appears to be very objective, and she appears -- it appears that she can certainly pass any type of legal challenge for cause.
>
> This technical issue as to the fact her husband asked her the question were you there on the Stayner case, if she answered no, she'd be lying, so she wouldn't do that. If she didn't answer, he would know that she in fact was on the Stayner case. And I'm sure it happened to a lot of jurors that day because of the publicity in the newspaper accounts that jury selection was starting.
>
> She was very conscientious in the context of calling the clerk of the court to notify the clerk of the court that her husband had inquired that if it was the Stayner case. And she didn't talk about the case, and she didn't know anything at that time of course about the case.

> And her husband just simply said, medically, do you think you can handle it. It's a high profile case. Can you handle it. And apparently she said she could.

(33 RT 3337-3338.)

Defense counsel responded that they had a different understanding of the interaction, and the court insisted that they were wrong:

> Mr. Burt: Well, the information we were -- that I understood that was conveyed in this telephone conversation was that her husband told her she was not going to serve on this case.
>
> The Court: No.
>
> Mr. Burt: That's the information we got.
>
> The Court: No, no.
>
> Mr. Burt: And of course --
>
> The Court: No. The information was her husband told her that he didn't think that maybe emotionally she could handle it, medically she could handle it because it's a high profile case. And I think there was some preference that she not be a juror. And she made that decision herself, but he did not tell her you will not be a juror in that case.

(33 RT 3338-3339.)

In fact, defense counsel was correct about what had happened, and the trial court initially had been so upset about the incident that he used it as an example to other prospective jurors to explain why they should not discuss the case with people at home.

On June 20, 2002, the clerk put on the record that Juror No. 12 had requested a hardship because of the problems with her husband. The court said:

> Her husband is a San Jose police officer. And she told him what case she was in court on, which violates the admonition. And he told her that she's not sitting on this case. So that's the information she apparently give [*sic*] Miss Willette; is that correct?

(23 RT 2312-2313.)

The court added that Juror No. 12 was "very upset. Apparently she was traumatized. . . . I think she was traumatized in the context where her husband told her what she's going to do or not do, and this is her husband, and she lives in the household, and she was very upset about it. So I think that was it. So she's coming in, so you can certainly cover that with her." (23 RT 2314.)

During the next jury selection session, the trial judge used this incident to explain why jurors should not discuss the case with anyone:

> And I bring this up because just this week it happened. And this is what we are aware of this, because the juror called us. And she went home and she told her husband that she was here in court on this particular case, and her husband apparently told her, "Under no stretch of the imagination are you going to be a juror in that case." And she became emotionally traumatized and called us. Well, all I could tell you is, you can't talk about it. If you have emotional feelings about that, or if you feel in some fashion you can't sit on a case, we can bring that up when you come in. All we ask of you now is simply this: don't talk about this case. Counsels apparently were not aware of that phone call. You were going to be made aware of it, because it came in last night to Miss Willette, and she was going to relay that to you. See, those kinds of things just cause problems.

(27 RT 2293.)

The trial court's description of the incident to other jurors was nothing like its insistence to defense counsel that Juror No. 12's discussion with her husband was a benign discussion about whether her health could withstand sitting on the trial. When a juror is emotionally traumatized by a fight with her spouse about whether she can sit on a high-profile death penalty trial, defense counsel has a right to challenge that juror for cause.

Not only did the trial court disbelieve defense counsel on an important issue regarding juror misconduct, but it based its ruling on an incorrect statement of what happened, as it did other times during the case, leading a presumptively biased juror – one who could not follow the court's instructions not to discuss the case – to sit on Mr. Stayner's trial.

Although incorrect legal rulings alone cannot establish judicial bias, the record here reveals numerous incorrect legal rulings that had the effect of undermining the defense case for life, interwoven with judicial comments refusing to acknowledge the actual facts of the case and other comments continuing to harass and demean defense counsel. The totality of the record shows pervasive anti-defense bias that violated both the state and federal constitutional rights to due process as well as state law.

## IV. THE NATURE AND EXTENT OF THE JUDICIAL BIAS REQUIRES REVERSAL

"[S]tructural errors not susceptible to harmless error analysis are those that go to the very construction of the trial mechanism—a biased judge, total absence of counsel, the failure of a jury to reach any verdict on an essential element. (See *Arizona v. Fulminante* [(1991) 499 U.S. 279], at pp. 309–310, 111 S.Ct. 1246; *Sullivan v. Louisiana* [(1993) 508 U.S. 275], at pp. 280–281, 113 S.Ct. 2078.)" (*People v. Gamache* (2010) 48 Cal.4th 347, 396, accord, *Avita v. Superior Court* (2018) 6 Cal.5th 486, 495-496.)

Because a defendant has a federal and state due process right to be tried by an impartial judge, there are instances when a judge's bias requires reversal under the structural error standard. "The United States Supreme Court has found 'an unconstitutional failure to recuse constitutes structural error,' (*Williams* [*v. Pennsylvania* (2016)], *supra*, 579 U.S. [1] at p. 4, 136 S.Ct. 1899) and that recusal is constitutionally required 'when the likelihood of bias on the part of the judge "'is too high to be constitutionally tolerable"' (*id.* at 136 S.Ct. 1899, discussing in part *Withrow* [*v. Larkin* (1975)], *supra*, 421 U.S. [35] at p. 47, 95 S.Ct. 1456; see also *U.S. v. Liggins* (6th Cir. 2023) 76 F.4th 500, 505)." (*Knudsen v. Department of Motor Vehicles* (2024) 101 Cal.App.5th 186, 200–201.)

The Sixth Circuit has noted that "judicial bias is a structural defect both when actual and when merely unconstitutionally probable ...." (*Coley v. Bagley* (6th Cir. 2013) 706 F.3d 741, 750.)

The Ninth Circuit has faulted a state court for applying a harmless error analysis in a judicial bias case "because when a defendant's right to have his case tried by an impartial judge is compromised, there is structural error that requires automatic reversal." (*Greenway v. Schriro* (9th Cir. 2011) 653 F.3d 790, 805.)

Thus, to determine whether the error here was structural, this Court must "consider whether the trial judge's inappropriate comments reflect a constitutionally intolerable possibility that he harbored an interest in the outcome of defendant's trial." (*Nieves, supra,* 11 Cal.5th at p. 499.) While this Court found that the judge's behavior in *Nieves* did not reach that level, here the judge's bias conveyed to the jury that he had an animus both to the defendant and defense counsel. The derogatory comments and ridiculing of portions of the defense case, especially concerning the presentation of mitigation evidence, demonstrated the judge's unconstitutional interest in the case and his disdain for the entirety of the defense case. On this basis, this Court should reverse the conviction and sentence in this case without evaluating prejudice.

Alternatively, if this Court believes it must engage in a prejudice analysis, this Court must cumulatively consider the instances of judicial misconduct throughout the trial. (See *Nieves, supra*, 11 Cal.5th at pp. 499-500 & *Sturm, supra*, 37 Cal.4th at p. 1243.) And while this Court should apply the *Chapman* standard, reversal is required even under *Watson*.

(*Chapman v. California, supra,* 386 U.S. at p. 24 & *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

> Considered in the aggregate, the inappropriate comments made by the trial judge spanned the entire penalty phase trial, from voir dire through the defense case in mitigation. "Perhaps no one of them is important in itself but when added together their influence increases as does the size of a snowball rolling downhill." (*People v. Burns* (1952) 109 Cal. App. 2d 524, 543 [241 P.2d 308].) The numerous instances of misconduct created an atmosphere of unfairness and were likely to have led the jury to conclude that "the trial court found the People's case against [defendant] to be strong and [defendant]'s evidence to be questionable, at best." (*People v. Santana*, *supra*, 80 Cal.App.4th at p. 1207.)

(*Sturm, supra*, 37 Cal.4th at p. 1245.)

In assessing the prejudice from judicial bias, this Court should look at the timing of the comments (*Nieves, supra,* 11 Cal.5th at pp. 499-500), and particularly whether they were made during closing statements or presentation of the defense case; the frequency of the improper comments (*id.* at p. 500); whether the comments affected the presentation of favorable defense evidence (*ibid.*); and the substance of the comments, such as comments that specifically demean or undermine the defense case. (*Ibid.*)

Here, the judicial bias began before the jury trial began, continued throughout all phases of the trial and continued through to the trial court's determination of post-trial motions. As in *Nieves* and *Sturm*, the instances of judicial bias were numerous, made at critical phases of the trial, tainted the jury, and interfered with the presentation of the defense case.

At the guilt phase, Mr. Stayner did not challenge the prosecution's case that he committed the killings. While Mr. Stayner's detailed confession and decision to lead investigators on a walk-through of the offense may have prevented the jury from finding that his actions did not cause the victims' death, he presented a mental health defense arguing that he was guilty only of lesser offenses for the three deaths. When this Court considers the extent of the judicial bias committed during the guilt phase, especially in the court's denial of the motion to continue to allow the defense to present their main mental health expert and during the testimony of the defense and prosecution mental expert witnesses, in light of the other numerous guilt phase errors (see, AOB, Claim XI), the prosecution cannot show beyond a reasonable doubt that the misconduct had no effect on the guilt verdicts. (*Chapman, supra*, 386 U.S. at p. 24.)

The error here was prejudicial at the sanity phase as well. Because there was ample evidence that Mr. Stayner suffered from a number of mental diseases and defects in both the guilt and sanity phases, the jury's critical task at the sanity phase was to determine whether his impairments made it so that at the time of the crimes, Mr. Stayner could not know or understand the nature and quality of his actions or distinguish right from wrong. (64 RT 8174 [jury instructions]; 70 RT 9302-9314 [defense counsel introducing the second prong of legal insanity].) The court's numerous interventions and admonishments during the defense sanity closing argument undermined defense counsel's

credibility and derailed her opportunity to present this part of Mr. Stayner's case. (See, e.g., 70 RT 9314-9318.)

The misconduct, constantly demeaning defense counsel, infected the sanity phase. It is reasonably probable that at least one juror's vote to find Mr. Stayner sane was affected by the judge's intemperate behavior.

Finally, in determining whether misconduct was prejudicial at the penalty phase of a capital trial, the Court focuses on the fact that the penalty determination requires jurors to make an individualized and normative, rather than factual, decision about the proper penalty. (*Nieves, supra,* 11 Cal.5th at p. 503.) "It is not simply a finding of facts which resolves the penalty decision, '"but … the jury's moral assessment of those facts as they reflect on whether defendant should be put to death …."'" (*People v. Brown* (1985) 40 Cal.3d 512, 540.) This kind of moral decision making is more susceptible to influence by intemperate judicial behavior than the sort of fact-finding required during a guilt trial.

In *Nieves*, the judicial misconduct was prejudicial at the penalty phase because, among other things, it (a) demonstrated contempt for defense counsel; (b) demeaned key mitigation evidence; (c) led to the exclusion of key mitigation evidence, such as brain injury evidence; and (d) prevented the defense from bolstering evidence of remorse. (*Nieves, supra,* 11 Cal.5th at p. 505.)

Here, the judicial misconduct interfered with Mr. Stayner's mitigation case in ways similar to those found prejudicial in *Nieves*. First, the scolding and snarky comments directed at

defense counsel from the court began early in the guilt case and continued through penalty phase closing arguments, the last time jurors would hear from defense counsel. The court made no attempt to hide its contempt for defense counsel and engaged in contemptuous conduct at every stage of the trial. Here, as in *Nieves*, "when a judge regularly denigrates the performance of counsel "'it is not the lawyer who pays the price, but the client.'" (*Nieves, supra,* 11 Cal.5th at p. 505.) The timing and frequency of the court's negative and unnecessary comments ensured that jurors would distrust both them and their arguments. And its failure to treat the prosecution equally – saving nearly all of its abuse for the defense team – enhanced the impression that the defense case for life was less meaningful than the prosecution's case for death.

Second, the court repeatedly denigrated defense counsel's attempts to show that people found Mr. Stayner to be kind and that his family was negatively impacted, from before his birth, by the painful fallout of mental illness and child molest. This parallels the diminution in the *Nieves* case of evidence that Mrs. Nieves was in significant emotional pain and wanted to kill herself.

Third, the court prevented counsel from presenting evidence that Mr. Stayner had presented no security concerns during his pretrial detention, which would have rebutted the prosecution's insistence that Mr. Stayner would pose a danger to female correctional officers if given a life sentence (See, e.g., 83 RT 10980 [prosecutor asking expert if CDCR employs female

correctional officers]; 85 RT 11212 [arguing he would pose danger to female correctional officers].) In the same vein, the trial court demeaned defense experts who were offered to prove Mr. Stayner's brain damage and mental health problems, and refused to accommodate their legitimate and tragic scheduling problems, while simultaneously undermining defense counsel's attempt to legitimately impeach the two prosecution experts – Waxman and Dietz – who were presented to destroy Mr. Stayner's mental health defense.

The court further undermined the mitigation case by refusing to let defense counsel question prosecution witnesses about Mr. Stayner's post-arrest demeanor and remorse, to counteract the claim that he was cold and remorseless. Minimizing and excluding evidence of remorse was part of this Court's reason for reversing the death judgment in *Nieves*. (*Nieves, supra,* 11 Cal.5th at pp. 505-506.) The court also interrupted counsel's legitimate attempt to ask jurors to vote for life because Mr. Stayner had helped solve the murder, scolding counsel during that part of the argument solely because counsel mentioned the method of execution in her questioning.

Just as in *Nieves*, the court here interrupted counsel's penalty phase opening for alleged "improper argument," and shut it down prematurely. (Compare *Nieves, supra,* 11 Cal.5th at p. 504 with 75 RT 9544, limiting defense opening to five additional minutes.) Indeed, some of the quotes between *Nieves* and Stayner are identical:

> Stayner: *It is improper argument*, and, counsel, *it's obvious it's improper*, and you know it's improper. So don't do that, please.

(85 RT 11231-11232, italics added.)

> Nieves: "That is improper, and you know it," referring to another of counsel's representations as "false and misleading," and remarking that counsel did not want to provide the jury with an accurate version of evidence.

(*Nieves, supra,* 11 Cal.5th at p. 484.)

Furthermore, the numerous instances of judicial misconduct escalated during the defense attempts to present a full mitigation case at all phases of the trial. The judge prevented the jury from hearing the critical defense expert, Dr. Woods, and excluded significant portions of the mitigation case in the penalty phase itself. The judge put his own finger on the scales of justice by demeaning defense counsel and their mitigation case on behalf of Mr. Stayner. "When the court embarks on a personal attack on an attorney, it is not the lawyer who pays the price, but the client." (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1174–1175.)

In sum, the jurors here were asked to judge a defendant who, much like Sandi Nieves, had committed a horrific crime but who presented extensive mental health and familial dysfunction mitigation as well as evidence that he accepted responsibility for his crimes and demonstrated remorse. If this Court could find that the comments made by the Nieves judge might have made a difference in one juror's vote for death (see *People v. Soojian* (2010) 190 Cal.App.4th 491, 518-521 [reasonable probability of

different result under *Watson* met when there is reasonable chance of hung jury]), it should find that the comments by Mr. Stayner's judge likely swung at least one juror to vote for death instead of life.

In *Nieves,* this Court explained that it could not find that the judicial misconduct had no effect on the penalty phase: "[W]e are unable to say the penalty 'verdict was "'surely unattributable"' to the trial court's [misconduct]." (*People v. Grimes* (2016) 1 Cal.5th 698, 723 [207 Cal. Rptr. 3d 1, 378 P.3d 320)" (*Nieves, supra*, 11 Cal.5th at p. 506.)

Judicial bias during the penalty phase of a capital case is subject to special scrutiny given the finality of a death sentence.

> We rely on a capital sentencing jury to "confront and examine the individuality of the defendant" and consider any "'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 330 [86 L. Ed. 2d 231, 105 S. Ct. 2633].) That critical function was compromised here, where "numerous instances of misconduct created an atmosphere of unfairness and were likely to have led the jury to conclude that 'the trial court found the People's case against [defendant] to be strong and [defendant]'s evidence to be questionable, at best.'" (*Sturm, supra*, 37 Cal.4th at p. 1243.)

(*Nieves, supra,* 11 Cal.5th at p. 506.)

As in *Nieves,* "[t]he trial judge effectively threw 'the weight of his judicial position' (*Mahoney, supra*, 201 Cal. at p. 627) behind the prosecution's case and erroneously excluded relevant and potentially beneficial mitigating evidence, thus

'undermin[ing] the defense theory of the case.' (*Sturm*, at p. 1243.)" (*Nieves, supra,* 11 Cal.5th at p. 506.)

## V. CONCLUSION

For the reasons set forth herein and in the Opening Brief, given the extent and nature of the instances of judicial bias and its likely effect on the jury during the penalty phase, this Court should reverse the verdicts and death sentence imposed in this case.

Dated: November 7, 2025

Respectfully submitted,

/s/ *Andrew Parnes*
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CARY ANTHONY STAYNER

## CERTIFICATION OF WORD COUNT

I, Andrew Parnes, appellate counsel for appellant Cary Stayner in the current case, hereby certify that the **Appellant's Supplemental Opening Brief** was produced on a computer using a 13-point Century Schoolbook font and that this brief contains **16,124** words according to Microsoft Word's word count (not including cover, tables, proof of service and this certificate).

I declare under the penalty of perjury that the foregoing is true and correct, and that this certificate was executed on November 7, 2025, at Ketchum, Idaho.

/s/ *Andrew Parnes*
ANDREW PARNES
Attorney for Appellant
CARY ANTHONY STAYNER

***People v. Stayner***
**Automatic Appeal No. S112146**
**Santa Clara County Superior Court No. 210694**

## CERTIFICATE OF SERVICE

I, Andrew Parnes, declare: I am over eighteen years of age; am not a party to this action; my business address is PO Box 5988, Ketchum, ID 83340; and I certify that on November 7, 2025, I did the following:

1) I electronically filed the attached **Appellant's Supplemental Opening Brief** with the Clerk of the Court using the TrueFiling online e-filing system provided by the Supreme Court

2) I served a true and correct copy of appellant's **Appellant's Supplemental Opening Brief**, on the following persons by electronically by transmitting a true copy via TrueFiling using the email address(s) as follows:

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3) I served a true copy of the attached **Appellant's Supplemental Opening Brief**, by mailing it via United States Postal Service in a sealed envelope, postage prepaid, and addressed to the following individual:

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

/s/ *Andrew Parnes*
Andrew Parnes

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **PEOPLE v. STAYNER (CARY ANTHONY)**
Case Number: **S112146**
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: **aparnes@mindspring.com**

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| MOTION | Motion to file supp brief 11-7-25 |
| APPLICATION | application re overlength brief 11-7-25 |
| BRIEF | S112146_Stayner_SuppAOB |

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

11/7/2025

Date

/s/Andrew Parnes

Signature

Parnes, Andrew (83921)

Last Name, First Name (PNum)

Law Office of Andrew Parnes

Law Firm