Supreme Court of California
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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	Case No. S092410
Respondent,	)	
vs.	)	Los Angeles Superior Court No. PA030589-01
SANDI DAWN NIEVES,	)	
Appellant.	)	

ON AUTOMATIC APPEAL FROM A JUDGMENT
AND SENTENCE OF DEATH

Los Angeles County Superior Court
Hon. L. Jeffrey Wiatt, Judge Presiding

APPELLANT'S SUPPLEMENTAL BRIEF

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I. *INTRODUCTION*

In the following supplemental argument, we address some of the key legal developments since the filing of Appellant's Reply Brief in July 2012. By addressing these legal developments appellant Sandi Dawn Nieves does not waive, abandon, or withdraw any of the arguments previously submitted in the opening and reply briefs. She makes the arguments to bring new authority to the Court's attention and to address new authority. See California Rules of Court, Rule 8.520(d)(1).

By submitting the following arguments appellant does not intend to emphasize or de-emphasize argument previously submitted to the Court. Should the Court request further briefing on any issue or matter that is not included here, we welcome the opportunity to provide it.

II. *CLAIMS OF JUDICIAL MISCONDUCT AND BIAS (AOB ARGUMENT III)*

The opening brief and reply brief detail the pervasive misconduct and bias of the trial judge in this case, which effectively denied Sandi Nieves a fair trial at the guilt and penalty phases. We will not repeat the factual underpinnings of the argument, except when relevant to the new legal developments and arguments described below.

A. *Supreme Court Developments*

A fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment is not only undermined by actual bias of the trial judge, but when there is an objective risk of bias. The correct legal question is "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Rippo v. Baker* (2017) ___ U.S. ___, 137 S.Ct. 905, 907 (per curiam).

In *Rippo* the defendant was convicted of murder and sentenced to death. At his trial he moved for recusal of the trial judge when he learned the judge was under federal investigation for bribery, contending the judge could not be impartial. After the trial judge refused to do so and the defendant was convicted, the Nevada Supreme Court affirmed on the ground that Rippo failed to show that state authorities were involved in the investigation. The Nevada Supreme Court held that Rippo failed to make out a claim of actual bias.

On habeas review, the Supreme Court reversed because the Nevada Supreme Court had applied the wrong legal standard, focusing solely on actual bias. Instead, it should have focused on whether from an objective standpoint there was an intolerable risk of bias.

Rippo was preceded by *Williams v. Pennsylvania* (2016) ___U.S.___, 136 S.Ct. 1899, another death penalty

case, in which a state court was reversed by the Supreme Court. The Court held that the Chief Justice of the Pennsylvania Supreme Court should have recused himself because earlier he had been the district attorney who gave the official approval to seek the death penalty against the defendant. Looking to the objective likelihood of bias, the Court held that recusal is constitutionally required by due process.[1] A court must be "'unburdened by any possible temptation . . . not to hold the balance nice, clear and true between the State and the accused.'" *Id*. at 1910, *quoting Tumey v. Ohio* (1927) 273 U.S. 510, 532.

Importantly, the Court confirmed that an unconstitutional risk of bias presents a structural error and that a showing of prejudice is not required. *Williams* at 1909. Bias or a risk of bias affects the "whole adjudicatory framework." *Id*. at 1910. See AOB at 52.

Rippo and *Williams* had not been decided when the opening and reply briefs were filed in this case. They expand the due process protection of a fair trial beyond actual bias to potential bias. They show that reversal for judicial bias or misconduct is not limited to actual bias, but

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[1] *Accord Echavarria v. Filson* (9th Cir. 2018) 896 F.3d 1118, 1120 (intolerable risk of an unfair trial when trial judge was investigated by the FBI and an FBI agent was the murder victim).

also when the risk of bias cannot be tolerated under the federal Due Process Clause.

As the Supreme Court has held, the risk of bias is not confined to cases involving a potential conflict of interest, but also cases in which a judge, such as Judge Wiatt, in this case, "'becomes embroiled in a running, bitter controversy' with one of the litigants" or becomes "'so enmeshed in matters involving [a litigant] as to make it appropriate for another judge to sit.'" *Hurles v. Ryan* (9th Cir. 2014) 752 F.3d 768, 789-790, *quoting Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 465 and *Johnson v. Mississippi* (1971) 403 U.S. 212, 215.[2] See AOB at 52-53; *Offutt v. United States* (1954) 348 U.S. 11, 17 ("[T]he trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two.").

Although the prior briefing addressed and emphasized

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[2] In *Hurles*, an Arizona trial judge filed her own pleading in the Arizona Court of Appeal, defending a pretrial ruling she had made. Among other things, she commented on the strength of the prosecution's case, stated that if defense counsel believed he needed second counsel because he could not provide competent representation alone, then counsel might withdraw her name from the list of attorneys who contracted with the county to serve as appointed counsel. 752 F.3d at 776. The judge continued presiding over defendant's trial and ultimately condemned him to die. *Id*. at 777.

actual bias, *Rippo* and *Williams* now make it clear that an objective risk of bias deprives a defendant facing a death judgment of a fair trial. Looking to facts of this case, and without the ability to look into Judge Wiatt's mind, his conduct throughout the trial shows actual bias. But if this Court does not find actual bias, then the judge's conduct, comments, and behavior show that the objective risk of bias due to his treatment of the defendant, defense counsel, defense witnesses, and defense experts was too high to be constitutionally tolerable. See AOB at 145-146 (relying on California law).

In *Williams,* the Supreme Court confirmed that such an unconstitutional risk of bias presents a structural error and that a showing of prejudice is not required. *Williams* at 1909. Bias or a risk of bias affects the "whole adjudicatory framework." *Id*. at 1910. See AOB at 52.

In addition to showing bias and misconduct throughout Sandi Nieves's trial, which in itself requires reversal, the federal Constitution required Judge Wiatt to recuse himself at the point that he became embroiled with defense counsel and counsel moved for a mistrial. See AOB at 76, 85-87.

B. *California Developments*

1. *Cases Requiring Reversal Due to Misconduct*

A host of California cases decided since the filing of the Reply Brief reversed judgments based on judicial

misconduct on facts far less serious than those in this case.

In *People v. Force* (2019) 39 Cal.App.5th 506, the court of appeal reversed a decision denying a sexually violent predator a conditional release. He contended he was denied a fair trial because, when he intended to testify on his own behalf, the prosecutor told defense counsel the defendant "could" or "would" be prosecuted for perjury for testifying contrary to earlier statements he had made. *Id.* at 839-841. "[A]fter being informed by defense counsel what the prosecutor told her in regard to the perjury issue – [defendant] decided not to testify at his trial." *Id.* at 841.

Even though the threat was not made to the defendant directly, and instead made to counsel, it violated his right to present a defense.

> Prosecutors must be sensitive to this right; they are not allowed to engage in conduct that undermines the willingness of a defense witness to take the stand. (*People v. Warren* (1984) 161 Cal.App.3d 961, 972, 207 Cal.Rptr. 912.) Such conduct includes making statements to the effect that the witness would be prosecuted for any crime he or she committed in the course of testifying, such as perjury. (In re Martin (1987) 44 Cal.3d 1, 30, 241 Cal.Rptr. 263, 744 P.2d 374 (Martin).)

Id. at 841.

Although the *Force* case involved prosecutorial misconduct, Sandi Nieves's case is even worse because it

was the trial judge who invited the prosecutor to consider charging perjury against a defense witness, expert Dr. Lorie Humphrey. AOB 94-95. This caused her to flee from the trial, truncating the defense neuropsych evidence at the guilt phase and leaving the defendant without a neuropsych expert at the penalty phase. See AOB at 29-30, 92-95, 490, 505-506; 61 RT 9610:19-9624:19.

In *People v. Tatum* (2016) 4 Cal.App.5th 1125, the court of appeal reversed a conviction for murder on the ground that the trial court had improperly failed to grant a mistrial. The trial court had given introductory remarks to the jury venire. To give an illustration of how a jury might have biases, the court told the potential jurors that based on its personal experience the court did not trust the credibility of plumbers and would therefore be biased against plumbers. Tatum's attorney moved for a mistrial based on the fact that the defendant's alibi witness was a plumber. The court denied the mistrial motion. *Id.* at 514. At trial the prosecutor argued that the alibi witness lied. The court of appeal reversed the conviction. "The court's statement that plumbers who came into court were liars validated the prosecutor's argument, irreparably damaging Tatum's chance of receiving a fair trial." *Id.* at 515.

Again, Sandi Nieves's trial was much worse because the trial court continually undermined the credibility of

defense witnesses such as Dr. Lorie Humphrey, Dr. Philip Ney, and Dr. Gordon Plotkin (see AOB at 88-96), by questioning their integrity, commenting on their testimony, and validating, assisting, and sometimes suggesting positions taken by the prosecution and its experts. AOB 118-145. Judge Wiatt's conduct was not confined to a single witness as in *Tatum*.

In *Victaulic v. American Home Assurance Co.* (2018) 20 Cal.App.5th 948, a civil case, the court of appeal reversed a large money judgment due to judicial misconduct. In that case, a defense witness was cross-examined regarding answers previously given to requests for admissions. The witness was accused of perjury. The witness was interrogated at length and twice interrupted by the trial judge. She ended up invoking her Fifth Amendment privilege and departed the witness stand. *Id.* at 963.

When it reversed, the court of appeal quoted extensively from the transcript of the trial. It showed the trial court badgering the witness (*id.* at 958-970), including an insinuation she had committed perjury. *Id.* at 968. The defendant twice moved for a mistrial, which was denied. *Id.* at 969-971. The plaintiff exploited the court's misconduct in its closing argument.

Relying on this Court's death penalty opinion in *In Re Sturm* (2006) 37 Cal.4th 1218, the court of appeal found

judicial misconduct due to the trial court's failure to be "'exceedingly discreet'" in what was said and done in the presence of the jury and its failure to avoid leaning toward one side or the other. The court of appeal reiterated that "[a] trial court commits misconduct if it 'persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge.'" *Id.* at 975, *quoting Sturm* at 1237-1238 (internal citations omitted).

Victaulic is relatively tame compared to the actions of the trial judge in this case: disparaging the defendant, disparaging defense counsel, disparaging defense experts, threatening defense witnesses and experts and assisting the prosecution. See AOB at 53-145. But *Victaulic* was not a death case. Here life is a stake. [3]

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[3] In addition to cases addressing claims of pervasive bias, there have been several new developments with regard to factual internet research by judges during a trial, which occurred in this case. See AOB 118-124 (internet research pertaining to defense experts Dr. Philip Ney and Dr. Gordon Plotkin). R. McKoski,"Reining in Jurist Investigations," *ABA Journal* (Feb. 2018); American Bar Association, *Standing Committee on Ethics and Professional Responsibility*, Formal Opinion 478 at p. 1 (2017) ("Judges risk violating the Model Code of Judicial Conduct by searching the Internet for information related to

(continued...)

2. *Cases Rejecting Claims of Judicial Misconduct*

This Court's recent cases rejecting claims of judicial misconduct in capital appeals are all different from this one.

People v. Armstrong (2019) 6 Cal.5th 735, 798-799, rejected claims of judicial bias based primarily on claims of legal error. As to the few statements made by the trial judge that the defendant identified as indicative of bias, this Court held the statements were justified in context. *Id.* at 799.[4]

People v. Gomez (2018) 6 Cal.5th 243, concerned a capital defendant's brief refusal to come to court one day during trial. The trial court erroneously allowed evidence of the refusal as consciousness of guilt. The defendant contended on appeal that the judge committed misconduct in his attitude toward the issue.

This Court held that the trial judge did not usurp the role of the prosecutor or instruct on consciousness of guilt out of an intention to harm or disadvantage the defendant. *Id.* at 293. This Court held that judicial error – admitting the refusal to come to court as relevant evidence – did not

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[3](...continued)
participants or facts in a proceeding."); Cal. Judges Association Judicial Ethics Advisory Opinion 68 (2013).

[4] The defendant in *People v. Buenrostro* (2018) 6 Cal.5th 367, 405, forfeited the claim of judicial misconduct at a competency hearing. Further, her showing was insufficient because it was based on legal error.

amount to constitutionally impermissible judicial misconduct.

Neither *Armstrong* nor *Gomez* consider or address pervasive misconduct affecting the course of an entire trial.

In *People v. Woodruff* (2018) 5 Cal.5th 697, this Court rejected twelve instances of alleged judicial misconduct, finding the trial court treated both the prosecution and defense evenhandedly, even though the court directed some pointed remarks toward defense counsel. Without addressing the instances separately, the defendant contended on appeal that the comments of the trial judge demonstrated "'sarcasm and scorn to defense counsel' that cumulatively was prejudicial." *Id.* at 643-644. This Court noted that the trial was lengthy, but that the comments did not demonstrate misconduct or bias.

Although there was sarcasm and scorn by the judge at Sandi Nieves's trial, there was also a whole lot more. Judge Wiatt's actions were not simply directed toward defense counsel, but also the defendant, defense witnesses, and defense experts.

In *People v. Peoples* (2016) 62 Cal.4th 718, this Court addressed three ex parte conversations by the trial judge. None involved the merits of the case. Although the defendant moved to disqualify the judge, this Court held that the ex parte communications failed to demonstrate "a

substantial probability of actual bias[.]" *Id.* at 429-430.[5]

Further, this Court held that numerous other instances of alleged judicial misconduct did not show bias. The Court found that most of the alleged instances of misconduct were actually claims of legal error, which the Court rejected on the merits. *Id.* at 789. To the extent the defendant claimed the trial judge showed favoritism, this Court held that this claim was belied by the record. The assertion that the judge was rude to defense counsel was rejected on the ground that the trial judge made discourteous comments to the prosecutor as well and that the comments were made outside the presence of the jury. Therefore, this did not result in a probability of actual bias. *Id.* at 789-790.

Most importantly, *Peoples* did note that the judge's conduct outside the jury's presence (see AOB at 76-88) may provide context for his behavior in the jury's presence. But, this Court held that the facts in the case did not suggest the trial judge unduly influenced the jury because there were no

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[5] Inasmuch as *Peoples* was decided prior to the Supreme Court's opinions in *Rippo* and *Williams*, this Court appears to have applied an incorrect standard of review under the United States Constitution by requiring a substantial probability of actual bias. As stated *supra*, the Supreme Court has made clear that the standard is whether or not the risk of bias is too high to be constitutionally tolerable. *Rippo v. Baker*, 137 S.Ct. at 907.

compelling examples of prejudicial behavior in the jury's presence. *Id*. at 790. Compare AOB at 54-76, 88-145.

This case is far different inasmuch as the pervasive instances of misconduct are not confined to ex parte communications which did not involve the merits, or only instances of misconduct outside the jury's presence.

People v. Banks (2014) 59 Cal.4th 1113, rejected a claim of judicial misconduct based on alleged one-sided rulings and remarks disparaging the defendant and defense counsel. Some of the alleged disparaging comments concerned the defendant's failure to come to court and his mental status. This Court found that the trial judge's expressed skepticism did not amount to bias. *Id*. at 1175. The judge's comments did not impact the jury. *Id*. This Court found the trial court's brief interruption of the defense opening statement was not disparaging and did not demonstrate bias, contrasting it to the interruptions in *Sturm*. *Id*. at 1177. Finally, the Court held that an isolated instance of the trial court rebuking defense counsel in connection with a question to a single witness on cross examination did not demonstrate pervasive bias. *Id*. at 1177-1178.

Banks is far different from this case where the misconduct included numerous instances in the jury's presence and it was pervasive.

People v. Maciel (2013) 57 Cal.4th 482, 533, addressed eight instances of alleged judicial misconduct. Defendant failed to object to any of them and they were forfeited. On the merits, this Court found that the statements were not disparaging or indicative of bias. In this case, unlike *Maciel*, disparagement is manifestly evident. See AOB at 76-111.

People v. Houston (2012) 54 Cal.4th 1186, rejected a claim of judicial misconduct involving a single witness, a defense psychologist. The trial court made two allegedly objectionable comments. The first was a play on words, commenting on a statement made on direct examination.[6] This Court held that the claim was forfeited because there was no objection to the comments and they were not pervasive to the point of making any objection futile. *Id.* at 825. This Court also said that in context the two brief remarks did not show that the trial court was no longer an impartial arbiter. *Id.*

The facts in the *Houston* case are completely dissimilar to the pervasive objectionable comments and conduct in this case.

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[6] The psychologist, Dr. Rubinstein, said, "A brain is a brain is a brain." 54 Cal.4th at 824. The trial court said, "Is that Gertrude Rubinstein?" *Id.* The court's other comment in ruling on an evidentiary objection was "It's really all the psychology stuff is mumbo jumbo stuff." *Id.* (original emphasis omitted).

*III. UNCONDITIONAL MENTAL EXAMINATION (*VERDIN V. SUPERIOR COURT*) (AOB ARGUMENT VI)*

Since the filing of Appellant's Reply Brief, this Court has addressed unauthorized discovery orders for examination of defendants (*see Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116) finding no prejudice. None of the cases are comparable to this case. They do not undermine defendant's claim of prejudice in this case.

People v. Krebs (2019) 8 Cal.5th 265, 346, addressed whether a prosecutor's remarks in closing statement were prejudicial. The prosecutor mentioned in closing that the defendant refused to be examined by a prosecution psychiatrist, but that defendant did allow an examination by a defense psychiatrist. Among other things, the prosecutor said, “Where's the fairness in that? Who's looking for the truth?” *Id.*

On appeal, the Attorney General conceded that at the time of trial there was no authority to compel defendant to submit to such an examination. Finding a lack of prejudice, this Court held that the case is similar to *People v. Wallace* (2008) 44 Cal.4th 1032, 1087.

We addressed *Wallace* in the reply brief. Reply Brief at 89. The *Krebs* opinion, however, addresses a prosecutor's reliance on the refusal to submit to an examination in closing argument, rather than an expert's mention of the

refusal as in *Wallace*. *Krebs* stressed the fact that the prosecution did not use the refusal to criticize a defense expert's conclusions. The defendant also told the jury why he refused to be examined. Joined with the strength of the prosecution case, this Court held the closing argument error was inconsequential.

Further, the *Krebs* opinion observed that the defense expert confirmed important parts of the prosecution expert's analysis and that the prosecutor's closing comments about the defendant's refusal were "brief." *Krebs* at 347. Under the totality of the circumstances, the Court held the prosecutor's comment about the refusal in closing argument did not affect the death verdict.

In this case, however, Sandi Nieves's refusal to submit to an examination was brought before the jury through direct examination of the experts, through the trial court's instruction to the jury, and through the prosecutor's closing argument that defendant was a manipulator and calculatingly deceptive. See AOB at 215, 218-219; 56 RT 8806:5-18 (prosecution closing argument). Here, the jury could and likely did use the defendant's refusal to submit to an unauthorized order in finding her guilty and later in its consideration of the appropriate penalty.

No case decided since *Verdin* is authority for finding the error in this case was not prejudicial.

IV. *VICTIM IMPACT EVIDENCE (AOB ARGUMENT XVII)*

A. *Federal Developments*

In *Bosse v. Oklahoma* (2016) ___U.S.___, 137 S.Ct. 1, the Supreme Court emphatically held that *Payne v. Tennessee* (1991) 501 U.S. 808, did not abrogate the Eighth Amendment injunction against the admission of “a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence[.]” *Id.* at 2; *Booth v. Maryland* (1987) 482 U.S. 496. However, in the past ten years, this Court has addressed this injunction on only a few occasions, ordinarily holding instead that victim impact evidence “is barred under the federal Constitution only if it is so extremely prejudicial that the whole of the trial is rendered fundamentally unfair.” See e.g. *People v. Mora and Rangel* (2018) 5 Cal.5th 442, 510-511.

Bosse focuses on the exclusion of victim impact evidence in which a victim’s family members provide characterizations and opinions about the crime, the defendant, and the appropriate sentence, holding that its admission is impermissible. The penalty phase of Sandi Nieves’ trial is replete with victim impact evidence consisting of this type of testimony.

For example, Minerva Serna blamed Sandi Nieves for keeping Serna's granddaughters from her. 60 RT 9298:9-10,

9302:24-9303:1. Referencing the crime, she talked about the smoke "that came through their body." 60 RT 9305:3-22. She called Nieves "vicious and malicious." 60 RT 9308:16. She described Nieves manipulating those around her. 60 RT 9311:14 ("For 18 years she pulled our strings."). She testified Sandi Nieves made the girls suffer when they were alive and speculated, without proof, that they had been abused physically. 60 RT 9303:5-12, 9305:19-20. She characterized Nieves as "beyond a human" and "evil all the time." 60 RT 9305:10-11, 9311:13. Serna testified that the girls had suffered "a miserable death that lasted for hours and hours." 60 RT 9307:9-17; 60 RT 9307:18-20 ("It was for hours.").

Fernando Nieves, the father of two of the girls, portrayed Sandi Nieves as manipulative and vindictive. He attacked her character by saying she used the children to get her way: "They [the children] would come spend time with me, unless she was mad at me. If I made her angry in some way, then she would not let me see them." 60 RT 9338:5-8; see also 9344:3-7 ("If I say no, she gets angry. Then what does she say to me? 'You can't see the kids.'"). He speculated that Sandi had petitioned for her own father to have custody of David [the surviving child] while she was in jail because she wanted to "control his [David's] testimony" during the trial. 60 RT 9365:12-22. He speculated about what would have happened if David had tried to leave the

house on the night of the fire. Sandi "would have stopped him forcibly, I think, from leaving that house." 60 RT 9359:1-2.

David Folden, the father of the two younger girls, repeatedly disparaged Sandi Nieves. He testified she had tried to turn her children against him: "She took them from me. She told them stories about me." 60 RT 9371:15-16. He told the jury that Nieves "wanted to control and manipulate everyone around her," and that she was "trying to do it now" to the jurors as well. 60 RT 9371:21-23. He then addressed the appropriate penalty: "This time it stops." 60 RT 9371:13-25.

Folden lashed out, saying "That person over there [Nieves] tried to even take things away from a 67-year-old lady just for being mean, bitter, I guess." 60 RT 9373:7-9.

Folden portrayed Sandi as a bad mother. He described the children as "starved for attention." 60 RT 9378:3-6. He characterized her as controlling and overly protective to the point of stunting her children's development.

Charlotte Nieves [Fernando Nieves's then wife and the girls' stepmother] was permitted to criticize Sandi Nieves's mothering of David Nieves [the surviving son]: "He was never taught to have an opinion. He was never taught to have a choice. . . . He was never taught to speak for himself, think for himself." 60 RT 9413:6-11. See 60 RT

9412:19-9415:3.

None of the characterizations of Sandi Nieves nor her conduct as described by Serna, Fernando Nieves, Folden, or Charlotte Nieves constituted criminal acts which would have been admissible under Penal Code section 190.3(b), if they had been proved beyond a reasonable doubt. Instead, as defense counsel stated in one of his numerous objections, it was pure "character assassination." 60 RT 9392:11-9393:1.

What is clear is that each of the four victim impact witnesses held deep animosity toward Sandi Nieves, dating from before the deaths of the children and they pointedly shared that animosity when they testified against her. They did not confine their testimony to descriptions of the young victims or the impact of the deaths on themselves or others.

The prosecution made good use of this testimony. In closing, the prosecution looked back to Sandi Nieves's character before the deaths. Alluding to David Folden's testimony that he felt Sandi Nieves always "won everything" while the children were alive, the prosecutor exhorted the jury to even the score: "She won when she inflicted the ultimate punishment on Dave Folden, on Fernando Nieves, and she wins again if you give her life." 64 RT 10126:9-11.

This character testimony as victim impact was clearly impermissible under *Bosse* and the Eighth Amendment.

But even if other testimony at trial was appropriate,

this victim evidence of Sandi Nieves's character and opinions about the crime, and the appropriate penalty, tainted the rest. The testimony was not harmless. Other than the circumstances of the crime, and the witness victim evidence, there was no other evidence in aggravation. On the other hand, Sandi Nieves had no criminal record. She did not present a threat of future dangerousness. And, she had friends and family who gave value to her life.

B. Recent California Cases

None of the opinions of this Court issued since the filing of the Reply Brief consider evidence comparable to this case. The victim impact evidence in this case consisted not only of the family testimony referred to in subpart A. *supra*, but also a 13 minute video, descriptions of the victims' funeral, posters showing photos of each of the victims on poster boards designed for trial to look like tombstones, showing dates of birth and dates of death, as well as a poster titled "In Remembrance" with photos of a shrine to the victims, including a bedroom with two empty beds, two bicycles, toys, and stuffed animals, but no children.

Although recent decisions of this Court summarize and apply this Court's jurisprudence on the issue, the cases are far different than this one.

For example, in *People v. Mendez* (2019) 7 Cal.5th 680, which summarized many prior cases, six witnesses testified

regarding two victims. Thirteen photos of one victim and fewer of the other were held not impermissible. Testimony regarding relationships with the victims, how they learned about the deaths, and how the murders affected them, was held not impermissible. As for the video found admissible, it merely depicted one event, a sixth grade graduation. *Mendez* noted that this Court had previously permitted videos of eight and four minutes, depicting preparation and a trip to Disneyland and a Christmas celebration. The Court also found admissible a poem written by the victim.

In this case, the prosecution introduced character evidence against the defendant, allowed a witness to give his opinions as to the penalty, and admitted a 13 minute video compilation (not one event), plus over 50 photos, dates of birth and death, and photos of a shrine.

In *People v. Bell* (2019) 7 Cal. 5th 70, this Court upheld admission of an edited four minute video tape of the victim's wedding. However, the Court observed that "[w]e have advised trial courts to 'exercise great caution in permitting the prosecution to present victim-impact evidence in the form of a lengthy videotaped or filmed tribute to the victim.'" *Id.* at 128, *quoting People v. Prince* (2007) 40 Cal.4th 1179, 1289. The Court further observed, that – unlike the photo montages in this case – the video did "not constitute a memorial, tribute, or eulogy[,]" *quoting People v. Dykes*

(2009) 46 Cal.4th 731, 785. *Id.* at 128.

Further, the video in the *Bell* case was admissible because, again unlike this case, the trial court carefully reviewed the video, requiring the prosecutor to cut certain portions, and unlike this case, the superior court gave the jury a special instruction concerning the jurors' proper role in considering victim impact evidence. *Id.* at 129.

In *People v. Westerfield* (2019) 6 Cal. 5th 632, this Court upheld the admission of testimony from the seven year old victim's teachers as to the victim's character and contributions and the effect of the murder on the teachers and classmates. Here, Sandi Nieves is challenging the substance, quantity and cumulative effect, which invited a purely irrational response from the jurors and made the penalty phase fundamentally unfair. Therefore, *Westerfield* has no application to this case.

In *People v. Spencer* (2018) 5 Cal.5th 642, seven witnesses testified, but their testimony covered only 73 pages of transcript. *Id.* at 677. The prosecution only entered four photos into evidence. *Id.* at 679. That case does not include the issues raised here.

In *People v. Montes* (2014) 58 Cal.4th 809, 882-883, this Court allowed a ten and a half minute video with an instrumental soundtrack, which included 115 photos of the victim. This Court held "the music used did not add

materially to its emotional effect." *Id.* at 883. *But see, People v. Sandoval* (2015) 62 Cal.4th 394, 442 (later holding that music is never permissible). As to the photographs, defendant only objected to one. His claim, however, had been forfeited by failure to object in the trial court. After reviewing the photo, the Court observed that it "flash[ed] by quickly" and was not particularly significant. 58 Cal.4th at 883. The image was not part of an effort to manipulate the jurors' emotions. *Id.*

None of these cases upholding the admission of video or photographs of victims is comparable to this case. Coupled with the character evidence and testimony given by the family, the victim impact evidence at this trial violated the Eighth Amendment.

V. *THE NECESSITY OF UNANIMOUS FINDINGS PROVED BEYOND A REASONABLE DOUBT*

Since the Reply Brief was filed, the Supreme Court of the United States decided *Hurst v. Florida* (2016) 577 U.S. ___, 136 S.Ct. 616, invalidating the Florida statutory scheme that allowed a judge to find the existence of facts necessary to impose a death sentence. Overruling decades old precedent, and its own line of cases upholding Florida's death penalty scheme, *Hurst* applied a broader principle: any fact that is required for a death sentence, but not a lesser punishment of life in prison, must be proved and

found by a jury. *Id.* at 619, 622. *See Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466.

Hurst is the latest in a line of Supreme Court opinions requiring that juries find under traditional constitutional principles – ie. unanimously and beyond a reasonable doubt – any facts that increase a penalty. *Alleyne v. United States* (2013) 570 U.S.99; *Cunningham v. California* (2007) 549 U.S. 270; *United States v. Booker* (2005) 543 U.S. 220; *Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona, supra, and Apprendi v. New Jersey, supra*. Here, there is no question that the determination that death is the appropriate punishment in a California case increases the penalty beyond that which would ordinarily be permitted by a guilt verdict.

Nonetheless, this Court has held that nothing in *Hurst* affects its previous conclusion that the California death penalty statute is constitutional. *E.g. People v. Beck* (2019) 8 Cal.5th 548, 670; *People v. Johnson* (2019) 8 Cal.5th 475, 527; *People v. Rangel* (2016) 62 Cal.4th 1192, 1235 n. 16.

To preserve our reliance on *Hurst*, and its line of cases, we urge the Court to reconsider its holdings that the Eighth and Fourteenth Amendments do not require that facts supporting a death sentence be found unanimously and that the ultimate decision that death is the appropriate penalty be found beyond a reasonable doubt.

VI. *CONCLUSION*

For the reasons given in the Opening Brief, the Reply Brief, and this Supplemental Brief, the entire judgment—the convictions, the special circumstance findings, the death sentence, and restitution—should be reversed.

February 21, 2020

Respectfully Submitted

By: /s/ Amitai Schwartz
Amitai Schwartz
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Sandi Dawn Nieves

CERTIFICATE OF COUNSEL

I am the attorney for Appellant Sandi Dawn Nieves in this automatic appeal from a judgment of death. The text of the foregoing brief consists of 5,639 words as counted by the Corel WordPerfect X9 word-processing program used to generate the brief.

February 21, 2020

/s/ Amitai Schwartz
Amitai Schwartz
Attorney for Appellant

PROOF OF SERVICE

Re: The People of the State of California vs. Sandi Dawn Nieves, California Supreme Court Case No. S092410

Los Angeles County Superior Court, Case No. PA030589-01

I, Amitai Schwartz, declare that I am over 18 years of age, and not a party to the within cause; my business address is 2000 Powell Street, Suite 1286, Emeryville, CA 94608. I served a true copy of the attached

APPELLANT'S SUPPLEMENTAL BRIEF

on the following by placing a copy in an envelope addressed to the parties listed below, which envelope was then sealed by me and deposited in United States Mail, postage prepaid, at Emeryville, California, on February 21, 2020.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 21, 2020 at Emeryville, California.

/s/ Amitai Schwartz

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 2/27/2020 by April Boelk, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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

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