S150984

IN THE SUPREME COURT OF CALIFORNIA

MARILYN KAYE FREEMAN, Petitioner, v. THE PEOPLE OF THE STATE OF CALFIFORNIA, Respondent.	Supreme Court Case No.: Related Petition for Writ of Mandate Supreme Court Case No.: San Diego County Superior Court No.: SCD 171601

From the Court of Appeal of the State of California
Fourth Appellate District, Division One

24 **PETITION FOR REVIEW**

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IN THE SUPREME COURT OF CALIFORNIA

MARILYN KAYE FREEMAN, Petitioner, v. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent.	)	Supreme Court Case No.: Related Supreme Court Case No.: S150706 Court of Appeal Case No.: D046394 San Diego Superior Court Case No.: SCD171601

From the Court of Appeal of the State of California
Fourth Appellate DIstrict, Division One

PETITION FOR REVIEW

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

I, Marilyn K. Freeman, respectfully requests that this Court review the February 5, 2007 decision of the Court of Appeal to secure uniformity of decision and to settle this important question of law.

STATEMENT OF ISSUES

The trial judge, Robert F. O'Neill, presided over a felony trial in October 2004 after he recused himself, sua sponte, on December 19, 2002 due to his admitted bias toward the defendant, Marilyn Freeman. Appointed trial counsel, William Apgar, agreed to the recused judge. Ms. Freeman's

objections to the reinstatement of Judge O'Neill were ignored or denied because Mr. Apgar did not "join in" her motions and objections to recused, biased judges. Judge O'Neill denied Ms. Freeman's requests to relieve Mr. Apgar and to substitute counsel retained by her family.

The trial was unfair and a sham. Ms. Freeman was not allowed to aresent a defense. Mr. Apgar was unprepared and argued against Ms. Freeman. Mr. Apgar never read discovery, or the file, did not interview Ms. Freeman about the case, did not contact or interview witnesses, did not subpoena the witnesses who had been designated by Ms. Freeman and prior appointed counsel, had no idea what to ask the witnesses who appeared to testify without subpoena on Ms. Freeman's behalf, had no idea how to cross examine prosecution witnesses, and had no idea what to ask Ms. Freeman when she testified in her own behalf. Judge O'Neill struck from the record nearly all of Ms. Freman's testimony, disallowed almost all of the testimony of witnesses for the defense, and chastised and ridiculed Ms. Freeman frequently in the presence of the jury. The tone Judge O'Neill used toward Ms. Freeman, in the presence of the jury, was demeaning and abusive. Judge O'Neill used a monotone to deliver instructions and rulings to the jury which were favorable to Ms. Freeman. Judge O'Neill made legally incorrect decisions to assure conviction of Ms. Freeman on all charges.

Judge O'Neill recused himself from this case on December 19, 2002. Judge Peter C. Deddeh recused the bench from

this case on January 6, 2003 and Judge Deddeh assigned independent judges from a different county to hear this case until May 14, 2004. O'Neill and the bench were recused because there was speculation that Ms. Freeman might have stalked Judge Harry Elias of the San Diego Superior Court. There was never a shred of evidence to support the speculation first voiced by County Counsel James Wellman, the opposing counsel in Ms. Freeman's juvenile court case. Judge Elias was the judge in that juvenile court case from which this case arose. Contrary to the speculation in the February 5, 2007 opinion, nothing was ever seen on Ms. Freeman's computer that had been seized by the authorities in connection with the current case (page 4, line 20 of the decision. The speculation led to the seizure of the computers and Ms. Freeman was arrested and her bail enhanced due to the speculation that she was stalking Judge Elias prior to the seizure of her computers. No evidence was ever found on Ms. Freeman's computers or elsewhere to support either the speculation that she was stalking Judge Elias or the elements of the crimes for which she was charged. Ms. Freeman's automobile was tracked by a global positioning device after her bail was reduced and she was able to bail out of jail at §150,000 in January 2003.

On February 5, 2007, the Court of Appeal reversed these convictions in full based on the violation of Ms. Freeman's right to a fair and impartial judge. The Court stated

at page 2 of the decision:

> "Freeman did not file a petition for writ of mandage at the time of the reinstatement. Thus, she may not obtaon appellate review of error under California's statutory disqualification scheme, but but she is entitled to review for constitutional due process error."

The Court of Appeal stated at page 8 of the decision:

> "A party seeking appellate review based on a violation under the disqualification statute must file a petition for writ of mandate within 10 days of the disqualification decision. (Code Civ. Pro. § 170.3(d)".

All case law and CCP § 170.3(d) clearly state that it is the determination of the qualification of a judge raised in a motion authorized by CCP § 170.1 or CCP § 170.6 that may be reviewed only by petition for writ of mandate sought within 10 days of notice to the parties of the decision. CCP § 170.3(d) does not apply to the decision of a recused judge to reinstate himself or to take further action in a case in which he has already been determined to be recused. CCP § 170.3(d) does not apply to a decision to reinstate a judge or to an order vacating a previous recusal.

On December 19, 2003, Judge O'Neill determined that he was biased and not qualified to act in this case. He recused himself and no party sought review of his decision. On January 3, 2006, Judge Deddeh recused the bench and neither party sought review of his decision. Those were the decisions to which CCP § 170.3(d) is properly applied. Those decisions determined the qualificaton of O'Neill and the bench to act in this case.

It is clearly the intent of the Legislature that a judge be without power and jurisdiction to act in a case after he either recuses himself or it is determined that he is disqualified to act in a case (CCP § 170.4(d).) It is clearly the intent of the legislature that the judicial actions of a recused judge be vacated (CCP § 170.4(c)(1).) These convictions are void as a matter of California and should be vacated rather than merely reversed on due process grounds.

The Legislature did not intend that the judicial actions of a recused judge be reviewable only by writ of mandate sought within 10 days. There is no provision for the reinstatement of a judge after he recuses himself or is determined to be disqualified. CCP § 170.4(d) states that a "didqualified judge has no power to act in any proceeding after his or her disqualification". "No power" has always been interpreted to mean without jurisdiction. CCP § 170.4(c)(1) requires that all orders and rulings made by a disqualified judge be vacated. Only the ministerial actions allowed in CPP § 170.4(a) will not be vacated. The Court of Appeal recognizes this statutory law at page 16 of the decision but has erroneously applied CCP § 170.3(d) to Judge O'Neill's reinstatement in violation of CCP § 170.4(d) to allow Judge O'Neill to regain power and jurisdiction to act in this case after he determined himself to be disqualified because of bias toward Ms. Freeman and recused himself from this case.

If the Legislature had intended that reinstatements

of disqualilfied judges (or merely the furt her judicial action by a recused judge) to be reviewed b y writ of mandate sought within 10 days, it would have said s o and not enacted CCP § 170.4(d) and CCP § 170.4(c)(1).

The c ourt of Appeal acknowledges, at page 16 of the decision, that there is no statutory provision authorizing a disqualified judge to be reinstated. At page 9 of the decision, the Court of Appeal quotes People v. Brown (1993) 6 Cal.4th 322, at page 333:

> "The writ requirement is designed to promote judicial economy because "'"permitting [a disqualification] to be attacked later on appeal of the judgment could invalidate every ruling made by the trial court judge after the disqualification motion was denied."'"

Brown clearly applies only to the determination of the qualification of a judge such as occurred in this case when Judge O'Neill recused himself from this case. The purpose of CCP § 170.3(d) is to limit review of the determination (usually the denial) of the qualification of a judge. Once a judge is determined to be disqualified, he is forever recused. If every denial of a CCP § 170.1 or CCP § 170.6 motion were subject to appellate review of the basis of the objection or challenge of the judge's impartiality after the case was concluded, judicial resourses would be wasted. Allowing a judge to reinstate himself does not promote judicial economy. Questions pertaining to reinstatements waste judicial resources and creat chaos in the administration of the courts. Judicial economy, as well as common sense, has been the basis for vacating the actions of disqualified judges.

There is no judicial economy if reinstatements are allowed in violation of principles of due process creating the necessity of review on due process grounds. The only result of the erroneous application of CCP 170.3(d) to this case is the retrial of Ms. Freeman after the passage of five years and three years of imprisonment. The District Attorney and Judge O'Neill proceeded to try Ms. Freeman with full knowledge that Judge O'Neill was recused from the case for bias. The District Attorney requested that the the order recusing the bench be vacated. To allow the District Attorney to retry Ms. Freeman after all of this would be unfair to Ms. Freeman and an intolerable windfall and second bite at the apple for the District Attorney. Had the Court or the District Attorney acted properly, or corrected these mistakes when Ms. Freeman complained in 2004, the District Attorney would have legally been able to try Ms. Freeman in a fair and impartial court.

There is no statutory or case law to support the Court of Appeal's decision to apply CCP § 170.3(d) to the reinstatement of Judge O'Neill. At page 8 of the decision, the Court of Appeal cites People v. Brown, supra; People v. Carter (2005) 36 Cal.4th 1215, 1242, fn. 19; and People v. Barrera (1999) 70 Cal.App.4th 541,550-551 in support of the application of CCP § 170.3(d) to a reinstatement. None of these cases support this application of CCP § 170.3(d) and are inapplicable to the facts of this case.

Carter filed a CCP 170.1 motion to challenge the judge and it was denied. The basis for the challenge of the judge

was not reviewable on appeal because Carter did not seek review by writ of mandate within 10 days. In Carter, the judge was determined to be qualified and he never recused himself from the case. That determination that the judge was qualified is what may only be reviewed within 10 days. In this case, the Judge O'Neill recused himself and could not be reinstated to this case.

Brown filed a CCP 170.1 challenge of a judge. When it was denied, Brown sought review by writ of mandate within 10 days. Review was denied by the court of appeal and by the Supreme Court of California. On appeal from the judgment, the Supreme Court held that CCP § 170.3(d) does not preclude review of the bias of the judge under principles of due process. Brown, supra.)

Barrera waived the non-waivable basis of disqualification that the commissioner in the case had appeared as Barrera's public defender briefly and early in the case. The Barrera decision held Barrera to seeking review of his waiver within 10 days pursuant to CCP § 170.3(d). Barrera claimed that his judgment of conviction was void because CCP § 170.4(b)(2)(B) forbids the waiver. The Court concluded that the improper waiver did not result in a void judgment and that CCP § 170.3(d) therefore applied to both waivable and non-waivable basis for disqualification. Commissioner Duffey denied he was biased and never recused himself.

These cases do not support the decision to apply CCP § 170.3(d) to a reinstatement decision. These cases do not involve a judge who has been disqualified or who has

recused himself. The judges in these cases were never disqualified or recused and so were never without power to act further in the case.

Barrera might apply to Ms. Freeman's case if, on December 19, 2002, Judge O'Neill had stated taht he was a good friend of Judge Elias and therefore was actually biased, or might be perceived as biased, toward Ms. Freeman but he would continue on the case if Ms. Freeman so agreed. This did not happen. Instead, Judge O'Neill recused himself from Ms. Freeman's case and was forever recused. Judge O'Neill determined his qualification in this case and his decision could only be reviewed by writ sought within 10 cays by a party. If O'Neill had changed his mind within the 10 days he could not have sought review of his decision. It makes no sence to allow Judge O'Neill to reinstate and allow review of the question of his qualification at that time.

CC· § 170.3(d) applies to the initial determination of the qualification of a judge and not to anything which may occur after audge recuses himself or is otherwise determined to be disqualified. CCP does not apply to the reinstatement of Judge O'Neill. Judge O'Neill's further judicial actions after his recusal and after his reinstatement are void as a matter of law. Judge O'Neill had a duty to not act in this case in which he was disqualified. Judge O'neill did not regain power to act in this case when Ms. Freeman failed to seek review by writ of mandate within 10 days of O'Neill's reinstatement. Neither Judge O'Neill

nor Judge Deddeh possessed power to act in this case to reinstate themselves or other judges. Both were recused from this case because they determined that they could not be fair toward Ms. Freeman and forever were without power to act in this case.

There is no cas authority or statutory law to support this decision by the Court of Appeal. This decision allows a judge to regain power to act in a case after he recuses himself for bias. Review is necessary to secure uniformity of decision and to settle this important question of law.

STATEMENT OF THE CASE

In an Information filed on September 12, 2003, the District Attorney for San Diego County charged petitioner, Marilyn Kaye Freeman, with two county of violating section 646.9(a) (stalking), one count of violating section 459 (residential burglary), one count of violating section 653(f) (solicitation to commit a crime); two counts of violating section 273(b) (child cruelty), and one count of violating section 242 (battery). Petitioner pled not guilty and denied the allegations.

On November 4, 2004, a jury convicted petitioner of each offense after a trial before Judge Robert F. O'Neill.

At the probation and sentencing hearing held April 27, 2005, the court (Judge Robert F. O'Neill) denied probation and sentenced petitioner to a total term of six years in state prison. The court designated the residential burglary the principal offense and sentenced petitioner to the middle term of 4 years. The court also imposed three consecutive one-third mid-term sentences of eight months each on the two stalking counts and the charge of solicitation to commit a crime. Appellant was sentenced to 438 days and given credit for time served on themisdemeanor child cruelty and battery counts.

Petitioner filed a timely Notice of Appeal on April 27, 2005. The Court of Appeal issued a decision on February 5, 2007. Petitioner requests review of that decision by this Court.

STATEMENT OF FACTS
RELATED TO THE RECUSAL OF JUDGE ROBERT F. O'NEILL

This case arose out of a dependency case involving Petitioner's 14 year, 10 month old daughter in September 2002. Petitioner claimed that her daughter was having psychiatric difficulties and demanded that the daughter receive proper psychiatric treatment. The County of San Diego refused to take the daughter to a psychiatrist on the daughter's health plan and Petitioner, a successful family law attorney of good reputation contested the proceedings in juvenile court. None of the daughter's accusations were credible and the social worker did not investigate the credibility of any of the daughter's statements. Petitioner denied all allegations. Petitioner employed a client who owed her money to help with the juvenile court case and to serve subpoenas. That client became angry with petitioner, demanded money from the Petitioner and told CPS that Petitioner had admitted to all the daughter's allegations. The client also reported to CPS that Petitioner had broken into nearly each place the client was to have served a subpoena. Petitioner denied all these allegations.

Petitioner did discover the location of the foster home by legal means and made no secret that she knew that location. Petitioner was concerned for the safety of her daughter in her existing state of mind and watched and enlisted the help of her friends to watch out for the safety of the daughter in the afternoons after school.

After discussion with the social worker on the case, the client untruthfully reported to CPS that Petitioner was stalking the daughter and foster parents. When the county counsel assigned to the juvenile court case, James Wellman, learned of the allegations made by the client, he remarked something like "She might be stalking Judge Elias too" or "I wonder if she is stalking Judge Elias too." Judge Elias was the judge in the juvenile court proceeding. This speculation was enough to activate the police charged with the protection of the San Diego County judges. The police interviewed Judge Elias and his family. A teenage nephew living with Judge Elias reported having seen an empty light ble Toyota or Nissan automobile parked in the neighborhood at some recent time. Petitioner owned a dark blue Chevrolet Cavalier which she had inherited from her father in 2000.

A search warrant was obtained for Petitioner's computers. Petitioner's home and office was searched and her 3 computers were seized and the shadows of the hard drives were reviewed for evidence concerning Judge Elias and to support the missing elements of the crimes for which Petitioner was arrested at the time the search warrant was served on December 6, 2002.

Petitioner was arraigned on four felony counts and two misdemeanors on December 11, 2002. At all hearings, the District Attorney claimed that Petitioner had been stalking Judge Elias. Petitioner's bail was enhanced to $500,000 because of the allegations that she was stalking Judge Elias.

Nothing was ever seen on Petitioner's computers to indicate that she was stalking judge Elias. It was mere speculation

Petitioner filed a P.C. 995 motion in early 2004 and it was summarily dismissed by a Judge Montes on or about May 13, 2004 because "she had to have done something wrong if she knew where her daughter's foster home was located." Petitioner's arguments that there was insufficient evidence at the preliminary hearing to support the elements of the crimes charged were never addressed and appointed defense counsel refused to file a petition for review of the decision on the 995 motion, stating that Private Conflict Counsel told him he could not do that.

After the 995 motion was denied, Petitioner was given another chance to plead guilty to one felony and receive probation. When she refused, her case was referred to Judge Deddeh on May 14, 2004, at the request of the District Attorney for reinstatement of the bench and assignment of the case to Judge O'Neill. Petitioner objected to the reinstatement of the bench and to assignment of the case to Judge O'Neill but her objections were ignored or denied because appointed defense counsel, William Apgar refesed to 'join in' her objections and motions. Mr. Apgar agreed to the recused, biased judges.

Within weeks, Judge O'Neill had unfairly incarcerated Petitioner at unreasonably high bail. Judge O'Neill raised Petitioner's bail to $1,000,000 when she bailed out at $505,000. All Petitioner's objections to O'Neill and to the bench were ignored.

Petitioner was very ill during the Spring and Summer of 2004. CPS and the Juvenile court had returned Petitioner's

daughter to Petitioner in early 2003 after the daughter made strange and not credible allegations against the second foster parents and after the daughter recanted her earlier complaints about Petitioner. In 2003, the daughter was diagnosed with brief psychotic episode, depression and disassociative amnesia. In the Spring of 2004, the daughter was diagnosed with severe, life threatening, Bulemia and Anorexia. Petitioner's daughter was also quite psychotic, again, because, it turned out, she was improperly taking her anti-depresant medication. Not only was Petitioner very ill, she was busy caring for her daughter and did not learn how to try to remove O'Neill and the bench from her case.

In October 2004, O'Neill tried the incarcerated Petitioner in a sham trial resulting in her conviction on all charges. Judge O'Neill refused to relieve Mr. Apgar, grant a continuance of the trial or allow retained counsel to be substituted. Petitioner's further objections and motions to remove Judge O'Neill and the bench were ignored and denied because Mr. Apgar did not join in her motions and objections. Mr. Apgar was unprepared in that he never read the discovery, did not interview witnesses, did not interview Ms. Freeman, did not subpoena witnesses, did not know what to ask the witnesses who appeared to testify without subpoena, and did not have any idea what to ask Ms. Freeman when she testified in her own behalf. Judge O'Neill struck from the record nearly all of Ms. Freeman's testimony. Judge O'neill ridiculed Ms. Freeman in the presence of the jury. Judge O'Neill used demeaning, exasperted and abusive tones toward Ms. Freeman

that she was stalking Judge Elias or that she had committed any crimes at any time whatsoever.

Petitioner appeared in front of Judge Robert F. O'Neill on December 19, 2002 and Judge O'Neill recused himself from the case because of the allegations that Petitioner was stalking his long time good friend Judge Elias. Judge O'Neill stated that he could not be fair toward Petitioner as reason for his recusal. Judge O'Neill recommended that the bench be recused for the same reason and Judge Peter C. Deddeh recused the bench on Janaury 6, 2003. Thereafter, except for one bail hearing and for ministerial matters, Petitioner appeared before a retired judge from another county until the recusal of the bench was vacated on May 14, 2004 and this case assined to Judge O'Neill for trial. For most of 2003, the hearings scheduled before a judge who traveled from a different county to hear cases in which the bench was recused were postponed because the search of Petitoner's was not completed. Nothing wss discovered to support the speculation that petitioner had been stalking judge elias. No evidence was discovered to support the missing elements of the crimes for which Petitioner was charged. Petitioner's automobile was tracked by GPS and no evidence was found to support the allegations she was stalking Judge Elias or the missing elements of the crimes for which she was charged.

Prliminary hearing was held before retired Imperial County Judge Charles Jones on September 3, 2003 and Petitioner was charged with four felonies and three misdemeanors though Judge Jones had dismissed the charge of residential burglary.

in the presence of the jury. Judge O'Neill made many legally incorrect decisions to assure th conviction of Ms. Freeman on all charges.

Petitioner's daughter testified on Ms. Freeman's behalf and recanted her earlier unsubstantiated complaints about Ms. Freeman. Essentially, Ms. Freeman was not permitted by Judge O'Neill to present a defense in this case. The testimony of the prosecution witnesses frequently contradicted earlier testimony; hearsay was introduced into evidence, altered photographs were introduced into evidence; and speculation was treated as fact.

Twenty seven months later, the Court of Appeal reversed these convictions in full on due process grounds allowing retrial.

ARGUMENT

I.

MAY AN ORDER RECUSING A JUDGE OR A BENCH BE VACATED OR MAY A JUDGE WHO HAS RECUSED HIMSELF FOR BIAS BE REINSTATED?

The Court of Appeal does not contend that there is any provision authorizing a disqualified judge to be reinstated. See bottom of page 16 of the decision.

Metropolitan Water District v. Superior Court (1934) 2 Cal.2d 4 allows a recusal order to be vacated when it the recusal was based on a mistake of law or fact. The recusals in this case were not based on mistakes of law or fact. See pages 14, 15 and footnote 6 of the decision.

II.

IS THE REINSTATEMENT OF A RECUSED JUDGE REVIEWABLE ONLY BY WRIT OF MANDATE SOUGHT WITHIN 10 DAYS OF THE REINSTATEMENT?

A. TO WHAT DID THE LEGISLATURE INTEND THAT CCP § 170.3(d) APPLY?

CCP § 170.3(d) states:

> "(d) The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought within 10 days of notice to the parties of thedecision and only by the parties to the proceeding."

CCP § 170.3(d) applies only to decisions determining the qualification of a judge brought pursuant to CCP § 170.1 or CCP § 170.6. (People v. Brown, supra; People v. Carter, supra, People v. Barrera, supra.) If a litigant is not happy with the result of a motion brought under CCP §§ 170.1 or 170.6, he must seek review by writ of mandate within 10 days of notice of the decision. This limitation on appeal

California Supreme court and that was also denied. On direct appeal, Brown asserted that his due process righ to a fair and impartial judge was denied. The Supreme Court of California held that Brown could raise the due process issue on appeal, stating in People v. Brown (1993) 6 Cal.4th 322:

> "Section 170.3(d) forecloses appeal of a claim that a statutory motion for disqualification authorized by secton 170.1 was erroneously denied, and this preclusion applies even when the statutory basis for the motion appears to codify due process grounds for challenging the impartiality of a judge. . . . Nothing in section 170.3(d), however, explicitly insulates a final judgment from appellate attack on the fundamental constitutional ground that the judgment was procured before an adjudicator who was biased."

Brown does not support the notion that CCP § 170.3(d) applies to a reinstatement decision. The Court, in Brown, applies § 170.3(d) to a statutory motion authorized by § 170.1. The Court reasoned earlier, in Brown as follows:

> "In Hull, supra, 1 Cal.4th 266, we concluded this provision [CCP § 170.3(d)] governs both for cause (§170.1) and peremptory (170.6) challenge brought under the statutory scheme. (1 Cal.4th at pp. 269-274.) In the course of our analysis, we observed that the section was designed to promote judicial economy by forcing expedited resolution of all disqualification challenges, and we construed the section as precluding a litigant from challenging denial of a disqualification motion on appeal from a final judgment. (1 Cal.4th at p. 275; accord, Guedalia v. Superior Court (1989) 211 Cal.App.3d 1156,1161.) In other wor ds, we concluded that section 170.3(d) creates an exception to teh general rule that interlocutory rulings are reviewable on appeal from a final judgment."

Brown clearly states that it applies to all disqualification challenges authorized by § 170.1 and § 170.6. Brown does not apply § 170.3(d) to reinstatement decisions or even contemplate that there could be a decision to reinstate a judge after he is recused on his own motion pursuant to § 170.3(a)(1) or by motion to challenge pursuant to § 170.1

of this type of interlocutory order saves judicial resources because delayed review of these orders could possibly invalidate every order made in every case because motions purusuant to CCP §§ 170.1 and 170.6 are common to most every case before the courts. (People v. Brown, supra.) There is no case law contrary to this interpretation. When a judge or litigant believes that one of the basis for disqualification in CCP § 170 et seq. is present, he is to bring a motion to disquaify himself (if he is a judge) or to disqualify the judge (if he is a litigant or attorney for a litigant) pursuant to CCP §§ 170.1 or 170.6. It is the ruling on that motion which is omay only be reviewed by writ of mandate sought within 10 days of the decision. A judge who is the subject of the disqualification motion has no standing to seek review of the decision. Only litigants may seek review of this type of decision.

The language of CCP § 170.3 clearly states that it is only applicable to the determination of the question of the disqualification of a judge.

B. IS REINSTATEMENT OF A RECUSED JUDGE A VIOLATION OF CCP § 170.4(d)?

CCP § 170.4(d) states:

> "Except as provided in this section, a disqualified judge shall have no power to act in any proceeding after his or her disqualifiction."

The reinstatement of O'Neill was clearly a violation of CCP § 170.4(d). The intent of the Legislature in enacting CCP § 170.4(d) was not merely to "further due process by protecting the integrity of the judicial process" as stated in footnote 8 of the Court of Appeal decision on page 16.

The Legislature intended that a judge have no power to act in a proceeding after his recusal except for the ministerial actions listed in CCP § 170.4(a). Any reinstatement of a judge after his recusaland any further judicial action by a recused judge could be said to be a 'violation' of CCP § 170.4. The Court of Appeal has apparently decided that any violation of any statute related to the qualification of judges (CCP § 170 et seq.) is reviewable only by writ of mandate sought within 10 days of the violation.

On page 2, the Court of Appeal states:

> "Freeman did not file a petition for writ of mandate at the time of the reinstatement. Thus, she may not obtain appellate review of error under California's statutory disqualification scheme, but she is entitled to review for constitutional due process error."

The Court of Appeal has decided that CCP § 170.3(d) applies to the reinstatement of a judge and to other violations of CCP § 170.4(d).

C. DID THE LEGISLATURE INTEND THAT CCP § 170.3(d) APPLY TO THE REINSTATEMENT OF A JUDGE IN VIOLATION OF CCP § 170.4(d)?

There is no case law other than this published opinion to support the application of CCP § 170.3(d) to the reinstatement of a judge in violation of CCP § 170.4(d). Based on the language of CCP § 170 et seq., the legislature clearly intended that judges not be reinstated and not take further judicial action after their recusal. CCP § 170.4(d) clearly states that except for the ministerial actions listed in CCP § 170.4(a), a recused judge has no power to act in a case. Once recused, a judge may only make ministerial orders

and rulings in the case. If the Legislature had intended to allow reinstatement of a recused judge, it would have enacted a statute allowing for the reinstatement of a judge. If the Legislature had intended to give power to a judge to reinstate himself in a case, the Legislature would have added this as an exception to CCP 170.4(d) and listed it in CCP § 170.4(a). If the Legislature had intended to allow any further judicial action by a recused judge the Legislature would have made an another exception to CCP § 170.4(d) or would not have enacted CCP § 170.4(d) If the Legislature had intended to allow for the reinstatement of a recused judge, they would have enacted a statute permitting reinstatement of a recused judge.

O'Neill's actions in presiding over the trial of Ms. Freeman is also in violation of CCP § 170.6(1) except that Judge O'Neill's bias toward Ms. Freeman was not established by motion pursuant to CCCP § 170.6 but by the admission of Judge O'Neill and his recusal was on his own motion pursuant to CCP § 170.3(a)(1) which states:

> "(a)(1) Whenever a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal and shall not further participate in the proceeding, except as provided in Section 170.4 . . ."

The entire intent of the Legislature in enacting CCP § 170 et seq. is to prohibit a judge from further judicial action in a proceeding after he is recused (disqualified.) CCP § 170.6 uses the following language:

> "(1) No judge, court commissioner, or referree of any superior court of the State of California shall try any civil or criminal action or special proceeding of any kind or character no hear anymatter therein that involves a contested issue of law or fact when it shall be

> established as hereinafter provided that the judge or commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding."

There is no waiver language in CCP § 170.6(1) because there is to be no waiver when the basis for the disqualification is bias (CCP § 170.3(b)(2)(A).)

The Legislature clearly does not anticipate that there will be a big problem of judges acting further in cases in which they are recused. To address this problem, the Legislature enacted CCP § 170.4(d) stating that judges have no power to act after their recusal or disqualification and CCP § 170.4(c)(1) which states that "all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated." The Legislature clearly intends that the actions of a disqualified judge be vacated.

The Legislature went further in enacting CCP § 170.3(d) to include language that only the parties to the proceeding may appeal a decision as to the disqualification of a judge raised pursuang to motion under CCP §§ 170.1 or 170.6. The judge who is the subject of the CCP §§ 170.1 or 170.6 motion may not appeal the ruling as to whether he is or is not qualified to act in that particular case. The Legislature clearly does not intend that a judge be able to reinstate himself or take any further action once he is recused on his own motion or on motion brought under CCP § 170.1 or §170.6. All judicial action by Judge O'Neill after his December 19, recusal and after his May 14, 2004 reinstatement is in violation of CCP § 170.4(d) and must be vacated. The legislature does

even hint that further action by a judge after his recusal is permissible under any circumstance whatsoever.

The Legislature clearly did not intend that CCP § 170.3(d) apply to the reinstatement of a judge after his recusal. The Legislature clearly did not intend that further judicial action by a recused judge be reviewable only by writ of mandate within 10 days. The Legislature clearly intended that the judicial actions made by a judge after his recusal be vacated. The Legislature did not anticipate the reinstatement of a judge after his recusal. There is no provision for such an event. Reinstatement is merely further judicial action after recusal. The decision to reinstate oneself is further judicial action and is impermissable. The reinstatement of the bench by Judge Deddeh on May 14, 2004 is impermissible further judicial action on his part. Judge Deddeh, too, was recused and without power to reinstate the bench, himself or Judge O'Neill.

Clearly, the Legislature intended that recused judges remain recused and take no further action in the proceeding. The Legislature clearly intended that CCP § 170.3(d) apply to the determination of the question of whether or not a judge should be recused or disqualified in a case. Once a judge is recused and no review is sought by writ of mandate within 10 days, that judge is forever disqualified from that proceeding. In this case both Judge O'Neill and the bench recused themselves on their own motion pursuant to CCP § 170.3(a)(1). Those decisions were only reviewable by writ of mandate sought within 10 days by either Ms. Freeman

or the District Attorney. The Legislature enacted a comprehensive set of statutes concerning the disqualification and the determination of the qualification of judges. The Legislature clearly wanted decisions either recusing or not recusing a judge to be settled finally and quickly. The Legislature clearly did not want judges to reinstate themselves or to act further in a case after they were determined to be recused. Judge O'Neill recused himself from this case on December 19, 2002 and Judge Deddeh recused himself and the bench of the San Diego Superior Court from this case on January 6, 2003. These decisions were final. The Legislature clearly did not intend that judges reinstate themselves and clearly did not intend that CCP § 170.3(d) apply to reinstatements or to further judicial action on the part of recused judges. If the Legislature had intended this it would have stated this intention instead of enacting several sections of law allowing a recused judge no power to act further in a case and requiring that further actions after recusal be vacated. The purpose of CCP § 170 et seq. is to promote fairness and rights to due process. Allowing reinstatement of a recused judge or further action by a recused judge or orders vacating a recusal order would create due process problems as evidenced by this case. The purpose of CCp § 170.3(d) is to promote judicial economy. There is no judicial economy if a decision as to the qualification of a judge is not final if not reviewed within 10 days. If judges are allowed the power to reinstate themselves,

no recusal order is ever final. The Legislature clearly intended that Judge O'Neill's recusal of himself and Judge Deddeh's recusal of the bench be the final word on their qualification to act in this case. If the Legislature had wanted to allow reinstatement, the Legislature would have enacted a provision for reinstatement. If the Legislature had intended that CCP § 170.3(d) apply to reinstatements or to further judicial action by a recused judge, the Legislature would have said that CCP § 170.3(d) applied to reinstatements and further judicial action by a recused judge. The Legislature did not do this. The Legislature clearly stated in CCP § 170.4(d) that a recused judge has no power to act further in that case. To interpret CCP § 170.3(d) as applying to reinstatement decisions or reinstatements of any kind is to open up the question of the qualification of a judge at any time creating due pr ocess problems, confusion and the unnecessary expenditure of judicial resources in review of the actions of recused judges. If the Legislature had intended CCp 170.3(d) to apply to reinstatement decisions there would be an exception for reinstatement decisions in CCP § 170.4(d) and CCP § 170.4(a). If teh Legislature had intended that CCP § 170.3(d) apply to reinstatements, it would have said so in CCP 170.3(d) and not expressed the intent that decisions concerning the qualification of a judge be settled early in a case to avoid wasted judicial resources. The Legislature clearly did not intend that judges be reinstated or that CCP § 170.3(d) apply to 'reinstatements'.

III.

DOES A JUDGE WHO HAS RECUSED HIMSELF REGAIN POWER TO ACT IN A CASE UNLESS REVIEW IS SOUGHT BY WRIT OF MANDATE WITHIN 10 DAYS OF HIS REINSTATEMENT AND/OR FURTHER JUDICIAL ACTION IN A CASE?

If this decision of the Court of Appeal is not reviewed and is allowed to become law, the effect of this decision is to allow a judge to regain power in a case after his recusal. This is not the intent of the Legislature. This does not promote fairness or due process. The Legislature intended that a judge have no power to act after his recusal/ disqualification. To allow reinstatement of that power is probably a violation of due process in all cases. This does not promote judicial economy. It promotes judicial chaos with respect to questions of when or if a judge should be reinstated. It wastes judicial resources deciding issues related to reinstatement. It wastes appellate resources because frequent review would be required to determine if reinstatements violated constitutional due process rights. The Legislature intended that a judge have no power to act in a case after his recusal or disqualification and that is the law (CCP § 170.4(d).) The Legislature clearly did not intend that a recused judge ever act further in a case or be reinstated. This decision allows a judge to regain power to act in a case by either reinstatement or just acting further in a case unless review is sought by writ of mandate within 10 days of reinstatement. This means that a court of appeal could decide that a judge was not recused and could act further in a case. This is opposite the intention of the Legislature

in prohibiting judges from seeking appellate review of orders/ determinations that they are disqualified (CC P § 170.3(d).) If a judge disagrees with a decision to disqu alify himself from a case, he would only have to reinstate himself by continuing to act in the case. If no one sought writ review within 10 days he would be reinstated. If writ review was sought within 10 days, the court of appeal would review his disqualification. If no writ review was sought within 10 days he would have regained power to act in the case, could proceed with as much bias as he wished and the poor defendant would be imprisoned for years seeking appellate review of the violation of his due process rights in a direct appeal. This is clearly not the intent of the Legislature and is in conflict with all principles of due process and and all existing case authority. If CCP § 170.3(d) applies to reinstatements then judges can regain power in cases after they recuse themselves for bias toward a party or after they are disqualified for any other reason. CCP § 170.3(d) only applies to the original decision granting or denying a recusal or disqualification. CCP § 170.3(d) does not apply to reinstatements of recused/disqualified judges. There can be no reinstatement of a judge after his recusal/disqual-ification. The actions of a disqualified judge are void and may be vacated at any time.

IV.

DOES PEOPLE V. CARTER SUPPORT THE APPLICATION OF CCP § 170.3(d) TO A DECISION TO REINSTATE A RECUSED JUDGE?

At page 8 of the February 5, 2007 decision, the Court of Appeal states:

> "California has enacted a comprehensive statutory scheme addressing the grounds and procedures for disqualification of a trial judge. A party seeking appellate review based on a violation under the disqualifictation statute must file a petition for writ of mandate within 10 days of notice of the disqualification decision. (Code Civ. Pro., § 170.3, subd. (d); People v. Brown (1993) 6 Cal.4th 322 (Brown); People v. Carter (2005) 36 Cal.4th 1215,1242, fn. 19; People v. Barrera (1999) 70 Cal.App.4th 541,550-551.)"

At page 2, the Court of Appeal decision states:

> "Freeman did not file a petition for writ of mandate at the time of the reinstatement. Thus, she may not obtain appellate review of error under California's statutory scheme, but she is entitled to review for consitutional due process error."

The Court of Appeal has decided that CCP § 170.3(d) applies to a decision to reinstate a judge. There is no provision for reinstatement of a judge once he is recused or disqualified. There is no statute or case law authorizing the reinstatement of a judge after his recusal or disqualification. CCP § 170.3(d) applies to motions to disqualifiy a judge. The statutory scheme clearly does not indicate that the Legislature intended that judges be reinstated or that a reinstatement decision be reviewed only by writ of mandate sought within 10 days of the reinstatement decision.

The Court of Appeal cites People v. Carter in support of the application of CCP § 170.3(d) to a decision to reinstate a judge. People v. Carter does not support this idea in the least.

In People v. Carter, Carter challenged Judge Lassiter's impartiality by way of a CCP 170.1 motion and the motion was denied. The court of appeal held that Carter was precluded from raising the question of Judge Lassiter's impartiality on appeal and that he should have sought review of the decision denying his CCP § 170.1 motion by writ of mandate within 10 days of the decision. This is the proper application of CCP § 170.3(d). CCP § 170.3(d) does apply to decisions determining the qualification of a judge on motion pursuant to CCP §§ 170.1 or 170.6. It could even be said to apply to apply to the December 19, 2002 decision of Judge O'Neill to disqualify himself or to the Janaury 6, 2003 decision of Judge Deddeh to disqualify the bench. It does not apply to reinstatments of a disqualified judge, to decisions to reinstate a disqualified judges or to further action taken by a disqualified judge. Once disqualified, a judge is forever disqualified from that case. People v. Carter does not support the court of Appeal decision to apply CCP § 170.3(d) to reinstatements of a recused (disqualified) judge.

V.

DOES PEOPLE V. BROWN SUPPORT THE APPLICATION OF CCP § 170.3(d) TO A DECISION TO REINSTATE A RECUSED JUDGE?

Brown filed a motion pursuant to CCP § 170.1 to challenge the impartiality of Judge Mortland. Judge Tomlin decided that Judge mortland was impartial and denied the CCP § 170.1 motion. Brown filed a petition for writ of mandate within 10 days and it was denied by the court of appeal. Brown sought review of the court of appeal decision by the

or § 170.6. The Court does not mention "violations" of the statutory scheme or "violations" of CCP § 170.4(d). The court clearly does not intend to apply § 170.3(d) to anything other than the ruling on a motion (challenge) brought pursuant to, and authorized by, either § 170.1 or § 170.6.

People v. Brown does not support the Court of Appeal's decision that § 170.3(d) applies to a decision to reinstate a recused, disqualified judge. This would not promote judicial economy because nearly every reinstatement would violate consititutional due process rights. CCP § 170 et seq. promotes judicial economy by requirien the further judicial actions of a recused judge to be vacated. udges might be encouraged to violate the statutes and reinstate themselves if they could regain power to act and if their further rulings and orders would not be vacated. Judges might be encouraged to reinstate themselves if § 170.3(d) applied to a reinstatement decision as asserted by the Court of Appeal in this decision. This would create much appearance of bias and many violations of due process. It was not the stated intention of the Court, in Brown that § 170.3(d) apply to a reinstatement decision.

VI.

DOES PEOPLE V. BARRERA SUPPORT THE APPLICATION OF CCP § 170.3(d) TO A DECISION TO REINSTATE A RECUSED JUDGE?

The facts in People v. Barrera (1999) 70 Cal.App.4th 541 are completely different from this case. The Commissioner in Barrera had served briefly as the public defender for Mr. Barrera earlier in the case. CCP § 170.1 states that a judge shall be disqualifiedwhen "The judge served as a

a judge shall be disqualified when "The judge served as a lawyer in the proceeding" and CCP § 170.3(b)(2)(B) forbids a waiver where the basis for the disqualification is that the judge has served as an attorney in the matter. The only similiarity between the Barrera case and this case is that the other non-waivable basis is that of bias and bias is the basis for O'Neill's recusal (as well as the recusal of the bench).

Commissioner Duffey did not disqualify himself. Instead, he stated that he could be fair and impartial in the case and obtained oral agreement from the parties and their attorneys that he continue on the case after his dsclosure of the fact that he had appeared as an attorney for Mr. Barrera early in the case. After conviction, Mr. Barrera claimed that the conviction was void because CCP § 170.3(b)(2)(B) forbids the waiver. The Court of Appeal found no Legislative intent that the waiver of a non-waivable basis for disqualification results in a void judgment. The Court decided that it would be unfair to allow Barrera to waive the basis for the disqualification and then claim the result was void if he was not satisfied with the result. The Court did not allow Barrera a second bite at the apple.

Ms. Freeman did not waive the recusals or the bias of O'Neill. Ms. Freeman constantly objected to the reinstatements. At no time did Commissioner Duffey recuse himself. Barrera did not waive a previous recusal. The District Attorney requested the reinstatement of the bench and O'Neill and

the District Attorney participated in the denial of a fair trial to Ms. Freeman. The District Attorney knew that both O'Neill and the bench were recused and knew that the actions of a recused judge are void and must be vacated. To allow the District Attorney to retry Ms. Freeman is not a conservation of judicial resources but a second bite at the apple for the District Attorney after obtaining a conviction that was certain to be overturned. All statutes, case law and the intent of the Legislature is that there be no reinstatements of judges after their disqualification or recusal, that a judge has no power to act after his recusal or disqualification, and that all further judicial actions taken after his recusal or disqualification be vacated.

People v. Barrera does not support the decision of the Court of Appeal to apply CCP § 170.3(d) to reinstatement decisions. Barrera merely states that the waiver of a non-waivable basis for disqualification does not result in a void judgement. It is clearly the intent of the Legislature that the reinstatement of a recused judge result in a void judgment.

VII.

IS THIS JUDGMENT VOID AND SHOULD IT BE VACATED?

A. IS A JUDGE WHO HAS RECUSED HIMSELF WITHOUT POWER TO ACT FURTHER IN THAT CASE?

CCP § 170.4(d) states:

"[A] disqualified judge shall have no power to act in any proceeding after his or her disqualification."

At page 1 of this decision, the Court stated:

> "Once disqualified, the judge is precluded from acting in the case except on limited and clearly defined matters.
>
> (See Geldermann, Inc. v. Bruner (1991) 229 Cal.App.3d 662,665; Christie v. City of El Centro (2006) 135 Cal.App. 4th 767, 777-780.) Further, there is no statutory provision authorizing a disqualified judge to be reinstated to preside over the trial when the judge was disqualified during earlier proceedings."
>
> CCP § 170.4(c)(1) states:
>
> "[A]ll orders and rulings of the [disqualified] judge . . . shall be vacated."

There appears to be no dispute that the actions of a disqualified, recused judge are void under California law. The analysis in Christie v. City of El Centro is especially thorough. This recent decision (2006) by the Fourth District Court of Appeal analyses the case law and follows proper case authority, relying on Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450,455 to conclude that the actions of a disqualified judge is "void and must be set aside."

This decision seems to recognize this precedent but and the lack of authority for a judge to be reinstated or to preside over a trial when he was disqualified earlier in the proceeding. This decision, however, creates a requirement that this law does not apply unless a court of appeal decides that it does on review by writ of mandate sought within 10 days of the reinstatement. The Court of Appeal also seems to decide that if a litigant brings a motion pursuant to CCP § 170.1 to to object to the reinstatement on the grounds taht the judge(s) are already recused, that this motion is also limited to review by writ of mandate sought within 10 days. It matters little when or how or how often a litigant

complains about further judicial action by a recused judge. The actions of the recused judge are still void because he has no power to act further in the proceeding. CCP § 170.3(d) does not apply to decisions to reinstate a recused judge or to complaints that a recused judge is acting further in a case. CCP § 170.3(d) does not apply to anything after the decision to recuse a judge. it is error for the Court of Appeal to use CCP § 170.3(d) as a reason to not vacate the actions of the judges in this case after their recusal. Ms. Freeman did what was required of her when she reminded the court that O'Neill and the bench were recused. It is and was the duty of Judge O'Neill and Judge Deddeh to not act further in this case after their disqualifications. O'Neill and the bench did not regain power to act in this case merely because Ms. Freeman did not seek writ review within 10 days of their further judicial action in this case. If she had sought writ review there would have been no question to review. This would not have been review of a decision to see whether the judge was qualified or not. The judges had already determined that they were not qualified and no one sought review of their decisions within 19 days of the recusals of Judge O'Neill and the bench. The proper method to prevent further action by a recused judge is a writ of prohibition. CCP § 170.3(d) is improperly applied in this case.

B. IS FURTHER JUDICIAL ACTION AFTER RECUSAL VOID?

All case law states that the further judicial action by a recused judge is void. Giometti v. Ettienne (1934) 219 Cal.687; Johnson v. German America Inc. Co. (1907) 150 Cal. 336; Morrissey v. Gray (1911) 160 Cal. 390; People v. Ebey

(1907) 6 Cal.App.769; Noorthoek v. Superior Court (1969) 269 Cal.App.2d 600; Zeismer v. Superior Court (2003) 107 Cal.App.4th 360; Zilog, inc. v. Superior Court (2001) 86 Cal.App.4th 1309,1323; In re Jenkins (1999) 70 Cal.App.4th 1162, 1165-1167; In re Jose S. (1978) 78 Cal.App.4th 619,628; McCauley v. Superior Court 91961) 190 Cal.App.2d 562,565; and Christie v. City of El Centro (2006) 135 Cal.App.4th 767.

CCP §§ 170 et seq., as amended in 1990, does not change this law. The enactment of CCP § 170.3(d) was never intended to allow a judge to take further action after his recusal. The present statutes still result in void orders and void convictions when applied to the actions of a recused judge. Once disqualified, a judge cannot be reinstated and CCP § 170.3(d) does not apply to a decision of reinstatement or to a reinstatement.

C. WHEN MAY THE ISSUE THAT THE ACTIONS OF A RECUSED JUDGE ARE OUTSIDE THE JURISDICTION OF THE COURT BE RAISED?

All of the actions in Ms Freeman's case since May 14, 2004 have been outside of the jurisdiction of the court and are void as amatter of law. This jurisdictional issue may be raised at any time.

T.P.B. V. Superior Court (1977) 66 Cal.App.3d 381 states:

> "Any act of a disqualified judge in violation of Section 170 of California Code of Civil Procedure is absolutely void whenever brought into question and a judgment rendered by such a judge is open to attack at any time. (Cadenasco v. Bank of Italy (1932) 214 Cal. 562; Cuyamaca Water Co. v. Superior Court (1924) 193 Cal. 584; In re Harrington (1948) 87 Cal.App.2d 831.) In the instant case, the judge admitted his disqualification on the basis that by

> reason of bias or perjudice a fair and impartial trial could not be had before him. From that moment, the judge was disqualified from acting or sitting in the case other than to declare a mistrial. under Section 170 it was required that th action or proceeding be heard by another judge [not disqualified] . . . The situation in the present case did not involve a mere error of law or procedure; rather it involved the very jurisdiction of the trial judge to proceed with the action."

The law continues to require that the actions of a disqualified judge are void. The law continues to be that the actions of a disqualified judge are outside the juris-

dication of the court. There is no case law which states otherwise. The only time the actions of a disqualified judge are 'voidable' is where the judge is not yet determined to be disqualified at the time the orders are made.

CCP § 170.3(d) only applies to contested hearings as to whether a judge is qualified to act in a case and if he is determined to be disqualified, his actions since the §170.1 or §170.6 motion was filed are vacated. In T.P.B. and in this case, the judge determined that he was biased. In Ms. Freeman's case, Judge O'Neill went so far as to recuse himself and recommend that the bench recuse itself as well.

CCP § 170.4(d) clearly provided that a judge, once recused, has absolutely no power to act further in that case.

The statutes and all case law state that, once recused, a judge has no jurisdiction, in the fundamental sence, to act further in that case. T.P.B. is the controlling precedent: This judgment of conviction is void and this lack of jurisdiction may be raised at any time.

CONCLUSION

For the above reasons, this judgment of conviction is void. CCP § 170.3(d) does not apply to reinstatements of judges. CCP § 170.3(d) does not apply to 'violations' of CCP § 170 et seq. or vilations of CCP § 170.4(d). CCP § 170.3(d) only applies to the determination of the gustion of the qualification of a judge. There is no provision for a judge to be reinstated after he recuses himself for bias toward a party. A disqualified judge does not regain power to act in a case by reinstating himself unless a litigant seeks review of his decision to reinstate himself by writ of mandate sought within 10 days and unless a court of appeal decides that he should not be reinstated. A judge has no power to act after his disqualification. Any judicial action in a case by a judge after he has been disqualified is void and may be vacated at any time. A judge is without fundamental jurisdiction in a case after his recusal.

The Court of Appeal errored in deciding that because Ms. Freeman did not seek review by writ of mandate within 10 days of the reinstatement of Judge O'Neill she is limited to review of only the violation of her due process rights. This decision does not promote judicial economy, fairness, principles of due process or advance the integrity or public perception of the courts. This decision allows a judge to regain power to act after he is disqualified or after he recuses himself for bias. This was not the intent of the Legislature when it enacted CCP § 170 et seq. There is no statute or case law to support this decision. Review of

this decision is necessary to secure uniformity of decision, to settle this important question of law, and to preserve the integrity of the courts and the judicial process.

Respectfully submitted,

Marilyn K. Freeman

Marilyn K. Freeman
Petitioner

CERTIFICATE OF COUNSEL
PURSUANT TO CALIFORNIA RULES OF COURT, RULE 14(c)(1)

I, Marilyn K. Freeman, certify,

1. I am the petitioner, and, if called as a witness could testify competently to the matters asserted herein. I make this certification pursuant to California Rules of Court, rule 14(c)(1).

2. I certify that the petition for review presented herein is over 30 pages in length. I do not know the word count as I have no access to a word processor.

I declare that the foregoing is true and correct pursuant to the laws of perjury of the State of California and that this declaration is executed on March 14, 2007 at Corona, California.

Dated: March 14, 2007

Marilyn K. Freeman

Marilyn K. Freeman

CERTIFIED FOR PARTIAL PUBLICATION[1]

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARILYN KAYE FREEMAN, Defendant and Appellant.	D046394 (Super. Ct. No. SCD171601)
In re MARILYN KAYE FREEMAN on Habeas Corpus.	D048111, D049238 (Super. Ct. No. SCD171601)

Consolidated appeal from a judgment of the Superior Court, Robert F. O'Neill, Judge, and petitions for writ of habeas corpus. Judgment reversed, petitions denied.

Carl M. Hancock for Petitioner and Appellant in nos. D048111 and D046394.

Marilyn Kaye Freeman, in pro. per., for petitioner in no. D049238.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela Ratner Sobeck and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

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1 Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part II.

Marilyn Freeman challenges a judgment convicting her of solicitation to commit kidnapping, residential burglary, two counts of stalking, and misdemeanor child endangerment and battery. The offenses arose from Freeman's assaultive conduct towards her teenage daughter, and actions Freeman took against her daughter's foster parents.

Freeman argues the judgment should be reversed because the Superior Court judge who presided over her trial had previously disqualified himself and was later reinstated into the case. We agree with Freeman's contention. In pretrial proceedings, the judge recused himself based on his friendship with a judicial colleague who Freeman was rumored to be stalking. When the prosecution later notified the superior court that it had found no evidence to substantiate these stalking rumors, the supervising judge assigned the case to the disqualified judge for trial, essentially retracting the prior disqualification order. The disqualified judge accepted the assignment over Freeman's objection.

Freeman did not file a petition for writ of mandate at the time of the reinstatement. Thus, she may not obtain appellate review of error under California's statutory disqualification scheme, but she is entitled to review for constitutional due process error. For reasons we shall explain in the published portion of this opinion, we conclude that fundamental due process error occurred when the judge, previously recused for bias, was reinstated into the case notwithstanding the repeated protests of the defendant and under circumstances reflecting a persistent appearance of bias. The judge's reinstatement created a serious likelihood of undermining public confidence in an impartial judiciary.

and created an error of constitutional dimension. Because the error affected the integrity of the judicial process, reversal is required.

In the unpublished portion of this opinion, we reject Freeman's arguments that the trial court erred in denying her motions for acquittal and that she could not properly be charged with solicitation to commit kidnapping. Thus, there is no bar to retrial on the charged counts. We also deny Freeman's two petitions for writ of habeas corpus that raise issues related to those presented in her appeal.

FACTUAL AND PROCEDURAL BACKGROUND

In the published portion of this opinion addressing Freeman's challenge to the reinstatement of the disqualified judge, we need only briefly summarize the facts underlying the offenses. In accord with our standard of review on appeal, we present the facts in the manner most favorable to the judgment. (*People v. Dayan* (1995) 34 Cal.App.4th 707, 709.)

On September 10, 2002, Freeman's 14-year-old daughter (E.) called the police reporting that her mother had assaulted her that day and had been doing so on a regular basis. E. was removed from her home and placed in a foster home. Freeman, an attorney, then engaged in an aggressive campaign to disrupt the foster placement and terrorize her daughter's foster parents in a misguided attempt to monitor and reunite with her daughter. Freeman solicited one of her clients to kidnap E. from the foster parents, burglarized the foster parents' home, chased the foster parents at high speeds on the freeway, followed them in her car on city streets, glared at them "in [an] evil manner"

when she was spotted, spied on them at their residence and elsewhere, took pictures of them, and sprayed her perfume in their vehicle.

The jury found Freeman guilty of solicitation to commit kidnapping, residential burglary, stalking, and misdemeanor child endangerment and battery. She was sentenced to prison for six years.

DISCUSSION

I. *Challenge to Reinstatement of Disqualified Judge*

Freeman asserts Superior Court Judge Robert O'Neill, who had disqualified himself for bias during pretrial proceedings, was erroneously reinstated to preside over her trial.

A. *Background*

On December 19, 2002, after Freeman was arrested and taken into custody, Judge O'Neill presided over a readiness conference. Before the hearing commenced, defense counsel advised Judge O'Neill that Freeman wanted new appointed counsel and asked for a *Marsden*[2] hearing. After considering Freeman's and her counsel's input, the trial court granted the request for new counsel.

At the conclusion of the *Marsden* hearing, Freeman, who was still in custody, requested that Judge O'Neill conduct a bail review hearing. Freeman stated that she wanted to request house arrest because there were "rumors through the back hallways that [she] was stalking" another Superior Court judge, Judge Harry Elias. The stalking

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2 *People v. Marsden* (1970) 2 Cal.3d 118.

rumors apparently arose from matters observed on Freeman's computer that had been seized by the authorities in connection with the current case.

Judge O'Neill stated that he had heard about the allegation, and explained that he had known Judge Elias for 23 years, they had worked together in the district attorney's office, and they were friends. Because of his relationship with Judge Elias, Judge O'Neill decided to "recus[e] [himself]" from the bail issue. Freeman informed Judge O'Neill that in another proceeding Judge Elias "made it very clear he [did not] think there [was] any substance to [the stalking rumors]." Notwithstanding this representation by Freeman, Judge O'Neill reiterated he was not "the person [who] should hear" Freeman's bail motion. Further, Judge O'Neill suggested that given the allegations concerning Judge Elias, Freeman might want to discuss with her counsel whether the bail issue should be considered by a judge who was not a member of the San Diego County Superior Court bench.

At a rescheduled readiness conference on January 6, 2003, Freeman's new counsel advised Judge O'Neill that Supervising Criminal Judge Peter Deddeh had requested that all further dates be set in his department so that the case could be assigned to an "independent retired judge." Judge O'Neill complied and set the subsequent proceedings to be heard in Judge Deddeh's department.

Between January and early September 2003, Judge Deddeh and several other San Diego judges presided over additional hearings related to appointment of counsel, bail review, discovery, and other matters. On September 3, 2003—in an apparent effort to avoid potential conflicts with the local bench given the Judge Elias stalking rumors—

Judge Deddeh assigned the case to retired Judge Charles Jones for all purposes. Judge Jones presided over the preliminary examination and bound Freeman over for trial. Between September 2003 and April 2004, Judge Jones presided over various pretrial matters. At a May 14, 2004 status conference, the district attorney advised Judge Jones that "the reason [for the assignment of the case to him] no longer exists." Accordingly, Judge Jones stated he would "transfer the matter back to [Judge Deddeh] . . . and let him decide" which judge should be assigned to the case.

At a hearing on May 14, 2004, Judge Deddeh concluded there was no need for recusal of the San Diego County Superior Court bench, explaining: "[T]he only reason the bench was being recused [was] because there [was] a possibility that . . . on Miss Freeman's computer there was some indication that she was stalking Judge Elias. Apparently the computer has been reviewed. So out of an abundance of caution, [the prosecution] said Judge Elias may be a victim in this case. And so apparently he's not a victim in this case. And so there is apparently no reason for the bench to recuse itself." Judge Deddeh then assigned the case to Judge O'Neill for all purposes.

At this point, Freeman objected (speaking directly to the court and not through her counsel), asserting that Judge O'Neill had already recused himself because he was "a good friend of Judge Elias." Judge Deddeh rejected the assertion, noting the Judge Elias matter had been resolved, but that Judge O'Neill could himself decide whether this was "an issue for him."

On May 14, 2004, Freeman personally filed a handwritten challenge to Judge O'Neill. The pleading stated that Freeman was challenging Judge O'Neill "for cause,"

and cited the circumstances of Judge O'Neill's December 2002 recusal. Freeman's counsel did not join in the challenge.

On May 20, 2004, Judge O'Neill and Judge Deddeh evaluated the motion in a series of hearings. Judge O'Neill's minute order reflecting actions at a 9:00 a.m. hearing states: "Peremptory challenge (declaration) filed. Per the court, file to be sent back to Dept. 11 for reassignment."[3] In Department 11, Judge Deddeh ruled that the challenge could not be honored unless it was filed by defense counsel, and transferred the matter back to Judge O'Neill. At a 10:00 a.m. hearing before Judge O'Neill, Judge O'Neill initially analyzed the challenge as if it were a peremptory challenge under Code of Civil Procedure section 170.6, but Freeman's counsel interjected that the challenge was for cause (i.e., Code Civ. Proc., § 170.1). Freeman's counsel stated that Freeman was satisfied with Judge O'Neill and suggested she wanted to withdraw the challenge. However, Freeman herself posited that Judge O'Neill was not allowed to "rule on his own challenge." Judge O'Neill agreed and transferred the matter back to Judge Deddeh for a ruling. At a 2:00 p.m. hearing before Judge Deddeh, Freeman (personally and through counsel) withdrew the challenge, and the case was sent back to Judge O'Neill. The minutes for the 2:00 p.m. proceeding state "[t]he defendant withdraws her CCP 170.6

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3 The discussion giving rise to this minute order was not transcribed.

challenge," whereas the reporter's transcript of the 2:00 p.m. proceeding reflects that Judge Deddeh characterized the motion as a "170.1 challenge."[4]

From July through October 2004, Judge O'Neill ruled on various pretrial matters. On October 18, 2004, the date set for the commencement of trial, Freeman herself again raised the issue of Judge O'Neill's earlier recusal from her case in December 2002, and presented a typed motion to disqualify Judge O'Neill for cause under Code of Civil Procedure section 170.1. Freeman asserted that she believed Judge O'Neill was prejudiced because he told her so in December 2002, and that she was "bullied" by her attorneys to keep him as the judge because they told her she would be assigned someone "really terrible." Judge O'Neill responded that the issue had already been resolved by Judge Deddeh, and noted that Freeman's disqualification motion had been withdrawn and further that the motion must be brought by Freeman's attorney, not Freeman herself. Freeman did not file a petition for writ of mandate challenging the rejection of her disqualification motion.

B. *Governing Legal Principles*

California has enacted a comprehensive statutory scheme addressing the grounds and procedures for disqualification of a trial judge. A party seeking appellate review based on a violation under the disqualification statute must file a petition for writ of mandate within 10 days of notice of the disqualification decision. (Code Civ. Proc.,

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[4] On appeal, Freeman does not contend her May 2004 handwritten motion was intended to be a peremptory challenge.

§ 170.3, subd. (d); *People v. Brown* (1993) 6 Cal.4th 322, 333 (*Brown*); *People v. Carter* (2005) 36 Cal.4th 1215, 1242, fn. 19; *People v. Barrera* (1999) 70 Cal.App.4th 541, 550-551.) The writ requirement is designed to promote judicial economy because "'"permitting [a disqualification] ruling to be attacked later on appeal of the judgment could invalidate every ruling made by the trial court judge after the disqualification motion was denied."'" (*Brown, supra*, 6 Cal.4th at p. 333, and fn. 8.)

Ordinarily, the failure to file a writ petition precludes a subsequent appellate challenge based on a disqualification claim. However, when the appellant's disqualification claim implicates *constitutional* due process rights, appellate review is permitted. In *Brown, supra,* 6 Cal.4th at pages 334-335, the California Supreme Court concluded that a party may raise a constitutional due process disqualification ground on appeal, even though the statutory disqualification ground addressing essentially the same due process issue may be reviewed only by writ. In *Brown*, the defendant had brought a writ petition challenging a disqualification decision on a statutory ground, and the petition was summarily denied. The *Brown* court concluded the defendant's due process claim was entitled to the procedural protections afforded on appeal (i.e., oral argument and a written opinion) and thus he could again raise the issue in his appeal from the final judgment. (*Id.* at p. 336.) In dicta, the *Brown* court suggested that in some cases a negligent failure to file a writ petition may constitute a forfeiture of the constitutional claim. (*Ibid.*) However, subsequent to *Brown*, the high court clarified that as long as the disqualification claim was raised at trial, it could be raised on appeal on constitutional grounds even if a writ petition was not filed. (*People v. Chatman* (2006) 38 Cal.4th 344,

363.) That is, "a defendant who raised the [disqualification] claim at trial may always 'assert on appeal a claim of denial of the due process right to an impartial judge.'" (*Ibid.*)

In this appeal, Freeman has raised numerous arguments challenging Judge O'Neill's participation in the trial. Because Freeman did not file a writ petition, our review is limited to determining whether Judge O'Neill's reinstatement into the case amounted to constitutional due process error. In particular, we evaluate Freeman's claims that her due process rights were violated because Judge O'Neill's initial decision to disqualify himself shows he was biased, and his reinstatement to preside over her trial was improper.

Judicial bias may arise from actual bias or the appearance of bias. Actual bias exists if the judge has a mental predilection or prejudice regarding a particular party. (*In re Marriage of Lemen* (1980) 113 Cal.App.3d.769, 789.) An appearance of bias exists when a reasonable person aware of the facts of the case might harbor a doubt that the judge would be able to be impartial. (*Brown, supra,* 6 Cal.4th at pp. 336-337; see *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 103-104.) Disqualification of a judge based on an appearance of bias is designed to protect the integrity of the legal system by promoting public confidence in an impartial judiciary. As pronounced by the California Supreme Court more than a century ago: "The trial of a case should not only be fair in fact, but it should also appear to be fair. And where the contrary appears, it shocks the judicial instinct to allow the judgment to stand." (*Pratt v. Pratt* (1903) 141 Cal. 247, 252.) In *Johnson v. Superior Court* (1958) 50 Cal.2d 693, 697, our high court again underscored the importance of the appearance of judicial

neutrality, stating: "It is important, of course, not only that the integrity and fairness of the judiciary be maintained, but also that the business of the courts be conducted in such a manner as will avoid suspicion of unfairness." Similarly, a Court of Appeal noted: "[T]he source of judicial authority lies ultimately in the faith of the people that a fair hearing may be had. Judicial behavior inimical to that necessary perception can never be countenanced and may well provide a basis for reversal . . . ." (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 253.)

It is clear that the existence of actual bias violates constitutional due process and requires reversal. (See *Bracy v. Gramley* (1997) 520 U.S. 899, 904-905; *People v. Vasquez* (2006) 39 Cal.4th 47, 69, fn. 12.) The constitutional import of the *appearance* of bias is less well defined. The United States Supreme Court has not clearly indicated whether, or under what circumstances, an appearance of judicial bias might rise to the level of a constitutional due process violation. (Compare *Bracy v. Gramley, supra*, 520 U.S. at pp. 904-905 [confining constitutional issue to actual judicial bias] with *Taylor v. Hayes* (1974) 418 U.S. 488, 501 and *In re Murchison* (1955) 349 U.S. 133, 136 [referring to due process as involving both actual and appearance of bias]; see *Welch v. Sirmons* (10th Cir. 2006) 451 F.3d 675, 700-701 (*Welch*) [discussing the unresolved issue]; *People v. Chatman, supra*, 38 Cal.4th at p. 363 [declining to decide the issue].)

Several federal courts have considered the appearance of bias issue in the context of habeas proceedings, and, relying on United States Supreme Court decisions, have concluded there is no clearly established federal constitutional right to disqualification of a judge based on the "*mere* appearance of bias." (*Welch, supra*, 451 F.3d at p. 701, italics

added; *Del Vecchio v. Illinois Dept. of Corrections* (7th Cir. 1994) 31 F.3d 1363, 1371-1372, 1375 (*Del Vecchio*); *Johnson v. Carroll* (3d Cir. 2004) 369 F.3d 253, 260-263.) However, these courts have recognized that when there is something *more* than a "mere" appearance of judicial bias, constitutional due process rights may be implicated. In *Welch,* the court noted that the United States Supreme Court decisions referring to the appearance of bias in the constitutional context involved situations "in which the circumstances are sufficient to give rise to *a presumption or reasonable probability of bias*." (*Welch, supra*, at p. 700, italics added.) Similarly, in *Del Vecchio*, the court concluded the high court's references to the appearance of bias did not refer to "bad appearances alone," but rather envisioned "circumstances that present 'some [actual] incentive to find one way or the other' or '*a real possibility of bias*. . . .'" (*Del Vecchio, supra*, 31 F.3d at p. 1375, brackets in original, italics added.)

California courts have also suggested there may be circumstances where the appearance of judicial bias has constitutional import. In *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1033-1034, the California Supreme Court reasoned that a hearing officer's financial interest in the case created an objective "appearance of bias that has constitutional significance" because the financial conflict might tempt the average adjudicator. In several cases the Courts of Appeal have equated the appearance of bias with fundamental error requiring reversal when the record was replete with inappropriate statements by the judge such that "the average person could well entertain doubt whether the trial judge was impartial." (*Catchpole v. Brannon, supra*, 36 Cal.App.4th at p. 247; *Hernandez v. Paicius* (2003) 109 Cal.App.4th 452, 455, 461-463;

Hall v. Harker (1999) 69 Cal.App.4th 836, 841-843, overruled on other grounds in *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 346.) Recently, the California Supreme Court concluded that an erroneous denial of a motion to recuse a *prosecutor* for the appearance of bias did not, under the particular circumstances of the case, rise to the level of constitutional error. (*People v. Vasquez, supra*, 39 Cal.4th at pp. 64-65.) However, in reaching this conclusion the court contrasted the standards governing prosecutorial bias with those governing *judicial* bias, and referred to the deeply-rooted tradition of maintaining "'*rigid requirements' of adjudicative neutrality* . . . ." (*Id.* at p. 64, italics added.)[5]

These federal and California decisions reflect that there may be situations where the appearance of judicial bias is sufficiently elevated so as to invoke constitutional due process rights. Thus, judicial bias may implicate constitutional due process not only when it is based on actual bias, but also when it involves an appearance of bias that could undermine the public's confidence in a fair judiciary.

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5 In *Vasquez*, the appearance of bias arose from a family relationship between a defendant and two employees in a large prosecutor's office. (*People v. Vasquez, supra*, 39 Cal.4th at p. 65.) To support its conclusion that there was no constitutional violation, the *Vasquez* court noted that the United States Supreme Court has generally not imbued situations involving the potential bias of a judge based on kinship or other personal connections (as opposed to a judge's direct pecuniary or personal stake in a case) with constitutional significance, but rather has left "that line-drawing process to state disqualification and disciplinary law, with only 'the most extreme of cases' being recognized as constitutional violations." (*Id.* at pp. 63-65.) This analysis is consistent with the conclusions in the federal cases that something more than the "mere" appearance of judicial bias is necessary to trigger a constitutional due process violation.

C. *Analysis*

At the December 2002 hearing, Judge O'Neill recused himself based on his awareness of rumors that Freeman had been stalking Judge Elias, with whom Judge O'Neill had a longtime friendship. Judge O'Neill insisted on disqualifying himself, telling Freeman he was not "the person [who] should hear" the bail motion, even when Freeman attempted to convince him the Judge Elias stalking rumors were not true. Although it is unclear from this comment whether Judge O'Neill reached this conclusion because he believed he personally could not be fair or because he recognized that these circumstances created an appearance of bias, the critical point for our analysis is that Judge O'Neill believed his participation in the case was improper and disqualification was absolutely necessary.

The issue before us is whether, based on the subsequent events, Judge O'Neill could be reinstated into the case without violating due process principles. These events consisted of the prosecution notifying the supervising judge that Freeman's computer files had been reviewed and there was no evidence that Judge Elias was a victim of Freeman's stalking activities. Judge O'Neill found this information eliminated the problem of actual bias and/or the appearance of bias. Although we can accept the validity of Judge O'Neill's belief that he could be fair and impartial and that he did not have any actual bias towards Freeman, we conclude the *appearance of bias* persisted despite these beliefs.

The prosecution's conclusion there was no supporting evidence on Freeman's computer does not definitively establish that the stalking did not occur, and a reasonable observer might question whether Judge O'Neill was still affected by the reports of

stalking conduct directed at his friend. The record shows Judge O'Neill initially believed he could not properly preside over the trial because of his awareness of the stalking rumors. The fact the prosecution did not find supporting evidence and decided not to pursue formal charges does not necessarily show the rumors were false or had dissipated. Thus, this was not a situation where the disqualifying factor was based on an objectively-verifiable fact that was later determined to be untrue.[6] Additionally, the stalking rumors were closely related to the criminal charges actually filed against Freeman, enhancing the perception that the prior rumors could continue to influence the trial judge's ability to be impartial. Viewing the totality of the circumstances, a reasonable person might still harbor doubts as to whether Judge O'Neill was unaffected by the rumors.

Once a judge has been disqualified for actual bias or the appearance of bias, the public has a right to expect that the judge will have no further dealings with the case except for minor, ministerial-type matters. This expectation is not only intuitively sound, it is consistent with California's statutory disqualification scheme which generally prohibits a disqualified judge from any further involvement in the case and provides no mechanism for a disqualified judge to be reinstated into the case. (Code Civ. Proc.,[7]

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6 Such a situation might arise, for example, when a judge was disqualified because of friendship with a particular person, and it is later discovered that the person was misidentified and was not in fact the judge's friend.

7 For convenience, we shall subsequently refer to the statutory provisions governing judicial disqualification (Code Civ. Proc. § 170 et seq.) without referring to the Code of Civil Procedure.

§§ 170.3, subds. (a)(1),(b)(1), 170.4.)[8] Section 170.4 delineates the duties a disqualified judge may still perform, and provides that except for these limited duties, "a disqualified judge shall have *no power to act in any proceeding after his or her disqualification* or after the filing of a statement of disqualification until the question of his or her disqualification has been determined." (§ 170.4, subd. (d), italics added.)[9] "Proceeding" is defined as "*the action, case, cause*, motion, or special proceeding to be tried or heard by the judge." (§ 170.5, subd. (f), italics added.) Thus, under the statutory scheme a disqualified judge may not "pick and choose" the matters from which he or she is recused. Once disqualified, the judge is precluded from acting in the case except on limited and clearly defined matters. (See *Geldermann, Inc. v. Bruner* (1991) 229 Cal.App.3d 662, 665; *Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 777-780.) Further, there is no statutory provision authorizing a disqualified judge to be reinstated to preside over the trial when the judge was disqualified during earlier proceedings.

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8 Although Freeman may not rely on the statutory disqualification scheme to obtain reversal for judicial bias, the scheme—which is designed to further due process by protecting the integrity of the judicial process—is a helpful guidepost to our constitutional analysis.

9 Section 170.4, subdivision (a) provides that a disqualified judge may perform the following duties: "(1) Take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge not disqualified. [¶] (2) Request any other judge agreed upon by the parties to sit and act in his or her place. [¶] (3) Hear and determine purely default matters. [¶] (4) Issue an order for possession prior to judgment in eminent domain proceedings. [¶] (5) Set proceedings for trial or hearing. [¶] (6) Conduct settlement conferences."

Additionally, although the disqualification statute allows the parties to waive some statutory grounds for disqualification, "personal bias or prejudice concerning a party" may never be waived. (§ 170.3, subd. (b)(2)(A).) This reflects the fundamental nature of the right and necessity for adjudication by an unbiased trial judge. Moreover, even as to matters that may be waived, the waivers are subject to strict statutory requirements and are not effective unless the parties and their attorneys agree in writing to the judge's participation and the writing is included in the record. (§ 170.3, subd. (b)(1).) Even if we were to apply the disqualification waiver standard to permit reinstatement of a recused judge, this record is devoid of a proper waiver. Apparently recognizing this, the Attorney General does not contend that the Freeman's withdrawal of her disqualification motion can be construed as a proper waiver of her right to challenge Judge O'Neill's reinstatement based on his earlier recusal for personal bias.

The fact that Judge O'Neill had previously recused himself for bias invokes issues of fundamental fairness once he was reinstated into the case, regardless whether the prior recusal was based on an appearance of, or actual, bias. Even if Judge O'Neill subjectively viewed his recusal as based on an appearance of bias, the circumstances giving rise to the recusal—including the long-standing friendship, the serious nature of the suspected activity directed at his friend, and the similarity of the conduct underlying the pending charges and the Judge Elias stalking rumors—are consistent with what one would typically associate with actual bias. Under these circumstances, involving a protesting defendant and a likely public perception of actual bias, the reinstatement of the disqualified judge created a serious likelihood of undermining public confidence in an

unbiased judiciary. This strikes at the heart of the integrity of our judicial system and creates far more than a "mere" appearance of bias, thus implicating constitutional due process concerns.

We conclude that Judge O'Neill's December 2002 recusal ruling barred him from presiding over Freeman's trial. Further, under the particular circumstances presented here, we conclude his erroneous reinstatement rises to the level of a constitutional violation requiring reversal. Maintaining public confidence in an impartial judiciary is a core value of our judicial system and is necessary to preserve the integrity of the judicial process. This value was denigrated when the judge, previously disqualified on bias grounds, presided over the trial notwithstanding the repeated protests of the defendant and circumstances reflecting a persistent appearance of bias. The reinstatement of the disqualified judge in this case sufficiently impacts the public perception of judicial neutrality so as to constitute structural error requiring reversal. (See *Catchpole v. Brannon, supra*, 36 Cal.App.4th at p. 247; *Hernandez v. Paicius, supra*, 109 Cal.App.4th at pp. 462-463.)

D. *Freeman's Petition for Writ of Habeas Corpus Alleging Appellate Counsel's Ineffective Representation on the Issue of Judicial Bias*

After the appellate briefing in this case was completed, Freeman filed an in pro. per. petition for writ of habeas corpus alleging that appellate counsel incompetently argued the judicial bias issue on appeal. Freeman asserts her appellate counsel was ineffective because he failed to raise the issue that the entire San Diego County Superior Court bench had been recused. Given our reversal of the judgment, we need not consider

this issue, and accordingly deny the writ. We do note, however, that our holding extends only to Judge O'Neill. The qualifications of any other San Diego Superior Court judge to preside over any retrial is not before us in this appeal.

II. *Issues Pertinent to Potential Retrial*

Given our reversal, we need not address Freeman's arguments regarding instructional error and the erroneous admission of evidence. However, several of her arguments raise issues that impact the district attorney's right to retry her case. Accordingly, we address Freeman's contentions that (1) the trial court erred in denying her motion for acquittal of the various charged offenses, and (2) she could not be properly charged with solicitation to commit kidnapping. We conclude there was substantial evidence to support a finding of guilt on the charged offenses, and that the solicitation to commit kidnapping charge was proper. Accordingly, there is no bar to retrial on the charged counts. (See *In re Cruz* (2003) 104 Cal.App.4th 1339, 1344-1345.)

A. *Facts*

Protective Custody

On the afternoon of September 10, 2002, Freeman's daughter, E., age 14, called 911. She reported Freeman had hit her and thrown her against walls, such incidents had been happening all her life, and recently the frequency of the incidents had been increasing. E. explained that her mother home-schooled her and would lock her in the trailer where they resided. E. stated that about one hour earlier, her mother "grabbed [E.'s] head. . . . beat [it] against the wall and . . . hit . . . and yelled at [E.] . . . " E. was

crying and afraid that when her mother returned home, "it [was going] to be even worse." E. told the dispatcher she had called her aunt and her aunt advised her to call 911.

About 50 minutes after the 911 call, Deputy Sheriff Margaret Barone spoke to E. on the phone. E. sounded very upset and frightened. About 15 minutes later, Deputy Barone arrived at E.'s residence. E. appeared terrified; her voice was cracking and her hands were shaking. Deputy Barone observed large welts on E.'s thigh and calf, bruising on her hip, and minor scratches on her arm. E. complained of pain to her forehead and shoulder.

E. told Deputy Barone that when she was sleeping on the couch that day, Freeman screamed and yelled at her to get up. Freeman kneed E. and started hitting and kicking her. During the struggle Freeman pushed E. and E.'s forehead hit the wall. When E. landed on the floor, her mother continued to kick her. E. managed to shove her mother off her; E. then ran out of the trailer and hid behind some bins. E. heard Freeman drive away, and then quickly drive back. Freeman yelled at E. to come out, but E. was too afraid. E. peeked around a corner of the bins and was terrified of the look on her mother's face.

E. told Deputy Barone that she first recalled being hit by her mother when she was three years old and she remembered the police being summoned about seven years ago. She stated the abuse had become progressively worse during the past year and had been almost a daily occurrence during the past six months. E. was concerned about what was going to happen when her mother returned home. Based on E.'s injuries, the potential for violence when Freeman returned, and E.'s level of fear, Deputy Barone took E. into

protective custody. Deputy Barone expedited their departure without gathering any of E.'s belongings, because E. was fearful and in a rush to leave. As they drove away E. crouched down on the floor of the police vehicle, stating she did not want her mother to see her.

E. was taken to Green Oaks Ranch, a temporary placement facility. Nurse practitioner Lorrie York observed bruises on E.'s hip, thigh, and calf, and scratches on her back, arm and leg.

Foster Home Placement

On September 17, 2002, Child Protective Services (CPS) placed E. in the home of foster parents Vanessa Franco and Diana Gonzalez. Typically, a parent who is permitted unsupervised visitation is given the foster parents' phone number to arrange visitation. However, because of the protective issues, E.'s placement was confidential and Freeman was not given the foster parents' phone number. Franco was told that Freeman could have contact only with the social worker, and the social worker would convey any necessary information about E. to Franco.

When Franco met E., E. was very fearful and intimidated by everything around her. As Franco and E. were driving to eat lunch on the day of their first meeting, E. sank very low in her seat, almost to the floorboards, so that her head could not be seen above the window. Franco tried to reassure E. that her mother was not following her. While living in Franco's home, Franco described E. as suffering from "a beaten dog syndrome" and noted she would jump if she heard a loud noise and would flinch if spoken to in a high tone of voice. E. told Gonzalez and Franco that her mother had physically assaulted

and tormented her for years, including kicking her, chasing her with a knife, pushing her into a brick wall, putting feces on her hairbrush, and threatening to kill her and make it look like suicide. E. stated her mother had also threatened other people with guns.

Solicitation to Commit Kidnapping

On September 3, 2002, Kimberly Oakley, who was contemplating divorce, hired Freeman, who is an attorney, to represent her. When Oakley next spoke with Freeman on September 15, 2002, Freeman seemed different. Contrary to her behavior at their first meeting, Freeman now rambled and failed to respond to Oakley's divorce-related questions. Freeman told Oakley that her daughter had been unjustly removed by CPS, and that she was desperately trying to locate E.'s foster home. Freeman explained that she was concerned for her daughter because of her daughter's undiagnosed schizophrenia. Oakley, who had a daughter with a drug addiction problem in a residential treatment program, was sympathetic. Thereafter, Freeman frequently called Oakley to "unload" about the situation, and Oakley offered to help Freeman.

During one of these conversations in September 2002, Freeman told Oakley that E. and her foster family were attending Calvary Chapel in Escondido, which was the same church Oakley attended. Accordingly to Oakley, Freeman repeatedly pressed her to speak to the Calvary Chapel youth pastor to find out information about E.

In early October 2002, Freeman told Oakley that she had "a couple of plans" to "steal" E. from the foster family and stated she always carried large sums of cash with her so she could take E. across the Canadian or Mexican border. Freeman told Oakley that one option she had contemplated was the use of an "escort" from a residential drug

treatment program to take E. Oakley explained to Freeman that this service, which was used to remove combative, uncooperative teens from their homes, could not be used to take E. from the foster family, but Freeman did not appear to understand this.

Freeman also repeatedly asked Oakley to "steal" E. from the foster family, stating she had a couple of ideas how to accomplish this. Freeman suggested a plan where Freeman would wait in the car and Oakley would try to lure E. out of the foster home by telling E. how much Freeman loved her. Freeman was sure E. would come over and see Freeman in the car, and then Freeman could "'take off'" with her. Freeman also proposed that Oakley go to E.'s YMCA after-school program while Freeman waited in the car. Freeman opined that when Oakley told E. how much her mother loved and missed her, E. would agree to walk over to Freeman's car; then Freeman "'would take [E.] and get her in the car and take off for the Canadian border or the Mexican border.'" Oakley refused Freeman's requests to carry out these plans. When Oakley refused, Freeman was angry with Oakley and told her she had another friend who she would ask to take E.

In late October, notwithstanding Oakley's previous refusals, Freeman continued to press Oakley to help her get E. Freeman told Oakley she "'really need[ed]'" Oakley's help and pointed out that it would be easy for Oakley to hide E. at Oakley's rural, gated home. Oakley continued to refuse her requests, telling Freeman her idea to take E. was "absolutely ludicrous."

October 11 Residential Burglary

Around 2:00 or 3:00 p.m. on October 11, 2002, Freeman called Oakley and told her she had broken into the office of the high school E. was attending and located E.'s

foster home address on the school's computer system. Freeman related that she had been spying on the foster family for "quite some time" and she was upset about the way they were handling E. Freeman told Oakley she would rent various cars and disguise herself in different outfits; she watched the foster family from the parking lot in their apartment complex; and she followed them when they went places.

At about 8:30 p.m. on October 11, 2002, Freeman again called Oakley. Freeman was hysterical because E. had not returned to the foster parents' home. Freeman explained that she was concerned for her daughter's safety because she had been watching the apartment for a good part of the day; E. had not returned home at her typical time; and E. still had not returned home. Freeman begged Oakley to go with her to watch the apartment. Freeman stated E. needed medication; no one had diagnosed E. with schizophrenia; no one could handle E. correctly; and E.'s life was being jeopardized. Oakley felt sorry for Freeman and agreed to accompany her.

Around 9:30 p.m., Freeman picked up Oakley at Oakley's residence. Freeman drove at a dangerously fast speed to the complex; she was hysterical and screeching that her daughter was in danger and she had to get her daughter away from the foster parents. Freeman told Oakley that she had spent several nights and days in the parking lot watching her daughter and the foster parents, and that she had tried that day to break into the foster parents' apartment.

Freeman and Oakley watched the apartment for about two hours, and it did not appear that anyone was at home. Oakley told Freeman it was time to leave, and tried to reassure Freeman that her daughter was all right. Freeman insisted she needed to "'find

out what's going on here' " and she had to see if E. was " 'okay.' " Freeman left the vehicle and went to a mini-mart where she bought a flashlight and batteries. After Freeman returned to the car and Oakley again tried to persuade her that they should leave and her daughter was fine, Freeman got out of the car and said, " 'I don't care. Why should I take this anymore?' " Freeman got the flashlight and a camera and told Oakley she was going inside the foster parents' apartment.

Oakley followed Freeman and tried to dissuade her from entering the apartment. Oakley saw Freeman go over a back wall and enter the apartment through a sliding glass door that had apparently been left open. Oakley saw the camera's flash go off several times and heard drawers being opened and closed. Freeman was in the apartment for about seven or eight minutes. When she returned, Freeman was in a manic-type state. She appeared elated that she had taken pictures; told Oakley that the foster mothers slept together; and stated she had found an address book although she did not have the book with her. Freeman appeared content that she had obtained what she had thought she would get in the apartment, and they left.

On October 12, 2002, Gonzalez noticed that their front door lock had been tampered with, but she did not notice any other disturbance at their apartment. About one month later, Franco and Gonzalez were informed that Freeman may have broken into their apartment.

October 19 Incident

Franco and Gonzalez first became aware that someone was following them on October 19, 2002. On this occasion, Franco and Gonzalez drove with E. and their other

foster daughter to Los Angeles to visit Franco's grandmother. They first stopped at Franco's mother's home in Oceanside, and then started their trip north at about 9:30 or 10:00 p.m. As Franco was driving on the freeway to her grandmother's house, she noticed a vehicle that seemed to have been following too closely behind her for some time. Franco changed her driving to see if the vehicle would pass them (i.e., slowing down, changing lanes), but the vehicle stayed behind them no matter what she did. Franco tried to lose the vehicle by accelerating to about 75 or 80 miles per hour and changing lanes, but the vehicle continued to follow them. The driver of the vehicle that was following them made several dangerous maneuvers to keep up with Franco, including cutting off vehicles in other lanes and driving within inches of Franco's back bumper. At one point Franco accelerated to 95 miles per hour in her unsuccessful attempts to evade the vehicle.

After the vehicle had been following them for about one-half hour and Franco saw that traffic up ahead was congested, Franco decided to exit the freeway to try to lose the vehicle. The vehicle followed her off the freeway, and at one point its headlights were turned off while it continued to follow them. Franco drove about 40 miles per hour on the surface streets trying to get away from the vehicle, and accidentally ended up on a dark, dead-end residential street with the vehicle still behind her. As Franco turned around in a driveway, the other vehicle stopped across the street with its headlights still turned off. Franco drove back to the freeway at a speed of about 45 to 50 miles per hour, with the vehicle still following her. Once on the freeway, the driver of the pursuing

vehicle continued to drive with the lights off. Franco finally managed to lose the vehicle by quickly cutting across traffic lanes and exiting on a left-side off-ramp.

During the incident, Franco was in a "complete panic" and her heart was pounding "a hundred miles a minute." Gonzalez was "[f]rightened to death." The two children were screaming hysterically in the back seat. Because of the speeds she was driving while trying to evade the car, Franco feared for the safety of the occupants of her car and other cars, but explained she was in "survival mode" and could think only of "get[ting] away."

Franco estimated that the entire incident lasted for about one hour. Gonzalez observed that the vehicle following them was a dark grayish-blue Ford Windstar minivan. At one point when the van was beside Franco's car, Gonzalez saw that the driver was light-skinned, heavyset, and appeared to be wearing a disguise, including a wig, dark glasses, and a mustache. During the incident, E. stated the driver was probably her mother who was "trying to get her."

Freeman admitted to Oakley that she had followed the foster parents on a Los Angeles freeway. Freeman told Oakley she had rented a car, dressed up in alternate clothing hoping the foster family would not recognize her, followed the family to a residence in Oceanside, and then chased them into a Los Angeles area. Freeman was "really proud" that she had chased them, and told Oakley she was glad that she "really shook them up" and "really scared them." Freeman stated she stared at them and gave one of the foster mothers a dirty look when she was driving beside her.

October 23 Incident

On October 23, 2002, another incident occurred. Around 10:15 p.m., while Gonzalez was driving with E. from Franco's mother's residence to their home, Gonzalez noticed that a gold Ford Explorer was following them. The vehicle continued to follow Gonzalez as she tried to evade it. Rather than going home, Gonzalez turned on a street, pulled over, and waited 10 minutes. She did not see the Ford Explorer, so she drove to their apartment. As they were walking towards their apartment, E. saw the gold Ford Explorer coming into the parking entrance of the complex. Gonzalez did not think it was safe to go to their apartment, so she and E. returned to their car. The Ford Explorer then turned around to leave the complex. Gonzalez, wanting to know who was following them, followed the Ford Explorer and had E. write down the license plate number, and the estimated year, make, and model of the vehicle. Gonzalez drove up next to the Ford Explorer when traffic slowed because of an accident. The driver tried to cover her face, but E. began crying and screaming, "That's my mother. How could she do this to me?" E. put her seat back so that she could not see Freeman. Gonzalez looked over at Freeman, and Freeman looked at Gonzalez "in this evil manner" as if she wanted to hurt Gonzalez.

Gonzalez did not return home, but drove to Franco's mother's house. When they arrived at Franco's mother's home, Gonzalez was hyperventilating and crying and E. was crying hysterically. At this point, Franco and Gonzalez called the police and CPS. Because of the incident, the next day Gonzalez stayed home from work and E. did not go to school, and E. had an emergency session with her therapist. Franco and Gonzalez

changed the locks on their door, put extra locks on the sliding doors and windows, and got a private mail box.

November 3 Incident

On November 3, 2002, between 6:00 and 7:00 p.m., Gonzalez noticed a white Ford Windstar van with tinted windows parked directly across from their apartment. Gonzalez told E. to stay in the apartment. Gonzalez grabbed her phone and stepped outside to see if anyone was in the van. She saw a head moving in the back of the van, but she could not see enough to identify the person. When she returned to her apartment, the van sped off. In spite of the extra security measures at her apartment, Gonzalez still felt frightened.

In early November 2002, during one of Oakley's meetings with Freeman, Oakley saw that Freeman was driving a white minivan. Freeman told Oakley that she had rented the minivan and that it was one of the cars she had been using to spy on the foster family.

Perfume Incidents

On one occasion, Freeman sent E. a filthy jacket that smelled like Tea Rose perfume. On another occasion, after Gonzalez left her car unlocked while picking E. up from school, the car smelled like Tea Rose perfume. E. told Gonzalez that the perfume smelled like her mother's perfume. Gonzalez felt scared, thinking that Freeman would "go to any extent to do something to [Gonzalez]." Freeman told Oakley that she had doused the jacket and sprayed the foster parents' car with her perfume because she wanted her daughter to smell her presence.

Oakley's Reporting of Freeman to CPS on November 10

On November 8, 2002, Freeman called Oakley. Freeman was crying and hysterical and threatening to kill herself. Freeman told Oakley that she had a lot of work to do in E.'s dependency case and that to win her case she had to prove E. was incompetent. Freeman asked Oakley to go with her to the law library to help her sift through the information. Oakley agreed to help Freeman in exchange for a reduction in Freeman's fees.

On November 9, 2002, Oakley accompanied Freeman to the law library. During this meeting, Freeman's mood shifted at different times from elated and happy to sullen and angry. Freeman "threw a ton of papers" from E.'s dependency case in front of Oakley and told her to read them. As Oakley started reading the papers depicting the reasons E. had been removed from Freeman's custody, Oakley realized that Freeman was "a complete con artist, that nothing she had ever told [Oakley] was ever true about her daughter." When Oakley questioned Freeman about the allegations in the dependency reports, Freeman acknowledged that she "vaguely remembered" hitting E. on the hips and slamming E. into a wall; that she was holding a knife during one of the reported incidents; and that she pretended to wipe a piece of toilet paper with feces on it on E.'s hair brush. When Oakley suggested that Freeman admit to some of the allegations and get counseling, Freeman became angry, stating that she could lose her law license and that she had to prove E. was incompetent.

On November 10, 2002, Oakley called CPS to advise E.'s social worker that she was concerned for E.'s safety. On November 14, 2002, E. was removed from Franco and Gonzalez's foster home.

On December 6, 2002, the police searched Freeman's residence and car. The police developed rolls of film found in Freeman's residence, and showed the photographs to Gonzalez and Franco. The photographs depict Gonzalez, the open front door of Franco's and Gonzalez's residence, their other foster daughter, Franco's place of employment and car, and Franco's mother's residence and car.

Foster Parents' Reactions to the Stalking

Because of the stalking incidents, Gonzalez and Franco felt their life was completely changed. They felt fearful and constantly on guard. Gonzalez had trouble sleeping and had nightmares. Franco felt vulnerable, helpless, and "completely violated." She was also concerned for the safety of her mother and other family members. During the time when they did not know who was following them, Franco was frightened because she had no idea what the person's intentions were. Once the stalker was identified as Freeman, Franco was frightened because she did not know what Freeman was capable of, particularly given E.'s accounts of her mother's previous violent behavior.

The jury convicted Freeman of two counts of stalking (one count per foster parent); residential burglary; solicitation to commit kidnapping; and misdemeanor child endangerment and battery of E. She received a six-year sentence.

B. *Motion for Acquittal of Stalking*

Freeman argues the trial court erred at the close of the prosecution's case-in-chief in denying her Penal Code[10] section 1118.1 motion for acquittal of the two stalking counts (one involving Franco and the other involving Gonzalez).

A trial court's evaluation of a motion for acquittal is governed by the same substantial evidence test used in an appellate challenge to the sufficiency of the evidence, i.e., the trial court determines "whether from the evidence then in the record, including reasonable inferences to be drawn therefrom, there is substantial evidence of every element of the offense charged." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 89.) If the record can reasonably support a finding of guilt, a motion for acquittal must be denied even if the record might also justify a contrary finding. (See *People v. Holt* (1997) 15 Cal.4th 619, 668.)

At the time Freeman engaged in the alleged offenses, the crime of stalking was defined as committed by "[a]ny person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family . . . ." (Former § 646.9, subd. (a).)[11] The elements of the stalking offense were (1) repeatedly following or harassing another person, (2) making a credible threat, (3)

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10 Subsequent statutory references are to the Penal Code unless otherwise specified.

11 After Freeman committed the alleged offenses in 2002, the language of section 646.9 was amended effective January 2003, apparently to clarify some of the elements. Subsequent references to section 646.9 are to the former version effective in 2002.

intent to place the person in reasonable fear for the safety of the person or his or her family, and (4) causing actual fear. (See *People v. Norman* (1999) 75 Cal.App.4th 1234, 1239; *People v. Carron* (1995) 37 Cal.App.4th 1230, 1238-1239.)

Section 646.9, subdivision (e) defined harassment as "a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose. This course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the person." Course of conduct was defined as "a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of 'course of conduct.'" (§ 646.9, subd. (f).) A credible threat was defined as a verbal or written threat, or a threat "implied by a pattern of conduct" made with the intent to place the victim in reasonable fear for his or her safety or the safety of his or her family and made with the apparent ability to carry out the threat so as to cause such fear. (§ 646.9, subd. (g).) The fear suffered by the victim need not be experienced simultaneously with the commission of the act designed to generate the fear; thus, stalking is committed even when the victim learns of the defendant's conduct some time after its occurrence. (*People v. Norman, supra,* 75 Cal.App.4th at pp. 1239-1241.)

Freeman argues: (1) her conduct of following E.'s foster parents served the legitimate purpose of furthering her fundamental right to parent; (2) there was no evidence she issued a credible threat with the intent to cause fear; and (3) there was no

evidence that a reasonable person would have suffered substantial emotional distress or that the foster parents actually suffered such distress.

1. *Fundamental Right to Parent*

We agree that a parent has a fundamental right to parent, and also agree that if the record had shown as a matter of law that Freeman's conduct reflected a legitimate exercise of this right, the jury's verdict could not stand. However, Freeman's contention is belied by a record that provides ample evidence from which the jury could conclude that Freeman's conduct was inconsistent with efforts to assert parental rights or to merely monitor the well-being of her child while in foster care. Evidence was presented showing that Freeman engaged in conduct that did nothing to inform her about her daughter's well-being and that in some instances seriously threatened her daughter's safety. This included making plans to "steal" her daughter, breaching the confidentiality of the foster placement, breaking into the foster parents' home when her daughter was not there, pursuing the foster parents and her daughter at dangerously high speeds on a Los Angeles freeway, turning off her vehicle lights while following them at night, following Gonzalez and her daughter on the San Diego streets and glaring at Gonzalez, spying on the foster parents at their residence and other places, and spraying Gonzalez's car with her perfume. When viewed in its totality, a jury could reasonably conclude Freeman's actions were unrelated to E.'s well-being, and did not serve the legitimate purpose of advancing Freeman's fundamental right to parent.

To support her argument that she should have been acquitted of the stalking charges based on the fundamental right to parent, Freeman asserts that no evidence was

introduced showing that she was precluded by court order from contacting her daughter during the time period of her alleged criminal behavior. Regardless of whether a formal no-contact order had been entered, such an order was not dispositive on the issue of stalking. Even if Freeman was permitted contact with her daughter, a jury could reasonably conclude that the means Freeman chose to monitor her daughter's foster placement exceeded the legitimate exercise of parental rights.

2. *Credible Threat with Intent to Cause Fear*

Freeman argues that the evidence did not show a credible threat with intent to cause fear because she consistently tried to hide her identity and she was motivated by a concern for her daughter and a desire for reunification with her. Because intent is inherently difficult to prove by direct evidence, the trier of fact can properly infer intent from the defendant's conduct and all the surrounding circumstances. (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099.)

Regardless of Freeman's attempts to hide her identity and her expressed concerns for her daughter, the evidence shows she acted in a manner inconsistent with an intention to merely check on her daughter's welfare without frightening the foster parents. On October 19 Freeman engaged in a lengthy, dangerous pursuit on a Los Angeles freeway. Freeman told Oakley that she was "really proud" she had chased them on a Los Angeles freeway and glad she had "really scared" them during the ordeal. A few days later, on October 23, she again followed one of the foster parents in her vehicle and glared at the foster parent "in [an] evil manner." On November 3 Freeman stationed herself in a van by the foster parents' apartment and sped off after she was spotted by one of the foster

parents. The foster parents ascertained that Freeman had sprayed perfume in their car. The foster parents were aware that Freeman had been resourceful enough to find their address even though the foster placement was confidential, and they were informed she had likely broken into their apartment.

Freeman's brazen burglary into the school to retrieve the foster parents' address from the computer, followed by her late night burglary into their residence, her reckless pursuit of them on a Los Angeles freeway, her glaring at Gonzalez when her identity was discovered, and her entry into Gonzalez's car to spray perfume, do not reflect surveillance conduct carried out with no intent to cause fear or no ability to carry out a threat. Further, the jury could reasonably consider that stalking by an unidentified person wearing a disguise can be even more ominous than stalking by an identified person, and that the foster parents were in the frightening position of being unable to stop the surveillance as long as they could not provide a positive identification. The fact that Freeman may have believed she was acting out of concern for her daughter and as a means to reunify did not mean that the jury could not conclude she chose to advance her goals by intentionally terrifying the foster parents. Viewing the circumstances in their totality, the jury could reasonably conclude that Freeman intentionally imbued her conduct with a sinister tone, and that she engaged in conduct that would inevitably convey to the foster parents her ability and desire to go to great lengths to spy on them and frighten them. The evidence supports a finding that Freeman intended to, and did, communicate a credible threat with the intent to cause fear.

Freeman posits that to the extent her course of conduct showed she committed the "follow[ing] or harass[ing]" element of stalking, that same conduct cannot be used to establish the "credible threat" element of stalking. The argument is unavailing. The fact that the same conduct may overlap to establish more than one element of an offense does not defeat the sufficiency of the evidence to support each element. We are not persuaded by Freeman's suggestion that the Legislature intended to require distinct conduct to show harassment and a credible threat because it defined harassment as a "*course* of conduct" whereas it defined an implied credible threat as arising from a "*pattern* of conduct." (§ 646.9, subds. (e), (g), italics added.) When read in its entirety, it is clear that the different definitional subdivisions of section 646.9 merely elaborate on the required elements, which in essence require a harassing course of conduct accompanied by a credible threat, the latter which may be implied by a pattern of conduct. Indeed, in subdivision (f) of section 646.9, the Legislature defined "*course* of conduct" for harassment as meaning a "*pattern* of conduct," thus using the two terms interchangeably. (Italics added.)

To support her assertion that there was no evidence she intended to place the foster parents in fear for their safety, Freeman notes that notwithstanding repeated opportunities to do so, she never issued an express verbal or written threat to them. The argument fails because the statute does not require an express threat; an implied threat from a pattern of conduct suffices.

3. *Substantial Emotional Distress Caused by Harassment*

There was also sufficient evidence for the jury to find that a reasonable person would have suffered substantial emotional distress from Freeman's stalking, and that the

foster parents did in fact suffer substantial emotional distress. Substantial emotional distress within the meaning of the stalking statute means "something more than everyday mental distress or upset. . . . [T]he phrase . . . entails a serious invasion of the victim's mental tranquility." (*People v. Ewing* (1999) 76 Cal.App.4th 199, 210.) The foster parents first became aware they were being followed on October 19; they again knew they were being followed on October 23 and discovered Freeman's identity; and on November 3 they knew someone was watching their apartment. They described their extreme fear during a Los Angeles freeway pursuit, and their ever-increasing fear and distress as the stalking continued and they discovered their pursuer was E.'s mother. They knew that Freeman had succeeded in breaking through the confidentiality of the foster placement, and discovered she had likely entered their vehicle to spray perfume and broken into their apartment. Franco testified she did not know what Freeman was capable of, particularly given her past behavior towards her daughter. Contrary to Freeman's assertion, the fact that Franco and Gonzalez chose to be foster parents and to thereby take the risk of exposure to confrontations with disgruntled birth parents did not require the jury to find a foster parent would not reasonably experience substantial distress when subjected to the prolonged type of conduct that occurred here. The record contains a full description of the foster parents' fearful reaction to Freeman's conduct and its lingering deleterious effects on their well-being, including nightmares, loss of sleep, and a sense of helplessness and vulnerability. This evidence was sufficient to support a finding that a reasonable person would have suffered substantial emotional distress, and that the foster parents experienced this type of distress.

Freeman further maintains that it was E.'s unverified descriptions of her mother's previous assaultive behavior that caused the foster parents' fear, rather than the conduct committed by Freeman towards the foster parents. The jury was not required to reach this conclusion. As stated, Freeman engaged in stalking conduct that started with a reckless vehicular chase on the freeway, more vehicular following, glaring, spying at their residence, and spraying of perfume in their car. Later, the foster parents discovered she had taken pictures of them and even broken into their apartment. Although E.'s descriptions of her mother's behavior may have served to heighten the foster parents' fear, the record supports a finding that Freeman's stalking was itself a terrifying ordeal for the foster parents.

C. *Motion for Acquittal of Residential Burglary*

Freeman challenges the denial of her motion for acquittal on the residential burglary charge brought at the close of the prosecution's case. The court did not err in denying her motion. The prosecution's theory of the burglary charge was that Freeman intended to facilitate her stalking objective when she entered the residence, and the jury was instructed that stalking was the felony underlying the burglary charge.[12] Freeman argues there was no evidence she intended to commit a felony when she entered the foster parents' apartment, and thus she only committed trespass.

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12 The jury was instructed: "Every person who enters a building with specific intent to commit stalking, a felony, is guilty of the crime of burglary . . . ."

Burglary is committed when a person enters a house with the intent to commit theft or any felony. (§ 459.) The defendant need not intend to actually accomplish the felony in the residence; it is sufficient if the "entry is 'closely connected' with, and is made in order to facilitate, the intended crime." (*People v. Griffin* (2001) 90 Cal.App.4th 741, 749.) The intent to commit the felony may be inferred from all the facts and the circumstances of the case. (*People v. Kwok* (1998) 63 Cal.App.4th 1236, 1245.)

The evidence is sufficient for the jury to reasonably infer Freeman's entry into the foster parents' residence on October 11 was closely connected with and made to facilitate her stalking of the foster parents. Prior to October 11, Freeman had already commenced her surveillance of the foster parents and she had formulated plans to remove E. from the foster placement without authorization. She had asked Oakley to press the Calvary Chapel youth pastor for information about E., and had repeatedly asked Oakley to help her "steal" E. from the foster family.[13] She had broken into the school to retrieve the foster parents' address from the computer and had been watching and following the foster parents for "quite some time." When Freeman exited the residence on October 11, she was elated that she had taken pictures and acquired information about the foster mothers. From these circumstances, the jury could infer that Freeman entered the residence with a view to obtaining whatever information she could to advance her plan to interfere with the foster placement, which included intimidating the foster parents. Although the

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[13] Oakley testified that Freeman's requests that she help "steal" E. occurred both before and after October 11.

activity that first frightened the foster parents did not occur until after the October 11 entry into the apartment (when the foster parents detected they were being followed), the jury could reasonably infer that from the inception of her surveillance efforts in early October Freeman intended to engage in whatever was necessary to carry out her goal of disrupting the foster placement, including following and frightening the foster parents. Based on this inference, there was sufficient evidence to support a finding that Freeman entered the apartment to facilitate her plans to commit stalking by harassing and intimidating the foster parents.

Freeman asserts the evidence shows her only intent when she entered the residence was to determine whether her daughter was safe. The jury was not required to draw this inference. Although Freeman told Oakley she wanted to know if her daughter was all right, Freeman entered the residence when it appeared her daughter was not at home. From this, the jury could infer Freeman knew she would not acquire any immediate information about her daughter's well-being, and that her intent was to try to get information to effectuate her plans to harass the foster parents. As noted, although Freeman's overall goals may have been to carry out what she thought was necessary to protect her daughter and to regain custody, this did not preclude an inference that she intended to unlawfully stalk the foster parents to accomplish her goals.

Given the sufficiency of the evidence to support the intent to commit stalking, we need not discuss Freeman's contention that the evidence was insufficient to show she intended to commit theft when she entered the residence. For the same reason, we also summarily deny Freeman's petition for writ of habeas corpus regarding the residential

burglary conviction, which solely challenges the sufficiency of the evidence to show the intent to commit theft.[14]

D. *Solicitation to Commit Kidnapping*

1. *Propriety of Solicitation to Commit Kidnapping Charge*

Freeman argues she could not properly be charged with solicitation to commit kidnapping because the more specific statute of child abduction applies to the facts of this case.

Freeman was charged with a violation of section 653f, subdivision (a), which makes it a crime to solicit another person to commit or join in the commission of certain specifically enumerated crimes, including kidnapping, and with the intent that the offense be committed. Kidnapping is defined in section 207, subdivision (a) as the taking and carrying away of a person by force or fear. Child abduction is defined in section 278 as the malicious taking of a child by a person not having a right to custody with the intent to detain or conceal the child from the lawful custodian. Child abduction is not one of the crimes enumerated in the section 653f solicitation statute.

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14 When arguing for acquittal of the burglary charge, Freeman's trial counsel asserted that "obviously, there [was] no theft" underlying the burglary. A theft theory was never presented to the jury, and the jury was expressly instructed that the felony underlying the burglary charge was stalking. In denying Freeman's motion for acquittal on the burglary charge, the trial court noted that some information may have been retrieved from the residence, but the court did not state there was evidence of theft as the underlying felony. Freeman's appellate and habeas arguments pertaining to theft do not correlate with the manner in which the case was presented to the jury.

Generally, a defendant may not be prosecuted under a general statute when the Legislature intends that a more specific statute with a less severe penalty govern the proscribed conduct. (*People v. Jenkins* (1980) 28 Cal.3d 494, 501-506; *Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1250; *People v. Jones* (2003) 108 Cal.App.4th 455, 463.) This "special over the general" preemption rule applies when (1) each element of the general statute corresponds to an element of the specific statute, or (2) "it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute." (*People v. Watson* (1981) 30 Cal.3d 290, 295-296; *People v. Coronado* (1995) 12 Cal.4th 145, 153-154.) This rule is designed to ascertain and carry out legislative intent, and the enactment of "a specific statute covering much the same ground as a more general law" typically reflects an intent that only the specific provision apply. (*People v. Jenkins*, *supra*, 28 Cal.3d at p. 505.)

Freeman's contention that the child abduction statute precludes prosecution for solicitation to commit kidnapping is misplaced. The two statutes do not govern the same conduct because the solicitation statute does not include child abduction in the list of enumerated crimes for which solicitation culpability may be imposed, and the child abduction statute does not cover solicitation activity. Freeman could not be charged with solicitation to commit child abduction because there is no such offense in the California Penal Code, and she could not be charged with child abduction because she did not steal E. Thus, it is not possible that the Legislature intended solicitation to kidnap a child to be governed by the child abduction statute, because the child abduction statute does not extend to solicitation activity and the solicitation statute does not extend to child

abduction. Freeman's argument premised on the existence of a more specific statute is unavailing.

2. *Motion for Acquittal of Solicitation to Commit Kidnapping*

Freeman contends the trial court should have granted her motion for acquittal of the solicitation to commit kidnapping charge because (1) both she and Oakley were entitled to immunity from culpability for the kidnapping of Freeman's own child from foster parents, and (2) there was no evidence of Freeman's intent that Oakley use force or fear.

a. *Parental Immunity from Kidnapping*

Freeman contends that she could not properly be convicted of solicitation to commit kidnapping of her own child because there was no evidence of the existence, or service on her, of a court order denying her the right to custody.

In *Wilborn v. Superior Court* (1959) 51 Cal.2d 828, 830 (*Wilborn*), the California Supreme Court noted that "'*[i]n the absence of an order or decree affecting the custody of a child*, it is generally held that a parent, or one assisting such parent, does not commit the crime of kidnapping by taking exclusive possession of the child.' " (Italics added.) After recognizing the majority view that a person assisting a parent with a kidnapping is not culpable if the parent could not be culpable, the *Wilborn* court adopted the minority rule that for policy reasons culpability should be imposed on a nonparent. (*Id.* at pp. 830-831.) The court premised its conclusion on a concern for the "mental anxiety of the parent who loses the child . . . [when] the child passes into the hands of one having no parental obligations toward the child." (*Id.* at p. 831.) The *Wilborn* court concluded that

"whatever may be the right of one parent, in the absence of an order for child custody, to invade the possession of the other to take or entice away their mutual offspring, such right may not be delegated to an agent." (*Ibid.*)

We need not address Freeman's contention that the *Wilborn* rule, declining to extend parental kidnapping immunity to nonparents, should not apply to a situation where a parent solicits a nonparent to take a child from *foster* parents. Even assuming that Oakley would be immunized from culpability for kidnapping if Freeman had the right to take her child (and thus Freeman would in turn be immunized from the crime of solicitation to commit kidnapping), the fact that at the time of the charged conduct CPS had placed E. with the foster parents created the practical equivalent of an "'order or decree affecting the custody of a child'" (*Wilborn, supra,* 51 Cal.2d at p. 830), which inhibited Freeman's parental right to take her child.

Consistent with this conclusion, the child abduction statute provides that CPS has the right to physical custody whenever it has taken protective custody "*by statutory authority* or court order." (§ 277, subd. (e), italics added; see also *People v. Ryan* (1999) 76 Cal.App.4th 1304, 1314 [general legal right to custody does not equate with right to physical custody for purposes of child abduction statute].) Regardless of the stage of the dependency proceedings or the issuance of any specific dependency court order, Freeman knew that her daughter had been removed from her physical custody and that she could not regain that custody without permission from the authorities. Accordingly, Freeman could properly be held criminally liable for her efforts to take her daughter from the foster placement without authorization. To hold otherwise would defeat the Legislature's

intent to protect the welfare of children who are removed from their parents' physical custody and placed in foster care during the pendency of dependency proceedings.

Alternatively, even if we were to construe the record as failing to show Freeman had lost her custody rights, Freeman could be culpable under the rule extending kidnapping liability to a parent with custodial rights who takes his or her child for an illegal purpose. "[W]hile a [parent] entitled to custody ordinarily cannot kidnap his [or her] own child, [the parent's] right to physical custody ends when he [or she] exercises it for a purpose known to be illegal. . . . [¶] [S]uch a parent is liable for kidnapping if he or she exercises custodial rights for an illegal purpose." (*People v. Senior* (1992) 3 Cal.App.4th 765, 781.) Because E. was in protective custody, Freeman could properly be liable for solicitation to commit kidnapping based on her illegal purpose of depriving CPS of its legal right to temporary custody of E. (See §§ 277, subd. (e) [providing that protective custody makes CPS a lawful custodian and gives CPS a right to physical custody], 278.5 [defining the crime of depriving a lawful custodian of right to custody or visitation].)

b. *Intent to Use Force or Fear*

Freeman asserts her acquittal motion brought at the close of the prosecution's case should have been granted because there was no evidence she intended that Oakley use force or fear when taking E., but only intended that Oakley persuade E. to voluntarily leave her foster parents. Oakley testified that Freeman discussed the use of an "escort" who assists with combative, uncooperative teens, and that Freeman described plans where Oakley would convince E. to approach Freeman's vehicle and Freeman would then

"'take'" E. or "'take off'" with E. From Freeman's discussion of the use of an escort, the jury could reasonably infer that Freeman anticipated resistance from E. and that she was trying to devise ways to overcome that resistance. Further, the jury could reasonably interpret Freeman's references to taking E. or taking off with E. as meaning that, if necessary, Freeman intended to use force or fear to make E. enter the vehicle. Drawing these inferences, the jury could conclude that Freeman wanted Oakley to help her take E. by force or intimidation once E. was near Freeman's vehicle. There was sufficient evidence to support a finding of Freeman's intent that Oakley use force or fear.

Because there was sufficient evidence of intent to use force or fear, we need not consider whether a minor in protective custody, such as E., is incapable of giving legal consent, thus altering the requisite force or fear element for kidnapping. (See *In re Michele D.* (2002) 29 Cal.4th 600, 607-612.)

DISPOSITION

The judgment is reversed. The petitions for writ of habeas corpus are denied.

CERTIFIED FOR PARTIAL PUBLICATION

Haller

HALLER, Acting P. J.

WE CONCUR:

McDonald

McDONALD, J.

O'ROURKE, J.

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