SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. **MARILYN K. FREEMAN,** Defendant and Appellant.	Case No. S150984 Fourth District Court of Appeal (Div. One) Case No. D046394

San Diego County Superior Court No. SCD 171601
The Honorable Robert F. O'Neill, Judge

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

This case presents two separate but related issues. The first concerns the showing necessary to prove actual judicial bias, and the second questions when the appearance of bias rises to a federal constitutional due process violation. The first issue, however, needs to be considered in the procedural context in which it arose. Judge O'Neill spontaneously recused himself in the context of a bail motion, and, based on remarks he made during the motion, Petitioner argued on appeal he had recused himself for actual bias. (A.O.B. at pp. 29 – 30.)[1] The Court of Appeal indeed concluded that "the circumstances giving rise to the recusal – including the long-standing relationship to his friend, the serious nature of the suspected activity directed at his friend, and the similarity of the conduct underlying the pending charges and the stalking rumors -- were consistent with what one would typically associate with actual bias." (Slip. Opn. at p. 17.) Coupled with the fact that Judge O'Neill's decision regarding bail directly impacted the safety and security of his long-time friend, sufficient proof of actual bias existed in the context of the bail motion to make Judge O'Neill's recusal "absolutely necessary." (Slip Opn. at p. 14.).

A judge, once disqualified for cause, must relinquish all decision-making authority in the case. (*Christie* v. *City of El Centro* (2006) 135

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[1]. "A.O.B." refers to Appellant's Opening Brief filed on February 28, 19

Cal.App.4th 767, 777 – 780.) He cannot, as the Attorney General assumes, simply reinstate himself. Framing the issue in this context, the question becomes whether a defendant who has shown sufficient actual bias to warrant recusal from one aspect of the case must justify continued disqualification by showing actual bias in every other aspect

The second issue, at what point the appearance of bias violates constitutional due process concerns, necessarily assumes a lack of demonstrable bias. America is and has always been, however, a nation obsessed with appearances. We are just as concerned with the appearance of corruption, vindictiveness, and unfairness as we are with their actuality. Indeed, the decisions from which the Attorney General argues the accused is constitutionally protected only from actual bias were all based on an appearance of bias so pervasive that actual bias could be presumed. In no case, however, was actual bias ever proved. The Attorney General's argument that pecuniary considerations and personal embroilment are the only "interests" which invoke constitutional protection is an attempt to define and limit interests the United States Supreme Court has said cannot be precisely defined. (*In Re Murchison* (1955) 349 U.S. 133, 136 [75 S.Ct. 623, 99 L.Ed. 942].) The Attorney General's rigid formula requiring proof of actual bias fails the test of due process.

> Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula.

(*Anti-Fascist Committee* v. *Mcgrath* (1951) 341 U.S. 123, 162 [71 S.Ct. 624, 660, 95 L.Ed. 817] Frankfurter, J. concurring.)

The Attorney General also mischaracterizes the case one involving the "mere" appearance of bias To the contrary, the Court of Appeal concluded that "far more" than "mere" appearance existed. (Slip Opn. at p. 18.) Differentiating this case from every other reported decision is the fact that the circumstances which raised the specter of bias compelled a sitting judge to disqualify himself from the proceedings. Unlike cases which raise a mere suspicion of bias, "the Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so." (*United States* v. *Couch* (5th Cir. 1990) 896 F.2d 78, 82.) Here, without any prompting, Judge O'Neilll spontaneously recused himself from the proceedings. As he was in the best position, as the fact finder, to evaluate his own ability to be impartial (*In re Carlos V.* (1997) 57 Cal.App.4th 522, 528.), the Attorney General cannot argue the recusal was improper. By recusing himself, Judge O'Neill eliminated any speculation that the "circumstances and relationships" did not sufficiently warrant it. (*In Re Murchison, supra,* 349 U.S. at p. 136.) His *sua*

sponte disqualification provides that "something more" which invokes constitutional protection.

ARGUMENT

I.

JUDGE O'NEILL RECUSED HIMSELF FOR ACTUAL BIAS.

Once Judge O'Neill realized that his ruling on Petitioner's bail motion subjected his long-time friend, Judge Elias, to the possibility that Petitioner might stalk and endanger him, Judge O"Neill developed a direct, personal, and substantial interest in the outcome of the ruling. He could not therefore rule on Petitioner's motion with an open mind, and his *sua sponte* recusal is compelling evidence of actual bias. Although the absence of a ruling makes it impossible to prove that Judge O'Neill would have issued a biased ruling, the circumstances are clearly synonymous with actual bias.

A. *Governing Principles*

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. (*Marshall* v. *Jerrico, Inc.* (1980) 446 U.S. 238, 242 [100 S.Ct. 1610, 64 L.Ed.2d 182].)

> This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.

(*Ibid.*)

The need to prevent unjustified or mistaken deprivations stems from the realization that there is "error inherent in the truth-finding process." (*Carey* v. *Piphus* (1978) 435 U.S. 247, 261 [98 S.Ct. 1042, 55 L.Ed.2d 252].)

> [I]n deciding what process constitutionally is due in various contexts, the Court repeatedly has emphasized that 'procedural due process rules are shaped by the risk of error inherent in the truth-finding process . . . .'

(*Ibid.* citing *Mathews* v. *Eldridge* (1976) 424 U.S. 319, 344 [96 S.Ct. 893, 47 L.Ed.2d 18 .)

Apart from the right to a trial free of the appearance of judicial bias, trial by a judge who is actually biased clearly violates due process.

> [T]he [constitutional] floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal," [Citation.] before a judge with no actual bias against the defendant or interest in the outcome of his particular case.

(*Bracy* v. *Gramley* (1997) 520 U.S. 899, 904 – 905 [117 S.Ct. 1793, 1796-97, 138 L.Ed.2d 97

The Attorney General argues there was no proof Judge O'Neill was actually biased at the trial. The problem, however, is that the issue of Judge O'Neill's qualification arose in the setting of an oral bail motion, and there was ample evidence to conclude the judge recused himself from that hearing on the basis of actual bias. Once disqualified, he had no jurisdiction and could not preside over the trial without offending the constitution.

Actual bias is defined as,

> [A] mental predeliction or prejudice; a leaning of the mind; "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction." [Citation.] Bias or prejudice consists of a "mental attitude or disposition of the judge towards a party to the litigation, . . ." {Citation.]

(*Pacific Etc. Conference of United* v. *Superior Court* (1978) 82 Cal.App.3d 72, 86.)

The facts prompting Judge O'Neill's clearly met this definition of actual bias.

The Information charged Petitioner with, inter alia, two counts of stalking her daughter's temporary foster parents, one count of first-degree residential burglary, and one count of soliciting kidnaping. In the course of the investigation, authorities seized Petitioner's computer, which produced at least three e-mails giving rise to rumors that Petitioner had "stalked" Judge Harry Elias, the judge presiding over the daughter's dependency proceeding. Immediately following a *Marsden* motion before Judge O'Neill, and while still *in camera*, Petitioner raised the issue of bail. Mentioning the rumors, Petitioner asked whether the court would consider lowering her bail.

Faced with the question of allowing Petitioner her liberty, Judge O'Neill was also squarely faced with the possibility that, by doing so, he would be exposing a long-time friend and colleague to a potentially dangerous situation. While Judge O'Neill questioned whether any San Diego County judge would be qualified to rule on Petitioner's motion, his recusal did not rest

on the appearance of bias but upon his personal belief that he was "not the person" to hear the motion. (R.T. I, 18.) Clearly, the trial judge is in the best position, as the fact finder, to evaluate his own ability to be impartial. (*In re Carlos V.*, *supra*, 57 Cal.App.4th at 528.)

Although Judge O'Neill did not specify the reason for his recusal, his remarks illustrate the difference between actual bias and the appearance of bias. His opinion that no San Diego judge might be qualified to hear Petitioner's case was clearly based on the appearance of judicial bias because threatening a judge raises the possibility that another judge may retaliate. Disqualification based on this factor alone, however, may not rise to a constitutional violation.[2] The appearance of bias becomes more attenuated with physical and relational distance. The judge may have no connection to the county or to the threatened jurist, and the threatening conduct may have no relation to the offense for which the accused is on trial.

Judge O'Neill's reasons for recusal, however, went far deeper than the "mere" appearance of a retaliatory motive. He was not only within the same county, but he had a long-standing personal and professional relationship with the threatened judge. Any change in Petitioner's bail status would accordingly increase or decrease the potential threat to Judge Elias. To the extent Judge

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[2]. The Court of Appeal expressed no opinion on whether disqualification of the San Diego Superior Court bench would be warranted.

O'Neill's decision affected his friend's security, Judge O'Neill had a personal stake in the outcome.

Raising those stakes was the similarity of the conduct which posed the threat to Judge Elias and the stalking charges for which Petitioner was facing trial. "Stalking": involves repeated conduct and a credible threat of harm. (Pen. Cod. § 646.9.) If Judge O'Neill could not separate the allegations from the concern his decision might have on his friend, he could not remain impartial. Petitioner was also facing trial for first-degree residential burglary and soliciting kidnapping, which increased Petitioner's threat potential.

Finally, the single-most critical difference in the appearance of bias and actual bias cases is the judge's own ability to state that he or she remains able to be impartial. In those cases, the higher courts have typically taken the judge at his word. (See, e.g. *People* v. *Guerra* (2006) 37 Cal.4th 1067, 1112.) Here, in contrast, Judge O'Neill expressed the belief, through his words and actions, that he could not be impartial, expressly rejecting Petitioner's request not to recuse himself. Taking Judge O'Neill at his word, his *sua sponte* recusal is sufficient proof of actual bias.

B. The Effect of Disqualification

Once disqualified, Judge O'Neill had no authority to preside over Petitioner's case. While the Attorney General successfully turned the table in the Court of Appeal, claiming that Petitioner waived her right to challenge her

conviction under the statutory disqualification scheme, the reality is that the onus was on the prosecution, once it learned of the disqualification, to seek writ review of Judge O'Neill's recusal. Since the statutory scheme does not authorize the Superior Court to reinstate a judge who has disqualified himself, Petitioner was not limited to the statute for relief.

California has enacted a statutory scheme which requires a litigant to challenge the judge's qualification at an early stage of the proceeding. (Cod. Civ. Proc. § 170.3, subd. (d).)

> It is undoubtedly the law that since bias or prejudice of a judge may first make its appearance only after the commencement of a legal proceeding, a litigant is entitled to urge the ground of disqualification at that time [Citation.], so long as it is done at the earliest practicable opportunity after the discovery of the facts.

(*In re Marriage of Lemen* (1980) 113 Cal.App.3d 769, 789.)

Here, Judge O'Neill gave affect to that scheme by recusing himself *sua sponte* from ruling on Petitioner's request for a reduction in bail. (R.T. I, 18.) In an unusual procedural twist, the bail request was made in the context of a *Marsden* hearing, the prosecutor was not present, and the recusal was not reflected in the minutes of the proceedings. Consequently, the prosecution had no actual notice of the recusal.

Under the legislative scheme, the prosecution would normally have had ten days to obtain writ review of the disqualification. (Cod. Civ. Proc. §

170.3.) Assuming the ten days began to run from the time Petitioner orally notified the Supervising Judge, Judge Deddeh, of the disqualification,[3] the process seriously broke down when Judge Deddeh purported to reinstate Judge O'Neill as the case's presiding judge. No statute or rule of law gave Judge Deddeh the right to reinstate a disqualified judge. Only the Court of Appeal has the authority to review a finding for disqualification.

Hence, the proper procedure here would have been for the prosecution, once it learned of the disqualification, to seek writ review if it felt, as it did, the recusal was made in error. Certainly, it did not seek review. Apparently hoping Judge Deddeh's action would pass constitutional muster, the prosecution consciously chose to forego the only available avenue of review for an uncertain chance that Judge Deddeh's novel treatment of the recusal was correct. Ironically, the prosecution's gambit paid off to the extent the Court of Appeal denied Petitioner relief under California's statutory disqualification scheme. Although there is no authority to suggest the Superior Court could reinstate a disqualified judge, the Attorney General successfully shifted the burden to Petitioner by claiming that her failure to seek writ review of the re-qualification precluded her reliance on Code of Civil Procedure section 170.1.

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[3] . Judge Deddeh, the prosecutor, and Petitioner's trial counsel could not have been unaware that Judge O'Neill had actually disqualified himself. Judge Deddeh reviewed the transcripts of the *Marsden* hearing, and the Attorney General has conceded those transcripts clearly disclose the recusal.

Petitioner, however, was not required to resort to the legislative scheme because that scheme was not intended to authorize or govern a judge's reinstatement. By its terms, the statute applies to resolve the question of whether a judge *should* be disqualified, and the Superior Court is authorized to intervene only when the challenged judge disputes the claim of bias. Judge O'Neill, however, resolved that question by recusing himself. Once disqualified, the Superior Court had no authority to reinstate him. Since the legislative scheme was not intended to and did not authorize the reinstatement of a disqualified judge, Petitioner's failure to seek writ relief did not operate to deprive her of her right to an impartial judge.

Worse than creating an imaginary burden to deprive Petitioner of her state right to an impartial judge, however, is that the Attorney General now claims that demonstrating actual bias in the context of the motion which resulted in recusal is not sufficient to prove the judge was actually biased. Instead, a defendant who successfully obtains a judge's recusal must show that the bias which prompted the recusal must manifest itself at every stage of the proceeding. In other words, one recusal is not enough to actually result in disqualification; a judge must recuse himself at every step of the proceedings.

This position highlights the absurdity of the circumstances. Once a judge has disqualified himself for any reason, the judge should not further preside over the defendant's case. A disqualified judge's further participation

offends the notion of justice and renders disqualification a nugatory act.

> It is no answer to say the disqualification arising from interest in the proceedings to say that the decision in the cause was correct. The statute does not say that the Judge is disqualified to decide erroneously; but that he shall not decide *at all* . . ..

(*Estate* of *White* (1869) 37 Cal. 190, 192 (emphasis added).)

A bright-line rule that actual bias is presumed once the issue of disqualification has been resolved against the judge would preclude judges from presiding over cases in which they have been disqualified, encourage parties to resort to the legislative scheme to resolve disqualification disputes, and preclude either party from taking a "wait-and-see" approach to the legality of reinstatement.

C. Actual Bias at Trial

Having once disqualified himself, Judge O'Neill was no longer cloaked with the mantle of judicial impartiality. (See, *Aetna Life Insurance Co.* v. *Lavoie* (1986) 475 U.S. 813, 820.) His assertion prior to trial that he could be impartial was inconsistent with his prior statement that he was not the person to hear Petitioner's case and conflicted with the fact of his recusal.

Stripped of the presumption of impartiality, Judge O'Neill's comments and rulings at trial take on greater significance. Unlike the defendant in *United States* v. *Couch*, *supra*, who did not object to the judge's continued participation after learning a leading defense witness was the judge's son, Petitioner vehemently protested Judge O'Neill's decision to preside over her

trial. (Cf., *People* v. *Guerra*, *supra*, 37 Cal.4th at 1112 [defendant failed to re-assert claim of bias].} Petitioner also pointedly accused Judge O'Neill of being "personally prejudiced" against her. (R.T. 6A, 727.) Instead of denying the accusation, Judge O'Neill stated only that Petitioner had withdrawn her challenge. The court's failure to deny the accusation of personal bias could be construed as an implied admission of its truth. (*People* v. *Riel* (2000) 22 Cal.App.4th 1153, 1189.)

While evidentiary rulings typically provide no basis for demonstrating bias (*Solberg* v. *Superior Court* (1977)19 Cal.3d 182, 205 – 206.), the cases which hold thus involve judges who did not disqualify themselves and were therefore entitled to the presumption of impartiality. Although the Attorney General claims the trial was "error free," Judge O'Neill's admission of Petitioner's daughter's 9-1-1 call under the spontaneous utterance exception[4] and his refusal to instruct the jury that a 14 year-old girl can consent to discuss reunification with a parent are both clearly erroneous rulings that impacted the trial. Again, relying on this Court's ruling in *Estate of White*, *supra*, it is not enough to say the court ruled correctly when it was disqualified from ruling at all.

Similarly, the court's remarks, both in- and outside of the jury's

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[5]. The 9-1-1 call was made after the daughter had telephoned Petitioner's sister five times to ask for advice.

presence, reveal Judge O'Neill's bias. His comments that Petitioner was "not benefiting herself" and "digging the hole deeper," as well as his ill-considered remark that Petitioner would have been in "better hands with Allstate" all tend to support the conclusion that the judge remained bias.

II.

AS TRIAL BY A JUDGE DISQUALIFIED FOR ANY REASON WOULD RESULT IN STRUCTURAL ERROR, THE CLAIM THE CONSTITUTION IS LIMITED ONLY TO BIAS FOR PENCUNIARY INTEREST AND EMBROILMENT IS UNNECESSARILY RESTRICTIVE OF DUE PROCESS.

The concept of impartiality boils down to influences. Any factor or combination of factors which unduly or improperly influences a judge, or ought to influence a judge, and which deprives him or her of the ability to "hold the balance nice, true and clear" denies the accused the most important guarantee of due process: a fair trial before an impartial tribunal. The Attorney General correctly points out that the Supreme Court has found such influences in the obvious circumstances where a judge has a pecuniary interest or has become personally embroiled with a person before the court. But these two situations clearly do not represent or define every influence which may deprive a judge of his impartiality. Certainly, they do not circumscribe the reach of the Due Process Clause.

A. *Due Process Extends to the Appearance of Fairness*

Both the United States Supreme Court and this Court have concluded

that, at some point, the probability of judicial bias becomes so high that due process concerns are implicated.

> [V]arious situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

(*Withrow* v. *Larkin* (1975) 421 U.S. 35, 47 [95 S. Ct. 1456, 43 L. Ed. 2d 712].)

> 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.)

While the Attorney General seeks to limit the reach of the constitution to two narrowly-drawn situations, the high court has avoided any sort of bright-line test for bias, instead using expansive language to denounce,

> every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

(*Timey* v. *Ohio* (1927) 273 U.S. 510, 532 [47 S.Ct. 437, 71 L.Ed. 749.].)

The range of possible temptations, however, is endless, and since no single rule could possibly cover ever conceivable "temptation," the Due Process Clause has been construed to require the appearance of fairness.

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to

> try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered.

(*In Re Murchison, supra,* 349 U.S. at p. 136.)

Much as the Attorney General would like to isolate and restrict its properties, due process is that part of the law which contributes to the "feeling of just treatment" (*Anti-Fascist Committee* v. *Mcgrath, supra*, 341 U.S. 123, 162, Frankfurter, J. concurring.) and that "feeling, so important to a popular government, that justice has been done." (*Id.* at 172.) These feelings do not lend themselves to rigid formulae or defined sets of circumstances. Indeed, although the Attorney General asserts that constitutional appearance of bias claims are limited to two areas, pecuniary interest and personal embroilment, an intolerable appearance of bias has also been found in gender bias and attorney bias cases. (*Catchpole* v. *Brannon* (1995) 36 Cal.App.4th 237, 247 [gender bias]; *Hall* v. *Harker* (1999) 89 Cal.App.4th 836, 843 [attorney bias].)

> Where the average person could well entertain doubt whether the trial judge was impartial, appellate courts are not required to speculate whether the bias was actual or merely apparent, or whether the result would have been the same if the evidence had been impartially considered and the matter dispassionately decided [Citations], but should reverse the judgment and remand the matter to a different judge for a new trial on all issues.

(*Catchpole* v. *Brannon, supra*, 36 Cal.App.4th at 247.)

American courts have worked tirelessly to ensure not only that justice has been done but to satisfy the appearance of it as well. (See, *Buckley* v. *Valeo*

(1978) 424 U.S. 1, 27 [96 S.Ct. 612, 46 L.Ed.2d 659] [Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption.]; *Federal Election Comm'n* v. *National Conservative Political Action Comm.* (1985) 470 U.S. 480, 496-497 [105 S.Ct. 1459, 84 L.Ed.2d 455] [B]arring corporate earnings . . . intended to "preven[t] corruption or the appearance of corruption."]; *North Carolina* v. *Pearce* (194) 395 U.S. 711 [89 S.Ct. 2072, 23 L.Ed.2d 656] [due process requires that a defendant be freed of apprehension of a retaliatory motivation on the part of the sentencing judge."]; *Blackledge* v. *Perry* (1974) 417 U.S. 21, 28 [94 S.Ct. 2098, 40 L.Ed.2d 628] [A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate.]; *Peters* v. *Kiff* (1972) 407 U.S. 493, 503 [92 S.Ct. 2163, 33 L.Ed.2d 83] [A jury that has been selected in an arbitrary and discriminatory manner . . . creates the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.].) The notion that the Justices who authored these phrases were merely "keeping up appearances for the benefit of the public," but not creating any "personal' rights, fails to appreciate the public's importance to the process.

The Attorney General contends that although the general public has a right to expect a judiciary free from the appearance of bias, the individual defendant has no such expectation and may not assert the "appearance of

judicial bias" as a constitutional error. And while it may appear to everyone else, even to the judge himself, that the circumstances demand the judge's disqualification, the individual must prove that the judge was actually biased before he is entitled to relief. There is no such requirement.

In every case the People cite, the chief evil has never been actual bias. Proscribing actual bias has always been the easy part. It is certainly the general rule. (*Tumey* v. *Ohio*, *supra*, at 522.) Normally, the judge who admits he is biased and recuses himself, does not, in the absence of an objective mistake, change his mind. As far as Petitioner can discern, neither this Court nor the United States Supreme Court have ever been presented with a similar situation, in which a sitting judge actually disqualified himself and then presided over a criminal trial. Its novelty is a testament to how plainly wrong it appears. This case presents, therefore, an example of the "extreme" cases in which the United States Supreme Court, in *Aetna Life Insurance Co.* v. *Lavoie*, *supra*, 475 U.S. at 821, envisioned the Due Process Clause would require disqualification.

Case-law does not usually confront the obvious. It addresses the "[n]ice questions [that] often arise as to what the degree or nature of the interest must be." (*Tumey*, *supra*, at 522.) Oddly enough, the Attorney General discounts *Tumey*'s importance, claiming it is an "actual bias" case, when, if fact, the pecuniary interest at issue there presented one of those "nice questions" which the general rule evidently did not cover. In *Tumey*, the high court impliedly

rejected the need to show actual bias.

> There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.

(*Tumey* v. *Ohio*, *supra*, at 532.)

Similarly, *Ward* v. *Village of Monroeville* (1972) 409 U.S. 57 [93 S.Ct. 80, 34 L.Ed.2d 267], where the pecuniary interest was more attenuated, also did not involve actual bias and, like *Tumey*, fell outside the "general rule." Citing the *Tumey* Court's "possible temptation" rationale, *Ward* rejected the notion that a defendant must show actual prejudice.

> If [the Ohio disqualification statute] means that an accused must show special prejudice in his particular case, the statute requires too much and protects too little.

(*Ward* v. *Village of Monroeville*, *supra*, at p. 61.)

The Attorney General is equally confused about the *Murchison*, *Mayberry*, *Taylor*, and *Offut*[5] line of cases. Again, not a single case found the judge to be actually biased. Rather, these cases provide the strongest refutation of the Attorney General's argument. *Offutt* states,

> The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to

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[5] . *In Re Murchison*, *supra*; *Mayberry* v. *Pennsylvania* (1971) 400 U.S. 455 [91 S.Ct. 499, 27 L.Ed.2d 5]; *Taylor* v. *Hayes* (1974) 418 U.S. 488 [94 S.Ct. 2697, 41 L.Ed.2d 897]; *Offutt* v. *United States* (1954) 348 U.S. 11 [75 S.Ct. 11, 99 L.Ed. 11.]

> personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice.

(*Offutt* v. *United States*, *supra*, 348 U.S. at 14.)

Murchison emphatically holds that "our system of law has always endeavored to prevent even the probability of unfairness." (*Murchison*, *supra*, at 136.) *Mayberry* relies on the supposition that "no one so cruelly slandered is *likely* to maintain that calm detachment necessary for fair adjudication." (*Mayberry*, *supra*, at 465, emphasis added.) In *Taylor*, on the other hand, the judge had not become embroiled with the defendant. This case, too, turned entirely on "a likelihood of bias or an appearance of bias." (*Taylor*, *supra*, at 501.) These cases hardly create a "bright line constitutional rule" because the judge in *Taylor* did not become overly embroiled as did the other judges. If there is a constitutional rule to be garnered from all of Respondent's citations, it is that the appearance of bias is more jealously guarded and given the benefit of more judicial thinking than the problem of actual bias itself.

Time after time and in circumstance after circumstance, the high court has addressed itself to, as the Attorney General puts it, "keeping up mere appearances for the benefit of the public." And for good reason. The public, with our uniquely American conscience, demands no less. The Constitution was not intended to apply to two narrowly-drawn "possible temptations" and

ignore all the other ways a judge might be influenced. The circumstances here compelled a sitting judge to disqualify himself from a case. Whether he did so for actual bias or the appearance of bias, Due Process required that he remain disqualified.

B. *The Error is Not Subject to Harmless-Error Analysis*

Trial before an impartial judge is fundamental to ordered liberty, and a trial before a judge who is not impartial is structurally defective. (*Arizona* v. *Fulminante* (1991) 499 U.S. 279, 309 [111 S.Ct. 1246, 113 L.Ed.2d 302].)

> The right [to trial before an impartial judge] is not subject to the harmless-error rule, so it doesn't matter how powerful the case against the defendant was or whether the judge's bias was manifested in rulings adverse to the defendant.

(*Cartolino* v. *Washington* (1997) 122 F.3d 8, 9 – 10.)

Cartolino dismissed the same argument Respondent makes here, that there is no evidence the judge had made any biased rulings.

> The issue is whether the judge was biased, regardless of how his bias may have manifested itself, or failed to manifest itself, in any defendant's case. Since Cartalino was a fugitive during much of the trial, it wouldn't have been difficult for the judge to turn the jury against him by hints or gestures impossible to detect in judicial review long after the event. But, to repeat, that is not the issue. The issue is whether the judge was biased, even if he kept his bias to himself.

(*Cartolino* v. *Washington*, *supra*, 122 F.3d at 10.)

Since a structural defect is not subject to harmless error analysis, this Court should affirm the Court of Appeal's decision.

III.

THE RECUSAL CREATED MORE THAN THE MERE APPEARANCE OF BIAS.

This case's most distinguishing feature is the fact that, without a request from either party, the trial judge spontaneously recused himself. Each case cited by the People involved a judge who was either not asked to recuse or refused a disqualification request. Examined from the perspective that the trial judges had indeed opted for disqualification, the results in those cases would have been far different. The fact of the recusal itself is that "something more" than "mere" appearance which is necessary to trigger constitutional protection.

The Attorney General cited the same cases and raised the same points in the Court of Appeal, and the critical point of that court's analysis began with the recognition of a key fact.

> [T]he critical point for our analysis is that Judge O'Neill believed his participation in the case was improper and disqualification was absolutely necessary.

(Slip Opn., p. 14.)

A judge has a statutory duty to hear cases, and the duty may not lightly be abrogated.

> The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.

(See *Laird* v. *Tatum* (1972) 409 U.S. 824 [33 L.Ed.2d 154, 92 S.Ct. 2318] memorandum of Rehnquist, J. at p. 837.)

While Judge O'Neill cited facts he believed disqualified him, he did not set forth a specific basis for his action. Whether for actual bias or the appearance of bias, those circumstances and relationships provided the "possible temptation" not to treat Petitioner fairly. Since the judge was statutorily precluded from disqualifying himself, a sufficient motive to be biased had to exist. (See, *Del Vecchio* v. *Illinois Dept. of Corrections* (7th Cir. 1994) 31 F.2d 1363, 1371.)

The circumstances and relationships in *Johnson* v. *Carroll* (3d Cir. 2004) 369 F.3d 253, did not rise above the mere appearance of bias because they did not prompt the judge to disqualify himself. The judge there stated that the outside communication had not influenced him and neither party moved for recusal. (*Id.* at 255.) Here, by disqualifying himself, the judge implied by his conduct that the circumstances had influenced him to the point where disqualification was necessary. Recusal is that one step over the threshold and through the one-way gate of disqualification.

Hardy v. *U.S.* (2nd Cir. 1989) 878 F.2d 94 is another case where the trial judge did not recuse himself. There, the mere ownership of stock in a corporate victim did not amount to an interest necessitating recusal, did not result in disqualification, and, "*without more*," did not create an appearance of impropriety sufficient to invoke due process protection. (*Id.* at 97, emphasis added.) Recusal is the "something more" missing from *Hardy*. If, indeed, the

judge had recused himself, the circumstances and analysis would have been completely different.

Commonwealth v. *Perry* (1976) 468 Pa. 515 [364 A.2d 312] is more closely-analogous. There, the judge refused to recuse himself based on his acquaintanceship with a peace officer the defendant had murdered. The judge stated that his relationship to the officer, as a frequent witness before the court, was irrelevant, and that he could remain impartial. (*Id.* at 524.) Here, however, the two judges were not mere acquaintances but had been close friends and co-workers for over two decades. Petitioner was charged with two counts of stalking, and the issue then before the judge, who was clearly concerned about rumors that Petitioner had stalked the judge's colleague, was whether Petitioner should be released from custody. The stalking rumors raised a potential threat of harm to the judge's friend. Thus, Judge O'Neill's bail decision bore directly on appellant's right to bail, and the judge properly recused himself.

None of the Attorney General's citations involve a judge who had actually taken the extreme step of recusal, so none are completely applicable. If, however, "something more" than mere appearance is necessary to invoke the constitution, actual recusal is that something. Unlike speculating over whether a judge should recuse, disqualification is an objective, verifiable step which infers that "the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable. (*Withrow* v. *Larkin*, *supra*, 421 U.S. at 47.)

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeal's opinion.

Respectfully submitted.

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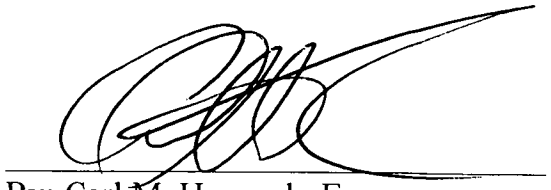

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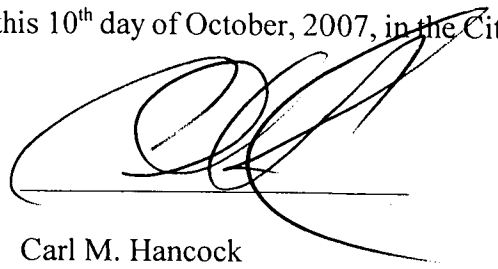
CERTIFICATE OF COUNSEL
PURSUANT TO CALIFORNIA RULES OF COURT, RULE 14 (C)(1)

I, Carl M. Hancock, certify:

I am the attorney for Marilyn K. Freeman, and, if called as a witness, would testify that the brief herein is less than 14,000 words in length. The word count is 6,418 words. In making this certification, I relied on my word processor's word-counting function.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 10th day of October, 2007, in the City of La Jolla, California.



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PEOPLE V. MARILYN K. FREEMAN
CASE NO. S150984

PROOF OF SERVICE BY MAIL

I, Monica Gallardo, declare:

I am over the age of 18 years of age and not a party to the within action. My business address is 4225 Executive Sq., Ste. 1500, San Diego, CA 92037. On October 11, 2007, I served the within:

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On each of the following, by placing the envelope for collection and mailing following ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in sealed envelope with postage fully prepaid, addressed as follows:

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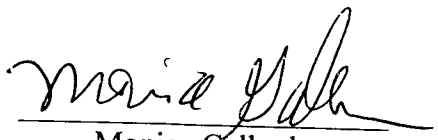
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I signed this declaration on October 11, 2007.



Monica Gallardo